PITCHING ON THE HILL:
BASEBALL’S ALLIANCE WITH THE MEDIA AND THEIR INFLUENCE ON PUBLIC POLICY

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The institution known as Major League Baseball enjoys a disproportionate level of influence over all branches of local and federal government. The media are the gatekeepers of information for society. Government representatives are dependant upon the media owners to explain to their constituents what they are accomplishing, and to exhibit themselves in a positive light so that they can be re-elected. As such, when these two institutions form an alliance they occasionally engage in unsuitable, and at times possibly illegal, business practices without facing significant consequences. Since the emergence of electronic media platforms, Baseball has used its privileged position to enter into business arrangements with the communication industry that maximize its returns from the exploitation of broadcasting its contests. In using its advantage with public policymakers, MLB has reshaped the media landscape and helped advance the interests of its business partners.
Baseball is the only entity within the United States to be exempt from all antitrust legislation. On numerous occasions, both the judicial and legislative branches of government have attempted to rectify the obsolete status the League maintains, but Baseball’s influence has protected it from the enactment of any modifications.

This thesis investigates the circumstances that surround Baseball’s antitrust exemption and the reciprocal causation between three institutions: baseball, the media, and Congress. The text presents numerous examples of how the League capitalizes on its exemption in court cases and the formation of public policy. The author conducts an in-depth analysis of the Sports Broadcasting Act of 1961 and its current interpretations in light of new broadcasting distribution technologies.

KEYWORDS: Antitrust, Cable Television, Institutions, Major League Baseball, Professional Sports, Public Policy, Sports Broadcasting.
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To my friends at Battery-Kimble, thanks for helping take care of “Q” while I drugged through my work. Brother, Rich, how did an old laggard like you get so...
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Chapter 1. Introduction

The sports-media complex maintains a unique position within the American political arena, and Major League Baseball reigns over all others in its ability to induce public policy in creating a marketplace in which it can prosper. For other industries, there is a correlation between economic largeness, access, and persuasion of government decision makers. For Baseball, the model deviates relative to its financial magnitude. Furthermore, its caretakers are adroit at wielding their influence for the benefit of alliances as well as themselves.

In a national economy, which features a Gross Domestic Product of $12.37 trillion, how is it that two industries, which combined contribute $96.2 billion in gross revenues, wield such enormous influence? According to the 2002 U.S. Economic Census, the broadcasting industry, not including the Internet, annually generates $73.9 billion. Spectator sports generate annual receipts of $22.3 billion.\(^1\)

By comparison, the oil and gas industry is widely considered one of the most powerful interests throughout the world. Its four largest companies record profits in one year greater than the combined revenues of sports and broadcasting; estimates of earnings for 2005, alone, exceed $100 billion. Nevertheless, even they cannot mandate

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\(^1\) U.S. Census Bureau, 2002 Economic Census, Arts, Entertainment, and Recreation Industry Statistics, Table 1[hereafter, 2002 Census]
policy as well as the sports-media complex. For example, despite millions spent in lobbying, oil companies cannot persuade policymakers to open certain reserves in Alaska, the Gulf of Mexico, or the coasts off Florida and California. In addition, government intercedes if it suspects any collusion among energy companies in fixing prices. When Baseball and/or the sports-media complex need permission to negotiate as a cartel, they get Congress to grant antitrust immunity within 72 days from its first hearing on the subject.

My argument enters ongoing discourse in numerous disciplines: communications, politics, law, and sociology. I touch upon three ongoing research streams: media as business, the history of baseball, and social networking. My organizing framework demonstrates the reciprocal causation of Major League Baseball and public policy on cable television. I will attempt to answer various research questions. How is it that public policies regarding professional sports, and the broadcasting thereof, are permitted to exist when they conflict with the public’s interest? Why do politicians perpetuate these public policies despite them conflicting with the public interest? Why are politicians so fearful of supporting policies that regulate Baseball, whereas they aggressively pursue similar actions against other industries?
In this thesis, I will chart the evolution of professional baseball and the emergence of different media platforms. I will analyze certain policy initiatives that affect their nexus. In turn, I will demonstrate the significance of Baseball’s accomplishments in persuading public policy by identifying the circumstances surrounding the decisions and the actors involved. I will conclude by describing compromises to the public sphere made in the name of preserving the National Pastime.

The media are the gatekeepers of information for society. They control the flow of communication between government and the people, and commerce and consumer. Government representatives are dependant upon the media owners to explain to their constituents what they are accomplishing, and to exhibit themselves in a positive light so that they can get re-elected. Since its inception, the American media has followed a commercial model. As such, one of its central purposes is to get advertisers’ messages to the marketplace.

Advertisers must reach all segments of the population, and professional sports represent the most efficient way for the media to reach the 49.2 percent that are male.\(^2\) Furthermore, since professional sports – specifically Major League Baseball – maintains an exemption from the restrictive rules of antitrust (granted to it prior to the advent of electronic media) the sport brings to the broadcasting-Baseball partnership a

\(^2\) 2002 Census
“get out of jail free” card for media to increase its effectiveness and avoid regulatory interference.

The paradox of the baseball industry has always been that owners need to simultaneously cooperate and compete. They cooperate in setting rules for the game and policies for managing the League. They band together to combat players and adversaries in negotiations. They compete with each other on the field and for fans. The more people support one particular team, the more that team earns through merchandising; the greater their attendance is both at home and on the road; and at times, popularity factors into attracting choice free agents. For the past 30 years since the advent of superstations and regional sports networks, competing for fans outside of one's home city also translates to greater demand for a club’s broadcast. Eventually the value of the team itself becomes predicated on the success in competing for national popularity.

Operating as both competitors and partners is difficult, and often the owners do not succeed. When this occurs, the League relies on outsiders to help them coexist; and politicians and public policymakers are whom they turn to most often. Baseball spends most its influence in maintaining their antitrust exemption. The application of this exemption increases earning opportunities in almost every endeavor Baseball purses - labor relations, broadcasting agreements, stadium construction, and controlling
the market (through territorial exclusivity and the number of teams.) The exemption enables the value of these revenue streams to reach a level that is substantial enough for those owners who would normally be renegade (overly competitive, internally) to succumb to the welfare of the association.

History indicates a profound inability for Major League Baseball to self-regulate. They claim to base their business practices on maintaining competitive balance on the field, yet little internal policy focuses on another club within the League intruding upon another’s territory or broadcast channel. Their approach to public policy is to rely on government to pass laws that restrict competition among themselves as well as with others. Since its inception, one of Major League Baseball’s business philosophies is to destroy competition before it starts. Therefore, policing themselves drives much of their public policy initiatives. For example, when some owners launch superstations that intrude another club's territory, the League turns to legislators to establish a Copyright Tribunal. The policymakers rationalize their favors to the League as necessities for maintaining competitive balance.

A 1922 Supreme Court case, Federal Baseball Club Of Baltimore, Inc. v National League of Professional Baseball Clubs, granted Baseball its antitrust exemption. The court's decision was based on the premise that "... baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the
state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce.\textsuperscript{3} Scholars and experts of antitrust law and professional sports in the media generally agree there is something peculiar about the business of professional team-sports that differentiate it from other industries. Professional baseball's peculiarities include player contracting, franchise allocation, territorial protections, the definition of controllable property rights, and broadcast. As such, balancing the public interest and that of the market is difficult to ensure.

Throughout the subsequent 80 years, continuing the exemption has been hotly debated. The courts argue with Congress that Baseball operates against the public good. Cities that feel extorted by the League plead to Congress for aid. Broadcasters that feel abandoned by Baseball for cable cite their losses as reasons for regulatory relief or enforcement. Cable operators justify their gouging prices and business practices on the need of America to have baseball available in the public sphere. Congress, the only institution with the power to do so, then threatens Baseball with removing the exemption. Nothing happens, and the debate begins anew.

