ON THE SCOPE AND EFFECT OF BASEBALL'S ANTITRUST EXCLUSION*

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I. INTRODUCTION

The issue of whether Congress should repeal the United States Supreme Court's thrice' stated view[1] that the game of baseball is neither interstate nor commerce and not subject to the Sherman Antitrust Act[2] has been an issue of long-standing interest. The

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1. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972); and Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

Federal Baseball presented the Court with its initial opportunity to apply the Sherman Antitrust Act to a professional sports league. *Id.* In *Federal Baseball*, a baseball team in the Federal League filed suit against the Professional Baseball Leagues alleging that the Professional Baseball Leagues had violated the Sherman Act by conspiring to monopolize baseball by buying or persuading all of the teams in the Federal League except the plaintiff to join the Professional Baseball League. *Id.* at 207. The Court found the antitrust laws to be inapplicable to professional baseball because the performance of baseball games was not interstate and because such games were not trade or commerce since "personal effort not related to production, is not a subject of commerce." *Id.* at 208-9.

In *Toolson*, the New York Yankees assigned the plaintiff's contract to their minor league team. Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 346 U.S. 356 (1953). When the player refused to report to the minor league team, the Yankees declared him "ineligible," and prohibited him from playing for any other team. *Id.* The Court extended baseball's antitrust exemption by stating that Congress did not intend the antitrust laws to include professional baseball. *Toolson*, 346 U.S. at 357. The Court noted that because over thirty years had elapsed since the *Federal Baseball* decision and Congress had not amended the Sherman Act to include professional baseball, the antitrust exemption should be allowed to stand. *Id.* The majority concluded its decision by indicating that it is the responsibility of Congress and not the Court to amend the antitrust laws. *Id.*

In *Flood*, the St. Louis Cardinals traded Curt Flood to the Philadelphia Phillies, a team that Flood did not want to join. *Flood*, 407 U.S. at 265. Since Flood's contract contained the standard reserve clause thereby forcing Flood to play for the Phillies, Flood filed suit alleging that the reserve clause violated the Sherman Act. *Id.* In its decision, the Court rejected part of the *Federal Baseball* reasoning by finding that the performance of professional baseball games was interstate commerce, *Id.*, at 282, but the Court did not overturn baseball's antitrust exemption because of *stare decisis*. *Id.* at 259. As a result, Flood remained a Phillie. *Id.* This author believes that the difficulty of applying antitrust doctrine to internally adopted professional sport league rules and policies, particularly player restraints, was a major factor in the *Flood* decision.

2. 15 U.S.C. § 1-7 (1982). Section 1 of the Sherman Act provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade of commerce among the several states . 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.

15 U.S.C. § 1 (1982). Section 2 of the Sherman Act provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine to 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 upon conviction thereof, shall be punished.

15 U.S.C. § 2 (1982).

efficacy of eliminating the baseball antitrust exemption, which is more appropriately called the "baseball antitrust *exclusion*," depends on how baseball would be affected and constrained if the antitrust exclusion did not exist. Ascertaining this requires an exploration of how antitrust would likely be applied to baseball. My conclusion is that, while it is in theory unjustified to treat baseball differently from other sports and, while problems exist in baseball which concern both the public and Congress, trying to abolish the exclusion would be politically futile and unlikely to further the public interest.

Even though baseball is treated differently under the Sherman Act than the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL), the conduct of those leagues is not better for the public than the conduct of Major League Baseball. Furthermore, the application of antitrust law to these other major sports leagues over the years by the federal courts has been inconsistent, often unjustifiable, and generally counterproductive. Subjecting baseball to the vagaries of this confusing enforcement process cannot predictably result in benefits to the public interest. Instead of focussing on this largely insignificant antitrust exclusion, Congress would do better to focus on the real problems in baseball today and to adopt legislation specifically targeted against those problems.

II. THE SCOPE AND EFFECT OF BASEBALL'S ANTITRUST EXCLUSION

The *Federal Baseball* holding has not been extended to any other sports.[3] Nonetheless, all of the often cited examples of "bad"

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3. Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Radovich v. National Football League, 352 U.S. 445 (1957); United States v. International Boxing Club, 348 U.S. 236 (1955).

