

BASEBALL ECONOMICS AND ANTITRUST IMMUNITY*

*Andrew Zimbalist***

I.	INTRODUCTION	288
II.	THE OWNERS' JUSTIFICATION FOR THE EXEMPTION ..	290
	A. The Players Would Challenge the Reserve Clause	290
	B. Major League Baseball Is Not Profitable	296
	C. The Exemption Allows the Commissioner to Operate Effectively	302
	D. The Exemption Prevents Franchise Relocations .	302
	E. The Exemption Prevents Frivolous Litigation ...	303
	F. Minor League Baseball Would Be Destroyed Without the Exemption	303
III.	INDEPENDENT PERSPECTIVES ON THE EXEMPTION ...	306
IV.	THE IMPACT OF THE EXEMPTION	307
	A. The Players	307
	B. The Media	310
	C. The Cities	312
V.	CONCLUSION	319

* This text is an edited and expanded transcript of written testimony given by Dr. Zimbalist on Dec. 10, 1992, before the Antitrust Subcommittee of the Senate Judiciary Committee.

** Robert A. Woods Professor of Economics, Smith College, B.A., 1969, University of Wisconsin; M.A., 1972, Ph.D. 1974, Harvard University. Dr. Zimbalist has been a visiting professor at Doshisha University in Kyoto, Japan, (1985) and a visiting research fellow at Harvard University (1980). Dr. Zimbalist chairs the Latin American Scholars' Association's Task Force on Scholarly Relations with Cuba and has served as a consultant in Latin America for the United States Development Corporation, the United States Agency for International Development, and numerous corporations. Dr. Zimbalist has published extensively in the areas of comparative economic systems and economic development and sports. Dr. Zimbalist's works include *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* (1992), updated and expanded paperback (January 1994), and *DIAMONDS ARE FOREVER: THE ECONOMICS OF PROFESSIONAL BASEBALL* (1992). Dr. Zimbalist has served as an economic consultant to law firms in a variety of sport law cases. Most prominently, Dr. Zimbalist served as a consultant to the law firm of Weil, Gotshal and Manges in *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1992), and the law firm Grippo and Elden in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 113 U.S. 409 (1992).

I. INTRODUCTION

Major League Baseball (MLB) is the only industry in the United States that has a blanket exemption from the country's antitrust laws and is subject to no trade regulation. The exemption's origin lies in the breakup of the Federal League (FL), which challenged MLB's monopoly during 1914-15. After two years of exploding player salaries, which resulted from competition for players between MLB and the FL, the leagues made peace. FL owners were either allowed to buy into MLB teams or they were paid off.

MLB's owners, however, treated the owners of the Baltimore Terrapins of the FL with scorn, offering them only fifty thousand dollars in settlement and saying they should be pleased with this paltry sum because, according to Charles Comiskey of the Chicago White Sox, Baltimore was not a major league city and, in fact, it was even a bad minor league city. Charles Ebbets of the Brooklyn Dodgers elaborated that the city had too large a population of "colored" people.¹

The Terrapins' owners, not surprisingly, sued MLB in 1916 claiming violation of antitrust laws.² In April 1919, they won their suit before the Indiana Supreme Court for treble damages of two hundred and forty thousand dollars.³ MLB appealed and the decision was reversed in April 1921 before the District of Columbia Circuit Court of Appeals.⁴ The case was again appealed and was heard before the United States Supreme Court in May 1922.⁵ The Court was headed by former President Taft, who also happened to be an erstwhile third baseman for Yale University's baseball team and the first President to throw out a ball on Opening Day. In ad-

1. ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME*, 9 (1992).

2. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 F. 681, 682 (1919).

3. ZIMBALIST, *supra* note 1, at 10.

4. *Id.* The District of Columbia Court of Appeals stated:

[t]he players . . . travel from place to place in interstate commerce, but they are not the game . . . [which] is local in its beginning and in its end The fact that the [owners] produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sports, not trade.

National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 F. 681 686 (1919).

5. See ZIMBALIST, *supra* note 1 (citing *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)).

dition, the Court's decision was written by Justice Holmes, who was himself a former amateur baseball player.⁶

In its opinion, the Supreme Court principally reasoned that MLB did not engage in interstate commerce and, hence, was not subject to the country's antitrust laws.⁷ A curious finding: did not the players cross state lines, were not the bats, balls, and uniforms manufactured in different states, was not the first World Series broadcast over radio in 1921, using a relay between New York City and Newark, New Jersey? Even more curious, the decision was reaffirmed by the Supreme Court in 1953⁸ and again in 1972.⁹ Congress from time to time has threatened to legislate away the exemption but has never come close to acting on its threats.

MLB is the only legally-sanctioned, self-regulating monopoly in the country. Decisions about how the game is played and how the business is conducted are made by the twenty-eight groups of men and one woman who are the fortunate owners of baseball's big league franchises. Prior to the forced resignation of Commissioner Francis "Fay" Vincent in September 1992, the owners were subject to at least one constraint, however minimal. Currently, their decisions about the fate of our National Pastime go completely unchecked.

6. *Federal Baseball*, 259 U.S. at 200.

7. *Id.* In *Federal Baseball*, the Court stated:

The business is giving exhibitions of base ball [sic], which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibition the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business . . . [T]he transport is a mere incident, not the essence thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the community accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.

Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922).

8. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

9. *Flood v. Kuhn*, 407 U.S. 258 (1972).

II. THE OWNERS' JUSTIFICATION FOR THE EXEMPTION

A. *The Players Would Challenge the Reserve Clause*

Without the exemption, the reserve clause could be challenged and, without the reserve clause, baseball's competitive balance would be undermined. This argument was put forward by virtually the entire baseball establishment and all of the players testifying before the Subcommittee on Monopoly Power of the House Judiciary Committee in 1951,¹⁰ at a time when the Yankee dynasty was in full swing and the game had no competitive balance whatsoever.

What exactly is the threat of free agency that the baseball owners rallied against, and the National Football League (NFL) owners recently accepted in *McNeil v. National Football League*?¹¹ It is nothing more than the right for players to receive competitive bids for their services, i.e., it is the same free labor market idea that functions in the rest of the United States economy.

The free labor market rights conferred by free agency, in fact, apply only to a small minority of professional ballplayers. Over four thousand minor leaguers have no free agency rights. With few exceptions, minor leaguers are paid between \$850 and \$2,000 a month for between two and one-half and five and one-half months per year.¹² They have no job security, few benefits, and only one in ten minor leaguers makes it to the major leagues. Of those who make it, only one in eight stays for more than six years.¹³ It is only those in this very select group of players with more than six years of experience in the major leagues who gain free agency rights.¹⁴

10. See ZIMBALIST, *supra* note 1, at 12. Although Congress considered removing the exemption at the time of these hearings, it seemed that confusion over the status of the ruling in *Gardella v. Chandler*, 172 F.2d 402 (2d. Cir. 1949), *appeal after remand*, 174 F.2d 919 (1949), was a major factor behind Congress' inaction in 1951. The reserve clause in a player's contract not only obligated the player to the team for the duration of the contract, but the reserve clause also allowed the team to "reserve" the player for the following year. HAROLD SEYMOUR, 2 BASEBALL: THE GOLDEN AGE 6 (1971).

11. 790 F. Supp. 871 (D. Minn. 1992).

12. See ZIMBALIST, *supra* note 1, at 115-16.

13. *Id.* at 106.

14. *Id.* See generally *Id.* at 74-104 (detailing the operation of baseball's labor markets, including the functioning of salary arbitration primarily for players with between three and six years of major league experience). In summary, there are even restrictions on the free labor market rights of free agents.

When an owner signs a free agent, the owner is making a business decision. Nobody is pointing a gun at the owners' head, compelling them to sign and pay exorbitant sums to individual free agents. A rational owner will estimate the expected value or additional revenue that the player will bring to the team and then offer the player any sum up to this amount. Since player performance is unpredictable, the owner will sometimes overestimate and other times will underestimate which causes player salaries under free agency to approach their value.¹⁵ It makes no sense for the owners to sign a player for six million dollars one day, and the next day call a press conference to announce that the team is losing money because player salaries are too high.

