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NOTES

THE NEED FOR AN ALTERNATIVE TO ANTITRUST REGULATION OF THE NATIONAL FOOTBALL LEAGUE

On November 6, 1995, the unspeakable happened. Arthur B. Modell¹ announced that he was moving the Cleveland Browns to Baltimore.² The fans of Cleveland, who for forty-six years jammed into cavernous Cleveland Municipal Stadium to cheer on their beloved Browns, win or lose, were told that through no fault of their own³ their team was being taken. The resulting outcry forced the National Football League (NFL) to agree to a deal guaranteeing that another team would play in Cleveland by 1999.⁴ Los Angeles and Houston were not fortunate enough to mobilize their fans for war against the league as Cleveland had done. Fans of the Rams and Oilers have been abandoned by the NFL despite years of support.⁵ This exodus of NFL teams to new cities highlights the in-

1. "In Cleveland, Art Modell is the anti-Christ." Paul Daugherty, *The Final Battle of Ohio: Heartbreak by the Lake*, CINCINNATI ENQUIRER, Dec. 17, 1995, Sports, at B1. This view is shared by the author. For other references to Modell personifying the anti-Christ, see John Crumpacker, *From Elvis to that Rat Modell, the Heroes and Goats of '95*, S.F. EXAMINER, Dec. 31, 1995, Sports, at D9 ("Pat Modell, wife of Browns owner/anti-Christ Art . . ."); Bud Poliquin, *It Was Business, Bottom Line*, SYRACUSE HERALD-J., Feb. 9, 1996, Sports, at D1 ("Dick MacPherson—who spent three seasons in the employ of Ohio's very own antichrist . . . —will tell you that Art Modell isn't nearly the creep he's been portrayed to be.").

2. Timothy Heider, Tom Diemer & Evelyn Theiss, *Browns Bolt; Modell Warned Mayor, Governor a Month Ago; Deal Announced in Baltimore*, PLAIN DEALER (Cleveland), Nov. 7, 1995, at 1A.

3. Steve Rushin, *The Heart of a City*, SPORTS ILLUSTRATED, Dec. 4, 1995, at 62 (indicating that the Browns ranked second or third in league attendance 11 times from 1975 to 1994).

4. Stephen Koff, Timothy Heider & Tony Grossi, *Cleveland, NFL Strike Deal to Bring New Team Here*, PLAIN DEALER (Cleveland), Feb. 9, 1996, at 1A.

5. The Rams, following their departure from Cleveland after the 1945 season, played

ability of existing NFL regulation to respond to public interest.

Courts' responses to attacks on the NFL have been neither clear nor in the public's best interest due to the difficulty of applying antitrust law to the NFL. The NFL has characteristics that make it a natural monopoly and therefore antitrust law should not be applied to it. Alternative regulation of the NFL is needed: regulation that serves consumer interests, is easy to apply, and does not infringe upon the rights of the league members.⁶

This Note is divided into four sections. The first describes the business of the NFL and why it leads to problems. This is followed by an examination of general antitrust law and its historical application to the NFL, focusing on difficulties involved in applying it to the NFL. The third section analyzes how the law should deal with the NFL and concludes that it should be recognized as a natural monopoly. The final section discusses how the NFL, as a natural monopoly, should be regulated and what effects such alternate regulation would have.

I. THE NFL

A. *The NFL's Business*

On August 20, 1920, representatives from four professional football teams met in Canton, Ohio to organize a league that used the same rules so they could earn more money from staging football games.⁷ After more meetings, two name changes, two mergers, and seventy-five years, the NFL still endeavors to earn money from staging football games.⁸ The NFL's ability to earn money depends upon its power to capture fan interest, which to date has

in Los Angeles for 49 years before bolting to St. Louis. See Mike DiGiovanna & Tracy Weber, *St. Louis Giddily Greets Its New Rams*, L.A. TIMES, Jan. 18, 1995, at A1 (discussing the Rams' move to St. Louis). The Oilers, one of the AFL's charter franchises and winners of its first two championship games, THE 1995 OFFICIAL NATIONAL FOOTBALL LEAGUE RECORD AND FACT BOOK 269-77 (1995) [hereinafter NFL R&F BOOK], have been in Houston since 1960. See Mitchell Landsberg, *Music City's Siren Song Lures Oilers*, THE COMMERCIAL APPEAL (Memphis), Dec. 24, 1995, at 3D (discussing the Oilers' move to Nashville).

6. This Note focuses on the NFL. The analyses and conclusions discussed may apply to other sports leagues as well, but several differences between the NFL and other leagues may prevent uniform application to all sports leagues. These differences include the existence of minor leagues in hockey and baseball, the NFL's sharing of all television revenue between teams, and Major League Baseball's antitrust exemption.

7. NFL R&F BOOK, *supra* note 5, at 258.

8. For a brief chronology of professional football, see *id.* at 258-68.

been awesome.⁹ Fan interest translates directly into ticket receipts, concession and parking receipts, merchandise sales, and television ratings that result in lucrative television contracts. To maximize revenue, the NFL acts to maximize fan interest. The manner in which the NFL maximizes revenue sets it apart from other business organizations.¹⁰

The NFL's basic tool for drawing fan interest is the professional football game. Interest in a single game is increased by placing it within a season so the impact of the game's result goes beyond the single contest.¹¹ The season culminates in playoffs and an eventual champion, further inducing fan interest.¹² Interest in a season is enhanced by placing the season within a series of seasons. This allows development of rivalries and player familiarity, both of which increase fan interest.¹³ Further stimulating fan interest are peripherals such as NFL-related merchandise and the Pro Football Hall of Fame, which would have little value or meaning outside the context of NFL games, seasons, and series of seasons.¹⁴ Together, the NFL games, seasons, and peripherals combine to generate fan interest that results in revenue.

To maximize interest and thus revenue, the NFL has developed a unique organizational structure. Member teams both com-

9. In every non-strike year since 1979, over 13 million fans have attended NFL games each year. *Id.* at 350. Nine out of the top 10 most-watched sporting events on television in the United States are all Super Bowls, led by Super Bowl XXVIII (1993), which had an estimated 134.8 million viewers. *Id.* at 351.

10. Other sports leagues, which are not specifically considered in this Note, are the possible exception.

11. The NFL playoff tie-breaking system creates situations in which any one game can have an impact on a number of other games. NFL R&F BOOK, *supra* note 5, at 13. See generally *id.* (discussing the factors used in the tie-breaking system).

12. In 1994, playoff attendance averaged 66,420 fans per game, as compared to 62,659 per game in the regular season. *Id.* at 227. The Super Bowls, which decide the NFL championship each year, have been among the most-watched television programs in history. *Id.* at 351.

13. For example, the last time the Cleveland Browns failed to fill Cleveland Municipal Stadium to near capacity for a game against the Pittsburgh Steelers was in 1983. CLEVELAND BROWNS 1994 FAN AND MEDIA GUIDE 184 (1994) [hereinafter BROWNS MEDIA GUIDE]. The peak attendance resulted from years of rivalry between the Browns and Steelers. The final chapter in this great rivalry was a sell out but drew less than capacity due to the Browns' announced move. The game still had an announced crowd of 55,388, more than six other games played that day despite the Browns' status. *Worth Noting*, BROWNS NEWS/ILLUSTRATED, Nov. 27, 1995, at 8.

14. See Ruth Coxeter & Chris Roush, *Meet the NFL's Newest Quarterback*, BUS. WK., Nov. 7, 1994, at 143 (detailing the plans of the new president of NFL Properties in running the merchandising arm of the NFL, which will receive royalties on \$3 billion in retail sales of licensed merchandise in 1994).

pete and cooperate at the same time. Individual teams compete for resources in the form of players but cooperate in determining rules of player allocation.¹⁵ In limited cases, teams compete for income in the form of ticket sales,¹⁶ but the major source of league revenue, proceeds from television contracts, is shared.¹⁷ This competition/cooperation arrangement is necessary to generate fan interest. Fans want to see the best players competing, so the league must attract the best players.¹⁸ Fans also want to see competitive con-

15. For example, all teams participate in the annual draft and supplemental drafts.

16. Competition between teams for ticket sales in the NFL is inconsequential because most cities only enjoy one team. The Los Angeles Rams (before the franchise moved to St. Louis) and the Los Angeles Raiders (before moving back to Oakland) may have competed for ticket sales when both were playing at home or if consumers decided which team's season tickets they wanted to purchase. Before leaving, and after returning to, Oakland, the Raiders may have competed with the San Francisco Forty-Niners. The Washington Redskins may face some ticket competition from Modell's Baltimore Ravens (the new name of Modell's team). The only longstanding ticket competition between teams in close proximity exists in New York. Even in that case, the New York Jets and New York Giants now compete only for season ticket holders because both teams play home games in the Meadowlands, thus they cannot both play home games at the same time so a consumer will not have to pick which game to attend on a given weekend (assuming a Giants fan would attend a Jets game, and vice versa, which, given the fans of both teams that the author knows, is not a very plausible assumption).

17. NFL teams share 77% of their revenues, 64% of which come from national television. Michael K. Ozanian, *Foul Ball*, FIN. WORLD, May 25, 1993, at 18, 18.

18. That fans want to see the best players compete against each other is illustrated in a number of ways. The higher post-season attendance, *see supra* note 12 (comparing regular season and playoff attendance), and television ratings in the NFL show that fans prefer games pitting the best teams against each other. Quality players competing in other leagues have drawn much higher attendance once they move to the NFL. For example, Jim Kelly began his career in the USFL, which averaged crowds of 24,500. Gary Pomerantz, *Stars' Saga Enables Shaky USFL to Brag; League Takes Time Out from Problems*, WASH. POST, July 15, 1985, at B2. Within six days of the announcement of his signing with the NFL's Buffalo Bills, the Bills had to hire 21 additional ticket office personnel to help sell 6200 season tickets and 38,000 tickets for the 1986 home opener, giving the Bills their first sell out since 1983. *Treasures Amid the USFL's Rubble*, MACLEAN'S, Sept. 29, 1986, at 48, 48-49; Shav Glick, *You Wouldn't Exactly Call Jim Kelly's New Place of Residence the Promised Land, but the Fans Expect Him to Lead Bills There; He Has Them Buffaloed*, L.A. TIMES, Sept. 4, 1986, Sports Part 3, at 10. The demand in college football for a playoff system is based on fans' (and the media's) desire to see the best players in the country matched up against each other. *See* Bob Eger, *Who's No. 1? Bowls vs. Playoff Debate Continues*, ARIZ. REPUBLIC, Dec. 5, 1993, Final Chaser, at C1 (discussing the demand for a college football playoff system). The low attendance of the 1987 NFL strike replacement games also shows that the fans' interest is in seeing the best players. *See* Ira Berkow, *Sports of the Times: The Best Were Invisible*, N.Y. TIMES, Dec. 29, 1987, (Late City Final Edition), at B12. (noting that attendance at strike replacement games averaged 24,453 as compared to 59,686 for the non-strike games in 1987).

