STRIKING OUT "COMPETITIVE BALANCE" IN SPORTS, ANTITRUST, AND INTELLECTUAL PROPERTY

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I. INTRODUCTION

On November 21, 2000, with Congress in recess for Thanksgiving and an unresolved Presidential election, the Senate Judiciary Committee held a hearing in Washington, DC. While the voters might have expected a meeting at such a time, they might not have expected the topic: the lack of competitive balance in Major League Baseball ("MLB").[1]

"Competitive balance" has been a focus of sports antitrust cases for three decades; now it appears not only in Senate hearings, but also has entered the lexicon of the sports pages.[2] This Article uses the term "competitive balance" as sports antitrust cases have generally done since it first appeared in a 1976 federal antitrust case:

> Competitive balance means in essence that all of the league's teams are of sufficiently comparable playing strength that . . . fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games, thus supporting the teams' television and gate revenues.[3]

The problem is that, in light of new experience and economic research, competitive balance should be thrown out of the ballgame.

The "competitive balance argument" maintains that, because predictable outcomes will reduce fan interest and therefore profitability, professional sports leagues require special treatment under the antitrust laws that recognizes their "strong and unique interest in maintaining competitive balance."[4] An antitrust exception, proponents argue, is necessary to create the on-the-field competition that draws fans. Under this theory, competi-

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1. *See* Irving Molotsky, *Congress Puts Baseball Economics in Play*, N.Y. TIMES, Nov. 22, 2000, at D5.

2. Andrew Zimbalist, *BackTalk; Monopoly's Money*, N.Y. TIMES, Nov. 6, 2005, at H11 ("Brian France, NASCAR's chief executive, said competitive balance was his concern when he proposed limiting the number of cars team owners could control."); Buster Olney & Steven Greenhouse, *With Labor Woes, Baseball Throws Fans a Brushback*, N.Y. TIMES, July 14, 2002, at A1 ("The owners are also intent on restoring some level of payroll parity among teams; by improving competitive balance, they say, small-revenue teams would become more attractive to fans.").

3. Smith v. Pro-Football, 420 F. Supp. 738, 745 (D.C. Cir. 1976).

4. Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (considering maintenance of competitive balance as a factor under rule of reason examination of joint restraint on player movement between teams).

tive balance helps a sports league compete with other forms of entertainment, including other sports leagues and "American Idol"-style reality television programs that may themselves provide "competing competitions."

However, the competitive balance argument is fundamentally flawed in that it relies upon three imperfect assumptions: (1) there is and must be only one championship competition per sports league, (2) leagues can and will successfully engineer balance in that competition, and (3) fan interest is directly related to a championship structure. This Article shows, with comparative data and research from the newly burgeoning field of sports economics, that each of these assumptions is doubtful. One possible solution lies in reconceiving the "competing competitions" envisioned by the competitive balance argument. In particular, competing competitions need not only be *between* different leagues of teams. Rather, a sports league can itself incorporate several different competing competitions among its constituent teams and thus maintain fan interest even in the absence of competitive balance in that league.

A circuit split currently exists on whether competitive balance is relevant to antitrust analysis of professional sports leagues, with the overwhelming majority of courts saying that it is.[5] Those judges whom have endorsed the competitive balance argument have done so based on an outdated paradigm of monolithic competition, where winning the singular league championship is "the only thing."[6] While this may accurately reflect historical experience, where World Series or Super Bowl victories have been the sole endgames, such lucrative enterprises as English soccer and "fantasy" sports leagues demonstrate that there can be more than one kind of competition that draws fans' attention and money. Thus, continued acceptance of the competitive balance argument may represent an aesthetic judgment about what an attractive sports league looks like, but does so unsupported by empirical study.

This Article advocates the rejection of the competitive balance argument in antitrust and the recognition of the value of innovative "competing competitions" beyond antitrust into intellectual property.[7] Previous commentators have expressed doubts about the means-ends connection between particular sports league restraints and the competitive balance ar-

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5. *See infra* notes 27-31 and accompanying text.

6. *See* Christopher Lehmann-Haupt, *Is Pro Football Bad for Us?*, N.Y. TIMES, Jan. 11, 1971, at 29 (quoting legendary coach Vince Lombardi as saying "Winning is not everything; it is the only thing").

7. The basic notion is that competing competitions can generate fan interest in a way that antitrust and intellectual property should consider. *See infra* Part III.

gument.[8] In contrast, this Article makes a frontal attack on the argument itself by surveying antitrust case law on competitive balance in professional sports[9] and by applying new economic findings to the current sports "arena."[10] Indeed, lawyers, legislatures, and public opinion all seem to lag behind economists' increasingly prevalent doubts about competitive balance.[11]

This Article proceeds in three parts. Part II summarizes the current treatment of competitive balance in antitrust law and in public discussions of sports. Part III explains why the competitive balance argument fails on its face by drawing on comparative data from English soccer, by applying to sports leagues the economic theories of monopsony and two-sided markets,[12] and by analyzing MLB's current dispute with "fantasy" leagues over intellectual property rights. Part IV proposes that the competitive balance justification be summarily rejected, explaining how this relates to areas beyond antitrust. A brief conclusion follows.

II. THE COMPETITIVE BALANCE ARGUMENT

A. Sports Leagues and Antitrust: The State of Play

No one wants to pay money to see one team appear without an opponent. Few want to pay money to see two teams bicker about what the rules

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8. *See* Roger Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L.J. 589, 615-16 (2005) [hereinafter Noll, *Buying Power*] (observing that "virtually all economic studies of professional sports" reject the claim that collusion in the market for players as a means aids competitive balance as an end); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players and the Antitrust Laws*, 1997 U. ILL. L. REV. 519 (1997) [hereinafter Ross, *Misunderstood Alliance*] (arguing for application of a "least restrictive means" test to filter out restraints lacking good ends-means connections to competitive balance); *see also* Gary R. Roberts, *The NCAA, Antitrust and Consumer Welfare*, 70 TUL. L. REV. 2631, 2667-68 n.69 (1996) (questioning, in the context of amateur athletics, whether a means-ends link exists between athletic association restrictions and competitive balance and observing an absence of empirical data at the time on that point).

9. *See infra* notes 25-42 and accompanying text.

10. *See infra* notes 111-145 and accompanying text.

11. *See, e.g.*, DAVID BERRI, MARTIN SCHMIDT & STACEY BROOKS, THE WAGES OF WINS 63 (2006) (arguing that "baseball does not have a competitive balance problem"); Allen Sanderson & John Siegfried, *Thinking About Competitive Balance*, 4 J. SPORTS ECON. 255, 273 (2003) (questioning whether "competitive imbalance in baseball deserve[s] so much attention" given empirical data suggesting it is not a problem).

12. Two-sided markets are situations in which one or several platforms enable interactions between different classes of end-users, such as a TV station trying to attract both viewers and advertisers. The owner of the platform tries to court both sides of the market at prices that allow a profit. *See infra* Section III.B.2.

of the game ought to be.[13] Thus, individual teams who are competitors on the field of play—and who may be economic competitors—must nonetheless cooperate to ensure there will even be a product at all. As a result, sports leagues pose an inherent dilemma in antitrust.[14]

The joint restrictions teams put in place through their leagues go beyond simple matters of time, place, and manner of game play. The restrictions extend to competition over investment and inputs, such as the skilled labor of professional athletes.[15] To analyze such restrictions, courts have fit sports leagues into their existing antitrust framework. In *NCAA v. Board of Regents of the University of Oklahoma*,[16] the Supreme Court set the modern standard for judging restraints of trade among rival teams. There, agreements limiting the ability of NCAA member universities to negotiate and enter into their own television contracts appeared in isolation to be anti-competitive.[17] The Court noted, though, that competing sports teams may have pro-competitive justifications for such collusion, since they must agree on a host of issues for the product to exist at all.[18] Accordingly, the Court found sports industry regulations well-suited to

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13. The first intercollegiate American football game took place between Harvard and Canada's McGill, rather than between Harvard and Yale, because the two American universities could not agree on the rules to use. *See Epilogue: McGill and the Birth of Football*, MCGILL NEWS ALUMNI Q., Summer 2005, http://www.mcgill.ca/news/2005/summer/epilogue/ (last visited Dec. 5, 2006); *see also* Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 229 (1984) [hereinafter Roberts, *Sherman Act*]. Roberts writes:

> Just as a single game inherently requires a complete integration of the two coproducing teams, the league product also requires complete integration of all the member clubs, none of which is by itself able to produce anything, and no two of which are able to produce a pennant race or a league champion. This total integration is not by the member clubs' choice; it is an absolute requirement.

Id.

14. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 332 (1978) (claiming that "[a]ll league sports . . . rest entirely upon the right to boycott . . . [a]nd [w]ere the leagues denied the power to enforce such [arguably anticompetitive] agreements . . . [they] would be destroyed"); Roberts, *Sherman Act*, *supra* note 13, at 295 ("[T]here is a legitimate concern that the structure of a league, unlike that of other business organizations, may cause, albeit infrequently, individual club economic interest to be contrary to the interests of the league as a whole.").

15. *See* BORK, *supra* note 14, at 332.

16. 468 U.S. 85 (1984).

17. *Id.* at 98-99.

18. *Id.* at 100-01.

rule of reason analysis rather than per se condemnation.[19] This result extended to sports leagues antitrust treatment familiar to other industries, but with a couple of notable exceptions.[20]

Baseball has an historical judge-made antitrust exception that has been narrowed by Congress and lower courts several times over the past dozen years.[21] Additionally, the non-statutory labor exemption from antitrust applies in sports as in other unionized industries, though the exemption only narrowly applies to restraints that affect labor and management and not to those that cause antitrust injury to third parties.[22] Despite these idiosyncrasies, courts continue to see sports-related antitrust litigation.[23]

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19. *Id.* Rule of reason analysis involves judicial consideration of not just the nature of the conduct at issue, but also issues such as its effects and the context of its application. *See* Bd. of Trade v. United States, 246 U.S. 231, 238-40 (1918).

20. *See infra* notes 21-22.

21. Three different Supreme Court opinions concern baseball's antitrust exemption. *See* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Fed. Baseball Club of Balt. v. Nat'l League, 259 U.S. 200 (1922) (holding that baseball is exempt from the Sherman Act because it is "not a subject of commerce"). One might wonder whether sports leagues are, in fact, generally exempt from antitrust laws. The short answer is "no." The slightly longer answer is that they do play by somewhat different rules. Perhaps most famously, under a longstanding judicially-created blanket exemption, the antitrust laws did not apply to Major League Baseball; since a 1998 legislative repeal, the antitrust laws now apply to baseball's dealings with its player labor union. *See* Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (codified as amended at 15 U.S.C. § 26b (2002)) (repealing the categorical exemption with respect to anticompetitive restraints involving players). Additionally, some lower courts have ruled that the exemption itself applies only to baseball's reserve clause limiting the mobility of its players between teams. *See* Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993) (concluding that the exemption does not apply to restraints involving rejection of investors seeking to relocate a team); Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1025 (Fla. 1994) (concluding that the exemption does not apply to restraints against team relocation). There is some disagreement over the current importance of baseball's exemption. *Compare* Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1 (2005), *with* Thomas Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENTM'T. L.J. 54 (2004). There have also been calls for repeal of baseball's antitrust exemption. *See, e.g.*, J. Philip Calabrese, *Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531 (1999) (suggesting the Curt Flood Act of 1998 did not go far enough toward repealing the antitrust exemption); Larry Smith, *Beyond Peanuts and Cracker Jack: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 138 (1996) (arguing for limiting a complete repeal of the MLB antitrust exemption as necessary or terminating altogether the MLB exemption to protect the future health of MLB).

22. As its name suggests, the non-statutory exemption is judge-made law that exempts certain union-employer agreements from antitrust law. There is a statutory labor exemption under the Clayton Act and the Norris-LaGuardia Act essentially declaring that

B. Competitive Balance: A Split and a Curve Ball

The competitive balance argument is the main pro-competitive justification that sports leagues offer to defend agreements otherwise prohibited by antitrust laws. The leagues have continually argued to courts of both law and public opinion that a lack of competitive balance over time would lead to predictable outcomes that would reduce fan interest and profitabil-

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labor unions, despite their general tendency to agree to fix prices, are not "combinations or conspiracies in restraint of trade" that offend the antitrust laws; the exemption specifically immunizes certain union activities such as group boycotts from the antitrust laws. 15 U.S.C. § 17 (2006); 29 U.S.C. §§ 52, 104, 105, 113 (2006). The non-statutory exemption applies not to union activities but to union-employer agreements. *See* Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 622 (1975) ("[T]he non-statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."). The courts of appeals have applied the non-statutory labor exemption to professional sports leagues; the dominant rule exempts such agreements when they concern a mandatory subject of bargaining (such as wages, hours, and conditions of employment), when they are the subject of bona fide arm's length agreement and when the alleged restraint on trade affects only the parties to the agreement seeking to be exempted. Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976); *see* Powell v. Nat'l Football League, 930 F.2d 1293, 1297 (8th Cir. 1989); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979); s*ee also* Powell v. Nat'l Football League, 678 F. Supp. 777, 783-84 (D. Minn. 1988); Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987); Zimmerman v. Nat'l Basketball Ass'n, 632 F. Supp. 398, 403-04 (D.D.C. 1986); Wood v. Nat'l Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984). *But see* Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (adopting a more open-ended standard without the bona fide bargaining requirement to uphold a minimum age requirement in the NFL player entry draft); Case Comment, *Antitrust Law—Nonstatutory Labor Exemption—Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny*—Clarett v. National Football League, 118 HARV. L. REV. 1379 (2005) (endorsing *Clarett* test). The general rule that emerges from the case law is that the non-statutory labor exemption applies specifically to union labor market transactions. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1051 (D.C. Cir. 1995) (observing that "the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market and has no anti-competitive effect on the product market"). It follows that if a players' union were to decertify, or if a restraint were to affect other markets—as some important league restraints do—this exemption should not apply. *Id.*

23. Indeed, even start-up leagues in "sports" that are relatively new to sports cable channels are the subject of lawsuits. *See* Ryan Nakashima, *Seven Poker Players Sue WPT over Use of Likeness, Name*, SAN JOSE MERCURY NEWS, July 19, 2006 (reporting "suit accus[ing] WPT Enterprises of 'price fixing' and 'group boycotts' by colluding with 12 member casinos to prevent players from entering tournaments unless they forfeit their rights" to their own likenesses).

ity.[24] This argument has achieved significant traction in antitrust cases; its impact in the public and political consciousness may be even bigger.

