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THOUGHTS ON PROFESSIONAL SPORTS AND THE ANTITRUST LAWS: *LOS ANGELES MEMORIAL COLISEUM COMMISSION V. NATIONAL FOOTBALL LEAGUE*

*by Lewis S. Kurlantzick**

For the National Football League (NFL), and for other professional sports leagues, the past several years have produced a number of off-field developments that may dramatically affect the structure of league governance. One notable development is the antitrust suit brought by the Los Angeles Memorial Coliseum Commission ("the Coliseum") and the Oakland Raiders ("the Raiders") against the NFL after the league attempted to block the team's move to Los Angeles.¹ At issue in the case is not the financial relationship between players

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1. *Los Angeles Memorial Coliseum Comm'n v. NFL*, No. 78-3523 (C.D. Cal. May 7, 1982), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

In addition to the antitrust claims, the Raiders alleged a breach of an oral contract to allow the move, breach of the Commissioner's fiduciary duty to treat each member fairly, and interference with prospective economic advantage. See Granelli, *The Antitrust Super Bowl*, Nat'l L.J., June 29, 1981, at 1, col. 2.

and owners—which was implicated in the collective bargaining negotiations between the National Football League Players Association and the owners' Management Council—but rather, the relationship of the owners among themselves and to the league. More particularly, the case brings into question the process by which decisions are made about the location and relocation of franchises—the control exerted by the league over team movement and the procedures by which that control is exercised. The Raiders and the Coliseum allege that the present system of control, which requires approval of a proposed franchise establishment or move by three-quarters of the owners,² violates the Sherman Act.³

This article examines the antitrust questions raised by the Raiders' suit. It evaluates the present arrangement in light of the peculiar economic character of a professional sports league. While the article focuses principally on professional football, other leagues—such as the National Hockey League (NHL) and National Basketball Association (NBA)—exercise similar controls on franchise movement⁴ and, there-

2. N.F.L. CONST. & BY-LAWS art. III, § 3.1(b) (1970, amended 1982) provides: "The admission of a new member club, either within or outside the home territory of an existing member club, shall require the affirmative vote of three-fourths of the existing member clubs of the league."

N.F.L. CONST. & BY-LAWS art. IV, § 4.3 (1970, amended 1982) provides:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the league.

3. Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976 & Supp. IV 1980).

4. The NHL, which classifies its constitution and bylaws as confidential documents, requires a unanimous vote to approve the relocation of a franchise, regardless whether the new site is within another's home territory. Letter from Gilbert Stein, Vice President/General Counsel, National Hockey League, to Lewis Kurlantzick (Sept. 21, 1982).

N.B.A. CONST. § 7 provides in relevant part:

A membership in the Association may be transferred only with the approval of the Board of Governors, given in its absolute and sole discretion by a vote of three-quarters of all of its members at a meeting duly warned for such purpose, which approval may be granted upon such terms and conditions as the Board by such vote shall, in its absolute and sole discretion, consider appropriate.

N.B.A. CONST. § 9 provides in relevant part: "A membership shall not be granted or transferred for operation within the territory of any member without the prior written consent of such member."

The legality of the NBA scheme was almost subjected to judicial scrutiny. In the spring of 1982, the San Diego Clippers of the NBA indicated a desire to move to Los Angeles. *See* N.Y. Times, June 8, 1982, at C7, col. 1. Undoubtedly, the possibility of an antitrust suit was on the minds of league officials as they decided how to respond, particularly because the Clippers intended to move into the Los Angeles Arena, which is run by the Coliseum. Indeed, the NBA went

fore, the analysis presented bears directly on the desirability and propriety of their arrangements as well.

I. BACKGROUND

In early 1980, after lengthy and secret negotiations with the Coliseum, Al Davis, the managing general partner of the Raiders, announced that the Raiders would be moving to the Coliseum to fill the void left by the Los Angeles Rams' move to Anaheim.⁵ Several lawsuits ensued in both federal and state courts, some aimed at striking down obstacles to the move, others aimed at keeping the Raiders in Oakland.⁶ Despite the legal battles, Davis signed a "memorandum of agreement" to move the Raiders to Los Angeles.⁷ On March 10, the NFL owners met and voted 22 to 0, with 5 abstentions, to deny permission for the Raiders' move.⁸ Davis stated that he was prepared to make the move without league approval.⁹ The result of the confrontation was the initiation of an antitrust suit by the Coliseum and the Raiders against the NFL.¹⁰

The presiding judge in the case analogized the dispute to a domes-

to court seeking a declaratory judgment as to the legality, under the antitrust laws, of their rules governing franchise movements. See N.Y. Times, June 23, 1982, at A22, col. 6. The action was dropped when the Clippers withdrew their request to move. See N.Y. Times, July 2, 1982, at A17, col. 4. See also note 71 *infra*.

5. Wallace, *Raider Move Is Imminent*, N.Y. Times, Jan. 19, 1980, at A17, col. 6.

6. Undoubtedly, the most ingenious response designed to forestall the move was the effort by the City of Oakland to use its power of eminent domain to condemn the team. See *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656, *modified*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982)(en banc). In *City of Oakland*, the Supreme Court of California held that the power of eminent domain may be used by a city to condemn and acquire an on-going enterprise when it is necessary to do so to effect a valid public use. The court did not rule on the merits, remanding the case for determination whether the proposed condemnation was in furtherance of a valid public use. 32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683.

The significance of loyal fan support is discussed *infra* at note 83. Not surprisingly, the interests of fans and communities in the face of what they perceive as abandonment has stirred political concern and has prompted the introduction of congressional legislation designed to discourage the movement of consistently well-supported teams by immunizing from antitrust challenge the enforcement of rules requiring approval by the membership of a league for any relocation of a member club.

7. See Granelli, *supra* note 1, at 1, col. 2.

8. Davis neither initiated nor attended this meeting and vote. He claimed that the approval process was illegal and the permission of the owners was unnecessary.

9. See Wallace, *N.F.L., in 22 to 0 Vote, Refuses to Allow Raiders to Move*, N.Y. Times, Mar. 11, 1980, at B17, col. 4.

10. The Coliseum first brought its antitrust action against the NFL in September 1978 after the Los Angeles Rams announced their plans to move to Anaheim. The Raiders instituted their action in 1980. The two actions were consolidated for trial. See Granelli, *supra* note 1, at 1, col. 2.

tic quarrel and urged the parties to settle their differences out of court.¹¹ But no settlement was negotiated and, after several delays, the trial began in May 1981. When the jury, after thirteen days of deliberation, was unable to agree on a verdict, the judge declared a mistrial.¹² A new trial began in March 1982, and, in early May, the jury issued a verdict in favor of the plaintiffs, pronouncing the NFL rules on franchise movement a violation of the Sherman Act.¹³ The judge issued an injunction barring the league from enforcing its rule and permitting the Raiders to move to Los Angeles.¹⁴ A motion to stay the injunction while the league appealed was denied,¹⁵ and the case is presently on appeal to the Court of Appeals for the Ninth Circuit.¹⁶

II. THE PROBLEM

What exactly is the Coliseum's and the Raiders' claim? They challenge the legality of two interconnected sets of league provisions that govern teams' territorial rights and franchise movements. First, the NFL Constitution and By-Laws, with certain insignificant exceptions, give each franchise the exclusive right to "exhibit" league games within a seventy-five-mile radius of its home city.¹⁷ No team can play games within the home territory of any other team unless the home club is a participant.¹⁸ And no franchise can be granted in an area that overlaps the home territory of an existing club without the affirmative vote of three-fourths of the members of the league.¹⁹ Second, no member may transfer its franchise to a different city without prior league approval. Approval of any transfer—whether or not to a location within the home territory of another club—requires an affirmative vote of

11. Prior to the trial, Commissioner Rozelle and Al Davis met with Judge Harry Pregerson, who retained trial jurisdiction after being elevated from the district court to the Court of Appeals for the Ninth Circuit, for five and one-half hours in an unsuccessful effort to settle out of court. See Rogers, *Raiders and N.F.L. Urged to Avoid Trial*, N.Y. Times, Jan. 20, 1981, at D22, col. 3; *id.*, Jan. 14, 1981, at A21, col. 1.