The fact that college teams such as Notre Dame may have a large fan base, even in

tests, so the league must have player allocation rules that promote competitive balance.¹⁹ The NFL's organizational structure has proven successful. It has been this country's premier professional football league for its entire existence.²⁰ The NFL's dominance of professional football has come under attack several times, however. The attackers could not match the NFL on the gridiron, so they tried a different playing field—the courtroom.

B. Why the NFL's Business Has Caused Problems

Since the NFL's member teams simultaneously cooperate and compete, attackers have claimed that this cooperation²¹ should be viewed as an illegal restraint of trade as it is in other industries.²² Other attackers have focused on the NFL's dominance, claiming that the NFL has unlawfully monopolized professional football because it is the only league that has been successful for a long period of time.²³ Each of these attacks is premised on the application of antitrust law to the NFL.²⁴

a losing season, does not undercut this argument because it can be explained by alumni support. Furthermore, Notre Dame most likely experiences even higher attendance figures in more competitive seasons, which supports the above proposition. Professional teams such as the Browns, with a large fan base even in losing seasons, also experienced a rise in attendance that generally correlated to their rise in record. *See* Rushin, *supra* note 3, at 62 (showing that the Browns' attendance was generally reflective of that season's performance).

19. Fans' interest in competitive contests is shown by higher attendance at playoff games, which normally feature two quality teams. *See supra* note 12 (comparing regular season and playoff attendance).

20. The success of the NFL is apparent because it has outlasted all of its rivals and has always posted higher average game attendance than any of its rivals, even the relatively successful AFL. NFL R&F BOOK, *supra* note 5, at 350.

21. The NFL cooperates in the form of television revenue sharing and joint agreements for player allocation.

22. *See infra* part II.D.1.

23. *See, e.g.,* USFL v. NFL, 842 F.2d 1335, 1342-43 (2d Cir. 1988); AFL v. NFL, 205 F. Supp. 60, 66 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

24. The NFL has come under antitrust attack from its players several times, most recently in *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir.), *cert. granted*, 116 S. Ct. 593 (1995). These decisions have revolved around labor disputes and in general have not presented problems unique to the NFL. Any new regulation of the NFL could address the labor issues presented in these cases, but existing labor law and labor-related antitrust law have not had the application problems that other areas of antitrust law have had with respect to the NFL. *See, e.g.,* Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976) (holding that the NFL's rule requiring a team that acquires a free agent to compensate the free agent's former club is an unreasonable restraint of trade in violation of the Sherman Act), *cert. dismissed*, 434 U.S. 801 (1977).

II. APPLICATION OF ANTITRUST LAW TO THE NFL

A. *General Antitrust Law*

An understanding of why antitrust law is difficult to apply to the NFL, and thus why such application should not be attempted, requires consideration of the purpose and operation of antitrust law in the United States. Congress passed The Sherman Antitrust Act²⁵ in 1890 in response to public outrage toward the excesses of big business.²⁶

1. Sherman Antitrust Act Section 1

Section 1 of the Act deals with conspiracies on the part of multiple firms to restrain trade.²⁷ It prohibits concerted action by multiple firms for the purpose of controlling prices and supply in a market.²⁸ In applying the Act, courts have developed two tests to determine whether a Section 1 violation exists, the *per se* test and the rule of reason test.²⁹ The *per se* test recognizes violations whenever a certain type of activity is present, whether or not the intent of the activity is to restrain trade and regardless of its actual empirical effects on restraining trade.³⁰ The Supreme Court created

25. Section 1 of the Sherman Act provides the following:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

15 U.S.C. § 1 (1994). Section 2 states the following:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. § 2.

26. ARTHUR D. AUSTIN, *ANTITRUST: LAW, ECONOMICS, POLICY* § 3.1, at 3-1 to 3-2 (1976).

27. *See* 15 U.S.C. § 1.

28. JOSEPH W. BURNS, *A STUDY OF THE ANTITRUST LAWS* 37 (1958).

29. *Id.* at 39.

30. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-57 (1982) (dis-

the per se test by noting that certain types of agreements may have the "necessary effect" of interfering with competition.³¹ Some activities that the Supreme Court found to be per se violations include price-fixing, territorial market division, and collective refusals to deal.³²

The rule of reason test allows the court to consider whether the activity under scrutiny is really a restraint of trade by looking beyond the activity itself.³³ The activity may be necessary for the efficient operation of the firms involved, despite the fact that its form is one that usually causes a restraint of trade. The Supreme Court created the rule early in the development of antitrust law by holding that the interpretation of the Sherman Act required application of the common law rule of reason.³⁴

2. Sherman Antitrust Act Section 2

Section 2 of the Sherman Antitrust Act addresses the existence of monopoly power in the hands of a single firm as a restraint of trade.³⁵ Section 2 endeavors to prevent firms from acquiring the monopolistic power to raise prices and restrict output. A monopoly exists when a firm controls enough of an output market to enable it "to control prices or exclude competition."³⁶ The output market includes all of one type of product, or all products that compete against each other.³⁷ For example, different brands of television sets compete in the same output market because a consumer must choose between brands when deciding to buy a television. A vacu-

cussing the cost benefits of using a per se test in finding that a per se violation of price fixing existed).

31. For a brief summary of the development of the Section 1 tests, see BURNS, *supra* note 28, at 39. The origin of the per se test can be traced to *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). That case established the rule of reason doctrine, thus beginning a differentiation between acts that would be found violations on their face and those that would not.

32. See BURNS, *supra* note 28, at 39, for a list of cases outlining each of these as a per se violation.

33. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (stating that the rule of reason requires "analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed").

34. See BURNS, *supra* note 28, at 39.

35. See *United States v. United States Gypsum Co.*, 339 U.S. 960, 960 (1950) (holding that defendants violated Section 2 by acting in restraint of trade and commerce among the states).

36. *United States v. du Pont & Co.*, 351 U.S. 377, 391 (1956).

37. See AUSTIN, *supra* note 26, § 5.8, at 5-16 ("Delineation of a product market typically focuses on the 'demand' function by evaluating for possible inclusion all substitute products that have a significant effect on sales of the defendant.").

um cleaner is not in the same output market as a television, because if a consumer wants a television, that consumer will not consider buying a vacuum cleaner. Section 2 tries to keep a single firm from controlling a large percentage of the output market since that firm could theoretically charge unfair prices due to the lack of a large number of suppliers.³⁸ The percentage of market share required by courts to find a Section 2 violation has varied.³⁹

Section 2 does not prohibit the legal acquisition and existence of monopolies; it merely prohibits use of monopoly power to maintain a monopoly position.⁴⁰ A monopoly may legally attain its position in a number of ways. A monopoly may be legally acquired as a result of a superior product or service.⁴¹ A monopoly may also be legally acquired through ability or intelligence.⁴²

B. *The Purpose of Antitrust Law*

The purpose behind the Sherman Antitrust Act and antitrust law in general is to protect consumer interests through maintaining competition and preventing trade restraints.⁴³ This purpose is based on the theory that competition in a free market will produce the best results for consumers because restraint of competition will allow firms to take unfair advantage of consumers by raising prices and reducing output.⁴⁴ Antitrust law does not compel competition.⁴⁵ It does seek to prevent firms from harming consumers by

38. Creation of a monopoly could begin with a firm charging very low prices. A firm with high but not complete control of an output market may lower prices below cost. This could occur if the firm is able to sell at losses for a longer period than its competitors. The firm's low prices will eventually drive competitors out of business. The firm then has complete control of the output market, enabling it to charge higher prices than if competition existed because consumers' only options are to buy from the firm or not buy the product at all.

39. *United States v. Columbia Steel Co.*, 334 U.S. 495, 528 (1948) ("The relative effect of percentage command of a market varies with the setting in which that factor is placed.").

40. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (stating that a monopolist must have intent as well as power to monopolize to fall within Section 2 of the Sherman Act).

41. *United States v. Grinnell Corp.*, 236 F. Supp. 244, 248 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966); *Cole v. Hughes Tool Co.*, 215 F.2d 924, 938 (10th Cir. 1954).

42. *Kansas City Star Co. v. United States*, 240 F.2d 643, 658 (8th Cir. 1957).

43. *United States v. Von's Grocery*, 384 U.S. 270, 274 (1966); *see* ROBERT H. BORK, *THE ANTITRUST PARADOX* 51 (1978) ("The only legitimate goal of American antitrust law is the maximization of consumer welfare.").

44. "Monopoly profits typically are founded upon output restriction, above-competitive prices, and a contrived misallocation of resources." CAMPBELL R. MCCONNELL & STANLEY L. BRUE, *MICROECONOMICS* 322 (1990).

