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AN ANTITRUST ANALYSIS OF SPORTS LEAGUE CONTRACTS WITH CABLE NETWORKS

Stephen F. Ross*

In its recent contracts, the National Football League (NFL) shifted a number of prime-time regular season football games from the over-the-air American Broadcasting Company (ABC) to the Entertainment and Sports Programming Network (ESPN), a cable network.¹ Fans without access to cable are now deprived of the opportunity to see these games, which they previously could view at no charge. In addition, the National Hockey League (NHL) recently shifted its television package — including the broadcasting of the Stanley Cup championships — from ESPN to Sports-Channel America.² ESPN, a “basic” cable network included in the monthly cable service charge, reaches virtually all cable viewers; Sports-Channel, because it charges as much as twelve dollars per month above the cost of the basic cable charge,³ reaches far fewer viewers.⁴ Thus, even fans with access to cable will now have to pay to watch hockey games previously viewed at no additional charge. By signing a contract with ESPN, Major League Baseball has also made a significant entry into cable. Although the contract will permit millions of fans with access to cable to watch national games on Wednesday and Sunday nights, certain exclusivity provisions in the contract may prevent fans from watching other games now seen for free.⁵ These emerging technologies potentially allow pay and cable television networks to charge viewers directly for programming now seen for free on over-the-air television, and to use a por-

* Associate Professor of Law, University of Illinois. The author wishes to give special thanks to Judge Frank Easterbrook and Professors Herbert Hovenkamp, Kit Kinports, Peter Maggs, Roger Noll, James Pfander, and Lawrence Sullivan for their time, effort, and detailed comments.


² Murphy, Left Out in the Cold, SPORTS ILLUSTRATED, Feb. 20, 1989, at 81.

³ Taaffe, A Better Open; Too Much Brent, SPORTS ILLUSTRATED, June 27, 1988, at 59.

⁴ Id. (as of 1988 ESPN reached fifty million households, while SportsChannel reached a mere seven million).

⁵ Justice, ESPN, Baseball Sign Four-Year, $400 Million Deal, Wash. Post, Jan. 6, 1989, at D1, D5.
tion of these funds to outbid the commercial networks for desirable sports contests.

Do the antitrust laws — Congress' "consumer welfare prescription"\(^6\) — offer any protection to consumers from efforts to exploit the new technologies of pay and cable television? I believe they do. The Supreme Court's decision in *National Collegiate Athletic Association (NCAA) v. Board of Regents of the University of Oklahoma*\(^7\) set forth a workable methodology that allows courts to analyze whether a package sale of broadcast rights increases or diminishes fan viewership of sporting events. When such agreements reduce viewership, they constitute unreasonable restraints of trade in violation of section one of the Sherman Act,\(^8\) and should be enjoined.

Application of NCAA in the manner I propose will require that the courts, in deciding this particular issue, initially resolve two other controversial issues surrounding antitrust policy. The first involves defining the goals of the antitrust laws. In concluding that the antitrust laws are intended to protect millions of Americans who currently pay nothing directly to watch sporting events on over-the-air television,\(^9\) I align myself with those who believe that the Sherman Act was designed to protect consumers from exploitation by sellers.\(^10\) Those who believe that the antitrust laws are solely concerned with the efficient allocation of goods sold in markets will find my analysis unhelpful, for sports fans are not "consumers" within their terms in that, to date, most fans have yet to pay anything to watch sports on television.\(^11\)

Second, my analysis requires courts to compare a package cable sale with other alternatives that the leagues might adopt if a court were to enjoin cable deals on antitrust grounds. Those who believe that examina-

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\(^9\) "The income distribution aspects of television are particularly critical because the present free system generates an enormous amount of consumer satisfaction. Any significant alteration in the distribution of the benefits derived from television viewing would have a major effect upon income distribution." R. Noll, M. Peck & J. McGowan, *Economic Aspects of Television Regulation* 21 (1973).
\(^11\) My thanks to Professor William Baxter for this observation.
tion of "less restrictive alternatives" represents misguided antitrust doctrine will also take issue with my proposal.

This Article discusses the proper antitrust treatment of package sales to cable. Part I considers whether the antitrust laws apply at all to such sales; it concludes that section one of the Sherman Act does apply and that neither the Sports Broadcasting Act of 1961 nor baseball's historic exemption from the antitrust laws prevents antitrust scrutiny of these contracts. Part II explains why cable package sales should be analyzed under a rule of reason test focused on the effect of a sale on fan viewership. Finally, Part III responds to several possible objections to the rule of reason standard proposed in Part II.

I. THE ANTITRUST LAWS APPLY TO CABLE CONTRACTS

Three plausible, but ultimately unpersuasive, arguments can be made to preclude antitrust scrutiny of package sales contracts between sports leagues and cable companies. First, a sports league could argue that it is a "single entity" and that the sale is therefore not subject to section one of the Sherman Act. Second, a literal reading of the Sports Broadcasting Act of 1961 may suggest that contracts with cable networks supported in part by commercial advertising are exempt from the antitrust laws. Finally, at least Major League Baseball could argue that its judicially-created antitrust exemption extends to its relationships with broadcasting entities.

A. Sports Leagues are Subject to Section One of the Sherman Act

League officials and their academic defenders have argued that section one of the Sherman Act does not apply to package sales of broadcast rights by sports leagues. They claim that each league constitutes a "single en-

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tity” and, because section one requires a “contract, combination . . . , or conspiracy” to restrain trade, the agreement among sports team owners to sell broadcast rights jointly is no more subject to section one than the unilateral pricing decision of a single firm.\textsuperscript{16} The courts have consistently and correctly held, however, that where leagues are composed of teams that are independently owned and operated and that do not share all profits and losses, they fail to qualify as “single entities” for purposes of the antitrust laws.\textsuperscript{17}

Each team has a property right in licensing the broadcasting of games played in its home park.\textsuperscript{18} Absent restraints, individual teams would com-


\textsuperscript{18} Liberty Broadcasting Sys. v. National League Baseball Club of Boston, Inc., 1952 Trade Cas. (CCH) ¶ 67,278, at 67,499 (N.D. Ill.). Baseball teams in the American League, for example, have ceded broadcast rights to the visiting team for rebroadcast in its own home territory and to the league for all rights in nationally televised games, and have agreed to share one-quarter of all income from pay television. See Note, Pooling of Local Broadcasting Income in the American Baseball League—Antitrust and Constitutional Issues, 32 Syracuse L. Rev. 841, 850 (1981) (citing American League of Professional Club Broadcasting Agreement of 1965).

In a recent article, Professor Gary Roberts claims that the league, rather than the individual clubs, has the property right in all league activities. Roberts, The Antitrust Status of Sports Leagues Revisited, 64 Tul. L. Rev. 117, 138-39 (1989). However, Roberts provides no support for this assertion. If these rights are owned by the league, it is only because individual owners have jointly agreed to give the league this property right. Roberts also suggests that, regardless of who owns the property right to broadcast games, the single entity defense applies because no game can be produced without the cooperation of the league and other teams. Id. at 127. Roberts ignores the fact that games may be licensed and broadcast independently, as has been traditionally done in baseball. He provides no explanation for his broad argument, which would suggest that firms forming joint ventures to produce their entire
pete not only on the playing field and for player talent, but for television viewers as well. For example, the Chicago Bulls might be able to market their own games to stations across the country who would be interested in featuring performances by superstar Michael Jordan; currently Jordan is only seen nationally as part of the package of games sold by the National Basketball Association (NBA) to CBS and the WTBS Superstation. The concern of antitrust laws with package sales is not that a particular team could charge whatever the market can bear for the rights to televise its own games, but whether teams in a league can combine to increase the profitability of a package sale by limiting the ability of each individual team to sell rights to networks, syndicates, or individual television stations or cable operators. If certain agreements among clubs are truly essential to promote the product, these agreements should be analyzed and sustained under the rule of reason analysis suggested by this Article.

output, which is then distributed and retailed independently by each firm, would be a single entity.

This explains why a contract to cablecast a single championship boxing event, or an individual team's contract with a single purchaser of broadcast rights, would not be subject to section one of the Sherman Act.

See infra Part II. Some commentators have argued that the Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), which held that an agreement between a corporation and its wholly-owned subsidiary was not a conspiracy for section one purposes, indicates that the lower court holdings rejecting the single entity theory are incorrect. See, e.g., Roberts, supra note 16, at 251-54. But, as Professor Daniel Lazaroff has shown, Copperweld and its progeny have been carefully limited to situations where there is a 'complete unity of interest' between the alleged conspirators and only one 'corporate consciousness.' Lazaroff, Antitrust and Sports Leagues: Re-examining the Threshold Questions, 20 ARIZ. ST. L.J. 953, 966 n.60 (1988) (citing cases). See Copperweld, 467 U.S. at 771. As I have demonstrated elsewhere, league commissioners may wish that league decisions were based on a single 'corporate consciousness,' but individual owners establish league policy based on their perceptions of their own individual interests. See Ross, Monopoly Sports Leagues, 73 MINN. L. REV. 643, 701-02 (1989).