12. N.Y. Times, Aug. 14, 1981, at A15, col. 1.

13. Los Angeles Memorial Coliseum Comm'n v. NFL, No. 78-3523 (C.D. Cal. May 7, 1982). See N.Y. Times, May 8, 1982, at 1, col. 1.

14. Los Angeles Memorial Coliseum Comm'n v. NFL, No. 78-3523 (C.D. Cal. June 14, 1982). See N.Y. Times, June 15, 1982, at D26, col. 5.

15. Los Angeles Memorial Coliseum Comm'n v. NFL, No. 78-3523 (C.D. Cal. June 14, 1982).

16. Los Angeles Memorial Coliseum Comm'n v. NFL, No. 78-3523 (C.D. Cal. May 7, 1982), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

17. N.F.L. CONST. & BY-LAWS art. IV, § 4.1.

18. N.F.L. CONST. & BY-LAWS art. IV, § 4.2(c) (1970, amended 1982).

19. N.F.L. CONST. & BY-LAWS art. III, § 3.1(b) (1970, amended 1982).

three-fourths of the members of the league.²⁰ The rules contain no criteria or standards for making the decision of approval or disapproval. At stake, then, are two fundamental elements of the NFL structure: the allocation of territories and the regulation of franchise movement.

While it is not unusual for players to initiate antitrust suits,²¹ it is most unusual for league members—who have much more invested in the system—to launch an attack on the basic principles by which the league is organized and run. Yet this is exactly what the Raiders' suit does. And not surprisingly, the action marks the first time that an antitrust suit has been brought by an NFL member against the league.

The NBA, however, faced a similar challenge in 1977 when the New York Knickerbockers threatened to block the then New York Nets' move to northern New Jersey.²² Because NBA rules require the consent of the team into whose territory a move is to be made,²³ the Knicks, whose home territory included much of New Jersey, claimed that the move could not be made without their approval. In response, Roy Boe, the owner of the Nets, initiated an action against the Knicks, producing near hysteria among other NBA owners.²⁴ The most ominous aspect of the lawsuit was that it questioned the legality of territorial rights in professional sports under the Sherman Act. Not unexpectedly, Lawrence O'Brien, the NBA Commissioner, issued a statement claiming that territorial exclusivity is indispensable to the operation of

20. N.F.L. CONST. & BY-LAWS art. IV, § 4.3 (1970, amended 1982). When the Coliseum filed the initial suit against the NFL, the league's constitution and bylaws required unanimous approval for the location or transfer of a team. See notes 69-78 *infra* and accompanying text for discussion of the old rule.

21. For example, rules in various professional sports governing player eligibility and the draft, as well as those limiting player movement through reserve and option arrangements, have been challenged. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Haywood v. NBA*, 401 U.S. 1204 (1971); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

22. An additional challenge nearly developed when Peter Gilbert, owner of the NHL's Colorado Rockies, applied for permission in February of 1982 to move his team to northern New Jersey. He indicated that he would consider bringing an antitrust action against the league if it refused permission. See Delano, *Denver's Hockey Franchise is on the Rocks*, N.Y. Post, Jan. 29, 1982, at 78, col. 1; N.Y. Post, Feb. 9, 1982, at 65, col. 2.

23. N.B.A. CONST. § 9.

24. Goldaper, *Nets, Seeking to Move to Jersey, Sue Knicks Over Effort to Block It*, N.Y. Times, July 7, 1977, at A1, col. 2. The Nets entered the NBA in 1976 and were permitted to play in Nassau County, which is also within the Knicks' territory, only after agreeing to pay the Knicks an indemnity payment of \$4 million. The Nets charged that the indemnity agreement was in violation of the Sherman Act. *Id.*

professional sports leagues.²⁵ And the other owners urged the Nets to drop the antitrust portion of its suit.²⁶ Because the dispute was ultimately settled out of court, the antitrust questions were never litigated.²⁷

The NFL owners and officials, like their counterparts in the NBA, are understandably concerned about a lawsuit challenging the league rules that govern territorial allotment. Horizontal territorial divisions—those between economic entities at the same level of the market structure—are viewed with disapproval under the antitrust laws.²⁸ Consider, for example, two supermarket chains that divide an area into two territories, thereby eliminating competition between the two in the regions where each has exclusive sway. Each company would be free to make price, quality, and other marketing decisions without considering possible actions of the other.²⁹ The incentive to provide quality goods at the lowest possible price would be lessened. Further economic “inefficiencies” would result if consumer demand in either subarea were greater than one company chose to supply because the arrangement prevents the movement of resources to meet that demand.³⁰ Such arrangements would, with good reason, be condemned as clear antitrust violations.³¹

25. N.Y. Times, July 9, 1977, at A11, col. 4.

26. See Goldaper, *N.B.A. Owners Will Meet on Nets' Suit*, N.Y. Times, July 8, 1977, at A11, col. 1.

27. Goldaper, *Nets Will Move to New Jersey—For \$4 Million*, N.Y. Times, July 27, 1977, at A1, col. 1. The agreement included an additional \$4 million indemnity fee to be paid by the Nets to the Knicks. *Id.*

28. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

29. In making these decisions, neither would have to worry about the possibility of the other coming into its area and selling the same or similar product more cheaply. It is worth noting that when the San Diego Clippers announced their intention to move to Los Angeles, they indicated that their ticket prices would be lower than those of the Los Angeles Lakers. See N.Y. Times, June 9, 1982, at D22, col. 6.

30. In addition to the price gouging that is permitted by the removal of competition through territorial rights, the impact of the practice on resource allocation, though difficult to quantify, may be significant. If a sports team is the only seller of the game in its area and the total supply is controlled by the league, “the supply of the services of professional sports clubs will be less than that required for efficient allocation of resources.” H. DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 80 (1973).

31. In the language of antitrust law, such clear transgressions are termed “per se” violations. Per se violations are agreements or practices that “because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

Football teams sell entertainment, and agreements not to sell too near the sales place of other football teams appear, at least initially, to fall squarely within the same prohibition. The demand for football may be so great in a particular area that the team can raise prices well above the level needed for it to continue to operate profitably. In the absence of geographical restrictions, the potential of another team moving into the area can operate as a constraint on the existing team's price decisions. Geographical divisions and transfer restrictions, though, remove this constraint. Indeed, the NFL's procedures for awarding franchises control the total supply of the product, while its territorial and transfer provisions make each team a monopolist in its own market area.³²

A closer look at professional football, however, reveals that its restrictions are not strictly analogous to horizontal divisions between competing businesses.³³ Professional football can accurately claim that it is significantly different from other, more typical, industries, such as supermarkets. Professional sports do not fit neatly into traditional models of industrial structure, and they have had some success in obtaining judicial recognition of their distinctive economic character. NFL teams are a hybrid form of economic animal—both business rivals and partners. Unlike other industries, the success of each member of the professional football industry depends, to a considerable extent, upon the success of all other members. When a new franchise is created, or when a club moves to a new area, its value is, in part, due to the investment already made in other teams. Established teams effectively invest in a new entrant. It takes several years for an expansion team, for example, to become competitive and attract fans. During this start-up period, established teams are likely to experience below-average attendance when playing the expansion team.

While the supermarket owner stands to gain from, and therefore is

32. It is true that potential competition from another league is always a possibility, but establishment of another league requires the commitment of large amounts of capital to a very risky venture.

33. Some of professional football's restrictions might be viewed as vertical divisions of the market. Vertical territorial limitations, restrictive agreements between manufacturers and dealers or distributors, are not per se violations of antitrust law. *See, e.g., Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *White Motor Co. v. United States*, 372 U.S. 253 (1963). The legality of these arrangements is determined through a particularized inquiry into their justification and effect. *See* note 52 *infra* and accompanying text.