1. Courts of Law: Playing by Different Rules?

Over three decades, the federal courts have many times dealt with the competitive balance argument across the gamut of American team sports.[25] While the total number of cases is not huge, such cases are not rare either.[26] Regardless, their influence most certainly goes beyond their mere number, since many cases involve issues that garner much media attention, such as franchise relocation, interleague competition, and labor unrest. The competitive balance argument has been used to justify restraints that include joint restrictions on the entry of new investors into the league,[27] on the geographic territories in which sports teams may conduct

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24. *See, e.g.*, Silverman v. Major League Baseball, 67 F.3d 1054, 1061 (2d Cir. 1994) (mentioning briefly that "[i]n antitrust litigation, the leagues perennially argue that some form of reserve system [limiting the movement of players] is necessary for competitive balance").

25. The argument has hoary antecedents, its logic having been favorably received by the D.C. Circuit 86 years ago in the slightly different context of the *Federal Baseball* case. *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 687 (D.C. Cir. 1920) (ruling baseball exempt from antitrust). The court observed that:

> If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain.

Id.

26. Since the District Court for the District of Columbia first discussed competitive balance in the context of a rule of reason antitrust case in 1976, the federal courts have discussed competitive balance in sports antitrust cases in 38 opinions, discussed *infra* at notes 27-30 and accompanying and following text. Additionally, the federal courts have also addressed the competitive balance argument in the context of antitrust claims involving amateur collegiate athletics. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Bd. of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983); *In re* NCAA I-A Walk-On Football Players Lit., 2006 U.S. Dist. LEXIS 28824 (W.D. Wash. 2006); Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995); Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).

27. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1113 (1st Cir. 1994).

operations,[28] on the entry of players into a sports league,[29] on the movement of current players between teams, on the terms of player employment and wages,[30] and on the televised broadcasts of games to fans.[31] Were it

28. *See* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 468 F. Supp. 154, 167 (C.D. Cal. 1979).

29. Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978) (considering competitive balance and joint restraints involved in draft system of new players); Robertson v. Nat'l Basketball Ass'n., 389 F. Supp. 867, 892 (S.D.N.Y. 1975) (discussing competitive balance in the context of a challenge to the NBA draft).

30. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (considering competitive balance and joint restraints on movement of players within a sports league); McCourt v. Cal. Sports, 600 F.2d 1193, 1215 (6th Cir. 1979) (mentioning competitive balance argument in passing in the context of challenge to National Hockey League restraints on player movement between teams); Fraser v. Major League Soccer, 7 F. Supp. 2d 73, 78 (D. Mass. 1998); Silverman v. Major League Baseball, 67 F.3d 1054, 1061 (2d Cir. 1994) (mentioning briefly that "[i]n antitrust litigation, the leagues perennially argue that some form of reserve system [limiting the movement of players] is necessary for competitive balance"); Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994) (considering competitive balance argument); White v. Nat'l Football League, 836 F. Supp. 1458, 1487 (D. Minn. 1993); White v. Nat'l Football League, 822 F. Supp. 1389, 1408 (D. Minn. 1993); Jackson v. Nat'l Football League, 802 F. Supp. 226, 232 (D. Minn. 1992); McNeil v. Nat'l Football League, 1992 U.S. Dist. LEXIS 21561, at *1 (D. Minn. 1992); McNeil v. Nat'l Football League, 790 F. Supp. 871, 876 (D. Minn. 1992); Powell v. Nat'l Football League, 690 F. Supp. 812, 818 (D. Minn. 1988); Mackey v. Nat'l Football League, 407 F. Supp. 1000, 1003 (D. Minn. 1975); Phila. World Hockey Club v. Nat'l Hockey League, 351 F. Supp. 462, 486 (E.D. Pa. 1972); *see also* Brown v. Nat'l Football League, 50 F.3d 1041, 1060 (D.C. Cir. 1995) (Wald, J., dissenting) (concluding that competitive balance should be a consideration under the rule of reason in judging restraints on player movement within a league); *cf.* Finley v. Kuhn, 569 F.2d 527, 539-41 (7th Cir. 1978) (discussing competitive balance in the context of commissioner veto of player transfers between teams, but applying the at-the-time categorical exemption of "the business of baseball" from the antitrust laws). *But see* Brown v. Pro Football, 812 F. Supp. 237, 239 (D.D.C. 1992) (concluding that the D.C. Circuit's pre-*NCAA* holding in *Smith* rejecting the competitive balance argument was still good law because *NCAA* was inapplicable to professional sports leagues due to unique character of amateur college athletics); Brown v. Pro Football, 1992 U.S. Dist. LEXIS 2903, at *31 (D.D.C. 1992) ("This Circuit has expressly found defendants' proffered 'competitive balance' and 'better product' purposes to be irrelevant to the rule of reason analysis."). The majority in the D.C. Circuit's *Brown* opinion did not reach this question.

31. *See* Chi. Prof. Sports Ltd. P'ship v. Nat'l Basketball Ass'n (*Chi. Prof'l Sports II*), 95 F.3d 593, 604 (7th Cir. 1996) (Cudahy, J., concurring) (observing that competitive balance helps "ensure that the league provides high quality entertainment throughout the season so as to optimize competition with other forms of entertainment"); Kingray v. Nat'l Basketball Ass'n, 188 F. Supp. 2d 1177, 1185 (S.D. Cal. 2002) (mentioning possible relevance of competitive balance argument in the context of league restrictions on broadcasting); *see also* U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1162 (S.D.N.Y. 1986).

not for purported ancillary benefits, these restraints might be considered per se antitrust violations.

Though the Supreme Court has not directly considered how antitrust should treat competitive balance in professional sports, the Court has given at least tacit approval to the competitive balance theory in the *NCAA* case discussed above.[32] In addition to considering the applicability of the rule of reason, the Court also considered whether NCAA rules that limited the frequency of televised college football games violated the Sherman Act. Although the Court condemned the NCAA restraints, it agreed generally that "the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important."[33] Particularly, the Court endorsed "justifiable means of fostering competition among amateur athletic teams," concluding that such means of enhancing competitive balance would be pro-competitive because they would "enhance public interest in intercollegiate athletics."[34]

Not surprisingly, professional sports leagues have sought cover under the competitive balance argument for their own practices.[35] However, the *NCAA* case concerned amateur college athletics; the circuits are split as to whether competitive balance in professional sports serves as an appropriate consideration under a rule of reason analysis.[36] Of the three Courts of

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32. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

33. *Id.* at 117. The Court concluded that goal of competitive balance was not causally linked with the restraints at issue. Lower courts have at times suggested that the Supreme Court's logic in *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), authorizing tradeoffs between inter-brand and intra-brand competition might apply. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) (citing *Sylvania*, 433 U.S. 36 (1977)). However, *Sylvania* differed in important respects, since both harms and benefits accrued in the same market (televisions) and the *Sylvania* brand comprised a very small portion of the overall market. The First Circuit in *Sullivan* appeared to recognize this, requiring fact-finding on remand of benefits in a separate market, to the extent that they fed back into the harmed market. *Sullivan*, 34 F.3d at 1113; *see also infra* notes 117-123 and accompanying text.

34. *NCAA*, 468 U.S. at 117.

35. *See* Silverman v. Major League Baseball, 67 F.3d 1054, 1061 (2d Cir. 1995) (observing that "[i]n antitrust litigation, the leagues perennially argue that some form of reserve system [limiting the movement of players] is necessary for competitive balance").

36. *Compare* Smith v. Pro Football, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (rejecting competitive balance as offsetting pro-competitive benefit), *with Sullivan*, 34 F.3d 1091 (1994) (remanding for consideration of pro-competitive effects of competitive balance as offsetting anti-competitive effects of joint restraints by member teams on public ownership of teams), *and* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (recognizing that "the NFL has a strong and unique interest in maintaining competitive balance among its teams"); *see also Chi. Prof'l Sports II*, 95 F.3d at 604 (Cudahy, J.,

Appeals that have directly addressed whether competitive balance is a pro-competitive benefit or an anti-competitive restraint, only the D.C. Circuit has rejected the argument as anti-competitive. Specifically, in *Smith v. Pro Football*, in considering whether a league-wide player-entry draft was anti-competitive, the D.C. Circuit held that competitive balance, even if it "produc[es] better entertainment for the public, higher salaries for the players overall, and increased financial security for the clubs," cannot be used to offset anti-competitive effects in the more narrow market for players entering the league.[37] While one might see this ban on "intermarket" tradeoffs as a relatively narrow ruling, it is largely fatal to the competitive balance argument. While leagues attribute restraints to an alleged need to generate and maintain fan interest, most antitrust cases seldom concern the market for fan interest. Rather, most cases concern the market for players, ownership interests, and broadcast rights.[38]

Since *Smith*, though, no other Circuit has held maintenance of competitive balance to be an impermissible consideration under the rule of reason.[39] Rather, subsequent Courts of Appeals have recognized that a professional sport league has "a strong and unique interest in maintaining competitive balance among its teams."[40] Judges have recognized that competitive balance "is needed to ensure that" professional sports leagues "provide high quality entertainment throughout the season so as to optimize competition with other forms of entertainment."[41] As a result, courts have concluded that the leagues' "interest in maintaining competitive balance" should be weighed as an offsetting pro-competitive justification for

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concurring) (suggesting that "competitive balance . . . is needed" but "is not the only contributor to the entertainment value of NBA basketball").

37. *Smith*, 593 F.2d at 1186. Although *Smith* predates *NCAA*, it has continued to be followed in the D.C. Circuit after *NCAA* due to the amateur-professional distinction—particularly, the NCAA's interest in avoiding professionalism and maintaining an image of scholasticism and amateurism. *See* Brown v. Pro Football, 812 F. Supp. 237 (D.D.C. 1992); Brown v. Pro Football, 1992 U.S. Dist. LEXIS 2903 (D.D.C. 1992).

38. The split is essentially a sports-specific version of the broader question of whether pro-competitive benefits that offset anti-competitive harms must accrue to the same relevant market under antitrust analysis. *See infra* notes 117-123 and accompanying text.

39. Courts have, however, often concluded that the particular restraints at issue before them are only tenuously linked with the asserted goal of competitive balance. *See infra* note 43.

40. *Mackey*, 543 F.2d at 621 (considering maintenance of competitive balance as a factor under rule of reason examination of joint restraint on player movement between teams).

41. *See Chi. Prof'l Sports II*, 95 F.3d at 604 (Cudahy, J., concurring).

otherwise anti-competitive restraints.[42] While the competitive balance argument is not a trump card that bests all plaintiffs,[43] it does provide professional sports leagues with a unique antitrust defense not available to other industries.[44]

Given this largely favorable reception, professional sports leagues continue to promote the competitive balance argument.[45] This seems logical, since courts have rejected the leagues' alternative justifications for their seemingly anti-competitive restraints. For example, courts have refused to allow leagues to justify player restrictions on the grounds that requiring teams to compete with each other for player services would lead to "ruinous competition," or that a team needs to have monopsony power over a player for a certain amount of time in order to recoup its investment in developing the player's skills.[46] Some commentators have argued that horizontal agreements among competing teams in a sports league should receive completely unique treatment based on the proposition that the law should treat a league as a "single entity," rather than as a group of bargaining competitors.[47] Such treatment would shift the analysis from relatively

42. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1111, 1113 (1st Cir. 1994); *see also Mackey*, 543 F.2d at 621.

43. Some courts that have recognized the leagues' interest in competitive balance have nevertheless found the restraints at issue to be inappropriate means of achieving the asserted end. *See, e.g.*, *Mackey*, 543 F.2d at 622 (stating that the court "need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL" because the rule at issue was "significantly more restrictive than necessary to serve any legitimate purposes"); *cf.* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984) (concluding that broadcast restrictions did not have a good means-ends link with maintaining competitive balance).

44. *See* Ross, *Misunderstood Alliance*, *supra* note 8, at 542, 544 (claiming that maintaining "competitive balance" as opposed to rejected defenses, such as the need to avoid "ruinous competition" or "recoup" investment in new players, is a "peculiar" "specialized" need for professional sports).

45. *See also infra* Section II.B.2.

46. Ross, *Misunderstood Alliance*, *supra* note 8, at 538; *see generally* U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (holding that fear of ruinous competition cannot be a justification for price fixing); *Mackey*, 543 F.2d at 621 (concluding that there is nothing unique about sports leagues to justify such defenses).