Why does Congress avoid setting policy adverse to Baseball's interests? It is because The Lords of Baseball work diligently in maintaining their icon, the "National Pastime." Baseball’s purity, representations of local community and family values, the

\textsuperscript{3} American League Baseball Club v Chase, 149 NYS 6, 17 (1914)
mythology associated with its players and traditions - all are actively maintained and aggressively promoted. To an elected official these are crucial texts with which to be associated. Many Americans are obsessed by their sports. No elected official wants to be attached to the loss to a community of its team; those responsible in obtaining a franchise for their constituency stand tall in public favor.

On more than one occasion a sports league has granted an expansion club to a politician that has delivered an important piece of legislation or chose not to interfere with one’s passage. In 1966, Emmanuel Celler (D-NY) opposed the merger between the American Football League and the National Football League. To circumvent his opposition, Senator Russell Long (D-LA) and Representative Hale Boggs (D-LA) led the Hill debate in favor of the League. Shortly thereafter, the League awarded a franchise to New Orleans. In 1973, Congress had completed conference committee negotiations on a new anti-blackout bill, which the NFL opposed. Senator Warren Magnuson (D-WA) did not file the conference report. The procedural omission negated the work and outraged the other House conferees. The NFL granted a franchise to Seattle the following June. The Congressional Task Force on Baseball Expansion first convened in 1990 to set a goal of six new baseball teams by the year 2000. Senators Tim Wirth (D-CO) and Connie Mack (R-FL) stopped calling for meetings after MLB expanded into their home states with the Rockies and Marlins.
Baseball as a Network

Professional baseball is a network primarily comprised of white, wealthy, men who inhabit several spheres – ownership, the media, advertising, and politics. The owners are successful executives mostly from other industries. Competitively driven and containing substantial egos, they are accustomed to doing as they wish and getting what they want. They own their team either to promote their other business or to elevate their profile to the public. Their names are repeatedly in the paper and their faces are on the television. When the team is successful, they host the most exclusive bacchanalia of the social season. Their ballrooms seat 60,000 people. They literally and figuratively control the hottest ticket in town.

Another network sphere is the media. They telecast the party to millions several times a week. They purchase the rights to this action-adventure/suspense-thriller, which commands the viewer's attention for seven months. Despite the millions spent, carrying a team's games is efficient programming. They fill lengthy blocks of time, cross-promote other programming, such as newscasts, and build positive relationships with advertisers.

The advertisers and sponsors are members of the network, as well. Not only do they buy commercial time, they buy naming rights to the stadium and they lease
billboards. They vend beer, and employ the people in the stands and at home watching. They also contribute to campaigns, political action committees (PACs) of members of Congress, and support both parties at all levels.

Thus, entering the network are the politicians. They raise money in the luxury suites; appear on camera while sitting in the owner's box next to the dugout, and speak at the ticker-tape parade celebrating a World Series championship.

Content

To analyze the dynamic between public policy and Baseball, I intend to show the importance of government decision-making to the League’s business model. I will primarily focus on the evolution of the business of baseball and parallel the growth of the sports-broadcasting complex. Lastly, through the analysis of certain policy initiatives, I will demonstrate how professional sports leagues use their stature to induce policymakers to act on their behalf.

In Chapter 2, I will identify the literature reviewed, the methodology I use, and the sources of data I draw upon. Furthermore, I recognize those issues that are relevant yet not included in my discourse.

Chapter 3 chronicles the business of baseball. The section reviews the organization of the League and the significance of its antitrust exemption. The owners
of Major League Baseball have a history of poor labor relations. In 1994, they
cancelled the World Series for the first time in history; something which two World
Wars, natural disasters, and The Great Depression could not accomplish. The chapter
delves into the correlation of labor strife to business developments and government
intervention. The public sector subsidizes all professional sports. The section
identifies its contributions through tax relief, stadium financing, and property rights
protection.

The sports-media complex is the subject of Chapter 4. Baseball’s role in the
emergence of many media platforms has been instrumental. For example, localism is a
founding principle of how our democracy structures the architecture of the American
communication system. Every medium relies on the sport as it mediates government’s
requirements to serve the local polity. The chapter traces events as they unfold that
show this interdependency. It also explores some interesting similarities of the cable
industry and MLB. They are both government-sanctioned monopolies. They both
exert great effort to avoid the court system so that elected officials can determine their
fate. They both have paradoxical relationships with their competition; cable and
broadcast networks, MLB and other professional sports. Local government subsidizes
both of their physical infrastructures – cable relies on support to wire neighborhoods,
municipalities finance the construction of stadia. Each manipulates the pricing for
their product with little regard to competition or supply-demand. Most of all, they both use their influence, partially inherited by cultural phenomena rather than generated utility, to manipulate the rules and conditions of conducting their businesses.

Chapter 5 seeks to interpret the relationship between government and the broadcasting of sports by summarizing congressional and court activities related to Major League Baseball and television. Primary actors are the sports barons and media moguls, their lobbyists, and politicians. Their personality and egos put them in their roles and motivate them to perform as they do. Here, the thesis identifies the machinations behind government intervention in professional sports. It draws a parallel between the emergence of cable television, the coinciding legislation that modifies media ownership, and the altering political-economic nexus of sports-related communication policy making. Furthermore, since media companies increasingly own or affiliate with baseball teams, the chapter investigates the impact of these alliances.

In the conclusion, I forecast potential future legislation. New technologies will continue to affect the transmission and reception of all programming. Major League Baseball already is making inroads into the Internet that will affect their relationship with cable. Cultural pressures calling for legislative action in family programming threaten the existing practices of cable operators on how they present channels. Offering a la carte programming, the practice of consumers selecting which networks
they pay for as apposed to the present tiering (in which the user must buy pre-packaged channels) can have a profound effect on the existing business model of the sports-media complex. Congress will have to address the dilemmas brought upon by these changes. Meanwhile, alliances will shift. How will it turn out, and whose influence is greater - Major League Baseball’s, the media moguls, or Congress? Does Baseball, finally, press too hard and lose its exemption?
Chapter 2. Literature Review, Data Collection & Methodology

Literature Review

The research conducted for this work covers industry, government, law, and cultural studies. Literatures reviewed take the form of books, scholarly theses, trade publications, microfilm, and Internet pages. Fields of study include communications, constitutional law, economics, public policy, and sports/entertainment. Data collected come from marketing research firms, government census and studies, trade associations, and historical documents.

Much of the research in communications centers on cable television and communication law. The Cable and Satellite Television Industries, by Patrick R. Parsons and Robert M. Frieden, give a comprehensive analysis of the history of cable, laws, and regulations on cable, and social issues related to its programming and viewing habits.

Theories behind the making of public policy and applying perspective to the First Amendment come from two authors, Philip M. Napoli and Cass Sunstein. Sunstein supports the collectivist model analysis to the First Amendment of which this paper follows. Historically, the judiciary proscribes to one of two philosophies when interpreting the intent of the constitution, the individualist concept or the collectivist
one. The individualist model subscribes to minimal interference by government, and
the collectivist model centers on interceding when necessary to promote an open and
plentiful environment for public expression. Since the early thirties, the Supreme
Court has leaned to the collectivist philosophy, and I align my interpretations of their
decisions along Cass Sunstein’s supportive writings on this approach. In his text,
Democracy and the Problem of Free Speech, he points out that the 1920’s was a
transitional period from individualist to collectivist thinking when Justice Oliver
Wendell Holmes writes extensively on the freedoms of the press and civil liberties.
This transition on the Court becomes apparent through this paper’s reconstruction of
Baseball’s antitrust exemption. Napoli’s, Foundations of Communications Policy:
Principles and Process in the Regulation of Electronic Media, extensively outlines the
foundational principles that the baseball/media partnership fulfill. My analysis will
show that the complex’ influence partially derives from the reciprocal synergy that
carry out these principles.