One of the fascinating and perplexing aspects of a sports league is that the relationships do not fit neatly into either the vertical or horizontal category. League territorial and transfer restrictions possess features of both vertical and horizontal market divisions.

not troubled by, his competitors' folding, in a sports league, the failure of several franchises could jeopardize the other teams and, perhaps, the entire league. Accordingly, it is not surprising that professional sports leagues will step in to support a failing team until new ownership can be found for the floundering franchise.

This "bail-out" practice highlights the differences between the operation of professional leagues and other enterprises. Teams must have someone to play. And while every team plays to win each game, each organization knows that it is in its self-interest for all teams to remain financially viable and highly competitive on the field. Sustained incompetence by a number of teams presumably would also lead to lowered television revenues—a loss incurred by all teams because broadcast revenues are distributed equally among league members.³⁴ This collective interest in the maintenance of on-field competitive balance may be reflected in some restrictions on player movement and some limits on the "battle of the treasuries" as well.³⁵ NFL teams, in addition, have a joint interest in the promotion of professional football over other sports and other forms of entertainment. An added function of the league, therefore, is to act like a trade association that markets the product of its constituent members.³⁶

It is this economic and athletic interdependence among teams that, in part, explains Commissioner Pete Rozelle's characterization of the NFL as a "partnership."³⁷ But Rozelle's use of the partnership label is also calculated to defend league restrictions on team location. Section one of the Sherman Act applies only to a "contract, combination," or "conspiracy" in restraint of trade.³⁸ By viewing itself as a single economic entity,³⁹ such as a partnership, the league asserts that its inter-

34. See note 63 *infra*.

35. While this interest is offered as a justification for these kinds of restrictions, it is not at all clear, based on limited experience to date, that liberalization or removal of such restrictions would lead to a permanent imbalance among league members.

36. Indeed, this promotional perspective—with the interests of organized football as an "inter-brand" competitor as a touchstone—may provide a helpful framework for assessing the legality of various practices. Thus, the greater the extent to which a practice can be tied to a joint interest in promotion, the less vulnerable it should be to antitrust attack. See text accompanying notes 60-62 *infra*.

37. The Commissioner characterized the NFL as a partnership in his testimony before the House Judiciary Subcommittee in December 1981. *Testimony of Pete Rozelle, Commissioner of the National Football League, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess.*, unofficial transcript at 2 (Dec. 10, 1981)(provided by National Football League). See also N.Y. Times, Dec. 11, 1981, at B4, col. 3.

38. Sherman Act § 1, 15 U.S.C. § 1 (1976 & Supp. IV 1980).

39. During the first trial of the Raiders' and Coliseum's action, cross-motions were filed seek-

nal rules are not subject to antitrust scrutiny because an agreement between at least two independent enterprises is necessary to violate section one. The NFL rules, the league argues, are similar to arrangements between different departments of a corporation or between a corporation and one of its subsidiaries.⁴⁰

But the operation of NFL franchises is not totally interdependent. Each member team is independently incorporated, maintains separate balance sheets, and, unlike a partnership, does not share its losses with other members. Moreover, the set of formal interfranchise agreements constituting the NFL Constitution and By-Laws could be deemed the necessary contract that would trigger examination under the antitrust laws. The partnership label, then, while somewhat illuminating, is also potentially misleading.⁴¹

Commissioner Rozelle has nonetheless persisted in arguing that the NFL should be viewed as a form of partnership that produces entertainment. The Commissioner testified before a House Subcommittee in 1981, seeking legislation that would recognize the novel form of single business enterprise that the NFL represents.⁴² He contended that the courts have failed to recognize the unique nature of the league and, consequently, have provided only minimal guidance for determining what league behavior is legal and what is not. More specifically, he requested a congressional statement that a sports league should be regarded as a single enterprise for purposes of examining certain of its activities under the antitrust laws.⁴³

ing a directed verdict with respect to the NFL's contention that it is a single economic enterprise for purposes of the suit. Judge Pregerson ruled that the NFL's member teams should be regarded as separate business enterprises for purposes of § 1 of the Sherman Act. *Los Angeles Memorial Coliseum Comm'n v. NFL*, No. 78-3523 (C.D. Cal. June 24, 1981). See *National Football League Isn't Single Entity, District Court Rules*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1028, at A-21 (Aug. 20, 1981).

40. Despite Rozelle's insistence that he is not after a wide-ranging exemption, acceptance of this line of argument would seem to result in a blanket immunity for the league and its members.

41. Should the NFL be recognized as a form of partnership, will the relationships between teams be governed by analogy to partnership law? For example, partners owe each other a high duty of care and loyalty. Did the league's decision to prevent the move of the Raiders violate a duty owed to Al Davis? Alternatively, did Davis violate a fiduciary duty owed to the other owners when he decided to move the Raiders to Los Angeles? The partnership label invites speculation about the answers to these and similar questions.

42. *Testimony of Pete Rozelle, Commissioner of the National Football League, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (Dec. 10, 1981)(unofficial transcript provided by National Football League).

43. *Testimony of Pete Rozelle, Commissioner of the National Football League, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess., unofficial transcript at 21 (Dec. 10, 1981)(provided by National Football

Although Commissioner Rozelle insisted in his testimony that he does not seek a sweeping exemption, it is not clear which of the league's activities are to benefit from the congressional "clarification." He apparently is most interested in preventing the use of the antitrust laws by league members to attack the internal structure and operating principles of the league. The Raiders' lawsuit presumably would fall into this category.⁴⁴ But Congress is not likely to grant any broad immunity from the antitrust laws.⁴⁵ Instead, of course, it could specifically exempt the territorial and transfer restrictions from antitrust scrutiny as it has done with other practices, such as the NFL's package sale of television rights.⁴⁶ And, in fact, a bill to legitimize professional league restrictions on relocation was recently introduced in the House of Representatives.⁴⁷

The courts have already demonstrated some awareness, however, of the peculiar economic character of professional sports.⁴⁸ Courts have

League). Pointing to inconsistencies in judicial decisions, Commissioner Rozelle argued that professional sports leagues are "in a Catch-22 situation—where the individual clubs are regarded as separate, independent entrepreneurs outside the plane of league decisionmaking, while all of the league's other members remain obligated to conduct all of their operations on whatever conditions are established by the individual club." *Id.* at 7-8. See also *House Panel Hears Call to Treat Sports League as Single Entity*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1044, at A-21 (Dec. 17, 1981).

44. The Professional Sports Stabilization Act of 1982, H.R. 6467, 97th Cong., 2d Sess., 128 CONG. REC. H2598 (daily ed. May 21, 1982), which has the support of the NFL, provides that it shall not be illegal under the antitrust laws for a league and its members "to enforce rules requiring approval by the membership of the league for any relocation of a member club of such league." *Id.* at § 2(1)(a).

45. Nor would the declaration sought be desirable. It is most likely and appropriate that Congress and the courts will view leagues as single entities for some purposes and not for others.

46. See 15 U.S.C. § 1291 (1976).

47. The Professional Sports Stabilization Act of 1982, H.R. 6467, 97th Cong., 2d Sess., 128 CONG. REC. H2598 (daily ed. May 21, 1982), was introduced in May of 1982 by Congressman Peter Stark, who represents the Bay area. The bill authorizes sports leagues to operate with rules requiring their member teams to obtain approval of the league membership before moving. If a league rejects a transfer proposal, it cannot be sued under the antitrust laws for maintaining the existing club location. *Id.* at § 2(1)(a).

Congressman Stark had introduced a similar bill in January 1981 to provide certain disincentives to relocation of professional sports teams. Sports Franchise Relocation Act, H.R. 823, 97th Cong., 1st Sess. (1981). This bill was broader in scope than the one offered in 1982. It attempted to legislate standards for the relocation of teams and to establish a regulatory framework for the evaluation of proposed relocations.