In *Haywood*, the NBA's Seattle Supersonics signed a player near the end of the NBA season and prior to the player's college graduation in violation of an NBA rule prohibiting a player to be drafted until four years after the player's high school graduation. *Haywood*, 401 U.S. at 673. The NBA sought to sanction the team, but Justice Douglas enjoined the NBA from taking sanctions against the Supersonics. *Id.* at 673-74. With the NBA playoffs rapidly approaching, the Court reinstated the injunction of the United States Court of Appeals of the Ninth Circuit and found that it would have been inequitable to prevent the player from playing with the Supersonics. *Id.* at 674.

In *Radovich*, the plaintiff played for the Detroit Lions of the NFL. *Radovich*, 352 U.S. at 448. Due to an illness to his father in California, Radovich asked to be traded to the NFL's Los Angeles Rams in 1946. *Id.* The Lions refused and Radovich breached his contract and signed with the Los Angeles Dons of the rival All-America Conference. *Id.* Two years later in

behavior by baseball owners which purportedly justifies abolishing the antitrust exclusion are more or less found in all of the major sports. Simply changing baseball's antitrust status will not result in public benefits.

The reason that the behavior of baseball owners is not noticeably different than that of owners in other sports, even though they enjoy the antitrust exclusion, is twofold. First, the exclusion is not as far reaching as many believe, and, even as to those matters it does cover, the owners' fear of its abolition effectively deters them from engaging in the most egregious conduct, and (2) the haphazard enforcement of the Sherman Act against the other sports leagues has resulted in very little, if any, meaningful benefit to the public. All of the major leagues engage in conduct contrary to the public interest, not just baseball, but this conduct generally involves the lawful exercise of monopoly power and not the unlawful acquisition or entrenchment of that power. Thus, the Sherman Act is not an effective vehicle to deal with it.

When league conduct does involve the acquisition or entrenchment of monopoly power, the courts have been largely ineffective in using antitrust law to combat it and to diminish market power. Thus, there is no significant predictable benefit to the public from applying the antitrust laws to sports leagues. The problem is structural, and the best way to benefit the public is to strike legislatively at the heart of that structural problem and not to ask courts randomly to review the normal profit-maximizing behavior of leagues under laws not designed to deal with such issues.

1948, the San Francisco Clippers of a minor league affiliated with the NFL sought Radovich's services as a player-assistant coach, but, because Radovich breached his contract with the Lions, the NFL blacklisted him. *Id.* As a result, the Clippers withdrew their offer and Radovich could not sign with the Clippers. *Id.* Radovich filed suit, claiming that the NFL violated the Sherman Act. *Id.* at 447. Even though the district court dismissed Radovich's case and the United States Court of Appeals for the Ninth Circuit affirmed by extending *Federal Baseball's* holding to football. *Radovich v. National Football League*, 231 F.2d 620 (9th Cir. 1956), *rev'd*, 352 U.S. 445 (1957), the Court reversed the lower courts by finding that the antitrust exemption is only applicable to baseball. *Radovich*, 352 U.S. at 451.

In *International Boxing Club*, the Court found boxing to be subject to the Sherman Act. *International Boxing Club*, 348 U.S. at 244-45. The Justice Department accused professional boxing promoters of restraining and monopolizing the promotion of championship matches. *Id.* at 239. The Court decided that the promotion of boxing matches was interstate commerce and subject to the Sherman Act. *Id.* at 241.

A. The Exclusion Does Not Cause Blatant Anticompetitive Conduct by Major League Baseball

The lower courts have narrowed the scope of the antitrust exclusion by holding in several cases that contracts between baseball entities such as teams, leagues, or players associations and third parties, will not be protected under Section One of the Sherman Act.[4] However, in *Portland Baseball Club v. Kuhn*,[5] the United States Court of Appeals fort the Ninth Circuit held that if the third party is a minor league baseball entity, the exclusion would apply.[6] This suggests that, while the scope of the exclusion is not limitless, it would probably be interpreted by most lower courts to give baseball entities greater latitude in structuring professional baseball and producing baseball entertainment without the fear of serious antitrust litigation.