Paul Starr’s The Creation of the Media, effectively describes the historical and
cultural contexts in which numerous technological advancements occur and public
policies form. His portrayal of the social forces that influence the first quarter of the
20th Century help explain the environment in which sports in America flourishes, and
how the newspaper and early radio industries utilize baseball.
Andrew Zimbalist, Ph.D., is among the most prolific writers on the economics of baseball, the sports-media complex, and how its owners conduct their business. Dr. Zimbalist has served as a consultant to numerous professional sports leagues, academies, and broadcasting entities. He arbitrates cases involving players, and testifies in government hearings on Baseball's antitrust exemption, stadium issues, and team relocation. I have drawn upon three of his books, numerous articles he has written for periodicals and communicated with him via email. *May the Best Team Win: Baseball Economics and Public Policy*, covers Baseball's antitrust exemption in-depth. *Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime*, gives a complex portrayal of the businessmen that own baseball clubs, there competitive and cooperative tendencies, the League’s relationship with its players, and the role the media plays in Baseball's business model. *National Pastime: How Americans Play Baseball and the Rest of the World Play Soccer*, co-written with Stefan Szymanski, continues his analysis of how baseball and broadcasting concurrently evolve. Andrew Zimbalist presently is a Robert A. Woods Professor of Economics at Smith College. At one time, he was involved in a professional baseball league that tried to compete with Major League Baseball by launching with the support of a substantial media entity. Despite attempts to litigate, the venture failed.
David A. Klatell and Norman Marcus, editors of *Sports for Sale: Television, Money, and the Fans*, has compiled a collection of articles covering the inter-relationship between sports and television. Furthermore, its contributors touch upon the cultural affects of the sports-media complex. Professor Roger I. Abrams and The Brookings Institute have been valuable in interpreting the foundations of sports law and the unintended consequences of action and in-action.

Major League Baseball has financed studies and commissions in preparation of legislative and judicial actions. I have cited those published and many available through the Internet. Historical resources from the League include *Total Baseball: the Official Encyclopedia of Major League Baseball*, SABR - whose mission is to foster the study of baseball past and present, and the research department at Cooperstown, Baseball’s Hall of Fame. Internet web sites centering on baseball, which I have accessed, include The Business of Baseball (SABR) and Baseball Almanac: The Official Baseball History Site. Collectively, these resources supply contracts with broadcasters, Collective Bargaining Agreements, the League Constitutions, and historical data relevant to the growth of the sport.

A discourse already exists regarding the intent of *The Sports Broadcasting Act of 1961* (15 U.S.C. 1291, hereafter, SBA), and the enforcement of other legislative

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4 Contributed to by former and current league officials, sports writers, players, and historians of the game.
actions pertaining to sports. An element of this debate is antitrust exemption and its application by the League and rights holders. Zimbalist questions the legality of the status quo and proscribes to the argument that an inappropriate dynamic exists in the political-economic nexus. Stephen F. Ross, Associate Professor of Law, University of Illinois argues the converse in his thesis, *An Antitrust Analysis of Sports League Contracts with Cable Networks*. He writes that the failure to legislate is a passive intent to allow the market forces to dictate outcome. A third point of view, put forth by Brett Goodman and others, is that regulations are simply outdated, and emerging issues pertaining to communications technologies are too overwhelming for Congress to keep current.

**Data Collection**

The Federal Depository Library Program (FDLP) and other sources for reprints of laws, committee and commission hearings, and court cases are instrumental in my being able to present the content of bills and the context in which they are enacted. I have accessed transcripts of hearings and traced some supporting documents through the FDLP on microform. *Thomas.gov* (from the Library of Congress) *FindLaw.com*, and *Lexis-Nexis.com* are my primary sources for case histories and Supreme Court decisions. *The U.S. Bureau of Census, Economic Analysis of 2003* supplied industry

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and consumer demographic data. The Federal Communications Commission (FCC) maintains a comprehensive web site from which I accessed News Reports, hearing transcripts, and regulations.

Periodicals such as *Forbes*, *Broadcasting & Cable*, and *MediaWeek* all continue a current commentary on the state of the television industry and its economics. I have resourced their articles and tables pertaining to the financial position of MLB, teams, and their electronic media partners.

Two trade associations supply research on the television industry and actively participate in the forming of public policy. The National Cable Telecommunications Association (NCTA) and the National Association of Broadcasters (NAB) each have pages on their web site with compilations of past and present economic performance by their respective membership. In addition, they post policy position papers submitted to Congressional hearings.

Baseball’s numerous fans have presented in incalculable quantity of statistics and data on the National Pastime. I have confirmed any historical information and/or statistics assembled from independent sources by seeking out second and third sources.

**Methodology**

My intent is to present all events in a chronological order. Consideration to times in which a correlation of government action and business transaction took place
determined the data sets selected. Through this discipline, I hope to exhibit the reciprocal causation of policy and revenue. I have tried to describe events with input from both the perspective of broadcasters and the professional sports industry. I selected court cases and legislative acts that I conclude to have future consequences on the sports broadcasting marketplace.

Extensive attention is shown to four key time-periods, the 1920’s, 1955-1965, the late 1980’s – early 1990’s, and since 2000. These three eras are when new communications technologies emerge as potent forces in the marketplace: radio, television, cable, and digital/satellite. I conclude that as a new technology is adopted, it alters consumer behavior and requires consideration of new public policies.

Finally, considering that both primary fields of this study - baseball and broadcasting - are cultural icons, I have attempted to include a neutral backdrop of societal trends in America.

**Glossary of Key Terms**

Blackout: a federal law requiring cable systems and television stations to delete coverage of local sports events to protect gate receipts or a local team’s telecast.
Cable Communications Policy Act of 1984 (47 USC 521; a/k/a Cable Act of 1984): an act of Congress that - among other things - preempts local, state, or Federal rate controls (deregulation) in any community where "affective competition" exists.


Copyright Royalty Tribunal (CRT): a panel created by Congress in the Copyright Act of 1976 that is responsible for creating a fee schedule for monies paid by cable operators to various claimants of copyrighted programming (such as broadcasters, film studios and producers, and sports leagues.)

Farm System (Minor Leagues): associations of clubs that professionally compete at a level below the major leagues. Some minor leagues are independent while others are affiliated with Major League Baseball. The affiliated leagues are either comprised of teams owned by a major-league franchise, or ones that maintain a contractual relationship. The players generally have contracts, of which an agreement
between the League and the Players Association stipulate certain conditions, with a major-league club.

Federal Communications Commission (FCC): an independent regulatory agency, authorized by the Communications Act of 1934, to establish rules, regulations, and policies pertaining to all areas of communication.

Free Agent: a player whose contract with a club has expired thereby allowing him to negotiate with any entity for his services without such entity needing to negotiate with the club with which the original contract expired.

Luxury Tax: see Salary Cap.

Must Carry: the obligation of a cable system to carry local television stations.

Professional League: an organization of clubs that operate teams playing a sport for remuneration. In return for the privilege of associating with the league, all clubs agree to adhere to a set of policies (usually set forth in a Constitution or set of bylaws) and to obey the rules of the contest as established by the league.
Regional Sports Network: a television channel that features sports programming, usually affiliated with one particular team or group of teams, which is distributed on multiple cable systems within a geographic area.

Reserve Clause: an element of a player's contract in which it is stipulated that once the existing contract expires, the rights to the player’s services remain with the club. The player cannot contract with another club without the regional clubs permission - usually granted through negotiations with the club wanting the player.

Retransmission (Consent): the rules governing whether cable operators must pay stations when they include them within their service.

Salary Cap: a ceiling established by a league that limits how much a club can spend on its collection of players. Some leagues require a "hard" cap, which prevents any club from exceeding the set amount. Others have "soft" caps, which identify a threshold in which clubs that exceed the amount are required to pay an additional sum (in Baseball, called a luxury tax.) The formula for calculating the tax, as well as how it is distributed is subject to negotiations among the owners and Players Association.
Sports Broadcasting Act of 1961 (SBA): an act of Congress in which the four major professional sports leagues (MLB, NBA, NFL, and NHL) are permitted to negotiate collectively as a cartel with a "sponsored, over the air, telecaster."

Superstation: an independent station that is retransmitted via satellite to multiple cable systems.