47. *See* Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH L. REV. 1 (1983); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L. J. 1013 (1984). *But see* Lee Goldman, *Sports, Antitrust and the Single Entity Theory*, 63 TUL. L. REV. 751, 761 (1989) (concluding that the single entity theory is "ultimately unpersuasive").

strict prohibitions on horizontal restraints of trade[48] to more ambiguous restrictions of monopolization.[49] Newer sports leagues, such as Major League Soccer, have attempted to structure themselves as single corporate entities with the constituent teams as subunits, in order to garner the relatively favorable antitrust treatment in the manner that the single-entity argument proposes.[50] However, the single entity argument has been largely rejected by courts.[51]

In sum, courts have generally accepted the competitive balance argument's basic premise that leagues must restrain economically competing teams in order to promote league interests as a whole. As the next Section will describe, sports leagues tout the argument not just in courts of law, but in the court of public opinion.

2. Courting the Fans—Selling the Public on Competitive Balance

American professional sports leagues have actively promoted public awareness of competitive balance. NFL, NHL, and MLB officials have all stressed the need for competitive balance in their respective leagues.[52]

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48. 15 U.S.C. § 1 (2006).

49. 15 U.S.C. § 2 (2006).

50. *See* Fraser v. Major League Soccer, 284 F.3d 47, 58 (1st Cir. 2002) (calling it "doubtful" whether Major League Soccer—organized with intent to be a single entity rather than a league of separate corporate and investment entities—possessed the unity of interests required for single entity treatment under antitrust precedent).

51. Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994) (rejecting single entity treatment for league of separate corporate and investment entities); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1388-90 (9th Cir. 1984) (same); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1256-58 (2d Cir. 1982) (same); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179-82 (D.C. Cir. 1978) (same); Mackey v. Nat'l Football League, 543 F.2d 606, 620 (8th Cir. 1976) (same); *see* Pepper Brill, Note, *Major League Soccer or Major League Sham? Players Bring Suit to Bite the Hand that Feeds Them*, 1999 COLUM. BUS. L. REV. 585, 610 (1999) (observing that "the courts have repeatedly rejected the single entity defense with respect to sports leagues."). *But see* Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting) (endorsing single entity theory).

52. *See, e.g.*, Judy Battista, *Distant Rumbles Heard in N.F.L.'s Labor Peace*, N.Y. TIMES, Jan. 25, 2006, at D3 (quoting NFL commissioner as supporting cost controls and revenue sharing to preserve "competitive balance" described as "the bedrock of the NFL's success"); Murray Chass, *On Any Given Day: Parity, or at Least Something Like It, Has Arrived*, N.Y. TIMES, July 18, 2004, at H2 (quoting MLB commissioner as citing "competitive balance" as logical outcome of revenue sharing and salary cost controls); Joe Lapointe, *Lockout is First Shot in Hockey's Labor War*, N.Y. TIMES, Sept. 16, 2004, at D1 (quoting NHL commissioner as citing "competitive balance" as a reason to try to control costs by capping players salaries, despite the fact that in the previous 3 seasons 12 different teams—the maximum number possible—had played in the league's championship semifinals).

Baseball has perhaps been the most active in introducing the phrase into public discussion, having charged its Commissioner in 2000 to protect the "integrity of . . . the national game of Baseball" and the public perception that "there is an appropriate level of long-term competitive balance among [the] clubs."[53] In this regard, MLB also formed a "Blue Ribbon Panel" of independent experts to study whether baseball has a "competitive balance" problem and to recommend possible reforms.[54] The "Panel Report" suggested a number of reforms that would, for the most part, assist teams with smaller revenues. These suggestions include "taxing" excessively high payrolls, allowing teams to relocate to cities where they could garner higher revenues, and subjecting foreign players to a player-entry draft rather than allowing them to negotiate as free agents.[55] Of course, reforms such as these would tend to aid lower-revenue teams at the expense of players and fans,[56] perhaps requiring cutbacks in player salaries and enabling teams to leave fans in their home cities for greener pastures. Consequently, reviewers of the Panel Report have disagreed about its overall value.[57]

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53. MAJOR LEAGUE BASEBALL CONST., art. II, § 4; *see* Stephen F. Ross, *Light, Less-Filling, It's Blue Ribbon*, 23 CARDOZO L. REV. 1675, 1675-76 (2002) [hereinafter Ross, *Light, Less-Filling*] (reviewing report of Commissioner's committee on competitive balance).

54. Richard C. Levin et al., The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics July 2000, http://www.mlb.com/mlb/downloads/blue_ribbon.pdf [hereinafter Panel Report].

55. *Id.*

56. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 32-33 (noting composition of Blue Ribbon Panel and suggesting that it was biased towards owners in small markets as opposed to other interests); Ross, *Light, Less-Filling*, *supra* note 53, at 1688 (asking "[w]hy are almost all solutions[proposed by the Panel] at the expense of non-owner constituencies?").

57. *Compare* Ross, *Light, Less-Filling*, *supra* note 53, at 1690 (stating that "[o]n balance . . . the Report remains a positive contribution"), *with* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 32, 36-50 (questioning whether "this was truly a panel worthy of a blue ribbon" and doubting whether MLB actually has a competitive balance problem and whether the Panel's proposals are worthwhile). *See also* ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 50 (2003) (approving of proposals redistributing revenue from richer teams in larger cities to poorer ones in smaller cities, but proposing a team minimum salary level to prevent owners from just pocketing redistributive payments).

Beyond its proposals, several of which were enacted,[58] the Panel Report also served to focus public discussion on MLB's lack of competitive balance, linking baseball's problems particularly to the issue of controlling player salaries. As a result, both the public and its elected officials have come to view MLB's problems through a lens favorable to the league's team owners. Other professional sports leagues, including the NHL and the NFL, have taken note of and have followed MLB's lead in making similar arguments.[59] Similarly, the sports media have increasingly cited a lack of competitive balance in sports as a serious problem that league policy must address.[60] As a result, Congressional committees have held hearings to generate possible solutions to the alleged "problem" of lack of competitive balance. One outcome of these hearings has been to suggest a solution of which has been considered for decades: the legislative grant of favorable antitrust treatment for professional sports leagues.[61]

In general, public discussion has not focused on antitrust law. Unfortunately, it has not particularly focused on data, either. Thus, as in the courts of law, the existing state of play in the court of public opinion may be due for a reappraisal. As the next Part describes, the recognition the competitive balance argument has received may well be the legal equivalent of an unearned run.[62]

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58. An August 2002 agreement between the baseball team owners and the players' union included the adoption of revenue sharing and a "luxury" or "competitive balance" tax on teams with extremely high payrolls. *See* Lawrence Ritter, *Show Me the Money*, N.Y. TIMES, May 25, 2003, at G7.

59. *See* Lapointe, *supra* note 52, at D1; Battista, *supra* note 52, at D3.

60. For example, a search of The New York Times' online database shows 38 articles discussing competitive balance and Major League Baseball in the almost 7 years since January 1, 2000, but only 29 such articles in the 14 years ending on December 31, 1999.

61. Congress has, at various times over decades, considered the extension of baseball's exemption to other sports. For example, in 1951 four separate bills were introduced to exempt organized professional sports from the antitrust laws. None of them was enacted. *See* H.R. 4229, H.R. 4230, H.R. 4231, & S. 1526, 82d Cong. (1st Sess. 1951). More recently, bills have been introduced, but failed to pass, that would provide additional exemptions to other leagues. *See, e.g.*, Kenneth Silverstein, *Bill May Halt NFL's Sack of Cities*, AM. CITY & COUNTY, Apr. 1, 1996, *available at* http://www.americancityandcounty.com/mag/government_bill_may_halt/index.html (describing bill introduced by Senator John Glenn that would exempt NFL from antitrust liability for blocking franchise relocations).

62. In other words, the recognition competitive balance has received by courts is the product of "field errors" (such as misguided public opinion and misinformed legislative response) rather than the product of hard-hitting judicial analysis.

III. RECONSIDERING THE COMPETITIVE BALANCE ARGUMENT

Judges have joined the media and Congress in looking upon the asserted link between increased competitive balance and increased fan interest with a relatively uncritical eye. Courts have endorsed the idea that if an anti-competitive restraint can be linked to competitive balance, the pro-competitive payoff of making the league more attractive to fans may outweigh the restraint's negative effects.[63]

However, recent innovations throw into question the idea that leagues need competitive balance to attract fans. Newer models of competition demonstrate alternatives that do not require focus upon a single league championship. In particular, examples from English soccer and from American baseball and basketball suggest that the time has come to re-evaluate the competitive balance argument. Because such examples are attractive but may fail to persuade due to their essentially anecdotal nature, this Part also provides support through empirical economic research, much of which is fairly recent.

Thus, this Part proceeds with three different critiques that challenge the need for competitive balance. First, competing competitions within a league can maintain fan interest, notwithstanding a lack of competitive balance for purposes of a traditional, singular league championship. Second, a study of two-sided markets and monopsony, or buyer market power, reveals rejections of the asserted welfare tradeoff between fans, players, and leagues implicit in the competitive balance argument. Third, antitrust should consider the possibility that maintaining room for alternative competitions, including fan innovation, may be welfare-enhancing overall.

A. The "Competing Competitions" Critique: Give It Some English

In considering the competitive balance argument, American courts implicitly assume that only a singular league championship will take place. Courts should not be faulted for assuming this must be the case, for each of the major American professional sports leagues currently holds a singular championship competition. However, English soccer[64] shows that such an arrangement does not have to be the case. American courts should not

63. *See* Mackey, 543 F.2d at 621.

64. This Article uses the word "soccer" for what the English would call football, unless as part of a proper name (i.e., the "Football League" of England).

allow the picture of a single championship competition to hold them captive when comparative data shows an alternative.

The English Premier League provides a meaningful comparison with North American professional sports leagues for several reasons. For one, it is among only a few leagues outside of North America that are truly on similar financial footing, in terms of both club valuations and revenue. According to media-published estimated valuations, the top Premier League clubs have similar valuations as the top teams in the NFL and MLB, and higher valuations than top NBA franchises[65] (see Table 1). Second, the Premier League and the North American leagues are considered global position leaders in their respective sports. Here, the Premier League is a particularly interesting comparison because although many of its teams are quite old, it only established itself as an independent entity in its current form in 1992 (partly in response to declining interest in English soccer during the 1980s).[66] As a result, the Premier League represents an innovation in league structure in a century-old professional sport.

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65. *See* Roger G. Noll, *The Economics of Promotion and Relegation in Sports Leagues*, 3 J. SPORTS ECON. 179 (2002) [hereinafter Noll, *Promotion and Relegation*] (stating that the Premier League is roughly comparable to MLB and the NBA, and behind only the NFL, in profits per team and average franchise value).

66. *See* Premierleague.com, The History of the F.A. Premier League, http://www.premierleague.com/fapl.rac?command=forwardOnly&nextPage=enHistory&categoryCode=History (last visited Oct. 23, 2006) (describing Premier League's formation at a time when "The English game was at possibly its lowest ebb" and explaining how the new league used satellite television and new "competition in Europe" to prosper). In part, the Premier League's creation represented independence and commercial rebranding, rather than all-out restructuring, of what used to be called the "First Division" of an umbrella organization in England called the Football League. The Football League comprised (and continues to comprise) several different levels of soccer leagues. However, this move occurred in the same year that a preexisting pan-European tournament was reconfigured to match the top several teams from a variety of nations' top soccer leagues. Thus, together, these changes altered the form of competition at the top level of English soccer.

Table 1[67]
Highest-Valued Teams by League

Premier League	MLB
1. Manchester United—$1.37B	1. New York Yankees—$1.03B
2. Arsenal—$841M	2. Boston Red Sox—$617M
3. Chelsea—$508M	3. New York Mets—$604M
4. Liverpool—$370M	4. Los Angeles Dodgers—$482M
NBA	**NFL**
1. New York Knicks—$543M	1. Washington Redskins—$1.3B
2. Los Angeles Lakers—$529M	2. Dallas Cowboys—$1.1B
3. Houston Rockets—$422M	3. New England Patriots—$1B
4. Chicago Bulls—$409M	4. Philadelphia Eagles—$952M

According to *Forbes*, Manchester United of the Premier League is the most valuable soccer club in the Premier League (and the world) with a valuation assessed at $1.37 billion. As demonstrated by Table 1, that value compares favorably with any of the North American league franchises. The Washington Redskins are the most valuable NFL club at $1.3 billion, the New York Yankees lead MLB with a valuation of $1.03 billion, and the New York Knicks lead the NBA at $543 million.[68]

The Premier League also generates revenue comparable to North American sports leagues. In 2004, the Premier League generated total revenue estimated at $2.4 billion,[69] which places it in the same ballpark as

67. Forbes.com, Special Report: The Most Valuable Soccer Teams, http://www.forbes.com/lists/ (follow "Richest Soccer Teams" hyperlink) (last visited Apr. 24, 2006).

68. *Id.*

69. DAN JONES ET AL., DELOITTE & TOUCHE, 2005 ANNUAL REVIEW OF FOOTBALL FINANCE: A CHANGING LANDSCAPE 26, Chart 2.3 (2005) [hereinafter 2005 ANNUAL REVIEW] (estimating total aggregate revenues for Premier League teams rose from £464 million in 1996-97 to £1.326 billion in 2003-04). The latter figure was converted to dollars at the average 2004 exchange rate of 1.83 dollars per pound. Lawrence H. Officer,

the NFL (estimated at $5.3 billion),[70] MLB ($4.5 billion),[71] the NBA ($3 billion),[72] and the NHL ($2.2 billion).[73] Additional facts are also worth noting. First, there are only 20 teams generating the Premier League's revenue while no North American sports league has fewer than 30 teams. Second, although the Premier League, like some American sports, has global appeal, the United Kingdom, its primary market, has one-fifth the population of the United States and a 25 percent lower Gross Domestic Product per capita.[74] Third, the Premier League's aggregate revenues nearly tripled from 1997 to 2004.

