Current Topics in Law and Policy

Sports Franchise Relocation: Competitive Markets and Taxpayer Protection

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In 1958, Walter O'Malley moved his baseball team from Brooklyn to Los Angeles.[1] This franchise relocation affected professional sports leagues[2] in two significant ways: it expanded the market for professional sports to cities on the west coast[3] and altered the relationship between sports franchises and their communities. O'Malley moved his team not because of a lack of support from either the team's fans or the city—traditional justifications for franchise movement—but rather in hopes of higher financial returns.[4]

Thirty years later, owners are still moving their teams in search of the best deal and not the best fans. During the period from 1981 to 1986, team owners in more than 25 American cities confronted their hosts with demands for increased public subsidies—demands often accompanied by threats of relocation.[5] Owners can use threats of relocation to gain an advantage during stadium lease negotiations because they control the supply of teams. Because there is no free entry into the market, a competitive market for sports franchises

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1. Wong, Of Franchise Relocation, Expansion and Competition in Professional Team Sports: The Ultimate Political Football?, 9 Seton Hall Legis. J. 7, 24-25 & n. 68 (1985).

2. A professional sports league is a voluntary organization which provides an institutional structure within which a champion can be determined from among the member teams. Quirk, An Economic Analysis of Team Movements in Professional Sports, 38 Law & Contemp. Probs. 42, 43 (1973). This Current Topic discusses the franchise movements within four professional sports leagues: the National Basketball Association (NBA), Major League Baseball (MLB), the National Football League (NFL), and the National Hockey League (NHL).

3. *Id.* at 49.

4. Wong, *supra* note 1, at 22-25. *See also* Roberts, Lamp of Experience, Society, May/June 1986, at 21, 22; Quirk, *supra* note 2, at 52.

5. Johnson, Balancing Interests, Society, May/June 1986, at 11.

does not exist. Moreover, exemptions from federal antitrust laws have diminished market forces that would lead the owners to increase the supply of franchises to meet the demand. The following descriptions of the experiences of Irwindale, California; Baltimore, Maryland; and Jacksonville, Florida, with franchise movement detail the potential impact of relocation on city coffers and taxpayer pocketbooks.

In 1987, Irwindale acquired a professional football franchise by luring the Raiders from Los Angeles. Prior to this acquisition, local officials successfully convinced Home Savings & Loan and the Miller Brewing Company to relocate their national headquarters to Irwindale, a town once known only for its gravel pits.[6] However, these industry moves neither matched the celebration caused by the announcement that the Raiders were coming to town,[7] nor involved the high level of risk inherent in the Raiders deal. In exchange for the opportunity to host the Raiders, city officials offered Raiders owner Al Davis a package worth over $110 million;[8] a package that included a non-refundable payment to Davis of $10 million, or approximately $10,000 for every citizen.[9]

While the Raiders deal represents a large potential loss to Irwindale taxpayers, the taxpayers in Baltimore have already been hit twice by relocation. In 1982, Baltimore Colts owner Robert Irsay intimated that he was interested in the Los Angeles market just as that city was looking for a team to replace the Rams, who had relocated thirty miles to the south in Orange County.[10] To keep the

6. Irwindale—From Pits to "Big Leagues," L.A. Times, Aug. 22, 1987, at 28 (Orange County ed.).

7. *Id.* at 1. The Raiders will begin playing in Irwindale in 1990.

8. Total taxpayer commitment could reach $170 million when access roads and debt service are counted. L.A. Hopes Deal for Raiders Fails, L.A. Times, Aug. 22, 1987, at 1 (Orange County ed.).

9. Fulton, Desperately Seeking Sports Teams, Governing, Mar. 1988, at 34. The population of Irwindale is approximately 1,000. L.A. Times, *supra* note 6, at 1.

10. Roberts, *supra* note 4, at 23. In 1982, to compensate for the loss of the Los Angeles Rams to Orange County, the Los Angeles Coliseum Commission lured Al Davis to move his franchise from Oakland to Los Angeles. To attract the Raiders, the Coliseum was forced to operate at a deficit for the first time in its history. Suddenly Everyone Wants to Build a Superdome, Business Week, Dec. 5, 1983, at 110, 112 [hereinafter Superdome]. The Raiders had received substantial support from the Oakland community; they had played the previous twelve years at home before sellout crowds. Effler, Off-the-Field Goals, Pub. Rel. J., Jan. 1988, at 17, 24. However, Al Davis moved his team to Los Angeles in return for major stadium concessions and the potential pay-off from the Los Angeles pay-television market. Roberts, *supra* note 4, at 23. As of this writing, franchise owners must pool revenue from broadcast television, while profits from the cable market need not be shared. Thus, Davis had a strong profit motive to position himself in the second-largest cable market in the country. Wong, *supra* note 1, at 17 n.47.

Colts in Baltimore, local officials offered Irsay a five-year lease and $24 million in stadium improvements, which he accepted.[11] Although Baltimore officials were able to overcome Irsay's first attempt at relocation, they were not successful five years later when the lease expired. At the end of the lease, in what has since become a widely publicized departure, Irsay moved his team to Indianapolis, a city which had been actively seeking a franchise.[12] Subsequently, in an effort to acquire another football team, Maryland officials offered William Bidwell $216 million to relocate his Cardinals from St. Louis to Baltimore. Bidwell, however, relocated his team elsewhere.[13]

Indianapolis serves as the role model for cities like Jacksonville that are pursuing the economic and intangible benefits inherent in association with a sports franchise.[14] Jacksonville offers any potential owner an 82,000 seat stadium plus promises of a new training facility, sky boxes, and a $125.8 million guarantee.[15] Cities like Jacksonville make threats of relocation credible, thus enabling owners to extract costly concessions from their current hosts. For example, the Houston Oilers used Jacksonville's multi-million dollar offer of guaranteed stadium revenues and gate receipts as a threat to force renegotiation of their lease at the Astrodome.[16]

Ultimately local taxpayers are financially accountable for the actions taken by their local officials when negotiating with sports franchises.[17] Fans do not support their teams exclusively through

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11. Roberts, *supra* note 4, at 23.