Telecommunications Act of 1996: an act of Congress that substantially revised the Communications Act of 1934. The over arching purpose of the Telecommunications Act of 1996 was to stimulate competition in telecommunications by reducing barriers to market entry. Among other things, the act authorized telephone companies to provide cable television service and cable operators to provide telephone service; it deregulated certain features of retransmission consent, basic services, and rates.

Territorial Exclusivity: a defined space in which a club retains exclusive rights to maintain a team. Also, it covers the geographic parameter in which the club holds broadcasting privileges.
Tiering: the method in which cable operators supply cable subscribers with one or more program services beyond the basic offerings at an extra charge. Each additional price increment is called a tier; traditionally titled, extended basic, premium, and digital.

What is NOT included

My biggest struggle in compiling this work is to contain the study to the political-economic nexus of sport/media commerce. This thesis does not delve into the philosophies of baseball. The game contributes to our cultural dictionary many metaphors, ideologies, and texts. For example, we refer to players as the boys of summer. Literary and cinematic images of fathers and sons going to games and playing catch are representations of purity, home, and family. Women hold an important place in baseball, as well. During World War II, a woman's league substituted a depleted infrastructure of professional baseball to entertain Americans. Nevertheless, I do not cover issues of gender or age. In other team sports, contestants throw bombs or execute slam-dunks to score points. In baseball, the objective is to reach home. Unlike the other major sports, Baseball has no clock; this represents the

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6 Comedian George Carlin recites "Baseball and Football" in his album "An Evening with Wally Londo, Featuring Bill Slazso."
sport’s essence of timelessness. Although, it is essential to understand these contexts of America's passion for baseball, and in turn to appreciate the league's influence on public policy and subsequent importance to the media, that dialogue I leave for others.

It seems that most of society's ills eventually infiltrate the sport. Often, these issues affect the interplay between baseball and politics. Baseball's tensions with its players have paralleled the nation's conflicts between management and labor. Racial integration and civil rights were literally, and figuratively, played out on the field. Cocaine abuse damaged the sport in the eighties just as it did urban and suburban America. Today, steroids are a metaphor for our cultural struggles with truth, honesty, and technological advancement. While I write this paper, the news media are covering a national debate over immigration issues pertaining to Latin America. Likewise, baseball commentators are discussing the growing number of Hispanic players relative to Afro-Americans and Caucasians. Although Congress plays a role in these difficult issues, I do not delve far into them.

A study of broadcasting technology encompasses more than emerging distribution platforms. Broadcasters historically used their coverage of games as a laboratory for testing production techniques using videotape, multiple camera angles, and instant replays. The World Series was the first nationally broadcast color program. Recently, technology developed by the Defense Department for tracking missiles was
adapted for television so that viewers could witness the movement of a pitch. The flight of the ball, traveling up to a hundred miles per hour, can be seen curving, sinking, and traversing the plate. Although I analyze baseball’s role in the advancement of broadcasting, I do not include these impacts on new technology.

Media ownership is a major issue of public policy. Although it enters my discourse relative to the emergence of regional sports networks, the topic requires much greater analysis than possible here.

Likewise, an analysis of the Internet will only be touched upon briefly. Cable operators have become gatekeepers for broadband access, and this service is a prominent element of their current business model. Baseball joins other professional leagues in actively pursuing its place on the Web. Fantasy leagues, webcasting of games, and real-time gathering of statistics occupy the attention of Internet users. “Sports data is now big business. More than 150 million Americans have access to the Internet, and what many of them want to see - particularly 18 - 34 year-old men, who make up a disproportionately large share of the Internet users - is information about sports leagues... web sites earn a reported $500 million annually from fantasy sports.”

The League is arguing in the courts the issue of exclusive property right in the statistics and scores of games. Will the evolution of the issue go forth the same way as

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past actions in broadcast and cable? Copyright does not protect facts. In *International News Service v Associated Press*, the court established the *hot news misappropriation doctrine.*\(^8\) One can see Major League Baseball use the doctrine in unintended ways to enhance their hold on Internet content and to restrict competition. This topic is relevant to my work, but not reviewable at this time.

There is an old cliché; the only two certainties in life are death and taxes. I briefly touch upon tax issues relating to stadiums, but much more is involved relative to Major League Baseball. In 1978, the House Ways and Means Committee proposed legislation to disallow season-ticket holders to deduct their ticket costs as a business expense. The action did not pass. Owners currently depreciate a player's salary similar to a piece of machinery. No other industry would depreciate a human being. Every dollar spent by companies advertising on telecasts and signage in ballparks is a tax-deductible expense. These public policies are a significant subsidy to the league’s bottom line, and occupy volumes written by some authors I reviewed. I leave them for future works.

\(^8\) 248 U.S. 215 (1918) in which it is debated what data is protected from competitive use.
Chapter 3. The Business of Baseball

In the early years of every professional sport, the owners were men of great dedication and expertise… their type was soon superseded, however, by the business tycoon who made his fortune in trade, then dabbled in sports ownership both as a means of advertising his product and finding community approval. The beer barons-Jacob Ruppert with his New York Yankees and Augie Busch with his St. Louis Cardinals-were prototypes; they became famous across America and the sales of their beer did not suffer in the process. It is interesting that when William Wrigley, the Chicago tycoon, wanted to buy into the National League, he was strongly opposed by Colonel Ruppert, who feared such ownership might be used to commercialize chewing gum.

Then came the third echelon of ownership, the corporate manager who bought a club not only to publicize his business enterprises but also to take advantage of the curious development in federal tax laws.⁹

The true birth of baseball as a business can best be charted to July 20, 1858 when the first recorded admission fee to a baseball game was the All-Star contest between the best players from New York against the best from Brooklyn. A $.50 admission price was charged to approximately 4000 spectators. Today, the clubs have a combined value in excess of $10 billion.¹⁰ We can attribute part of the expansion to the game’s iconic image as the National Pastime and the owners’ savvy exploitation of its status; furthermore, comparing baseball’s growth relative to the adoption of radio

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¹⁰ *Double Play: MLB Valuations*, Forbes Magazine, 26 Apr. 2004
and television exhibits the benefits these two industries yield to one another. However, how much are these two institutions dependent upon each other, and how did this reciprocal relationship come to be?

In 1903, the dues for a club to enter the League were $500\textsuperscript{11}. In the late 1930’s, following the advent of radio and its adoption of baseball as a major source of content, teams sold for approximately, $1.5 million.\textsuperscript{12} In the 1950’s, prior to the Sports Broadcasting Act and when most teams had developed their own television broadcasting agreements, a team sold for $3.75 million.\textsuperscript{13} The advent of cable caused the value of teams to soar. In 1976, the Braves sold for $12 million, yet in 1981, the Phillies sold for $30 million. Today, in the era of media companies and sports franchises collaborating in regional sports networks, the Boston Red Sox sold for $700 million, in 2002.

On February 2, 1876, The National League of Baseball Clubs put to paper its constitution, and from the start, certain issues have been prescient. On the first page, following the roster of eight teams is a clause specifying territorial exclusivity. The constitution contains elaborate rules for contracting with players and the procedures for dealing with their grievances. Two of the four field rules specified on prohibiting


\textsuperscript{12} The 1933 sale price for the Boston Red Sox.

\textsuperscript{13} The 1953 sale price for the St. Louis Cardinals.
gambling of any kind and the respect to which umpires are entitled, “…any person hissing or hooting at, or offering any insult or indignity to him, must be promptly ejected from the grounds.”

In its final paragraph, the constitution takes note of the importance in protecting from abuse “our National Game.” Identifying baseball as the National Game, or National Pastime, is more than a marketing term. It has protected the owners on countless occasions.

Ever since that summer day in 1858, the Barons of Baseball have been fleecing each other, taking advantage of its players, and manipulating politicians. Sometimes by design, more often by chance, external forces have helped to increase revenues and prevent the custodians of the game from destroying themselves.