Those fans who express outrage at players' multi-million dollar salaries should ask themselves why baseball franchise owners should have different rules of the game than other businesses in the United States. They should also consider that if player salaries were somehow to decrease, the money would most likely be pocketed by the owners. They should further consider that multi-million dollar salaries are not so uncommon in the entertainment world. Bill Cosby's annual income exceeds one hundred million dollars, Madonna's exceeds sixty million dollars, Michael Jackson's exceeds fifty million dollars, and Prince's latest contract brings him ten million dollars per record... and an entertainer's professional lifetime is generally significantly longer than a ballplayer's.¹⁶ Finally, the fans should consider the hundreds of corporate executives whose salaries and stock options yield over five million dollars annually. Perhaps there is something inequitable about the market-engendered salary structure in the United States, and perhaps it would be desirable to reintroduce a truly progressive income tax, but there is no persuasive rationale for singling out baseball's free agents for ridicule.

Consider the traditional owner claim that free agency disrupts competitive balance, a claim that was repeated unsuccessfully in court in 1992 with regard to football by the NFL owners.¹⁷ The basis for this claim is that rich clubs or big city clubs will be able to

15. *Id.* There is a subsidiary issue here. Small city franchises that are only marginally profitable may find that they are caught on the short end of the bargain before the scales balance. Unpredictability and risk are more serious threats and deterrents to small city teams. This is another reason to increase revenue sharing among teams in MLB.

16. *Id.* at 77.

17. *McNeil v. National Football League*, 790 F. Supp. 871 (Minn. 1992).

buy the best talent disproportionately and; therefore, dominate opponents on the field. If measured by the number of different teams winning their division, pennant or World Series, there has actually been more competitive balance in MLB under free agency than at any time since 1903.¹⁸ If other measures are used, such as the standard deviation or the spread in win percentages or excess tail frequencies, the conclusion is similar. Further, big city teams have actually had a lower than average finish in the standings since 1977.¹⁹

How can these unexpected results be explained? First, since it always has been possible to sell or trade players, the introduction of free agency did not initiate the movement of players from poor teams to rich teams, it only changed who captured the economic rent or extra value generated by the players.²⁰ That is, prior to the advent of free agency, top players were sold or traded from poor to rich teams and the owners received payment for the player. With free agency, the top player may still move from a poor to a rich team, but now the player receives the payment in the form of higher salary. Thus, free agency *per se* does not change the pattern of player movement across teams, it only changes the distribution of income between owners and players. If one adds to this insight the fact that today teams losing free agents are compensated with amateur draft picks then it follows, other things being equal, that free agency would lead to a somewhat greater competitive balance.

The problem with this explanation is that it does not provide insight as to why big city teams have not outperformed small city teams on average since 1977. For this we must turn to the second factor. Because of greater unpredictability in player performance, it is no longer possible to buy a winning team. Studies on the correlation of average team salaries and a team winning percentage revealed a positive and strong correlation prior to 1960, but no significant correlation over the last thirty years.²¹

Why has performance become more unpredictable? Some will say it has to do with increased pressure on the players from their

18. JAMES QUIRK & RODNEY FORT, *PAY DIRT*, ch. 7 (1993).

19. *Id.*

20. Simon Rottenberg, *The Baseball Players' Labor Market*, J. OF POL. ECON. 64 (June 1956).

21. Performance predictability becomes even more problematic as players enter the second half of their careers and are increasingly plagued by injury. Most free agents are in their late twenties or their thirties.

high salaries and media attention.²² Under this reasoning, some players are better equipped psychologically to cope with the pressure than others, but this ability is not always evident during the players' early years. I believe a stronger and more tractable phenomenon is at work and that is talent compression.

Table 1
Baseball Players and Population

Year	Major League Players	United States Population	Pop/Player
1890	480*	63 mil.	131,250:1
1903	320*	80 mil.	250,000:1
1990	650	250 mil.	385,000:1

* based on assumption of an average of twenty roster players per team.

As detailed in Table 1, in 1990, the population-to-player ratio was fifty-four percent higher than it was in 1903, the beginning of the modern era of professional baseball.²³ That is, a smaller and smaller share of the population is playing professional baseball. Further, new groups have entered the game. Before 1947, no Blacks played in the major leagues and there were few Latinos. Today, these two groups comprise almost thirty-five percent of major league ballplayers.²⁴ Moreover, the population is healthier, more physically-fit, and better trained in baseball-specific skills through, *inter alia*, the expansion of youth league baseball.²⁵ Because major league ballplayers comprise a smaller fraction of an increasingly prepared population, the difference between today's best, average, and worst players is much smaller than it was twenty or forty years ago. Unlike track and field records which are based strictly on individual prowess and improve gradually over time, baseball performance statistics are the result of the balance of competing forces. Baseball's annual hitting and pitching records have not improved over time and with one exception they have not even been approached in recent times. Moreover, this one exception dates

22. See generally, ZIMBALIST, *supra* note 1, at 90-104.

23. *Id.* at 143.

24. *Id.* at 144.

25. *Id.*

back to 1961 and is tainted by an asterisk in the minds of most fans.²⁶ There is no more compelling evidence of talent compression than a review of batting and pitching records and their dates of accomplishment as summarized below:²⁷

Table 2
Performance Records

Category	Player	Year
Batting Average:		
.424	Rogers Hornsby	1924
.420	George Sisler	1922
.420	Ty Cobb	1911
Runs Batted In:		
190	Hack Wilson	1930
184	Lou Gehrig	1931
183	Hank Greenberg	1937
Home Runs:		
61	Roger Maris	1961
60	Babe Ruth	1927
59	Babe Ruth	1921
58	Hank Greenberg	1938
58	Jimmie Foxx	1932

26. I refer here, of course, to Roger Maris' 61 home runs in 162 games, compared to Babe Ruth's 60 home runs in 154 games.

27. To be sure, the lively ball was not introduced until 1920 and this contributed to pitchers' low Earned Run Averages (ERAs) during the 1910s, but it also contributed to lower batting averages. Batting averages rose 13 points in 1920 and ERAs rose 0.39 points. Even adding 0.39 points to the ERAs listed in Table 2 would leave them considerably below the best performances in recent times. Eventually pitchers adjusted to the lively ball and both batting and slugging averages gave back some of the gained ground. Other rules' changes that have affected performance records since 1903 include: narrowing the strike zone in 1950, widening the strike zone in 1963, narrowing the strike zone and lowering the pitchers' mound in 1969, and the introduction of the designated hitter in the American League in 1973. Controlling for the different effects of these changes does not alter the argument regarding the impact of talent compression in the text.

Doubles:

67	Earl Webb	1931
64	George Burns	1926
64	Joe Medwick	1936

Runs:

177	Babe Ruth	1921
167	Lou Gehrig	1936
163	Babe Ruth	1928
163	Lou Gehrig	1931

Earned Run Average:

1.01	Dutch Leonard	1914
1.04	T.F. Brown	1906
1.09	Walter Johnson	1913

Similar to today's batters, the great batters of yesteryear faced many strong pitchers, but they also faced a steady diet of weak pitchers not enjoyed by today's players. Likewise, the great pitchers of yesteryear faced many strong batters but they also faced a large number of weak batters. Because the inequality among the players was greater during baseball's earlier years, the stronger players were better able to take advantage of their weaker opponents and set baseball's long-standing records. With rare exceptions, the only yearly record that is challenged consistently by today's players is stolen bases, and, interestingly, this activity has much more to do with individual prowess than it does with an outcome of competing forces.²⁸ In any event, it is this compression of baseball talent that today results in greater difficulty in selecting dominating players and leads to greater competitive balance among the teams. It is also clear evidence that talent is sufficient for a significant increase in the number of major league teams.

Other factors may have played a smaller role in the preservation of competitive balance since 1977 and warrant a brief mention: the introduction of the amateur draft in 1965; the relative equalization of team revenues with the more rapid growth of the national television revenues which are equally shared by the teams; poor management by big city owners and neglect of their farm systems;

28. See ZIMBALIST, *supra* note 1, at 144.

possible perverse incentive effects of long-term contracts on older players; greater difficulty in keeping a winning team together; and lastly, greater ease for bottom teams to improve quickly.²⁹

B. Major League Baseball Is Not Profitable

The owners of major league baseball franchises perennially have claimed that their industry is not profitable, that it is not a typical business.³⁰ If the owners are not making a profit, after all, then how can it be argued that they are abusing the monopoly power conferred by the exemption?