Professor Myron Grauer has made the extraordinary argument that decisions by individual owners which are both anticompetitive and contrary to the interests of the joint venture as a whole must be tolerated because, in some circumstances, the grant of this power to individuals may be necessary to induce them to join the venture. Grauer, The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act, 64 TUL. L. REV. 71, 103-04 (1989). Under this reasoning, non-competition agreements would fail to restrain trade because, in some circumstances, a broad agreement not to compete may be necessary to protect the parties. This argument has never been accepted as the law. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899).

For a persuasive critique of academic advocacy of the single entity defense, see Goldman, Sports, Antitrust, and the Single Entity Theory, 63 TUL. L. REV. 751 (1989). Notwithstanding his own effective refutation of arguments that would remove sports agreements from section one scrutiny, Professor Goldman inexplicably concludes his article by advocating a single entity defense where the
Thus, section one does apply to package sales of telecast or cablecast rights by sports leagues. Indeed, the Sports Broadcasting Act's antitrust exemption for certain agreements to sell broadcasting rights would have been entirely unnecessary if the single entity argument was valid in this context. The statute was explicitly designed to protect such agreements from section one challenges. In fact, no one suggested that such a sale was illegal under any theory other than as an unreasonable restraint of trade in violation of section one.21

B. The Sports Broadcasting Act

The Sports Broadcasting Act provides that the

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

league exercises day-to-day control of all participants or where the league produces a "new product." Id. at 795. Goldman's first basis for a single entity defense would allow any cartel to fix prices with impunity, for example, as long as total control was ceded to a powerful cartel administrator. His second basis suggests that the Supreme Court's decision in Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), was incorrectly decided. Broadcast Music held that, because a joint venture among competing musical composers created a new product (a blanket copyright license), the agreement was subject to scrutiny under the rule of reason and was not per se illegal. Id. at 21-25. Under Goldman's theory, the defendant composers would constitute a single entity and face no section one scrutiny.

Professors Grauer and Weistart have argued that sports leagues are not subject to section one because agreements among league members about rules, schedules, and other matters are necessary for the product to exist at all. Grauer, supra at 89-90; Weistart, supra note 16, at 1056-57. The Supreme Court, however, has effectively rejected this argument. In NCAA, the Court observed that agreements among schools "are essential if the product is to be available at all" and concluded that the challenged restraint should be analyzed under section one's rule of reason analysis. NCAA, 468 U.S. at 101. Were Grauer and Weistart correct, this observation would have led the Court to dismiss the section one complaint against the NCAA's television restrictions, rather than deeming them unreasonable restraints on trade. But see Roberts, supra note 18, at 129 (asserting, without further explanation, that the fact that NCAA schools also compete in offering educational services and that NCAA agreements cover many sports make the NCAA a trade association, not a single entity, for purposes of analyzing television restraints).

21 This was the basis of the court's decision in United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961), which gave rise to the 1961 legislation.
Consider, for example, the application of the Act to ESPN programming, which is supported in part by sponsored advertising. If "telecast" includes broadcasting over cable, the ESPN contracts with the NFL and Major League Baseball are literally within the terms of the statute's exemption.

The choice of such a specific phrase suggests, and the House Committee Report accompanying the Sports Broadcasting Act makes clear, that the narrow purpose of the Act's exemption was to permit the NFL to sell a package of league games to CBS, just as the rival American Football League had sold a package to ABC. Despite some recent complaints, the Supreme Court's consistent approach to statutory interpretation suggests that even if the word "telecast" unambiguously includes ESPN programming, the statute should nevertheless be construed in light of congressional intent as expressed in clear legislative history. The legislative record established that such a package sale was necessary to ensure that all road games would be televised back to the NFL franchises' home areas. Thus, the House Judiciary Committee concluded that "the public interest in viewing professional league sports warrants" an accommodation "with minimal sacrifice of antitrust principles."

Under these circumstances, Congress acted to promote, not restrict, viewership of games — especially the games fans care about most, those of their local teams. In contrast, as explained in Part III below, a contract

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28 Although this was the stated intent of the Act's sponsors, it is not clear whether the effect of the Act was to increase viewership. For example, the number of nationally telecast baseball games
shifting games to cable television could significantly decrease game viewership with no corresponding benefit to fans.

The Sports Broadcasting Act was passed by Congress at the behest of the NFL, the principal interest group sponsoring the legislation and its principal beneficiary. Thus, comments of NFL officials made during legislative hearings on the bill are particularly relevant in defining the statute's scope. In these hearings, then NFL Commissioner Pete Rozelle unequivocally conceded that the legislation was not intended to apply to games shown on pay or cable television. During hearings before the House Antitrust Subcommittee, the committee's counsel directly asked whether Commissioner Rozelle, who was accompanied by the league's attorney, understood "that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV." The Commissioner responded, "Absolutely."

For example, in Trbovich v. United Mine Workers, 404 U.S. 528 (1972), the Court held that section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, currently codified at 29 U.S.C. § 482(b) (1988), did not prevent a dissident union member from intervening in an action brought against the union by the Secretary of Labor. The Court relied on testimony by a spokesperson for the AFL-CIO and a law professor who had assisted in drafting the legislation to support its conclusion that labor groups were concerned about frivolous lawsuits and that the statutory provision at issue was thus aimed at limiting the initiation of lawsuits, but did not bar intervention once an action was commenced by the government. Trbovich, 404 U.S. at 535-36. See also Wald, supra note 26, at 202 (value of hearings is increasing because in "many cases the best explanation of what the legislation is about comes from the executive department or outside witnesses at the hearings").

Judge Easterbrook argues that statutes designed to serve private rather than public interests should be construed to give effect to the "bargain" agreed to by the special interests involved and Congress, and should not go further. Easterbrook, The Supreme Court, 1983 Term — Foreword: The Court and the Economic System, 98 HARV. L. REV. 4, 15 (1984). His argument lends additional force to the proposition that testimony of representatives of the special interests sponsoring legislation should figure prominently in interpreting that legislation.


Id. The NFL has consistently adhered to this position in subsequent testimony. In response to a question posed by Senator Arlen Specter at a 1982 Senate Judiciary Committee hearing, then NFL Counsel Paul Tagliabue stated that "the words 'sponsored telecasting' in [the 1961 Act] were intended to exclude pay and cable. This is clear from the legislative history and from the committee reports. So, that statute does not authorize us to pool and sell to pay and cable."
The Supreme Court has repeatedly held that antitrust exemptions are to be construed narrowly. In light of the clear congressional purpose to increase viewership and the NFL's unequivocal concession that the Act did not apply to cable television, the Sports Broadcasting Act should be read to exclude package sales to cable, such as the NFL-ESPN, NHL-SportsChannel, and Major League Baseball-ESPN agreements.

C. The Baseball Exemption

In Federal Baseball Club of Baltimore v. National League, the Supreme Court held that the "business [of] giving exhibitions of baseball, which are purely state affairs," was not interstate commerce and thus not subject to the antitrust laws. Toolson v. New York Yankees reaffirmed this position, stating that "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws." In Flood v. Kuhn, the Supreme Court exempted baseball from antitrust scrutiny for a third time. Conceding that the original reasoning of Federal Baseball was no longer valid, the Court nonetheless concluded that continuing the judicial exemption was warranted based on "a recognition and an acceptance of baseball's unique characteristics and needs." However, the Flood Court's reasons for maintaining baseball's antitrust exemption do not support extending Flood's application from agreements among baseball owners about the internal conduct of their sport to agreements between baseball owners and third parties that restrain trade in the broadcast market.


In another context, the literal language of the Act has also been disregarded in light of clear legislative history. In United States Football League v. NFL, 634 F. Supp. 1155 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335 (2d Cir. 1988), the USFL alleged that the NFL's contracts with all three over-the-air networks resulted in an illegal monopolization in violation of section two of the Sherman Act, 15 U.S.C. § 2 (1988). Each contract clearly fell within the literal terms of the Sports Broadcasting Act. Nevertheless, the court found that the legislative history reflected a congressional intent not to exempt contracts where the intent or effect was to exclude rival leagues from over-the-air television, and interpreted the Act in light of this intent. NFL, 634 F. Supp. at 1164.

259 U.S. 200, 208 (1922).

346 U.S. 356, 357 (1953).

Justice Blackmun proffered three principal rationales to support the *Flood* Court's decision to continue the "aberration that has been with us now for half a century." First, as the Court had previously noted in *Toolson*, Congress had never seen fit to overturn the judicial decisions exempting baseball from the antitrust laws. The Court emphasized that remedial legislation had been introduced repeatedly in Congress but never enacted. Second, for many years, baseball had been left alone to develop with the understanding that its practices were not subject to federal legislative action. Third, judicially overturning *Federal Baseball* would sow confusion and create retroactivity problems.