12. Indianapolis officials had supported the construction of a $77 million publicly-financed sports facility, even though no team had committed to play in the stadium. Superdome, *supra* note 10, at 112. The investment made by the city paid off, but it was fortunate. St. Petersburg, Florida is the latest city to build a sports arena despite not having a major tenant. This stadium, financed with an $85 million bond issue and named the Florida Suncoast Dome, has been called everything from a "terrible mistake" to "fiscal har[e]-k[a]ri" by stadium experts. Fulton, *supra* note 9, at 34. In spite of these gloomy forecasts, St. Petersburg might obtain a team; the Chicago White Sox baseball organization is rumored to be interested. USA Today, Mar. 28, 1988, at C11.

13. Fulton, *supra* note 9, at 34. Bidwell moved his team to Phoenix. This move was approved by the league owners on March 15, 1988. NFL Approves Cardinals' Move, L.A. Times, Mar. 16, 1988, § III, at 1 (Orange County ed.).

14. For further descriptions of these benefits, see *infra* text accompanying notes 23-26.

15. Deford, This Bud's Not For You, Sports Illustrated, Nov. 2, 1987, at 67, 68.

16. Fulton, *supra* note 9, at 36.

17. The events in Irwindale, Baltimore, and Jacksonville are not unique. Since 1950 more than 68 franchises in the professional leagues have relocated. Johnson, Municipal Administration and the Sports Franchise Relocation Issue, Pub. Admin. Rev., Nov./Dec. 1983, at 520. Several teams have relocated more than once. In 1953, the Boston Braves moved to Milwaukee; thirteen years later they moved to Atlanta. In 1955, the Philadelphia Athletics moved to Kansas City; twelve years later they moved to Oakland. In 1982, the Oakland Raiders moved to Los Angeles. In 1990, the Raiders will begin playing

team-related revenues; their tax dollars build and operate the stadiums where franchises play. Because the majority of the facilities used by sports franchises are publicly owned,[18] the impact of relocation on taxpayer pocketbooks is already great and could become greater.[19]

The resolution of the policy issues raised by franchise relocation is likely to shape the way the federal government applies antitrust laws to professional sports.[20] Further, because parallels exist between sports franchise movement and plant closings and relocations, the congressional response to this issue may have implications for non-sport industries.[21] Therefore, policy makers, even those apathetic about sports, cannot ignore franchise movement. This Current Topic argues that the federal government must become involved in the relocation issue in order to protect cities and their taxpayers from the exorbitant demands of franchise owners and proposes a market-sensitive regulatory solution to the policy issues arising from the relocation of a franchise. By mandating that every stadium lease include conditions which create a notification provision, set mandatory minimums for owner contribution and length of lease, and, upon relocation, require a franchise owner to reimburse the local municipality for any investment in remodeling, the federal government can protect the interests of the fans left behind when a franchise leaves town.[22]

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their home games in Irwindale. The St. Louis Cardinal football team is the latest addition to this group. They moved to St. Louis from Chicago in 1960. They will play the 1988 football season, not in St. Louis, but in Phoenix.

For more detailed examples of the effects of relocation on cities, see Baade, Is There an Economic Rationale for Subsidizing Sports Stadiums?, Heartland Pol'y Study, Feb. 23, 1987, at 1, 9 (New Orleans, Toronto, Philadelphia, Seattle, and Baltimore); Alm, Sports Stadiums: Is the U.S. Overdoing it?, U.S. News & World Report, May 21, 1984, at 51 (Buffalo, San Francisco, New York, and Atlanta).

18. Of the 94 facilities used by professional football, baseball, hockey, and basketball teams since 1953, 67 are or were publicly owned. Baade, *supra* note 17, at 2. More than 50 state and local governments have spent six billion taxpayer dollars to build or refurbish stadiums in the past twenty years. Alm, *supra* note 17, at 51.

19. As the gap between the desire for franchises and their supply has grown, authorities have begun to spend tens of millions of taxpayer dollars to build sports stadiums even before an expansion franchise has been granted or the owner of an existing franchise had agreed to play in the stadium. Alm, *supra* note 17, at 51; Johnson, The Sports Franchise Relocation Issue and Public Policy Responses, in Government and Sport 230 (A. Johnson & J. Frey eds. 1985).

20. Johnson, *supra* note 19, at 222. For a discussion of the antitrust implications of sport, see *infra* text accompanying notes 53-62.

21. Johnson, *supra* note 17, at 519.

22. For further discussion of this regulatory approach, see *infra* text accompanying notes 82-91. Two authors have suggested the appropriateness of attacking the relocation problem through the stadium lease. Meggyesy, The National Football League Monopoly, Society, May/June 1986, at 16, 17; Johnson, *supra* note 17, at 526. However,

To support the proposition that federal intervention to protect taxpayer investment in sports franchises is both necessary and proper, this Current Topic begins by describing the reasons municipal officials demand sports teams. It then discusses past governmental actions that have effectively limited the supply of sports teams and put local officials at a disadvantage in bargaining with team owners. Before concluding with a proposal designed to protect taxpayers by creating an artificially competitive market, this Current Topic reviews past judicial decisions and legislative attempts to regulate the movement of sports franchises and examines why those attempts are insufficient.

I. The Demand Side: Why Acquire A Sports Franchise?

Many cities want to host sports franchises because they provide a city with both tangible and intangible benefits.[23] Host cities receive direct economic benefits from rental income, tax revenue, and employment opportunities. Indirect economic benefits accrue from industries necessary to support a team, such as food, lodging, and transportation, and from the business created by the influx of fans into the surrounding community.[24] Moreover, identification as a professional sports city adds immeasurable prestige and creates an environment that attracts non-sport industries.[25] In addition, a

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neither author explains why the league structure renders this the only solution that can overcome market inequities, nor why involvement by the federal government is necessary to implement this solution. This Current Topic addresses these questions.

