

# Journal of the National Association of Administrative Law Judiciary

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Volume 33 | Issue 1

Article 8

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11-6-2013

## A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow

Stephen Dixon

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### Recommended Citation

Stephen Dixon, *A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2013)

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**A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow**

**By Stephen Dixon**

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## I. INTRODUCTION

\$2,150,000,000. That was the price that the Guggenheim Partners—a Los Angeles-based team of investors whose public face is local icon Magic Johnson—paid to purchase the Los Angeles Dodgers baseball team.<sup>1</sup> In the prolonged bidding period that preceded this decision—a game of financial tug of war between titans bidding for control of one of the most prolific professional sports teams in U.S. history—no other potential owner's bid was within \$600 million of the Guggenheim bid.<sup>2</sup> Not only did the new owners of the historic franchise outspend their opponents by an obscene amount, they outspent history.

The previous record of the highest price paid during the sale of a professional baseball franchise was the \$845 million paid to purchase the Chicago Cubs several years earlier.<sup>3</sup> The Dodgers more than doubled that price. Before the sale, the Dodgers themselves were coming off one of the most disappointing stretches in their long, mostly successful, history: subpar play on the field<sup>4</sup> (decades since a

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<sup>1</sup> *Dodgers Sold to Magic Johnson Group*, ESPN LA (Mar. 28, 2012, 1:21 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7745566/los-angeles-dodgers-selling-team-magic-johnson-group-2b](http://espn.go.com/los-angeles/mlb/story/_/id/7745566/los-angeles-dodgers-selling-team-magic-johnson-group-2b).

<sup>2</sup> Darren Rovell, *Made For TV: If Their New Deal Hits Big, the Dodgers May Have Been a Bargain After All. Your Team Should Be So Lucky*, ESPN THE MAGAZINE, Nov. 12, 2012, at 34-37.

<sup>3</sup> ESPN, *supra* note 1.

<sup>4</sup> The Dodgers last World Series title came over twenty years ago, in 1988, delivered on the bat—and hobbled leg—of slugger Kirk Gibson and his iconic home run. *On This Day: Kirk Gibson Hit His World Series Homer*, USA TODAY (Oct. 15, 2012, 3:07 PM), <http://www.usatoday.com/story/gameon/2012/10/15/kirk-gibson-bryan-cranston-dennis-eckersley-vin-scully-world-series-home-run/1633933>.

Since then, it has hardly been the glory days for the Dodgers. They have traded superstars away, like Hall of Famer Pedro Martinez, just before their prime, at the same time trading for players who have ultimately underperformed or—like Manny Ramirez—shined brightly before disgracing the team with a lengthy steroid suspension. See Ross Newhan, *A Long-term Trade Deficit: L.A. Dodgers' Worst Trade Ever? For Many Fans, and One Hall of Fame Baseball Writer, the Choice is Clear: Pedro Martinez for Delino DeShields in 1993*, L.A. TIMES (Apr. 22, 2008), <http://articles.latimes.com/2008/apr/22/sports/sp-pedrodelino22>; see also Tom Verducci, *Ramirez Tests Positive, Suspended 50 Games by MLB*, SPORTS ILLUSTRATED (May 11, 2009, 12:18 PM), <http://sportsillustrated.cnn.com/2009/baseball/mlb/05/07/manny/index.html>.

last World Series appearance),<sup>5</sup> lagging attendance,<sup>6</sup> dubious financial practices, abhorrent team oversight conducted by their less-than-admired owner,<sup>7</sup> and, most tragically, a fan's brutal beating after a game in the team's expansive parking area.<sup>8</sup> Even ignoring these

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<sup>5</sup> As if to rub pine tar in the Dodgers' wounds, the universe has rewarded the Dodgers' bitterest rivals, the San Francisco Giants, with *two* World Series Championships in the last three years. See Andrew Keh, *With a Sweep, Giants are Champions Again*, NY TIMES (Oct. 29, 2012), [www.nytimes.com/2012/10/29/sports/baseball/giants-sweep-tigers-to-win-second-world-series-title-in-three-years.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/29/sports/baseball/giants-sweep-tigers-to-win-second-world-series-title-in-three-years.html?pagewanted=all&_r=0). The Giants' first title came when Los Angeles was at a nadir, but perhaps the second, and most recent, title hurt more. In 2012, just after the Dodgers acquired their top-dollar stars, the Giants went on an improbable title run and left the Dodgers in the proverbial rosin dust. Bill Plaschke, *The Giants Leave the Dodgers in Their Wake*, L.A. TIMES (Oct. 25, 2012), <http://articles.latimes.com/2012/oct/25/sports/la-sp-plaschke-giants-20121026>.

<sup>6</sup> Attendance in 2011 was down almost two million fans from just two seasons earlier. BASEBALL ALMANAC, <http://www.baseball-almanac.com/teams/laatte.shtml> (last visited Feb. 3, 2013).

<sup>7</sup> Less-than-admired would be perhaps the most magnanimous way of describing Frank McCourt, who was described in 2011—in bold type—as “the most hated man in the history of Los Angeles” by the Los Angeles Times sports blog. See Steve Dilbeck, *Frank McCourt: the Most Despised Man in the History of Los Angeles*, L.A. TIMES (June 27, 2011, 3:51 PM), <http://latimesblogs.latimes.com/dodgers/2011/06/frank-mccourt-the-most-despised-man-in-the-history-of-los-angeles.html>.

McCourt fought his ouster, most notably towards the end by trying to cling to some of the team's enormous parking revenues. Ramona Shelbourne, *McCourt Gets No Parking Money*, ESPN LA (Mar. 29, 2012, 10:08 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7752934/frank-mccourt-receives-no-parking-revenue-los-angeles-dodgers-sources-say](http://espn.go.com/los-angeles/mlb/story/_/id/7752934/frank-mccourt-receives-no-parking-revenue-los-angeles-dodgers-sources-say).

<sup>8</sup> Bill Shaikin, *Frank McCourt Agrees to Sell Dodgers*, L.A. TIMES (Nov. 1, 2011, 9:45 PM), <http://latimesblogs.latimes.com/dodgers/2011/11/mccourt-agrees-to-sell-dodgers.html>.

San Francisco Giants fan Bryan Stow was severely beaten by several men in one of the parking lots adjacent to Dodger Stadium after a game. *Bryan Stow: the Dodger Stadium Beating One Year Later*, L.A. TIMES (Mar. 31, 2012, 9:38 AM), <http://latimesblogs.latimes.com/lanow/2012/03/bryan-stow-a-year-after-dodgers-beating-remarkable-progress.html>.

The beating of Bryan Stow should not be lightly discussed. It is perhaps callous to list it here with these other of the Los Angeles Dodgers' recent foibles. Stow was beaten by several men outside of Dodger Stadium, while shocked baseball fans on their way to their cars looked on. Without trivializing the human aspect of the Bryan Stow tragedy, the entire event did become a talking point for both fans of the Dodgers and Dodgers haters in the following seasons. Fan anger

ignominious warts that any visitor to the old ballpark at Chavez Ravine could not help but notice, one could be forgiven for failing to see how the \$2.15 billion price tag made any sense at all. Stripped of the Dodgers' mystique, the glitz of L.A., and the rest, this was still just a baseball team. Ninety feet from home plate to first base. Same clay on the infield as any other. Same beer in the same plastic cups in the stands. What made this deal any different than the hundreds that came before it? One word: television.

At the time of the historic sale, the Dodgers found themselves at a broadcasting crossroads. The decision facing every professional sports team in North America these days is whether, when their current television deal runs its course, they should attempt to capitalize on fan interest and establish their own network, soaking in all of the benefits and room for growth that such a maneuver would entail. Or, whether a market for that team's broadcast rights exists such that the team should "cash in" and sign off on the biggest contract that it can manage.<sup>9</sup> Either way, television in sports—and the money that television in sports represents—has never, ever been bigger.<sup>10</sup> After the purchase of the Dodgers by Magic Johnson and company, the team acquired hundreds of millions of dollars' worth of on-field talent, and has completely committed to wringing as much as

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about the lack of security in the parking lots and about the general tenor around the stadium had been bubbling over before the incident, and the fact that McCourt made a literal fortune from the very fans who were afraid to park there did nothing to assuage the outrage.

<sup>9</sup> See Joe Forward, *Sports and the Law: A National Niche and a Baseball Deal to Remember*, 85 WIS. LAW. 6, 11 (2012) ("Teams such as the New York Yankees and the Boston Red Sox have started their own networks, retaining the broadcasting rights while reaping the big revenue rewards. In turn, these teams can sign the big money players. After 2013, the new Dodgers owner could do the same, or let broadcasters compete for broadcasting rights").

<sup>10</sup> See Natalie L. St. Cyr Clarke, *The Beauty and the Beast: Taming the Ugly Side of the People's Game*, 17 COLUM. J. EUR. L. 601, 624 (2011). Although the League arranges national broadcasting contracts, the bulk of broadcasting revenue traditionally comes from the local contracts that individual teams enter into. *Id.* Increasingly, however, teams are setting up their own networks. In New York, both MLB teams have stakes in their own network; the Yankees' YES Network generated \$400m in revenue in 2010. *Id.* This contributed to the Bronx Bombers, at \$427m, having revenue of about \$155m higher than the team with the next highest revenue team, Boston Red Sox. *Id.*

they can out of a subsequent television deal.<sup>11</sup> It sure seems like it was all worth it. The Dodgers recently announced that they have come to terms on a deal with Time Warner Cable, worth an estimated eight billion dollars over the next twenty-five years.<sup>12</sup> As part of the deal,<sup>13</sup> there will be a “team-owned” channel, called “SportsNet LA,” debuting in 2014.<sup>14</sup>

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<sup>11</sup> Rovell, *supra* note 2, at 35–37.

The Dodgers’ 2012 season was, from most perspectives, a disappointment. Although the team exhibited improved performance on the field, and saw attendance—and “buzz”—boost throughout the season, they failed to make the playoffs. See Tim Brown, *Dodgers’ Desperate Playoff Chase Ends With Another Stumble*, YAHOO! SPORTS (Oct. 3, 2012, 3:47 AM), <http://sports.yahoo.com/news/dodgers--desperate-playoff-chase-ends-with-stumble.html>. Most would see the future as “bright,” for the team even still. Late in the season, the Dodgers acquired Mexican-born slugger (and Southern California favorite) Adrian Gonzalez, pitcher Josh Beckett, and outfielder Carl Crawford from the Boston Red Sox in what can be called, without hyperbole, one of the largest trades in baseball history. See Jayson Stark, *A Blockbuster Unlike Any Other: Red Sox, Dodgers Pull Off a History-Making, Franchise-Changing Trade, in August*, ESPN MLB (Aug. 25, 2012, 7:03 PM), [http://espn.go.com/mlb/story/\\_id/8302371/red-sox-dodgers-deal-history-maker](http://espn.go.com/mlb/story/_id/8302371/red-sox-dodgers-deal-history-maker).