In the 1880’s, newspaper circulation bloomed. With it, coverage of sporting events took a prominent role in the American conscience. The telegraph permitted out-of-town box scores to be available for the following morning’s edition. Instead of accepting this as “free publicity,” owners tried to protect their commodity by suing the press for infringement on their property. When trust busting and anti-monopoly fever over took Washington, they reframed the game’s image to convince the courts that their sport did not involve interstate commerce (thereby exempting them from the Sherman and Clayton Acts.) Despite others appreciating the potential and power of

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radio, some Baseball owners feared the new technology would adversely affect their ticket sales. The Pittsburgh Pirates was the first franchise to enter into an agreement with radio station KDKA in 1921, but the Brooklyn franchise resisted the medium until 1939.

The relationship between television and baseball is the most complex, and examined later in detail. Nevertheless, the lack of cohesiveness and competitive nature within the League can be exhibited in 1958 when two extremely successful franchises, the Brooklyn Dodgers and the New York Giants, left their lucrative surroundings to migrate to the west coast. Their motivation was greater broadcast dollars. In the year following, the Philadelphia Phillies decided to televise half their schedule - 77 of 154 games - into New York City. For the first season, Philadelphia’s profits were enormous; curiously, there was no second season. As discussed in a later chapter, 1958 is also the first year of a national television contract for regular season games. Philadelphia joined the New York Yankees as the only clubs not to participate in the agreement.

In many ways, the transformation of the League’s ownership from a fraternity of wealthy brew masters and car salesman to a cartel of media moguls has changed the very essence of the League. Throughout the 20th century, labor troubles beset the sport. One can argue that because of this evolution, the notion that owners and players
are in a joint venture has arisen due to the owners appreciating the enormous negative
effect of labor unrest on their broadcasting interest. Prior, their bravado and
confrontational nature superseded any financial harm brought about by their dislike of
upstart players.

Acting simultaneously as competitors and partners causes difficulties for
business tycoons. For example, the Copyright Act of 1976 validated superstations.
Ted Turner’s adroit business acumen in exploiting this opportunity made him a
multibillionaire. His WTBS might have been the first in airing his Atlanta Brave’s to a
national audience, but Chicago’s WLS and New York’s WOR soon followed. They
and others that started regional sports networks have enjoyed massive new revenues
from these intrusive practices. Major League Baseball needed to rely on a third party,
Congress, to manage one owner’s infringement on another’s territorial rights. They
were not capable of policing themselves.

In short, throughout its 150-year existence, owners have been criticized for
their shortsightedness endangering the game. However, it is this shortsightedness, and
subsequent inability to act in unison, that often results in unintended positive
consequences.
Organizing Professional Baseball

The 1876 Constitution identified eight professional baseball clubs. Four teams from the east coast, Philadelphia, Boston, New York and Hartford; and four from the mid-west, Chicago, Cincinnati, Louisville and St Louis. Each club was granted territorial exclusivity for their city plus a five-mile radius. No visiting team was permitted to play any club in a territory other than the League club. Future clubs that might be admitted to the League were to originate only from a city whose population was greater than 75,000, and the host city was required to be incorporated in the name.

Dues levied by the League were $100 per year from each team. A tribunal was established to hear disputes between two or more clubs. Any player dismissed, expelled, or disciplined by a team could appeal his punishment to the tribunal. Witnesses were placed under oath, and the findings of the panel were uncontestable.

Players enjoyed complete free agency. The only restrictions to be that if a player signed a second contract with a differing team, the player could not begin playing until the expiration of the first contract. If a team released a player for any reason except “a negative reflection on character” (in which case he was banned from playing in the League,) the player needed to wait 20 days before commencing play with a new team.

The championship season extended from March 15 to November 15 and each team played one another ten times. Games were called for rain and could end in a tie.
The only reason for a club failing to meet its engagement without forfeiture was the death of a player. The club with the most wins at season’s end was the champion and “…a pennant (of the national colors), to cost not less than $100” was to be awarded the club who “shall be entitled to fly the pennant until the close of the ensuing season.”

A National Agreement for the Government of Professional Baseball Clubs was approved on September 11, 1903. It identified four objectives: the perpetuation of baseball as the national pastime of America, protection of the property rights of the clubs, promotion of the welfare of ball players, and adoption of rules. Essentially, it established what we now know of as the major leagues and the minor leagues. The agreement was the culmination of an on-going battle between the National and American Leagues, representing a truce in their battles earlier that year. The newly formed Major Leagues consisted of two circuits each containing eight teams. Both Leagues had clubs in Boston, New York, Philadelphia, Chicago, and St. Louis. The National League kept its teams in Brooklyn and Cincinnati; the American League resided in Washington, DC and Cleveland. Teams could move to a different city with consent of the majority of the clubs within their league so long as it was not to a city in which a major league club existed. If a club moved to a city in which a minor league team resided, the minor league would be paid $2,500 and the existing minor league

\[\text{\footnotesize{\textsuperscript{15}} Id.}\]
team would be negotiated with to determine equitable compensation “for any assets that they may have by the club desiring to locate in such city.”\textsuperscript{16}

Baseball’s operation was governed by a commission of three individuals, the President of the National League, the President of the American League and a Chairman of the Commission that served for a one-year term. The 1903 agreement articulated the terms and conditions of how leagues and their teams operated in the ownership of players’ contracts. It established the reserve clause, specified payments from a major league team to a minor league team for the drafting of a player, prohibited a farm system, and limited the rights of a player with respect to where he wanted to play. One hundred years later, professional baseball still maintains a draft, the reserve clause and another element of this agreement – a salary cap (although it disappeared for decades in-between.)

A year and a half later, in February of 1905, the two leagues extended their relationship to include the terms and conditions for their pennant winners to play a best-of-seven game series for the \textit{Professional Base Ball Championship of the World}. 10\% of all receipts were to be paid to the Commission, 40\% of the receipts for the first

four games were to be put into a players pool (split 75% to the winners; 25% to the losers), and the remaining monies went to the two teams, equally.

The next substantive addition to the major leagues’ internal agreement came in 1921. Its purpose was to establish the Commissioner. Following the national calamity involving eight Chicago players known as The Black Sox Scandal, the ownership succumbed to political and popular pressure to empower an individual of “high moral standing” to oversee the “best interests of the national game of baseball.” The 1921 agreement called for the Commissioner to hold office for seven years at annual compensation of $50,000, and he was eligible to succeed himself or a successor was to be chosen by a vote of the majority of the clubs.

Even at this early stage, there is no doubt that Baseball considered itself the National Pastime. “In the event of failure to elect a successor within three months after the vacancy has arisen either major league may request the President of the United States to designate a Commissioner.” Kenesaw Mountain Landis, a federal judge from the Northern District of Illinois, was hired, and held office until his death in 1944. His legacy was of being a tyrant and a major obstacle to the long over-due integration

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17 Eight players for the Chicago White Sox conspired to lose the 1919 World Series. When word got out that gamblers whom placed bets against the heavily favored Chicago team paid them off a national scandal broke out endangering the integrity of the game. Major League Baseball eventually permanently banned all eight players.
of Afro-Americans into Baseball. Nevertheless, his appointment was perhaps the best example of Machiavellian events for the major league’s owners; his most noted accomplishment on the federal bench was his presiding over the Standard Oil Anti-Trust trial. Was it merely fortuitous that within two years after Judge Landis taking over the Commissionership, the Supreme Court ruled that Major League Baseball was exempt from the nation’s antitrust laws?

A year and a half following Judge Landis’ death in office, the two leagues appointed a steering committee of six of its veteran executives to submit a report on the state of the baseball industry. The report’s foreword included the following observations,

Baseball, as a game, provides pleasure and relaxation to millions who see it played and to countless millions who followed from the printed page and radio. The time is not far distant when more millions will relax at home or in the theater and see and hear the game wherever it may be being played.

Professional baseball, however, is more than a game. It is big business—a $100 million industry-actively engaged in providing the American public with its greatest and, next to the movies, its cheapest entertainment buy.