To properly assess this claim, it is necessary to understand the structural circumstance of franchise ownership which assumes one of three legal forms: business partnership; subchapter S corporation; or, in a few instances, a submerged division within a large corporation.³¹ In practice, what this means is that there are no stockholders for whom you have to show profits to convince that you are doing a good job or to please through increases in stock prices, and there are no stockholders to whom you have to open the books. This leaves baseball's owners free to manage their books practically at will, either to show greatly diminished profits or to show losses. Reality is different.

Consider the opportunities for accounting legerdemain. First, related party transactions from cross ownership permit owners to easily transfer millions of dollars of profit from one business to another.³² For instance, the Tribune Company owns both the Chicago Cubs and superstation WGN which broadcasts Cubs and White Sox games. Chicago is the third largest media market in the country, and baseball broadcast rights to this city alone are worth in excess of fifteen million dollars a year.³³ However, as a superstation that reaches over forty million homes nationally, WGN's contract with the Cubs is worth well over twenty-five million dollars.³⁴ Evidence from the late 1980s suggests that WGN was paying the Cubs around seven million dollars per year for broadcast

29. *Id.* at 90-104.

30. *Id.* at 47.

31. *Id.* at 47-73.

32. *Id.*

33. See ZIMBALIST, *supra* note 1, at 47-73.

34. *Id.*

rights.³⁵ These figures imply that the Tribune Company chose to transfer roughly twenty million dollars from its Cubs pocket to its WGN pocket.

Why would they do that? Baseball believes it derives public relations value by making franchises seem less profitable than they are or by making them appear to earn losses. The clubs then use this as ammunition in their negotiations with the Major League Baseball Players' Association (MLBPA), with the cities, the minor leagues, as well as Congress and the courts.

Seventeen of MLB's twenty-eight teams have had cross-ownership ties with broadcasters since 1986 and have been able to utilize the same transfer-pricing scheme as the Tribune Company.³⁶ Corporate tie-ins also take other forms. Anheuser-Busch, for instance, owns the St. Louis Cardinals as well as Busch Stadium as two separate divisions. While the Cardinals pay a standard rent for the stadium, the ball club receives none of the parking, concessions, or general stadium revenue which could amount to ten to fifteen million dollars or more annually.³⁷

Anheuser-Busch also derives significant promotional value for its beer products from its ownership of the Cardinals and Busch Stadium. To be sure, promotional synergy between products of other businesses and baseball franchises benefits most owners.

It may also be a matter of legislative concern that MLB's franchise owners use baseball's protected monopoly and subsidized status as a means to secure competitive advantage for their businesses in other industries. This occurs not only through transfer-pricing schemes and promotional synergy but also through easier access to loans (often using the franchise or some of its contracts as collateral) and to politicians.

Second, owners in a franchise partnership often make loans as individuals of tens of millions of dollars to the partnership to which they belong.³⁸ This means that the partnership that owns the ball club may make interest payments of millions of dollars annually to one of the partners.³⁹ In essence, the partner is choosing to receive his return on investment in the form of interest income instead of

35. *Id.*

36. *Id.*

37. *Id.*

38. See ZIMBALIST, *supra* note 1, at 47-73.

39. *Id.*

profit distribution. The end result is that the team's reported profits are artificially diminished.

Third, owners can pay themselves handsome salaries, even though they retain a full complement of front office personnel. Details on the practices in MLB in this regard are not available, but the NFL players' antitrust suit of 1992 produced some fascinating revelations.⁴⁰ NFL teams, like those of baseball, are closely-held partnerships and subchapter S corporations.⁴¹ At least six NFL owners paid themselves over a million dollar salary in 1990, including the owner of the Buffalo Bills who paid himself three and one-half million dollars and Norm Braman, who owns the Philadelphia Eagles and lives most of the year in France, paid himself the modest salary of seven and one-half million dollars.⁴² In other words, the Eagles might have had a seven million dollars profit turned into a one-half million dollar loss from this sleight of hand. Although we do not have specific salary information for executives of baseball teams, we do know that some teams have front office expenses from ten million dollars to twenty million dollars above those of other teams.⁴³ Naturally, extensive ownership and front office perquisites can also hide profits.

Fourth, each of these three accounting practices is perfectly legitimate, but owners can also dishonestly manipulate or falsify their books by underreporting revenue or overstating costs. We caught an unusually candid glimpse of the books of the Cincinnati Reds as a result of the suit brought by Marge Schott's minority partners against her.⁴⁴ Among other things, it was shown that Schott was giving her car companies free advertising in Reds' media outlets and double charging several major investment expenditures, such as their new five million dollar electronic scoreboard and their artificial turf field.⁴⁵

Fifth, unlike other industries which cannot depreciate their

40. *McNeil v. National Football League*, 790 F. Supp. 871 (Minn. 1992).

41. Roger Noll, *Oversight Hearings on Major League Baseball's Antitrust Exemption*, United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, at 3066-80 (July 7, 1992).

42. *Id.*

43. More generally, as long as baseball's employees are paid above their reservation wage, which is the best wage they could earn outside of baseball, then the industry's true monopoly profits will be hidden, even if no accounting gimmickry is employed.

44. See ZIMBALIST, *supra* note 1, at 39.

45. *Id.*

employees, sports teams are allowed to depreciate their players. Player costs, of course, are also expensed. The general practice is for the owners to assign fifty percent of the team's purchase price to players and then depreciate this sum over five years.⁴⁶ Thus, a team purchased for one hundred million dollars would claim depreciation of ten million dollars a year over five years, diminishing book profits by ten million dollars per year. Eventually, the depreciation is partially recaptured in higher capital gains taxes, and the actual gain to ownership is equivalent to an interest free loan over the holding period.⁴⁷ The value of this tax shelter has fallen over time with a lower proportion of the franchise purchase price assignable to players, decreasing tax rates, and the diminishing spread between income and the capital gains tax rates (although the spread between income and capital gains tax rates has increased again in the 1990s). Nonetheless, during the early years of ownership, player depreciation privileges result in sharply lower book profits.

Lastly, it must be noted that in response to the owners' cries of poverty that there is also an investment return in the consumption value of ownership.⁴⁸ Most owners admit to great pleasure from the power and public exposure that team ownership confers.⁴⁹ Even the most outlandish and irresponsible owners seem to become community icons.⁵⁰ Certainly, the tens of thousands of baseball fanatics participating in rotisserie and other fantasy leagues will recognize this consumption value immediately.

If baseball teams were not yielding a positive economic return, it would defy all the laws of economics for franchise values to be over one hundred million dollars and to have risen so rapidly over the past two decades. Consider for instance, the Seattle Mariners, one of baseball's weakest teams financially and on the field: the Mariners sold for \$6.5 million in 1977, \$13 million in 1981, \$77 million in 1988, and \$106 million in 1992.⁵¹ Six teams currently are appraised above one hundred and seventy-five million dol-

46. *Id.* at 35.

47. The actual value of the loan would be the appropriate average rate of interest plus the average rate of inflation times the accumulated amount of depreciation summed over the ownership period with adjustments for the early years.

48. *Id.* at 32-34.

49. See ZIMBALIST, *supra* note 1, at 32-34.

50. *Id.*

51. *Id.* at 51.

lars.⁵²

Baseball's smallest media market is Cincinnati.⁵³ We know from our privileged access to the Reds' books that the Reds have been eminently profitable, earning an average annual profit of \$9.4 million during 1985-89, then \$19 million in 1990 alone, \$12 million in 1991, and approximately \$5 million in 1992.⁵⁴

Therefore, properly interpreted, virtually all MLB teams are profitable and not to be, seems to require a combination of a small city, poor team performance, and wasteful management. Besides, whoever said capitalism guarantees profits?⁵⁵

Two caveats are appropriate here. First, the protracted boom period since the mid-1970s of almost fifteen percent annual revenue growth has come to an end.⁵⁶ The national media contract, which had grown sixteen-fold between 1976 and 1990, will likely diminish around thirty percent beginning with the 1994 season.⁵⁷ However, the national media contract with Columbia Broadcasting System and the Entertainment Sports and Programming Network (ESPN) represents less than one-quarter of MLB's revenues and the shortfall here likely will be offset by growth in local television and radio contracts, licensing, luxury boxes, concessions and other income.⁵⁸ Overall, we can expect slow revenue growth rates through the remainder of this decade. Mismanagement is a lot easier to conceal during periods of rapid revenue growth.