This trend continued into the offseason wherein the Dodgers won the bidding rights for a South Korean pitcher, paying \$25.7 million simply for the rights to negotiate with Ryu Hyun-jin. Dylan Hernandez, *Ryu Hyun-jin Signs With Dodgers*, L.A. TIMES (Dec. 9, 2012), <http://articles.latimes.com/2012/dec/09/sports/la-sp-dn-ryu-signs-20121209>.

While the big trade did not lead to improvements on the field, the message was clear—the new ownership group is “all in.” They expect to spend big, win big, and, almost exclusively through funds obtained in the new television deal, earn big. See Scott Boeck, *Magic Johnson: World Series or Bust*, USA TODAY (Feb. 4, 2013, 1:15 PM), <http://www.usatoday.com/story/gameon/2013/02/04/magic-johnson-dodgers-world-series/1890413> (quoting Magic Johnson as having stated, “[w]e want to go to the World Series. If we don’t accomplish that, yes, it’s not a good season for us”).

<sup>12</sup> Bill Shaikin, *Dodgers Officially Announce Deal with Time Warner Cable*, L.A. TIMES (Jan. 28, 2013), <http://articles.latimes.com/2013/jan/28/sports/la-sp-dodgers-tv-20130129>.

<sup>13</sup> The deal is still pending, waiting for the approval of Major League Baseball. As of March 10, 2013, Major League Baseball had not yet reviewed the terms of the agreement. Mike Ozanian, *Dodgers TV Deal with Time Warner Cable Still Not Seen by MLB*, FORBES (Feb. 9, 2013, 7:48 AM), [www.forbes.com/sites/mikeozanian/2013/02/09/dodgers-tv-deal-with-time-warner-cable-still-seen-by-mlb](http://www.forbes.com/sites/mikeozanian/2013/02/09/dodgers-tv-deal-with-time-warner-cable-still-seen-by-mlb).

<sup>14</sup> *Id.*

Before this deal was reached, prognostication about the possible terms and effects of the deal could hardly be avoided. One sportswriter predicted that when the Dodgers sold the rights to broadcast their games in the coming seasons, they would have been able to negotiate a deal for up to \$225 million per year.<sup>15</sup> Shortly after the conclusion of the 2012 Major League Baseball (MLB) season, one sportswriter opined that rather than gargantuan, the prospective Dodgers' television deal should really be termed "dangerous."<sup>16</sup> Most predict that the Dodgers' move to Time Warner Cable and an exclusive—read, not free—cable home for all of their games will lead to consternation among Dodger fans, but at least a few sportswriters have predicted that it's nothing more than the wave of the future.<sup>17</sup>

The financial windfall from selling television rights to a pre-existing Regional Sports Network (RSN), a type of network that obtains the rights to broadcast sports teams' games in a certain market, such as Fox Sports or Comcast, is only one option available to teams when they reach this crossroads. Perhaps the even more lucrative option—certainly the option with the higher financial "ceiling" for runaway success—was for the Dodgers to take "control" of their own network.<sup>18</sup> That's just what they have decided to do, but with a few tweaks to the system along the way.

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<sup>15</sup> Rovell, *supra* note 2, at 35–37.

<sup>16</sup> See Jeff Passan, *Dodgers' \$6B-\$7B TV Deal Will Widen Chasm Between MLB's Rich and Poor*, YAHOO! SPORTS (Nov. 25, 2012, 11:08 PM), <http://sports.yahoo.com/news/dodgers---7-billion-tv-deal-will-widen-chasm-between-mlb-s-rich-and-poor-040842261.html>.

Yahoo!'s Jeff Passan sums up the fears of a certain contingent of television-money wary fans aptly, writing that the Dodgers' potential T.V. money haul really symbolizes the "the siren that baseball's new era has arrived, one in which the sport's best revenue-sharing intentions cannot save it from the self-cannibalizing greed that drives these TV mega-contracts—and drives a wedge between the haves and have-nots harder to extract than sword from stone." *Id.* Passan goes on to highlight the fact that—if the predicted television revenues prove accurate—the Dodgers will be taking in more television money than most teams earn in *entire revenue*. *Id.*

<sup>17</sup> Josh Luger, *How the \$7 Billion Dodgers TV Deal Could Actually be Good for Consumers*, BUSINESS INSIDER (Feb. 7, 2013, 3:30 PM), <http://www.businessinsider.com/how-the-7-billion-dodgers-tv-deal-could-actually-be-good-for-consumers-2013-2>.

<sup>18</sup> *Id.*

Not all of the moving parts of the Dodgers' deal with Time Warner have been announced just yet, but it appears that the Dodgers will be the proud proprietors of a "team-owned" network.<sup>19</sup> Here is why that detail is critically important for Magic and his colleagues: Major League Baseball generally collects about one-third of broadcast revenue that any given team generates, and these revenues are then included in baseball's "revenue sharing" mechanism, which attempts to level the playing field between rich and poor in the major leagues by redistributing the wealth.<sup>20</sup> But, and this is the critical distinction, when a team assumes the risk of owning its own television network—if the money is merely "potential" instead of guaranteed, depending on how the team manages its broadcasting, its finances, and the network as a whole—that team is generally allowed to keep almost all of the network's profits.<sup>21</sup> It would be as if lawyers who "hang their own shingle" did not have to pay back any of their law school debt. When you're expecting to make as much money as the Dodgers are over the next twenty-five years, this potential savings makes an unmistakably colossal difference.<sup>22</sup>

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<sup>19</sup> Shaikin, *supra* note 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* But this also represents one of the major reasons this deal has not yet been announced. Bill Shaikin, one of the foremost Dodgers sportswriters and a blogger for the L.A. Times, discussed the following issues in his piece on the deal with Time Warner Cable:

At least two elements of the new television contract probably will draw particular scrutiny from MLB, according to people familiar with the deal but not authorized to discuss it. *Time Warner Cable has guaranteed the Dodgers fees* from cable and satellite providers even if those companies do not carry the new channel, the people said. Also, TWC has guaranteed the Dodgers certain fees as part of what the team might present as an expansion of TWC's current sponsorship. *If MLB contends the Dodgers are taking no significant financial risk in those or other elements of the contract, the league could assess the 34% fee on the relevant revenue.* The Dodgers are prepared to appeal any such assessments to the U.S. Bankruptcy Court, which has final say as part of the settlement between McCourt and MLB.

*Id.* (emphasis added). Whether or not the Dodgers are truly taking on enough of the "risk" inherent in owning their own network is a unique question. It is also one of



Even with only the early details of this massive deal having been reported, it appears that, by deciding to build their own “dedicated network,” the Dodgers have become the newest members of a small—but growing—broadcast club. They are now essentially the owners of what is known as an Individual Regional Sports Network (IRSN).<sup>23</sup> These networks, popularized in recent years by the success of the Yankees Entertainment and Sports Network (YES), the Red Sox’s New England Sports Network (NESN), and the University of Texas’s Longhorn Network, among several other channels, may be the wave of the future in sports broadcasting. As with any venture, there are drawbacks to taking a sports team network “out on its own.”<sup>24</sup> But one by one, teams are realizing that the potential benefits outweigh these risks.<sup>25</sup> This article will analyze the potential

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the many ways in which this Dodgers T.V. deal might blaze new ground for future broadcast issues in sport. Either way, all eyes are on the boys in blue.

<sup>23</sup> It was hypothesized that the Dodgers may have been wrangling for some sort of control with a larger Regional Sports Network, like Fox or Time Warner, which would allow them to achieve a “best of both worlds” type of scenario. See Bill Shaikin, *Fox or Time Warner? Dodgers Said to be “50/50” Over TV Choice*, L.A. TIMES (Jan. 4, 2013, 5:45 PM), <http://www.latimes.com/sports/dodgersnow/la-sp-dn-fox-time-warner-dodgers-tv-20130104,0,2302915.story>.

<sup>24</sup> Presumably, these are the “risks” that Major League Baseball takes into account when determining that a team that owns its network does not have to pitch in as much to league revenue sharing. See Jack Humphreville, *Would You Pay \$120 to Watch the Dodgers on TV?*, CITYWATCH (May 31, 2013), <http://www.citywatchla.com/lead-stories-hidden/5168-would-you-pay-120-to-watch-the-dodgers-on-tv>.

<sup>25</sup> RSNs and independently owned RSNs carry various benefits and risks. The most clearly recognizable risk is simply that independent ownership leaves one more exposed to the potential costs of failure, whereas attaching a television deal to a larger “host” network, like Fox, Comcast, and the rest, helps to allocate some of these burdens.

It is believed that the Dodgers negotiated with Fox Sports for some time before beginning to entertain offers from Time Warner Cable. The major holdup appeared to be the fact that the Dodgers wanted to be considered an IRSN, even if this were to occur as part of a larger deal with combined ownership with an established company like Time Warner, which might allow them to pay substantially less to MLB, as discussed above, than if they signed a more-standard contract with an RSN. See Shaikin, *supra* note 23. According to Bill Shaikin:

The Dodgers' discussions with MLB center on whether all of their guaranteed television revenue should be subject to baseball's

for expansion of IRSNs throughout baseball and sports in general, and, more importantly, what freedom baseball's regulatory authority might have to reign in this wild expansion in the "best interests of the game" and to maintain some semblance of parity in the sport moving forward.

All of this is well and good for the business pages, but what about the game that takes place *on the field*? With the Dodgers ready to join the Yankees as the league's biggest spenders, will there be anything left for the small market teams, and their fans, to play for?

It has become apparent to baseball fans, and sports fans in general, that it must be asked whether the leagues themselves can do anything to restrict, or at least to further regulate, this potential expansion. As the way that Americans watch sports changes more rapidly than ever, it is getting harder and harder to regulate financial growth and its effect on competitive balance. Could MLB stop the Dodgers<sup>26</sup> from joining baseball's other elite teams as partial or whole RSN owners, thus arming them with a greater opportunity to use broadcast wealth as a way to expand the revenue gap in the sport?<sup>27</sup> Could MLB reassess the formula currently used to

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revenue-sharing program. At issue in a \$6-billion deal: whether the team's contribution to the program would be about \$1 billion or about \$2 billion. The league believes—and there are indications the court might agree—that the Dodgers must take some element of risk with any money not subject to revenue sharing. The Dodgers must contribute 34% of the annual rights fee to baseball's revenue-sharing program. The team plans to launch its own regional sports network, in part to avoid the prospect of Fox or TWC paying a much higher rights fee. However, in order to get dividends from a regional sports network, the league believes the team should be required to take the accompanying risk of ownership. The Dodgers are looking at other ways to structure a deal that would shield that money from revenue sharing and satisfy MLB as well.

*Id.*

<sup>26</sup> They have not, and they will not. Perhaps the question needs to be asked now, if only to better prepare the method of analysis for the next big market team that attempts to cash in with a massive television deal.

<sup>27</sup> See 2012 MLB Salaries by Team, USA TODAY, <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team> (last visited Feb. 3, 2013), for a list of Major League Baseball salaries by team and player.