… this partnership, and the agreement among the partners to cooperate in the business of baseball, constitute a monopoly. Our council do not believe we are an illegal monopoly (because our partnership arrangement and cooperative agreements are necessary in the promotion of fair competition and are therefore for the best interests of the public) but we are a combination, and as such, the policies and rules and
regulations adopted control everyone of us in the operation of our individual businesses.

Baseball in this country has been like Topsy; it "just grewed." Nor did it do a bad job of it. Through the years, however, the business of baseball has been run in the most haphazard way imaginable. On the whole it has gone along pretty well, and human nature being what it is, we have just "let it go."19

From these statements, it is clear that many within the industry could foresee the business and political landscape ahead. The report goes on to dedicate much of its attention to two issues, the unionization of its players and the reluctance of the major and minor leagues to incorporate black players.

Culturally, the report recognized that throughout the country, workers were organizing. Society was accepting the premise that management and labor were in partnership. The committee recommended that the League move proactively. They suggested it create player representatives that could act as liaisons with ownership and outlined a comprehensive plan for a pension fund, group medical and disability insurance. Within the context of race relations, it acknowledged that the fans were more interested in excellence of play rather than the color of the performer. It pointed out that black players were all-Americans in football, world champions in boxing,

gold-medal winners in the Olympic Games, and that 54 professional players from the Negro Leagues served with the Armed Forces in the recently ended world war - one player was killed and several wounded in combat. Despite these recommendations, the Boston Red Sox, the last of the major league teams to integrate, did not hire an Afro-American ballplayer until 1959. Some say the delay was the hundreds of thousands of dollars that many teams earned from the rental of their stadiums to Negro League franchises, but more likely, it was institutional racism.

There was one sentence that vaguely recognized watching games at home, “The time is not far distant when more millions will relax at home...” Was television’s potential really not appreciated? Regardless, Baseball certainly was aware of the importance to their economic future of the antitrust exemption.

**Antitrust**


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20 The report goes on to analyze the economic realities of the Negro leagues. Blacks accounted for over 50% of the attendants in some cities, and that Negro baseball was a $2 million business. “One club, the Kansas City monarchs, drew over 300,000 people to its home and road games in 1944 and 1945. Over 50,000 people paid $72,000 to witness the East-West game at the White Sox stadium in Chicago.”
The Supreme Court deems the nation's antitrust laws a "charter of freedom."

Their purpose is to prohibit powerful companies from controlling the marketplace due to their size and monopolistic position. Protecting consumers is not of concern to the courts. In 1890, by overwhelming majority Congress passed the Sherman Antitrust Act. This core of antitrust policy made it illegal to restrain trade or to form a monopoly. Twenty-four years later, because of much confusion over what was, and was not, permitted under the Sherman Act, Congress passed the Clayton Act that prohibited specific business practices. Entities could not price discriminate, merge sale-practices or dealership agreements, nor merge, acquire or interlock corporate directorships so long as they substantially lessened competition. In addition, the Act established the Federal Trade Commission (FTC) to police antitrust.

After successfully breaking up the major offenders - Standard Oil, US Steel, and American Tobacco - government’s focus on trust busting abated. In the early 1920s, President of the United States Herbert Hoover and his government promoted business cooperation and industries policing themselves. Concern in high barriers to entry and predatory pricing by large companies became the basis for monopolization claims. Ensuring a healthy interstate commerce was of primary importance. Furthermore, all branches of government showed respect to the century-old practice of
necessary government-granted monopolies. It was within this spirit that Major League Baseball's monopolistic status was evaluated.

At the start of the judicial antitrust debate, decisions were based on the premise that “...baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce.”

Soon thereafter, in the first and foremost case to reach the Supreme Court, Federal Baseball, the League won its exemption predicated on this same logic. Each subsequent time a court looked into the issue, it has used the rationale that it is Congress’ responsibility to alter the premise.

Baseball’s welfare and future should not be for politically insulated interpreters of technical antitrust statutes, but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the Congressman face his constituents the next November and also face the consequences of his baseball voting record.

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21 In one of history’s fascinating ironies, an early government-granted monopoly was Robert Fulton’s steamship service across the New York/New Jersey Hudson River. Fulton's company operated as the sole provider of steamboat traffic until an entrepreneur named Thomas Gibbons sued. In 1824, the Supreme Court struck down Fulton's government granted monopoly ruling that states could not legally regulate interstate commerce. One of Gibbons employees was a young Cornelius Vanderbilt whom later went on to become a leading actor in the creation of the railroad trusts - one of the concerns that precipitated Sherman’s act.

22 American League Baseball Club v Chase, 149 N.Y.S. 6,17 (1914)

23 407 U.S. 258, 268 (1972)
Despite subsequent developments such as nation-wide broadcasting, and the evolution of the industry into a multi-billion dollar concern, Congress has not acted and Baseball works diligently to prevent them from doing so.

**Federal Baseball**

Ten years following the truce between the National and American Leagues (which formed what we know of as the Major Leagues), a new organization called the Federal League was founded. It started as a minor league, but quickly began signing major league stars. The Federal League made inroads by taking advantage of the restrictive practices that the 1903 Agreement set forth. It offered players long-term contracts, doubled some salaries, and ostracized the restrictive practices that the existing owners had placed upon its players. On average, salaries in professional baseball doubled within the next two years. MLB responded by using its market position as advantage and threatened to blacklist any ballplayer that jumped to a Federal League team. The Federal League sued.

In January 1915, a renowned anti-trust jurist, Kenesaw Mountain Landis, heard the case in the Illinois U.S. District Court. Landis encouraged the parties to reach a settlement on their own, and withheld judgment for nearly a year. “As a result of thirty
years of observation, I am shocked because you call playing baseball ‘labor’,” declared Judge Landis. The two parties reached a settlement, and the Federal League ended up receiving a large pay-off of $600,000. Furthermore, several owners incorporated their clubs into MLB. Others were excluded from the settlement; essentially, their brethren sold them out. One was the Baltimore Terrapins.

White Sox owner, Charlie Comiskey, called Baltimore a minor league city and “not a hell of a good one at that.” Dodgers’ owner Charles Ebbets cited the Maryland city as one of the worst cities for baseball because “you have too many colored population to start with.” The Terrapins filed an antitrust suit in 1916. After receiving an award of $240,000 in April 1919, the District of Columbia Court of Appeals reversed the decision two years later based on the definition of antitrust, “the players…travel from place to place in interstate commerce, but they are not the game… [which] is local in its beginning and in its end…The fact that the [owners] produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.”

On May 29, 1922, the Supreme Court in *Federal Baseball* upheld the Appeals Court’s reversal. The Terrapin’s attorney made an aggressive case that the major

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league clubs monopolized the market for baseball players in violation of the Sherman Act, and that they were monopolizing the market because the reserve clause precluded players from joining the Federal League - thus preventing the development of another competing league. Furthermore, by virtue of some baseball clubs joining MLB and others being prohibited, MLB was using their power to create a monopoly. The Court’s opinion was written by Justice Oliver Wendell Holmes, centered on the opinion that the “business of giving exhibitions of baseball, which are purely state affairs” is not interstate commerce, and thus not subject to the antitrust laws. Just because teams traveled across state lines to stage a contest “a mere incident, not the essential thing,” and that baseball was a “personal effort, not related to production”\textsuperscript{27} it was not interstate commerce.

The Chief Justice was former President of the United States, William Howard Taft. Taft was the first choice to become the inaugural Commissioner of Baseball just a year earlier, but he decided to refuse on the basis that he expected appointment to Chief Justice by the newly elected fellow-Republican, Warren Harding. The Court’s decision was unanimous.