23. Some argue that only the benefits and not the costs inherent in a sports franchise are considered by a city. Costs incurred by a host community include debt service, operational expenditures, foregone property tax revenues, cost of police protection, traffic control, sanitation, and the opportunity costs of land use. Johnson, *supra* note 5, at 11-12. *See also* Baade, *supra* note 17, at 12-18 (spending on sports merely displaces spending on other sorts of services). Others argue against public financing of sports facilities on the ground that it represents nothing more than a wealth transfer from the local taxpayer to the wealthy team owner. Axthelm & Murr, Rx for Cities: Build a Dome, Newsweek, Dec. 28, 1987, at 21.

24. These benefits can amount to millions of dollars annually. For example, $8 million was infused into the Baltimore economy per home game during the 1983 World Series; a Denver group has projected that a major league baseball team would add an additional $70 million to its economy; and the Pittsburgh Steelers generate $11 million in revenues during their home season. Superdome, *supra* note 10, at 112. The Pittsburgh Pirates contribute $37 million to the local economy every home season, and the Indianapolis Colts generated an additional $21 million for the Indianapolis community. Alm, *supra* note 17, at 52. The City of Oakland estimates that its economy has lost $30 million annually due to the departure of the Raiders. Wong, *supra* note 1, at 31.

25. Alm, *supra* note 17, at 51; Axthelm & Murr, *supra* note 23, at 21; Johnson, *supra* note 19, at 222-23. Johnson has also suggested that there is a potential downside for a city to be associated with a franchise; that franchise might be lousy. Johnson, *supra* note 5, at 12. However, the team's fortunes—and therefore the city's—can change in just one season.

sports franchise can unite divergent local communities by providing a source of urban identification and pride.[26]

A teamless city may obtain a franchise through creation of a new league, expansion of an existing league, or acquisition of a franchise located in another city.[27] The first two alternatives have proven to be ineffective methods of acquiring a professional sports team. Operation of a franchise in a new league, either in a new sport or in competition with an established league, is financially very risky.[28] Expansion of an existing league is equally unreliable; it may require years of lobbying before the league agrees to expand.[29] Thus, teamless cities are forced to compete against one another for ex-

26. Roberts, *supra* note 4, at 22. Owners are aware that local officials perceive the loss of a franchise as a real financial and psychological setback and capitalize on this feeling when negotiating to gain lease concessions. *Id.* at 23. "Have you heard of Brooklyn since the Dodgers left?" Alm, *supra* note 17, at 52 (quoting Oakland City Attorney Dave Self); "Yes, what do you want to become, a cold Omaha?" Superdome, *supra* note 10, at 110 (quoting the response of late Vice President Hubert Humphrey to a question asking if he thought keeping the Twins and the Vikings in Minneapolis was important).

27. Johnson, *supra* note 5, at 12.

28. Only through merger with an established league can a city hosting a new league franchise obtain the benefits of being perceived as a big league city. Johnson, *supra* note 5, at 13. Since 1960, six new leagues have been attempted. Out of these six leagues, franchises from only three were admitted into the league against which they competed. Johnson, *supra* note 19, at 227. Thus, with assignment of a franchise in a new league, there was at least a small hope that one franchise would break into the major leagues.

In addition, new leagues are risky. Excluding the USFL, the four expansion leagues formed after 1960 that lasted at least two years experienced over fifty franchise relocations and failures. Johnson, *supra* note 5, at 12. Although theoretically possible, acquisition by expansion is not likely to meet a city's demand for big league status or for a return to glory. The founders of arena football, 6'-4"-and-under basketball, and lacrosse leagues stressed that their goals were to keep costs down and to offer no big league hopes. Teams in these leagues expect fewer spectators and field teams in cities located close to one another. Thus, franchises are available, but the product is not the same. Who Wants to Start Another Pro League?, Fortune, July 20, 1987, at 12. The 6'-4"-and-under basketball league has now folded, showing that even minimal expectations might be too high for such new leagues. Youngman, Folding a Fitting Punch Line for Little League's Brief Run, Orange County Register, Apr. 14, 1988, at C2 (evening ed.).

29. Franchise owners must approve every league expansion, and they have little incentive to do so. They can afford not to expand into cities that could support a franchise because it is difficult for a rival league to become established. Further, by not expanding into every city, the owners keep the demand for existing franchises higher than the supply, thus raising market values. Before the NBA announced plans to locate four new franchises in Minneapolis, Orlando, Charlotte, and Miami (Fulton, *supra* note 9, at 35), only six teams were created through expansion in the professional leagues during the past twelve years. Johnson, *supra* note 19, at 228. Currently, there are no announced plans for either MLB or the NFL to expand. Alm, *supra* note 17, at 51-52. However, a panel of U.S. Senators has declared that they will re-examine baseball's antitrust exemption if Commissioner Peter Ueberroth does not respond to their request for MLB to consider expansion. Hardball in Capitol, N.Y. Times, Apr. 15, 1988, at D23. Thus, for a city to acquire a franchise through expansion, city officials must lobby league officials both to expand and to grant an expansion franchise to their city.

isting franchises.[30] The result of this competition is increased taxpayer liability.[31] Liability is increased as a consequence of concessions made by municipal authorities because owners are able to play one city's offer against another's.[32] Sports franchise relocation would not pose the problem that it does for cities and taxpayers if there existed a viable means of increasing the supply of teams. However, the structure of professional leagues enables owners to keep the supply of sports teams below the level of demand.[33]

II. The Supply Side: Sports Leagues As Markets

Professional sports leagues, because of the unique characteristics of their product, maintain monopolistic practices that would not serve public policy goals if allowed in non-sport industries.[34] Noncompetition in the business dealings between rival teams is a special requirement of sport. Leagues sell competition on the field, and this competition must be perceived as honest. Team playing strengths must be relatively balanced in order to draw public support.[35] Yet, ironically, to produce balanced competition leagues generally cannot allow individual teams to compete against one another in the business world. In light of the nature of the sports product, leagues have sought and received the right to control the geographical location of member franchises, regulate player assignments, pool television revenues and gate receipts, and establish rules and sanctions to ensure the equality of member playing strengths.[36] Each of these anti-competitive practices has been upheld either by judicial[37] or legislative action.[38]

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30. Municipalities compete against one another in the number of guaranteed ticket sales, length of interest-free loans, and size of training facilities they offer an owner to remain in or to relocate to their city. Johnson, *supra* note 19, at 230.