This revenue growth has in part been the result of the Premier League solving a chicken-and-egg problem between attracting the best players and attracting more fans. The Premier League profited from the explosion of cable and satellite television over the last decade, leading to huge increases in foreign and domestic broadcast revenue. Those revenues have allowed clubs to pay more for top international talent, which in turn has further driven demand for the Premier League on television.[75] These changes make the Premier League one of a handful of soccer leagues, along with those of Spain and Italy, that are truly international entertainment products.[76] In North America, the NBA and MLB have enjoyed an influx of international talent in the last decade—the NBA from Europe and South America, and MLB from Asia and Latin America—transforming once exclusively North American leagues into global show-

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Exchange rate between the United States dollar and the British pound, 1791-2004, ECONOMIC HISTORY SERVICES, http://eh.net/hmit/exchangerates/pound.php (last visited Aug. 11, 2006).

70. Michael K. Ozanian, *The Business of Football*, FORBES.COM, Jan. 27, 2005, http://www.forbes.com/lists/2004/09/01/04nfland.html (estimating 2004 NFL revenue at $5.3 billion).

71. Michael K. Ozanian, *The Business of Baseball*, FORBES.COM, http://www.forbes.com/business/2005/04/06/05mlbland.html (last visited Dec. 13, 2006) (follow "revenue" hyperlink) (estimating 2004 MLB revenue at $4.5 billion).

72. *Necessary Roughness*, FORBES, Dec. 27, 2004, at 131, *available at* http://www.forbes.com/free_forbes/2004/1227/131.html (estimating NBA revenue at $3 billion).

73. Michael K. Ozanian, *Ice Capades*, FORBES, Nov. 29, 2004, at 124, *available at* http://www.forbes.com/forbes/2004/1129/124_print.html (estimating 2003-04 NHL revenue at $2.2 billion).

74. *Compare* CIA, World Factbook, United Kingdom, https://www.cia.gov/cia/publications/factbook/geos/uk.html (last visited Aug. 5, 2006) (listing population at 60.3 million and per capita GDP at $30,300), *with* CIA, World Factbook, United States, https://www.cia.gov/cia/publications/factbook/geos/us.html (last visited Aug. 6, 2006) (listing population at 298.4 million and per capita GDP of $41,800).

75. 2005 ANNUAL REVIEW, supra note 69, at 26.

76. *Id.*

cases.[77] While the NFL cannot attract global talent because the sport is played sparsely elsewhere, it, along with the NBA and MLB, has aggressively marketed itself internationally.[78]

Interestingly, the Premier League has been successful despite the fact it appears laughably imbalanced by American standards. Following the logic of the competitive balance argument, this fact is puzzling. Like the D.C. Circuit in *Smith*, economists examine balance at the season-level (whether teams can reasonably compete for the league championship), and to a lesser extent, on a game-by-game basis (whether a team could reasonably win any particular game).[79] Though analysts tend to focus more often on season-level balance, the two measures are largely related since a league full of ".500" teams will probably be evenly-matched enough at any given time to produce competitive games.[80]

Additional league competitive balance data are discussed in the paragraphs below, but one might more quickly gather how competitively imbalanced the Premier League is by observing sports gambling odds. Sports wagering is legal in the United Kingdom, and the largest retail gambling operation in the world is the UK-based Ladbrokes—long a FTSE 100 index[81] corporation. In August 2006, approximately one month before the start of the season for both the 32-team NFL and 20-team English Premiership, Ladbrokes naturally was taking bets on the odds to win each league's respective titles. Given that professional odds-makers try to set and maintain odds in order to balance the flows of money on both sides of a bet, the odds come to reflect the expectations of those who "put their money where their mouth is." The Indianapolis Colts, the team deemed mostly likely to win the NFL championship (the Super Bowl), were offered at 5:1—meaning for every dollar (well, pound sterling) wagered, the bettor would win five more if the Colts won the league title. These odds imply that the market believes the Colts have about a 17% chance of win-

77. For example, at the 2005 MLB All-Star game, the annual home run derby of the game's top sluggers featured eight different competitors representing eight different countries. ESPN 2006 SPORTS ALMANAC 71 (Gerry Brown & Michael Morrison eds., 2006) [hereinafter ESPN ALMANAC].

78. Super Bowl XXXIX between New England and Philadelphia in February, 2005 was broadcast in 222 countries and translated into thirty-two languages. *Id.* at 246.

79. *See* Smith v. Pro Football, 593 F.2d 1173, 1185 (D.C. Cir. 1978).

80. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 45 (proposing to measure competitive balance based on the difference between the observed level of balance in team records over a season and an ideal level based on the statistically expected standard of deviation if the teams were all equally matched).

81. This is a leading index of the London Exchange, comparable to the Dow 30 in the U.S.

ning the Super Bowl. Meanwhile, the Premier League favorite was Chelsea, offered at 4:9—for every dollar you bet, you would win about 44 cents if Chelsea won the league championship, implying that the market thinks Chelsea has roughly a 70% chance of winning the Premier League Championship.[82] Thus, if you believe the gamblers, the Premier League pales in comparison to the NFL when it comes to season-level competitive balance (and indeed, not just gamblers, but the English media are aware of this contrast).[83] Nonetheless, predictable results have not thwarted the Premier League in rivaling North American sports leagues when it comes to money.

The previous decade's results in the Premier League show striking imbalance relative to the NFL, NBA, and MLB. In the last ten years only three clubs have won the twenty-team Premier League.[84] Manchester United has won five titles, Arsenal has three and Chelsea two.[85] Meanwhile, in North America, the NBA has boasted four different champions over that spell, six different MLB clubs have won the World Series, and there have been seven different Super Bowl winners (see Table 2).

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82. *See* Ladbrokes.com, Online Sports Betting, Poker Games, Casino and Games, http://www.ladbrokes.com (last visited Aug. 8, 2006) (printout on file with author). The difference in odds is in part due to the lopsidedness of talent in the Premier League, but also due to the NFL's championship being the result of a season-ending, single-elimination tournament between top teams. The Premiership's championship, on the other hand, is awarded to the team with the best overall records in wins, ties, and losses, based on points earned for wins and ties. A single-elimination tournament increases the overall "randomness" that a given team will win the championship by forcing the "best" team to face higher odds of being eliminated due to a poor performance in a single-elimination playoff game.

83. *See In a League of Its Own*, THE ECONOMIST, Apr. 29, 2006, at 63 (writing enviously about how the NFL "giv[es] all 32 owners a chance to field teams that are both financially viable and athletically competitive" in "striking contrast with English football's Premier League," which "is dominated by the same teams, year after year"). Oddly for a publication entitled, "The Economist," the article fails to discuss how the Premier League nonetheless compares well with the NFL with respect to financial investment and revenues. *Id.*

84. Due to relegation and promotion, 36 different teams have, at one season or another, participated in the 20-team Premier League. *See infra* notes 91-93 and accompanying text.

85. *See* SKY SPORTS 2005-2006 FOOTBALL YEARBOOK 590-99 (Glenda Rollin & Jack Rollin eds., 2005) [hereinafter SKY SPORTS YEARBOOK]. Even this short list of champions needs context. Arsenal and Manchester United alternated as champion for nine years before Chelsea won in 2004-05, and Chelsea's breakthrough only occurred after Chelsea owner Roman Abromovich boosted its payroll to the "$200 million mark, roughly the same level as the New York Yankees." *See* David Moore, *Constellation of Stars Lifts Chelsea*, USA TODAY, Jul. 19, 2006, at 1C. Chelsea is also the prohibitive favorite to win in 2006-07. *See supra* notes 81-83 and accompanying text.

Table 2[86]
Season-over-Season Competitive Results 1996-2005

No. of Different Clubs that:	Premier League (36 diff. teams)	MLB (30 teams)	NBA (30 teams)	NFL (32 teams)
Won League Championship	3 (8%)	6 (20%)	4 (13%)	7 (22%)
Finished in Top Eight (Eng.)/Qualified for Play-offs (N. Am.)	22 (61%)	20 (67%)	28 (93%)	31 (97%)

Winning the title is not the only measure of balance, though. Indeed, winning a league championship is special because it is rare (more so for Cubs fans); but something that is rare may well provide too small a sample to be reliable. Thus, one might also compare the number of teams that qualify for a postseason tournament. For example, competitive imbalance also emerges upon comparing across the past decade the number of North American leagues to have qualified at least once for the playoffs to the number of different Premier League clubs to have finished in the top eight of the league table.[87] The results show that twenty-two of the thirty-six soccer clubs that spent a season or more in the Premier League over that span had at least one top eight finish,[88] while thirty-one of thirty-two NFL teams qualified for the postseason along with twenty-eight of thirty NBA clubs and twenty of thirty MLB teams.[89] The Premier League, as demon-

86. ESPN ALMANAC, *supra* note 77, at 95, 246, 371. The NBA Champions were San Antonio Spurs (3 titles), Los Angeles Lakers (3), Chicago Bulls (3), and Detroit Pistons (1). MLB World Series winners were New York Yankees (3 titles), Florida Marlins (2), Chicago White Sox, Boston Red Sox, Anaheim/Los Angeles Angels, and Arizona Diamondbacks (1 each). NFL Super Bowl Champions included the New England Patriots (3 titles), Denver Broncos (2), Pittsburgh Steelers, Tampa Bay Buccaneers, Baltimore Ravens, St. Louis Rams, and Green Bay Packers (1 each). *Id.* at 254-55.

87. Finishing in the top eight in the Premier League serves as a fair comparison with playoff qualification in the three North American leagues. Taken in the aggregate, 39% of teams in the three North American leagues (36 of 92) qualify for the playoffs annually. That correlates closely with the 40% of Premier League teams (8 of 20) that finish in the top eight annually.

88. SKY SPORTS YEARBOOK, *supra* note 85, at 590-99. The comparison is somewhat difficult because, although the Premier League has included 36 different teams during this span, it only includes 20 teams in any particular season. *Id.*

89. ESPN ALMANAC, *supra* note 77, at 99-102, 249-56, 371-75. The only NFL team to miss the playoffs was the expansion Houston Texans, who did not begin play until 2002. The two NBA teams that didn't qualify were the expansion Charlotte Bobcats, who began play only in 2004-05, and the Golden State Warriors. The Warriors were the only

strated by these statistics, represents a challenge to the idea that leagues need competitive balance to succeed financially.

Despite its lack of competitive balance, the Premier League maintains fan interest because of its *competing competitions*. Soccer in England is governed by the Football Association, an independent body not affiliated with any club or club ownership group, that sets the rules for competition.[90] Like major league sports in North America, the Premier League produces a league champion. Unlike North American leagues, the championship is decided via a thirty-eight game schedule with no playoffs, the winner being the team that achieves the best record.[91] However, there are also additional competitions at the top and bottom of the league. In addition to the games that count toward the league championship, teams in the Premier League compete in several tournaments during the season, sometimes with teams from other leagues. At the bottom of the standings is a second competition to avoid placing in the bottom three, who are relegated to the division below and must try to re-qualify for the Premier League the next year.[92]

Fans pay attention to the Premier League in part due to its members' participation in a complex system of tournaments separate from the league games. Two "cup" competitions are interspersed within the league schedule. The Football Association ("F.A.") Cup is older and more prestigious than the other cup competition, the League Cup. The cups are both structured as single-elimination knockout tournaments in which there are no seedings and the draw for each successive round is done at random. As long as a given team meets basic standards of ability and stadium quality, the F.A. Cup is open to any team in England. Participants in the League Cup include not only the twenty Premier League teams, but also seventy-two other clubs that compete in the lower-echelons of the league struc-

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team to play the full decade in either the NBA or NFL and not once qualify for the post-season.

90. *See* TheFA.com, History of the FA Cup, http://www.thefa.com/TheFA/The Organisation (last visited Apr. 24, 2006) [hereinafter History of the FA Cup].

91. Team records are translated into a total point score by awarding points for wins and ties, with the team holding the most points at the end of the season being awarded the championship. SKY SPORTS YEARBOOK, *supra* note 85, at 48; *see also* Premier-League.com, Rules of the Barclays Premiership Competition, http://www.premierleague.com/fapl.rac?command=forwardOnly&nextPage=enCompIntro (last visited Apr. 24, 2006).

92. SKY SPORTS YEARBOOK, *supra* note 85, at 595.

ture.[93] Twice a year, the Premier League and "minor" league teams participate together in single-elimination tournaments (see Table 3).

Table 3[94]
Summary of Annual Competitions Available to Premier League Clubs

The Premier League	Every Premier League team plays each opponent twice in the thirty-six game regular season. At the end of the season, the team with the most points (based on wins and ties) is crowned champion.
The Relegation System	Every season the Premier League teams placing 18th-20th in competition are relegated to a lower league named (confusingly) the Championship, where they must attempt to requalify for the Premier League the following season.
The F.A. Cup	A single elimination tournament that takes place on designated weekends during the season. The competition is open to any club within England meeting a basic standard of ability and stadium quality. In 2005-06 a record 674 clubs entered the Cup. The competition was first played in 1872, and the winner receives an invitation to compete in the UEFA Cup.
The League Cup	A single elimination tournament similar in structure to the F.A. Cup, but open only to the 92 clubs in the four professional divisions of the league. Like the F.A. Cup, the winner receives an invitation to the UEFA Cup.
The Champions League	The most prestigious club competition in Europe. The name reflects the fact that it originally invited only the previous season's Premier League champion to compete against the champions of other European Leagues.. It has since been expanded so that the top four League finishers are also invited to participate. Entrants play a round-robin group stage against other top European clubs, with the top finishers advancing to a single-elimination tournament stage that culminates in the crowning of a European Champion.
The UEFA Cup	A second European tournament structured in a similar manner to the Champions League. The UEFA Cup is typically open to the Premier League teams that finish fifth and sixth in the league standings, along with the winners of the two cup competitions.