None of these concerns warrants extension of the baseball exemption to anticompetitive contracts for the sale of broadcast rights to cable companies. Justice Blackmun assembled a fair quantum of evidence showing that Congress "as yet has had no intention to subject baseball's reserve system [the system challenged in *Flood*] to the reach of the antitrust statutes." In the area of the broadcasting of baseball games, however, Congress did legislate by enacting the Sports Broadcasting Act, and made the policy decision that leagues should be able to package their broadcast rights free of antitrust scrutiny for over-the-air telecasting only.

As a second rationale for the continuation of the baseball exemption, Justice Blackmun observed that Major League Baseball had relied on the Court's decisions allowing the reserve system to take effect. Major League Baseball's 1988 contract with ESPN, in contrast, represents the first package agreement among baseball teams concerning cable contracts. Applying

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36 Id.
37 Id. at 284. See also *Toolson*, 346 U.S. at 357.
38 *Flood*, 407 U.S. at 283-84.
39 Id. at 275, 284.
40 Id. at 283.
41 Id. See, e.g., id. at 273-74 ("the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause") (citing H.R. Rep. No. 2002, 82d Cong., 2d Sess. 229 (1952)); id. at 282 (noting that several bills that passed one house expanded the reserve system).
42 See supra notes 22-32 and accompanying text. The Sports Broadcasting Act includes a disclaimer provision which states that the Act shall not be deemed to "affect the applicability or nonapplicability of the antitrust laws" to any contract between baseball clubs. 15 U.S.C. § 1294 (1988). Thus, it would be improper to infer from baseball's inclusion within the Act's exemption that Congress affirmatively sought to overrule *Federal Baseball*, and I do not rely on the Act for such an argument. Rather, my point is that the exemption should not be extended to cover cablecasting contracts because, unlike issues relating to the reserve clause, Congress has rendered its policy judgment with respect to such contracts.
the antitrust laws to such contracts will hardly require the major structural changes in baseball that might be expected from wholesale elimination of the antitrust exemption. Moreover, despite the continued vitality of *Federal Baseball*, the Justice Department has repeatedly reviewed and threatened antitrust actions against Major League Baseball for anticompetitive broadcast arrangements, and Major League Baseball has invariably modified its arrangements accordingly.

Finally, Justice Blackmun's concerns about retroactivity are also inapplicable. A decision striking down the reserve system as violative of the antitrust laws could retroactively subject Major League Baseball to significant treble damage awards in suits brought by players. Challenges to cable contracts, in contrast, would most likely come at the outset in suits for injunctive relief. Damages suits would be limited in time and scope because, to date, Major League Baseball has made only one package sale to a cable company.

The one reported judicial opinion to consider this issue agreed that contracts between baseball teams and broadcasters are not protected by the *Federal Baseball/Toolson/Flood* exemption. In *Henderson Broadcasting Corporation v. Houston Sports Association*, the court, focusing on *Flood*'s concern with baseball's "unique characteristics and needs," held that broadcast contracts did not fall within that category:

The issue in the case is not baseball but a distinct and separate industry, broadcasting . . . . To hold that a radio station contract to

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43 I have suggested elsewhere that removing the exemption, whether by legislation or Supreme Court decision, would pave the way for divestiture of Major League Baseball into two or more competing leagues with significant structural and economic effects. See generally Ross, *supra* note 20.

44 See Horowitz, *supra* note 28, at 279 (Major League Baseball modified broadcast restrictions in 1950 to permit blackouts only in minor league territories where a game was being played or in major league territories where the club was telecasting a game in its home territory); *id.* at 279-80 (renewed threat of antitrust suit led to suspension of all restrictions for 1952 season); *id.* at 282 (because Justice Department refused to approve "Game of the Week" package involving most baseball teams, CBS package sale was modified to include less than half the clubs); *id.* (Justice Department refused to approve agreement preventing teams from telecasting in each other's territory, resulting in extensive telecasting of National League games in New York City in 1958 in direct competition with Yankees broadcasts).

45 For example, one study using 1967-68 data suggested that the reserve system allowed clubs to pay players only 11% of their economic value. Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915, 929 (1974).

broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities and markets outside baseball... as a shield against the statutes validly enacted by Congress.47

In Flood, the Court relied on baseball's uniqueness to justify treating it differently from football, boxing, and non-sports entertainment.48 What arguably makes Major League Baseball unique is its unchallenged status as a monopoly league,49 its complex body of rules governing player allocation and development (including the reserve clause and the minor league farm system), and the strong power of the Commissioner to regulate the conduct of teams and players in the "best interests" of baseball.50 Henderson Broadcasting correctly held that broadcast contracts do not involve these unique characteristics.

Baseball is a league sport, and sports leagues may have special needs. But baseball's needs for package television sales or other restrictions on telecasting are no different from those of any other major league sport, and Congress addressed those needs specifically in the Sports Broadcasting Act.

The bottom line in Flood was that the Court viewed the reserve system as essential to baseball's existence.51 There is no evidence that Major League Baseball's ability to contract with cable networks is similarly essential. Major League Baseball has prospered for years without such contracts, and permitting only those contracts that pass antitrust muster will hardly endanger our "national pastime."52

47 Id. at 271.
49 Football, basketball, and hockey have all faced significant challenges by rival leagues. The last actual challenge to Major League Baseball in this country was by the Federal League in the early 1900s. Ross, supra note 20, at 718. An effort by a minor league team to challenge baseball expansion was summarily rejected. Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101 (9th Cir. 1974).
51 See supra note 41. See also Flood, 407 U.S. at 268 n.9 (quoting Flood v. Kuhn, 443 F.2d 264, 272 (2d Cir. 1971) (Moore, J., concurring) ("[i]f baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November").
52 Several other lower courts have applied the antitrust laws to agreements between baseball
II. THE RULE OF REASON: DOES THE AGREEMENT INCREASE VIEWERSHIP?

A. Package Sales Should Be Analyzed Under the Rule of Reason

Package sales of broadcast rights are agreements among individual clubs, who could otherwise sell rights to broadcast their own games, to forego such independence in order to receive the presumably higher prices that such packages attract. Package sales are, in short, agreements among competitors. Antitrust law has often condemned agreements among competitors under a standard of per se illegality. However, as early as the first broadcast rights decision in 1953, courts have recognized that the special needs of professional sports leagues require more careful analysis. Although lower courts have occasionally strayed from this wisdom, the Supreme Court has recently reaffirmed that most sports league arrangements are to be reviewed under the rule of reason.

In NCAA, the Court noted that both amateur and professional sports teams and third parties without even discussing the possibility that the antitrust exemption might apply. See, e.g., Nishimura v. Dolan, 599 F. Supp. 484 (E.D.N.Y. 1984) (contract between cable company and New York baseball teams allegedly restrained trade in market for cable hook-ups); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 365 F. Supp. 235 (N.D. Cal. 1972) (contract between Oakland Athletics and concessionaire allegedly restrained trade in market for concession franchises), rev'd on other grounds, 512 F.2d 1264 (9th Cir. 1975), cert. denied, 459 U.S. 1009 (1982). Indeed, although the NFL vigorously argued as late as 1957 that Toolson applied to football (see Radovich v. NFL, 352 U.S. 445, 450 (1957)), NFL broadcast rules were struck down on antitrust grounds as early as 1951. The courts have held that, regardless of whether the baseball exemption would be extended to football, the exemption was limited to the "internal operation of professional baseball itself" and did not extend to interstate commerce in television and radio. United States v. NFL, 116 F. Supp. 319, 328 (E.D. Pa. 1953). One reported decision, applying with no analysis the baseball exemption to an alleged group boycott of two discharged umpires (Salerno v. American League, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971)), preceded Justice Blackmun's decision in Flood anchoring baseball's exemption to the sport's "unique characteristics and needs." Flood, 407 U.S. at 282.

See, e.g., United States v. Topco Assoc., 405 U.S. 596, 608-09 (1972) (restrictions agreed to by group of competing grocers seeking to compete with larger chain stores condemned as per se illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se") (emphasis in original).
operate in markets "in which horizontal restraints on competition are essential if the product is to be available at all." Some agreements can increase output — the number of viewers able to watch games — even while they restrict the independence of individual teams. As the NFL successfully argued in securing passage of the Sports Broadcasting Act, for example, the ability to offer a package deal of all NFL games to CBS enabled the league to extract the network's promise to televise every team's road games back to its local market. Absent the opportunity to secure a league package, CBS would not have been willing to make this promise, and fans in some areas would have been unable to watch their teams play on the road. Because sports leagues are necessary to provide the "product" — telecasts of NFL football, NHL hockey, or Major League Baseball games — per se condemnation is inappropriate.