31. Some might argue that taxpayers can protect themselves and dissuade local officials from entering into the type of stadium lease discussed throughout this Current Topic by simply utilizing the electoral process. Yet the electoral process cannot serve as a corrective device. If taxpayers are unhappy with an official about the terms of a lease, they can vote that official out of office, but the lease may remain in effect years later. In addition, it is more politically beneficial for an official to land a team than it is harmful for that official to enter into a bad lease. Axthelm & Murr, *supra* note 23, at 21.

32. Because demand exceeds supply, owners can negotiate more favorable leases than they would be able to if the supply were allowed to grow to meet demand. Johnson, *supra* note 17, at 522.

33. For an analysis why mandatory expansion of the professional leagues is not an effective policy, see *infra* text accompanying notes 76-78.

34. Meggyesy, *supra* note 22, at 18.

35. Morris, In the Wake of *Flood*, 38 Law & Contemp. Probs. 85, 86 (1973).

36. Quirk, *supra* note 2, at 43-47.

37. "Courts have long recognized that professional sports leagues are unlike ordinary businesses and are unique in their basic structures. As a consequence it has been

As a consequence of this governmental protection, no adequate market mechanism exists to secure public investment in sport. Franchise owners do not have any incentive to self-regulate franchise movement. It is clearly in their interest to move their teams to the highest potential revenue use.[39] Because owners pool gate receipts and television revenues, relocation to achieve a higher return also serves the interest of non-relocating owners. In addition, pooling creates an incentive for an owner to seek concessions.[40] Moreover, the professional leagues do not have an interest in monitoring franchise movement[41] because the league structure makes it virtually impossible for a competing league to survive for an extended period of time.[42]

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accepted that some restrictions on competition in business practices may be necessary in order to promote competition on the playing field." Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, S. 298 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 283 (1985) (paper by Morton Rosenburg entitled Proposed Sports Relocation Legislation: Background and Legal Implications, at CRS-6 n. 23) [hereinafter Professional Sports Immunity]. Rosenburg cites several cases in support of this proposition, including Flood v. Kuhn, 309 F. Supp. 793, 801 (S.D.N.Y. 1970) and MacKey v. NFL, 543 F.2d 606, 619 (8th Cir. 1973).

38. For example: current tax policy permits team owners to depreciate the value of players' contracts, I.R.C. § 167(a) (1988); an antitrust exemption allows sports leagues to negotiate contracts for the right to televise league members' games, Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified at 15 U.S.C. § 1291 (1982)); another antitrust exemption facilitated the merger between the NFL and the American Football League, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (1966) (codified at 15 U.S.C. § 1291 (1982)).

39. Each league has rules regulating an owner's ability to relocate. This type of rule was at issue in Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). For further discussion of this case, see *infra* text accompanying notes 57-62. In order to move a franchise, an owner must receive approval from the other owners. Historically, receiving this approval has not proven difficult. It is in each owner's interest to approve the relocation plans of another owner because she might want to relocate in the future. When a relocation bid has been voted down, it has most often been because the owner making the request was disliked by the other owners. As a result, Bill Veeck and Charlie Finley [and Al Davis] are the only owners whose bids have not been approved. Quirk, *supra* note 2, at 48-51.

40. Each professional league has some form of revenue sharing, although they differ markedly among the professional leagues. *Id.* at 45. Thus, the only way for an owner to make a profit above the league norm is to exploit those aspects of the sports business that are not under league control. One such area is the revenue generated from concessions present in the stadium lease. By obtaining the maximum amount of concessions during bargaining, an owner can cut costs and thereby increase profits above the league norm.

41. Franchise movement does have a downside for a league, however. Relocation is detrimental for a league as a whole because relocation breaks down relationships between communities and teams. Effler, *supra* note 10, at 24. This is another important aspect of sport that differentiates it from non-sport industries. For a discussion of other differences, see *infra* text accompanying notes 43-46.

42. Rival leagues represent the only potential market mechanism to combat the antitrust advantages granted to professional leagues. Even when they win, they lose. In United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, United States Football League v. National Football League, 842 F.2d 1335

Thus, due to past governmental action (and inaction) and to the structure of professional leagues, local officials are unable to bargain adequately for conditions that will protect a city's financial and emotional investment in a franchise. In the absence of federal government support, if a city attempts to protect its taxpayers by incorporating into its stadium lease conditions similar to those advocated by this Current Topic, that city will either be forced to back down or to lose its team. At the bargaining table, an owner can afford to call a city's bluff because many other teamless cities will not demand such protection for their taxpayers. The professional leagues are organized to protect the interests of the owners; an individual city's ability to protect its interests during negotiations is limited because no adequate method exists for cities to band together to insist on conditions that will protect all taxpayers. Only through federal government involvement can inequities in the sports franchise market be corrected and taxpayer investment be protected.

III. Non-Competitive Markets and Ramifications For Taxpayers

A discussion of proposed governmental intervention into the bargaining process raises two related questions: first, how is the sports industry different from non-sport industries; and second, if public policy does mandate federal government involvement, why should it regulate sports franchise relocation when similar problems exist in non-sport industries.[43]

A. Why the Sports Industry Differs From Other Industries

Franchise owners are involved in the sports industry to make a profit, and any regulatory solution to the franchise relocation problem must allow team owners the opportunity to make a return on their investment. Yet sports franchises have, over time, come to represent something more than simply another means to reach a profitable end. A sports franchise also functions as a cohesive ele-

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(2d Cir. 1988), the district court denied a motion for judgment notwithstanding the verdict on the USFL antitrust claims and motion for a new trial on damages, upholding the jury-determined damages award of $1 for NFL violations of federal antitrust laws. Most expansion leagues fail, however. Moreover, if an expansion league has shown that it can compete with an established league, it is in the interest of *both* leagues to merge. A merger will reduce player salaries and thus increase owner profits. Meggyesy, *supra* note 22, at 20. *See also* Morris, *supra* note 35, at 96.