48. The courts have recognized the unique nature and purpose of sports league activities and have held that the per se rule is inappropriate for evaluating sports league activities. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462, 503-04 (E.D. Pa. 1972); *Flood v. Kuhn*, 316 F. Supp. 271, 273-76 (S.D.N.Y. 1970).

sought to accommodate the Sherman Act's hostility to restraints on free competition with the practical necessity of allowing some joint action to achieve balanced, sustained, and geographically dispersed athletic activity.⁴⁹ When examining restrictive practices, courts have considered proffered justifications—such as the interest in preserving the financial integrity of each team and the league—that would not even be entertained in suits involving other industries.⁵⁰

But courts cannot end the inquiry by recognizing that teams in one sense are joint venturers. That recognition constitutes only the beginning of the analysis. For while it is unwise to apply antitrust law mechanically to professional sports, any deviation from normal application must be carefully considered and narrowly drawn. Although there may be a league and public interest in preserving the financial viability of a professional league, for example, that interest is not served by enabling team owners to achieve excess profits.

Indeed, the public interest arguably would be better served by strictly applying antitrust law to league rules like the one challenged by the Raiders. There is theoretical support for the argument that the removal of territorial and transfer restrictions, combined with greater ease of entry, will lead in the long run to increased equality of financial strength among teams. Financial equality then, in theory, will allot to the teams comparable amounts for investment in players, which will lead to parity in performance levels among the teams. The creation of competitive balance will, in turn, increase fan enjoyment because uncertainty of outcome heightens the pleasure derived from viewing sports events and more fans will be associated with a potential winning team.⁵¹

In sum, the question whether the NFL's restrictions are undesirable under the antitrust laws is a complicated one. Recognition of the distinctive nature of a sports league makes the issue of antitrust legal-

49. The NFL has an interest in creating fan interest throughout the country. This dispersion is attractive to television producers and accounts, in part, for the NFL's huge contracts with the television networks. The league also has an interest in promoting national identification with the game—in having it seen as an "American" game. Such a view helps keep the national press and media interested in the game. This aspect of promotion is not insignificant. The failure of hockey to succeed in cities like Atlanta and the NHL's inability to obtain a network contract both reflect, in part, a lack of national identification with the game.

50. See, e.g., *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976).

51. Fan enjoyment appears to be increased through vicarious association with a potentially winning team, and there are, by definition, more potential winners in a close race. For a more thorough discussion of the competitive model applied to professional sports, see H. DEMMERT, *supra* note 30, at 81-88.

ity difficult because the NFL arrangements emerge as neither obviously legal nor obviously illegal. Judging the legality of a restriction involves difficult considerations of the league's peculiar economic character and the impact of its practices on the public.

III. EVALUATING A LEAGUE PRACTICE

Evaluation of a league practice requires a particularized analysis of the purported benefits of the practice and its probable anticompetitive effects to determine if, on balance, the practice is a "reasonable" one. Thus, the business justifications for the restraints and their competitive implications must be examined in order to decide whether these justifications are substantial enough to outweigh the possible decrease in competition.⁵² Admittedly, a balancing test of this sort requires courts to make a number of relatively imprecise determinations and, consequently, some degree of unpredictability about the antitrust status of some arrangements is unavoidable. Commissioner Rozelle has noted this lack of certainty and has strongly criticized the approach because it offers so little guidance to NFL decisionmakers.⁵³ It is questionable,

52 In the language of antitrust law, this method of evaluation is termed the "rule of reason." The Supreme Court, recognizing that literal application of the Sherman Act would outlaw all contracts or combinations that restrain trade, read the rule of reason into the Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). A number of federal courts have found the rule of reason to be the applicable rule for evaluating sports league restraints. See note 48 *supra*. In the first antitrust suit brought by the Coliseum against the league, the federal district court dismissed the case with leave to amend because the Coliseum did not allege standing to bring the action. The court then held that the rule of reason was the applicable rule for evaluating §§ 3.1(b) and 4.3 of the N.F.L. Constitution and By-Laws. The court explained that

Sections 3.1 and 4.3, the very sections challenged here, appear, on their face, to promote competition to some degree. The reason for this observation is as follows: In order for professional games to be played (and thus for economic competition to exist), the teams must not only agree on how the games are to be played, by adopting playing rules, and who the participating teams are to be, by adopting playing schedules, but also must agree on where the games are to be played. Games, traditionally, are played where one of the participating teams has its home city. Therefore, an agreement on where the games are to be played necessarily involves an agreement on the location of each team's home city.

Los Angeles Memorial Coliseum Comm'n v. NFL, 468 F. Supp. 154, 166 (C.D. Cal. 1979).

53. *Testimony of Pete Rozelle, Commissioner of the National Football League, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess., unofficial transcript at 14-20 (Dec. 10, 1981)(provided by National Football League). In his testimony, Rozelle claimed that the law regarding application of antitrust law to sports leagues is confused and unsettled. *Id.* at 1. Moreover, he asserted, the rule of reason has not proved flexible enough to accommodate leagues' special requirements. *Id.* at 4. As indicated in the text, there is some foundation for Rozelle's concern. Rozelle also stated that, in the absence of some congressional exemption, the unpredictability of antitrust law as applied to sports leagues—and presumably the decision in the Raiders' suit—makes it impossible for the NFL to

however, whether the antitrust laws provide significantly less guidance to the NFL than to other enterprises.⁵⁴ And it is perhaps possible to better articulate the factors that should govern the determination of the reasonableness of practices in the context of professional sports.

Given that league members will claim that every restriction is absolutely requisite, the key determination is which practices are essential to the successful operation of the league. More specifically, the touchstone should be whether the restrictions are reasonably necessary to accomplish a legitimate objective and, in the jargon of antitrust law, whether less restrictive alternatives exist. A less restrictive alternative is an arrangement that will serve the desired objectives with less anticompetitive impact.⁵⁵ In thinking about this question, attention must be paid not only to the reasonableness of outcomes of league decisions, but also to the process and procedures by which these decisions are made.

A prime reference point throughout should be the necessity of the practice for the functioning of a league. Is the practice essential for organized competition? The definition of a legitimate objective, in this context, should distinguish between restrictions designed to protect the interests of the league as a whole, including its long-range promotion of the game, and those that appear primarily rooted in the profit maximization interests of the individual owners.⁵⁶ The league has a legitimate interest, for example, in regulating the length of the schedule, the number of players kept on a roster, and the dimensions of the field. Similarly, prohibitions on betting by players are necessary to protect the integrity of the game. Concerted control over ticket pricing, however, is not essential for the proper functioning of the game. Therefore, restrictions such as agreements on the price of tickets should be condemned.

The question becomes, then, whether the NFL's territorial and

award expansion franchises. *Id.* at 8.

54. A number of questions that might be worth pursuing suggest themselves. Are the NFL and other leagues given less guidance with respect to antitrust application than other businesses? Are there more frequent conflicting decisions among the federal courts where sports leagues are involved? Do conflicts cause relatively more damage here?

55. Thus, a concern for financial stability might justify practices designed to insure that a move by one team into the home territory of another will not produce two weak, and possibly nonviable, franchises. This concern, however, would not justify price-fixing arrangements.

56. This approach suggests, at least for some purposes, a conception of the owners as distinct from the league itself. This conception is not unique. Trade associations can digest data and send that information to their members in situations where industry members cannot, by themselves, collect nondigested data.

transfer restrictions are more analogous to ticket pricing agreements or to housekeeping regulations. In short, do the restrictions constitute a carefully circumscribed means to effectuate a legitimate *league* objective? The answer appears to be "no."

IV. ANALYSIS OF THE NFL'S RESTRAINTS

Understandably, the NFL attaches a high priority to the continuity and stability of its franchises. Some restriction on franchise movement, perhaps only a requirement of adequate advance notice of intention to move, is necessary for scheduling and administrative planning purposes. More centrally, though, the existence of financial stability among league members is a desirable long-term value. Instability in the long run results in higher costs, which probably means fewer benefits, such as lower ticket prices, for football consumers. Lower costs should translate to lower prices, even if the seller is a monopolist. Because unsuccessful franchises erode public interest in the league as a whole, both financial and public confidence considerations support limiting relocation and entry to teams that have good prospects for long-term success. Failing franchises are a drain on all teams in the league.