Various Premier League teams also compete in European competitions during the season. The Champions League is a competition involving the best club teams from throughout Europe. The top four annual finishers in the Premier League qualify for the following year's Champions League

93. The League Cup was first contested in 1962. *Id.* at 602-19. The FA Cup was first contested in the 1871-72 season and is now in its 125th season. History of the FA Cup, *supra* note 90.

94. SKY SPORTS YEARBOOK, *supra* note 85, at 793-827.

competition. The Champions League starts with a group round robin stage, from which the top teams advance to single-elimination knockout rounds that culminate in the crowning of the European club champion.[95] The UEFA Cup is a secondary European competition whose structure mirrors that of the Champions League with group stages leading to knockout rounds.[96]

In addition to these championship competitions, there is also a competition to avoid the bottom of the barrel. England's soccer structure allows any club—no matter how small—to reach the top level of play through a system of merit.[97] Every year the bottom three finishers in the Premier League are dropped, or "relegated," and replaced by the top three teams from the second-tier division, currently known as the Championship. The three relegated teams can earn a return to the Premier League if they finish at the top of the Championship the next season. Similarly the bottom three teams in the twenty-two team Championship are relegated to the division below, known as Division One. That process continues to Division Two, which is the fourth and bottom level of fully professional soccer in England. These four tiers of professional play comprise the "Football League."[98]

The ladder continues below Division Two with the semi-professional Football Conference. Though the F.A. changes the process from time to time, usually the bottom team from Division Two is relegated to semi-professional status, while the champion of the Conference is promoted to full professional status in Division Two. This process of relegation and promotion continues beyond the Conference through an array of semi-professional conferences down to small regional and local leagues.[99]

This system thus allows any team to enter the league structure. Though initial entrance to the league structure is unhindered, the F.A. sets objec-

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95. *Id.* at 793-809.

96. *Id.* at 811-27.

97. This Article focuses on professional sports in England, but the system of promotion and relegation is not unique to the country. According to a consultation paper issued by the European Union, the system of promotion and relegation "is one of the key features of European sport.' In theory teams can start at the lowest rung of the ladder in a regional competition and by dint of sporting merit alone they reach the top." Stephen Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 635-36 (2002) [hereinafter Ross & Szymanski, *Open Competition*] (quoting European Commission Directorate-General X, The European Model of Sport, http://ec.europa.eu/sport/action_sports/historique/docs/doc_consult_en.pdf (last visited Nov. 20, 2006)).

98. Noll, *Promotion and Relegation*, *supra* note 65, at 179.

99. *Id.* at 180; *see also* Ross & Szymanski, *Open Competition*, *supra* note 97, at 635-36.

tive requirements for each level, including stadium capacity, financial standing, and ability to pay players. Any club can progress up the ladder as long as it wins games and meets the progressively strict business guidelines set by the F.A. at the higher levels.[100]

The "open architecture"[101] of professional soccer in England helps the Premier League maintain fan interest through these various competing competitions. This is not to say that North American sports leagues should be compelled to follow such a model. Rather, this example demonstrates that competitive balance may not be the requisite that antitrust courts assume. Courts make this assumption based on the questionable paradigm that fan interest must focus on a single, unique league championship rather than multiple rewards and penalties on multiple levels of play. Instead, the experience of professional soccer in England shows that it is possible for fan interest to remain high even if courts were to strike down the anticompetitive restraints protecting competitive balance.[102]

B. The "Two-Sided Market" Critique: A Bad Trade?

A closer examination of the explanations used by professional sports leagues to defend restraints in antitrust actions reveals several weaknesses

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100. The open entry system also provides an outlet for disgruntled fans. Last year some Manchester United fans, furious over the sale of the club to American billionaire Malcolm Glazer, founded their own club and named it F.C. United of Manchester. The club has begun play in the North West Counties League, and could conceivably play in the Premier League in a decade if promoted yearly. John Cassidy, *The Red Devil*, THE NEW YORKER, Feb. 6, 2006, at 46.

101. The term "open architecture" has been used for more than a decade to describe systems that are characterized by "free access" and "decentralized" design, such as the internet, rather than the traditional "closed," "channelized" systems characterized by scarcity, like traditional broadcast media. *See* Jerry Berman & David Weizner, *Abundance and User Control*, 104 YALE L.J. 1619, 1622 (1995). The term has an older, similar meaning when referring to the design of computer hardware. *See* Rochelle Dreyfus, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 VA. L. REV. 677, 735 n.206 (1986) (describing IBM as having designed the PC with "open architecture" rather than a "proprietary" system).

102. It is possible that, taking existing monopolistic practices and anti-competitive restraints as a given, competitive balance could become more important than it would otherwise be. However, where such arrangements are not compelled or authorized by the government apart from the antitrust laws, giving weight to the competitive balance argument because of such anti-competitive circumstances would essentially give bonus points to law violators. In a sense, applying the competitive balance argument to monopolistic enterprises may be sports' version of antitrust's famous "Cellophane Fallacy." *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 3.4b-c (discussing error in assuming that currently monopolized industry is "normal" when considering consumer response).

in the competitive balance argument. While team owners and leagues cite the competitive balance ideal, an alternative motive for labor market and investment restraints lies in applying the concepts of monopsony and two-sided markets to sports leagues. Taken together, these concepts undercut the asserted validity of the economic tradeoff between anti-competitive costs and pro-competitive benefits that lies at the heart of the competitive balance argument. As this Section will discuss, monopsony (or buyer market power) creates significant problems for the competitive balance argument. The economic issues inherent in two-sided markets further exacerbate the flaws in the competitive balance argument.

1. Monopsony

Courts and commentators have readily applied the theory of monopsony to professional sports leagues.[103] If teams can jointly agree, through league rules or otherwise, to reduce the competition faced by the talented player labor they employ, they can reduce the cost of one of their most important inputs. As a result, they often institute restrictive policies—such as player-entry drafts, reserve clauses, and salary caps[104]—that reduce the ability of players to force teams to compete for their services. Additionally, in the same way that a monopoly cartel must worry about a new entrant undercutting their price, a monopsony cartel must worry about defectors or new competitors outbidding their low fixed price. The concern manifests itself in league policies designed to control new investment and stem the development of competing leagues.[105]

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103. *See* Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 599 (7th Cir. 1996) (Easterbrook, J.) (observing that, to its players, the NBA "looks more like a group of firms acting as a monopsony" than as a single source of a product called "NBA basketball"); Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) (observing that "[a]thletic prowess is . . . a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation"). *See* Ross, *Misunderstood Alliance*, *supra* note 8, at 542 (observing and defending the use of professional sports league restraints to enhance monopsony power).

104. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (considering restraints on movement of existing players within a sports league); Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978) (considering player-entry draft system); *Brown*, 50 F.3d 1041 (considering fixed salary system for players).

105. *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1111 (1st Cir. 1994) (considering challenge to league ownership policy); U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986) (considering challenge to alleged exclusive deals to thwart entrant by locking up television broadcast market).

Monopsony has an often-ignored cost, though.[106] Like monopoly, it leads to lost efficiency through "deadweight loss."[107] A monopolist causes its consumers to purchase less of its product when it raises prices. Thus, a rational monopolist makes up for the lost output by recouping revenue on the remaining units sold. Similarly, a monopsonist causes its suppliers to sell less of their product when it lowers prices. A rational monopsonist makes up for the lost supply by paying less on the remaining units it purchases. That is, the monopsonist benefits by paying less for what it buys, which represents a transfer of welfare from its suppliers due to the monopsonist's market power. Furthermore, monopsony generates an additional overall loss to society, since the amount of output purchased is less than what it would be in a competitive market.

When applied in the context of major league sports, monopsony theory leads to a claim that may be hard to swallow for those repeatedly subjected to the rhetoric of "overpaid" athletes playing a "game" for a living. Monopsony theory predicts that the aggregate number of athletically talented people striving to become professional athletes will plummet if sports league wages are depressed and other fields look relatively more attractive. This theory should also make sense to law students, since typically the number of students applying to law schools—and consequently the test scores of those admitted—rises in a recession, when alternative fields look worse by comparison. To be sure, recession or not, law schools will fill their classes and still "look" and "feel" the same—just as the Yan-

106. Despite its efficiency loss, *see infra* notes 108-109 and accompanying text, courts have sometimes treated monopsony more leniently than monopoly on the grounds that while seller market power leads to higher prices, buyer market power leads to lower prices. These prices could then be passed on to consumers if the buyer were, for example, a chain store or intermediary. *See, e.g.*, Balmoral Cinema v. Allied Artists Pictures Corp., 885 F.2d 313, 314 (6th Cir. 1989) (suggesting that an agreement among theater owners not to bid against each other for movies to show might "serve rather than undermine consumer welfare" because it could result in lower prices for consumers); Kartell v. Blue Shield, 749 F.2d 922, 930 (1st Cir. 1984) (refusing to condemn a health insurer's policy of setting the maximum price it would pay for health care services used by its insureds and stating that "the prices at issue here are low prices, not high prices"). This appears to ignore the problem of deadweight loss, which is common to both monopoly and monopsony. *Compare* HOVENKAMP, *supra* note 102, § 1.2 (questioning differential treatment since monopsony reduces output in the monopsonized market just as monopoly does in the monopolized market, and observing that "[m]any federal judges have failed to see this"), *and* Noll, *Buying Power*, *supra* note 8, at 591 (concluding that "asymmetric treatment of monopoly and monopsony has no basis in economic analysis"), *with* Jonathan M. Jacobson and Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) (arguing for more lenient treatment of joint-purchasing organizations by competitors).

107. *See* HOVENKAMP, *supra* note 102, § 1.2.

kees will still have 25 players on their roster. Some might even repeat the cliché that the most successful law students (such as law review editors), are, like major-league athletes, overpaid.[108] But if law firms acted in concert to downwardly fix the prices that they paid to law review editors, studying law would become a less attractive career choice for the potential students at the margin. Similarly, given the long odds against making it to the major leagues, a young person with athletic talent might skip taking the first step on the professional ladder and instead proceed into another field. As a result, the "deadweight loss" theory predicts that under monopsony, the overall talent level in a league (or law schools) will decline due to depressed wages.[109]

Courts and commentators who advocate the competitive balance argument often fail to note either the possibility of monopsony or the "deadweight loss of talent" that monopsony creates. A few commentators, like Professor Stephen Ross, defend the competitive balance argument despite recognizing leagues' tendency to become monopsonies.[110] However, as discussed in the next Section, viewing professional sports leagues through the lens of two-sided market theory compels the conclusion that the nature of the leagues magnifies these harms.

2. Two-Sided Markets

Courts and commentators often try to fit professional sports leagues into the corporate and antitrust paradigm of "joint ventures" when evaluating the restraints employed by these leagues.[111] Comparing sports leagues to joint ventures makes sense if one assumes that teams in a league are separate entities cooperating to make a product.[112] But sports leagues are

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108. *See, e.g.*, Geoff Yuda, *Competition: Just Part of the "Business"?*, 23 PENN. LAWYER 28, 29 (2001) (reporting results of a survey in which 39 percent of large-law-firm managing partners in Pennsylvania thought first- and second-year associates were "grossly overpaid"); *Associate Salaries: Are Your Firm's on Target with Market Rates?*, 96-2 LAW OFFICE MGMT. & ADMIN. REPORT 1 (Feb. 1996) (reporting that "many law firm administrators and managing partners fe[lt] that associates" were "overpaid" in 1996 despite static salaries for years). The author, on the other hand, believes that the market is just "clearing."

109. *See* Noll, *Buying Power*, *supra* note 8, at 589.

110. *See, e.g.*, Ross, *Misunderstood Alliance*, *supra* note 8, at 540-42.

111. *See* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n., 95 F.3d 593, 599 (7th Cir. 1996) (considering applicability of joint venture rubric to the NBA); *see, e.g.*, Ross & Szymanski, *Open Competition*, *supra* note 97, at 627 (arguing efficiency would be enhanced during the entry of new teams into sports leagues if teams were viewed as joint ventures).

112. *See* Thomas A. Piraino, *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889 (1999) [hereinafter, Piraino, *Proposal for Antitrust*] (arguing

more than simply joint ventures between teams; they are also intermediaries between players on one side, and fans on the other. Thus, they form a two-sided market.

Two-sided markets[113] are situations in which one or several platforms—typically a media outlet, a market, a network, or even computer software—facilitate interactions between different end-users. The owner of this platform will usually try to court both sides of the market at prices that allow a profit.[114] Typical examples of two-sided markets include newspapers that compete for advertisers as well as readers, computer operating systems that compete for software developers to write applications and consumers to use them, and credit card payment systems that try to attract both merchants and cardholders. Two-sided markets are characterized by what economists call "demand-side economies of scale," more commonly known as the "chicken-and-egg" problem. These effects are sometimes referred to as "network effects."[115] Specifically, an end-user in the market values the product more as more end-users adopt it. For example, Microsoft Windows becomes more valuable to a computer user as more users adopt it and as more software developers write applications for it. The shelves of law school libraries contain much discussion about two-sided markets and the network effects that characterize them. However,

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that antitrust treatment of joint ventures is also appropriate for monopolistic professional sports leagues).