Twenty-five years later history seemed to repeat itself, but Baseball became wary of its fortunes in the highest court. In what could be one of the leading examples of this paper’s thesis, the machinations of soliciting the friendly legislature to intercede

\textsuperscript{27} 259 U.S. 200, 208 (1922)
and subsequently avoid the tenuous judiciary, went into hyper-drive. Following World War II, the Mexican League was formed in June 1946. As it did in 1915, MLB announced a ban on players who jumped to the new league. New York Giants outfielder Danny Gardella decided to accept $13,000 to play in Mexico rather than the $5,000 offered by New York. Soon thereafter, he found the conditions abominable and wanted to return. He was blacklisted and sued. He lost his original case, but won $300,000 on appeal. “The Second Circuit of Appeals found in Gardella’s favor, ruling that the advent of radio and television had clearly involved Baseball in interstate commerce and that the sport was therefore covered by the Sherman Act. The written decision did not mince words, stating that the reserve clause was “shockingly repugnant to moral principles that…have been basic in America…[since] the Thirteenth Amendment…condemning involuntary servitude…for the reserve clause…results in something resembling peonage of the baseball player”\cite{Zimbalist 2004, pg. 18}

Major League Baseball at first appealed the findings to the Supreme Court, but realized that the primary tenet of their business model was seriously in danger. The climate was different now that the War was over, and the Courts had evolved since the 1920s. MLB looked for Congressional support and was rewarded by a friendly hearing before the House of Representatives’ Committee on the Judiciary. A Subcommittee on the Study of Monopoly Power convened that studied eight antitrust cases pending
against professional sports. The League sent Ty Cobb and dozens of other ballplayers to testify in support of the game’s need for exemption. Sportswriters and business leaders from other industries converged on Washington, trumpeting the virtues of the National Pastime. Baseball settled with Gardella and three proposals for bills relating to Baseball emerged. Nevertheless, they never reached the House for a vote; to the politicians, the League’s racial discriminatory practices made it impossible for them to act in support. It was agreed that doing nothing was the safest course. The whole episode mysteriously faded from sight and the issue remained dormant for another decade.

**Toolson v New York Yankees**

In 1956, the Supreme Court again chose to address the antitrust issue. George Toolson was a minor league outfielder for the New York Yankees. Unable to make it to the big club, in 1953 he was reassigned to another minor league team. He refused to report and filed suit claiming that the team’s order, granted to it under the reserve clause, violated the antitrust laws. Since *Federal Baseball* was the law of the land, each lower court ruled against Toolson. Three years later the case reached the high court and the justices took the opportunity to voice their dislike for their previous ruling. For one, in the ensuing thirty years, the advent of radio and television
broadcasting altered the interstate commerce issue. Moreover, the labor/management relationship in America had drastically changed since the end of World War II and the War’s precursor, the Great Depression. Nevertheless, it was not the opportunity to change its ruling that motivated the Court, but its desire to send Congress a message.

In a one-paragraph opinion denying the appeal, the Court stated, “We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” Interestingly, it was in the dissenting opinion by Justice Burton that shows the fascinating game played by the two branches of government.

Whatever may have been the situation when the Federal Baseball Club case was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. In the light of organized baseball's well-known and widely distributed capital investments… its receipts and expenditures of large sums transmitted between states…its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the
defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.

Conceding the major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress…

The Court’s opinion includes lengthy excerpts from the 1952 Subcommittee on the Study of Monopoly Power report. “Organized baseball is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico…Of the 52 leagues associated within organized baseball in 1951, 39 were interstate in nature…After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball.” To summarize, the Supreme Court acknowledged that Congress was ignoring its own investigation that found against the status quo exemption given to Major League Baseball. Therefore, it was not that Congress had forgotten about the antitrust anomaly or that sufficient changes to the

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marketplace had not taken place. Politically, Baseball was not an entity with which elected officials wanted to intercede.

The Supreme Court did not let up, either. In what sounds like identical issues from the Gardella and Toolson cases, a few years later it ruled in *Radovich v National Football League* (352 U.S. 445 (1957)) that football was subject to antitrust laws. The Court found the following: 1) The NFL played games in various cities and that significant revenue was generated from the interstate transmission of the games over radio and television. 2) The League conspired to destroy other competitive leagues by boycotting their players. 3) Each team within the League used a standard player contract, which prohibited a player from signing with another club without the consent of the club holding his contract. 4) The League black-listed any player violating his contract thus preventing him from becoming a player in an affiliated league and effectively prevented his employment in organized professional football in the United States. Within the written opinion, the Court referred to its disgust with Congress’ conduct concerning Baseball.

**Flood v Kuhn**

It took twenty more years before the Supreme Court again looked at MLB’s special status; on June 18, 1972, the Court issued its ruling in *Flood v Kuhn. Stare
decisis" is a prominent philosophy in the psyche of the Supreme Court, and under this auspice the Court voted 5 to 3 to uphold Federal Baseball and Toolson. This time the Court did not focus its writings on Congress’ inaction, but on the recognition that too many long-term commitments had been made based on the “aberration” and “anomaly” that Baseball’s exemption represented.

Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business… The game is on higher ground; it behooves every one to keep it there… If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts…Professional baseball is a business and is engaged in interstate commerce… Other professional sports operating interstate - football, boxing, basketball, and, presumably, hockey and golf… are not so exempt.

In dissent, Justice William O. Douglas’ opinion was especially enlightening to what Baseball had become, “While I joined the Court's opinion in Toolson v New York Yankees, Inc., I have lived to regret it; and I would now correct what I believe to be its fundamental error... Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the Federal Baseball Club decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs…The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with

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30 From the Latin, let the old decision stand.
31 407 U.S. 258 (1972)
equities. This is not a romantic history baseball enjoys as a business. It is a sordid history.”

Altering the status quo was never anyone’s motivation behind the Flood case; not Flood in bringing it, not the Justices in hearing it, and certainly not the League in its actions precipitating it. The case served as a vehicle to send a message to the League. The actors behind the case knew nothing changed to warrant the Court altering its findings. Behind the message was Marvin Julian Miller, an individual whom is widely regarded as the most influential non-player or owner in the history of the game. Curt Flood was a career .300 hitting centerfielder for the St. Louis Cardinals. In 1968, *Sports Illustrated* deemed him the best in the game. A year later his team traded him to Philadelphia and Flood petitioned the Commissioner, Bowie Kuhn, to nullify the trade. Kuhn refused and Flood sued for $3 million. His actions were funded by the Major League Player’s Association, which until the year before had existed in relative obscurity for fifteen years. Miller took over the Association in 1966 and had already negotiated the first Basic Agreement for players in 1967: the minimum salary rose from $7,000 to $10,000, and the players received increases in meal money and an owner’s contribution to a pension fund.

The Flood case was the centerpiece of Miller’s strategy to obtain leverage for what became an era of power in the hands of the players. While the case traveled

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32 *Id*
through the judicial system, the Player’s Association negotiated a series of Basic Agreements that accomplished everything that 70-years of judicial and legislative actions could not. In 1969, a Basic Agreement included an increase in the owner contribution to the pension fund to $5.45 million, a better retirement plan, and of greatest importance recognition by the owners of the Player’s Association as a collective bargaining agent. Major League Baseball now had a union. Within months of this recognition, The Major League Baseball Players Association proposed formal negotiations in altering the reserve clause and for free agency status for players, after three years’ service. The owners rejected the proposal and two-years of negotiations ensued. On April 1, 1972, the first strike of professional athletes in America began.

**Collective Bargaining**

Over the subsequent thirty years, most modifications to the League’s business model occurred because of collective bargaining. During these protracted negotiations, the owners’ animosities towards the players often overwhelmed their better judgment. They considered this a better strategy since now labor matters went to arbitration thereby avoiding the court system. However, their skills in influencing politicians and public opinion were rendered useless. Baseball’s owners controlled most threats
coming from public policymakers, but following the Flood case, they repeatedly lost most confrontations with the Players.

Following the 1972 strike that cost the League 86 regular season games, seven work stoppages of one type or another were inflicted upon MLB. The owners identified three as lockouts and four were strikes by labor. The two longest were in 1981 that lost 712 games and 1994-1995, which pre-empted the World Series.