Ideally, professional football seeks long-term tenure by competitive teams in major markets—those population centers that can provide the critical mass of fan support required for long-run financial viability. These population areas also supply much of the television and radio audience that supports professional football. The development of both fan loyalty and traditional rivalries is threatened by team turnover. If fans know that their team can move anytime it wishes, they very likely will be less enthusiastic in their support. This prospect is of particular concern for a new franchise; it is difficult to generate initial support if prospective fans know that as soon as the team improves, it may choose to move. Thus, although at any given time one or more teams may be interested in moving, there is a continuing collective interest in mutual restraint.

For related reasons, sports leagues may be concerned about the impact of relocations on the financing arrangements in stadium leases. It is common practice for public agencies to finance the construction of sports stadia. If a team moves or fails, taxpayers are left supporting a limited-use facility that may be incapable of generating other revenues. Avoidance of resentment and ill will, at a minimum, therefore, counsels limitations on transfer and entry.

Territorial rights and transfer restrictions can contribute to the

achievement of financial stability. The extent of market power bestowed on a given team by these rights depends on several factors, including the existence and quality of other professional sports teams in the area and the availability of alternative forms of entertainment. Unquestionably, however, territorial rights provide significant protection from competition—protection that may be necessary to encourage the requisite investment in professional teams. Investment in a football team involves a large capital commitment to an uncertain venture that is likely to suffer start-up losses. Without some measure of territorial exclusivity, the costs and risks of entry might be prohibitive.

Moreover, territorial exclusivity is not unique to professional sports. There are analogues in other industries. Consider the producer of brand A televisions, for example, who grants certain retailers exclusive selling rights in a particular geographical area on the premise that such a grant is necessary to provide incentive for investment in market development and promotion. This “vertical” restriction,⁵⁷ on balance, may be beneficial to competition. Although it may reduce intrabrand competition—competition in the sale of brand A—it may also increase interbrand competition by making brand A a more effective competitor with brand B. Recognizing the possible beneficial effects on competition, the Supreme Court has held that such arrangements do not automatically constitute antitrust violations.⁵⁸ In judging the legality of these arrangements, a court must consider, among other factors, the newness of the product, the need for the restriction to induce distributors to enter the field, the extent of restriction on intrabrand competition, and the extent to which interbrand competition will be stimulated.⁵⁹

The manufacturer’s purpose in assigning areas to dealers to encourage aggressive promotion or good warranty service is to become a better interbrand competitor.⁶⁰ The social cost, of course, is insulation

57. See note 33 *supra*. Such arrangements between manufacturers and distributors are termed “vertical” in the language of antitrust in contrast with “horizontal” arrangements—those between economic entities at the same level of market structure. While these categories are often helpful, analysis of professional sports supports the notion that sometimes the categories are simply descriptive of the outcome rather than analytical tools used to reach the outcome.

58. See, e.g., *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977); *White Motor Co. v. United States*, 372 U.S. 253, 261-64 (1963). Vertical divisions of markets are evaluated with the rule of reason.

59. See *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-56 (1977).

60. The manufacturer’s interest in vertical arrangements is one of higher collective revenues. But the franchise arrangement may antagonize some dealers when it requires them to act for the benefit of all franchises rather than in their own self-interest. By analogy, preventing a move by

from intrabrand competition at the retail level. Similarly, a sports league may want to provide incentives for its franchises to promote football in favor of competing entertainment events and establish a local identity for the team. A professional football team, like any other retailer, is more likely to expend energy and resources on promotion if it is confident that it will reap the benefits. The presence of many teams, or many retailers, in the same geographical area will discourage promotional expenditures.

While any loss of competition should provoke concern, the loss in intrabrand competition caused by vertical restrictions is thus of less concern if there is significant interbrand competition. If there are not good substitutes for the product, however, there cannot be effective interbrand competition. The question is, then, are there close substitutes for professional football? If there are, there is less reason to be concerned about the market power of the NFL and restraints within the league. The existence of another professional football league, with teams in NFL cities, would provide a close substitute for the NFL's product. Absent another football league, alternative forms of athletic and entertainment events provide the most likely substitutes for football.⁶¹

The concept of interbrand competition provides an additional touchstone in assessing the antitrust status of various practices. If there are effective substitutes for football, then the NFL could be deemed to have a legitimate interest in bettering its position as an interbrand competitor.⁶² To the extent that its territorial restrictions are attributa-

the Raiders to Los Angeles because the move *might* result in lower overall broadcast revenues for the league, due to the decrease in geographical dispersion, may appear "unfair" to the Raiders. But antitrust law cannot define or respond well to this unfairness. And, if it tries to respond, it may make matters worse. The concern of the antitrust laws is the preservation of the competitive process rather than protection of a particular competitor. Of course, whether a move would decrease overall revenues is an empirical question, and such an impact seems doubtful. Moreover, geographical dispersion can be achieved without forcing the Raiders to stay in Oakland. See note 72 *infra*.

61. The degree to which the newly formed United States Football League will provide a substitute for the NFL's product may be minimized by the fact that the two leagues' seasons will not coincide. One index of the existence of close substitutes would be the reaction of football ticket buyers to an increase in ticket prices. If large numbers of buyers responded by purchasing other forms of entertainment, then their reaction would indicate that close substitutes are available. Such consumer behavior might indicate that football should be viewed as only a part of the larger market for entertainment events.

62. Thus, the desire to have franchises survive and prosper financially supports an insistence on suitable facilities, tactics aimed at promotion of the game and the team, the reasonableness of considering demographics in determining probable fan support, and the pursuit of television con-

ble to that goal, the anticompetitive impact of the restraints may be acceptable. The NFL is more likely to become an effective national interbrand competitor if it disperses successful teams throughout those areas that can support franchises.

Strategic placement of franchises can generate nationwide public interest—also an important factor in obtaining lucrative network television contracts, the proceeds of which are shared among all NFL teams.⁶³ Indeed, any analysis of the NFL structure must include consideration of the central role played by broadcasting in providing revenues to teams and football viewing to fans. One of the problems with territorial and transfer restrictions, as noted, is that they provide economic power that may be used to reduce consumers' choices. However, to the extent that television provides extensive access to football, this monopoly concern is reduced.⁶⁴

tracts. Similarly, nationwide exposure to promote football serves interbrand concerns. The objective of geographical dispersion and the service of servable markets, television contracts—both as a result of promotion and as a form of promotion—and “good-of-the-game” restrictions on the behavior of players and coaches can be seen as rooted in interbrand competition.

63. An analysis of the NFL must include a consideration of the role played by broadcasting contracts in providing revenues for teams. Local radio revenues are given exclusively to the team authorizing the broadcasts. But network television revenues are split evenly among all the teams. The NFL operates with a limited antitrust exemption that permits it to sell television rights as a package and divide the proceeds equally. 15 U.S.C. § 1291 (1976).

In 1980, each team received approximately \$6 million from the league's television contracts. See N.Y. Times, Dec. 12, 1981, at A18, col. 1. In 1981, though total revenue varied among teams according to gate and radio income, the average team received 47% of its revenue from gate receipts and 42% from broadcast contracts. Moreover, the percentage of income received from broadcast contracts in the future will increase dramatically under the latest network contract. The NFL agreed to a five-year contract with the major networks for approximately \$2 billion. This contract will allot to each team about \$14.2 million per year. See Eskenazi, *The State of the N.F.L.: It's Still Winning More Than It Loses*, N.Y. Times, May 2, 1982, at A1, col. 1; Eskenazi, *N.F.L. TV Pact \$2 Billion*, *id.*, Mar. 23, 1982, at D23, col. 6. In no other sport is so large a percentage of the revenue paid by television networks. And cable television could eventually provide an additional substantial source of revenue.