Baseball has had a long and well-documented, frustrating history with revenue and competitive balances. While the NHL, the NFL, and the NBA all boast salary

determine how much of its broadcast revenues a team has to give back through revenue sharing? It is more likely than not that these issues will need to be addressed in the coming years.

The effects of the Dodgers' deal will be felt soon enough. In ten years, when more teams are reaching for the golden chest, it will be important for baseball, and the baseball adoring public, to be aware of what control they might be able to exercise—or to ask a regulatory authority to exercise—in order to preserve the competitive balance of the sport that they love.

## II. THE BUSINESS OF REGIONAL SPORTS NETWORKS

Individual Regional Sports Networks like the YES Network and the Longhorn Network are offshoots of a broader base of network, the Regional Sports Network itself. RSNs are the primary way that most Americans watch sports in the modern era, but that has not always been the case. Any discussion of the history of sports broadcast issues needs to begin with the Sports Broadcasting Act of

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caps of some kind to ensure parity, Major League Baseball has resisted such a move. William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV 61, 93 (2004) (discussing how the "luxury tax" in MLB is not a "hard cap," as in other sports). That is to say, the MLB Players Association ("MLBPA") has resisted such a move. The MLBPA is arguably the toughest and most successful of the professional players unions. Darren A. Heitner & Jason B. Wolf, *In Baseball's Best Interest?: A Discussion of the October 2010 MLBPA Regulations Governing Player Agents*, 10 VA. SPORTS & ENT. L.J. 249, 250 (2011) ("In 1997, it was said that 'the strongest union to date' is the Major League Baseball Player's Association . . . currently in effect. Fourteen years later, that statement would be hard to refute.").

In the last twenty years, players' salaries have skyrocketed and teams have gone along for the ride, with salaries shooting up to as much as \$150 to \$200 million dollars for the top teams, while small market teams are left fighting to build a team with less than half—and sometimes about a quarter—of that amount. See David Haddock, Tonja Jacobi, & Matthew Sag, *League Structure & Stadium Rent-Seeking: The Role of Antitrust Revisited*, 65 FLA. L. REV. 1, 14 (2013) (stating that the average MLB salary in 2012 was over \$3 million).

The average salary of a New York Yankees player is over \$6 million per year. See *2012 MLB Salaries by Team*, USA TODAY, *supra* note 27. The average salary of an Oakland Athletics player is \$2 million per year. *Id.* While both teams made the playoffs in 2012, you can bet the farm that the Yankees will be there with more consistency over the next decade, much as they were in the last. See *Standings*, MLB.COM, <http://mlb.mlb.com/mlb/standings> (last visited Feb. 3, 2013).

1961.<sup>28</sup> The Sports Broadcasting Act (SBA) was Congress's reaction to a now-infamous case pertaining to the broadcasting of National Football League (NFL)<sup>29</sup> games.<sup>30</sup>

In the early days of sports broadcasting, teams were able to manage their own rights because these rights had been generally considered to belong to the teams themselves, rather than the league.<sup>31</sup> This original suit between the U.S. and the NFL, commonly known as "NFL 1," dealt with the pooling of NFL broadcasting rights, and specifically with whether it was an unreasonable restraint on trade for the NFL to enforce Article X of its bylaws, which prevented outside-market games from being broadcast into another team's local market when that team was "on the road."<sup>32</sup>

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<sup>28</sup> Exemption From Antitrust Laws of Agreements Covering the Telecasting of Sports Contests and the Combining of Professional Football Leagues, 15 U.S.C. § 1291 (2011).

<sup>29</sup> The NFL has been a hotbed of antitrust issues, specifically relating to broadcasts, both on radio and television, of team's content. While baseball and MLB perhaps hold the most interesting hand when it comes to antitrust immunity, the NFL's history is almost as rich. *See* Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1390 (9th Cir. 1984) (discussing how, according to the Ninth Circuit Court of Appeals, "NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.").

<sup>30</sup> United States v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>31</sup> Lance L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sports Leagues*, 54 DEPAUL L. REV. 1237, 1243-44 (2005).

<sup>32</sup> *Id.*; Bradley W. Crandall, *The DirecTV NFL Sunday Ticket: An Economic Plea for Antitrust Law Immunity*, 79 WASH U. L.Q. 287, 296-98 (2001).

Sunday Ticket poses an interesting counterpoint to some of the support for baseball's proliferation of mega-money deals and RSNs as being "good for business." Most NFL fans simply love having the opportunity to go to their area watering hole—or even to remain in the comfort of their own home—and to watch every NFL game, each week, at their leisure. The RSN money coming into baseball generally handicaps baseball and prevents MLB fans from enjoying such a luxury. RSN/MLB cooperation has instituted blackout rules that would prevent a subscriber of the MLB Extra Innings package (a similar programming model to NFL Sunday Ticket) who lived in, say, Boston, from watching Red Sox games on the Extra Innings broadcast, instead forcing that subscriber to purchase the New England Sports Network separately in order to see the games. *See How Are Blackouts Determined for MLB EXTRA INNINGS*, DIRECTV.COM,

During the years after 1953, NFL Commissioner Pete Rozelle began to worry that the competitive balance of the league could be affected by an individualized system—if the teams in the big markets got all the big television money, then the smaller market teams would obviously struggle to keep up—so the NFL decided to pursue a course of “pooling” broadcasting rights and selling them as one big contract, with revenues to be shared throughout the league.<sup>33</sup>

The decision in NFL 1, which found that some of the NFL’s procedures had an acceptable business purpose but that other parts were in fact unreasonable was considered by some to be vague, and the NFL approached the court in 1961 seeking clarity before the league attempted to enter into a “pooled rights” television contract with CBS.<sup>34</sup> The court in this subsequent case, known as “NFL 2,” found that such a “pooled rights” situation would constitute an antitrust violation and should be prohibited.<sup>35</sup> Judge Grim, writing for the court in the Eastern District of Pennsylvania, held that, in essence, the NFL was seeking to give CBS the power to determine which games should be telecast and where, which constituted an agreement among all NFL teams to restrain the “trade” of NFL games throughout the country.<sup>36</sup> If this decision took hold in higher courts and was left standing by the legislature, it would have changed the entire course of sports broadcasting in this country and the way

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[http://support.directv.com/app/answers/detail/a\\_id/1723/~how-are-blackouts-determined-for-mlb-extra-innings%3F](http://support.directv.com/app/answers/detail/a_id/1723/~how-are-blackouts-determined-for-mlb-extra-innings%3F) (last visited Feb. 9, 2013).

As much as fans love NFL Sunday Ticket, it is hard to imagine a Cowboys fan deciding to up his subscription knowing that he could watch every NFL game each Sunday *except* for his hometown team.

<sup>33</sup> Ariel Y. Bublick, *Are You Ready for Some Football?: How Antitrust Laws Can be Used to Break Up DirecTV’s Exclusive Right to Telecast NFL’s Sunday Ticket Package*, 64 FED. COMM. L.J. 223, 233 (2011).

<sup>34</sup> Crandall, *supra* note 32, at 296; *United States v. Nat’l Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961).

<sup>35</sup> *Nat’l Football League*, 196 F. Supp. at 447.

<sup>36</sup> Bublick, *supra* note 33, at 232-33.

The NFL argued that restricting the broadcasts of home games when the home team was not on the road would boost home attendance (that logic will sound familiar to modern day NFL fans of teams like the San Diego Chargers, who are sometimes restricted from watching their home team’s games for reasons not unlike the argument that Judge Grim shot down half a century ago). *Id.* at 231. Judge Grim felt that the NFL was a “truly unique business enterprise,” and that this type of restraint was a restriction. *Id.*

that Americans watch football—the most popular sport in the country.<sup>37</sup> Every Sunday would be drastically different. “Pooled broadcasts” like the ones at issue in the NFL cases are essentially what we watch on CBS, FOX, and ESPN week in and week out.<sup>38</sup>

Congress did not take long to recognize this potentially damaging situation for the relatively young league and acted quickly. Later that same year, in 1961, Congress effectively gave the “big four”<sup>39</sup> U.S. sports a pass on Sherman Act antitrust violations as they related to telecasting of the leagues’ contests.<sup>40</sup> Virtually every subsequent

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<sup>37</sup> See Sean Leahy, *Poll: NFL Beats Baseball Again as America’s Most Popular Sport*, USA TODAY (Jan. 25, 2011, 1:23 PM), [http://content.usatoday.com/communities/thehuddle/post/2011/01/poll-nfl-beats-baseball-again-as-americas-most-popular-sport/1#.UTzj-L\\_ZOPU](http://content.usatoday.com/communities/thehuddle/post/2011/01/poll-nfl-beats-baseball-again-as-americas-most-popular-sport/1#.UTzj-L_ZOPU).

<sup>38</sup> *Id.* at 235–36. Would the situation truly have been untenable? It is tough to say. It would be hard to argue with a modern sports fan who—through the gift of hindsight—might posit that the NFL would not have survived a “wild west” system of broadcasting in the league’s early days. Baseball *did* survive a similar situation for many years, although perhaps the competitive imbalance that Rozelle feared might take hold in the NFL is the result that we have been left with in MLB.

Another point to consider is the different nature of the NFL as it relates to broadcasting. An MLB season is a marathon: 162 games played in different markets to considerably lower television audiences than the least-enthralling NFL game of a season. See Craig Calcaterra, *For the One Thousandth Time: NFL and MLB TV Ratings are Apples and Oranges*, NBC SPORTS: HARDBALL TALK (Feb. 8, 2011, 12:04 PM), <http://hardballtalk.nbcsports.com/2011/02/08/for-the-one-thousandth-time-nfl-and-mlb-tv-ratings-are-apples-and-oranges> (According to Craig Calcaterra, “[t]he vast, vast majority of baseball games are consumed on a local level. Fans watch their own teams’ games and rarely watch others. Why? Because their team is on TV every day. The couple of national broadcasts a week aren’t at all significant in comparison. Football, in contrast, is a nationally-televised sport.”). With its sixteen games spread weekly onto a few select days, the broadcasted game truly is king in the NFL. *Id.*

<sup>39</sup> The “big four” is generally recognized to be professional football, baseball, hockey, and basketball. Certainly, college sports, golf, NASCAR auto racing, and others can lay claim to being more important to society than some of the “big four”—hockey being the most assailable on that count.

<sup>40</sup> Kaiser, *supra* note 31, at 1245. In its own words, Congress said that:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league or clubs participating [in those four sports] sells or otherwise transfers all or any part of the rights of

sports broadcasting contract can trace its legal foundation back to the SBA and this 1961 legislative action.

But it is not just CBS and other large, nationwide networks that owe their sports-related success to the SBA. The RSN was born over a decade after the SBA took effect. A collection of parent networks and their affiliates began to gobble up local sports teams' broadcast rights.<sup>41</sup>

It took most of the last decade for the evolution of the RSN and the IRSN to reach the point at which we now find ourselves. In the 1990s and early 2000s, the RSN was still a big money maker, but, inferentially, it operated as much of the rest of the revenue making processes in sports did. The better a team played, the more people tuned in, the more fans in the seats, the more hats on the heads, *et cetera*. As one sportswriter pointed out in the wake of the Dodgers' television deal with Time Warner Cable, Magic Johnson and the other owners down at Chavez ravine "will take in a huge amount of cash just for putting a team on the field 162 times a year."<sup>42</sup> And this payout, to the tune of a potential \$8 billion, will continue for the next twenty-five years.<sup>43</sup> All teams would like to be in the Dodgers' shoes

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such league's member clubs in the sponsored telecasting of the games . . . .