Second, there is a potential distribution problem. With the expected reduction in the national media contract which is shared equally among all teams and the consequent increased dependence on non-shared income sources, many small city franchises which are only marginally profitable and are more limited in their resources will likely experience greater financial pressure in the years

52. *Id.*

53. *Id.* at 145.

54. See ZIMBALIST, *supra* note 1, at 145 (citing John Erardi, *Schott Aims to Downsize Reds*, CINN. ENQ., Nov. 25, 1992, at 4).

55. Further, if the owners truly feel that the finances of certain small city franchises are too fragile, they always have the option of increasing revenue sharing among the teams. Presently, approximately one-third of an average baseball team's revenue comes from shared sources; in the NFL this figure is over three-fourths.

56. ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME*, (forthcoming Jan. 1994). This is an updated and expanded paperback edition of the original 1992 text.

57. *Id.*

58. *Id.*

ahead.

Herein lies a key dynamic behind baseball's economic instability. The big city owners (Jackie Autry, California Angels; Bill Giles, Philadelphia Phillies; Peter O'Malley, Los Angeles Dodgers; Jerry Reinsdorf, Chicago White Sox; George Steinbrenner, New York Yankees; Fred Wilpon, New York Mets; the Tribune Company, Chicago Cubs; et al.) are adamantly opposed to increasing revenue sharing.⁵⁹ Their strategy has been to say to the small city owners: "We know you don't want our charity; instead, what we'll do is help you make your operation more profitable."⁶⁰ So, in lieu of more revenue sharing, they go after baseball's various constituencies.⁶¹ They go after the MLBPA and is therefore why there has been a work stoppage every time the collective bargaining agreement has expired since 1970, yielding the preposterous outcome that an industry with fifteen percent yearly revenue growth, twenty percent yearly salary growth, average salaries over one million dollars, no foreign competition, and growing employment does not experience labor peace.⁶² This is why we might have a work stoppage during the 1994 or 1995 season.⁶³ They go after the cities, which are confronted with threats of teams moving if they do not build new stadiums.⁶⁴ They go after the minor leagues, which three years ago were forced to share more of their revenue with their parent franchises or face extinction.⁶⁵ They also go after the fans, who are faced each year with more expensive cable packages, tickets, concessions, and parking costs. It should serve as a stern warning to baseball's barons, for instance, that the neighborhoods surrounding, Camden Yards, Baltimore's new stadium are seventy percent Black but only two percent of attendees at Camden Yards in 1992 were African-American.⁶⁶

59. *Id.*

60. *Id.*

61. See ZIMBALIST, *supra* note 56.

62. See generally ZIMBALIST, *supra* note 1, at 47-53.

63. See ZIMBALIST, *supra* note 56.

64. CHARLES EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM*, (1993).

65. See generally ZIMBALIST, *supra* note 1, at 105-21.

66. See ZIMBALIST, *supra* note 56.

C. *The Exemption Allows the Commissioner to Operate Effectively*

Various baseball team owners and commissioners have maintained that the sport's antitrust exemption was needed to allow the commissioner to exercise the "best interests of baseball" clause effectively.⁶⁷ Without the exemption, the exercise of this power might abridge free commerce or property rights and be vulnerable to a successful challenge.⁶⁸ In practice, the commissioner rarely invoked this power and did not serve as a sufficient check on the owners, who, after all, hire and fire the commissioner.⁶⁹ Nevertheless, to the extent that this power ever had enduring significance, it has now been negated by the forced resignation of Commissioner Vincent and the owners' clear intention to restructure the office, further circumscribing the commissioner's independence.⁷⁰ Plainly, this argument is now obsolete.

D. *The Exemption Prevents Franchise Relocations*

A rationale expressed by the owners more frequently over the past several months is that the exemption permits baseball to prevent franchise relocations.⁷¹ First, the premise of this claim is not fully correct. It is based on a facile interpretation of the decision of the United States Court of Appeals for the Ninth Circuit in *Los Angeles Memorial Coliseum Comm'n v. National Football League*.⁷² The decision did not say that any league rules restraining franchise movements were in violation of the antitrust laws, only that the NFL's Rule 4.3 and its application in this case were in violation.⁷³ One salient fact, for instance, was that if the Raiders' move to Los Angeles was restrained by the NFL, the league would have preserved the Rams' monopoly in the Los Angeles area, as defined by Rule 4.1 to cover a radius of seventy-five miles.⁷⁴

Second, to the extent that MLB's exemption has thwarted some

67. Andrew Zimbalist, *Oversight Hearings on Major League Baseball's Antitrust Exemption*, United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, at 4-65; 82-146 (Dec. 10, 1992).

68. Steven Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 659 (1989).

69. See ZIMBALIST, *supra* note 67, at 358-60.

70. See ZIMBALIST, *supra* note 56.

71. See ZIMBALIST, *supra* note 67, at 82-146.

72. 726 F.2d 1381 (9th Cir. 1984). See Glenn M. Wong, *On Franchise Relocation, Expansion and Competition in Professional Team Sports*, 9 SETON HALL LEGIS. J. 17 (1985).

73. See ZIMBALIST, *supra* note 56.

74. *Id.*

team movement in recent years, the purposes and processes underlying this outcome must be examined more closely. Is MLB ready to forswear all future team movements and, hence, render obsolete the practically ubiquitous practice of threatening cities with imminent departure in order to secure more favorable stadium deals? Apparently not. To take one prominent example: Allan "Bud" Selig, Acting Commissioner and owner of the Milwaukee Brewers, after emotionally explaining MLB's commitment to franchise stability to Senator Metzenbaum's antitrust exemption oversight hearings in December 1992, returned to Milwaukee and threatened a move to Phoenix or Charlotte if there were not more municipal financial support for a new stadium.⁷⁵ To the extent that Congress is concerned with franchise movement, there is a more direct and preferred remedy; namely, to give cities the right of first refusal and to allow municipal ownership.⁷⁶

E. The Exemption Prevents Frivolous Litigation

The owners have also claimed that the exemption prevents a proliferation of frivolous litigation. This rationale would perhaps also serve the argument for granting the exemption to all industries in the United States. It is no longer clear, however, that the rationale applies to baseball. MLB's longstanding protected and unregulated monopoly status has occasioned such ownership laxity and arbitrariness that at least four lawsuits are presently pending, one for over three billion dollars.⁷⁷

F. Minor League Baseball Would Be Destroyed Without the Exemption

The owners' most recent claim is that lifting baseball's exemption will lead to the end of minor league baseball. This is a threat that they made in 1990 during the discussions around the present Professional Baseball Agreement (PBA) between the minor and major leagues.⁷⁸ It is no more credible today than it was in 1990.

The present number of National Association (the minor leagues)

75. *Id.*

76. *Id.*

77. *Id.* (See, e.g., *Piazza v. Major League Baseball*, ____ F Supp. ____ (E.D. Pa 1993) and *Times Publishing Company, Inc. v. St. Petersburg*, 558 So. 2d. 487 (Fla. App. 1990)).

78. See generally ZIMBALIST, *supra* note 1, at 105-21.

franchises evolved over time through the self-interested and maximizing strategies of major league clubs. The major leagues have not been coerced into maintaining the number of farm teams they currently have; rather, they have made this decision freely and purposefully. Minor league clubs perform several invaluable functions for the major leagues: they serve as the venue for player development; they serve to build fan interest in their prospects, in their team, and in professional baseball in general and to diversify the fan base geographically; they serve to provide reserve players during the course of a season to replace injured or poorly performing players; they serve as a retraining or rehabilitation ground for recovering major league players; and, last but not least, they serve to corner the market on player talent making it extremely difficult for rival major leagues to form.⁷⁹

MLB says it pays dearly for these services. It points to its player development budget, which came to \$169,679,000 in 1990 and \$187,231,000 in 1991, according to its own figures.⁸⁰ On average, this amounted to over \$7.2 million per team in 1991.⁸¹ However, this figure includes scouting expenses of \$1.83 million per team, signing bonuses of \$1.4 million per team, and administrative expenses of around \$1 million per team.⁸² The actual expenditures on each minor league team were relatively modest.⁸³ The average major league expenditure on a Triple-A team in 1991 was \$810,731, on a Double-A team \$367,923 and on a Single-A team \$222,549.⁸⁴ These sums are gross and do not adjust for the revenue sharing payments from National Association teams to their parent clubs in effect since 1991.⁸⁵