64. It might be objected here that watching a telecast is not a close substitute for being there. This objection appears plausible. But there are undoubtedly fans who are content with a telecast, and the NFL and other sports leagues have expressed concern that the availability of telecasts will affect gate attendance.

One sports writer probably articulated the sentiment of at least some football fans when he wrote:

Let's face it, with due and true apologies to the Oakland fans who stalwartly supported the Raiders through the better half of two decades, the average NFL bum—like me—just wants to be sure that when he calls the candy store on Sunday morning, there's going to be a game there when he clicks on the tube Sunday afternoon.

The rest is superfluous. LA Raiders, Oakland Raiders, Sheboygan Raiders. Who cares.

Drury, *Davis-Rozelle Battles Take Toll on the Mind*, N.Y. Post, June 25, 1981, at 99, col. 3.

Because television contracts provide a large percentage of each team's revenues, and because broadcasting creates and serves a nationwide audience for games, there may be little need for a rule protecting teams from territorial "invasions." Television revenues lessen the economic incentive for a team—whether an existing one or new one—to invade another territory and minimize the economic consequences for teams whose territory is invaded. Subject to the caveat that television revenues in part reflect local fan identification with local teams, the importance of team location may be sharply limited by the role of television.

Even assuming, however, that the NFL has a legitimate interest in regulating the location of its teams in pursuit of the goal of stability and that the increasing importance of television contracts does not vitiate that interest, the question remains whether the present restrictions are reasonable and necessary. There is no reason to assume that, without these restrictions, teams would casually encroach upon the territory of an existing team. The existing team may be well established and enjoying the benefit of accumulated fan support and goodwill. Capital

The NFL and several other professional leagues expressed concern about the effect of telecasts when they objected to a Federal Communications Commission (FCC) order that repealed cable television rules on distant signal carriage. The leagues argued that cable TV, by making available game broadcasts from distant cities when a team is playing at home, would reduce gate receipts, threaten the league concept by damaging weaker franchises, and eventually result in less sports programming. In ruling that the FCC conclusion that sports programming requires no special protection after the repeal of the distant signal rules was not arbitrary, the Court of Appeals for the Second Circuit noted that "the leagues did not produce any evidence that the number of sports broadcasts by home clubs has been reduced in the existing areas of high cable penetration, or would be reduced in the future" and that numerous variables, other than the availability of sports programming on television, influence gate receipts. *Malrite TV v. FCC*, 652 F.2d 1140, 1150 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

The question of the effect on game attendance of the same game or another game being televised that day is ultimately an empirical one on which studies need to be done. Relevant information would include figures on "no-shows"—people who purchase tickets but do not attend the game—when there is a sellout. Researchers would have to control statistically for factors such as weather. Other variables would have to be considered—such as the situation where two mediocre teams play locally and a game between two powerful teams is televised the same day. If, in fact, television were a substitute for live viewing, and if fans were to opt for telecasts over attending, there would seem to be no economic or social reason to interfere with their preference.

However, one study concluded that the lifting of local television blackouts did not have an effect on the number of no-shows. The authors analyzed the effect of the lifting of television blackouts on the number of no-shows during the 1973 through 1977 NFL seasons. They concluded that, while the weather and the quality of the home team did influence the decision to attend, the lifting of blackouts had no influence on the number of no-shows. See Siegfried & Hinshaw, *The Effect of Lifting Television Blackouts on Professional Football No-Shows*, 32 J. ECON. & BUS. 1, 10-11 (1979).

costs and the prospect of competing against an entrenched franchise make entry difficult and risky, whether for an existing team considering relocation or for an expansion franchise. These risks constitute a particularly effective deterrent when the team is profitable in its present location and has strong fan support.⁶⁵ These are factors that Al Davis must have considered before deciding that the Raiders could be more profitable in Los Angeles. And, antitrust policy is premised on the view that such entrepreneurial judgments are best left to the individual businessman.

The history of baseball franchise location and movement illustrates the importance of economic disincentives and incentives in regulating team placement. The record of two-team cities such as Boston, Philadelphia, and St. Louis suggests that economic considerations, rather than league territorial rules, are the main deterrent to multiteam cities and that economic disincentives are usually sufficient to discourage relocation in saturated markets.⁶⁶ Conversely, the creation of the multiclub metropolitan areas of San Diego-Anaheim-Los Angeles and San Francisco-Oakland is evidence that the rules do not preclude entry when the economic incentives to enter are sufficiently strong.⁶⁷

There may be circumstances in which a league justifiably wishes to have available some mechanism for control over team movement. An owner whose team is losing money, for example, may be reckless in his choice of a new location. Prevention of ill-planned moves would protect the long-term interests of the league and its members. But it is also possible that the exclusionary power will be invoked simply to maximize the monopolistic profits of existing franchises. And, in determining the "reasonableness" of a particular restrictive practice, courts have looked unfavorably on overbroad restraints, particularly where there are no appropriate procedural safeguards against arbitrary application.⁶⁸

65. Indeed, the element of risk that derives from leaving an area with a substantial team following applies to any move, whether or not into the territory of another team.

66. Each of these cities was at one time the home of two major league baseball teams. In each instance one of the city's teams relocated in another city.

67. See J. MARKHAM & P. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 103-10 (1981).

68. See, e.g., *Bridge Corp. v. American Contract Bridge League*, 428 F.2d 1365 (9th Cir. 1970), cert. denied, 401 U.S. 940 (1971); *STP Corp. v. United States Auto Club*, 286 F. Supp. 146 (S.D. Ind. 1968).

Justice William J. Brennan, Jr., in his concurring opinion in *White Motor Co. v. United States*, 372 U.S. 253, 264 (1963), suggested evaluating territorial restrictions by considering whether the arrangements are "more restrictive than necessary, or excessively anticompetitive."

At the time the Coliseum commenced its suit, the NFL required a unanimous vote to approve the transfer of a team to a site within the territory of another team.⁶⁹ Such a structure appears fatally flawed. The practical effect of a unanimity requirement is that each team has veto power over any proposed move into its territory. This places completely and precisely in the wrong hands the decision whether to permit entry into an area—in the hands of the entity most interested in restricting competition solely to gain monopolistic profits. One surely would expect a rational owner to veto any “invasion” or, at least, to extract substantial compensation for the reduction in his market power.⁷⁰ While the NHL was considering the move of the Colorado Rockies to New Jersey, for example, the principal owner of the New York Islanders remarked frankly that “from the Islanders’ own selfish viewpoint, we have no interest in it [the Rockies] being there. Why should we want to share a good thing if we don’t have to?”⁷¹

He also suggested that the Court explore whether less restrictive alternatives are available. *Id.* at 270-71 (Brennan, J., concurring).

69. The Coliseum commenced its suit in September of 1978 after the Rams announced their intention to move to Anaheim. The Coliseum initially argued that league rules enabled the Rams, whose new home territory included Los Angeles, to frustrate its efforts to obtain another football team. The rules were changed to the present three-quarters approval requirement shortly after the suit was filed. *See Granelli, supra* note 1, at 1, col. 2.

In 1979, the district court, considering only the Coliseum’s complaint, dismissed the suit with leave to amend. The Coliseum failed to allege that there was a likelihood that members of the league would not approve the move. *Los Angeles Memorial Coliseum Comm’n v. NFL*, 468 F. Supp. 154 (C.D. Cal. 1979). The Coliseum later met the standing requirements and its motion for a preliminary injunction was granted. However, the court of appeals reversed the order and remanded the case to the district court. 484 F. Supp. 1274 (C.D. Cal.), *rev’d*, 634 F.2d 1197 (9th Cir. 1980).

70. Presumably, an incumbent team’s owners will attempt to obtain an amount reflecting the decrease in its future income attributable to the existence of another team in the territory. The calculation necessarily will be imprecise.