15 U.S.C. § 1291 (2011).

<sup>41</sup> For a fascinating discussion of the Sports Broadcasting Act as it applies to different aspects of antitrust issues within the four major U.S. sports, see Nathaniel J. Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L. J. 211, 249 (2012) Nathaniel J. Grow's *In Defense of Baseball's Antitrust Exemption*. Grow's analysis includes the following information:

The SBA grants each league a limited antitrust exemption for purposes of jointly negotiating broadcast agreements for the 'sponsored telecasting of [its] games.' However, courts have subsequently interpreted 'sponsored telecasting' to mean only broadcasts on free, over-the-air networks, and, as a result, the SBA does not protect the leagues' collective broadcast agreements with cable providers.

*Id.*

<sup>42</sup> See Richard Sandomir, *Sweet TV Deal Will Taste Bitter to Fans*, N.Y. TIMES (Jan. 28, 2013), [http://www.nytimes.com/2013/01/29/sports/baseball/dodgers-sweet-tv-deal-will-taste-bitter-to-fans.html?ref=sports&\\_r=0](http://www.nytimes.com/2013/01/29/sports/baseball/dodgers-sweet-tv-deal-will-taste-bitter-to-fans.html?ref=sports&_r=0).

<sup>43</sup> *Id.*

but, unfortunately, they simply cannot. They will have to compete with them though, if they can.

In his 2007 book about the evolution of the Boston Red Sox and the team's renaissance under new ownership, author Seth Mnookin described the wave of RSNs in baseball:

Most RSNs are independently owned and pay teams a negotiated fee for the right to broadcast its games. The success of team-owned RSNs [IRSNs] like NESN has led other teams to adopt that model. In 2002, the Yankees established the Yankees Entertainment and Sports (YES) Network; previously, Yankees games had been carried by the MSG Network. In 2006, the New York Mets began broadcasting games on their new regional network. It was partially in anticipation of this that the Mets went on an expensive free-agent acquisition spree the last several seasons, as they tried to build a fan base for their cable network.<sup>44</sup>

Now, there are over forty RSNs in the United States.<sup>45</sup> The two most commonplace in American homes—both featured on virtually every television provider's sports package—are Comcast SportsNet (CSN) and Fox Sports Net (FSN).<sup>46</sup> These two RSNs and their affiliates compete in most regions to acquire the rights to broadcast a portion of—if not all of, as is common in today's market—a local sports team's contests.<sup>47</sup> This trend can be seen in almost every region across the country. Try watching a sports contest in most U.S. hotel rooms without having to locate the local CSN or FSN affiliate.

However widespread the CSN/FSN format might be, it is not entirely uniform. Over the past two decades, a few individual teams have branched out and acquired an ownership right in the television networks showing their games. Again, we speak of the elite teams that have the capital to make such an investment and, perhaps more

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<sup>44</sup> SETH MNOOKIN, *FEEDING THE MONSTER: HOW MONEY, SMARTS, AND NERVE TOOK A TEAM TO THE TOP* 73 (SIMON & SCHUSTER 2007).

<sup>45</sup> Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 *LOY. CONSUMER L. REV.* 56, 56 (2008).

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 57.



importantly, the fan interest and ratings to make that investment pay dividends.<sup>48</sup>

IRSNs, in a form similar to the way that we recognize them now, began to appear several years ago, with mixed early success. The Memphis Grizzlies' attempt at launching The Grizzlies Regional

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<sup>48</sup> While the Yankees and their YES Network, and the University of Texas and its Longhorn Network, may be the most dynamic examples to analyze, they are not alone on that frontier. The Boston Red Sox own an eighty percent stake in the New England Sports Network ("NESN") and capitalize on this investment partially through the team's natural ability to draw eyeballs to television screens. *Boston Red Sox on the Forbes MLB Team Valuations List*, FORBES, <http://www.forbes.com/teams/boston-red-sox> (last visited Apr. 73, 2013).

In a recent book published about the "new era" of Red Sox ownership, Seth Mnookin describes the appeal of an RSN like NESN. MNOOKIN, *supra* note 44, at 733. Mnookin wrote the following about the new owners' thinking in purchasing the Red Sox:

In addition to the baseball club, the Red Sox sale included Fenway Park, which the team owned, and the team's 80 percent stake in NESN, the regional sports network that broadcasts Red Sox and Boston Bruins hockey games. Over the previous decade, regional sports networks—or RSNs—had become increasingly profitable, and NESN was the crown jewel of the bunch. In fact, to many of the parties interested in bidding for the Red Sox, NESN was the main draw. While the Red Sox themselves might turn a profit or a loss of a couple of million dollars in any given year, NESN, whose profits were not supposed to be subject to baseball's revenue-sharing agreements, was seen as a likely cash cow. The Red Sox had a monopoly on baseball fans in most of New England, and NESN was usually the only way those fans could watch their team play. The potential for advertising revenue was enormous.

*Id.*

Red Sox owner John Henry poses an especially interesting study in the value of owning one's own sports network. Not only are Henry's Red Sox games broadcasted on the network, but NESN also showcases the Liverpool Football Club, an English soccer team of which Henry also owns a controlling stake, raising that team's profile in the United States and—at least in theory—raising revenues across the board. *Liverpool FC News, Schedule, Scores, Statistics, Video*, NESN.COM, <http://nesn.com/liverpool-fc> (last visited Apr. 83, 2012). In 2012, you could even see Liverpool F.C. play a game of soccer at Fenway Park, the 100-year-old home of the Boston Red Sox. *Football at Fenway*, REDSOX.COM, <http://boston.redsox.mlb.com/bos/ticketing/footballatfenway.jsp> (last visited Apr. 83, 2013). That this game was broadcast on NESN goes without saying.

Sports Network failed before it began, and the Minnesota Twins-owned Victory Sports channel closed its doors after only six months, due to the Twins' inability to reach agreements with local distributors.<sup>49</sup> Over the past decade, as detailed above, a strong collection of a few elite teams have begun to carve out their own defined area in their local broadcasting market. Primarily, this innovation took place in baseball, with several MLB teams obtaining at least a partial interest in their respective RSN. It has spread into other sports, though—most notably with the recent inception of the leviathan that is The Longhorn Network.

### III. SPORTS BROADCASTING AND THE NCAA

College football and its individual teams do not enjoy the SBA protections afforded to the four major “professional” sports; they instead derive their freedom to make certain broadcasting decisions from case law.<sup>50</sup> In *NCAA v. Board of Regents of the University of Oklahoma*, the most influential case on this topic, the Supreme Court held that the National Collegiate Athletic Association's (NCAA) restrictions on the number and type of games that an individual school could make available to the viewing public constituted “unreasonable horizontal restraints.”<sup>51</sup>

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<sup>49</sup> Moss, *supra* note 45, at 57–58. Observing the financial situation in basketball, as far as television deals and parity is concerned, is akin to looking upon a serene lake (let's say that the MLB is Niagara Falls). There have been some contentious moments in the past few years, such as NBA Commissioner David Stern's executive veto of a trade between the New Orleans Hornets and the Los Angeles Lakers, wherein Stern cited the best interests of the league as his motivation; but for the most part the NBA has parity and revenue sharing under relatively tight control. See Howard Beck, *N.B.A. Rejects Trade Sending Paul to Lakers*, N.Y. TIMES (Dec. 8, 2011), [http://www.nytimes.com/2011/12/09/sports/basketball/paul-set-to-join-lakers-as-part-of-3-team-deal.html?\\_r=0](http://www.nytimes.com/2011/12/09/sports/basketball/paul-set-to-join-lakers-as-part-of-3-team-deal.html?_r=0).

A successfully managed RSN in the NBA—the Lakers being a prime example—would still wield many benefits, but the tightly managed NBA salary cap prevents the topsy-turvy parity issues that plague the MLB. See Mark Deeks, *Parity? The N.B.A. Already Has It*, N.Y. TIMES (Jan. 19, 2011, 3:45 PM), <http://offthedribble.blogs.nytimes.com/2011/01/19/parity-the-n-b-a-already-has-it>.

<sup>50</sup> Kaiser, *supra* note 31, at 1251-52.

<sup>51</sup> *Id.*; *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

The 1984 decision, written by Justice Stevens, gave the benefit of the doubt to the NCAA in its analysis, dissecting the issues as if the NCAA had only the purest of intentions and was acting to protect the integrity of its sports and to have a “procompetitive” effect.<sup>52</sup> Justice Stevens’ analysis, well-reasoned and comprehensive, concluded that there were not substantial competitive benefits to the NCAA’s restricting the broadcast of schools’ games in such a way.<sup>53</sup> Justice Stevens was careful to support the regulatory body’s actions, which were made in order to preserve tradition and maintain the integrity of the NCAA, noting that “the role of the NCAA must be to preserve a tradition that might otherwise die.”<sup>54</sup> However, Justice Stevens concluded, “rules that restrict output are hardly consistent with this role.”<sup>55</sup>

The financial makeup of the various college sports conferences under the NCAA umbrella is complex but, ultimately, most conferences operate under a “rising tides lifts all boats” approach:

A conference can also attempt to control its members’ actions through the media rights and revenues that the conference receives from those contracts. The first step is to share revenue equally. When each member of the conference receives equal revenue from the media contracts, it is in the best interest of each school to want stability and exposure for all of the other members of the conference. When one school makes more money, all of the member schools make more money. The Pac-12, the Big Ten, the Southeastern Conference, and the ACC all share media revenue equally amongst their members. In October 2011, the Big 12 also agreed to share revenue equally. This

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<sup>52</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 114.

<sup>53</sup> *Id.* at 1176 (stating that, while it is “reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold . . .”).

<sup>54</sup> *Id.* at 120.