1. Player Rules

One area in which baseball is most certainly protected is in rules restraining the player market. Because these player rules involve an exercise of monopsony power, raising very tricky conceptual antitrust questions, they are more difficult to analyze under standard antitrust principles.[7] However, the impact of the antitrust exclusion in the player restraint context is virtually non-existent given the extraordinarily successful use of the federal labor laws by the Major League Baseball Players' Association (MLBPA) in collective bargaining. It is hard to imagine that players or consumers would be any better off today with respect to the labor market if

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4. *See* Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3rd Cir. 1981) (finding that memorabilia merchandiser's contracts with individual minor and major league players were subject to the Sherman Antitrust Act but were not a restraint of trade or a conspiracy to monopolize); Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tex. 1982) (holding that a baseball team's owner's cancellation of a broadcast contract with a broadcaster was not central enough to baseball to be exempt from the Sherman Act); and Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 365 F. Supp. 235 (N.D. Cal. 1972) (holding that a corporation unreasonably exercised monopoly power in violation of the Sherman Act by procuring lengthy and exclusive contracts for concession services at baseball games through the use of credit to major league baseball owners).

5. 491 F.2d 1101 (9th Cir. 1974).

6. *Id.* at 1103.

7. *See, e.g.*, Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984) (stating that a program to fix the maximum price patients would be charged for medical services presented less of an antitrust concern because it tended to lower, not raise, prices for consumers).

the antitrust exclusion were abolished.[8]

2. Relationships with Minor Leagues

Another area in which courts would probably find baseball protected is in the complex relationships between the major and minor leagues. The baseball exclusion plays its most significant role in allowing Major League Baseball to maintain its relationships with its minor league affiliations without the fear of serious antitrust challenge. Thus, abolishing the antitrust exclusion might lead to radical changes in the structure and operation of the minor leagues and could potentially alter the structure and behavior of all professional baseball in unpredictable ways. If the baseball minor leagues, as presently constituted, are sound from a policy standpoint, this should be a sufficient enough reason to continue to maintain baseball's antitrust exemption.[9] The NFL and the NBA do not need such an exemption in this regard because collegiate athletics perform the function of a minor league system. If, however, one believes that the current system is undesirable, abolishing the baseball antitrust exclusion and leaving the matter to judicial enforcement would not likely foster desirable changes. Specific legislation addressing the needed changes would be preferable.

3. Radio and Television

A third area in which baseball is protected is broadcasting — television and radio restrictions on member clubs or league televi-

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8. Ironically, player restraints from 1975 until 1993 have been far more restrictive in the NFL which does not enjoy antitrust protection and has repeatedly faced antitrust litigation over its rookie player draft and restrictions on veteran free agents. The relative successes of the players associations in both Major League Baseball and the NFL over the years suggests that the availability of antitrust suits against the league may actually distract a union's attention from more effective labor law remedies.

9. The existence of the minor leagues, coupled with the tight control of their structure and operation by the major leagues, effectively precludes the emergence of any upstart major leagues to compete against Major League Baseball. Barriers to entry in sports with no minor leagues are enormous enough for newcomers like the American Football League (AFL) in the 1960s, the World Football League and the American Basketball Association in the 1970s, and the United States Football League in the 1980s, but the existence of the baseball minor leagues makes entry so much more difficult that potential new comers are deterred from even trying. Still, even if the current structure of the minor leagues were significantly altered, it is uncertain whether new upstart major leagues would be attempted, whether such a league would be successful, or whether such a league would on balance be beneficial for fans or the general public interest.

sion contracts with pay channel networks.[10] Currently, however, unlike the NBA, Major League Baseball does not impose any significant quantitative restrictions on its member teams. It does prohibit individual teams from selling television rights for individual games to cable companies outside (but not over-the-air broadcasters) of a designated home viewing area. However, whether this restriction actually prevents a team from having any games televised somewhere else, whether someone with antitrust standing would challenge the restriction, whether a court would find the restriction violative of the Sherman Act, and whether lifting this restriction benefits the public interest all are questionable. Given the complexities of television technologies and the effects of broadcasting schemes on public viewing, as well as the unique nature of a sports league, it is far from clear that subjecting this limited restriction on team cablecasts to antitrust review would result in a benefit to the public interest.

Major League Baseball does have a significant television contract with the Entertainment and Sports Programming Network (ESPN), which is arguably not "sponsored telecasting" and thus not exempt under the Sports Broadcasting Act of 1961. However, the evening games shown under this contract would not otherwise appear on a major network and thus, are getting far greater exposure to the benefit of the public. Furthermore, because of the politically volatile nature of sports broadcasting, it is unlikely that baseball owners would try collectively (as opposed to individually) to restrict teams or utilize pay channels in ways that would significantly diminish viewership. If the owners did, Congress would be quick to react. As a result, the impact of the exclusion in the broadcasting area is largely theoretical.