45. *See United States v. United States Steel Corp.*, 251 U.S. 417, 444 (1920) (stating

restricting competition.⁴⁶ Whether injury to the public results from an activity is usually an important factor in the determination of whether the activity is an antitrust violation.⁴⁷

C. Example of Conventional Application of Antitrust Law

*United States v. Aluminum Co. of America*⁴⁸ provides an illustration of conventional application of the Sherman Act. The Aluminum Company of America (ALCOA) was charged with violating the Sherman Act by monopolizing the manufacture of virgin aluminum ingots.⁴⁹ The court's first step in analyzing whether a violation existed was to consider ALCOA's output market share by determining the appropriate market and ALCOA's share of that market.⁵⁰ It found that ALCOA's output market consisted of virgin ingots only because the supply of secondary, or recycled, ingots was in effect controlled by the supply of virgin ingots, from which the secondary ingots originally came.⁵¹ The court compared ALCOA's production of ingots with the total production of all virgin ingot manufacturers and found that ALCOA's control over the ingot market was over ninety percent.⁵² The court held as a matter of law that such high market share constituted a violation,⁵³ though it said that a sixty percent share *may not* be a violation and a thirty percent share *would not* be.⁵⁴ The court rejected ALCOA's contention that because the company did not use the monopoly to charge unfair prices, no violation existed.⁵⁵ Proving a

that the goal is to fight the realization of monopoly, not the expectation of it).

46. *United States v. American Linseed Oil Co.*, 262 U.S. 371, 388 (1923) (stating that the goal of the Sherman Act is to secure equality of opportunity by fighting the forces that destroy real competition).

47. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). *But see Fishman v. Estate of Wirtz*, 807 F.2d 520, 536-37 (7th Cir. 1986) (resting the decision upon whether post hoc analysis could clearly identify whether adverse impacts on ultimate consumers would be unjust). *Fishman* does not directly contradict *Aspen Skiing*. *Fishman* concedes that identifying consumer effects may be relevant to the extent that it is feasible and sheds light on the impact of an alleged violation on the *competitive process*. *Id.* at 537.

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

49. *Id.* at 421.

50. *Id.* at 422-25.

51. *Id.* at 425.

52. *Id.*

53. *Id.* at 425.

54. *Id.* at 424.

55. *Id.* at 427 ("[I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit.").

monopoly existed (from which monopolistic intent could be inferred) was enough to establish a violation.⁵⁶

D. *The Application of Antitrust Law to the NFL*

Despite the unique qualities of the NFL that make defining its economic characteristics very difficult, legal opponents of the league have made economic-based attacks in the form of antitrust lawsuits. Courts have been forced to try to apply antitrust law to the NFL. The results have been inconsistent and have not always served the purpose for which antitrust law was created: protection of consumer interests.⁵⁷

1. The League as a Single Entity

The NFL has argued that it should be considered a single entity for purposes of application of Section 1 of the Sherman Act so that concerted action by teams is not collusion between independent firms.⁵⁸ The NFL has a number of qualities that make it appear to be a single entity. The single entity debate has been thoroughly discussed by courts and commentators.⁵⁹ The fact that the league as a whole produces a product and the impossibility of individual teams to produce apart from the league are among the factors supporting a single entity view of the NFL.⁶⁰

The independent operation of the teams and the lack of any financial support obligation between teams support the view that

56. *Id.*; see also *infra* note 153 (discussing latent monopoly power).

57. See *supra* part II.B (discussing the purpose of antitrust law).

58. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 27-28 n.11 (1991) (explaining the NFL's interest in being treated as a single entity).

59. Many sources discuss the single entity argument. See generally *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Jacobs, *supra* note 58; Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1987); 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 (1984) [hereinafter Roberts, *Sports Leagues*]; Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987).

60. Roberts, *Sports Leagues*, *supra* note 59, at 227-31.

the NFL is merely a joint venture made up of distinct entities.⁶¹ Opponents of the single entity view maintain that the interdependence between teams is merely a result of the business form chosen and is not required for the league to function.⁶² The teams could have incorporated as a single entity but chose not to.⁶³ Although television revenue is shared, teams do not share profits or losses.⁶⁴ This financial independence of individual teams supports the position that the NFL should not be treated as a single entity.

This Note assumes that the single entity view of the NFL is correct because of the high level of team interdependence.⁶⁵ A team apart from the league would generate little fan interest because it would have no one to play, so it could not survive.⁶⁶ Since the teams cannot survive apart from the league, they cannot be considered distinct entities capable of determining their own course in the market, and therefore the league must be treated as a single entity. The notion that the NFL's teams could have joined together as a single corporation ignores the fact that they instead chose to take on a different single entity form, namely a partnership.⁶⁷ As a partnership with the member teams as partners, the NFL should be "an entity distinct from its partners."⁶⁸

The courts have responded inconsistently to the NFL's and

61. Jacobs, *supra* note 58, at 30; Rosenbaum, *supra* note 59, at 749 n.82.

62. Rosenbaum, *supra* note 59, at 782.

63. *Id.*

64. *Id.*

65. This Note does not focus on the single entity debate, which is applicable to consideration of Section 1 violations of the Sherman Act. Arguments supporting recognition of the NFL as a single entity are discussed in greater depth in Roberts, *Sports Leagues*, *supra* note 59. Recognizing the NFL as a single entity is important because this Note maintains that the NFL should be treated as a single natural monopoly for purposes of Section 2 of the Sherman Act. However, such recognition is not vital to this Note's analysis, because the same conclusions would apply if the NFL were an oligopoly. The Supreme Court extended Section 2 to cover oligopolistic situations in *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (finding that the large market share held by three producers combined was sufficient to find violations of Section 2).

66. The idea that a single team cannot survive has been attacked by pointing to the Harlem Globetrotters, who play exhibition games to large audiences, always beating the hapless Washington Generals. Jacobs, *supra* note 58, at 42 n.70. This is a poor analogy because the Globetrotters do not survive as a sports team, but instead as a group of entertainers. Their appeal is purely in their comic antics and amazing tricks of coordination with a basketball and has little or nothing to do with the "game" that is going on.

67. See Grauer, *supra* note 59, at 23-35 (comparing the NFL's structure and that of a law partnership).

68. UNIF. PARTNERSHIP ACT § 201 (1994). Although the Revised UPA is not accepted in most states yet, it represents the latest trend in legal scholarship.

other sports leagues' argument that they are single entities. In *Mid-South Grizzlies v. NFL*,⁶⁹ the court allowed joint action by the NFL's teams to pass an antitrust attack.⁷⁰ The National Basketball Association (NBA) and the National Hockey League (NHL) have been recognized as single entities by courts.⁷¹ Congress, while not explicitly recognizing the NFL as a single entity, did allow it to sign television deals and share revenue from those deals among its teams as if it were a single entity.⁷² However, a majority of courts reject the NFL's claim that it is a single entity, though the reasons for doing so have not been clearly articulated.⁷³ In at least

69. 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

70. In deciding to apply a rule of reason test to the alleged violations in this case, the court stressed the practical need for the league to engage in joint activity. It chose not to address the single entity defense because the NFL's conduct was found not to be in violation of antitrust laws regardless of whether the league was a single entity. *Id.* at 562. The court did note that the Second Circuit had rejected the single entity defense based on different facts, citing *North American Soccer League v. NFL*. *Id.* at 562 n.11. However, that case merely cited precedent without providing reasoning for rejecting the NFL's single entity contention. See *North Am. Soccer League v. NFL*, 670 F.2d 1249, 1256-57 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

71. *Levin v. NBA*, 385 F. Supp. 149, 152-53 (S.D.N.Y. 1974) (granting summary judgment motion of defendant because prospective buyers of NBA team who were rejected by the league were not prevented from competing but merely from joining the competition); *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 970 (C.D. Cal. 1974) (finding that NHL teams are "members of a single unit" in holding that no Sherman Act Section 1 violation existed).

72. See 15 U.S.C. § 1291 (1994).

73. See, e.g., *North Am. Soccer League*, 670 F.2d at 1256-57 (citing laundry list of precedents); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1180-81 (D.C. Cir. 1978) (calling the league a "joint venture" and applying Section 1 to it but not specifically addressing the single entity issue); *Mackey v. NFL*, 543 F.2d 606, 620-22 (8th Cir. 1976) (holding the NFL liable for Section 1 violations after applying the rule of reason test to restrictions on free agent signing); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 468 F. Supp. 154, 164 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) (concluding that the competition between teams for players, and in some locations for fans, indicates that NFL teams are economic competitors).

With the exception of the court in *Los Angeles Memorial Coliseum Commission*, none of the courts provided reasoning for their conclusion. They merely referred to earlier cases, based ultimately on *Radovich v. NFL*, 352 U.S. 445 (1957). That case specifically denied the NFL an antitrust exemption like that possessed by major league baseball but did not mention the single entity debate or provide reasoning for its denial of an exemption other than saying that the reasons why baseball had an exemption did not apply to the NFL. See *id.* at 449-52. The *Los Angeles Memorial Coliseum Commission* conclusion was based in part on reasoning regarding competition for fans that is no longer valid because teams in two of the three locations it mentioned have moved (Los Angeles and Baltimore); moreover, it ignored fan loyalty and revenue other than ticket receipts. See *Los Angeles Memorial Coliseum*, 468 F. Supp. at 164.

one case, *Los Angeles Memorial Coliseum Commission v. NFL*,⁷⁴ the court decided that NFL restrictions on team movement violated Section 1 of the Sherman Act;⁷⁵ this resulted in action that was arguably against consumer interest. Due to that decision, the people of Oakland lost the Oakland Raiders.⁷⁶ Courts have not established a definite rule nor have they always shown deference to consumer interests in cases involving the single entity status of the NFL and other sports leagues.

2. Defining the Product of the NFL

Analysis of a business organization for application of Section 2 of the Sherman Act must consider what the organization produces. A firm can only have monopoly power if its product makes up a large enough segment of the market.⁷⁷ Determining whether a product makes up a large segment of a market first requires knowing what that product is. In normal application of Section 2, product identification is not a problem. Companies produce tangible output that can be easily quantified, such as so many tons of steel. This output can be compared to the overall amount of steel produced to indicate how much power a company has in a market.

There has been considerable debate surrounding the nature of the NFL's output.⁷⁸ The league's base for producing its product is the professional football game. But the value of any single game is enhanced by and depends upon its place within a season and a series of seasons, such that individual games cannot be considered the league's product.⁷⁹ Counting the amount of games played over

74. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

75. *Id.* at 1398.

76. The court found that an NFL rule requiring approval of three-fourths of the member teams for one team to move into another's territory to be a violation of Section 1 of the Sherman Act. The court affirmed an injunction preventing the NFL from interfering with the move of the Oakland Raiders to Los Angeles. *Id.* at 1398, 1401. *See infra* part IV.D.2 (discussing *Los Angeles Memorial Coliseum Commission*).