<sup>55</sup> *Id.*

agreement means that the schools will share all revenue from Tier I and Tier II broadcast rights for football and mens' basketball. However, it allows schools to keep revenue from Tier III network rights, which includes Texas' Longhorn Network.<sup>56</sup>

This revenue distribution will be key to the decisions that major schools might make in the future. Conference realignments, which have been commonplace of late, are not likely to settle down in the coming years, and while most big schools are presently attuned to the benefits that come with a big, conference-wide television agreement, it is easy to see how the allure of retaining 100% of the profit from "Tier III" network rights could be overwhelming.<sup>57</sup>

The appeal of retaining these revenues has convinced at least one major university to try to go it alone. On August 26, 2011, the Longhorn Network took to the airwaves.<sup>58</sup> The network, owned jointly by ESPN and the University of Texas, is completely dedicated to Texas athletics—a first in college sports broadcasting.<sup>59</sup> Until the Longhorn Network debuted, college sports broadcasting had only experienced broader conference-specific channels.<sup>60</sup>

Not all of the early feedback was positive. Some critics saw the ESPN and University of Texas' plan to air high school football games on the Longhorn Network as an attempt to gain an improper advantage in recruiting.<sup>61</sup> Even University of Texas' head football coach Mack Brown has not been entirely satisfied with the network.<sup>62</sup>

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<sup>56</sup> Benjamin I. Leibovitz, *Avoiding the Sack: How Nebraska's Departure From the Big 12 Changed College Football and What Athletic Conferences Must do to Prevent Defection in the Future*, 22 MARQ. SPORTS L. REV. 675, 6918–929 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> Jason Cohen, *With Texas Network, U.T. Remakes the Playing Field*, N.Y. TIMES (Sept. 3, 2011), [http://www.nytimes.com/2011/09/04/us/04ttsports.html?\\_r=0](http://www.nytimes.com/2011/09/04/us/04ttsports.html?_r=0).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Tom Spousta, *Rivals See Unfair Edge in Longhorn TV Network*, N.Y. TIMES (July 26, 2011), <http://www.nytimes.com/2011/07/27/sports/ncaafootball/big-12-rivals-see-unfair-recruiting-edge-in-longhorn-network.html>.

<sup>62</sup> Dom Cosentino, *Even Mack Brown Hates the Longhorn Network*, DEADSPIN (Oct. 22, 2011, 6:40 PM), <http://deadspin.com/5953938/even-mack-brown-hates-the-longhorn-network>.

Brown was quoted as saying that he felt “overexposed” by the network, explaining, “I’ve got a microphone on every time I talk to the team . . . I didn’t ask for it. We were given a deal we had no input in.”<sup>63</sup>

It has been reported that the Texas Longhorn athletics program will gain revenues of approximately \$15 million each year from the Longhorn Network.<sup>64</sup> Such a figure does not begin to reflect the value that such an enterprise can have. Simply increasing the “number of eyeballs” that see Longhorn football will be a benefit to the school’s reputation, leading to a growth in its fan base, its reputation, and even greater growth in its coffers.

For now, the Longhorn Network seems to have reached a position of stable, if uneasy, success. What potential issues could arise? College sports, unlike professional sports and the more rigidly-defined antitrust laws that apply to them, are essentially testing the boundaries as they go. College athletics seems to currently be in a state of flux, and it will be fascinating to track the developments and see where things go next. Will there be more independent networks? The financial strength that comes from these networks might be enough to cause some schools to go *fully* independent and leave their conferences altogether, weakening the conference system that has defined college sports for generations. After all, realignment is really all about the money at the end of the day. Other schools will be looking to the University of Texas to see when and if they might want to try branching out on their own into this brave new world.

#### IV. IRSNS IN MAJOR LEAGUE BASEBALL – A RICH MAN’S GAME?

With a few notable exceptions, the IRSN advances made in the MLB—where, out of the four major sports, they are most commonly found—have been made by the wealthiest, most popular, and most

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<sup>63</sup> *Id.*

<sup>64</sup> Josephine R. Potuto, *They Take Classes, Don’t They?: Restructuring a College Football Post Season*, 7 J. BUS. & TECH. L. 311, 32211, n.66 (2012) (citing Jonathan Woo, *Big 12, FOX Agree to TV Deal*, THE HORN (Apr. 14, 2011), [http://www.readthehorn.com/sports/4022/big\\_xii\\_fox\\_agree\\_to\\_tv\\_deal](http://www.readthehorn.com/sports/4022/big_xii_fox_agree_to_tv_deal) (last updated Apr. 21, 2011)).

influential clubs.<sup>65</sup> The Dodgers are on the verge of making waves, one way or another, in their RSN/IRSN decision; the Boston Red Sox have an 80% ownership stake in their local RSN, New England Sports Network; the New York Mets own more than half of SportsNet New York; and Yankees have the YES Network.<sup>66</sup> The current character of the IRSNs in baseball is probably owed to the fact that creating one takes a substantial amount of capital, whereas simply selling a team's rights in a more traditional vein costs very little. Still, the benefits are clear.<sup>67</sup>

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<sup>65</sup> An interesting exception to this trend is the recent turn of events that transpired between the Baltimore Orioles and the Washington Nationals, and the two teams' mutual RSN deal. Orioles' owner Peter Angelos had long fought for decades—for decades—to keep a second team from moving into the beltway. See Maury Brown, *Bizball: Inside the MASN/Nationals Television Contract Dispute*, BASEBALL PROSPECTUS (June 25, 2012), <http://www.baseballprospectus.com/article.php?articleid=17468> (detailing the history of the television contract concerning Angelos's Orioles and the Washington Nationals, including the fact that, at the deal's inception, Angelos was taking in 90% of the station's broadcast revenues).

Angelos felt that a team in the nation's capital would cut into his revenues., *Id.*, Hand he was able to keep the proponents of placing a team in D.C. at bay for years. *Id.* Finally, when a team was placed in D.C., Angelos was able to finagle an obscenely beneficial RSN deal in his favor, in which the Orioles would retain such a large percentage of the ownership of the network that they would essentially be making money *off of* the Nationals. *Id.* Over the coming years, as a part of the broadcast contract language, the Nationals' ownership stake in the network will gradually increase up to 33%. *Id.*

<sup>66</sup> See Jonah Keri, *How a Television Contract Could Launch a Rangers Dynasty*, GRANTLAND (Sept. 7, 2011), [http://www.grantland.com/story/\\_/id/6939177/how-television-launch-rangers-dynasty](http://www.grantland.com/story/_/id/6939177/how-television-launch-rangers-dynasty).

Keri notes that, even with the clear benefits that the Rangers will receive from its their massive deal with an RSN, Fox Sports Southwest, the team considered creating an IRSN of its their own, but was unable to because of the precarious financial situation that the team's owners found themselves in after they assumed control. *Id.*

The team was still able to wrangle a ten to fifteen percent ownership interest in Fox Sports Southwest. See Tom Van Riper, *TV Money is a Game Changer for Baseball and the Dodgers*, FORBES (Mar. 21, 2012, 12:28 PM), <http://www.forbes.com/sites/tomvanriper/2012/03/21/the-new-moneyball> (“Local television has become a financial game-changer that dwarfs all others.”).

<sup>67</sup> See Keri, *supra* note 66. Keri writes that:

And what are these benefits? Well, sheer unadulterated profit, for one thing. Forbes values the Yankees organization at approximately \$1 billion more than it was about ten years ago when the YES Network was founded.<sup>68</sup>

These benefits are not confined to the money that a team takes in directly from the spike in viewership it gets to its product when it creates its own RSN. Simply the *possibility* of a team making its own Regional Sports Network is enough to drive actual established RSNs, like FOX Sports or Comcast, into a feeding frenzy.<sup>69</sup> A survey of the recent history illustrates this trend, as teams' broadcast rights attract a series of bidding wars between hopeful broadcasters. In a recent Forbes article, the seller's market and the battle between providers was described in detail:

The best things that baseball owners now have going for them are Fox and its war with various cable providers. The former craves the local content for its channels, the latter believes in sports as a retention hook for its service. In Houston, Comcast gave new Astros owner Jim Crane an equity stake and a huge bump in rights fees to wrest it away from Fox, whose current deal dates back to 2005. Meanwhile in San Diego, Fox has drawn the Padres away from Cox Communications with a huge fee increase and 20% of a new regional network.<sup>70</sup>

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[f]or teams like Pittsburgh and Tampa Bay, it might be a case of the poor getting poorer, while the rich gain a chance to get richer. But where six or seven years ago maybe 10 teams could have realistically built their own RSNs, Gennaro estimates that 20 or more could do it today.

*Id.*

<sup>68</sup> See Van Riper, *supra* note 66 ("As the YES Network celebrates its ten-year anniversary in 2012, the Yankees are worth over \$1 billion more than they were the day it launched: FORBES pegs valuation growth to a current \$1.85 billion from \$730 million since then.").

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

## V. WHO'S GETTING LEFT BEHIND – AND WILL ANYONE GO BACK FOR THEM?

The parallels between the quickly evolving world of IRSN ownership—and even of RSN cash-ins caused by this mad scramble—and the “rich get richer” world that Commissioner Rozelle forecasted when he approached the court system fifty years ago are clear. More for some has, thus far, meant more for a few others as well. But it has not necessarily meant more for all. More importantly, it *cannot* mean more for all. Part of the reason why the Dodgers having more money from ownership translates into the team having a better television deal, and being an overall more successful franchise, is because they can put that money back on the field.<sup>71</sup>

In a recent article for ESPN.com, baseball writer Buster Olney detailed the November 2012 trade between the Toronto Blue Jays and the fire sale-happy Miami Marlins.<sup>72</sup> In the trade, the Marlins—in an effort to slash salaries and save money—sent a plethora of superstars and highly paid players to Toronto for a slew of cheap minor leaguers. The trade sent shockwaves throughout professional baseball, causing many sportswriters to cry foul about the league's systemic flaws, and it caused others to predict that Marlins fans might even boycott attending their own team's games.<sup>73</sup> Olney surveyed what he saw as a potentially fractured “have” and “have-not” future in MLB: “two officials say that as clubs like the Los Angeles Angels, Texas Rangers and Dodgers *gain more revenue through local television deals* and the gap between the Haves and

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<sup>71</sup> This should already be apparent in the way that the Dodgers have begun to outspend—quite literally—every other team in baseball since the Guggenheim Group assumed control.

<sup>72</sup> Buster Olney, *Miami Deal Embarrassing for Team, MLB*, ESPN (Nov. 14, 2012, 9:10 AM), [http://insider.espn.go.com/mlb/blog/\\_/name/olney\\_buster/id/8630571/miami-marlins-conned-fans-politicians-mlb-stadium-deal-subsequent-transactions-mlb](http://insider.espn.go.com/mlb/blog/_/name/olney_buster/id/8630571/miami-marlins-conned-fans-politicians-mlb-stadium-deal-subsequent-transactions-mlb).

<sup>73</sup> See Michelle Kaufman, *How Will the Miami Marlins' Trade Affect Ticket Sales?*, MIAMI HERALD (Nov. 15, 2012), <http://www.miamiherald.com/2012/11/15/3097842/how-will-the-miami-marlins-trade.html> (“After the Marlins' trade of much of their talent on Tuesday, not only might they suffer on the field, but they might suffer at the box office as well.”).



Have-Nots grows, other teams will be faced with the same choice as the Marlins very soon.”<sup>74</sup>

Competitive balance has always been, and will always be, a two-way street. There is a direct, natural correlation between the broadcast viewership and market size of the “rich teams” and how much they can and will expend on the field product. Thus, it follows quite reasonably that the product in the small markets will only continue to get worse.<sup>75</sup> There is money to be had in broadcast deals, for lots of teams. But there is a limit to this windfall. Small markets will inevitably suffer,<sup>76</sup> unless the league takes action. Action may not be necessitated at this very instant, but it will inevitably be required at some point in the future.<sup>77</sup> Which brings about the only next logical question: what can the league do?