113. "Two-sided market" is a term of art borrowed from economics. Its market definition may not necessarily apply in antitrust law, since case law has sometimes discussed different sides of a two-sided market as, in fact, different markets. *See* Jean Charles Rochet & Jean Tirole, *Two-Sided Markets: An Overview* (IDEI-CEPR, Toulouse, France, January 23-24, 2004), *available at* http://www.frbatlanta.org/filelegacydocs/ep_rochet over.pdf; David Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 330 (2003) (defining a two-sided market, but observing that "[d]espite their economic importance, multi-sided markets have only recently received attention from economists and, with the exception of some recent work on payment cards, have received virtually no attention in the scholarly literature on antitrust"); Randal C. Picker, *Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers?*, 72 U. CHI. L. REV. 189, 202-03 (2005) (describing Microsoft's Windows Media Player as a platform in a two-sided market, with consumer listeners on one side and content creators on the other).

114. *See* Rochet & Tirole, *supra* note 113, at 4.

115. "Network effects" have been defined as situations where consumers of a product benefit from other consumers' use of it or a compatible product. *See* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 483-84 (1998).

the application of the concept to the antitrust law of sports leagues appears to be a novel issue.[116]

A professional sports league can be seen as a two-sided market in which individual teams and leagues as a whole provide platforms to court both the fan- and player-sides of the market. They do so in an environment dominated by a chicken-and-egg problem between these two groups of end-users. That is, all else being equal, fans are attracted to teams and leagues with more athletic talent—witness the higher prices and greater attendance at major league professional sports versus minor leagues. On the other side of the market, talented players are attracted to teams and leagues with higher numbers of fans, which makes higher player salaries possible. Each end of the market feeds into the other.

Given this environment, it follows that teams in a league increase their profits if they coordinate their behavior to maximize the talent they can purchase while minimizing its cost, thus maximizing the fan interest they can translate into revenue. Monopsony thus encourages restraints to keep costs lower on the player-side of the market. Leagues might also be expected to apply restraints among teams to raise revenue on the fan-side of the market.

Defenders of the competitive balance argument argue that the benefit to one side of a two-sided market outweighs the harm to the other side of the market.[117] In particular, they argue that benefit accruing to leagues through competition against other leagues or other forms of entertainment outweigh the economic harms of monopsony in the player input market.[118] In arguing this, they endorse a distributional tradeoff between the economic welfare of one group (players) versus another (fans). While one can

116. One commentator has described sports leagues as benefiting from network effects, because they become more attractive to fans as they become "national in scope," and has described nationwide leagues in the single sports context as "natural monopolies." Piraino, *Proposal for Antitrust*, *supra* note 112, at 899. This conception of network effects differs from the two-sided market idea described in this Section, and may in fact simply be a form of economies of scale, rather than "true" network effects. Natural monopolies are often defined as industries characterized by such strong economies of scale that they exhibit "declining average costs"—meaning that having a single supplier can be more efficient than having competition. *See* John Duffy, *The Marginal Cost Controversy in Intellectual Property*, 71 U. CHI. L. REV. 37, 38 (2004).

117. *See* Ross, *Misunderstood Alliance*, supra note 8, at 539-41 (defending competitive balance argument based on "possibility" that harm caused by monopsony to competition in the player labor market may be offset by increased output through qualitatively better entertainment due to competitive balance).

118. *Id.*

defend such a tradeoff on non-economic grounds,[119] one can only defend such a tradeoff economically by claiming that the benefits to one group outweigh the costs to the other. This argument differs from efficiency defenses in which the benefits and harms accrue to the same parties. In a prominent example, regulators and courts considering major corporate mergers frequently face the argument that the reduction in competition that consumers may face when competitors merge will be more than offset by a reduction in costs due to increased efficiency as a result of the merger. In such an argument, the costs and benefits accrue to the same group: consumers. Despite this, antitrust has rejected this kind of tradeoff in the merger context.[120] Given this doubt, redistributive transfers between different parties have not surprisingly been viewed skeptically, with those skeptics advocating that they be tightly constrained.[121] In a further distillation of these views, the First Circuit has endorsed the position that, in the professional sports context, such a tradeoff is relevant only to the degree that the benefit in one market "feeds back" into the harmed market.[122]

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119. *Id.* at 541 (citing "the need to democratically interpret the Sherman Act" and stating that "it is highly doubtful that the voters . . . would prefer such an anti-consumer result" as the invalidation of "an agreement necessary to enable a sports league to offer exciting championship races should nonetheless be invalidated because it has an adverse effect on some player[s']" salaries). It should be noted that this view implicitly assumes the necessity of a single unique championship competition, as critiqued in the previous Section.

120. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) (rejecting defendants' argument that they should be allowed to merge because, although competition in Philadelphia would be reduced, the banks would be better able to compete for large business accounts against New York-based banks); FTC v. Tenet Healthcare Corp., 17 F. Supp. 2d. 937, 948 (E.D. Mo. 1997) (concluding that balancing of pro-competitive effects in one market versus anti-competitive effects in another is not allowed in merger cases).

121. *See, e.g.*, Robert Pitofsky, *Efficiencies in Defense of Mergers*, 7 GEO. MASON L. REV. 485, 490-91 (1999) (advocating a "narrow approach" to such tradeoffs in the merger context due to "measurement issues" concerning the harms and benefits and the "fairness question" of whether it is "appropriate to deny to one group the guarantees of a competitive market in order to provide the benefits of efficiency to another group"). There are those who do advocate this kind of interparty transfer, although they have drawn some criticism. *See* Noll, *Buying Power*, *supra* note 8, at 591-92 (noting that antitrust tolerance of monopsony "must be based on an argument that it is socially desirable to redistribute income to a group of buyers even if doing so is costly to their members of society" and calling such a position "difficult to defend").

122. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1113 (1st Cir. 1994) (concluding that considering pro-competitive effects on another market is legitimate "to the extent the NFL's policy [that bans public ownership] strengthens and improves the league" as "a popular entertainment product unimpaired by the conflicting interests that public ownership would cause . . . resulting in increased competition in the market for ownership interests in NFL clubs").

That is, the market aided by a restraint must itself generate a compensating benefit in the harmed market that exceeds the harm created by the restraint.[123]

The effects of monopsony and the characteristics of two-sided markets make the tradeoff at the core of the competitive balance argument difficult to defend. First, monopsony involves a reduction in output, and thus, a deadweight loss to overall market efficiency. If a buyer cartel holds prices down, fewer sellers will enter the market. Thus, even if restraints create a reduction in player labor costs that accrues to fans as consumers, there is still a net welfare loss as athletic talent forgoes entering the market at the lower price. While it may be difficult in practice to determine whether less athletic talent is entering a monopsonistic league than it otherwise would, this general effect of monopsony is fairly undisputed.[124]

Second, the demand-side economies of scale that exist in professional sports characterize it as a two-sided market. This categorization means that the output-reducing effects of monopsony should be magnified. In the same way that fans find a team or league more attractive as it attracts more talent, conversely the reduction in player talent that monopsony causes should tend to dampen fan interest. Additionally, if a player finds a team or league that draws more fans more attractive, then a reduction in fan interest should also feed back into the player market. The end result should be a spiral of dissatisfaction. Strong market power combined with this dynamic may explain why professional leagues remain very profitable at least temporarily, while fan interest wanes or shifts to competing forms of entertainment (e.g., NASCAR). In the same way that it is difficult to ascertain whether monopsony actually causes downward pressure on the amount of player talent, determining whether fan interest is lower than it might have been may be hard to measure. However, if sports leagues are properly understood as two-sided markets,[125] such effects ought to be real.

Sports leagues defend their right to engage in monopsony practices and reap the gains that come with being a successful platform in a two-

123. *Id.*

124. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 316 (1991) (noting that monopsony "reduce[s] the producers' profits, causing them to reduce supply in the future"); Noll, *Buying Power*, *supra* note 8, at 594 (arguing that monopsony's "net effect on society is a loss of efficiency and welfare and a redistribution of wealth to consumers of the monopsonized product"); *see also supra* notes 106-107.

125. *See, e.g.*, SangHoo Bae & Jiyoung Kwon, *Two-Sided Network Effects in the Market for Professional Sports* (Northeastern University Economics Dept. Seminar Series, Feb. 7, 2006), *available at* http://www.economics.neu.edu/activities/seminars/documents/baepaper.pdf.

sided market. They argue that they are either currently constrained by external competitors in the same field, or that they will have to compete in the future with new entrants "for the field" itself.[126] Defendants in other antitrust cases involving two-sided markets have also made these arguments.[127] Deserving of merit or not, these claims are distinct from the assertion that there is an inherent, internal need for competitive balance within a sports league. Indeed, a focus on leagues' external competitors and on possible new competitors in order to excuse the leagues' restraints is congruent with the approach taken by antitrust defendants in other areas.[128]

The competitive balance argument is flawed both in its assumption that a single unique competition is beneficial, and that the tradeoff it creates between fans and players is justified. However, the competitive balance argument also draws strength from a third justification: that it is tightly linked to fan interest.

C. The "Weak Link" Critique: Letting Fans Call Their Own Shots

In addition to advocating for restraints in the market for player labor, the competitive balance argument also has a fan-side component. The argument goes that with a system of competitive balance, fans will show more interest in a sports league compared to other leagues or other forms of entertainment. However, empirical research from the fairly new field of sports economics refutes this alleged connection between fan interest and competitive balance. Furthermore, there are strong arguments that, even if they wanted to, some sports leagues would not or could not significantly improve competitive balance through their policies. Finally, the rejection of the competitive balance argument extends beyond the narrow confines of antitrust law. The example of major league baseball's fight against fan-organized fantasy leagues suggests that this Article's contentions bear on questions beyond the rule of reason in antitrust, into questions of intellectual property rights.

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126. United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001). *See generally* Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968) (discussing the distinction between competition for a field and competition within it).

127. *Microsoft*, 253 F.3d at 49.

128. *Id.* at 51-55 (considering what other products might be able to play the intermediary role that Microsoft Windows does between software users and software developers).

1. Competitive Balance and Fan Interest

The basic, fan-side premise of the competitive balance argument is that fans find sports leagues more attractive when teams are more evenly-matched. On a broad level, this is almost certainly true; few would want to watch a game where the identity of the victor was already a certainty. Indeed, the fact that television replays of classic sports events draw abysmal ratings further proves this point.[129]

But the fact is that games with an absolute certainty of outcome are like Soviet elections: an extreme case. Decades ago, scholars found a link between fans' desire to attend games and the level of uncertainty surrounding the victor of a league championship race, but their findings assumed an extreme case in which the identity of the victor was either known or unknown.[130] Even if it were true that total absence of surprise repels fans' attention, this does not by itself prove that maintenance of fan interest requires league-wide competitive balance.[131] In fact, recent studies of the link between fan interest and the degree of competitive balance (rather than the simple binary choice of whether victors are known or un-

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129. *See* Stefan Szymanski, *Tilting the Playing Field: Why a Sports League Planner Would Choose* Less, *Not More*, *Competitive Balance* 2 (Tanaka Business School Discussion Papers, TBS/DP05/35, 2004) [hereinafter, Szymanski, *Tilting the Playing Field*], *available at* http://www3.imperial.ac.uk/pls/portallive/docs/1/43004.PDF (last visited July 10, 2006) (observing that "without uncertainty a game is relatively uninteresting" and noting the lack of "excitement generated by watching a re-run of last year's World Series"); BERRI, SCHMIDT & BROOKS, *supra* note 11, at 26 (observing that "the fact that we do not know the outcome attracts us" and noting "the dismal ratings ESPN Classic earns from showing reruns of the greatest sporting events in history"). The comparison between watching a rerun and lack of competitive balance is not totally apt, however, since a fan with a good memory watching a rerun might recall not only the victor of the game, but could also anticipate the major events in the game as they were about to take place. To the extent that part of the viewer's utility is the "adrenaline rush" while watching quick, unexpected events, that would be lost.

130. Two studies suggest that more fans attend a game when a championship race is closer. *See, e.g.*, HENRY G. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 11 (1973); Roger Noll, *Attendance and Price Setting*, *in* GOVERNMENT AND THE SPORTS BUSINESS 115, 156-57 (Roger Noll ed., 1974).

131. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 82-83. The authors point out that "[t]here is a disconnect between the theoretical and empirical treatment of competitive balance." *Id.* The reason is that theories that discuss when uncertainty of outcome is "completely taken away" do not fit a world where "uncertainty of outcome" persists even when the level of competitive balance is "quite low." *Id.* In other words, even during the Yankees' dominant periods in baseball, fans could not be completely certain of the outcome of games or season championships.

known) have found little empirical evidence that such a link exists.[132] For example, in a 2006 book, economists David Berri, Martin Schmidt, and Stacey Brook examined the relationship between competitive balance and attendance in the NBA over time and found no statistically significant relationship.[133] In 2002, economist Brad Humphreys weighed several measures of competitive balance against baseball attendance over the course of the 20th century and found virtually no relationship.[134]

The lack of empirical support for the proposition that increased competitive balance attracts fans at the margin should not be as surprising as it sounds. There are disproportionately successful teams that opposing fans "love to hate"; revenues and attendance numbers do not discriminate between attendance out of admiration versus dislike. Furthermore, "anti-Yankees" fans, for example, do not live in a world in which outcomes are 100% foreordained. Even if they enjoy their schadenfreude relatively rarely, the intense feelings and emotions when they do could compensate for the lack of competitive balance.

2. Competitive Balance and League Policies

The competitive balance argument also falls short because of the lack of evidence that leagues seek, or are even capable of achieving, high levels of competitive balance. If leagues do not possess sufficient motive to create competitive balance, then it is reasonable to doubt whether they will design policies accordingly. This doubt applies also to those league policies that run afoul of the antitrust laws. Additionally, even if leagues pursued policies that promote competitive balance, there is reason to wonder whether they can practicably achieve it.