79. *Id.*

80. See Major League Baseball, *Report of Independent Members of the Economic Study Committee on Baseball*, App. B, at 3-9 (Dec. 3, 1992).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. The pre-1990 PBA contained the following provisions: Each major league team paid each Triple-A affiliate for 100 balls, 300 bats, \$8.00 a day meal money per player on the road as well as for nine hotel rooms. Every time a player was moved from one team to another, a \$35.00 transaction fee was paid to the National Association. At the Triple-A level, the major league club paid all player salaries except the first two hundred dollars per month per player; of an average Triple-A team payroll of seven hundred and eighty-five thousand dollars, all but twenty-one thousand dollars was paid by the parent club. These subsidies varied at the Double-A and Single-A levels. MLB also paid each minor league team a television fee, theoretically to compensate them for the lost attendance from major league broadcasts. The total

The major league investment in minor league teams, then, appears to be justified by the return. If a major league team does decide to reduce its number of affiliated minor league teams, it will do so at the Single-A or rookie league level.⁸⁶ Only one team at the Double-A and Triple-A levels is allowed, but several major league teams maintain two or three A-level teams.⁸⁷ For each Single-A team that is eliminated, it will save the parent club just over two hundred thousand dollars or roughly one-fifth the amount it pays the average major league ballplayer.⁸⁸

Hence, there is good cause to be skeptical of MLB's claims of losing or wasting money on their minor league teams. It is true that there is waste in their player development systems, but it lies in scouting and elsewhere, not in the National Association teams themselves.

To be sure, the impact of lifting MLB's antitrust exemption on minor league baseball is a complicated issue to analyze. It depends in part on how the exemption is lifted, whether other legislative or executive initiatives accompany the lifting and the course of litigation against MLB. One likely outcome will be a legal challenge to

paid to the minor leagues in television fees in 1990 was \$1.8 million. The principal financial elements of the 1990 PBA which took effect during the 1991 season, were as follows: One, the National Association pays a flat annual fee to MLB of \$750,000 in 1991, a minimum of \$1.5 million in 1992, \$1.75 million in 1993, and \$2 million in 1994. This sum is based on a maximum contribution of five percent of revenues for each minor league club with the percentage declining at higher revenue levels. Two, the National Association agreed to participate in a joint licensing arrangement with MLB Properties and in return will receive a minimum of \$2.8 million a year for four years, a sum equal to the estimated trading card royalties accruing to the minor leagues. Three, minor league clubs paid travel expenses on the road for a maximum of 29 people, including coaches and trainers, at the Triple-A level, 27 at the Double-A level, and 26 at the Single-A level in 1991; the maximum rising to 30 at all levels by 1993. The previous arrangement was for the minors to pay expenses for 20, 19, and 18 at the Triple-A level, Double-A level, and Single-A level, respectively. Four, major league clubs pay all salaries and meal money for players and umpires, and buy all equipment; previously, Triple-A clubs contributed two hundred dollars per month for player salaries and equipment, meal money and umpire-development costs were shared. Five, the \$35.00-per-transaction payment to the minors was eliminated. Six, minors no longer received a cut of the majors' television rights' fees, previously set at twenty-five thousand dollars per club at Triple-A, sixteen thousand dollars at Double-A, and eleven thousand dollars at Single-A. According to National Association President Mike Moore, in 1992, minor league teams spent approximately \$13.5 million on team-related expenses and sent the majors \$1.9 million from ticket sales. Further, Major League Baseball Properties earned between one-quarter and one-half of a million dollars from licensing minor league products during 1992.

86. See generally ZIMBALIST, *supra* note 1, at 105-21.

87. *Id.*

88. See Major League Baseball, *supra* note 80.

the restraints of free labor markets in the amateur draft and minor leagues. These challenges, in turn, will facilitate the formation of rival leagues which either by themselves or through pressure on MLB will occasion an expansion in the number of major league teams. If major league teams maintain the average size of their farm systems, this, of course, would increase the number of minor league teams and make it more difficult for minor league teams to play cities against each other.⁸⁹ If major league teams, under greater competitive pressure and possibly higher minor league salaries, decide to economize on their player development budgets and reduce the number of farm teams per major league team, (but not overall as there will be more parent clubs), then they will have more money available to support each team and its ballpark. Either way, the result should be salutary for the minor leagues and their host cities.

III. INDEPENDENT PERSPECTIVES ON THE EXEMPTION

Outside the industry, views on the importance of baseball's antitrust exemption have varied widely. One commentary has argued that prior to the introduction of free agency there was cause to remove baseball's antitrust exemption, but with free agency the exemption has little economic meaning.⁹⁰ This study was commissioned by MLB. Economist Gerry Scully resonates that not only do the players have free agency now but they have a powerful union to protect their interests, so lifting the antitrust exemption would accomplish little.⁹¹

On the other end of the spectrum is the position that could scarcely paint a rosier picture of the benefits from applying anti-trust statutes to baseball. Law Professor Stephen Ross has stated that:

[c]ompeting leagues would vie against each other for the right to play in public stadiums, driving rents up and tax subsidies down. Leagues would be more eager to add new expansion markets, lest those markets fall into the hands of a rival league. Because the competing leagues would bid on players, salaries would reflect more accurately the

89. ANDREW ZIMBALIST, *THE WELL-BEING OF MINOR LEAGUE BASEBALL IN NEW YORK STATE*, New York State Senate, Committee on Tourism, Recreation and Sports Development, (Feb. 9, 1993).

90. JESSE MARKHAM & PAUL TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY*, (1981).

91. JOHN SCULLY, *THE BUSINESS OF MAJOR LEAGUE BASEBALL*, at 192-93 (1989).

players' fair market value, and no one league would unduly restrict intraleague mobility of players. Teams thus could obtain more readily the right player for the right position. Leagues would hesitate to move prime games to cable for fear of losing their audience, as well as the loyalty of their fans, to a league whose games remained available on free television. The pressure of competition would force each league to maintain intelligent and efficient management.⁹²

Reality lies somewhere in between these polar contentions which in one extreme professes that antitrust action would do away with all problems in MLB and the other extreme that it would do nothing. Where does it lie? The first question to answer is what areas of MLB are still affected by its exemption?

IV. THE IMPACT OF THE EXEMPTION

A. *The Players*

Damages in the recent collusion arbitration hearings against the owners were settled at two hundred and eighty million dollars.⁹³ If antitrust principles were applied to these cases, the MLBPA would have been entitled to triple damages or eight hundred and forty million dollars.⁹⁴ Realizing this, the MLBPA added a clause to the 1990 Basic Agreement stating that in the future, owners' collusion over free agent salaries will be subject to triple damages.⁹⁵ The owners accepted the change, so the only remaining advantage seems to be indirect. If the exemption is lifted, the MLBPA will have recourse to injunctions and pre-trial discovery procedures.⁹⁶ The implicit threat that either injunction or discovery rights might be invoked may further deter collusive behavior among the owners. MLB would also be liable for the MLBPA's legal expenses if it were to lose an antitrust case.⁹⁷ Finally, lifting baseball's exemption would give the MLBPA recourse to the remedy obtained by the NFL players in *McNeil*; namely, if the owners attempt to bust the union and vitiate free agency rights, the MLBPA's ability to sue the league on unnecessary restraint of trade

92. See Ross, *supra* note 68, at 646.

93. See ZIMBALIST, *supra* note 1, at 24-26.

94. *Id.* at 179.

95. *Id.*

96. See ZIMBALIST, *supra* note 56.

97. *Id.*

in the labor market would exist.⁹⁸

What about the players with less than six years of experience who do not have free agency rights? Since the MLBPA operates essentially as a union shop, including all major league players, the collective bargaining agreement legally binds all major leaguers to its provisions.⁹⁹ Players without free agency status cannot bring an antitrust suit against MLB because of the non-statutory labor exemption that allows labor unions involved in bona fide, arms'-length bargaining to surrender possible protection under antitrust statutes.¹⁰⁰ Removing the antitrust exemption, then, would have no direct effect on MLB's relation with the major league players.