The question of whether the SBA can be extended to apply to the RSN and IRSN dealings of individual sports leagues is unsettled, but most scholars believe that authorities would have trouble enforcing any restrictions under the SBA as it is structured.<sup>78</sup> It has generally been decided that the SBA applies only to “sponsored telecasting”—meaning broadcasting that goes over the airwaves—not cable, as most Americans receive their sports programming.<sup>79</sup> RSNs and

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<sup>74</sup> See Olney, *supra* note 72. Olney argues that, “[a]s the current labor deal runs its course, some baseball executives predict, there will be significant infighting between the two camps—the Haves and Have-Nots—and the Marlins’ sell-off may have been the precursor of all of that.” *Id.*

<sup>75</sup> Competitive balance is already a true problem in Major League Baseball, only recently corrected—to some extent—by the revolution in scouting and evaluating talent that has allowed smaller payroll teams to hang tough with the big spenders around the league. See Mark Koba, *How Small-Market Teams Survive Baseball Economics*, CNBC (Jan. 30, 2012, 1:10 PM), [http://www.cnbc.com/id/45960981/How\\_SmallMarket\\_Teams\\_Survive\\_Baseball\\_Economics](http://www.cnbc.com/id/45960981/How_SmallMarket_Teams_Survive_Baseball_Economics).

<sup>76</sup> Some would say, *continue* to suffer.

<sup>77</sup> Whether this is five, ten, or twenty years away depends on how strongly one perceives the importance of competitive balance—on and off the field—to be in baseball.

<sup>78</sup> Moss, *supra* note 45, at 72–73.

<sup>79</sup> *Id.* See also Bublick, *supra* note 33, at 233 (stating that the most important phrase in the SBA is “‘sponsored telecasting,’ which courts have construed to mean that the SBA only applies to broadcast television and not to cable or satellite.”); Crandall, *supra* note 32, at 297–98 (“[t]he legislative history of the SBA indicates that Congress, by specifically addressing ‘sponsored telecasting’ of professional

IRSN channels are almost universally shipped off through cable and satellite packages and not the SBA-protected “sponsored telecasting.”

So, if the SBA cannot allow sports leagues to take actions as they relate to teams and IRSN/RSN development without cognizance of standard antitrust issues and vulnerability, the choices for the leagues in policing these issues become much more limited. Therefore, any potential strictures and regulations that sports leagues might try to impose upon individual teams and/or conferences as they attempt to branch out and achieve greater individual profits would most likely have to be undertaken in some way that would not violate antitrust regulations.

As previously noted, the greatest advancement in the area of IRSNs has been made in Major League Baseball.<sup>80</sup> Inherently, baseball is also the most susceptible to problematic developments.<sup>81</sup> Oddly enough, baseball also boasts the most unique history of antitrust regulation. While still affected by the SBA as the other four major sports are, baseball’s true “antitrust” exemption is different than the exemption possessed by its “big four”<sup>82</sup> brethren—baseball’s

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sports contests in the language of the SBA, intended to exempt the sale of pooled broadcast packages to free television networks only.”).

<sup>80</sup> See *MLB’s Biggest Cable Deals*, FORBES, <http://www.forbes.com/pictures/mlh45if/future-of-local-deals> (last visited Feb. 9, 2013).

<sup>81</sup> See Olney, *supra* note 72.

<sup>82</sup> Not discussed in this article is the rich history of soccer and broadcasting issues/antitrust violations. There have been issues both foreign and domestic that scholars have wrangled with for years, the most notable being whether Major League Soccer (“MLS”) in the United States represented a “single entity” for purposes of antitrust litigation. See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002).

In *Fraser*, MLS players joined together to sue the league, arguing that the league’s owners violated antitrust laws by agreeing not to compete in free agency for the services of certain players. *Id.* at 54-55. In addition, the players alleged that MLS had attempted to monopolize the market for player services in the U.S. *Id.* at 55. The District Court in *Fraser* found that MLS was a single entity, and thus could not really be guilty of violating the applicable antitrust laws as alleged by the plaintiffs. See Robert M. Bernhard, *MLS’ Designated Player Rule: Has David Beckham Single-Handedly Destroyed Soccer’s Single-Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 422-23 (2008).

On appeal, the First Circuit essentially said that MLS represented a “‘hybrid arrangement’ somewhere between a single-entity and a collaboration of existing independent competitors.” *Id.* at 424. In his article for the Marquette Sports Law

exemption has been judicially crafted and refined for almost a century.<sup>83</sup>

#### VI. THE “BUSINESS OF BASEBALL” AND BASEBALL’S ANTI-TRUST EXEMPTION

Baseball is unique from the other sports in many ways. In this day and age, football is certainly more popular than baseball.<sup>84</sup>

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Review, Robert Bernhard summarized the rather obtuse history of *Fraser* and how it might affect soccer in the United States in the future:

Major League Soccer's limited-liability company structure and various organizational features allowed it to win summary judgment in its single-entity defense in the district court's hearing of *Fraser*. However, the United States Court of Appeals for the First Circuit affirmed the district court's judgment on grounds of relevant market, refusing to answer the single-entity question definitively. The players argued, and some scholars have agreed, that MLS's single-entity structure as a limited liability company is simply a “sham” designed to circumvent antitrust law, and even the First Circuit expressed doubt as to whether MLS should properly be deemed a single-entity or whether some sort of hybrid definition is more applicable. Regardless, no court has expressly overruled the district court's finding that MLS is a single-entity. Consequently, for various reasons, where other professional sports leagues failed in single-entity defenses, MLS succeeded.

*Id.* at 431.

“Across the pond,” the success of the English Premier League and its relatively egalitarian broadcasting regulations is causing some in America to take notice. *See* Clarke, *supra* note 10, at 624 (stating that “in the Premier League, a balance is still struck between maintaining some level of financial parity between clubs, yet incentivizing teams to finish as high as possible . . . . The success of the Premier League's system of distribution accounts for seven out of the 20 clubs in the Money League being English. Success of this system is also evidenced by the Italians' and Spanish shift from individual rights selling to collective selling and distribution.”).

<sup>83</sup> Kaiser, *supra* note 31, at 1253.

<sup>84</sup> *See* Christine Brennan, *Baseball Still Takes a Back Seat to the NFL*, USA TODAY (Oct. 5, 2011, 11:57 PM), <http://usatoday30.usatoday.com/sports/columnist/brennan/story/2011-10-05/baseball-football-nfl-viewership-fans/50671798/1> (featuring an interview with MLB Commissioner Bud Selig, discussing the embarrassment of how a “football pregame show was watched by more people than either of the first two Yankees-

Basketball is cooler, and its popularity growing with more alacrity on both a domestic and global level.<sup>85</sup> But baseball is the “American Pastime,” for whatever that term continues to be worth—which might just be quite a bit. The sport is unique not just in its product and popularity, but on a legal level as well. Baseball is in possession of a rather unassailable antitrust exemption that no other sport possesses.<sup>86</sup> While many of the other sports fall under the regulatory framework of legislative actions passed down by lawmakers—the Sports Broadcasting Act included—baseball is in possession of a judicially crafted exemption, which has left it free to act with virtually absolute impunity for almost a century.<sup>87</sup> Of the long string

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Tigers postseason games. Or any of the other series, which included the big-market Phillies and Rangers . . . Americans are big-events fans now more than ever, and the NFL has intelligently marketed itself as the ultimate big deal.”)

<sup>85</sup> See Dustin C. Lane, *From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization*, 13 PAC. RIM L. & POL’Y J. 127, 138 (2004) (discussing the globalization of basketball with a focus on Yao Ming and the advent of American basketball in China, and an in-depth look at some of the issues involved). “Basketball is booming in China,” Lane writes. *Id.*

Basketball continues to grow in China, but the NBA is also reaching out in other communities around the world, helping to fuel basketball’s global growth. See Jeremy Kahn, *N.B.A. in India, in Search of Fans and Players*, NY TIMES, <http://www.nytimes.com/2010/12/28/sports/basketball/28india.html> (last visited Feb. 9, 2013) (“This season, the league will play its first regular-season games in Europe, a two-game matchup in March between the Nets and the Toronto Raptors in London. And having conquered China, the N.B.A. has its sights fixed on Asia’s other big emerging market: India.”). See also Alicia Jessop, *The Surge of the NBA’s International Viewership and Popularity*, FORBES (June 14, 2012, 12:42 PM), <http://www.forbes.com/sites/aliciajessop/2012/06/14/the-surge-of-the-nbas-international-viewership-and-popularity> (discussing a “surge of international interest” in the NBA).

<sup>86</sup> See Mary K. Braza, *The Eleventh Circuit Uses Baseball Antitrust Exemption And The Fourth Amendment to Shut Down An Antitrust Investigation*, 11 No. 2 ANDREWS ANTITRUST LITIG. REP. 18, 18–19 (2003).

<sup>87</sup> See H. Ward Classen, *Three Strikes and You’re Out: An Investigation of Professional Baseball’s Antitrust Exemption*, 21 AKRON L. REV. 369, 369–70 (1988) (“The Supreme Court’s decision in *Federal Baseball Club v. National League* removed professional baseball from federal antitrust scrutiny in contrast to all other professional sports, placing professional baseball in a unique position. The Federal Baseball decision has allowed professional baseball to mature without the concern of acting in restraint of trade. It has also spawned a body of case law that defies traditional legal reasoning and creates great disparity among different professional sports.”).

of cases that professional baseball can count as legal victories against challenges of all types of impropriety, three are widely considered to be the most important. A better understanding of these three cases, and the antitrust history of Major League Baseball in its entirety, is helpful in understanding the immense power that the sport can wield and why it should be able to stamp out parity-destroying deals<sup>88</sup> before they take effect.

The first case in this trinity, in which a zealous judge first established Major League Baseball's antitrust immunity, is known as *Federal Baseball*<sup>89</sup> or "FBC." In *Federal Baseball*, the Federal Baseball Club of Baltimore brought suit against the National League, alleging anti-trust issues.<sup>90</sup> The Baltimore team, once content to be a member of its own league—separate from the more established National League—filed its lawsuit after, according to the Baltimore team, the National League systematically began buying up the other teams in Baltimore's league, leaving Baltimore with no one to play, and thus, no reason to exist.<sup>91</sup> Essentially, the Baltimore ball club argued that the actions of the National League amounted to an exercise of monopoly power over the business of baseball.<sup>92</sup>

In determining whether antitrust laws should in fact apply to the teams competing in professional baseball, Justice Holmes found that professional baseball was *not* an interstate affair, and thus could avoid regulation.<sup>93</sup> Even though teams crossed, and in fact, *had to*

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<sup>88</sup> Or better yet, to repair the ineffective revenue sharing system that is currently in place, which contributes to the lack of competitive balance within the sport.

<sup>89</sup> *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

<sup>90</sup> *Id.* at 206–08.

<sup>91</sup> *Id.* at 207–08.