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132. *Id.* at 216 (stating that "we do not have much evidence that fans really care about the level of competitive balance"); *see* Stefan Szymanski, *Income Inequality, Competitive Balance, and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer*, 111 ECON. J. 69, 69 (2001) (concluding, with respect to English professional league soccer, that "match attendance appears unrelated to competitive balance").

133. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 64-82.

134. Brad Humphreys, *Alternative Measures of Competitive Balance in Sports Leagues*, 3 J. SPORTS ECON. 133-48 (2002). Humphreys found that there was no statistically significant relationship between attendance and competitive balance as measured by either the Herfindahl-Hirschman Index familiar to antitrust merger analysis or by an index based on the relationship of observed standard deviation of wins in a league compared to the standard deviation statistically expected in a league full of games where wins and losses are as even as a coin-toss. *Id.* Using a third, newly-introduced eponymous measure, Humphreys examined baseball throughout the 20th century and found a very weak relationship: moving from the lowest level of observed competitive balance to the highest level would draw an average of only four more fans per game. *Id.*

Some recent economic studies have suggested that, at the margin, increased competitive balance could actually decrease fan attendance.[135] In one example, Professor Stefan Szymanski analyzed the relationship between attendance and wins for the 30 MLB teams from 2001 and 2003, and discovered that a situation of perfect competitive balance would actually generate *lower* league-wide attendance.[136] Similarly, Professors Berri, Schmidt, and Brook confirmed that, based on data from the NBA's 2003-04 season, increasing competitive balance would have negatively impacted league-wide attendance.[137] Indeed, both studies point out that markets differ in size and economic response to wins. The authors infer that because wins appear to generate more revenue in some markets than others, leagues to some degree actually have a strong interest in avoiding competitive balance.[138]

Given the evidence that competitive balance may actually decrease fan attendance, a rational sports league might choose not to pursue competitive balance as a matter of policy.[139] Economists make sense of these findings with the intuition that not all teams in a league are created equal. At the margin, some teams gain more fan interest than others for every win. This could be for a variety of reasons, including the fact that some teams play in larger markets with more people.[140] However, there are only so many wins to go around.[141] As a result, a league that is not yet at full attendance capacity could sell additional seats to its games by instituting

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135. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 83 (finding that empirical "analysis of gate revenue [in the NBA] suggests that [moving closer to] perfect balance would lower league revenues"); *See* Szymanski, *Tilting the Playing Field*, *supra* note 129, at 28 (concluding, based on empirical study, that increased competitive balance may not be in the interest of maximizing attendance in Major League Baseball).

136. *See* Szymanski, *Tilting the Playing Field*, *supra* note 129, at 28.

137. *See id.* at 127.

138. *See id.* at 8, 28.

139. One might argue that professional sports leagues could maximize their competitiveness versus other forms of entertainment by pursuing an optimal level of competitive imbalance. Such a standard seems utterly unworkable for courts under the rule of reason. At any rate, this is not the competitive balance argument as courts have so far approached it.

140. *See* BERRI, SCHMIDT & BROOKS, *supra* note 11, at 83 (finding that "an additional win had greater value for the Chicago Bulls, New York Knicks and Los Angeles Lakers than one more win had for the Minnesota Timberwolves, Indiana Pacers and San Antonio Spurs" for the 2003-04 NBA season).

141. In the absence of ties, the number of wins must equal the number of losses, league-wide.

policies that yield more wins for teams that generate comparatively more marginal revenue per win.[142]

Even if professional sports leagues want to achieve competitive balance, they may not be able to do so. Recent economic studies have found that one of the most important determinants of competitive balance is the size of the underlying population capable of playing the sport.[143] The scope of the eligible population depends on factors beyond a sports league's control plus factors, like the inherent nature of the sport, which the league cannot easily alter. For example, economists have found, perhaps unsurprisingly, that the key factor limiting competitive balance in the NBA is that there is a short supply of very tall people, and an even shorter supply of those with NBA-caliber skills.[144] The NBA cannot simply make more Shaquille O'Neals and Major League Baseball cannot easily engineer another Barry Bonds.[145] To the extent that the nature of a sport subjects an already small minority of athletically gifted people to an additional filter—e.g., "are you 7' tall?" or "can you hit a slider?"—the variance among those who succeed will increase, and achieving competitive balance may become difficult, if not impossible.

Given the difficulties of increasing competitive balance and the questionable motives to do so, it seems overly charitable for courts to allow sports leagues to claim that their anti-competitive restraints aim to achieve such a result. After all, sports leagues have not attempted to create or en-

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142. *See* Szymanski, *Tilting the Playing Field*, *supra* note 129, at 32 (observing applicability of this insight, but noting that a league like the NFL, where "nearly all" games are already sold out, would not face the same incentives).

143. *See* Sangit Chatterjee & Mustafa R. Yilmaz, *Parity in Baseball: Stability of Evolving Systems?*, 4 CHANCE 37 (1991); *see also* ANDREW ZIMBALIST, BASEBALL AND BILLIONS 97 (1992); Martin B. Schmidt & David J. Berri, *On the Evolution of Competitive Balance: The Impact of an Increasing Global Search*, 4 ECON. INQUIRY 693 (2003).

144. David J. Berri, Stacey J. Brook, Aju Fenn, Bernd Frick & Roberto Vicente-Mayoral, *The Short Supply of Tall People: Competitive Imbalance in the National Basketball Association*, 39 J. ECON. ISSUES 1029 (2005).

145. In fact, many restrictive policies found in sports leagues (such as minimum-age requirements and limitations on the flow of "backup" players on one team to another team where such players would be on-field starting players) actually reduce the pool of talent available to draw upon. Furthermore, Congress has threatened to close off pharmacological solutions to this problem. Clifton Brown, *Uniform Steroid Rule is Proposed in House*, N.Y. TIMES, Apr. 28, 2005, at D1 ("While Commissioner Paul Tagliabue defended the National Football League's steroid policy before a House committee Wednesday, some members of Congress were planning to support a uniform testing policy for all professional sports leagues in the country."); Murray Chass, *Congress Blows Smoke and Ignores Real Killers*, N.Y. TIMES, Nov. 15, 2005, at D4 (describing proposed legislation that sets forth penalties for steroids use in professional sports).

force rules requiring that particularly outstanding players be shared among teams as an "essential facility" for winning a championship. But, as the next Section discusses, fans have innovated to create a system for sharing such players and for maintaining interest by creating fantasy leagues that allow them to "reallocate" key talent and create their own competitive balance.

3. Major League Baseball v. New Competing Competitions

The competitive balance argument presumes that the league itself must produce the competition that generates fan interest (and thus revenue). However, recent experience suggests that that is not necessarily the case. Fan innovation and globalization are capable of creating new competitions outside of the traditional league system.

Fans create interest-generating competition through so-called "fantasy" leagues in which they reallocate (or "draft") players onto fantasy teams of their own creation. Despite the term, "fantasy" baseball does not involve sending Batman, Cinderella and Don Quixote up to bat. Instead, fantasy players form a league by "drafting" real-life professional players to be members of their respective fantasy teams. The statistics that these players generate in real games are collected, and fantasy points are awarded based on these statistics. The better a fantasy team owner's real-life players perform, the more fantasy points his or her team accrues. The points tallied ultimately determine a fantasy league champion.[146] Invented in 1979 by writer and editor Daniel Okrent as "rotisserie baseball," such fantasy leagues have spread beyond baseball to other sports.[147] As a result, they have become widespread, with 15 million people spending approximately $1.5 billion annually to create and participate in such leagues.[148] The advent of computers and the internet aided the gain in popularity, as they have made tracking and crunching player data much easier.[149] These

146. For an authoritative history and description of "fantasy" or "rotisserie" baseball, see SAM WALKER, FANTASYLAND: A SEASON ON BASEBALL'S LUNATIC FRINGE (2006).

147. Okrent is credited with inventing rotisserie league baseball. *See, e.g.*, Matthew Purdy, *Who's on First? Wonder No More*, N.Y. TIMES, June 7, 2001, at G1 (describing Okrent as "the Abner Doubleday of Rotisserie baseball" after the claimed inventor of actual real-world baseball). However, board games based on the principle of simulating professional baseball by drawing on real world statistical data for its players existed for decades before Okrent's invention. *See* Lorne Manly, *Strat-o-matic A Throwback, Endures Era of the Xbox*, N.Y. TIMES, Jan. 13, 2006, at D1.

148. *See* Alan Schwarz, *Baseball Is a Game of Numbers, But Whose Numbers Are They?* N.Y. TIMES, May 16, 2006, at A1.

149. *See* Jim Hu, *Let the Fantasy Games Begin—At Work*, CNETNEWS.COM, Sept. 27, 2004, http://news.com.com/Let+the+fantasy+sports+games+begin--at+work/2100-1038_3-5381539.html (describing the online industry and observing that "[b]efore the Web,

"virtual reality" fan-operated leagues rely on the "real world" leagues for the player performances and statistics that the fantasy leagues use to generate their own games.[150] As a result, fans produce an "improved" league that contains the same level of unpredictability as the underlying real-world sports league. Because fantasy leagues rely on actual events in the real-world league, they help maintain fan interest in the latter.[151]

Unfortunately for the owners of fantasy baseball teams, Major League Baseball has taken a very real stance against these leagues. By litigating, MLB's internet arm seeks to compel the entities that provide fantasy baseball player statistics to purchase licenses from them.[152] In a case currently on appeal, MLB has so far been unable to garner such intellectual property protection.[153] The basis of MLB's argument does not appear to be that they themselves own the statistics, an argument that courts have previously rejected.[154] Rather, MLB, which purchased the players' internet and

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fantasy players would gather after work and pour through daily papers and sports magazines to compile their scores . . . [b]ut now the Internet does all the grunt work in real time").

150. *Id.*

151. *See, e.g.*, *Has Major League Baseball Hit a Foul in Its Recent Skirmish with Online Fantasy Leagues?*, KNOWLEDGE@WHARTON, June 14, 2006, http://knowledge.wharton.upenn.edu/article.cfm?articleid=1495 (free registration required) [hereinafter *MLB Skirmish*] (quoting *Baseball America* reporter stating that "[t]here is no question that fantasy leagues have helped baseball maintain and cultivate its popularity" and that they "have given people a great reason to pay attention every day"). The fantasy leagues generate interest among those who otherwise might ignore baseball, though they also alter the interest of existing fans. *Id.* (quoting fantasy-league magazine editor asserting that he "wouldn't care at all about Major League Baseball but for fantasy baseball"); WALKER, *supra* note 146, at 63 (author describing history of and own participation in a fantasy baseball league and observing that "[f]or as much baseball as I'm watching in these early days, I don't have the slightest idea what the [real] standings are, nor do I care").

152. *See* Complaint at 5, C.B.C. Distrib. & Mktg v. Major League Baseball Advanced Mktg., 443 F. Supp. 2d. 1077 (E.D. Mo. 2006), *available at* http://www.pacer.psc.uscourts.gov (alleging that MLB has attempted to preclude non-licensed entity from providing player statistics for use in fantasy baseball).

153. *See* C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Mktg., 443 F. Supp. 2d. 1077, 1081, 1095 (E.D. Mo. 2006) (concluding that use of player names with statistics without license does not violate right of publicity and, at any rate, would be protected First Amendment speech even if it were a violation). Major League Baseball is currently appealing this ruling. *See MLB Says It Will Appeal Fantasy Ruling*, ESPN.COM, Aug. 9, 2006, http://sports.espn.go.com/mlb/news/story?id=2544949.

154. *See* Nat'l Basketball Ass'n. v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997) (rejecting the NBA's misappropriation claim against Motorola and concluding that the NBA lacked a property right in factual descriptions of its games).

wireless rights from the players' union in 2005, contends that the players' rights of publicity are being infringed.[155]

MLB's challenge to fantasy league data providers raises familiar questions concerning the tension between intellectual property and the First Amendment,[156] as well as whether the right of publicity has become unmoored.[157] In addition to addressing these arguments, courts should also allow the logic of competing competitions to inform their considerations of whether to allow the right of publicity to fetter fantasy leagues.[158] Intellectual property issues often revolve around questions of how to best foster innovation while also avoiding misappropriation. Courts should take into account the value of innovation created by fantasy league fans when weighing the rights of fantasy leagues versus players' rights of publicity. Additionally, they should consider the competitive benefits fantasy leagues generate as "competing competitions."[159] While MLB's intellectual property rights may be entitled to protection, the ability to foreclose

155. *See* Memorandum in Support of MLBAM Motion for Summary Judgment at 1, C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Mktg., 443 F. Supp. 2d. 1077 (E.D. Mo. 2006), *available at* www.pacer.psc.uscourts.gov (asserting that "the right of publicity prevents [player statistics provider] from using players' names and identities" without a license).

156. *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917 (2005).

157. *See* Stacey L. Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006) (arguing that expansion of the right of publicity should be tempered by grounding the right in trademark law principles of source identification and limited by attaching the right mainly to the traditional trademark law harms of confusion and dilution).

158. It is possible that MLB is exempt from the areas of antirust law concerning this aspect of its business. Professional baseball is exempt from antitrust laws under its judicially-created exemption (save for labor relations, the exception for which Congress has repealed). *See* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Fed. Baseball Club of Balt. v. Nat'l League, 259 U.S. 200 (1922) (holding that baseball is exempt from the Sherman Act because it is "not a subject of commerce"). However, no case has discussed whether the scope of baseball's exemption extends to internet distribution of statistics. Furthermore, the judge-made law of baseball's antitrust exemption should not prevent a court from considering the efficiency consequences of fan innovation when dealing with intellectual property rights.