77. AUSTIN, *supra* note 26, § 5.8, at 5-16.

78. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1393 (calling the Super Bowl "the ultimate NFL product"); *North Am. Soccer League v. NFL*, 670 F.2d 1249, 1251 (1982) (identifying the NFL's business as "providing public entertainment in the form of competitive football games"); Roberts, *Sports Leagues*, *supra* note 59, at 229 (defining the NFL's product as the "interrelationship among the 224 regular season and nine playoff games, culminating in the Super Bowl"). *But see* Jacobs, *supra* note 58, at 54 n.126 (defining the NFL's product as individual games and not the season to which these games belong).

79. Professor Jacobs claims that individual games are the league's true product and that games do have significant value apart from the season. He points to the existence of

a period of time is not analogous to counting tons of steel produced because the games cannot stand alone. A ton of steel is the same whether or not it is the only ton of steel produced by a company. A single NFL game's value depends upon things such as the popularity of players involved in the game, the intensity of the rivalry between the teams, and the importance of the game in the playoff hunt. None of these factors can exist without considering other games, often from other seasons. Simply counting games ignores these factors. Perhaps counting games would be appropriate if any combination of factors could be differentiated in the computation to account for the fact that each game has a different value. Such a computation would be difficult and highly subjective. The problem in defining something as basic as the league's product increases the difficulty in applying Section 2, which requires a quantifiable product as a basis for market share.

This difficulty is reflected by the fact that courts have given little consideration to exactly what product the NFL, or any sports league, produces. Although they have dealt extensively with the question of what output market for the product is appropriate,⁸⁰ they have not defined exactly what the product is. The cases that attempt to define the product of leagues do so through generalizations that are useless in formulating the type of specific analysis required for application of antitrust law.⁸¹ This failure on the part

college football to prove this. Jacobs, *supra* note 58, at 54 n.126. Pointing to college football, however, does not show the viability of a single game apart from a season. College teams play seasons in pursuit of a goal. Depending on the team, that goal may be a conference championship or national playoff berth and shot at the national championship in NCAA I-AA to NCAA III or NAIA. Even independent Division I teams play a season with the goal (whether or not realistic) of being voted national champions in one of the several polls or at least making a bowl appearance. The bowl games are no more divorced from the season than are late season NFL games between teams that can have no effect on the playoff picture.

The NFL's product goes beyond even seasons, however. For example, a recent Monday Night Football game between the San Francisco Forty-Niners and the Los Angeles Raiders drew interest beyond that which would normally be attracted by the teams because Jerry Rice was approaching and in fact passed Jim Brown's record for career touchdowns. See Jim Trotter, *Rice's TD Binge Lifts Him to Top of Charts*, SAN DIEGO UNION TRIB., Sept. 6, 1994, at D1 (detailing Rice's performance in front of a record Candlestick Park crowd). The product the NFL offered that night depended not only upon all the games and seasons Jerry Rice had played in his career, but also upon all the games and seasons Jim Brown had played, as well as the games and seasons played by all the players who could not match the accomplishments of Brown and Rice.

80. See *infra* notes 86-88 (discussing possible output markets).

81. See *North Am. Soccer League*, 670 F.2d at 1251 (defining the NFL's product only as "public entertainment in the form of competitive football games between its member

of courts to define the product of sports leagues in quantifiable terms that would allow an analysis of market share for Section 2 purposes is not a result of the courts' inadequacy, but of the problems involved in developing a quantifiable definition because of the unique nature of the leagues' products.⁸²

3. Defining the Output Market

Once an organization's product is identified, the amount of product that it produces must be compared to the aggregate output of all organizations producing that product, or the output market, to determine market share. Large market share is the most common indication of a Section 2 violation.⁸³

Assuming the product of the NFL could be simply defined, for example as single football games, the output market in which the NFL competes is very difficult to determine. The possible output market range extends from the unique brand of professional football offered by the NFL to professional sports in general to all forms of leisure activity. The purpose of defining an output market is to analyze whether a firm produces a disproportionately large share of the product, giving it an unfair advantage.⁸⁴ Defining exactly where the NFL fits in this market would require analysis of the preferences of anyone who watches or attends NFL games, buys NFL merchandise, or visits the Pro Football Hall of Fame. If a fan is willing to watch a professional football game on television but would take a nap if no game were on, to that fan the NFL has no competition in the output market. If a fan decides between watching a NBA game or an NFL game, that fan places the NFL's output in a market which includes other professional sports. If a fan is torn between attending an NFL game or an opera, the appropriate output market for that person would be leisure activity in general.

To determine which market is appropriate for the NFL, an

teams" without giving any definition that could be used in any quantitative analysis, making no mention of seasons, past season, or peripherals); *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,756 (N.D. Ill. 1981) (characterizing professional basketball as a "form of entertainment which is unique in the eyes of the consumer" but also failing to offer a quantifiable definition).

82. This Note does not seek to define the NFL's product. It merely notes the great difficulty in determining such a definition and that this difficulty makes application of conventional antitrust law problematic.

83. See generally *supra* notes 36-39 (discussing violations of Section 2).

84. *Id.*

analysis must consider the individual preferences of all consumers of the NFL's product, possibly including a weighted average based on a survey of consumers' willingness to spend money on certain items. Such an analysis must include differentiation based on factors that make games distinct from one another, such as playoff games, rivalries, and popular players. This is much more difficult to evaluate than objective figures such as sales volume. Since consumer preferences vary over time, the results of such an analysis will also vary, so the analysis would have to be repeated every time an antitrust challenge is brought up. Because the results would change over time, however, no consistent answer to the antitrust question of appropriate output market would be produced.⁸⁵

Inability to define the product of sports leagues such as the NFL has prevented courts from reaching a consensus in defining the appropriate output market of the NFL. Courts have used many different points along the possible output market spectrum. Some have found a broad entertainment market to be appropriate.⁸⁶ Others have used a narrower entertainment market, but one that still extends beyond the sport in question.⁸⁷ Many courts have found that sports leagues compete in an output market made up only of the particular sport and competition level.⁸⁸ None of the market definitions were based on any study of the league's competition in the eyes of consumers. In no case has a court defined a product market and then stated that a sports league makes up a specific percentage of that market.⁸⁹

85. "Once the statistics on market share are fixed, the judgment on monopoly in fact is made." AUSTIN, *supra* note 26, § 5.8, at 5-17. If market share statistics cannot be fixed, no "judgment on monopoly in fact" can be made. *Cf. id.*

86. *See, e.g., Theatre Party Assocs. v. Shubert Org.*, 1988-2 Trade Cas. (CCH) ¶ 68,251, at 59,558 (S.D.N.Y. 1988) (noting that a theatre production's output market may include sporting exhibitions).

87. *See, e.g., North Am. Soccer League*, 670 F.2d at 1258 (finding that the NFL competes with other sports leagues).

88. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977); *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 970 (C.D. Cal. 1974); *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,763. The courts in each of these cases found that the sports leagues competed against other professional leagues of the same sport.

89. The exception, of course, is when courts found the league to be its own output market, in which case it necessarily makes up 100% of the market.

E. Why Antitrust Law Should Not Be Applied to the NFL

Antitrust law is not applicable to the unique circumstances of the NFL. The need to consider a firm's product and output market to determine if a violation exists precludes antitrust law from being useful when applied to the NFL. Since courts cannot determine the product and output market of the NFL, they cannot find violations that are based on findings about product and output market. Courts have invented many different definitions of the NFL's product and output market to try to warp the NFL into a structure with which antitrust law can deal.⁹⁰ However, the realities of the league's characteristics simply do not allow them to be considered in economic-based antitrust terms.

In addition to the fact that the NFL's characteristics do not allow meaningful application of antitrust law, the purpose of antitrust law is not served when it is applied to the league.⁹¹ The interests of the consumers, or fans, of the NFL must be considered by antitrust law for it to be properly applied. Fans have indicated that one of their important interests is in seeing the best football players compete against each other.⁹² A reasonable assumption is that fans are also interested in seeing these contests, whether on television or in person, at the lowest possible cost. Antitrust law rests on the assumption that consumer interests are best served through competition in the market. Such an assumption may not be valid in the case of the NFL; a fan's interests may not be served by competition between leagues in a market. Competition between leagues will divide the best players between leagues, preventing fans from seeing all the best players compete against each other. Competition between leagues has resulted in player bidding wars.⁹³ Increasing player salaries would probably lead to the need for leagues to charge higher prices, either in the form of higher ticket and peripheral prices or perhaps in shifting games from free to pay television.⁹⁴ Antitrust laws designed to promote competition

90. See *supra* part II.D.3 (demonstrating how the antitrust concept of output market has been applied to the NFL).

91. See *supra* part II.B (discussing the purpose of antitrust law).

92. See *supra* note 18 (discussing fans' interest in seeing competitive matches).

93. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 731 n.397 (1989) (citing the example of the rise in NFL salaries after the commencement of the USFL).

94. One could argue that interleague competition would lead to lower prices in order to attract more fans to games. However, since most of each team's revenue comes from

could produce results diametrically opposed to results that would be in the interests of fans. Since the NFL's product and output market are not definable to the extent necessary for an antitrust analysis and since application of antitrust law to the NFL does not serve the purpose for which it was created, courts cannot properly apply antitrust law to the NFL.

III. ANALYSIS: THE NFL SHOULD BE CONSIDERED A NATURAL MONOPOLY

Whether or not courts can properly apply antitrust law to the NFL, they must consider how the NFL fits into the law when the league is attacked on antitrust grounds. The league is a natural monopoly under existing legal and economic principles. Treatment as a natural monopoly will limit the circumstances under which legal challengers can make antitrust attacks. It will also necessitate an alternate mechanism of regulation similar to those that exist for other natural monopolies.

A. *Characteristics of a Natural Monopoly*

The NFL possesses the characteristics that identify a firm as a natural monopoly. The economic characteristics are not always the same characteristics as those which courts have used to find natural monopolies. However, the NFL possesses both legal and economic features indicating that it is a natural monopoly.