<sup>92</sup> *Id.* at 207.

<sup>93</sup> *Id.* at 209.

Holmes's perplexing opinion has been interpreted in several different ways since the day it was passed down, even though the general principle that baseball is exempt from antitrust laws has weathered virtually every storm. The actual text is instructive. In the opinion, Holmes wrote that:

The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must

cross, state lines as a function of contesting games of baseball, “the transport is a mere incident, not the essential thing,” Holmes wrote.<sup>94</sup> Furthermore, even though the ultimate aim of the contests was to make money, professional baseball itself was not “trade or commerce,” according to the Court.<sup>95</sup> Therefore, given that MLB did not constitute interstate commerce, it could not be subject to the regulations that the Baltimore club was attempting to hold it to.<sup>96</sup>

*Federal Baseball* remains one of the more confounding decisions in the history of the Court, but it is difficult to understate its ramifications for the future of sport in American society.<sup>97</sup>

Several decades later, the holding of *Federal Baseball* was more or less affirmed by the Supreme Court in *Toolson*.<sup>98</sup> The Court refused to take affirmative steps in regards to baseball’s antitrust exemption, opting instead to hold that if Congress had not seen fit to counteract the effects of *Federal Baseball*, then it must have done so with a reason.<sup>99</sup> That the Court would maintain baseball’s antitrust exemption is not a terribly difficult concept to grasp; how the Court could maintain that, in 1953, when professional baseball was still

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be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.

*Fed. Baseball Club*, 259 U.S. at 208-09.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Congress may have been attempting, in part, to remedy some of this confusion when it passed the Curt Flood Act in 1998. See Morgan A. Sullivan, *A Derelict in the Stream of the Law: Overruling Baseball’s Antitrust Exemption*, 48 DUKE L.J. 1265, 1266 (1999) (arguing that “Congress presumably eliminated the confusion surrounding the exemption’s application to players’ labor disputes when it passed the Curt Flood Act of 1998,” but that the “limited and unsettled impact of the Curt Flood Act actually reinvigorates the debate over the scope of the original antitrust exemption.”).

<sup>98</sup> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

<sup>99</sup> *Id.* at 357.

neither an interstate activity nor actual commerce worthy of regulation, is a much more confusing premise.<sup>100</sup>

In *Flood v. Kuhn*,<sup>101</sup> a 1972 Burger Court opinion, the boundaries of free agency were tested, and thus the ability of MLB to control its product was defined—or perhaps more aptly, redefined—with lasting implications.<sup>102</sup> It was to be arguably the most influential judicial

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<sup>100</sup> *Id.* at 357–60 (Burton, J., dissenting). Justices Burton and Reed dissented from the per curiam opinion of the Court in *Toolson*, clearly voicing their opinions that to hold that baseball was not an interstate, commercial enterprise was ludicrous. *Id.* at 357 (Burton, J., dissenting). “[I]t is a contradiction in terms,” the dissenting Justices wrote, “to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.” *Id.* at 358 (Burton, J., dissenting).

<sup>101</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>102</sup> The judicial history of the *Flood* opinion is among one of the most fascinating—and sardonic—in history. The opinion’s author, Justice Blackmun, had spent the majority of the 1972 term laboring over his authorship of the so called “abortion opinions.” BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT 186–93* (1979).

*Flood* was the first time that Blackmun exited a conference as the senior member of a majority—a position that allowed him to select the writer of the opinion—he chose himself with no real hesitation. *Id.* at 188. Justice Blackmun, noted for his tireless research and attention to detail—sometimes at the expense of reasonable timeliness and to the frustration of his fellow Justices—had become exhausted with his work on the abortion issue, and he relished the opportunity to indulge his own love of baseball’s history with a quixotic opinion. *Id.*

What Blackmun ultimately published was more of a lengthy ode to his love of the sport than an analysis of antitrust law and baseball’s path for the future. *Id.* at 190–92. Bob Woodward, who studied the Court for near a decade while creating his book, “The Brethren,” described the opinion thusly:

In three extended paragraphs, [Blackmun] traced the history of professional baseball. He continued with a list of “the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided . . . for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in season and off season: Ty Cobb, Babe Ruth . . .” There were more than seventy names. “The list seems endless,” Blackmun wrote. He paid homage to the verse “Casey at the Bat,” and other baseball literature. When he had finished, Blackmun circulated the draft. [Justice] Brennan was surprised. He thought Blackmun had been in the library researching the abortion cases, not playing with baseball cards.

opinion in American professional sports history, but it had a rather inauspicious beginning within the Court itself.<sup>103</sup>

In *Flood*, Curt Flood, an MLB player regarded as one of the premier centerfielders in the league with the St. Louis Cardinals, took issue with his team summarily trading him to another team, against Flood's own personal wishes and his preference to remain—along with his family—in St. Louis, where he had built a life for himself.<sup>104</sup> Flood was not consulted about the trade and given no notice that he had been traded—and, inherently, needed to move—to Philadelphia.<sup>105</sup> Flood complained to the Commissioner of MLB, specifically asking that he be contractually released from his contract with the Cardinals and made a “free agent,” giving him the freedom to determine on his own where he should play; the request was denied.<sup>106</sup>

The subsequent antitrust suit, filed by Flood in the Southern District of New York, named virtually everyone in a position of power within MLB as a defendant.<sup>107</sup> Flood's message was clear: baseball had been acting unilaterally and with a despotic flair in its management of the game. Flood's argument spoke in immediate terms about the use of players, but his reasoning is transferable to the league's treatment of teams, stadiums, and, it stands to reason, *television deals*.<sup>108</sup>

Justice Blackmun, writing for the Court, held that, “[w]ith its reserve system enjoying exemption from federal antitrust laws,

*Id.* at 190.

Other justices eventually lobbied Blackmun—most likely with a sarcasm undetected by Blackmun himself—to have *their own* favorite baseball players added to the list (Blackmun would weigh the attributes of each player, in earnest, before deciding whether or not they deserved inclusion in his own judicially-crafted Hall of Fame). *Id.* at 190–91.

<sup>103</sup> *Id.* at 186–92.

<sup>104</sup> *Flood*, 407 U.S. at 264 (highlighting that Flood was a seven-time “Gold Glove” award winner, a strong hitter, and a designated team captain during his time with the Cardinals).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* Flood sued the Commissioner of Baseball, the presidents of the two major leagues, and the twenty-four major league clubs. *Id.*

<sup>108</sup> *Flood*, 407 U.S. at 264.



baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.”<sup>109</sup> But, the Court decided, this aberration was worth maintaining.

Turning specifically to the radio and television broadcasting issues that Justice Blackmun could see looming on the horizon, Blackmun wrote that the “advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.”<sup>110</sup> In so stating, Blackmun was not just making an aside about the effect of sports broadcasting on antitrust issues in professional sports, but also reiterating a powerful assumption that his opinion made: Congressional inaction in the decades after *Federal Baseball* and *Toolson* represented a tacit approval,<sup>111</sup> by Congress, of the principles of those two cases and warranted upholding baseball’s antitrust exemption absent Congressional mandate.<sup>112</sup>

The conclusion of this long string of cases, stretching over several decades, can be succinctly summarized in one of the last clauses of Blackmun’s *Flood* opinion. Congress had no intention, Blackmun held, “of including the business of baseball within the scope of the federal antitrust laws.”<sup>113</sup> Players, like Curt Flood,<sup>114</sup> could and would continue to be traded.<sup>115</sup> And, this article argues,

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<sup>109</sup> *Id.* at 282.

<sup>110</sup> *Id.* at 283.

<sup>111</sup> Congress’ tacit approval was known as “the positive inaction doctrine.” Sullivan, *supra* note 97, at 1267.

<sup>112</sup> *Id.* at 1278–80.

<sup>113</sup> *Flood*, 407 U.S. at 285 (quoting *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 346, 357 (1953)).

<sup>114</sup> Flood, in some small consolation, was granted the privilege of being the namesake for the 1998 “Curt Flood Act” passed by Congress. Curt Flood Act of 1998, Pub.L. 105–297, Oct. 27, 1998, 112 Stat. 2824 (1998).

<sup>115</sup> There were many moments in the future of free agency, leading to the much more player-friendly system that we have now; some of them only shortly after the *Flood* decision. See William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL’Y 283, 284–95 (2007); see also Susan H. Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335 (1998) (tracing the history of Major League Baseball’s free agent system and Jim “Catfish” Hunter’s successful fight to become the first modern “free agent”).

even though players are now given more freedom in their movements, the Court's reasoning would still allow Major League Baseball to take greater steps to monitor and regulate the business affairs of its teams—including issues relating to broadcast television contracts—in the best interests of our national pastime.

#### VII. APPLYING THE ESTABLISHED LAW TO INCREASE REGULATION IN BASEBALL – A DECISION THEY JUST WON'T MAKE

Having established that baseball's antitrust exemption is virtually beyond reproach, the next question we must ask is, does baseball's judicial exemption provide a window of opportunity for MLB to step in and regulate the television/broadcast dealings of its teams for the benefit of the league as a whole? The baseball commissioner has the power to review trades and determine whether they are fair or "in the best interests of the game."<sup>116</sup> One has to assume that sooner or later it is going to become apparent to Commissioner Selig—or to subsequent commissioners—that the "unfair" aspects of the game are the product of a potentially broken system. This does not mean that baseball should stop teams from making money, but MLB might be able to influence how teams use that money, to the ultimate benefit of the league as a whole.

Will they be able to act? This article argues that they will be, and actually are presently, able to act. The more appropriate question is, "why don't they act?"

Baseball's antitrust exemption, though it might be of muddled lineage, still lives. It is the strongest antitrust shield in professional sports and perhaps one of the strongest in American business.

But, in an interesting dichotomy, the game with perhaps the greatest ability to control its image, its teams, and its league as a whole, chooses not to.

One explanation for baseball's lack of action may be the sport's commissioner.<sup>117</sup> While the National Football League is managed by

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<sup>116</sup> See Forward, *supra* note 9, at 7–8 ("The commissioner has the power to act 'in the best interests of baseball.' Thus, the commissioner has the authority to investigate acts, transactions, or practices considered 'not in the best interests of baseball.'").

<sup>117</sup> Perhaps of some interest to this article's readers, Selig, unlike some of his predecessors who have served as MLB Commissioner, is not an attorney.

the firm (some would say draconian) measures of Roger Goodell, and the National Basketball Association is currently enjoying its last year under the stewardship of the roundly respected David Stern, baseball has Bud Selig.<sup>118</sup> Speaking to his decisiveness in times of crisis, Selig was once faced with the logistical conundrum of what to do in an All-Star exhibition game when one team ran out of pitchers.<sup>119</sup> He decided not to have some sort of altered competition to see who won, but to simply . . . go home; the game was declared a tie.<sup>120</sup> That the game was being played in Selig's hometown of Milwaukee and that it was supposed to be viewed as a celebration of the commissioner's career only added to the embarrassment.<sup>121</sup>

Some of the criticism of Commissioner Selig stems from the fact that many see him as an owner first—of his hometown Milwaukee Brewers—before they see him as a commissioner.<sup>122</sup> Others feel that Selig's reign will be, and maybe can only be, defined by the steroid era.<sup>123</sup> There will always be those who feel that Selig, along with the rest of baseball's owners, managers, and other overseers, let the players run roughshod over the league's record books while abusing drugs to accomplish their fraudulent feats.<sup>124</sup> For some, Selig's

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Interestingly, some legendary MLB players and managers have possessed law degrees, including likely Hall of Fame player and manager Tony La Russa, who once said that the “best degree a baseball manager can get is a J.D. The law degree taught me how to study, how to think, and how to implement and develop a strategy.” *Id.* at 11.