Minor leaguers are in a different category. They do not belong to the MLBPA, nor any other union, and MLB restrains them from entertaining competitive bids for their labor services.¹⁰¹ This is a restraint of trade and no labor exemption applies. Theoretically, a minor leaguer could sue MLB. Of course, such a suit would be time consuming and costly, and most minor leaguers have neither the money nor the interest to challenge their employers. Moreover, any lawyer would advise them that their chances in such a suit would be slim since the courts have repeatedly upheld MLB's exemption.¹⁰² Were the exemption lifted, this is an area that could well be affected.¹⁰³

The existence of the reserve system in baseball's minor leagues is also a factor that makes it more difficult for competing leagues to establish themselves; in economists' jargon, the minor league re-

98. See ZIMBALIST, *supra* note 67, at 358-79.

99. See ZIMBALIST, *supra* note 1, at 178-80.

100. *Id.*

101. *Id.*

102. *Id.*

103. The absence of a blanket antitrust exemption in the NFL and the National Basketball Association (NBA) has not mattered in this regard because they do not have professional minor leagues; colleges serve in this capacity. Interestingly, however, both the NFL and the NBA have been challenged in court on a related issue where MLB is also vulnerable — the amateur draft. In all three sports, amateur players, either out of high school or college, are drafted by professional teams and prevented from seeking competitive bids for their services. The NBA and NFL have won their cases, basically on union shop grounds. That is, an amateur being selected in the basketball or football drafts is about to enter the "majors" and its players' union, so they are bound by the rules of the union's collective bargaining agreements. These rules accept the draft and, hence, by the labor exemption, the drafts are legal. Players drafted in baseball, however, are headed for the minor, not the major, leagues where there is no union. Thus, a challenge of baseball's June amateur draft would be quite compelling in the absence of baseball's exemption.

serve system is a barrier to entry. When the Continental League was forming in the late 1950s, Branch Rickey appealed to MLB to allow the new league to draft and pay for players from its minors.¹⁰⁴ MLB never responded to the request.¹⁰⁵ The Continental League had the option of suing MLB for exploitative adhesion, but here again, the MLB was protected by the antitrust exemption. Not anxious to test its exemption over this issue and to otherwise alienate scores of politicians, MLB compromised on an expansion program that incorporated some of the prospective team owners from the Continental League.¹⁰⁶ Another effort to form a third league was close to fruition in 1987 when the stock market crashed in October, financially decimating some of the monied individuals involved in the effort.¹⁰⁷ The effort was revived with some new investors in 1990; precisely one of the chief concerns was access to minor league talent.¹⁰⁸ Without such access, the quality of play would be too low and the riskiness and expense of drafting players out of high school too great to make the new league viable. A third league in baseball does not have the option that the American Football League (AFL) or United States Football League (USFL) had in football to offer sweeter deals to college players. Unlike college football and basketball, the overwhelming majority of college players in baseball are not ready for major league competition.¹⁰⁹

The exemption, then, deters the formation of competitive leagues. This deterrence helps to explain the failure of rival major leagues to emerge in baseball since 1914-15 as well as the slower pace of expansion since the 1960s of MLB relative to the other professional team sport leagues.¹¹⁰ The National Basketball Association (NBA), the NFL, and the National Hockey League (NHL) have all experienced rival leagues over the last thirty years and they have all expanded more rapidly than MLB.¹¹¹

104. See ZIMBALIST, *supra* note 1, at 180.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. See generally ZIMBALIST, *supra* note 1, at 105-21.

110. ANDREW ZIMBALIST, Address at Smith College, (Nov. 1992).

111. In 1967, there were ten teams in the NBA and six teams in the NHL; in 1991 there were twenty-seven and twenty-two teams respectively. That is, the NBA expanded by a factor of 2.7 and the NHL by 3.7 over the period, while MLB expanded from twenty to twenty-six teams, a factor of 1.3. The NFL has also expanded more rapidly, but the existence of so many quasi-major football leagues, such as the Canadian Football League, the USFL, the

Among other things, a rival league would serve to pressure MLB to deal with its notoriously inefficient and wasteful management practices. It would also temper some of the troublesome arrogance that characterizes the baseball establishment.¹¹² In the end, management waste and abuse are paid for by the fans, the cities, the players, the umpires, and many other employee groups.

B. The Media

Here antitrust has a straightforward role to play. MLB restrains trade when it imposes territorial restrictions on the broadcasting of its games.¹¹³ Although somewhat vitiated by compulsory license with the carriage of local Atlanta Braves, Cubs, Mets, and Yankees off-air games on superstations, baseball's territorial restrictions still apply to all local cable deals as well as to the broadcast deals of other teams.¹¹⁴ Thus, a Yankee fan living in Massachusetts cannot see the Yankees on cable (Madison Square Garden Network) at any price because the Red Sox have been awarded exclusive rights to the area by MLB.¹¹⁵ The explosion in cable channel capacity from the advent of fiber optics and digital compression will soon make it technologically feasible as well as cost effective to offer fans throughout the country the choice of watching any major league game on any given day.¹¹⁶ As long as MLB awards teams exclusive territorial rights, however, this technological potential is thwarted.

Further complicating the implementation of unrestricted game viewing is MLB's system of revenue sharing. In particular, local broadcast revenues, with the exception of a small share of cable income, are retained by the team.¹¹⁷ Some teams earn over forty million dollars from their local media contracts while others earn under ten million dollars.¹¹⁸ To the extent that local rights lose exclusivity as viewership to local games becomes available national-

World Football League, the World League of American Football, and arena football over the years makes a direct calculation more problematic. Of course, the precise rates of expansion will depend on the base year chosen.

112. See generally ZIMBALIST, *supra* note 1, at 29-45.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See generally ZIMBALIST, *supra* note 1 at 29-45.

118. *Id.* at 147-66.

ly, the pressure for additional revenue sharing among teams will mount.¹¹⁹ Baseball's big city franchises, then, are likely to resist the move toward a policy that would maximize consumer choice and welfare. If, however, in the spirit of political compromise with the small city teams, the big city owners surrender exclusivity to some share of local broadcasts, it is likely that MLB itself will centrally program and market on pay-per-view the menu of nationally available games. The existence of territorial rights and MLB's monopoly marketing of the pay-per-view games, in turn, will increase the purchase price for viewership and further limit the access of low and middle-income Americans to enjoy the national pastime.

The right to negotiate a network package for over-the-air broadcasting conferred by the Sports Broadcasting Act of 1961 (SBA) should be qualified to guarantee a certain level of fan access to free telecasting.¹²⁰ The 175-game ESPN package is, strictly speaking, a violation of antitrust law since it is pay television and not protected by the SBA.¹²¹ If MLB's blanket exemption was lifted, the ESPN package would be subject to challenge.¹²² In exchange for the right to make such a package deal, MLB might be required to lift its local blackout provisions on certain nights.¹²³ By allowing ESPN games into certain local markets on these nights, this would somewhat raise the value of the ESPN package and somewhat lower the value of local contracts, but on balance the gross revenues should not be affected.¹²⁴ It would simply redistribute revenues from local sources (only a small share of which is shared) to national sources (all of which is shared).

In 1987, MLB's television committee recommended a rule that team owners not be allowed to own television stations.¹²⁵ Over former Commissioner Peter Ueberroth's objections, the rule was accepted and has been honored only in the breach.¹²⁶ Cross ownership ties now affect more than fifteen teams and in the one case the Tribune Company owns the Cubs, the superstation WGN that broadcasts the Cubs and the White Sox as well as local stations

119. See ZIMBALIST, *supra* note 56.

120. 15 U.S.C. §§ 1291-4 (1961). See generally ZIMBALIST, *supra* note 1, at 167-86.

121. See generally ZIMBALIST, *supra* note 1, at 147-66.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See ZIMBALIST, *supra* note 56.

that will broadcast the games of five other major league teams in 1993.¹²⁷ The Tribune Company, then, has enormous power within the baseball establishment and it is using this power to promote its interests.¹²⁸ For instance, the immediate provocation for former Commissioner Vincent's ouster was his decision to realign the divisions in the National League so that they would correspond to their member teams' geographic locations.¹²⁹ This would have promoted more local rivalries in the long run, reduced team travel expenditures, and allowed the fans in Cincinnati and Atlanta to see more night games at normal hours.¹³⁰ The Tribune Company disliked the move, however, because, given the divisional scheduling formula in the National League, it would have put a larger number of WGN's games on after prime time for most of the nation.¹³¹ Once again, the short-term profit interests of the most powerful owners conspired with baseball's exemption to limit fan access to the National Pastime.