1. Economic Definition and Characteristics

Natural monopolies exist in industries in which the disciplinary pressures of a competitive system are inoperative.⁹⁵ This occurs in cases in which one firm can meet demand at lower costs than multiple firms.⁹⁶ If one firm can meet demand at the lowest

television, *see supra* note 17, leagues must first serve the needs of the television market, which would require generating revenue by any means to get the better players for the television audience. Also, the size of the television audience and the difficulty involved in attending NFL games support an assumption that a league would act to expand its television audience at the expense of in-person fans for two reasons. First, the difficulties involved with in-person attendance (purchasing tickets, driving to the game, parking, etc.) indicate that in-person fans probably have a more inelastic demand curve because they are willing to endure more to see a game, so leagues face less risk of losing those fans than television fans. Additionally, the sheer number superiority of television fans would probably induce a league to keep that audience at the expense of losing in-person fans due to increased ticket prices.

95. AUSTIN, *supra* note 26, § 4.9, at 4-10.

96. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548,

cost, competition reduces efficiency by increasing overall costs instead of promoting efficiency.⁹⁷ Firms that compete in an industry that is subject to a natural monopoly tend to merge or engage in competition that will destroy one of the two firms.⁹⁸

When products of monopolies have no close substitutes, a natural monopoly may exist.⁹⁹ Consumers either purchase from the monopoly supplier or go without the product. No substitutes exist because one or more barriers prevent competition.¹⁰⁰ Natural monopolies are created by barriers that are inherent to the industry: low marginal costs, which means that average costs decline as output is expanded, and impracticality or unworkability of competition.¹⁰¹ The typical example of a natural monopoly is a public utility such as a firm supplying electricity.¹⁰² Once electricity is being generated, increasing the number of houses that receive the electricity can be done at low cost. Thus, total average costs decline as output is increased. Competing electric companies would each have reduced output due to the competition and thus higher average costs, meaning that competition would actually increase costs to consumers.¹⁰³

2. Legal Definition and Characteristics

Legal acquisition of a monopoly is possible through several means. A monopolist may legally achieve its position through ability or intelligence.¹⁰⁴ It could acquire its monopoly by offering a superior product or service.¹⁰⁵

548 (1969) (discussing justifications for regulation of natural monopolies).

97. MCCONNELL & BRUE, *supra* note 44, at 220.

98. AUSTIN, *supra* note 26, § 4.9, at 4-11.

99. MCCONNELL & BRUE, *supra* note 44, at 217.

100. *Id.* at 218.

101. *Id.* at 219-20. For background reading on the economic terminology for costs, see *id.* at 174-76. Marginal cost is a firm's cost of producing one additional unit of output. Per unit production costs can vary as the number of units produced changes. Production requires both fixed costs, such as the cost of heating a factory, which are the same regardless of the number of units produced, and variable costs, such as the cost of materials used in a product, which vary directly based on how many units are produced. Low marginal costs exist when fixed costs are the major portion of a firm's costs. This means that additional output requires only a small increase in variable costs on the part of the firm. Fixed costs do not increase as output increases. The result is that as output increases, the average cost of each unit of output drops.

102. *Id.* at 220.

103. *Id.*

104. *Kansas City Star Co. v. United States*, 240 F.2d 643, 660 (8th Cir. 1957).

105. *Cole v. Hughes Tool Co.*, 215 F.2d 924, 938 (10th Cir. 1954).

Special characteristics and needs of an industry can bring about special regulation.¹⁰⁶ While not applicable solely to natural monopolies, lawmakers have used this idea as the basis for exempting some industries from antitrust law and instead using alternate regulation mechanisms.¹⁰⁷

A monopoly may legally exist because the benefits of competition are limited.¹⁰⁸ This is essentially the same as the basic economic definition that a natural monopoly exists when the disciplinary pressures of competition fail to operate. Legal definitions of natural monopoly seem to incorporate the features of economic definitions but are broader in that they consider more situations to be natural monopolies than economic definitions.

Courts have found legal natural monopolies in a variety of situations. A firm that won an exclusive contract to manufacture two-way radios may have acquired a natural monopoly.¹⁰⁹ A newspaper operating in a city capable of supporting only one newspaper had a natural monopoly,¹¹⁰ while the cable television industry within a city was also found to be a natural monopoly.¹¹¹

B. The National Football League's Natural Monopoly Characteristics

The National Football League possesses characteristics that make it a natural monopoly according to both economic and legal definitions.

1. Economic Natural Monopoly Characteristics

Disciplinary pressures of competition force a firm to reduce prices and raise quality so that at least some consumers will choose that firm's products over a competitor's. Firms that cannot attract consumers and still compete on a cost basis are driven out

106. AUSTIN, *supra* note 26, § 4.9, at 4-11.

107. *See id.* (arguing that the need to protect the public from bank failure is a justification for bank regulation, national defense is a special need used to explain international shipping regulation, and the need for integrity in stock transactions necessitates regulation of the New York Stock Exchange).

108. *See Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982) (finding that cable television in Indianapolis was a natural monopoly).

109. *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373, 377 (S.D.N.Y. 1969).

110. *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960).

111. *Omega Satellite Prods. Co.*, 694 F.2d at 126.

of the market. These pressures are inoperative on the NFL. Since one of consumers' demands is a league made up of the best players,¹¹² competition between multiple leagues would not meet demand because the best players would not always play each other.¹¹³ Even if division of best players were not a problem, multiple leagues would not meet demand at lowest costs. The brief periods in which multiple leagues existed were marked by player bidding wars, which increased the primary cost of the leagues.¹¹⁴ The impossibility of meeting demand with multiple leagues and the cost increase that would occur if multiple leagues competed for players render the disciplinary pressures of competition inoperative. The characteristics of the NFL thus match the economic definition of natural monopoly situation.¹¹⁵

Illustrating the inability of competitive forces to operate in a market with the NFL is the merger and failure of all would-be competitor leagues. Firms that try to compete with a natural monopoly tend to merge or engage in competition that will destroy one of the two firms.¹¹⁶ This is exactly what has happened to the leagues that have tried to compete with the NFL.¹¹⁷ Without even considering the economic traits of the NFL, repeated failure of rival leagues suggests that the league is a natural monopoly.

112. See *supra* note 18 (discussing fans' interest in seeing competitive matches).

113. But see Ross, *supra* note 93, at 724-25 (arguing that fan demand for a single championship and interleague competition could be met by agreements between multiple leagues to compete in a championship game, have interleague scheduling, and allocate players).

114. See *id.* at 730-33 (discussing the predatory pricing, including bidding wars, that new leagues engage in to compete with established leagues).

115. See *supra* part III.A.1.

116. See *supra* part III.A.1.

117. Since the inception of the NFL, several rival leagues have attempted to compete with it. The more noteworthy ones are the All-American Football Conference (AAFC), the 1960's American Football League (AFL) (as opposed to less successful earlier AFLs), the World Football League (WFL), and the United States Football League (USFL). The AAFC began operation in 1946. By 1949, financial difficulties forced the league to fold but not before the NFL agreed to accept three of its teams, the Cleveland Browns, the San Francisco Forty-Niners, and the Baltimore Colts (not the direct predecessor of the current Indianapolis Colts). JACK CLARY, GREAT TEAMS' GREAT YEARS: CLEVELAND BROWNS 28-30 (1973). The AFL, which took the field for the first time in 1960, was the NFL's most successful competitor but this competition lasted only until 1967, at which time the leagues agreed to merge. DAVID HARRIS, THE LEAGUE: THE RISE AND DECLINE OF THE NFL 62-63, 65-66 (1986). The more recent challenger leagues have had no success. The WFL ceased operation after two forgetful seasons from 1975-1977. *Id.* at 168-70, 215-16. The USFL fared little better, playing only 1983-85 and making its biggest splash not on the football field but in the courtroom through its antitrust attack on the NFL. See generally *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

The economic barriers of low marginal costs and impracticality of multiple firms that prevent other firms from entering and competing with a natural monopoly¹¹⁸ exist in the NFL. The NFL's low marginal costs are a result of its high percentage of fixed costs. The major cost item of the NFL is player salaries.¹¹⁹ As of the 1994 season, these costs are fixed by a salary cap.¹²⁰ Even before the NFL's imposition of a salary cap, these costs were fixed costs. A fixed cost is one that does not vary with changes in output.¹²¹ An increase in number of games clearly represents an increase in the NFL's output, however that may be defined. On an individual team level, the fixed cost nature of player salaries is illustrated by the fact that teams that make the playoffs play more games thus have more output but do not have increased salary costs because they played more games than other teams.¹²² On a league level, which is more applicable to this discussion, the fixed cost nature of salaries can be shown by comparing average salary changes in years in which the total number of league games changed.¹²³ Low marginal costs and impracticality of multiple

118. MCCONNELL & BRUE, *supra* note 44, at 220.

119. The following is NFL league averages (1993):

Player Compensation	\$31.9 million
Total Expenses	\$49.3 million
Compensation as Percent of Expenses	64.7%

Ozanian, *supra* note 17, at 18 n.4.

120. Jeff Babineau, *NFL Seeks to Level the Playing Field with Team Salary Caps*, ORLANDO SENTINEL, Nov. 21, 1993, at C13.

121. MCCONNELL & BRUE, *supra* note 44, at 172.

122. Because the shares paid to participants of playoff games are paid by the league, see NFL R&F BOOK, *supra* note 5, at 316, 323-25 (listing the share paid to each player on each team playing in their respective championship games and the Super Bowl), individual teams do not incur greater salary costs by participating in playoff games, unless their players' contracts have incentive clauses based on postseason participation.

123. Following the 1977 season, the NFL increased the number of regular season games played by each team from 14 to 16 and added two wildcard playoff games (one in each conference). NFL R&F BOOK, *supra* note 5, at 264. Average player salaries and percentage increases from 1974 to 1981 were as follows:

Year	Average Salary	Percent Increase
1974	\$33,000	20.0%
1975	\$39,600	20.0%
1976	\$47,500	19.9%
1977	\$55,300	16.4%

league competition, which as discussed above results from fans' interest in seeing the best players concentrated in one league, are natural monopoly barriers that prevent competitors from being able to challenge the NFL.