B. Applying the NCAA Test: Does the Cable Agreement Increase Viewership?

The Supreme Court's decision in NCAA set forth the proper standard for analyzing broadcast rights agreements under the rule of reason. In that decision, the Court condemned the NCAA's package sale of college football television rights to two networks and one cable station. The Court held that, because prices were higher and output lower "than they would otherwise be," the agreement was anticompetitive and thus illegal under the rule of reason. The Court found dispositive the district court's finding that, absent the agreement, many more games would be shown on

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57 Id. at 101.
58 Celler Hearings, supra note 30, at 39-40 (testimony of then NFL Commissioner Pete Rozelle).
60 NCAA, 468 U.S. at 107.

The Court's analysis in NCAA casts doubt on the validity of the decision in United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961). In that decision, the district court enjoined a proposed package sale of NFL games to CBS that gave the network authority to determine which games would be televised. The court held that the contract violated the final judgment previously issued in the case, United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953), which prohibited the NFL from signing contracts that restricted the areas within which telecasts could be shown. The court's focus on the existence vel non of restrictions, as opposed to the overall effect on viewership, is inconsistent with NCAA.
television.61

In focusing on output, the Supreme Court considered the number of games that would be broadcast on television as a proxy for total viewership.62 This surrogate valuation method often will be correct. However, an agreement that shifts games to cable will clearly reduce viewership, even if the same number of games are broadcast.63 Although ESPN has made great strides in a short period of time, more than fifty million of the approximately eighty-nine million homes with television sets in the United States still do not receive ESPN.64 And, of course, consumers must pay for this service. The prospects are even bleaker for hockey fans, for SportsChannel reaches only ten million homes in this country.65 Thus, even if fans were willing to pay significant sums of money to watch games they now watch for free, many would be unable to do so.

Does this mean that the NFL-ESPN, NHL-SportsChannel, and Major League Baseball-ESPN contracts violate the antitrust laws? Not necessarily. The fatal flaw in the NCAA plan, according to the Supreme Court,

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61 NCAA, 468 U.S. at 105 n.29 (citing Board of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1294 (1982)).
62 See id. at 99.
63 The proxy of games for viewership is incorrect in two other situations. First, if televising games so diminished the live gate attendance of marginal teams that the entire league was jeopardized, a reduced number of televised games would result in the league’s continued operation, while an unrestricted number would result in the league’s demise. Under these circumstances, total viewership (television viewers and in-person attendance) would be enhanced by limiting the number of televised games. This rationale was the basis for Judge Grim’s 1953 decision permitting NFL teams to agree jointly to blackout games in any territory when the local team was playing at home. NFL, 116 F. Supp. at 324-25. For a strong argument, based on empirical evidence, that televised games do not destroy live attendance, see Horowitz, supra note 28, at 284-86.
64 Second, some leagues have found that televising a large number of games saturated the audience so that viewership declined despite the increased number of games. League officials have speculated that when too many league games are televised, people tend to postpone their viewing and end up watching fewer games. Thus, the NBA reduced the number of games in its national package but found that the ratings from the remaining games substantially increased, so that more people actually watched NBA basketball under the more restrictive plan. See Interview with David Stern, NBA Commissioner, ANTITRUST, Summer 1987, at 25-26.
64 According to a recent survey by the Nielsen Media Research, there are approximately 92,042,410 television households in the United States. NIELSEN MEDIA RESEARCH, NIELSEN STATION INDEX 1 (Sept. 1989). ESPN reaches 53.4 million homes, or 58.5% of all homes with television sets. CHANNELS, 1990 FIELD GUIDE 78 (Dec. 1989).
65 Murphy, supra note 2, at 81.
was that output was "lower than [it] would otherwise be." The key issue, therefore, is whether viewership is lower because of the challenged contract than it would be if that contract were enjoined.

How should a court reviewing a challenged contract determine if output is "lower than [it] would otherwise be"? To prevail in an antitrust challenge, the plaintiff should have the burden of showing that, were the contract at issue to be held illegal, the league or its members would probably enter into an alternative contract (or contracts) that would result in an increase in the number of persons viewing the game. The fact that alternative media exist to broadcast league games is insufficient; the plaintiff must show that the league would likely select the alternative media were the court to grant the plaintiff relief. Plaintiffs may find it difficult to satisfy this burden in challenging the current contracts between major sports leagues and cable networks.

The NFL-ESPN 1988-1989 contract, for example, results in eight Sunday night games to be shown on the cable network, in addition to the sixteen weekly Monday night games on ABC and the two or three games on CBS and NBC during each of the sixteen Sunday afternoons in the regular season. Initially, the contract would appear to reduce viewership from the previous contract when, in addition to the Sunday afternoon and Monday night fare, ABC telecast selected prime-time games on Thursday and Sunday nights. Because many fans do not receive cablecasts in their homes, viewership under the new contract will probably be "lower than [it] would otherwise be" if these games were televised on ABC or another national network instead of ESPN. Thus, if ESPN was simply the highest among several acceptable bidders, the contract should be held illegal. In that event, NFL owners have jointly agreed to raise prices and reduce viewership, which is exactly what NCAA members did in their unlawful television plan.

But the NFL is, of course, under no obligation to show games on any particular network or to schedule special Thursday or Sunday night

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68 NCAA, 468 U.S. at 107.
67 See supra notes 64-65 and accompanying text.
66 The loss of viewership may be significantly mitigated, however, because the contract generally requires ESPN to relicense the broadcast rights to over-the-air stations in the viewing areas of the teams involved. See Metzenbaum Hearings, supra note 1, at 22 (written statement of former NFL Commissioner Pete Rozelle).
games. Suppose the league could present internal documents or credible testimony showing that the network offers for these selected games were unacceptably low and that, absent the ESPN offer, the NFL would have eliminated this mini-package of games. The result would then be a schedule of Sunday afternoon games and one Monday night game. Under such a scenario, what would "otherwise be" would be no nationally televised games on selected Sunday evenings. Given these facts, the ESPN contract provides fans with the option of paying for nationally televised games they could not otherwise see. The ESPN deal thus increases output and is pro-competitive.

This analysis can also be applied to the NHL-SportsChannel contract. If the evidence showed that SportsChannel simply had outbid ESPN, fewer hockey fans would be able to watch NHL games than "would otherwise be" because SportsChannel reaches even fewer homes than ESPN. Consequently, a court would hold that the contract violated the antitrust laws because, if the contract was enjoined, the NHL would return to ESPN, and hockey games would be available in more homes than if the contract had been sustained. Alternatively, if the NHL would not have accepted ESPN's offer for a renewed contract, the contract with SportsChannel should stand unless the plaintiff could come forward with another alternative broadcasting arrangement that would increase viewership and would likely be selected by the NHL.

Most plausibly, the NHL-SportsChannel contract may be designed to permit SportsChannel to expand during the lifetime of the contract. The ultimate result will not be a reduced number of viewers of NHL hockey because, as SportsChannel's programming becomes more attractive, it expects to achieve the same level of household penetration as ESPN. The effect will be to provide hockey fans with the same coverage that would have been available on ESPN, thereby providing the industry as a whole with a new rival to increase competition among purchasers of broadcast rights.

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69 See Murphy, supra note 2, at 81.
70 See McManus, You're Nobody Until Somebody Sees You, SPORTS INC., Feb. 6, 1989, at 30-31; Murphy, supra note 2, at 81.
71 A cable network might argue that, even if the medium-term effect of a package sale contract would be to reduce viewership of sports contests, the overall effect of the contract might be pro-competitive if it allows the cable network to compete in the broader market for all programming with established television networks. Because courts do not have the capacity to evaluate intelligently the
Scrutiny of the Major League Baseball-ESPN contract under this analysis yields similar results. The contract provides that ESPN will cablecast six baseball games each week during prime evening hours — one each on Sunday and Wednesday nights, and doubleheaders on Tuesday and Thursday nights. Under the terms of the contract, local teams are free to continue to broadcast any games they choose during the Tuesday and Thursday doubleheaders. However, ESPN has exclusive rights to show games in the Sunday and Wednesday night slots. Currently, only the Texas Rangers regularly play baseball on Sunday nights; hence, Wednesday night is the only time when a significant number of games currently shown on over-the-air television could not be telecast due to this agreement. Moreover, none of the over-the-air networks is presently interested in broadcasting prime-time baseball.

The results of the Major League Baseball-ESPN contract therefore appear to be pro-competitive. Even assuming that teams did not replace Wednesday night telecasts with additional telecasts on other nights, the net increase in games available to those subscribing to ESPN (six games per week) should outweigh any decreased viewing of local Wednesday night broadcasts occasioned by the exclusivity provision of the ESPN contract. It can be reasonably predicted, then, that the overall effect of the contract will be to increase viewership of Major League Baseball games.

net economic effect of agreements that clearly reduce output in one market but may potentially increase competition in another market, antitrust law properly does not allow parties to justify agreements on this ground. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370-71 (1963) (rejecting merger found to reduce competition for retail banking and small business loans in Philadelphia, notwithstanding increased ability of merged bank to compete with New York banks for very large loans).