Finally, it is not certain that the *Federal Baseball* exclusion protects restraints of trade on baseball broadcasting. The exclusion

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10. The Sports Broadcasting Act, 15 U.S.C §§ 1291-4 (1961), currently exempts league television contracts for "sponsored telecasting" in baseball, basketball, football, and hockey. *Id.* The Sports Broadcasting Act states, in pertinent part:

> The antitrust laws shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

15 U.S.C. §§ 1291 (1961).

has been held to cover the structure and production of the game, but it has never been extended by the courts to the marketing and sale of broadcasting rights through the interstate media of radio and television. If someone wanted to challenge baseball's restriction on team cablecasts outside the home viewing area, a significant chance exists that the courts would hold that the antitrust exclusion did not apply. If so, abolishing the exclusion would accomplish nothing in this area, except to encourage potential plaintiffs to bring suit.

4. Franchising and League Structure

The fourth and last major area in which the exclusion protects baseball is in franchising decisions — namely in deciding how many teams should be in the league, where those teams will be located, and who will own them.[11] An example is the National League's decision during the Fall of 1992 to reject the purchase and relocation of the San Francisco Giants by a group of St. Petersburg, Florida, businessmen. The federal antitrust laws do not apply properly in these situations because while franchising decisions are an *exercise* of monopoly power, such decisions do not create or entrench market power.[12] Thus, it is in this sphere that the greatest potential for judicial mischief exists through the misuse of antitrust law in appropriate and highly political ways, a potential which by itself

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11. Since this article was first written, the United States District Court for the Eastern District of Pennsylvania has rendered a surprising decision holding that the *Federal Baseball* exclusion did not protect Major League Baseball in cases involving franchising decisions, specifically in a case in which National League owners disapproved of the sale of the San Francisco Giants to owners who planned to move the team to St. Petersburg, Florida. Piazza v. Major League Baseball, ____ F. Supp. ____ (E.D. Pa. 1993). In fact, in denying Major League Baseball's motion to dismiss, the court held that the exclusion protected only restrictions on players, and perhaps only the now defunct lifetime reserve system. *Id.* If this decision stands up on appeal, it could dramatically limit the scope of the exclusion and make congressional efforts to repeal it moot.

12. One exception would be if a league expands in reaction to an upstart league's effort to place a franchise in an attractive unoccupied community. Such targeted expansion can disrupt the operations of the upstart league, prevent it from gaining a toehold in attractive communities, and weaken its ability to survive as a viable competitor. However, in the most blatant case of this happening -- the NFL's expansion into Dallas in 1960 and Minneapolis in 1961, simultaneously with the start-up of the AFL, antitrust law was unable effectively to deal with it. *See* American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963) (holding that the NFL had not monopolized or attempted to monopolize because the relevant market included over 60 cities which could support professional football franchises and the NFL occupied on 14 of them).

argues strongly against simply abolishing the exclusion.[13]

It should be noted that the greatest impact of the baseball antitrust exclusion flows from how it alters the risk assessment of baseball executives and thereby causes them to vary their conduct. If faced with a competing upstart league, owners believe that, if they were to engage in blatantly anticompetitive or politically unpopular conduct, the courts and/or Congress would intervene and possibly abolish the exclusion, even if the antitrust laws would not likely apply to that conduct. Thus, the risk of losing the exclusion may deter undesirable conduct by baseball owners more than if the exclusion did not exist.[14] This is not to suggest that baseball does not benefit from the exclusion. By allowing major league owners to maintain control over the minor leagues and make franchising decisions without the serious risk of expensive and unpredictable litigation, the exclusion is a substantial benefit to the owners. However, whether these owner benefits injure the public interest is unclear. One could make a case that the current minor league structure benefits the public and that subjecting baseball to the vagaries of often politically motivated and/or confused courts in franchising cases would cause more injury to the public interest than good. The exclusion's impact on the public interest is not sufficiently clear to justify its abolition, at least not without specific guidance from the courts on how to apply antitrust law in specific cases.

B. Applying Antitrust Law to Professional Sports Leagues Does Not Predictably Benefit the Public Interest

One incident that has brought the issue of repealing the baseball antitrust exclusion in to sharp public focus was the National League's rejection of the sale and transfer of the San Francisco Giants to investors in St. Petersburg, Florida. That this incident should cause an effort to repeal the antitrust exclusion illustrates why simply abolishing the exclusion would not serve the public interest.[15]

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13. For a perfect example of such judicial abuse of antitrust law in franchising cases, *see* Los Angeles Memorial Coliseum Comm'n v. National Football League (Raiders I), 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); and Raiders II, 791 F.2d 1356 (9th Cir. 1986), *cert denied*, 484 U.S. 826 (1987).