2. Legal Natural Monopoly Characteristics

The NFL achieved its position for several reasons, each of which involves a means that courts have recognized as a legal way of attaining a monopoly.¹²⁴ It achieved its position through the ability and intelligence of its management. Whether the NFL has always been managed with great intelligence is both subjective and not important. What is important is that the NFL has been managed with more intelligence than its rivals, in particular the USFL and WFL. Poor management of these leagues hastened their deaths and allowed the NFL to maintain its position through the perfectly legal means of exercising its relatively greater ability and managerial skill.¹²⁵ The quality of the NFL's product can only be objectively evaluated by looking at attendance and television ratings, from which a relative level of product quality can be inferred. The NFL's attendance and television ratings have been better than those of any rival league, indicating that the NFL achieved and maintained its monopoly because of its superior product.¹²⁶

1978	\$62,600	13.2%
1979	\$68,900	10.1%
1980	\$78,700	14.2%
1981	\$90,000	14.4%

Don Pierson, *Players Sure to Want a Slice of NFL's Rich New TV Pie*, CHI. TRIB., Mar. 11, 1990, Sports, at 11.

Average salaries in 1978 increased by the second lowest percentage for any year between 1974 and 1981. This indicates that the increase in number of games, which is a quantifiable measure of output, was not matched by an increase in salary costs beyond normal yearly increases. Salary costs must therefore be considered fixed in relation to output.

124. See *supra* part III.A.2.

125. See *USFL v. NFL*, 842 F.2d 1335, 1344 (2d Cir. 1988) (noting that WFL franchises were underfinanced and located mostly in small markets); *id.* at 1351-52 (noting managerial decisions by the USFL that caused its failure).

126. While competing with the USFL, NFL games usually drew national ratings of 15 or 16. The USFL's first season games averaged only a 7 rating and dropped to 5.5 by the second year. Larry Stewart, *ABC Seeks to Cut Pay to USFL; Network Is Asking for Steep Reduction in \$15-Million Deal*, L.A. TIMES, Apr. 20, 1985, Sports Part 3, at 1. The USFL average attendance per game was 27,272 in 1984, and 24,452 in 1985, while the NFL drew 59,813 and 59,567 in those seasons, respectively. Dave Goldberg, *Will Move to Fall Bring on the Fall of USFL?*, L.A. TIMES, July 2, 1985, Sports Part 3, at 8; NFL

Several qualities of the NFL favor its legal recognition as a natural monopoly. Special characteristics of an industry justify special legal consideration in the face of antitrust laws.¹²⁷ The NFL many unique characteristics justify special legal consideration in antitrust cases. Congress has already recognized this in granting the NFL special treatment (along with other sports leagues) in the areas of mergers and television contracts.¹²⁸

Finally, no benefits would arise from competition between the NFL and rival leagues. Costs would increase and fans would not be able to see all the best players compete against each other.¹²⁹ Since no benefits arise from competition, application of antitrust law to the NFL without acknowledging its status as a natural monopoly is potentially detrimental to consumers as well as the league.

C. *Anti-Natural Monopoly Arguments*

Some commentators have argued that the NFL is not a natural monopoly.¹³⁰ Stephen F. Ross presented the most thorough argument against finding the NFL to be a natural monopoly.¹³¹ Ross argues that the NFL, like other sports leagues, is a monopoly but that it is not a natural monopoly and should therefore be broken up.¹³² However, this Note demonstrates that his arguments opposing recognition of the NFL as a natural monopoly are not persuasive.

R&F BOOK, *supra* note 5, at 350. Other factors, such as the USFL's spring playing dates and market size disparity between teams of rival leagues, may have contributed to the NFL's better attendance and TV ratings. However, without a superior product, the NFL could not maintain its attendance and ratings edge. It has maintained such an edge; therefore superior product quality can be inferred. Objective inferences aside, any knowledgeable football fan who watched the USFL in action would agree that higher quality football could be found in the NFL. *See, e.g.,* Tony Kornheiser, *The USFL: It's Almost Forgotten, But It Isn't Gone Yet*, L.A. TIMES, May 5, 1985, Sports Part 3, at 12.

127. *See supra* part III.A (identifying the characteristics of a natural monopoly).

128. *See* 15 U.S.C. § 1291 (1994) (allowing certain sports leagues to sign television deals and share revenue as if they were single entities).

129. *See supra* notes 92-94 and accompanying text (discussing fans' interests in a competitive contest at the lowest possible cost).

130. *E.g.,* Rosenbaum, *supra* note 59, at 815-16 (asserting that the idea of a natural monopoly is an idea not normally applied to sports leagues because they are like all other forms of entertainment); Ross, *supra* note 93, at 716-17, 721-23.

131. Ross, *supra* note 93, at 716-17, 721-23.

132. *Id.* at 716-17.

1. Minimum Size

Ross addresses the argument that the minimum size of a league is too large to support multiple leagues.¹³³ This argument says that if the number of cities capable of supporting a team is small (from six to eight being the minimum number to have a viable league), only one league is possible.¹³⁴ Since the NFL currently has thirty teams, there are more than enough cities to support the existence of two leagues under the minimum size analysis; thus, Ross argues that the NFL cannot be a natural monopoly. Failure of this argument has no bearing on whether the NFL is a natural monopoly, however; it merely shows that the NFL has more teams than absolutely necessary to operate.

2. Cost of Forming a Rival League

Ross next addresses the argument that league expansion costs less than formation of rival leagues.¹³⁵ He discounts this argument by claiming that no evidence exists indicating that costs for a second league would be any higher than for a monopoly league.¹³⁶

This is both incorrect and irrelevant. It is incorrect because it ignores some of the NFL's major assets that could not be purchased by a rival league. No amount of cost expenditure by a new league can provide it with the intangible assets possessed by the NFL, which are important to generating fan interest. A new league cannot purchase rivalries, records, or fan loyalty, which are important revenue generating assets of the NFL. While a new league could generate these over time, the time needed would be an additional cost making overall costs for a second league higher than those of an existing monopoly league. Moreover, the assertion is irrelevant because showing that a rival league could operate at the same cost as the NFL does not show that the NFL is not a natural monopoly. Two electric utilities could operate in the exact same area for the exact same cost. Whether multiple firm operation is in the consumer's best interest is the key issue in finding the exis-

133. *Id.* at 716.

134. *Id.* (noting studies that have found that six to eight teams are needed to have a league).

135. *Id.*

136. *Id.* at 717 (stating that "stadium rental, player salaries, and administrative costs" would not be higher for a new league than for an existing one).

tence of a natural monopoly.¹³⁷

Ross claims that low costs to the league do not translate into value to society.¹³⁸ He supports this by saying that unlike the case of utilities, monopoly sports leagues do not better serve the public. This ignores the public's interest in concentration of talent. He does address the idea that one league can operate at lower costs than leagues in competition, but claims that the public does not benefit from lower league costs.¹³⁹ He supports this by noting that the automobile industry could merge into one company and reduce overall expenses¹⁴⁰ yet no one would call it a natural monopoly.¹⁴¹ This ignores a defining economic characteristic of natural monopolies that the NFL possesses. The relevant cost that separates natural monopolies from other industries is average cost per unit of output. Overall expenses are not important in defining a natural monopoly. Any industry would face lower expenses if it had sufficient market power over suppliers. An increase in output of cars always requires an increase in raw materials expense. Since the major cost of each car is raw materials, increasing the number of cars produced does not reduce the average cost per car. The NFL's average cost decreases as it increases output (if output is measured in quantifiable terms such as number of games played), so it is unlike an automobile manufacturer monopoly.¹⁴²

3. The Reason for the Failure of Rival Leagues

Ross claims that the NFL's major rivals failed to survive for reasons unrelated to the NFL's natural monopoly position.¹⁴³ The AAFC failed because complete domination by the Cleveland Browns resulted in lack of fan interest. But this is merely another way of saying the NFL had a superior product, which courts have recognized as a legitimate means of acquiring a monopoly.¹⁴⁴ The suggestion that the league failed because one team dominated for a period of four years is not supported by examples from other sports. The Boston Celtics, New York Yankees, and Montreal

137. See *supra* part III.A.1 (discussing the economic definition and characteristics of natural monopolies).

138. Ross, *supra* note 93, at 716.

139. *Id.* at 717.

140. This could be done by suppressing wages and obtaining favorable input prices.

141. Ross, *supra* note 93, at 717.

142. See *supra* part III.A.1 (discussing the economics of natural monopolies).

143. Ross, *supra* note 93, at 721-22.

144. See *supra* notes 41-42 (giving cases that discuss superior product and intelligence).

Canadians each dominated their leagues for periods greater than four years, yet their respective leagues managed to survive.¹⁴⁵

4. Serving Public Interest with Multiple Leagues

Two arguments supporting the proposition that one league is in the public's best interest are that only a single league can produce a champion and assure the competitive balance necessary for exciting contests.¹⁴⁶ Ross counters the championship game argument by saying that rival leagues could agree to a championship game and interleague play.¹⁴⁷ He counters the competitive balance argument by saying that leagues could agree with the players' union about how to allocate players.¹⁴⁸ These results in fact happened in the NFL-AFL merger, which resulted in a single, larger league.¹⁴⁹ Rival leagues that play each other—necessitating a commonly arrived at schedule and common rules—and that have agreements about player allocations would not in fact be distinct leagues.

IV. SIGNIFICANCE OF THE NFL BEING A NATURAL MONOPOLY: NEED FOR ALTERNATE REGULATION

Inapplicability of the Sherman Act to natural monopolies has forced courts to consider the special nature of natural monopolies when considering antitrust attacks.¹⁵⁰ It has also required alternate

145. Teams in other sports exhibited dominance equal to that of the Browns in the AAFC without threatening the existence of their leagues. The New York Yankees ruled Major League Baseball from 1936 to 1943, winning seven pennants and six World Series, and again from 1949 to 1965, winning 14 pennants in those 16 years and adding nine World Series victories, including five straight from 1949 to 1953. *THE SPORTING NEWS, GREATEST SPORTS DYNASTIES* 13 (Joe Hoppel et al. eds., 1989). The Boston Celtics captured 11 NBA crowns over 13 seasons from 1956 to 1969, including a seemingly unmatchable eight consecutive titles without destroying the NBA, which at the time was not widely popular. *Id.* at 54. The Montreal Canadiens dominated the NHL from 1956 to 1979, appearing in 19 of 25 Stanley Cup finals in that stretch and winning 15 of them, yet the league managed to continue. *Id.* at 154-55, 395. Even within the NFL, the Green Bay Packers, Pittsburgh Steelers, and San Francisco Forty-Niners have enjoyed periods of dominance close to that displayed by the AAFC Cleveland Browns without threatening the existence of the league. See NFL R&F BOOK, *supra* note 5, at 269-75.