72 Justice, supra note 5, at D1.


74 Justice, supra note 5, at D5.

75 Shortly before the ESPN contract was signed, CBS and Major League Baseball agreed on a $1.08 billion, four-year contract that entitled CBS to televise 12 regular season games and all post-season games. Some commentators have complained that the reduction in the number of regular season games shown on the over-the-air networks will adversely affect fans who do not receive cable and wish to watch a national "game of the week." See, e.g., Smith, It's Going, Going, Going . . ., Sports Illustrated, Apr. 10, 1989, at 104. However, this change might not affect overall viewership; Major League Baseball's current contract with NBC gives that network exclusive rights to broadcast on Saturday afternoons. Litsky, Scouting: Stiff Competition, N.Y. Times, Apr. 12, 1983, at B8, col. 2. Under the new CBS contract, local teams will have an increased opportunity to televise their own games on Saturday afternoon, which may attract as many or more viewers than the current regime.
The foregoing analysis suggests that correct application of antitrust rules to sports league cable contracts will not significantly impair current league initiatives in that direction. Adopting this analysis, however, is vitally important to the prevention of future league contracts that might harm fans and reduce viewership. For example, shifting post-season games or Sunday afternoon football games to cable would reduce viewership because, for the foreseeable future, it appears that the over-the-air networks are very interested in broadcasting these games.\textsuperscript{76}

The above analysis could also prevent local baseball teams from moving the bulk of their games to cable. Recently, for example, the New York Yankees entered into a ten-year contract shifting all local broadcasts to a cable station.\textsuperscript{77} This contract will cause a significant reduction in viewership, for most of New York City is not wired for cable.\textsuperscript{78} The contract is not an antitrust violation in and of itself, however, because a firm with market power is entitled to sell its product unilaterally at a profit-maximizing price.\textsuperscript{79}

Even if the Major League Baseball-CBS package reduced viewership, it would be exempt from antitrust scrutiny as a result of the Sports Broadcasting Act. Unless a plaintiff could show that the Major League Baseball-ESPN contract somehow caused this reduction in the number of regular season games shown nationally by over-the-air stations, complaints about the CBS contract should not affect the analysis of the ESPN agreement.

\textsuperscript{76} See McManus & Rosner, \textit{CBS Emerges as Hardball Champ}, \textit{SPORTS INC.}, Dec. 19, 1988, at 1 (network paid $1.1 billion — almost $1 million per inning — for rights to show post-season games and twelve regular season games annually through 1993).


\textsuperscript{79} See, e.g., Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 927 (1st Cir. 1984) (defendant "is free to exploit whatever market power it may possess [even] when that exploitation takes the form of charging uncompetitive prices"), \textit{cert. denied}, 471 U.S. 1029 (1985); Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) ("more than monopoly power is necessary to make the charging of a non-competitive price unlawful"), \textit{cert. denied}, 444 U.S. 1093 (1980). Professor Lawrence Sullivan argues that a legal ban on monopoly pricing is ill-advised because such pricing actually serves the goals of the antitrust laws by attracting new competitors into the market and because such a rule would be very difficult for courts to administer, requiring constant reevaluation of the reasonableness of the monopolist's price. L. SULLIVAN, \textit{HANDBOOK OF THE LAW OF ANTITRUST} 117-18 (1977). Almost a century ago, then Circuit Judge William Howard Taft noted that for courts to go about determining the legality of conduct under the Sherman Act based on the reasonableness of the price charged would be to "set sail on a sea of doubt." United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), \textit{aff'd as modified}, 175 U.S. 211 (1899). Recognizing that today's reasonable price may not be reasonable tomorrow (see United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927)), courts have wisely refrained from holding that a firm violates section two of the Sherman Act merely by charging a monopoly price. \textit{Accord} 3 P. AREEDA & D. TURNER, \textit{ANTITRUST LAW} \textit{\textsuperscript{1}}}
Nevertheless, the contract might violate the antitrust laws because Major League Baseball teams have all agreed not to broadcast their games from any television station outside their own home territory and within the home territory of another club. This agreement may not significantly harm consumers currently, however, because the demand in New York for other American League games played in competition with the Yankees games is probably insufficient to interest an over-the-air station. If Yankees games are exclusively shown on cable, however, this situation could change. For example, the agreement would become more significant if it prevented the Boston Red Sox from televising its games in New York. Moreover, because American League teams have agreed to share the revenue from local cable contracts, the agreement begins to look more like a package sale and less like a unilateral transaction. Application of the NCAA viewership test to Major League Baseball contracts thus appears to be of growing significance to consumers.

III. OBJECTIONS TO A FAN-ORIENTED VIEWERSHIP TEST

Several objections to this proposed rule of reason analysis can be anticipated. First, critics could claim that the proposed analysis would bar agreements increasing the quality of sports programming available to consumers. Second, they might observe that fans pay nothing directly to watch games on free television and do not pay any additional amount to watch games on a basic cable service such as ESPN. Arguably, therefore, fans are not “consumers” of goods in a market deserving of antitrust protection. Third, considerable academic criticism has surrounded the suggestion that courts should explore the possibility of less restrictive alternatives to a challenged practice.

710 (1978).

See Horowitz, supra note 28, at 276-77.

See Note, supra note 18, at 850 (citing agreement among owners); Newhan, The Ueberroth Era, L.A. Times, Jan. 11, 1989, at 1, col. 3 (25% of Yankees' annual income from local cable contract will be shared with other teams).
A. Do Package Sales of Sports Contests to Cable Result in Better Programs?

One argument against the NCAA viewership test is that the test incorrectly equates output with the number of fans viewing sports contests. Critics might argue that the increased profits sports leagues and cable networks derive from exclusive or semi-exclusive package sales allow a superior quality of program to be shown on cable. This argument has two flaws, one factual and one legal. As a factual matter, the current nature of major league sports and the level of technology are such that no appreciable increase in quality results from showing a game on cable. As a legal matter, the Supreme Court’s antitrust precedents do not permit rivals to justify joint restraints of trade with a claim that the resulting monopoly profits would allow them collectively to increase the quality of their separately produced goods or services.

In a variety of areas, Congress and the courts have recognized that both consumers and society are best served by a policy allowing creators of innovative goods to receive a monopoly profit as an incentive to creating other such works. Thus, federal copyright laws give authors the exclusive right to sell their works for limited periods of time in an effort “to motivate the creative activity of authors and inventors by the provision of a special reward.” Similarly, the courts have acted under the antitrust laws to permit rivals to join in producing a “new product.”

To be sure, there are some instances where the lure of profits from the sale of cable rights might increase the quantity of games shown. An over-the-air station’s best offer for the right to show a home baseball game, for example, may be unattractive to the local team because it fears a loss of revenue from live attendance. Pay or cable programming may be able to offer more money, thus compensating the team for any resulting decrease in attendance. Such an increase in the quantity of viewership, however, will be the key factor in the NCAA viewership test.

It is unlikely that any significant increase in quality will result from higher profits for cable. Unlike movies, for example, major league sports telecasts provide for commercial time-outs during natural breaks in the

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83 See R. NOLL, M. PECK & J. McGOWAN, supra note 9, at 140.
action. It is theoretically possible that a cable programmer could offer slightly fewer commercials, insightful commentary in lieu of commercials, or a higher quality play-by-play and commentary than is currently offered by over-the-air networks. Few, if any, cable programs have made such claims to date. In any event, such innovations are unlikely to outweigh the extra charge fans must pay to watch games they now see for free. Furthermore, a “high quality” cablecast of a game could be offered for a price if a substantial number of fans were willing to pay for it. Meanwhile, other fans, preferring the “low quality” television network program, could continue to watch the same game for free.

Thus, package sales to cable are quite different from the blanket copyright licenses that musical composers join together to produce. The former are exclusive rights, whereas the latter are non-exclusive. The rights to show sporting events can be sold easily by individual teams on a game-by-game or team-by-team basis. No league-wide sale is essential for the product to be sold, and no “new product” is created by the package sale. In contrast, blanket licenses by definition provide purchasers with the rights to a multitude of musical compositions, and are thus essential if the product is to exist at all.