43. Johnson, *supra* note 5, at 15. For a general discussion of how sports franchises can be distinguished from other businesses, see Note, The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation, 13 Fordham Urban L.J. 553, 574, 584-85 (1985).

ment for a city. The nature of sports competition in America creates a "home team," and this identification of a team with a community is an important difference between sport and non-sport industries. Consider the following passages:

> Oakland is a poor community. It has severe unemployment; it has had auto plant closings. But the one thing that has helped Oakland rebuild since its real demise began after the Second World War has been its professional sports franchises. It has been a unifying factor between labor and management and between rich and poor.[44]

> When we won the Super Bowl, we had a parade and a million people turned out. They represented every age group, every racial background, every economic and social value on earth. And they climbed on top of the Stock Exchange Building and they stood out on ledges of high rise buildings and they said one thing—thank you. And this is the public interest that exists in major league sports and football.[45]

The bonds that develop between a city and a team make sports special. While workers in a non-sport firm might celebrate a company achievement, such as record profits, that celebration does not overflow into the lives of non-plant employees as reaction to a sporting event does.[46] For this reason, sports franchise movements produce intangible as well as economic effects different from those resulting from plant relocations and closings in non-sport industries.

B. *Justifications For Government Involvement*

The federal government has long been deeply involved in the regulation of sports. Actions by the Supreme Court in the area of antitrust law and by Congress through legislation concerning television broadcast rights, league mergers, and depreciation of assets have enabled franchise owners to maintain their negotiation advantage over cities. It is difficult to imagine how taxpayers would have been affected if both the judicial system and Congress had acted differently, but the federal government is involved beyond the point of attempting to minimize the scope of its influence over professional sports by not monitoring franchise movement.[47] It alone has the

44. Johnson, *supra* note 19, at 223.

45. *Id.*

46. Sport also serves a different function than publicly subsidized industries. While symphonies, opera companies, and repertory theaters exist in part because of public subsidies, the author would contend that these activities do not serve as means for bringing together people of vastly different viewpoints, as sport does. Moreover, they tend not to have the same kind of economic impact on a city as a sports franchise.

47. Gorton, Professional Sports Franchise Relocation: Introductory Views from the Hill, 13 Seton Hall Legis. J. 1, 2-3 (1985).

regulatory power at its disposal to protect taxpayers by overcoming the association problems presented by the desires of competing cities.[48]

Because the business aspects of professional sports touch upon numerous points of federal concern, Congress is the appropriate body to regulate franchise movement.[49] Local communities have done everything within their power to prevent franchise relocation. Their efforts have failed not because they bargained poorly, but because of the lack of competitiveness caused by the league structure.[50] Moreover the federal government, rather than the individual state governments, must regulate franchise relocations because of the commerce and antitrust questions which surround team movement. Finally, but for the federal government's past involvement, the situation for taxpayers would be much better. For example, by allowing the pooling of television revenues, Congress has made it financially possible for owners to leave high market share cities for cities with better deals, but lower shares.[51]

The inability of Congress or the courts to formulate a response sufficient to secure community investment in sports teams is startling. Absent local subsidies, professional leagues could not exist today in their present form.[52] Unlike other industries where Congress has broken down barriers to stimulate more competition, in the sports industry the federal government has helped foster a league structure that allows franchise owners to exploit taxpayers. The time has come for Congress and the courts to recognize officially the role taxpayers play in the operation of professional sports and to protect that group, just as it has protected the professional leagues and the owners. By taking such action, Congress would explicitly affirm both the importance of taxpayer dollars to the opera-

48. Johnson, *supra* note 5, at 11; Meggyesy, *supra* note 22, at 17. *But see* Gattuso, Congress and Rule-Making, Society, May/June 1986, at 6; Rosenberg, Simple Problems, Simple Solution, Society, May/June 1986, at 24.

49. Professional Sports Immunity, *supra* note 37, at 308-13 (for example, antitrust, tax, labor, immigration, and communication law).

50. "In sum, there is a national problem, beyond the ability of cities or private parties to resolve: in these circumstances, I believe that a legislative solution is necessary and appropriate." Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, S. 298 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 30 (1985) (Senator Spector's response to question asking if local communities and private parties had done enough on their own to avoid problems caused by terms of contracts they negotiated with sports franchises).

51. Professional Sports Antitrust Immunity: Hearings on S.172, S. 259, S. 298 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 17-19 (1985) (correspondence between Senator Spector and NFL Commissioner Peter Rozelle).

52. Johnson, *supra* note 17, at 519.

tion of the sports industry and the unique consequence of sports competition—the intangible benefits created by the relationship of fans with their home team.

IV. Government Response To The Relocation Problem

The plight of local taxpayers caused by franchise movement has not gone totally unnoticed by the federal government. Over its past four terms Congress has considered several pieces of legislation aimed at protecting local communities. However, none of these proposed legislative solutions has gained sufficient support to become law. Team relocation has had its day in court as well, yet the judicial system has failed to create any additional protection for affected taxpayers. The following sections analyze why these federal efforts to regulate franchise relocation on behalf of local taxpayers have been insufficient.

A. Litigation

With the exception of major league baseball, all professional sports leagues are subject to federal antitrust laws.[53] While these leagues have been unsuccessful in achieving the complete exemption enjoyed by baseball, courts have upheld league attempts to deny transfers of franchise ownership,[54] to control membership,[55] and to expand during the formation of a rival league[56] on the grounds that these practices were necessary to provide balanced and honest competition. However, the Ninth Circuit's holding in *Los Angeles Memorial Coliseum Commission v. National Football League*[57] dramatically changed the way in which antitrust laws are applied to restrictions placed on franchise movement by the professional leagues.