14. For example, this author does not believe that the major league owners, if faced with a competing upstart league, would employ tactics similar to those used against the Federal League in the *Federal Baseball* case in 1922.

15. Had baseball been subject to the same type of antitrust challenge in St. Petersburg

In the current Giants controversy, antitrust law could not sensibly be applied to cause a result more in the public interest than the decision of the league owners. On the one hand, the league's decision to require a franchise to remain in its current home city led to charges that the decision was a Section One "conspiracy . . . in restraint of trade" by the league owners. On the other hand, no sensible antitrust principle can justify such a claim that would not equally apply to the inevitable lawsuit by interests in the other city if the league had voted the other way In these cases, a non-baseball league is faced with a Catch-22 situation — whether it approves or disapproves of the move, it will be sued by the disappointed city in an inevitably highly charged emotional and political environment.[16] This situation can not predictably lead to results that generally benefit the public interest. The fact is that no sensible set of principles exists under current antitrust doctrine to explain when or why a joint venture partnership like a sports league might violate Section One of the Sherman Act if it grants or rejects a proposal to expand its membership to allow a change in ownership of a member franchise or to allow the relocation of a member franchise's home games. Basic partnership/joint venture law makes every partner in a joint venture bound by the terms it agreed to in the founding venture contract[17] and imposes a fiduciary duty on every partner not to compete against the venture or to seize any venture assets for its own unilateral benefit without the venture's approval. It is axiomatic that a lawful joint venture has the inherent right to determine how many partners it will have, who those partners will be, and where those partners will do business under the name and trademarks of the venture.[18] To suggest that it might violate

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that the NFL faced in the *Los Angeles Memorial Coliseum Comm'n* case, it would have faced a prolonged and expensive legal battle in a politically biased forum that might have resulted in a distorted application of the law, the creation of poor precedent, and injury to the public interest. The legally unjustified result and unexplainable precedent of the *Los Angeles Memorial Coliseum Comm'n* decision ushered in the modern era of great uncertainty over the ability of leagues to control franchise relocations and triggered the frequent use of relocation threats by owners to create bidding wars between cities at the expense of taxpayers.

16. Of course, in some cases a league could do what the NFL did when the Philadelphia Eagles threatened a move to Phoenix in the mid-1980s — that is, before it votes the league could bring a declaratory judgment suit in the city it will support asking the "home town" judge to declare that it is not illegal for the league to require the team to play in that city. This, however, is simply allowing procedural posturing rather than a rule of law to bring about the appropriate outcome.

17. In the case of a sports league, such a founding venture contract is the league's constitution.

18. This would not be true if the venture were in fact a cartel. Such an organization is

anticonspiracy rules for joint venture partners to exercise these inherent legal rights is without merit. Judicial rulings to the contrary simply achieve politically desired results at the expense of creating confusion and encouraging expensive groundless litigation in future cases. As a result, sports leagues will operate more out of an interest to avoid litigation than to do what is best to enhance the quantity and quality of its entertainment product.

Because it is not in the public interest for sports leagues to be subject to misdirected, confusing, and politically motivated ad hoc regulation by federal courts, I have argued that leagues should be treated as single firms incapable of internally conspiring within the meaning of Section One when the governing body of the venture's partners adopts rules or makes decisions relating solely to the structure and operation of the league itself.[19] Since abolishing the baseball antitrust exclusion would cause baseball's structural and operating decisions to be subject to the same type of random, unpredictable quasi-regulation by home town judges as the NFL faced in the *Los Angeles Memorial Coliseum Comm'n v. National Football League*[20] case, I oppose that abolition.

III. THE REAL PROBLEM

I do not argue that there is not a problem with the current market structure of baseball or any major league sport. I only argue that the current manner in which antitrust law is applied to sports leagues is not the proper way to deal with that market problem. The real problem is that in many markets in which major sports leagues operate, they have enormous market power. Coupled with the inherently highly decentralized structure of a sports league and the highly *athletically* competitive nature of the league's entertain-

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illegal in its inception, and one need not judge the legality of its subsequent behavior. United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951). Because the joining of sports teams into a league creates an entity to produce a valuable product that could not be produced by the teams separately, no one has ever seriously suggested that leagues are unlawful in their inception. As a result, they should be accorded the same lawful authority to structure and operate their joint venture business as that given to any partnership, except to the extent their decisions create or entrench monopoly market power. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

19. To the extent such rules or decisions create or entrench excess market power, they could properly be challenged as acts of monopolization or attempts to monopolize by the league under Section 2 of the Sherman Act.