Even if the factual argument set forth above is incorrect, the Supreme Court made clear in Fashion Originators' Guild of America v. Federal Trade Commission that rivals may not restrain trade in order to create an economic incentive for each of them to improve the quality or innovation of their products. Like those who contend that fans will enjoy a “superior” football game if rivals are permitted to obtain monopoly profits from the sale of cable rights, the Fashion Originators' Guild argued that its elaborate system for preventing “style piracy” would realize a level of profits that would allow the Guild to continue to produce new and innovative fashion designs. Suggesting that Congress could bestow upon

84 The American Society of Composers, Authors, and Publishers (ASCAP) offers a blanket license permitting the licensee to perform any and all compositions owned by ASCAP members and affiliates as often as the licensee desires for a flat fee. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 6 (1979). In Broadcast Music, the Supreme Court reversed a court of appeals decision that held blanket licenses to be per se violations of the Sherman Act. On remand, the court of appeals reviewed the licenses under the rule of reason and found them to be lawful. CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981).

85 312 U.S. 457 (1941).

86 Id. at 461.
fashion designs the same intellectual property protection afforded copyrighted works, the Supreme Court rejected the argument that private groups could agree to create similar protection.

In sum, it appears unlikely that package sales will allow sports league owners to combine with cable networks to provide a superior product for consumers. Likewise, other theoretically plausible efficiency explanations for such sales are not persuasive. Rather, the primary reason why cable networks might outbid over-the-air networks for package sales of rights to show sports league contests is that the cable technology allows these networks to exploit more fully the monopoly power possessed by the combined teams in a league, and their higher bid reflects a sharing of those profits between the network and the league's members.

B. Should the Antitrust Laws Protect Sports Fans?

Sports fans do not pay directly to watch NFL football on television. Rather, advertisers pay television networks for the right to promote products during the games. The networks' anticipated proceeds from the sale of advertising in turn determine what they are willing to bid for the right

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87 See id.
88 Id. at 465. For a fuller discussion of an efficiency argument based on the defendant guild's ability to create a private system of property rights in clothing design, a recognition that the Supreme Court's decision rejects the creation of such a system on legal grounds, and a critique of that decision, see Liebeler, Book Review, 66 CALIF. L. REV. 1317, 1329-31 (1978) (reviewing R. BORK, THE ANTITRUST PARADOX (1978)).

Another efficiency-based argument might be that allowing package sales to cable more efficiently allocates the television spectrum. Moving games to cable may be an effort by networks and advertisers to use more channels at a given time. This Article's proposed test, which focuses on whether a cable package sale decreases viewership from what would "otherwise be," is sensitive to this efficiency concern. If, for example, advertisers prefer "Sunday Night at the Movies" to "Sunday Night Football," then the over-the-air network will show the former rather than the latter, regardless of the availability of cable. In this situation, the NFL should be free to show Sunday night football games on cable. Under the standard proposed here, the antitrust laws intervene only if both the over-the-air network and the cable network prefer to show football, but the cable network is able to outbid the over-the-air network because of its technological ability to charge fans directly.

Yet another efficiency argument for reducing viewership in the short run suggests that such a reduction is necessary to prevent "oversaturation" of the market. Where oversaturation is a real possibility, the result of the short-term reduction should be a medium-term increase in viewership over what would be the case as a result of this oversaturation. See, e.g., Interview with David Stern, supra note 63. Thus, a league in this situation should be able to defend its practices under the viewership standard advocated by this Article.
to broadcast league games.

Some critics may therefore argue that, if the antitrust laws are solely concerned with the allocation of goods and services exchanged for valuable consideration in the marketplace, sports fans (other than those who pay to attend the games in person) should not be deemed consumers of NFL football. The only services sold in the market relate to advertising. If HBO outbids CBS for the rights to NFL football, then HBO’s subscribers must value the games more than CBS’ advertisers, and allowing HBO to broadcast the games would be the “efficient” allocation. Moreover, since only one network will be showing each game, the choice between HBO and CBS has no effect on the use of society’s resources, and hence raises no concerns about the inefficient allocation of society’s resources. For example, Professor Diane Wood-Hutchinson has criticized the NCAA decision for assuming that viewers were the consumers. She concludes that if advertisers had been correctly identified as the consumers of the sale of college football television rights, the Court would probably have found no market power and no resulting harm to allocative efficiency.90

But the antitrust laws were not originally intended, nor should they now be applied, solely to promote the efficient allocation of resources. Rather, an important original purpose, which remains equally valid today, is to prevent the transfer of wealth from consumers to producers that may be occasioned by the exercise of producers’ economic power. Interpreting the antitrust laws in this manner is supported by both historical and economic considerations.

Professor Robert Lande has persuasively set forth the evidence supporting the historical argument that the Sherman Act’s sponsors believed that one of the statute’s principal goals was to protect consumers from wealth transfers.91 Although his argument need not be repeated here, it is particularly noteworthy that Senator Sherman’s original resolution condemned trusts or other business arrangements that “tend to foster monopoly or to

90 Wood-Hutchinson, Antitrust 1984: Five Decisions in Search of a Theory, 1984 Sup. Ct. Rev. 69, 108-11, 139-40. See id. at 111 (“If the Court had looked more carefully at the market,... it [may have] taken the dissent’s approach and upheld the Plan, on the theory that college football is only a small part of the overall television market and that it is the latter market that is relevant for the advertisers who underwrite the programs in the end.”).

91 See generally Lande, supra note 10.
According to Senator Sherman, the legislation would not cripple the economy, but would only prohibit combinations "for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." Senator Sherman explicitly recognized that monopolistic trusts might be efficient because of "better methods of production." But he rejected this efficiency as a justification for the trusts, because "all experience shows that this saving of cost goes to the pockets of the producer."

It was economically rational for Senator Sherman's constituents to support his proposal to prohibit combinations of firms that robbed them of what would later be termed "consumer surplus," and this concern should be equally popular with today's voters. The concern with consumer surplus, rather than allocative efficiency, is understandable because the transfer of wealth from consumers to monopolistic producers is the most visible result of monopoly pricing. The Sherman Act was originally passed and is currently supported by representatives and senators elected by voters who are predominantly consumers. In the context of this Article, these voters' economic concerns are more likely to be focused on wealth transfer issues, such as their ability to continue to watch their favorite teams for free, than on efficiency issues, such as the proper allocation of advertising resources.

A welfare economist might advise that society would be better off with narrowly drawn antitrust laws that allowed firms such as sports and cable companies to do as they pleased, followed by enactment of separate distributive legislation providing transfer payments to eliminate any harm to consumers. But if transfer payments are not forthcoming, the majority of

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92 19 Cong. Rec. 6041 (1888) (emphasis added).
93 21 Cong. Rec. 2457 (1890) (emphasis added).
94 Id. at 2460.
95 Competition normally forces firms operating in a free market to lower the price of their goods and services to cost, although many consumers would willingly pay far in excess of that price. See E. Mansfield, Microeconomics 31-33 (5th ed. 1985). Economists refer to the difference between the maximum amount consumers would pay and the actual price as "consumer surplus." Id. at 100.
96 Lande, supra note 10, at 74. Under normal market conditions, transferred wealth usually will be between two and forty times as great as the accompanying allocative inefficiency. Id. at 75.
citizens are worse off with this narrow legislation that fails to protect consumer surplus.

Some would question my conclusion that the antitrust laws should be construed broadly merely because such a construction — given the likely distribution of wealth — will make more people better off. They would argue that there is no basis for my normative judgment that it is preferable for millions of fans to save money and to be able to watch sporting events on free television than for the already wealthy owners to become further enriched. Even if the citizenry did not know at the time that the rules were established whether they would be (1) sports fans, (2) sports or cable owners, or (3) citizens indifferent to the entire matter, they would realize that they were so much more likely to be in the first category than in the second that the rational step would be to support the broader, pro-consumer rule.

In sum, the historic evidence suggests that the authors of the Sherman Act intended to protect consumers from exploitation by monopolistic producers, despite the fact that exploitative practices might be allocatively efficient. Moreover, were the question reconsidered today, it is likely that voters would want their representatives in Congress to pass or retain laws prohibiting conduct that makes sports team and cable owners better off at the expense of consumers. Accordingly, the original intent of the anti-

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88 This is because, as a general philosophical matter, it is difficult to "measur[e] happiness across persons for purposes of determining the effect of a policy on total utility." Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487, 488 (1980). Because the addition of different persons' utilities is "philosophically and functionally problematic" (Cooter & Ulen, An Economic Case for Comparative Negligence, 61 N.Y.U. L. Rev. 1067, 1099 (1986)), some would argue that whether society as a whole is better off by either allowing millions of fans to save money and watch desired sporting events or permitting wealthy owners to become further enriched is an indeterminable question.

89 Cooter & Ulen, supra note 98, at 1099-1100, justify a tort rule of comparative negligence by demonstrating that if voters are uncertain as to whether they would be victims or injurers, and it is equally likely that they will fall in either category, they will prefer such a rule. My argument proceeds one step further, justifying a pro-consumer antitrust rule where voters are uncertain as to whether they would be consumers or producers and where it is highly probable that they will be consumers. Cf. J. Rawls, A Theory of Justice 12-15 (1971) (analyzing how society would adopt rules if individuals operated behind a "veil of ignorance" about their place in society).