Before the *Raiders* case, membership decisions concerning intraleague franchise movement were exempt from antitrust scru-

53. The Supreme Court granted MLB an antitrust exemption that permits it to conduct its affairs outside the federal antitrust statutes in Federal Baseball Club v. National League, 259 U.S. 200 (1922). This antitrust exemption was upheld in Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972), but has been denied to other leagues. *See* Radovich v. National Football League, 352 U.S. 445 (1957) (football); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (basketball); Nassua Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972) (hockey).

54. Levin v. National Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974).

55. Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 561 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983).

56. AFL v. NFL, 323 F.2d 124 (4th Cir. 1963).

57. 726 F.2d 1381, 1385 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) [hereinafter *Raiders*].

tiny.[58] However, the Ninth Circuit in *Raiders* upheld the district court's decision that the NFL's rule governing franchise relocation[59] was, in this instance, a restraint of trade in violation of section 1 of the Sherman Act.[60] Although *Raiders* involved a NFL franchise, its resolution has put each professional league's authority to regulate franchise movement in doubt;[61] since 1982, five teams in three leagues have either moved or attempted to move.[62]

The *Raiders* litigation has led cities to attempt to acquire ownership of a franchise through eminent domain actions. Eminent domain describes the government's power to take property from an unwilling property owner for a public use. In 1980, the city of Oakland brought an eminent domain action to acquire the Oakland Raiders football team. After protracted litigation, which culminated in a California Supreme Court holding that California eminent domain law provided a city the opportunity to prove "public use,"[63] the California Court of Appeals upheld the lower court judgment on remand that any eminent domain acquisition of the Raiders by Oakland was invalid under the commerce clause.[64] The United States Supreme Court denied certiorari, thus ending the city's hopes of keeping the Raiders in Oakland.[65] Four years later, the city of Baltimore filed an eminent domain action to keep the Colts from moving to Indianapolis. This action was dismissed by the federal district court on procedural grounds.[66]

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58. San Francisco Seals v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974).

59. The NFL's relocation rule (Rule 4.3) required unanimous approval from league members before a franchise could relocate into the home territory of another franchise. The NFL lowered this requirement to three-fourths of league members after the unsuccessful suit by the Los Angeles Coliseum Commission. Los Angeles Coliseum Commission v. National Football League, 468 F. Supp. 154 (C.D. Cal. 1979). Weistart, League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 Duke L.J. 1013, 1015 (1984).

60. *Raiders*, 726 F.2d at 1385. *See* 15 U.S.C. § 1 (1982).

61. *See* National Basketball Ass'n v. San Diego Clipper Basketball Club, 815 F.2d 562 (9th Cir. 1987) (challenge by NBA franchise to NBA relocation restrictions).

62. Note, The Professional Sports Community Protection Act: Congress' Best Response to Raiders?, 38 Hastings L.J. 345, 351 (1987).

63. City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982).

64. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 421, 220 Cal. Rptr. 153, 157 (1985).

65. City of Oakland v. Oakland Raiders, 106 S. Ct. 3300 (1986). For an in-depth discussion of the *Raiders* litigation, see Note, Keeping the Home Team at Home, 74 Calif. L. Rev. 1329 (1986).

66. Mayor & City Council of Baltimore v. Baltimore Football Club, 624 F. Supp. 278 (D. Md. 1986).

B. Legislation

Franchise relocation became a major Congressional issue as a result of the *Raiders* litigation.[67] The legislation introduced in Congress to correct the problems associated with sports team relocation contained a variety of proposals designed to protect local communities: additional antitrust exemptions, sports arbitration boards, mandatory expansion, and first-refusal rights.[68] Congress did not adopt any of these solutions. These methods were insufficient to protect community investment because they failed to reduce the inequities present during lease negotiations.

1. Additional antitrust exemptions. Representative Stark[69] and Senators Eagleton[70] and DeConcini[71] introduced bills that granted further antitrust exemptions to the professional leagues to allow them to divide revenues in a manner promoting competition.[72] These bills also upheld league rules authorizing league members to decide if a relocation could occur.[73] An additional bill introduced by Representative Stark amended the existing exemption concerning the pooling of telecasting revenues to include pay-television revenues.[74]

The exemptions mentioned above do little to reduce the inequalities created by the league structure for they do nothing more than codify what leagues are already doing.[75] Even if legislation incorporating these or similar exemptions had passed, local taxpayers would not be better off. Owners would still be able to play one city off of another and to relocate without having to consider the true costs of the relocation.

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67. Professional Sports Immunity, *supra* note 37, at 314.

68. All legislation described in this section can be traced to one of two legislative origins. S. 3183, introduced by Senator Magnuson, is representative of the restrictive category of relocation proposals, while S. 2784, introduced by Senator DeConcini, is indicative of the variety of legislation that would solve the relocation problem by granting further autonomy to the leagues. *Id.*

69. H.R. 6467, 97th Cong., 2d Sess. (1982).

70. S. 259, 99th Cong., 1st Sess. (1985).

71. S. 298, 99th Cong., 1st Sess. (1985).

72. S. 259, 99th Cong., 1st Sess. § 4(a)(2) (1985); S. 298, 99th Cong., 1st Sess. § 2(1)(b) (1985); H.R. 6467, 97th Cong., 2d Sess. § 2(1)(b) (1982).

73. S. 259, 99th Cong., 1st Sess. § 4(a)(1) (1985); S. 298, 99th Cong., 1st Sess. § 2(1)(a) (1985); H.R. 6467, 97th Cong., 2d Sess. § 2(1)(a) (1982).

74. H.R. 823, 97th Cong., 1st & 2d Sess. § 7(2) (1982).

75. *See supra* note 40 (revenue sharing); *supra* text accompanying notes 53-62 (antitrust discussion).