20. 726 F.2d 1381 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

ment product, this has led many lower courts and legal observers to oppose granting "single entity" status to leagues.[21] "Better they be subject to arbitrary, ad hoc judicial regulation of their use of monopoly market power than no regulation at all" goes the argument. I do not agree with this argument's implicit view of the proper role of the law. Better ways do exist to cure the evil of monopoly market power than subjecting the holder to the arbitrary, ad hoc use of anticonspiracy principles that cannot rationally be applied to the internal rules of an inherently totally integrated joint venture partnership.

What the courts largely have done to date is to use Section 1 randomly and unpredictably to overturn league exercises of monopoly power, rather than properly using Section Two to attack behavior that actually causes or entrenches that market power.[22] Instead of repealing baseball's antitrust immunity, I would urge Congress to explore legislation that would standardize and sensibly define the way antitrust law applies to all professional sports leagues. Congress should either regulate some of the operating decisions of the sports leagues and/or force on the sports leagues a market structure that greatly mitigates their excessive market power.

The source of the problem that creates the current disappointment and anger in St. Petersburg is not that the National League owners "conspired" to leave a team in its current home city. Had the owners decided to let the Giants move to St. Petersburg, the fans in Northern California would have been just as disappointed and angry as the fans in St. Petersburg are, the same calls for repealing the exclusion by California politicians would surface, and the potential for the same kind of politically biased Section One

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21. It should be noted that several judges have found leagues to be single entities for Section 1 purposes, at least in the context of a specific case. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1401 (9th Cir.), *cert denied,* 496 U.S. 900 (1984); North American Soccer League v. National Football League, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd,* 670 F.2d 1249 (2d Cir. 1980), *cert. denied,* 459 U.S. 1074 (1982); and *San Francisco Seals* v. *National Hockey League,* 379 F. Supp. 966 (C.D. Cal. 1974). Additionally, Chicago Professional Sports v. National Basketball Ass'n, 961 F.2d 667 (7th Cir.), *cert. denied,* 113 U.S. 409 (1992), strongly hinted that the court might have found the NBA to be a single entity had the league raised the issue.

22. The only case in which a court utilized Section 2 to bring about a meaningful reform in professional sports was *Philadelphia World Hockey Club v. Philadelphia Hockey Club,* 351 F. Supp. 462 (E.D. Pa. 1972) (holding that the NHL's lifetime reserve system would likely be found to allow the NHL to monopolize professional hockey).

antitrust litigation in San Francisco would exist. The real problem is that not enough teams exist to satisfy the market demands of all the major metropolitan areas in the country that can reasonably support one team. When two markets the size of the West San Francisco Bay and Tampa/St. Petersburg areas exist with only one available team, one community is going to be bitter and disappointed. The solution is not to subject the league's decision as to which community gets that franchise to Section One antitrust scrutiny by a judge and jury in the disappointed city. The solution is to create enough franchises within a reasonable period of time to satisfy the reasonable demand for them.

The shortage of franchises to meet reasonable demand reflects the monopoly power of existing major sports leagues over the nationwide market in which franchises in each sport are sold. If a league faced meaningful market competition, it could not afford to let attractive communities go without a team lest the competitor take and entrench itself in those communities first. Furthermore, the unique ownership structure of a sports league compounds the problem of the league's monopoly market power.

If Major League Baseball were owned by a single person or group of stockholders, its total profitability would be enhanced by occupying every attractive territory in which no Major League Baseball team is currently operating. However, because the peculiar ownership structure of a league requires that for every additional team there be an additional partner who will then share the league's total profits, it is not necessarily true that even a new profitable franchise would increase profits per partner. As a result, league owners rationally will not expand unless the profitability of a new team would be great enough to justify an up-front franchise fee sufficient to compensate the existing franchise owners for a decline in their profits. Even in cases where such franchise fees could be charged and paid, major league owners will usually resist expansion because the fewer the number of franchises in existence, the more each franchise is worth because of bidding wars between cities to attract or keep them. It is a classic example of how the market value (price) of a franchise can be inflated to monopoly levels by artificially reducing its supply well below natural market demand.