146. Ross, *supra* note 93, at 723.

147. *Id.*

148. *Id.*

149. For a brief discussion of the details of the AFL-NFL merger, see HARRIS, *supra* note 117, at 62-63, 65-66.

150. See *supra* part III.A.2 (discussing the legal definition and characteristics of natural monopolies).

regulation in many situations.¹⁵¹ Finding the NFL to be a natural monopoly would not only require that courts give special consideration to its status when it is attacked based on the Sherman Act, it would also justify alternate regulation that would be more applicable to the NFL's unique circumstances.

A. *The Extent of the Sherman Act's Applicability to a Natural Monopoly in the NFL*

Since the NFL is a natural monopoly, its status as a monopoly is not a violation of Section 2 of the Sherman Act. Shutting out competitors through natural process is not a restraint of trade.¹⁵² The size of the NFL's market share, however that market is defined, should not in itself open the league to any antitrust attack, though the court may infer monopoly power solely from market share.¹⁵³ The only way the NFL could be liable under the Sherman Act is if it engaged in activity intended to unlawfully prevent another firm from trying to compete for the NFL's natural monopoly.¹⁵⁴

B. *Alternate Regulation of the NFL*

Even as a natural monopoly, the NFL is still prohibited from using its power to restrict rivals from competing for its monopoly.¹⁵⁵ Otherwise, antitrust law is inapplicable to a natural monopoly. This does not mean the NFL should be free from regulation.¹⁵⁶ Regulation apart from standard antitrust law is the com-

151. See *S.S.W., Inc. v. Air Transport Ass'n of Am.*, 191 F.2d 658, 661 (D.C. Cir.), cert. denied, 343 U.S. 955 (1952) (stating that application of antitrust laws is limited in cases of regulated industries).

152. *Lamb Enters., Inc. v. Toledo Blade Co.*, 461 F.2d 506, 515 (6th Cir. 1972) (stating that foreclosing competitors from the market is not unreasonable when it is "the natural result of success in a natural monopoly situation").

153. Size of market share alone is not a violation of Section 2, but courts have found that a large enough market share creates situations in which monopoly power must exist, so size alone is in actuality a violation of Section 2. See, e.g., *United States v. Griffith*, 334 U.S. 100, 107 (1948) ("[M]onopoly power . . . may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.").

154. See *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("If the most efficient method of determining which firm should have the natural monopoly is a competitive process that will inevitably destroy the other firms, the antitrust laws presumably would forbid interference with that process.").

155. See *id.* (stating that interference with the natural, though destructive, competition for a natural monopoly would be an antitrust violation).

156. Professor Gary R. Roberts, Professor of Law and Sports Law Program Director at Tulane Law School, in hearings before the Senate Judiciary Committee, argued for a

mon response to natural monopoly situations.¹⁵⁷ Such regulation is created to protect public interests, because antitrust law cannot do so in natural monopolies.¹⁵⁸

Consideration of special regulation of certain aspects of the National Football League is not new. Congress's antitrust exemptions for mergers and television contracts¹⁵⁹ are clear examples of special regulation of the NFL. Several Senators have offered proposals for regulating team movement.¹⁶⁰ One commentator has suggested that Congress step in and forcibly break up the NFL's monopoly.¹⁶¹ Determining what regulation is appropriate requires consideration of the goals and ideal characteristics of such regulation.

1. The Scope and Goal of Regulation

Any regulation of the NFL should be broad enough to cover every aspect of league activity. Piece-meal regulation through specific congressional acts,¹⁶² Senate proposals dealing with only one issue facing the league,¹⁶³ and court decisions applicable only to

limited antitrust exemption in cases of franchise relocation and ownership restrictions because he sees alternate regulation as not politically feasible. *On the Application of Federal Antitrust Law to Professional Sports Team Franchise Relocations, 1995: Hearings Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Judiciary Comm.*, 104th Cong., 2d Sess. (Nov. 29, 1995) (testimony of Professor Roberts), available in LEXIS, Legis Library, CNGTST File. He states that in such cases, public interest will best be served by letting the league make decisions free from antitrust constraints. *Id.* This Note agrees that owners' and fans' interests will often align. *See infra* part IV.B.2. However, this will not always be the case, and having the fox guard the hen house is not the answer. Since antitrust regulation of sports leagues is not a particularly partisan issue, alternate regulation in this area may be more practically feasible than in many other areas in which Congress involves itself.

157. *See* *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953) ("[I]t is for Congress to decide what conditions, and subject to what regulations, such a monopoly shall conduct its business."), *aff'd*, 347 U.S. 521 (1954).

158. "If competition is inappropriate, *regulated* monopolies should be established to avoid possible abuses of uncontrolled monopoly power." MCCONNELL & BRUE, *supra* note 44, at 373 (emphasis in original).

159. *See* 15 U.S.C. § 1291 (1994). This statute also refers to other sports leagues. *See id.*

160. *See* Charles Gray, Note, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329, 1362-67 (1986) for a discussion of proposed NFL franchise relocation bills. The specifics of the bills vary, but they involve setting objective standards that a franchise must meet before it can relocate. *Id.* More bills have been proposed in the wake of the Browns' move. *See, e.g.*, S. 1625, 104th Cong., 2d Sess. (1996) (exempting from antitrust laws a professional sports league's enforcement of its own relocation rules).

161. Ross, *supra* note 93, at 748.

162. *See* 15 U.S.C. § 1291 (1994).

163. *See* Gray, *supra* note 160, at 1362-67.

specific fact patterns,¹⁶⁴ have produced the current system, which offers no clear conclusions on how the NFL's activity will be viewed under the law. The NFL's inability to gauge how it will be treated under the law contributed to the unchallenged abandonment of Baltimore by the now Indianapolis Colts and allowed Modell to move his franchise from Cleveland to Baltimore because he knew the league could not easily prevent his move.¹⁶⁵

Since the purpose of regulating the league is to protect public interests, any system of regulation must serve those interests.¹⁶⁶ The inability of antitrust law to serve those interests is a major reason why alternate regulation is necessary. The interests of consumers, in this case the fans, must be at the heart of the regulation.

2. The Role of League Members in Regulation

New regulation must give some deference to league members. Consumer interest must be the focus, but three justifications support giving league members some input into any regulatory mechanism.

Regulation should not infringe on private property rights of the league members.¹⁶⁷ Because the government is not in the business of running a football league, it should only interfere with league decisions if needed to protect consumer interests.

Some deference is appropriate because league interests and consumer interests will tend to align on some issues.¹⁶⁸ The league generates revenue from fan interest.¹⁶⁹ Because the league

164. See, e.g., *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

165. The NFL's state of confusion regarding antitrust laws was the reason why the league took no legal action when the Colts moved to Indianapolis at the end of the 1983 season. Phil Elderkin, *Rozelle Calls for Guidelines as to Where the NFL Fits in Anti-trust Laws*, CHRISTIAN SCI. MONITOR, Jan. 21, 1985, Sports, at 20. "NFL commissioner Paul Tagliabue told the [Senate Judiciary] committee Wednesday that team owners are unwilling to oppose the moves and risk legal action again after the Oakland Raiders successfully sued the league to move to Los Angeles in 1982." Bruce Alpert, *Sports Law Expert: Regulate NFL*, TIMES-PICAYUNE (New Orleans), Nov. 30, 1995, at D1.

166. See *supra* part II.B (discussing the purpose of antitrust law).

167. See Gray, *supra* note 160, at 1361 (discussing protection of team owners' property rights as a problem with which franchise relocation legislation must deal).

168. Fan and league interests will clash in many cases, such as broadcasting of games solely on pay television, but if fan and league interests aligned perfectly, regulation would be unnecessary.

169. See *supra* part I.C; see also, Gray, *supra* note 160, at 1365 (stating that "[g]enerally, the leagues' interests have matched the public's interests" in the area of

will make decisions that will increase its revenue, and that revenue is generated from fan interest, the league will tend to make decisions that it thinks will enhance fan interest, thus league and fan interests will tend to align. For example, if the league could enforce its own rules, it would not allow movement of a franchise with strong fan support (as measured by television ratings) because it would not want to jeopardize the income generated from that support. The league would not create player allocation rules that allow certain teams, such as larger market teams, to dominate because its members know that fans want to see competitive contests.

Finally, some deference is desirable because the league members are best suited to manage league affairs because of their experience with the unique situation of the NFL.¹⁷⁰ Regulation by parties who do not understand the issues facing the league and its fans will not be able to make informed decisions. Because they are the parties with the most knowledge about their own operations, league members should have some input into the regulatory mechanism.

3. Reducing Litigation Costs Through Regulation

Any new regulation of the NFL should try to minimize costs associated with the current practice of applying antitrust law to the NFL.¹⁷¹ The confusion caused by the lack of applicability and lack of consensus of current regulation creates litigation costs as each issue is taken to trial repeatedly.¹⁷² New regulation that is directly applicable to issues facing the league and that allows development of guidelines that can direct future league action will reduce the costs of repeated litigation.

franchise relocation).

170. See Gray, *supra* note 160, at 1361 (stating that franchise location regulation should recognize that sports leagues are best able to manage their operations).

171. "Minimizing the cost of administration of social enterprises . . . is a well established and independent societal goal." Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 Wis. L. REV. 893, 920 (1984) (discussing societal goals of legal systems).