2. *Mandatory expansion.* Legislation introduced by Senator Gorton required both the NFL and MLB to expand.[76] Senator Eagleton's bill, while not requiring expansion, mandated that each league have an expansion policy.[77]

Forced expansion of the professional leagues would reduce the owners' bargaining power generated by their ability to control the supply of franchises. However, mandatory expansion is not an appropriate solution to the problem of franchise relocation because it involves the federal government too deeply in the running of a professional league. The government would have to decide how many new franchises each league could support, determine which cities were eligible for expansion and in what sports, and enforce its decisions. Although a city may be able to support a franchise, it is not entitled to one; the government must involve itself only so far as to make the position of the owners and the cities at the bargaining table equal.[78]

3. *First-refusal rights.* Several bills introduced into Congress required that before a relocation could take place, any parties who met league ownership criteria and pledged that they would not move the franchise be given an opportunity to buy the franchise.[79]

A franchise owner has the right not only to decide when to sell her franchise, but also to select to whom she will sell it. Although first-refusal rights is an attractive solution to the relocation problem, it tips the balance too far in the cities' favor. The right of first-refusal fails as an appropriate solution because it impinges on an owner's inherent right to select a buyer; to some owners, the identity of the buyer will be more important than the amount of money included in the deal.

4. *Sports arbitration boards.* Almost all of the bills provided for the creation of a process to determine if a franchise relocation was necessary and appropriate. The bills introduced by Senators Eagleton and Gorton each incorporated an elaborate set of criteria,[80] but most often a relocation was judged on the adequacy of the

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76. S. 287, 99th Cong., 1st Sess. § 303(a) (1985). Similar legislation was introduced in the House by Representative Mikulski. *See* H.R. 885, 99th Cong., 1st Sess. § 303 (1985).

77. S. 259, 99th Cong., 1st Sess. § 9(a) (1985).

78. One additional disadvantage of forced expansion is that it would essentially preclude any rival league from becoming established.

79. *See* S. 172, 99th Cong., 1st Sess. (1985); S. 2505, 98th Cong., 2d Sess. (1984); H.R. 5430, 98th Cong., 2d Sess. (1984); H.R. 5388, 98th Cong., 2d Sess. (1984).

80. S. 259, 99th Cong., 1st Sess. (1985) (Eagleton); S. 287, 99th Cong., 1st Sess. (1985) (Gorton).

current playing facilities, the existence of a breach of a condition in the stadium lease, and the level of revenue generated by the franchise. Senate Bill 172 is representative of the legislation utilizing this three-part test.[81]

This approach is inappropriate because market forces, not political ones, should control franchise movement. Reliance on the market produces an objective standard to review relocations. If a relocation, after considering all costs, is profitable, the relocation will occur. If the costs of a relocation are greater than the expected increase in profits, the relocation will not occur. In contrast, both the legislative *selection* and *application* of franchise relocation criteria are subjective. Thus, there is no guarantee that profitable moves will not be rejected and that more costly moves will not be approved. Moreover, neither the taxpayers' nor the owners' interests are protected by the use of an arbitration system. Congress, by requiring owner contribution, minimum lease lengths, and leasehold payback, would reduce the inequities caused by the owners' ability to control the supply of franchises and create a situation where market forces would monitor relocations.

V. Market Incentives and Taxpayer Protection

The type of federal involvement outlined in this Current Topic is modeled after the action taken by Congress to correct the unequal bargaining position of non-union employees when it introduced national minimum workplace standards and actions taken by state and local governments to protect tenants by implementing building codes. Before minimum wage laws, not only were individual workers unable to bargain with employers for higher wages, but they were forced by market incentives to accept wages at below market levels. Similarly, before implementation of building codes, tenants could not bargain for adequate housing conditions, and market forces created incentives for tenants to accept below standard housing. In both instances, for the pubic good, the government imposed its authority to overcome the collective action problems of the non-union employees and tenants. The adoption of federal standards for stadium leases[82] would reduce the negative effects on taxpayers of league revenue sharing and league control of the supply of

81. S. 172, 99th Cong., 1st Sess. § 4 (1985).

82. Modification of this aspect of professional sports is not so broad as to infringe upon the property rights of sports franchise owners (as would forced league expansion) nor so narrow as to alter how professional leagues function (as would a change in the antitrust laws or the requirement of mandatory Congressional or judicial review of proposed relocations).

franchises by removing the incentives for relocation which those practices create.[83]

The standards that, by their incorporation into a stadium lease, would reduce incentives for owners to relocate and thereby create a more equal bargaining environment are described below and discussed in turn:

(1) a notification period of at least the length of one season of the sport involved to allow local officials time to consider ownership demands;
(2) an agreement that if the franchise moves before the expiration of the lease, the owner will pay the cost of the leasehold improvements contained in the agreement, less depreciation;
(3) a required monetary contribution from the owner based on the level of public financing spent on leasehold improvements; and
(4) an established minimum length of the lease based on the level of public financing spent on leasehold improvements.

A. *Imposition of a Notice Requirement*

The requirement that an owner give notice of any proposed agreement to relocate at least a season in advance is probably the most important of the proposed standards. Notice minimizes an owner's ability to bargain for lease concessions by threatening to immediately relocate to another city, as the owner of the Houston Oilers did with Jacksonville[84] and the Philadelphia Eagles did with Phoenix.[85] Under this proposal, if either franchise had threatened to move without giving notice, their owners would either have been making idle threats or, in the event of a move, given cause for a

83. Both revenue sharing and owner control of supply affect lease negotiations. *See supra* text accompanying note 40 (revenue sharing); *supra* text accompanying notes 31-33 (owner control).

The federal government would have the power to enforce these lease agreements without interfering with state sovereignty. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In *Garcia*, the Supreme Court held that the only limit on the federal commerce power as applied to the states is that inherent in all congressional action: the built-in restraints that our system provides through participation in federal government action. 469 U.S. at 556. Therefore, application of the minimum-wage and overtime requirements of the Fair Labor Standards Act to a municipally owned-and-operated mass transit system was not violative of either state sovereignty or any constitutional provision.