71. *N.Y. Times*, May 19, 1982, at B11, col. 1. When the San Diego Clippers of the NBA applied for permission to move to Los Angeles in 1982, however, the Los Angeles Lakers’ owner waived his rights to object to the move and insist on compensation. *See id.*, June 8, 1982, at C7, col. 1. Three possible reasons for his position appear plausible. First, he may have thought that the move was not likely to be approved and, therefore, that he need not retain a veto over it. The fact that later in the year the league moved to strip the San Diego owner of his franchise suggests that the Lakers’ owner may well have had reason to believe that the move would not be permitted. Second, he may have believed that his team was so well entrenched that its position would not be significantly affected by the Clippers’ move. Third, at a time when antitrust suits are common, he may have thought that his behavior would reduce the chances that he and the league would be exposed to antitrust liability.

When the Clippers applied for permission to move, the league began an inquiry into several relevant matters, including whether the team would be properly financed, whether the facilities in which it intended to play were adequate, and whether the area could support two teams. But, in

There is no reason to assume, however, that large metropolitan areas, such as New York-New Jersey and Los Angeles, cannot support two professional football teams.⁷² The presence of two teams in an area provides a choice for consumers and all the benefits to fans incident to the existence of alternatives. If the stability of the league is not threatened by having two teams in the same territory, and if both teams can operate profitably, then no restrictions on team location are justified. The flaw in the NFL's unanimity scheme was not that it restricted moves to promote stability, but rather that it could be used to prevent moves that did not endanger the viability of the league or existing teams. The veto power conferred by a unanimity requirement enables an owner to continually block relocations or new franchises solely because the invasion would threaten his economic self-interests.⁷³ Moreover, a unanimity rule may encourage owners to extract questionable "indemnification" payments from a team that wishes to move.⁷⁴

light of the Raiders' case, the league was not sure whether it was free to consider these matters and rule on the request. As a result, the league filed a declaratory judgment action in federal court in San Diego, seeking a declaration of the scope of its authority under the antitrust laws. *See id.*, June 23, 1982, at A22, col. 6. The action never proceeded to a judgment, however, because in September 1982 the Clippers withdrew their request for permission to move. *See id.*, July 2, 1982, at A17, col. 4.

72. Indeed, during the trial, Commissioner Rozelle stated that the NFL would be better served by keeping the Raiders in Oakland and adding an expansion team in Los Angeles. *See id.*, Apr. 7, 1982, at A18, col. 4. But the placement of a new team in Los Angeles would undercut the decision to keep the Raiders in Oakland to the extent that the decision was based on a judgment that the Los Angeles area cannot support more than one team. Moreover, the declared objective would be accomplished at the cost of keeping the Raiders in Oakland, where they do not want to be. The option to permit the Raiders to move and to place a new team in Oakland was always available.

73. In the language of the sport, an individual franchise should not be the sole referee of this kind of call.

74. Under a unanimity rule, a team that thought it might be injured by a move might insist on payment even though its defined territory would not be invaded. Indeed, with a unanimity rule, any member might demand a payment in exchange for its vote. In the NBA and the NFL, the "home territory" extends to a radius of 75 miles from the city's corporate limits. N.B.A. CONST. § 10(a); N.F.L. CONST. & BY-LAWS art. IV, § 4.1. In the NHL, a team's "home territory" includes all areas within 50 miles from the city's corporate limits. Letter from Gilbert Stein, Vice President/General Counsel, National Hockey League, to Lewis Kurlantzick (Sept. 21, 1982).

A case in point may have occurred when the league gave the Colorado Rockies permission to move to northern New Jersey after they agreed to make a substantial "indemnification" payment to the Philadelphia Flyers. East Rutherford, New Jersey, the site of the Rockies' new arena, is more than 50 miles from Philadelphia and thus beyond the Flyers' home territory. In all, the Rockies agreed to pay indemnification fees totaling approximately \$12.5 million to the New York Rangers, New York Islanders, and the Flyers. *See* Mifflin, *Rockies Are Sold and Moved to Meadowlands*, N.Y. Times, May 28, 1982, at A17, col. 1. In response to the question why the Flyers were paid, the NHL Vice President/General Counsel replied that the matter was confiden-

Recognition of the undesirability and antitrust illegality of unanimity requirements is significant for several reasons. First, other leagues continue to operate with similar rules. The NHL requires a unanimous vote for approval of a transfer.⁷⁶ The NBA requires only a three-quarters vote,⁷⁸ but if the move is into the area of an existing team, that franchise must also approve.⁷⁷ Second, legislation that was introduced in Congress in reaction to the Raiders' move apparently would immunize such rules from antitrust scrutiny.⁷⁸

Shortly after the Coliseum filed its antitrust action against the NFL in 1978, the league changed the approval requirement from unanimity to three-quarters.⁷⁹ Should this change save the NFL arrangement from antitrust violation? Al Davis charges that the change is merely cosmetic; an individual owner who wants to prevent a move can easily gather enough support to preclude a three-quarters vote of ap-

tial. Letter from Gilbert Stein to Lewis Kurlantzick (Oct. 15, 1982). The Rockies also paid a "transfer fee" of \$10 million to the league. See *Mifflin, Rockies Are Sold and Moved to Meadowlands*, N.Y. Times, May 28, 1982, at A17, col. 1. This fee obviously exceeded the amount needed to cover the administrative costs that the league would incur in adjusting to the change in location. In response to the questions why the league was paid, where the money paid to the league goes, and whether it is distributed among league members, Mr. Stein again stated that the information was confidential. Letter from Gilbert Stein to Lewis Kurlantzick (Oct. 15, 1982). There is good reason to believe, however, that the payment of the transfer fee reflected the fact that the grant of permission to move deprived the league of the opportunity to place an expansion franchise in New Jersey.

75. Letter from Gilbert Stein, Vice President/General Counsel, National Hockey League, to Lewis Kurlantzick (Sept. 21, 1982). The NHL Constitution, like the NFL's, does not set forth any criteria or standards for making the decision to approve or disapprove the relocation of a franchise.

76. N.B.A. CONST. § 7.

77. N.B.A. CONST. § 9.

78. See The Professional Sports Stabilization Act of 1982, H.R. 6467, 97th Cong., 2d Sess., § 2(1)(a), 128 CONG. REC. H2598 (daily ed. May 21, 1982)(not unlawful under the antitrust laws for a professional league and its members "to enforce rules requiring approval by the membership of the league for any relocation of a member club").

79. The affirmative vote of three-fourths of the existing member clubs is necessary to approve the transfer of an existing franchise or the establishment of a new one. N.F.L. CONST. & BY-LAWS, art. III, § 3.1(b) (1970, amended 1982); art. IV, § 4.3 (1970, amended 1982). This amendment, according to the NFL, also means that no indemnity is payable as a matter of right to a team into whose territory another club is authorized to move. As a result, the NFL rules on movement are somewhat less restrictive than those in the NHL and NBA. Because the NHL requires unanimity, an accommodation must be reached with the incumbent team in the area. The NBA requires only a three-quarters vote, but if there is an incumbent team, then its approval must be secured by the moving team. The NFL now requires a three-quarters vote and makes no formal provision for compensation to an incumbent team. The principal operative significance of the NFL's "home territory" concept now lies in defining the area in which home games that are not sold out cannot be televised.

proval. This is particularly true, it is claimed, when a "maverick" such as Davis wishes to make the move. Indeed, in other sports, transfer rules have been abused when applied to unpopular owners. In 1953, for example, baseball's American League voted twice not to permit Bill Veeck, the owner of the St. Louis Browns, to move his team to Baltimore. After the second refusal, Veeck sold the team. Two days later, the league voted unanimously to permit the new owner to make the move.⁸⁰

In any case, the new scheme retains a number of troublesome features, among which are the absence of any explicit criteria for approval or disapproval of a plan to move and the lack of procedural safeguards to ensure that an owner can present his case fully and have it judged fairly. In addition, the restrictive rule is unlimited in duration. Movement into a team's territory is restricted long after that team has had a chance to recoup its start-up costs. Particularly troubling is the totally discretionary nature of the process. Every proposed move must be voted on by all the owners without criteria to guide the decision or standards by which the decision can be evaluated. Moreover, the arrangement lacks procedural provisions aimed at insuring that the league does not act arbitrarily or impose restraints that exceed the scope of its need to self-regulate. While the interdependence of league members and the resulting need for an inquiry when an owner wishes to move a franchise—as well as when a franchise is sought—must be recognized, the exercise of this discretion in an anticompetitive fashion and its use to discipline unpopular league members, like Davis, must also be considered.