172. See, e.g., *supra* notes 69, 73 (citing many cases that have tried to resolve the single entity issue).

C. *Suggested New Regulation*

The NFL must be statutorily removed from the full scope of antitrust law.¹⁷³ Legislation should indicate that Section 2 of the Sherman Act is only applicable to the NFL if the activity in question is allegedly a restraint of trade done with the intention of unfairly preventing a rival league from competing for the NFL's natural monopoly.¹⁷⁴ The NFL would of course be subject to all non-antitrust laws, such as labor laws and discrimination laws, because the NFL's unique characteristics are not a hindrance to their normal application.

An arbitration board should replace courts and current antitrust law in regulating the rest of the league's activities. The board should be made up of both league representatives and non-league representatives. The NFL may select one-fourth of the board members by any means the league chooses. This would produce a board that is somewhat deferential to the NFL. Selection of the non-league members could be through any reasonable selection method, such as congressional appointment. Non-league members should be selected based on substantial familiarity with the NFL and lack of incentive to subordinate the interests of fans to those of the league. Possible non-league members could be members of the media, former players, or even outsiders who display sufficient understanding of issues facing the NFL and its fans. A majority vote should be required to reach decisions so the league representatives cannot dominate; they must get the votes of over one-third of the non-league members.

Challenges to league actions would be heard by the board. The board may offer advisory opinions but will only directly rule on activities that are challenged. A preliminary inquiry will be made to see if the challenge has merit. If so, it will be considered by the board.

173. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689 (1978) (stating that the task of exempting industries from antitrust regulation is left to Congress).

Statutory exemption already exists for the NFL to a limited extent through 15 U.S.C. § 1291 (1994), which exempts agreements of NFL sports telecasts from antitrust laws. Other industries also have statutory exemptions. *See, e.g.*, 47 U.S.C. § 221 (1994) (exempting telephone and telegraph companies from the full scope of antitrust law and placing them under FCC regulation).

174. *See supra* notes 152, 154-55 and accompanying text (noting that shutting out competitors through a natural process is not a restraint of trade).

Exactly what actions may be challenged must be spelled out. The areas of activity most likely to involve the league acting to fans' detriment are in player movement, franchise movement, broadcast of games, and number of games. Only actions dealing with these issues could be considered. Playing rules and allocation of league profits are examples of areas in which the league's actions could not be challenged under the arbitration board.

Guidelines by which the board can judge league actions are necessary. The basic guideline is that the league cannot take actions that are contrary to fan interest. Fan interest should be defined as the interest of the average fan in watching games involving the best players available either in person or on television without facing unreasonable restrictions or costs.¹⁷⁵ The board could develop, and would develop as actions are challenged, a list of what specific actions will be found to be against fan interest. This will provide the NFL with a source of guidance so confusion about what actions are permitted will be minimized. This will result in reduction in costs because the league will know beforehand if actions are permissible, making much litigation unnecessary.

Decisions of the board may be subject to judicial review, but such review should be limited. Subjecting the decisions to full judicial review would merely add a layer to the current system in which courts rule on issues under antitrust law.¹⁷⁶

Review similar to that allowed in labor arbitration contract situations may be desirable.¹⁷⁷ Decisions could be reviewed if a dispute arises over whether the board is basing its decisions on the established guidelines. While the board's opinion of how guidelines apply to particular actions by the NFL would not be reviewable, decisions would face judicial review to determine if in fact the board based its decisions on those guidelines.¹⁷⁸ Thus, decisions

175. As with many legal definitions, this one is somewhat vague but necessarily so to enable it to cover many possible fact situations.

176. See Gray, *supra* note 160, at 1366-67 (stating that judicial review "would take the teeth out of" proposed relocation regulation that provides objective standards for relocation for the purpose of avoiding litigation).

177. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (stating that courts must refuse enforcement of an arbitration award if the award does not "draw its essence" from the arbitration agreement).

178. See *id.* at 598 (reversing the circuit court's refusal to enforce an arbitration decision because the circuit court's refusal was not based on the arbitrator's failure to premise the award on his construction of the contract, but because the court disagreed with the arbitrator's construction).

could be judicially challenged on the grounds that the board did not follow the fan interest guideline in reaching them but the board's opinion of what the fans' interests are could not be challenged.

D. Practical Results of Recognizing the NFL as a Natural Monopoly and Developing Alternate Regulation

Looking at two recent cases involving the NFL shows the practical results of finding the NFL to be a natural monopoly and regulating it through non-antitrust means.

1. The USFL Case

If the court had acknowledged the NFL's natural monopoly in the USFL case,¹⁷⁹ the rival league would not have won even its nominal judgment. In that case, "the jury found that the NFL had willfully acquired or maintained monopoly power" and that its "unlawful monopolization of professional football had injured the USFL."¹⁸⁰ If the court had recognized the NFL's natural monopoly, it could not have been in violation of antitrust law without a showing that it unlawfully used its monopoly power to prevent competition by the USFL, a claim that the jury specifically rejected.¹⁸¹ Even though the USFL won only nominal damages, the NFL did lose on the USFL's claim that it was a monopoly.¹⁸² This leaves the NFL open to further attacks based solely on the fact that it is a monopoly. The USFL's victory also allowed it to recover attorney fees under Section 4 of the Clayton Act.¹⁸³ While the \$5.5 million award was significantly less than the \$440 million in damages claimed by the USFL, it was money that the NFL should not have been forced to pay.¹⁸⁴

179. USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988), cert. denied, 493 U.S. 1071 (1990).

180. *Id.* at 1341.

181. *Id.* The jury found that "the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade." *Id.*

182. *Id.*

183. 15 U.S.C. § 15(a) (1994); USFL v. NFL, 887 F.2d 408, 411 (2d Cir. 1988).

184. 887 F.2d at 411 (listing attorney fees awarded); USFL v. NFL, 842 F.2d at 1341 n.3 (listing damages sought by USFL).

2. The Los Angeles Coliseum Commission Case

The *Los Angeles Memorial Coliseum Commission v. NFL*¹⁸⁵ opinions provide a clear example of a situation in which antitrust application to the NFL ignored, and arguably went against, consumer interest. Alternate regulation taking fan interests into account should prevent similar decisions in the future.

In the late 1970s, the Los Angeles Rams changed their home field from the Los Angeles Memorial Coliseum to Anaheim Stadium.¹⁸⁶ The Coliseum Commission wanted to attract another NFL team but saw as an obstacle the league rule requiring three-fourths of the NFL's teams to approve a franchise relocation to an area within seventy-five miles of another franchise (in this case the Rams).¹⁸⁷ The Commission filed suit against the NFL, claiming that the rule was a restraint of trade in violation of Section 1 of the Sherman Act.¹⁸⁸ The court dismissed the initial case, but gave the Commission leave to amend its complaint to clarify its claims.¹⁸⁹

By the second trial, the Commission had reached an agreement that would bring the Raiders from Oakland. The Commission premised its claim on the effect that the NFL's rule had on its efforts to complete a deal with the Raiders.¹⁹⁰ In considering the NFL's rule under a rule of reason test, the court said that it had to balance the NFL's interests with the interests of individual teams.¹⁹¹ The court concluded that a rule requiring a majority of teams to approve franchise movement would adequately serve league interests and that the three-fourths rule was over-restrictive and thus a restraint of trade.¹⁹² The court did not consider the interests of consumers, which are supposed to be the basis for antitrust law. In affirming, the circuit court mentioned the importance of "[f]an loyalty and location continuity" in considering relocation. It stated that "[s]ome sort of procedural mechanism" may

185. 726 F.2d 1381 (9th Cir. 1984), *aff'd* 484 F. Supp. 1274 (C.D. Cal. 1980), *cert. denied*, 469 U.S. 990 (1984).

186. *Id.* at 1384.

187. *Id.* at 1384-85.

188. *Id.* at 1385.

189. *Los Angeles Memorial Coliseum Comm'n*, 484 F. Supp. at 1275.

190. *Id.*

191. *Id.* at 1277.

192. *Id.*

be necessary to take those factors into account.¹⁹³ However, the circuit court affirmed the decision that did not take fan interest into account, saying that “[t]o the extent the NFL finds the law inadequate, it must look to Congress for relief.”¹⁹⁴ If an alternate regulatory system is created, the interests of the fans will not be ignored as they were when the Raiders left Oakland.

3. The Cleveland Browns Move

Nothing in NFL history has demonstrated the desperate need for coherent antitrust regulation incorporating consumer concerns like the move of Modell's franchise to Baltimore. The move of the Cleveland Browns, historically one of the NFL's most successful franchises¹⁹⁵ and a fixture in Cleveland for forty-six years, met with widespread public outcry.¹⁹⁶ Commissioner Paul Tagliabue told the Senate Judiciary Committee, during the rash of Capitol Hill activity following the announced move, that NFL owners were unwilling to block the move for fear of losing an antitrust suit as they did against the Raiders.¹⁹⁷ While fan upheaval compelled the NFL to reach a special agreement with Modell and the city of Cleveland,¹⁹⁸ the underlying problem was not addressed. Issues of public interest will continue to come up each time a franchise moves or each time the league is faced with another issue that, because of the NFL's unique position as a natural monopoly, is of great interest to consumers but over which they have no voice, economic or otherwise. The alternate regulation suggested in this Note should guarantee that a travesty the likes of which Cleveland has had to endure will no longer be possible.

193. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1397.

194. *Id.* at 1401.

195. The Browns have made the post season in 23 of their 46 seasons, tying the franchise with the New York Giants for the highest number of years with a post season appearance among all NFL teams. The franchise is in one of the top five NFL teams in terms of percentage of seasons ending in a post season appearance. See BROWNS MEDIA GUIDE, *supra* note 13, at 168.

196. See Rushin, *supra* note 3, at 60.

197. Alpert, *supra* note 165, at D1.

198. See *supra* note 4 and accompanying text (discussing fan outrage at the move).

V. CONCLUSION

Application of antitrust law to the National Football League has been fraught with difficulty and confusion. The NFL's characteristics make it a natural monopoly and therefore put it beyond the scope of standard antitrust law. Instead of trying to contort existing law so that it can deal with the NFL, the government should create new regulation applicable to the National Football League, regulation that will serve the consumer interest goal of antitrust law.

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