84. *See supra* text accompanying note 16.

85. The city of Philadelphia, under the Eagles' threat of relocation to Phoenix, signed a ten-year lease which required the city to construct 50–80 sky boxes at no cost to the Eagles, with all of the revenues from the leasing of these boxes going to the team. The city will also spend $500,000 to construct and furnish additional field boxes, the revenue from which will be allocated to the franchise. Other provisions of the new agreement include additional team-related facilities, rent deferral, and game-day security. The total cost to the city is estimated at $30 million. Baade, *supra* note 17, at 9.

breach of contract suit. Had this condition been included as part of its stadium lease, the city of Baltimore could have brought suit for breach of contract against the Colts as a result of their midnight move, rather than having to sue on the unreliable theory that through the use of eminent domain, they could acquire the Colts.

Notice benefits a city in several other important ways. First, it creates a "cooling-off" period in which city officials can decide whether continued association with the sports franchise is desirable. Second, it allows a city to cease futher allocations of public funds for franchise-related items. Finally, it provides notice that the team and the business it generates will be leaving, thus allowing time for local businesses to adjust their economic forecasts.

B. *Payment for Leasehold Improvements*

The cost of constructing a new stadium or remodeling an existing stadium as part of an agreement made by a city to keep or to attract a team is a public subsidy. It is a cost to the local taxpayers that is external[86] to the franchise owner. Because owners are not required to reimburse cities for stadium improvements if they move their franchises prematurely, owners do not consider these costs when computing *their* costs of relocation. If an owner is forced to assume the cost of lease-hold improvements when relocating, the costs of relocation will be higher and the movement of the franchise will be less attractive. Fewer relocations may be the result. Payment of leasehold improvements does not penalize an owner, nor does it in any way take away an owner's right to move. It serves as an effective taxpayer protection because it forces an owner to consider the true costs of a move, thus reducing the franchise value created when owners artificially restrict the level of supply.

C. *Required Financial Contribution*

A city should not accept all of the risks associated with stadium financing. Requiring franchise owners to contribute towards the financing of either building a stadium or upgrading an existing facility after allocation of a federally-determined[87] amount of municipal

86. Internal costs are those costs that are included in the price of an item. A purchaser must consider these costs before acting. External costs represent costs that are not included in the price of an item. External costs are costs that a purchaser does not have to consider explicitly before acting.

87. To determine the proper level of public and private financing for stadium improvements, Congress should utilize the accepted percentage used in the commercial real estate industry necessary for a down payment, which is 10%. This amount repre-

funds will lessen the risks to the host city. In addition, tying the financial well-being of the owner to the city reduces incentives for franchise movement. If an owner does decide to relocate, this lease provision would require that the owner continue to service the public debt in proportion to his financial contribution to the funding of the stadium. The city of Toronto signed a lease that required the city to pay $50 million to expand its baseball facility if plans for a domed stadium fell through.[88] Inclusion of a clause in the lease that put a percentage of the financing burden on the owner would create an incentive for that owner to make sure that the more cost effective of the two options was built, thus reducing the level of public financing and liability.

D. *Required Length of Lease*

A lease provision that requires the length of the stadium lease to increase with the level of public financing would provide a clear choice for the owner—more public funding or a shorter lease. Similar to the contribution levels of financing, the schedule determining the length of the lease would be prescribed by the federal government and not be subject to negotiation.[89]

With this trade-off required by law, Robert Irsay still might have been able to negotiate a five-year lease with the city of Baltimore, but he would not have received the $24 million in stadium improvements. Had he insisted on receiving funding for the improvements, the lease would have been longer. This provision would have corrected what is possibly the worst example of the type of risks cities are forced to accept because of the imperfect market for sports franchises. In early 1980, Minneapolis faced the possibility that both of its professional franchises would relocate. In response to this threat, the city built a $76.5 million domed facility.[90] In spite of this show of financial support, soon thereafter the city again faced the threat that one of its franchises would leave. A clause in the lease with the Twins allowed the franchise to annul its lease if the team did not draw 2.4 million fans in 1984, although the Twins had

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sents a commitment on behalf of the buyer; the required contribution clause is meant to do no more than to provide a mechanism for cities to receive a financial commitment from owners.

88. Baade, *supra* note 17, at 9.

89. Congress should determine the appropriate schedule of length of lease based on the following proposition: the length of the lease should be at least as long as the time required for the asset to depreciate to a net value of zero, assuming the use of generally accepted accounting principles and no salvage value.

90. Superdome, *supra* note 10, at 110.

never drawn more than 1.5 million fans in any one season.[91] The team stayed when local businesses bought enough tickets to guarantee that at least 2.4 million tickets would be sold.

Conclusion

Under present league rules and government regulations, a competitive market for professional sports franchises does not exist. This lack of a competitive market has created inequities that force local officials to put the taxpayers they represent at substantial risk during negotiations to acquire or to retain a franchise. Because market forces are restricted, the supply of sports teams is kept artificially below the level of demand and the costs of relocating are much lower than they might be otherwise. Team owners do not have to consider the true costs, both internal and external, when deciding whether to relocate. The judiciary and the federal legislature have neglected to incorporate market analysis in their efforts to protect the investments of local taxpayers. The proposal set forth in this Current Topic argues for a market-based solution to the franchise relocation problem.

Congress must take steps to establish an environment in the professional sports industry that emulates a truly competitive market. Implementation of non-negotiable standards for stadium leases will create a balance at the bargaining table between franchise owners and municipal officials. As a result, taxpayers will be protected and owners will still be able to relocate their sports franchises. While future franchise movements will be more expensive, the higher costs will more accurately reflect the costs of relocation to *all* parties. Under this regulatory scheme, some owners will still find it more profitable to move. Others, when forced to reimburse cities for the economic and psychological damages caused by a relocation, will stay, realizing that there really is no place like home.

91. Alm, *supra* note 17, at 51.