Under current market constructs, there will always be far fewer franchises in each professional sport than there are cities that could reasonably support one. How many fewer is a difficult question to

resolve because the size of a market to support a team in a league with a relatively unrestrained internal labor market depends on the degree to which the league is politically willing to share revenues. If every team in a league equally shared every revenue dollar in the league, every community in which a team would be profitable could reasonably support one and be athletically competitive. If no revenue is shared, only a few huge metropolitan areas could probably support competitive teams. Given the very low amount of revenue sharing in Major League Baseball today, it may be that the market does not justify more than the current number of teams (if that many), although some of them are probably in the wrong cities.

In short, I see the major public policy problems in baseball today to be the woefully inadequate degree of revenue sharing, the far too few number of franchises, and the accelerating shift of televised games from widely-viewed free or cheap channels to more expensive pay cable or pay-per-view channels.[23] All three problems will remain uncorrected because of the enormous market power that Major League Baseball enjoys in many of its operating markets. None of these problems will be cured by simply abolishing the antitrust exclusion and subjecting baseball to the same kind of random antitrust enforcement to which the other major sports leagues have been exposed. The three problems are the symptoms of market power, not the causes of market power that antitrust doctrines are designed to address.

If Congress is to solve or mitigate these "real" problems, it must attack the source. This could be done in one or some combination of three ways: (1) legislatively mandate a minimal level of revenue sharing for every major professional sports league, require expansion on a reasonable timetable to some set number of teams, and set a minimum percentage of televised games that must be on over-the-air and/or "basic package" cable channels; (2) create a regulatory body empowered to correct structural market problems; or (3) require each major sports league to be split into two to four wholly independent leagues with equal market power and governed by wholly independent governing boards or commissioners with no lawful right to cooperate in anything other than the staging of All-

23. Because this shift is taking place at the individual club level, it does not pose any arguable Section 1 conspiracy issues. It is simply another classical exercise of monopoly power - restricting output (the number of viewers) in order to charge much higher monopoly prices to the far fewer viewers willing to pay those prices.

Star, playoff, and possibly regular interleague games. The various pros and cons of each of these approaches are many and would need to be explored in detail before choosing the best one or combination of them.

There is one additional idea that might be more easily legislated. Congress should consider requiring that a strong commissioner be appointed by a board comprised equally of representatives of the club owners, the MLBPA, and Congress. This simple plan would guarantee that the commissioner would represent and be responsive to the interests of all relevant groups, including the public.

IV. CONCLUSION

The baseball antitrust exclusion is not a cause of any easily identifiable injury to the public, primarily because it is impossible to predict that the courts would apply antitrust law to baseball in a way that would enhance that public interest. Also, the fear of losing the exclusion may effectively deter baseball owners from engaging in egregious conduct, some of which antitrust law might not affect. The exclusion also has the benefit of protecting baseball from the expensive, behavior-distorting, and often counterproductive effects of being subjected to ad hoc, arbitrary judicial regulation under the guise of enforcing Section One anticonspiracy principles ill suited for reviewing the internal decisions of an inherently integrated joint venture partnership.

While treating baseball differently from the other major league sports is an anomaly, little political interest presently exists in changing the current exclusion. This is so first because antitrust enforcement by the courts is so random and unpredictable, easily identifiable benefits do not exist from abolishing the exclusion. Furthermore, any incident triggering immediate political passions against the exclusion, like the St. Petersburg-San Francisco dispute, will invariably create equally strong countervailing political interests. It would be legally and politically counterproductive to propose abolishing the exclusion in a context where the interests of some cities are pitted against the interests of other cities. The chances of passing some meaningful legislation will be much greater if the Antitrust Subcommittee can propose something with more obvious benefits that might be able to muster a political consensus.

I recommend that Congress disregard the largely insignificant baseball antitrust exclusion and instead focus on the real problems

affecting the public interest in professional baseball today, most specifically, the lack of adequate revenue sharing, the fewer than justified number of franchises, and the shifting telecasting practices of the teams. The ultimate legislative ways of doing this are varied and need careful further study, but I am confident that focussing political attention in this fashion would have greater long-term benefits for fans and the public generally than wasting time and political capital on a futile effort to abolish the exclusion, an effort that even if it succeeded would create more legal confusion and chaos than predictable benefits.