C. The Cities

MLB behaves like a standard monopoly in restricting supply (the number of teams) below the demand for teams from economically viable cities; that is, it creates an artificial scarcity.¹³² There were, for instance, eighteen ownership groups from around the country in 1990 who paid one hundred thousand dollars simply to apply to be one of the National League's two expansion teams.¹³³ This excess demand forces cities to compete with each other to attract new teams or to retain existing ones. MLB can blackmail

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. See ZIMBALIST, *supra* note 56.

132. Over the past year, owners have been quick to point out that there were several franchises on the block that had not been sold. They claimed this was evidence of no excess demand. To this claim it must be pointed out that: (a) demand was artificially restricted by imposed conditions from MLB; (b) the asking price was unrealistic in some cases; and, most importantly, (c) all things equal, investors always shy away from uncertainty and risk and MLB in 1992 was confronted by the prospects of labor unrest, legal turmoil, political backlash, and a smaller national television contract. Despite this, the franchises in Detroit, Houston, San Francisco, and Seattle all sold at around the one hundred million dollar mark, while the Baltimore Orioles were recently sold for a record one hundred and seventy-four million dollars in August 1993.

133. See generally DAVID WHITFORD, *PLAYING HARDBALL: THE HIGH-STAKES BATTLE FOR BASEBALL'S NEW FRANCHISES* (1993).

the cities into bankrolling new stadiums replete with luxury boxes, advertising-friendly electronic scoreboards, adjacent and abundant parking, and an extensive network of in-stadium restaurants and concessions outlets. All this can be worth tens of millions of dollars in additional annual revenue to a team and bring the city no more in rental payments. The cities are being mugged.

The standard ploy for a MLB franchise is to threaten to move the team.¹³⁴ Such threats have consistently brought owners either more favorable rental contracts for their teams, as with the Minnesota Twins who have paid zero rent since 1989, or stadium retrofits such as the one hundred and five million dollar investment by New York City in adding luxury boxes, new scoreboards, concession outlets, and parking to Yankee Stadium during 1974-75,¹³⁵ or entire new stadiums with a wide array of revenue-generating accoutrements, such as the new and beautiful Camden Yards ballpark in Baltimore which brought the Orioles' owner Eli Jacobs some forty million dollars in profits this past year.¹³⁶

If the affected city dares to demur and ask for a better deal, matters can get ugly very quickly. There were two notorious cases in 1992.¹³⁷ The first was in Seattle where a local group trying to buy the team was told by former Commissioner Vincent that MLB had one rule that required local ownership and another rule that proscribed foreign ownership.¹³⁸ Seattle's group included Nintendo of America, originally as a majority owner.¹³⁹ Despite the facts that the Mariners' owner at the time lived in Indianapolis, that the previous owner lived in Los Angeles, and that the chief executive officer of Nintendo of America had lived in Seattle for fifteen years, raised his children there, and would become the first Mariner owner to possess a Washington state driver's license, the prospective Seattle group was told by the former Commissioner Vincent to expect a cold shoulder from MLB.¹⁴⁰ This was the status quo until Speaker of the House of Representatives Thomas Foley from the state of Washington told MLB that if the Seattle group was turned down that it could expect to see legislation removing baseball's an-

134. See generally ZIMBALIST, *supra* note 1, at 123-46.

135. New York City received zero rent from the Yankees in 1976.

136. See ZIMBALIST, *supra* note 56.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

titrust exemption in Congress within twenty-four hours.¹⁴¹ MLB relented and allowed Nintendo to hold forty-nine percent of the partnership's shares.¹⁴²

The second case was resolved in December of 1992 and involved the San Francisco Giants.¹⁴³ Back in 1958 when the plans for cold and windy Candlestick Park were being hatched, Mayor Christopher of San Francisco and his city council were either hoodwinked or paid off by Charles Harney, owner and construction contractor of the prospective stadium site on the bay.¹⁴⁴ Giants' owner Horace Stoneham was guilty of benign neglect.¹⁴⁵ There have been four referenda since 1987 to raise funds for a new stadium in the Bay Area and all four were voted down.¹⁴⁶ Only Harold Stassen and Gus Hall have lost more elections! Of the four referenda defeats, however, only two were in San Francisco proper.¹⁴⁷ The last one in the city was in November 1989, one month after the massive earthquake.¹⁴⁸ The mayor, who had been actively supporting the new stadium, stopped campaigning for it and an ownership group from Sacramento which controlled the NBA franchise there, hoping to lure the Giants ninety miles east, began a propaganda effort against the stadium on the grounds that a new stadium was needed but now was not the time to spend public funds on it while earthquake relief efforts were so crucial.¹⁴⁹ This referendum lost by 50.5% to 49.5% or by less than two thousand votes!¹⁵⁰ The most recent vote in June 1992 in San Jose was in the context of a gargantuan fiscal crisis, and it is well to recall, as it was repeatedly recalled for the voters in San Jose, that Bob Lurie, the Giants' owner, inherited a multimillion real estate fortune from his father, that he bought the Giants in 1976 for eight million dollars and the team would sell for approximately one hundred million dollars.¹⁵¹ Besides, if a failed referendum was a sufficient condition to vindicate franchise relocation, then the Detroit Tigers also would be justifi-

141. See ZIMBALIST, *supra* note 56.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See ZIMBALIST, *supra* note 56.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. See ZIMBALIST, *supra* note 56.

able carpetbaggers because on May 17, 1992, a stadium initiative in Detroit failed decisively.¹⁵²

San Franciscans have been accused of being unworthy baseball fans.¹⁵³ Many have pointed to the Giants' attendance which fell from 2.06 million in 1989, to 1.98 million in 1990, and 1.74 million in 1991.¹⁵⁴ Yet, in 1991 the team record was seventy-five wins and eighty-seven losses with a fourth place finish in the Western Division of the National League.¹⁵⁵ It is possible to estimate econometrically what the Giants' attendance would have been had San Francisco fans behaved like average baseball fans. Controlling for city population and team win percentage, the expected attendance at Candlestick would have been only 1.69 million in 1991 or fifty thousand below the actual, and with a contending team in 1992, attendance at Candlestick Park surpassed 2.6 million.¹⁵⁶

In the meantime, the city of Tampa, Florida, the thirteenth largest media market in the country, has been promised a major league team since 1984.¹⁵⁷ In 1988, the city financed the construction of a one hundred and thirty-eight million dollar domed stadium, intended originally as the new home of the White Sox.¹⁵⁸ Jerry Reinsdorf, owner of the White Sox, then used Tampa's beckoning dome to induce Chicago and Illinois to build his team a new Comiskey Park.¹⁵⁹ When Bob Lurie signed a sale agreement with a Tampa group on August 6, 1992, the city began an additional thirty million dollar investment to prepare the ballpark for major league play.¹⁶⁰ Now the dome will remain empty and Tampa once again finds itself without a team. MLB will have several major litigations brought against it, the costs of which in large measure will ultimately be borne by the fans and will likely bring further instability to the game.¹⁶¹

The obvious answer to MLB's ability to blackmail the cities and to extract annual subsidies totalling over two hundred million dol-

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. See ZIMBALIST, *supra* note 56.

157. *Id.*

158. *Id.* See also EUCHNER, *supra* note 64, ch. 6.

159. See ZIMBALIST, *supra* note 56.

160. *Id.*

161. *Id.*

lars from them is to rebalance the supply and demand equation through an expansion of franchises. There are enough economically-viable cities to support a gradual expansion to forty teams by the year 2004.¹⁶² The Reds operate profitably in baseball's smallest media market, the thirtieth largest in the country.¹⁶³ Without incorporating any smaller media markets, since four metropolitan areas have two teams each and two teams are in Canada, it would be possible for MLB to expand to thirty-six teams.¹⁶⁴ Another six media markets were at least eighty-six percent the size of Cincinnati in 1990; at a market growth rate of 1.4% a year, by the year 2000 they would all be larger than Cincinnati was in 1990.¹⁶⁵ Thus, there are more than enough economically viable cities to support such an expansion.