In sum, the NFL's present three-quarters approval rule should be deemed an antitrust violation. But the dilemma is apparent. While some requirement of approval appears reasonable, the potential for abuse is clear. And there is little in the NFL territorial restrictions,

80. Similarly, in 1977, Ted Turner, the flamboyant owner of the Atlanta Braves, was barred from having any role in the operation of the team for a full year. He was found to have communicated with Gary Matthews, who was to become a free agent, before the time at which he was permitted to negotiate with Matthews. See Chass, *Kuhn Suspends Turner, Braves' Owner, for Year in Matthews Case*, N.Y. Times, Jan. 3, 1977, at A29, col. 2. One cannot help but suspect that the sanction imposed on Turner was punitive and "disciplinary" because it appears to be wholly out of proportion to the gravity of the offense.

In addition, a discriminatory application of league procedures occurred with the sale of the Chicago Bulls of the NBA. The owner of the Chicago Stadium, who was seeking to buy the team, used his economic power and friendship with several NBA owners to effect a denial of the transfer of the franchise to a rival bidder. See *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. Oct. 28, 1981).

transfer rules, and decisional procedures that give much assurance that this potential will be contained.

V. PROPOSAL

The challenge is to design a scheme that permits some regulation of team location when genuine league interests are involved without running afoul of antitrust law. The concern about abuse of league discretion might be lessened if the league adopted rules designed to protect only its legitimate interests, including guidelines, and provided that the rules could be applied in some situations without requiring all the owners to vote. Thus, the question whether an area can support a team, or two teams, for example, might be decided in part with a population-based rule or rule of thumb such as that employed by Major League Baseball. Baseball's governing rules enable a league to prevent the other league from moving a team into a city already occupied by one of its teams only if the city has a population of less than 2.4 million.⁸¹ And legislation introduced in 1979 to prohibit the grant or exercise of exclusive rights in a geographical area included an exception where the home territory contains less than two million residents.⁸² Similarly, the NFL might articulate a set of presumptions or a list of factors, including, for example, population, income statistics, and the number of college teams in the area, to be considered when deciding whether to permit moves. Such devices would help an antitrust court to structure its inquiry and would lessen the chance of an antitrust violation by reducing the potential for abuse of discretion.

The NFL admittedly has a legitimate interest in the development of fan loyalty, a goal that is furthered by franchise continuity.⁸³ But

81. Major League Rule 1(c).

82. Sports Antitrust Reform Act, H.R. 2129, 96th Cong., 1st Sess., 125 CONG. REC. H591-92 (daily ed. Feb. 13, 1979). This bill also would have repealed baseball's antitrust exemption. The congressional swings are worth noting. The 1979 bill was designed to outlaw exclusive rights in geographical areas. In contrast, the legislation introduced in 1982, in reaction to the Raiders' case, is designed to strengthen transfer restrictions.

83. What attention should be given to fan support of a team over a period of time? Does sustained loyalty create some kind of an obligation to keep the team in place? The fans of the Raiders are understandably upset that Al Davis has moved the team to Los Angeles. But, as any Brooklyn Dodger fan knows, the law does not endow consumers with any right to a sufficient supply of a particular product. Arguments that "fairness" to loyal fans requires some restrictions on team movement do not put forth a claim that has traditionally been within the protection of the antitrust laws. The fan whose team moves to another city is no different from the consumer whose favorite cereal is taken off the shelf. The argument can be made that fans at the new site have as strong a claim to the team as its present fans. Moreover, if the new area offers greater potential for fan support, free-market principles dictate that the interests of the new fans should

the league can guard against the potential problem of frequent team turnover with an objective rule or set of rules, for example, that require its teams to stay in place for a minimum number of years. The arrangement may be made more flexible, if necessary, by allowing a team to move prior to the expiration of the minimum period if it can demonstrate special circumstances such as poor attendance, losses over a period of years, inadequate facilities, or breach of its lease. In practice, moves or attempts to move by sports franchises have been relatively rare in recent years. And it is difficult to argue that franchise relocation has produced serious permanent harm in any professional sport.

The fact is that the NFL and other professional sports leagues can, if they wish, devise alternative arrangements that will serve legitimate league objectives and also, by limiting the opportunity for arbitrary application of restraints, will be much less vulnerable to antitrust challenge. Consider, for instance, a scheme whereby the league: 1) states that its objective, among other concerns, is to prevent moves that would weaken an incumbent team and thereby weaken the league; 2) sets forth a policy stating that such a move will be permitted if it appears that two teams can be viable in the particular area and the incumbent team will not be seriously undercut by the move; 3) sets forth objective criteria consistent with the league objective and policy that will be looked to in deciding whether a move should be permitted; and 4) places the decision in the hands of a separate entity with no direct financial stake in the decision—the Commissioner or, better still, a disinterested arbitrator—so as to insulate it from the owners' short-term interest in restricting competition. Such a scheme would be responsive to league needs, but contrasts notably with a unanimity or three-

prevail. Resources must be free to move to areas where there is greatest demand. Indeed, the policy of the antitrust laws—commitment to protection of the competitive process rather than any particular competitor—is based, in part, on the premise that if an area can support a new business or team, someone will move a business or team to that area.

It should not be concluded, however, that there are in fact no legal or extralegal forces in operation that are of aid to loyal fans. The league does have a legitimate interest in placing some restrictions on team turnover. And sustained fan support reduces the likelihood that a team will relocate. If a team has a proven following in its present location, a prudent owner will be quite hesitant to move the team. Moreover, if a move does occur, the existence of proven fan support will make the city an attractive candidate for another franchise. In fact, the history of professional baseball indicates that there is more than theoretical support for the argument that resources will move to meet demand. Several cities have been "deserted" and subsequently "resettled" by baseball teams. In addition, in cities where stadia are publicly owned or operated, lease provisions provide an additional barrier to team movement. Finally, the Raiders' experience draws attention to the possible use of the power of eminent domain to restrain team movement. *See note 6 supra.*

quarters rule and the process by which it is applied.⁸⁴

SUMMARY AND CONCLUSION

The antitrust suit filed by the Coliseum and the Raiders focuses attention on the complex economic nature of a sports league. Resolution of the Raiders' claim may well force dramatic changes in the organization and operation of sports leagues. Professional sports leagues do not fit well with standard models of industrial organization, and application of antitrust law to leagues must be tailored to the unique kind of economic enterprise they constitute. Practices that would clearly be violative of the antitrust laws in other industries may be lawful in the sports context, and offered justifications, such as financial stability, that would be given little credence elsewhere, may be valid here.

The distinctive character of a sports league, however, does not justify a sweeping exemption from antitrust scrutiny. Courts must judge whether particular practices are essential to the league's continued success. In determining legality, the touchstone for a court should be whether the contested practice is essential for organized competition. In addition, it may be helpful in measuring legality to ask, first, whether the arrangement flows from an interest in interbrand competition and, second, whether the practice appears to be rooted principally in the profit-maximization interests of the individual owners as competitors or in the needs of the league as an organized entity, including its long-range promotion of the game. Moreover, courts must always consider whether a less restrictive arrangement could adequately protect league interests.

In conclusion, while both the need for flexibility in the application of the antitrust laws to professional sports and the difficulty of evaluating the reasonableness of particular arrangements must be acknowledged, the NFL restrictions challenged by the Raiders should be deemed a violation of section one of the Sherman Act. But a less restrictive alternative can be justified.

84. It should be reiterated that the discussion of geographical and transfer restrictions has implications for rules governing the admission of new teams as well. Thus, some limit on teams' discretion with respect to the decision whether to admit new teams and an articulation of the factors to be considered is desirable.