<sup>118</sup> See Bob Nightengale, *Tie in '02 All-Star Game Mattered*, USA TODAY (July 11, 2007, 4:02 AM), [http://usatoday30.usatoday.com/sports/baseball/allstar/2007-07-10-AllStartiegamefeature\\_N.htm](http://usatoday30.usatoday.com/sports/baseball/allstar/2007-07-10-AllStartiegamefeature_N.htm).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Nightengale, *supra* note 119 (quoting Commissioner Selig's statement: “It was embarrassing . . . and I was tremendously saddened by it. I had looked forward to it so long in Milwaukee, and then that happened,” and also All-Star outfielder Torii Hunter's statement: “I just thought it was the wrong thing to do.”).

<sup>122</sup> See Jacob F. Lamme, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 180–81 (2004).

<sup>123</sup> See *Bud Selig: the Good, the Bad, & the Ugly*, CBS SPORTS BLOG, <http://www.cbssports.com/mcc/blogs/entry/5814416/5852703> (last updated Feb. 28, 2008, 6:47 PM).

<sup>124</sup> See *id.*

passivity and apparent lack of leadership have defined him and, for many, such traits have defined this era in baseball's history.<sup>125</sup>

Any criticism of Bud Selig aside, the post of Major League Baseball Commissioner is one of great, unilateral power. Baseball Commissioners have historically acted most impressively through their power to take any action that they feel is "in the best interests of baseball."<sup>126</sup> In his 2012 article, *Sports and the Law*, the *Wisconsin Lawyer's* Joe Forward wrote:

The commissioner has the power to act "in the best interests of baseball." Thus, the commissioner has authority to investigate acts, transactions, or practices considered "not in the best interests of baseball." Like a judge, the commissioner can summon individuals, order document production, and impose preventive, remedial, or punitive sanctions deemed appropriate. The commissioner may also adopt regulations in the best interests of baseball.<sup>127</sup>

Ironically, and to his credit, it was Bud Selig who decided that getting the Dodgers some new owners *was* in the best interests of baseball; the Commissioner seized control of the Dodgers day-to-day activities in 2011.<sup>128</sup> Looking back, there is most likely no baseball-

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<sup>125</sup> See *id.* See also *Commish Doesn't Want Steroids Blame*, ESPN (Feb. 17, 2009, 4:49 PM), <http://sports.espn.go.com/mlb/news/story?id=3912702>.

Despite the advances made in testing for steroids in baseball—and despite protestations from baseball's leadership that the steroid era is "over"—big name players are still being busted every few months. See Tim Elfrink, *A Miami Clinic Supplies Drugs to Sports' Biggest Names*, MIAMI NEW TIMES (Jan. 31, 2013), <http://www.miaminewtimes.com/2013-01-31/news/a-rod-and-doping-a-miami-clinic-supplies-drugs-to-sports-biggest-names/full> (detailing how stars, including one of the game's all-time homerun leaders, Alex Rodriguez, were frequent clients of a Miami-based steroids supplier); See also Michael S. Schmidt, *Selig Says Steroid Era is Basically Over*, N.Y. TIMES (Jan. 11, 2010), <http://www.nytimes.com/2010/01/12/sports/baseball/12steroids.html> (quoting Selig's statement that, "[t]he use of steroids and amphetamines amongst today's players has greatly subsided and is virtually nonexistent, as our testing results have shown . . .").

<sup>126</sup> See Forward, *supra* note 9, at 7–8.

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* at 8.

appreciating person on this planet who would say that Commissioner Selig was wrong in so acting. The Dodgers needed McCourt out, and they needed new ownership.<sup>129</sup> The circuitry of it all paints an interesting picture.

### VIII. CONCLUSION

More likely than not, baseball will not face any sort of adjustments to its financial structure or to its revenue generating and revenue sharing mechanisms. Whether baseball needs to be saved from itself is a debate that will be had more and more frequently in the coming decades. Many people will look back on the sale of the Dodgers, and Commissioner Selig's role in it, and simply admire it for being a decision made by a commissioner who loved baseball and who wanted to save one of its most storied franchises from falling into further disrepair—and they would not be crazy for feeling that way. But some people will look back at the mad dash for television money that followed and see something more. After all, there are only so many elite baseball players to go around.

In the end, perhaps this is how baseball was always meant to be played. It is the American pastime. Let other sports worry about parity and fret over protecting the little guy. Baseball built itself out of the ashes of the Civil War.<sup>130</sup> The greatest franchise in the history

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<sup>129</sup> See Richard Sandomir, *Old Owner of Dodgers Not a Popular Topic with New Owners*, N.Y. TIMES (May 2, 2012), <http://www.nytimes.com/2012/05/03/sports/baseball/frank-mccourt-old-owner-of-dodgers-not-a-popular-topic-with-new-owners.html> (“After an increasingly unpopular reign as Dodgers’ owner—which culminated in a particularly nasty legal brawl over control of the team with Commissioner Bud Selig—Mccourt has become a bit like Harry Potter’s archenemy, the evil Lord Voldemort: he who must not be named.”).

<sup>130</sup> See *Thomas v. Silva*, *Baseball as a Source of Judicial Thought and Construction*, 78 MICH. B.J. 1296, 1297 (1999). Silva writes:

Baseball's popularity among soldiers during the Civil War helped stimulate interest in it among all classes of people once they returned home. In fact, a Chicago tournament in 1867, featuring the Washington Nationals, a team comprised of government clerks and law students, and widely considered America's finest team, gave A. G. Spalding his first taste of the

of sports was built on the back of a man not much more than a decade out of an orphanage.<sup>131</sup> This is baseball. After all, every single time two teams have taken the field there has been one shared piece of knowledge between all the ballplayers out on the grass and each and every fan sitting in the stands. They all know. Someone has to lose.<sup>132</sup>

But these questions need to be asked, if not answered, at some point. Baseball has the authority and the administrative infrastructure necessary to take action and to restore some kind of economic competitive balance to the game. Every other major American sport has taken such a step. No other American sport faces the manic financial future that baseball does. The rich—who are, in baseball, obscenely rich—will get richer. Not planning ahead in an unregulated Wild West of financing is surely not the best way to manage a league wherein the *true* competition should be taking place on the field, not in the billion-dollar boardroom.

It is doubtful that potential efforts to prevent MLB from acting to protect the integrity of the sport would face a legal attack strong enough to dent the armor-plated hide of the *Federal Baseball, Toolson*, and *Flood* cases. It ultimately becomes an issue of money. Who is willing to risk the revenues of the biggest market teams for

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national spotlight when his legendary pitching handed the Nationals their first defeat.

*Id.*

<sup>131</sup> Referring, of course, to George Herman “Babe” Ruth. See Robert M. Jarvis, *Babe Ruth as Legal Hero*, 22 FLA. ST. U. L. REV. 885, 885 (1995).

Ruth appeared in 2503 games, belted 714 home runs, collected 2873 hits, knocked in 2211 runs, drew 2056 walks, and retired with a .342 batting average and an unparalleled .690 slugging average. Incredibly, before his powerful bat dictated moving him from the mound to the outfield, Ruth also compiled a 94–46 wonloss record and a 2.28 earned run average as a pitcher.

*Id.* Yankee Stadium, where the Yankees played their home games from 1923 until 2008, was nicknamed “the house that Ruth built,” because of Ruth’s incomparable influence. See Jared Tobin Finkelstein, *In Re Brett: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430 n.2 (1983).

<sup>132</sup> Except at the All-Star Game.

the sake of the small?<sup>133</sup> Who is willing to make the long term decisions, with the big picture interests of the sport of baseball in mind, at the risk of potential cost in revenue for baseball's wealthy?<sup>134</sup>

As television revenues continue to boom, the landscape of both college and professional sports is changing. The future might see the

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<sup>133</sup> Jeff Passan, in an article published on Yahoo! Sports after news of the Dodger's T.V. deal broke, lamented the inaction of the commissioner and others in power. *See* Passan, *supra* note 16. Passan noted the perplexing behavior of baseball's leader:

Every chance he gets, Selig prattles on about baseball being in a Golden Era. In some respects, he's right. The fan experience is at its apex. The game itself never has been of higher quality. Baseball, in a vacuum, is quite superb.

And yet the sport is not played there. It is in real life, where Selig and the owners over whom he presides and the players who are in their employ worship the dollar, bow to it and judge themselves by it. Never, in that respect, has baseball found itself so gilded.

Nor, sadly, has it found itself so vulnerable to the vagaries set to come simply because the sport couldn't harness its own greed.

*Id.*

<sup>134</sup> At least one sportswriter has already asked whether this business model will make sense for the Dodgers themselves. *See* Mark Saxon, *The Price of Contention: Long-term Concerns*, ESPN L.A. (Jan. 31, 2013, 11:59 AM), [http://espn.go.com/blog/los-angeles/dodger-report/post/\\_/id/3681/the-price-of-contention-long-term-concerns](http://espn.go.com/blog/los-angeles/dodger-report/post/_/id/3681/the-price-of-contention-long-term-concerns).

As time moves along, are the Dodgers owners going to look to streamline their business to make it more profitable? The principal owners, Guggenheim Partners, state on their Web site that their "singular mission" is to "serve as superior stewards of capital and trusted advisors to our partners and clients." They have more than \$170 billion under their supervision.

The obligation of Mark Walter and his partners is to maximize the wealth of their investors, not to maximize the happiness of Dodgers fans. To keep the money flowing out of fans' bank accounts and into their business, the Dodgers at some point are going to have to win . . .

*Id.*

dissolution of collegiate conferences, if not the economic survival of only a few super conferences. In professional sports, the teams with the flexibility and the capital to win the RSN-related battles may upset the competitive balance of their respective sports. Do the circumstances warrant increased regulation? They certainly warrant consideration.

As it stands now, it does not appear that baseball is anywhere close to thinking such measures necessary. In reality, the Dodgers' former owner, the roundly despised Frank McCourt, was truly ousted over concerns from MLB that he would not get *enough* money from a pending television deal.<sup>135</sup> No, for now it appears that all revenue is good revenue at the old ballgame. Who truly will end up on top, when another season, decade, and era's worth of box scores have been tallied, is anyone's guess. The MLB standings are hard to predict, even in this day and age.

The Forbes list, on the other hand . . . .

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<sup>135</sup> See Passan, *supra* note 16.