100 See Rodino Hearings, supra note 16, at 97 (testimony of Atlanta Braves and WTBS cable Superstation owner Ted Turner, suggesting that congressional action will force leagues to keep the World Series and the Super Bowl on free television); Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 39 (1982) (testimony of then NFL Commissioner Pete Rozelle) ("if we tried to go off free television
trust laws, as well as the current justification for those laws, supports the Supreme Court’s decision in NCAA that the Sherman Act prohibits agreements that reduce the number of fans willing to watch sporting events.

C. Examination of Less Restrictive Alternatives

The analysis proposed here continues a long-standing antitrust tradition of exploring less restrictive alternatives before sanctioning agreements among competitors. Such an approach should have a great deal of appeal for those who wish to promote the interests of consumers. Antitrust doctrine properly permits rival firms to enter into agreements or joint ventures with competitors in order to produce new products or to make or sell existing ones more efficiently. Yet, to protect consumers adequately, the antitrust laws must also condemn agreements both harmful to consumers and unnecessary to achieve efficiencies in production or distribution. Several objections have been made to the examination of less restrictive alternatives. Although some may have merit in other contexts, none of them are persuasive in evaluating sports league contracts with cable networks.

First, the approach of examining less restrictive alternatives has been confirmed both by the Supreme Court’s NCAA decision and by the Court’s prior decision in Arizona v. Maricopa County Medical Society. In Maricopa, the government challenged an agreement among competing doctors that established maximum fees to be charged for insured patients. The Court upheld a grant of summary judgment in favor of the government on the ground that the benefits of the agreement could be achieved by the less restrictive means of creating fee schedules established by insurance companies instead of by the doctors. Similarly, if the purpose of a...
sale of broadcast rights is to provide the public with an opportunity to view football or hockey contests, it is not reasonably necessary that the contest appear on pay cable systems when, absent those alternatives, the league will allow the broadcast of the same games on media with broader viewership.

Commentators across antitrust's ideological spectrum agree with this approach. According to former Judge Robert Bork, a contract that "may be useful but is not essential" — particularly descriptive of the relationship between broadcast contracts and the agreement among league owners to produce football or hockey games — is lawful when it is "capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose." Similarly, Professor Lawrence Sullivan has written that the proper judicial response in cases where concerted agreements among rivals may yield efficiencies is to conduct a truncated rule of reason analysis where "even if the claimed efficiencies are real and significant, if they can be substantially obtained by means significantly less threatening to competition, the inquiry should . . . end."

Finally, there is a practical justification for examining less restrictive alternatives. Although some league package sales may be efficient, others may be anticompetitive, especially where the league exercises monopoly power. For example, advertisers pay approximately fifty cents per household to sponsor the regular season NFL games. If a cable network could charge one dollar per household for an NFL game, the league would realize more revenue from the cable network than from the over-the-air networks if it attracted just over half of the current viewership. In other words, the NFL could find it profitable to shift all of its games to a cable network, even if the result was a significant reduction in the number of viewers. This is precisely the type of agreement that, in Senator Sher-

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Example, on remand in *Sylvania*, the Ninth Circuit upheld the challenged location clause because, inter alia, it was not "overly restrictive." *Sylvania*, 694 F.2d 1132, 1138 (9th Cir. 1982).


106 Cf. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CALIF. L. REV. 893, 909 (1987) (courts properly consider less restrictive alternatives because a particular alternative may be chosen precisely because it both adds to efficiency and increases market power).

107 Letters from Ronald W. Bess, President, Bayer Bess Vanderwarker, to author (July 18, 1988 and Nov. 10, 1988) [hereinafter Bess Letters].
man’s words, “increase[s] the profits of the producer at the cost of the consumer.” Such an exercise of market power should not be allowed to escape judicial scrutiny.

One concern with less restrictive alternative analysis is that firms will be deterred from desirable activity for fear that courts will second-guess their business decisions. Such concerns are unfounded if courts ask only whether the restriction is “reasonably necessary.” Courts properly dismiss cases where the so-called alternative could not have been reasonably anticipated by the defendant and merely reflects the ingenuity of plaintiff’s counsel. In the context of sports broadcasting, however, over-the-air telecasts always represent a potential alternative to cablecasts; furthermore, sales to a basic cable service invariably represent a potential alternative to sales to subscription or pay-per-view cable firms. The league will almost always have at its disposal a reasonable estimate of the potential viewership from any of these alternatives and, of course, will know what it would do if the most profitable alternative were to be held illegal. Thus, there is little risk of unfair “Monday morning quarterbacking” by courts or juries if the NCAA standard is applied.

Others object to an examination of less restrictive alternatives because, in many cases, the alternative does not fully accomplish the defendant’s legitimate goals. For example, suppose that several firms formed a joint venture to research and develop an innovative technology, and agreed that any innovation would not be licensed or shared with any companies in direct competition with any venturer. The ability to limit the “appropriability” of developing technology is arguably necessary to induce the participating firms to undertake the costs of research and development. It may be that a less restrictive alternative of mandatory licensing with royalties would be feasible for some ventures; however, other firms might not be willing to enter the venture absent a more restrictive clause. Concerns about how the courts should balance the public’s interest in competi-

108 21 Cong. Rec. 2457 (1890).
111 See Senate Comm. on the Judiciary, The National Productivity and Innovation Act, S. Rep. No. 427, 98th Cong., 2d Sess. 16-17 (1984) (few firms will contribute to joint research programs without assurance that contributions will not be appropriated by rivals and used against them).
tion and dissemination of technology (preferring licensing) with the public's interest in encouraging collaborative projects to develop new technology (preferring limits on appropriability) lead some to argue that the less restrictive alternative test is either inappropriate or should be significantly narrowed. 112

These concerns are inapplicable in the context of sports cable contracts. Regardless of the broadcasting entity, the same product is being offered to consumers — the broadcasting of a sporting event. The quality of the product is not significantly affected by whether the game is shown on cable or over-the-air television. 113

Another criticism of the search for less restrictive alternatives is the inquiry's waste of judicial and private resources in antitrust litigation when the defendants have insufficient market power to harm consumers. Only in cases where the defendants enjoy sufficient market power to harm competition, the argument runs, will the courts need to engage in less restrictive alternative analysis. Thus, these critics propose that the courts make an initial determination of the defendant's economic power, turning to the less restrictive alternative argument only when it is necessary to do so.

This argument has merit when the cost of litigating the market power question is less than the cost of litigating the question of less restrictive alternatives. Indeed, where joint venturers who agree on an ancillary restraint clearly face vigorous "interbrand" competition from other firms, it makes sense to conclude that any reduction in competition among the venturers will be "checked" by rival ventures. 114 On the other hand, when the joint venturers could achieve their goals by means of an obvious less restrictive alternative, it makes sense to conclude that the more limited approach should be pursued, whether the defendants selected the more restrictive restraint deliberately (in order to exploit market power) or inadvertently. 115 Focusing on less restrictive alternatives is particularly well-


113 See supra notes 82-89 and accompanying text.

114 Cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977) ("when interbrand competition exists ... it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product").

115 Inadvertent exercises of market power can cause serious antitrust problems. For example, in Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1493-96 (D.C. Cir. 1984), the court
advised when the inquiry into market power will be time-consuming and difficult.\textsuperscript{116}

The foregoing considerations strongly advocate the potential usage of less restrictive alternatives in the sports context. As noted above, the search for less restrictive alternatives will not be particularly difficult.\textsuperscript{117} Moreover, it is fairly clear that the major professional leagues do not face sufficient competition such that any attempt to exploit a reduction in competition among team owners will be "checked" in the marketplace; in other words, they all probably have market power.\textsuperscript{118} Indeed, what sports league could possibly contemplate shifting to cable if its viewers believed that an adequate substitute remained on free television? Thus, a search for less restrictive alternatives would appear to be a more efficient use of litigation resources than an initial fight over market definition.

of appeals reversed the district court's grant of summary judgment to the defendant based on the defendant's lack of anticompetitive intent and, on remand, required the district court to evaluate carefully the economic effect of the challenged restraint. The author of this Article, while serving in the Justice Department's Antitrust Division, filed an \textit{amicus curiae} brief for the United States with the court of appeals in \textit{Kreuzer}. In discussions with counsel, it became apparent that the challenged rule, which excluded the plaintiff from full membership in the defendant association and thereby denied him referral benefits, was initially based on a desire to exclude dentists like the plaintiff, whose practice was broader than periodontology, from editorial control of the defendant's magazine. Nevertheless, years later, the plaintiff produced facts sufficient, at least at the summary judgment stage, to support a conclusion that the rule may have had a significant effect in rigidifying dental specialties and reducing competition among dentists.