Although the decision of the United States Court of Appeals for the Ninth Circuit in the *Los Angeles Memorial Coliseum Comm'n* case is often misinterpreted as discussed above, applying antitrust law has hardly been a godsend to the erstwhile NFL cities of Baltimore, Oakland, and St. Louis.¹⁶⁶ When Al Davis moved his Raiders to Los Angeles in 1982, the NFL was so embarrassed by Davis' naked greed that it tried to stop him.¹⁶⁷ Davis went to court and won on the grounds that the NFL was restraining trade and interfering with his property right.¹⁶⁸ Baltimore Colt owner Robert Irsay, encouraged by the Davis precedent, packed up his bags in 1984 and was in Indianapolis in less time than it took Johnny Unitas to run out of the pocket.¹⁶⁹ The NFL's St. Louis Cardinals followed suit in 1988 when they moved to Phoenix.¹⁷⁰ The NFL was not willing to risk the expense and effort to challenge these moves even though there was no existing team in Indianapolis or Phoenix whose monopoly was being challenged.¹⁷¹

The case can be made, then, that if baseball's exemption is lifted it should be accompanied by additional legislation.¹⁷² One piece of

162. See generally ZIMBALIST, *supra* note 1, at 123-46; 167-86.

163. See ZIMBALIST, *supra* note 56.

164. See generally ZIMBALIST, *supra* note 1, at 123-46; 167-86.

165. *Id.*

166. See e.g., EUCHNER, *supra* note 64, chs. 4-5, and Wong, *supra* note 72, at 17-18.

167. *Id.*

168. Oakland was unsuccessful in the California courts when it tried to invoke eminent domain to prevent the Raider relocation.

169. See generally EUCHNER, *supra* note 64, ch. 5.

170. *Id.* at ch. 7.

171. *Id.*

172. It is also true that removing the exemption alone may provoke private antitrust

legislation would give cities the right of first refusal. That is, before an owner was allowed to move a team or to sell it to owners in another city, the team should be offered for sale to its host city.¹⁷³ The host city, in turn, could either buy it and operate it as a quasi-public company or it could arrange for a widely-dispersed ownership among its citizens — as in Green Bay, Wisconsin, with the Green Bay Packers of the NFL.¹⁷⁴ The fair market value could be set by an independent arbitration body.

Presently, MLB has a policy proscribing municipal ownership.¹⁷⁵ Thus, when Joan Kroc attempted to give the Padres to the city of San Diego in 1987, the baseball establishment informed her that this was impossible.¹⁷⁶ Publicly, the owners state that municipal ownership would be too cumbersome and inefficient.¹⁷⁷ Many minor league franchises, however, are municipally-owned, management is separated from local politics, and the teams are run efficiently.¹⁷⁸ The real concern of baseball's barons is that public ownership means public accountability which, *inter alia*, may lead to open books.¹⁷⁹ Open books means loss of control and that is where the real threat lies.¹⁸⁰ Right of first refusal legislation would overturn MLB's prohibition on municipal ownership.

A second piece of legislation would set down an expansion timetable for baseball.¹⁸¹ Again, here I would argue for forty teams by the year 2004. Congress may prefer a decision rule for expansion to a specific timetable; if so, an adjudicator agency would have to interpret and oversee the implementation of the rule.

Another public policy option would be the creation of a federal sports commission.¹⁸² Such a commission, originally proposed in

suits yielding damages but no structural relief. For structural relief the antitrust division of the Department of Justice or the Federal Trade Commission probably would have to get involved. The outcome in this case would be uncertain and the process would be expensive and drawn out.

173. See ZIMBALIST, *supra* note 56. Because a team might be municipally-owned, legislation would need to stipulate that municipal exemptions under the National Labor Relations Act not be allowed to disrupt collective bargaining in the baseball industry.

174. See ZIMBALIST, *supra* note 1, at 124.

175. See generally ZIMBALIST, *supra* note 1, at 123-46.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See generally ZIMBALIST *supra* note 1, at 123-46.

181. *Id.* at 167-86.

182. *Id.*

1972 by United States Senator Marlow Cook, a Republican from Kentucky, would set guidelines for expansion in each league, control franchise movements, regulate the relationship between professional and amateur sports, and curb the reckless commercialization of organized sports.¹⁸³ The checkered history of regulatory bodies in the United States and the primacy of special interests in Washington politics argue for great caution before pursuing public policy along these lines.¹⁸⁴ An oversight commission would have an advantage over a piecemeal legislative approach in being able to respond more flexibly, promptly and, possibly, more intelligently to new problems. It would, of course, be desirable to build in safeguards to minimize the opportunities for the industry to capture its regulators.¹⁸⁵ As perilous as this option may appear, the existing alternative may well be worse: that is, professional sports leagues run by self-interested owners unfettered by the forces of competition or regulation, and inter-collegiate athletics run by the National Collegiate Athletic Association, which in turn is controlled by the non-academically-minded athletic directors from the big-time universities.

Each of the above public policy options entails some direct government interference in the industry. An alternative approach to undoing baseball's contrived scarcity of franchises would be for Congress to legislate that the four divisions in MLB be broken into separate business entities.¹⁸⁶ The new leagues would be allowed to collaborate in setting common playing rules and arranging post-season contests, but their business dealings would be separate from each other.¹⁸⁷ They would compete for fan loyalty, for television contracts, for worthy cities, and so on. Owning a team in more than one league and vertical interlocks would be prohibited.¹⁸⁸

183. *Id.*

184. One might also wonder whether the status quo wherein Congress periodically threatens to revoke the exemption if baseball does not behave in certain ways avoids the penetration of special interests. Besides, even without the threat of removing the exemption, there exists another threat — the removal of the nonsensical right to depreciate players.

185. One such safeguard might be a requirement that no regulator could come from or go to a sports industry within a five-year period. Another might stipulate that the regulators be chosen from lists provided by particular constituencies, such as the United States Conference of Mayors, the Consumer Federation of America, sportswriters, the players, and the owners.

186. ROGER NOLL, *GOVERNMENT AND THE SPORTS BUSINESS* (1974).

187. *Id.* See Ross, *supra* note 68, at 730.

188. Such a hands off approach has a certain appeal but the move from contrived scarcity to contrived competition might also disfigure the National Pastime beyond the tolerance level

V. CONCLUSION

In 1947, Commissioner Happy Chandler broke baseball's long-standing tradition by decreeing that Blacks be allowed into the game.¹⁸⁹ Before leaving office in 1951, Commissioner Chandler made a public statement with another democratic sentiment: "I always regarded baseball as our National Game that belongs to 150 million men, women and children, not to sixteen special people who happen to own big league teams."¹⁹⁰ Our long-dormant public policy needs to be awakened if we are to rescue Commissioner Chandler's vision.

In April of 1976, the House of Representatives passed a resolution establishing a Select Committee on Professional Sports (a.k.a. the Sisk Committee) to investigate the stability of the country's major sports industries.¹⁹¹ The Sisk Committee issued its report on January 3, 1977, concluding: "Based upon the information available to it, the Committee has concluded that adequate justification does not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of an overall sports antitrust reform."¹⁹² To accomplish such a reform, the Sisk Committee recommended the establishment of a successor committee to undertake a broad study and then propose a specific legislative course of action.¹⁹³ The successor committee was never created.

No bill to lift baseball's exemption has ever made it out of committee in either the House of Representatives or the Senate.¹⁹⁴ Thus, Congress heretofore has shown itself to be content with baseball's legal monopoly. In other cases where the government has deemed it desirable to sanction a monopoly, such as with public utilities, the government has also sought to assure through regula-

of the average fan. For instance, in addition to or instead of competing by offering lower ticket prices or cheaper broadcasting, the competition might take the form of greater commercialization or excessive experimentation with new rules to excite fan interest. Were true price competition also to break out, the threats of financial fragility and geographical instability of franchises may reappear. Under such conditions, the industry would still survive but are such outcomes the most desirable for the fans and the cities?

189. See ZIMBALIST, *supra* note 1, at 12.

190. *Id.* at 186.

191. *Id.* at xiv.

192. See MARKHAM AND TEPLITZ, *supra* note 90, at 1.

193. See ZIMBALIST, *supra* note 1, at xiv.

194. See generally ZIMBALIST, *supra* note 1, at 167-86.

tory controls that the monopoly did not abuse its privileges.¹⁹⁵ Not so with baseball; it is a self-governing, unregulated monopoly.

There is no justification for treating the baseball industry differently from others in this regard. It is unaesthetic, unseemly, inefficient, and unjust to perpetuate the historical mistake of baseball's exemption any longer. Congress cannot sensibly exercise its duties and represent the best interests of the United States electorate by periodically threatening to revoke the exemption. The anomaly should be ended forthwith and accompanying legislative protections should be enacted.

I did not vote for 1992 United States Presidential candidate Ross Perot, but I found his rallying cry to the electorate most appealing: "Take back your government." I think it is also time to take back our National Pastime.

195. *Id.*