159. *See MLB Skirmish*, *supra* note 151 (stating that the League's legal stance "will have unexpected and unwelcome ramifications" and "might . . . discourage the sort of innovation that has made some segments of the economy so vital").

unlicensed fantasy leagues may fall outside the reasonable scope of such rights. In a reversal of the typical intellectual property dispute, MLB, the intellectual property rights-holder, is arguably using its rights to appropriate the profits from another's innovation.[160]

In addition to the innovation of fantasy leagues, globalization provides another means for externally-driven competing competitions to take place. In an attempt to emulate the success of World Cup soccer, American professional sports leagues in recent years have sought to engage professional hockey and baseball players in competitions against their global counterparts. While the NHL and MLB did not endorse these tournaments enthusiastically at first,[161] both leagues have since relented and now permit national teams to be comprised of players from both their leagues and foreign leagues.[162] In the future, there may be tournaments that match existing professional teams from different nations' leagues against each other, with rosters grouped by team affiliation rather than citizenship.[163] Such tournaments already take place among teams from different national soccer leagues in Europe. The most notable is the Champions League, which matches the top teams from a variety of leagues.[164] Should American pro-

160. *Id.* (contrasting the fact that, in the past decade of music industry litigation against online file-sharing, the music industry was trying to protect its core business of selling music, while Major League Baseball's litigation is aimed at seeking revenue from a source that it had not been engaged in and others had worked to develop—selling statistics).

161. *See* Murray Chass, *Finally a Chance to Find the Real World Champion Past October*, N.Y. TIMES, May 12, 2005, at D4 (describing formation of the World Cup-style "World Baseball Classic" and noting that "[t]he players union for years proposed it, but Major League Baseball, until recent years, was not interested"). A fear of competing competitions may explain the reluctance of league and baseball owners to foster a tournament that could involve external competitors; *see also* Harvey Araton, *These Games Deserve Better From N.H.L.*, N.Y. TIMES, Feb. 15, 2002, at D2 (describing NHL's grudging allowance of its players to represent their countries for the first time at the 2002 Winter Olympics and noting NHL commissioner's stance that future Olympic participation "is no sure thing").

162. There actually has been an amateur "Baseball World Cup" run by the International Baseball Federation, for 68 years, but it does not include professional players active in Major League Baseball. *See* International Baseball Federation, Baseball World Cup, http://www.baseball.ch/2003/t/wc/wc.htm (last visited Oct. 23, 2006).

163. Such games occur now, but only as single-match non-recurring exhibitions that do not seriously threaten existing leagues. Additionally, they appear to be done only with league approval. Tyler Kepner, *Yanks Rediscover Japan 70 Years After First Visit*, N.Y. TIMES, Mar. 28, 2004, at H1 ("On Sunday night, the Yankees play the Giants in an exhibition game that may feel much more important. It is the first of two exhibitions; the other is against the Hanshin Tigers on Monday and is expected to attract more attention here than the series with the Devil Rays.").

164. *See* SKY SPORTS YEARBOOK, *supra* note 95.

fessional sports leagues attempt to wall themselves off from such proposals through exclusionary agreements, the logic of competing competitions suggests that, at minimum, they should not be allowed to justify their actions based on poorly-defined and weakly-supported competitive balance concerns. Furthermore, the value inherent in having competitions compete against each other should compel courts to provide the same regard for future international proposals that antitrust courts provide to entrants to an existing market.

IV. HOW TO DEAL WITH THE COMPETITIVE BALANCE ARGUMENT

Given the preceding discussion, this Article's proposal is a simple one: Reject the "competitive balance" justification under the rule of reason. As simple as they are, this prescription and the reasoning supporting it yield three new levels of understanding. First, at the narrowest, the competitive balance argument should no longer avail defendants in sports antitrust cases under the rule of reason. Second, more broadly, future antitrust courts should cast a more skeptical eye toward "aesthetic" arguments like competitive balance, given that there is scant proof of a hard nexus with financial results. Finally, and most broadly, the empirical weakness of the competitive balance argument warrants judicial skepticism beyond antitrust criticisms.

A. Reject Competitive Balance Under the Rule of Reason

"Competitive balance" is a thirty-year-old argument that should fail. Given the serious doubts that empirical evidence casts on the argument, courts should no longer allow professional sports leagues to argue that their practices should be excused due to their allegedly positive effects on competitive balance. Instead, courts should treat professional sports leagues as they treat other industries involving two-sided markets. As Prof. Stefan Szymanski, a prominent figure in sports economics, points out, "the study of sports economics as a distinct area of research rests on a single issue, the 'competitive balance problem.'"[165] Similarly, the competitive balance argument explains in large part why antitrust has handled sports with kid gloves. There is no reason why sports leagues should be treated any differently from other industries that require cooperation be-

165. Szymanski, *Tilting the Playing Field*, *supra* note 129, at 1.

tween economically competing entities to produce a product,[166] given that these other industries also deal with organized labor.

Antitrust should treat leagues as businesses that offer one product (access to on-the-field competition) in a two-sided market. For example, should a league be a monopoly in that regard, it should enjoy the benefits, such as supra-competitive pricing, that being a monopoly provides. However, one should approach actions to entrench or extend that monopoly in the same manner that antitrust law would analyze similar efforts to take advantage of monopoly status.[167] That is, should fan innovation, international tournaments, or other investors arise to provide competing competitions, predatory or exclusionary acts by professional sports leagues aimed at preventing such competition should be examined under the same rubric that antitrust applies to other industries. That may not be easy; there is certainly disagreement as to how and when a monopolist may thwart a competitor.[168] However, in the absence of a tested argument for treating pro sports leagues otherwise, applying the antitrust treatment afforded other industries seems to be efficient, fair, and logical.

B. Exercise Skepticism About Arguments that May Be Aesthetics

The evidence suggests that competitive balance does not drive fan interests, that it may not be achievable as a result of league policies, and that leagues may not even rationally want to achieve competitive balance, even if they could. How, then, can we explain judges' overwhelming fondness for competitive balance in sports as a "legitimate concern" in antitrust

166. Consider the consumer electronics industry, where competing manufacturers often face a dynamic where they must agree on a dominant standard, such as DVD or VHS, or face a public wary to invest in a standard that might fail, such as Betamax or Digital Audio Tape. David Pogue, *For DVD Watchers, High-Def Disarray*, N.Y. TIMES, Jan. 1, 2006, at D3 ("The obvious losers are movie fans. They risk buying a $1,000 player that can play only half of available movies. Worse, when one format finally wins, some customers would have bet on the wrong horse.").

167. *See* United States v. Microsoft, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (affirming conclusion that by foreclosing a "substantial percentage of the available opportunities for browser distribution, Microsoft managed to preserve its monopoly in the market for operating systems" and thus violated Section 2 of the Sherman Act).

168. *See* Thomas Piraino, *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 857 (2000) (concluding that Microsoft's design of its operating system to not work with potential competitors' products was an antitrust violation because the only possible reason for such practices is "to extend its monopoly power from the operating system market to the applications markets"). *But see* Patrick Ahern, *Refusals to Deal After Aspen*, 63 ANTITRUST L. J. 153, 154 (1994) (describing a Supreme Court case that appeared to impose on a monopolist a duty to deal with competitors and explaining that among commentators, "most agreed that it was a troublesome case").

law? Of course, one argument could be simply that the data are wrong and judges have the discretion to determine what is right. However, one would hesitate to press that point against the author, subjects, and fans of the non-fiction bestseller *Moneyball*.[169]

Rather, "competitive balance" may simply be a matter of aesthetics. Judges may rely on an intuitive feel for what seems to "make" for a better sports league. The problem with this is that it exhibits a relatively strong "status quo" bias.[170] If one assumes that leagues in the future will exist as they currently do, then for them to consist of evenly-matched teams may make sense. However, this assumption may itself be an error. Judges are no better situated to decide whether league rules promote better sports competition than they are to decide whether blanket licenses for collections of musical compositions promote better-sounding music.[171] Additionally, one should expect that the leagues would make the competitive balance argument so long as it accords with their own rational self-interest. Thus, the assertion that competitive balance makes a league more entertaining may be nothing more than an aesthetic judgment, with no basis in logic or empirical evidence. Though one can "feel" that a league in which the Yankees win five straight World Series is a less optimal one,

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169. MONEYBALL is a 2003 non-fiction bestseller by Michael Lewis that describes how Billy Beane and the Oakland Athletics manage to outguess the rest of MLB in scouting talented players by depending more on data and less on the conventional wisdom of baseball that depends on how a player "looks" or what "tools" he appears to have. *See* MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME 31 (2003) (quoting baseball manager focused on data rather than impressionistic scouting based on how a player "looks" as saying "we're not selling jeans here"). The book itself has spawned a small but prominent literature in American law reviews for its explanation of how data trumped eyewitness observation and how a multimillion dollar enterprise like MLB can evolve a conventional wisdom that appears incorrect and refutable by data and empirical analysis. Richard H. Thaler & Cass R. Sunstein, *Market Efficiency and Rationality: The Peculiar Case of Baseball*, 102 MICH. L. REV. 1390 (2004); Note, *Losing Sight of Hindsight: The Unrealized Tradition of Law and Sabermetrics*, 117 HARV. L. REV. 1703 (2004); *see also* Paul Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483 (2003).

170. This bias is akin to the availability heuristic, in which people answer a question of probability or frequency by thinking of salient examples that come to mind. *See* Cass Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 752 (2003) (discussing the "availability heuristic" as "probably . . . the most well-known [heuristic] in law").

171. *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21-22 (1979) (concluding that a non-exclusive blanket license to the music of all composers handled by an intellectual property rights clearinghouse was not price-fixing but rather a pro-competitive practice and effectively, a "different product" than simply the aggregation of underlying rights).

and though it may be a popular stance, the evidence does not support this view.

C. Reconsider Similar Arguments Beyond Antitrust

While not free from controversy, antitrust already possesses a body of law dealing with practices aimed at blocking new entrants to a market.[172] It may thus be worthwhile to extend the idea of "competing competitions," and the superior efficiency and innovation they provide, beyond antitrust.

In particular, new forms of competition within existing sports leagues can generate new consumer welfare through technological changes or changes in the environment in which leagues exist. Specifically, fantasy leagues, international tournaments between teams from different national leagues, or even entirely new competitions yet unimagined, all have the potential to bring structurally static—and possibly monopolistic[173]—professional sports leagues "up to date" with consumer preferences.

It is important to note, though, that one cannot accurately weigh new competing competitions unless one recognizes that, despite their lack of longevity and established doctrinal intellectual property rights, competing competitions can nevertheless represent valuable innovation. Commentators have recognized that intellectual property rights cannot capture the full scope of innovation.[174] Thus, courts should take the claims of new competing competitions seriously if they complain about exclusionary practices that block them.

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172. *See* Lorain Journal v. United States, 342 U.S. 143, 150 (1951) (condemning incumbent newspaper's policy forbidding advertisers from buying advertising time from a radio station new to the market). *But see* Hovenkamp, *supra* note 102, § 7.6c (commenting that the Supreme Court in *Lorain Journal* never considered what percentage of the market was actually foreclosed by the newspaper's practices). *See also Microsoft*, 253 F.3d at 70 (concluding that "a monopolist's use of exclusive contracts may, in certain circumstances, give rise to [an antitrust] violation even though the contracts foreclose" a relatively small share of the available market).

173. *See generally* Thomas A. Piraino, *Proposal for Antitrust*, *supra* note 112 (arguing that professional sports leagues are monopolies and their restrictive policies should be scrutinized for a tighter ends-means connection); Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643 (1989) [hereinafter Ross, *Monopoly*] (arguing that American professional sports leagues are monopolies that should be broken up by the government).

174. *See*, *e.g.*, R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1004-05 (2003) (describing phenomena which can generate valuable information that is neither appropriable nor subject to intellectual property rights). While some may use this argument to bolster existing intellectual property rights by noting their positive effects on such unappropriable innovation, *id.*, such innovation is valuable in and of itself, whether it is generated by incumbents or new entrants.

V. CONCLUSION

In light of the evidence, the competitive balance argument is seriously flawed. The proposal advocated here to remedy the situation is a relatively modest one. Others have suggested more ambitious steps, such as forcibly restructuring American sports leagues.[175] Due to their relatively intrusive nature, these suggestions are unlikely to be implemented; it is difficult to imagine Congress or the federal judiciary changing the landscape of pro sports by fiat. The approach advocated in this Article has the virtue of appearing low-key despite its potential for far-reaching change. By depriving the leagues of one argument in their defense under the rule of reason, it publicly spotlights the fact that little evidence exists to support the competitive balance argument.

Additionally, this proposal seeks to perform "intellectual jiu-jitsu" by channeling the forces of innovation and globalization against the dominance of American professional sports leagues. The rule and reasoning advocated in this Article defends and empowers those who privately find ways to improve the entertainment that the leagues currently provide. Preventing existing leagues from foreclosing new competitions may well promote their continued existence in substantially the same form as today. But, it also forces them to improve their product, rather than depend on restrictive policies that they can no longer justify with vague allusions to "competitive balance."

175. *See, e.g.*, Piraino, *Proposal for Antitrust*, *supra* note 112, at 889 (advocating application of antitrust's controversial essential facilities doctrine to compel sports teams to admit new teams); Ross, *Monopoly*, *supra* note 173 (advocating AT&T-style government breakup of leagues); Ross & Szymanski, *Open Competition*, *supra* note 97 (advocating implementation of a European soccer-style relegation and promotion system in American professional sports).