\textsuperscript{116} See \textsc{M. Handler, H. Blake, R. Pitofsky \& H. Goldschmid, Manual for Teachers to Accompany Cases and Materials on Trade Regulation 15} (2d ed. 1983) ("no present area of antitrust is more obscure or more perplexing" than market definition); \textsc{L. Sullivan, supra} note 79, at 43 (simplification of market definition questions is essential if courts are to function, "given the limited capacity of judicial institutions for dealing with economic data"); \textit{Interview with Judge Robert H. Bork, Antitrust}, Summer 1989, at 16, 18.

\textsuperscript{117} See \textit{supra} text following note 101.

\textsuperscript{118} Because consumers presently pay nothing directly for the ability to watch most sports contests, it is difficult to apply the Justice Department's test for market power — whether a hypothetical monopolist in the proposed market could profitably increase its price by five percent for one year — to sports leagues. United States Dept. of Justice, \textit{Merger Guidelines — 1984}, § 2.11, \textit{reprinted in Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551} (1988). Although there is no empirical evidence directly on point, it appears fairly clear that each major sports league does have the ability to "profitably impose a small but significant and nontransitory" increase in price. \textit{See id.} at 20,556. For example, in 1986, the television networks received approximately fifty cents per household from advertisers for broadcasting Sunday afternoon NFL games over the air. \textit{See Bess Letters, supra} note 107. Thus, if a sports league used the technology of pay television to charge approximately one dollar per household per game, it could substantially increase its profits, unless it lost half of its viewership and all of its advertising sponsorship. The latter scenario seems highly implausible.
Nevertheless, in a recent article, Professor Gary Roberts argued that restraints imposed by sports leagues should be considered lawful if they "reasonably relate" to a lawful purpose, regardless of whether there are less restrictive ways of accomplishing that purpose.¹¹⁹ Virtually any package sale would satisfy Roberts' standard. Sports teams need to agree on a host of rules in order to form a league, and may well need to agree on some restraints on telecasting to promote wider league exposure. Because the sale of broadcast rights "relates" to the teams' lawful purpose in organizing a league, Roberts would apparently conclude that any such sale is lawful, including, for example, the sale of Super Bowl rights to a pay-per-view cable station — even though such a sale would result in a high fee, would significantly reduce viewership, and would apparently be unnecessary to achieve an efficient production or distribution of the product.

Roberts' sole support for his conclusion that sports league actions "reasonably relate[d]" to a lawful purpose should be automatically lawful is a prior article by Professor Thomas Arthur.¹²⁰ Arthur, criticizing the policy-oriented precedents that have characterized antitrust jurisprudence, argued that interpretations of the Sherman Act should be anchored on the common law governing contracts in restraint of trade rather than on sound competition policy according to the currently prevailing view of the Supreme Court.¹²¹ To provide this anchored interpretation, Arthur relied on the authoritative appellate court opinion of then Circuit Judge William Howard Taft in *United States v. Addyston Pipe & Steel Co.*¹²² Unfortunately, Arthur deviated from the *Addyston Pipe* anchor when he concluded, for his own policy reasons and in contrast to *Addyston Pipe*, that consideration of less restrictive alternatives is inappropriate in antitrust cases.

In *Addyston Pipe*, Judge Taft reconciled the various strands of the

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¹²⁰ Id. at 1010 (citing Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 281 (1986)).

¹²¹ Arthur, *supra* note 120, at 280, 290.

¹²² Id. at 271 (existing antitrust doctrines should be replaced by those set forth in Judge Taft's opinion, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899)). For an argument that Judge Taft may have presaged the evolution of the common law's condemnation of anticompetitive cartels, see Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1041-44, 1055-56 (1989).
common law concerning restraints of trade that should be incorporated into antitrust analysis under section one of the Sherman Act. He concluded that the common law's evolutionary permissiveness in judging a restraint among competitors applied only to a restraint that was "ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of that contract."123

By the time Addyston Pipe was decided, nineteenth-century English common law had already established the principle that a restraint was unreasonable if it was "so large as to interfere with the interests of the public."124 Accordingly, where a clearly less restrictive alternative exists, such as over-the-air telecasting, the English common law would refuse to enforce contracts whereby individual sports teams refuse to compete in the sale of their team's broadcast rights, but instead sell a package deal to cable television.125

The Supreme Court has recently reiterated its long-held view that the "Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."126 This conclusion logically follows from Judge Taft's observation in Addyston Pipe that the principal point of section one's prohibition on contracts in restraint of trade was to make criminal and tortious those contracts that had previously been merely unenforceable.127 Thus, courts can fairly attribute to the Fifty-first Congress an intent to make contracts that would be

123 Addyston Pipe, 85 F. at 282. For example, Taft cited the case of Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871). Addyston Pipe, 85 F. at 288. In Morris Run, the Pennsylvania court, applying a New York statute, rejected a joint venture designed in part "to lessen expenses," 68 Pa. St. at 184, because the resulting restraint was "too general" for such an end. This case was one application of the "classical rule that the restraint could not be broader than necessary to protect the parties' business." Hovenkamp, supra note 121, at 1043.


125 See also 6A CORBIN ON CONTRACTS § 1387, at 58 (1962) (restraints ancillary to a proper purpose are not justified if they control production). Whenever a dominant league's package deal reduces viewership below that which would "otherwise be" so as to violate the rule of reason as set forth in NCAA, it will necessarily reduce "production" and thus also constitute a void restraint of trade under the common law.


127 Addyston Pipe, 85 F. at 279.
unenforceable today under the common law of contracts also criminal and tortious under the Sherman Act. It is clear that the common law today will not enforce contracts that restrain trade where, in the words of the Restatement of Contracts, "the restraint is greater than is needed to protect the promisee's legitimate interest."\(^{128}\)

It would appear, then, that a jurisprudence which seeks to limit judicial policymaking by anchoring the interpretation of antitrust statutes in the common law clearly would require an examination of less restrictive alternatives. So why does Professor Arthur argue that a restraint "reasonably relate[d]" to a legitimate goal should be sustained even if a less restrictive alternative is clearly available? He cites three reasons: business planning will be impaired when it is unclear which alternative is least restrictive; a clearly less restrictive alternative may not really accomplish the defendants' legitimate goals; and a court might disagree with the planner's judgment.\(^{129}\)

As noted above, the first two arguments are inapplicable in the sports cable context; broadcasting games on over-the-air television is always an obvious alternative, and the broadcast will be of the same quality whether telecast or cablecast.\(^{130}\) As to Arthur's concern that courts might reach the wrong result, this is basically a policy argument against the wisdom of allowing a court to review alternatives. Arthur thus suggests that where, as in this instance, he finds that policy arguments relating to judicial administration of the antitrust laws are more persuasive than the common law rule, he is prepared to jettison the latter. Given that Arthur's entire article is intended to prevent judges from interpreting the law to suit their own policy preferences, there appears little reason to adopt his position, or its application by Professor Roberts to the sports league context.

In sum, NCAA's instruction that courts must examine less restrictive alternatives before sanctioning league package sales of broadcast rights is supported by policy considerations, long-standing antitrust precedent, and common law rules governing contracts in restraint of trade. A careful examination of less restrictive means will not preclude efficient contracts by sports leagues, but will protect consumers from contracts that principally

\(^{128}\) *Restatement (Second) of Contracts* § 188(1)(a) (1981).

\(^{129}\) Arthur, *supra* note 120, at 343.

\(^{130}\) See *supra* notes 82-89 and accompanying text.
serve to fatten the pockets of league and cable owners at the expense of fans.

**Conclusion**

The antitrust laws protect consumers against economic injury which may result from agreements among competitors. Because sports league contracts with cable companies have the potential either to reduce or to increase viewership, they should not automatically be condemned. Rather, they should be analyzed under a rule of reason. Under modern rule of reason analysis, a contract with a cable company should be invalidated if the plaintiff can point to an available alternative that is likely to increase overall viewership and that would be pursued by the league if the challenged contract were invalidated. Where such an alternative exists, a court should grant relief under the antitrust laws and enjoin the cable contract. Unless the court has erred, the league will then select the less restrictive alternative, and fans will have an increased opportunity to view the games they wish to see.

Resolving this specific debate about how the antitrust laws ought to be applied to sports cable contracts illustrates the proper application of the Sherman Act generally. Those who believe that a massive wealth transfer from sports fans to league and cable owners raises legitimate policy concerns can more concretely understand why the Sherman Act generally should be used to invalidate agreements among firms to use their combined economic power to exploit consumers, regardless of whether those agreements adversely affect the efficient allocation of societal resources. Those who believe that federal legislation should prevent teams from agreeing not to compete with each other and selling a combined package of exclusive broadcast rights to cable companies, when it is clear that the teams will otherwise show more games on over-the-air television, can more concretely understand why the Sherman Act, like its common law antecedent, should not tolerate agreements among rivals that are broader than necessary to produce or distribute goods and services to consumers.

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