When negotiations concluded following the first strike, the players obtained two substantive concessions: a salary arbitration mechanism, and a rule that allowed any player with ten years of service, the last five with the same team the right to veto any trade. Three years later, two players refused the terms of new contracts offered by their clubs. The season being over, they claimed that their clubs did not hold any option on their services. The case went to mediation and the owners ignored the panel’s urging to negotiate in good faith. Following a long delay, the arbiter ruled in favor of the players and forced the League to appeal through the federal court system. No court was willing to take the case and the ruling stood. A brief lockout was imposed, yet no games were cancelled. A year later, when a new Collective Bargaining Agreement was finally signed, players with six years major league tenure
won the right to free agency. 281 players signed multiyear contacts and the average salary almost tripled over the next four years.\textsuperscript{33}

Over the next ten years, management and labor fought out their differences in the public sphere, and with each negotiation, the players’ share of revenues increased. The owners gradually organized more effectively and navigated their confrontations so that they never pushed so far that government interceded or that their broadcast partners shied away. In 1984, the new national broadcast agreements quadrupled in annual value to the League. Nevertheless, the owners asserted that they were losing money and presented financial documents to indicate losses escalating to $155 million per year. After a two-day strike, they reached an agreement and the players got more, but the owners felt they had stemmed the tide of escalating salaries.

Prior to the negotiations, the owners selected Peter Ueberroth as the new Commissioner of Baseball. Ueberroth came to the job with enormous credibility. Before his new post with Baseball, he obtained national notoriety as organizer of the 1984 Los Angeles Summer Olympics. Due to the success of the games, (under his leadership they netted a surplus of over $250 million) he was named \textit{Time} magazine's Man of the Year in 1984. The atmosphere in the League offices changed dramatically. He was authorized to fine up to $250,000 any owner that spoke out in public about financial or labor issues. He forced the Chicago Cubs to install lights at Wrigley Field

\textsuperscript{33} Zimbalist 2004, pg. 80
so that they could play night games and instilled professionalism to Baseball’s merchandising and marketing. Although his tenure lasted merely five years, Ueberroth brought to the club owners discipline, credibility with other industries (the lights at Wrigley were at the request of television that wanted to broadcast games in prime time,) and big profits. Unfortunately, the newfound cohesiveness felt by the owners resulted in them forcing him out of office, and one of the most damaging infractions they ever committed.

**Collusion**

In February of 1986, the Major League Players Association filed the first of three grievances charging that the owners acted in concert by boycotting the employment of free agents. Since the end of the previous season, no player received an offer longer than three years for fielders and two for pitchers. Some stars got no offers at all and some were offered lesser contracts with no competing interest. Later, the owners created a databank from which they shared information on the offers they did make. The business practice continued for almost three years.

Three separate grievances ensued. In each case, the arbiters found in favor of the players. Regardless, the owners continued their collusion and persisted in challenging the findings. Finally, over four years later, on December 21, 1990 the owners settled by agreeing to cease collusive practices and pay to those players harmed
$280 million plus interest. As Fay Vincent, the Commissioner during the time of settlement, wrote twelve years later, “The effects of collusion so thoroughly polluted the whole relationship between the union and the owners that the impact is still being felt…ringleaders of collusion, were the ones who were the most adamant in saying, ‘We’ve got to find some way to get around this union, we have to see if we can break them.’”

The accuracy of Vincent’s perceptions proved correct during the next round of negotiations. In 1992, the owners un-ceremonially dismissed Vincent and decided against hiring a replacement. They selected the owner of the Milwaukee club as a temporary leader thus making for the first time an owner acting-Commissioner. Under this new management structure, Major League Baseball experienced the longest interruption to its season, a lost World Series, dozens of unfair labor practices law suits, and a summons to the White House by the President of the United States. Estimated losses to the League were in excess of $72 million and attendance dropped over 20% the next season. Nevertheless, when an agreement was finally reached and games resumed, the owners got what they wanted most; the League introduced its first revenue sharing system, a luxury tax, and liberal allowances in drafting players from other countries. Lastly, what seemed curious to writers and fans that followed the

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34 Fay Vincent, The Last Commissioner (Simon & Schuster, 2992) pg. 281, as cited in Zim 2004, pg. 85
action, the owners agreed to potential action pertaining to their most prized possession, the antitrust exemption.

The agreement contained an unprecedented clause stating that under certain conditions, both labor and management would go to Congress to seek a partial lifting of the League’s antitrust exemption as it applied to collective bargaining. Because of its impatience with the owner’s behavior in the Collusion cases and their willingness to allow the recent strike, Congress passed its only bill affecting Baseball, *the Curt Flood Act of 1994*. The act gave the players a right to sue the League if the owners attempted unilaterally to impose new restrictive conditions on baseball’s labor market. Apparently, the Player’s Association got a second weapon with which to fight the owners.

However, the action did not adversely affect the owners. As Andrew Zimbalist explains,

> To bring an antitrust suit, the union first would have to decertify, and then might have to wait several years while the litigation played out. If the judge found in the union's favor, the union and owners would then have to negotiate a new agreement. In the interim, the owner-imposed system would be operative. Since the average career length in MLB is approximately 5 years at the major-league level, such a prolonged process might affect most, if not all, of the average player's career span. The union might also make itself vulnerable to owner machinations when it attempted to recertify after the antitrust suit was concluded. The Curt Flood Act, therefore, is only a very modest step toward helpful public policy.\(^{35}\)

\(^{35}\) *Zimbalist 2004, pg. 137*
Once again, Congress came to the rescue of Major League Baseball. Despite the Player’s Association usurping owners influence over the game for thirty years, the owners won back some of their advantage through what was perceived as a loss imposed by government. They forced the union into a more cooperative mindset and partially negated the only organization that had defied them. Mostly, they discovered an agent that helped them accomplish changes they were not capable of enacting among themselves.

The thirty baseball owners differed in strategy, ideology, and personality. Clubs that generate big revenues in big markets wanted less revenue sharing and tended to accommodate the players more in fear of work stoppages that cost them rights fees. Owners that resided in small markets earned little in rights fees and resented multimillionaire ballplayers; they wanted a larger share of other’s local revenues. In the middle were the rest that could be swayed to tip the balance one-way or another. Therefore, rarely could they work together to reach an acceptable outcome. By having a player’s union participate in determining future financial decisions, changes occurred where compromise was impossible. At no time did this become as apparent as when the Barons of Baseball finally over-played their hand with Congress, years later.
In 2003, days after the completion of an especially exciting World Series, Bud Selig (now permanent Acting-Commissioner) announced that too many clubs were losing money\textsuperscript{36} and that the League was permitting the contraction of two teams.\textsuperscript{37} Fans, players, and Congress were upset. Congress convened twenty-seven hearings and proposed three bills within a year\textsuperscript{38}. The Metropolitan Sports Facilities Commission in Minneapolis, MN successfully sued the Twins to honor their stadium contract for the next season. Eventually, the owners backed down while negotiating with the Players Association. As a condition in agreeing to the 2004 Collective Bargaining Agreement, Major League Baseball tabled discussions on contraction. The pending legislations died; once again, the Players Association saved the owners from themselves.\textsuperscript{39}

\textbf{Relocations & New Stadia}

For thirty-two years, the nation’s capital craved a major league club. Despite numerous efforts, city leader’s hard work continually failed. Years ago, attendance figures for the Washington Senators were acceptable and the District of Columbia area

\textsuperscript{36} Despite an average annual growth rate of 17%.
\textsuperscript{37} The teams were to be announced later, but it was widely suspected that Montreal and Minnesota were the two clubs to be lost.
\textsuperscript{38} Lexus-Nexus\textsuperscript{®} Search terms used: Baseball and relocation & baseball and contraction in Congressional Publications, Georgetown U Lib. 2 Apl 2006.
\textsuperscript{39} Some commentators speculate that MLB never had any intentions to contract; that it was merely a ploy to prepare for the upcoming negotiations with the Player’s Association. Furthermore, it pressured those markets in which teams were seeking new stadiums from their municipalities.
has since grown to be the eighth largest market in the country. Therefore, there is a substantial fan base. Some teams in the League reside in parts of the country that have lost much of its middle-class population; there even has been an attempt at contraction, in which the League would have dismantled two teams. So why has the city always been over-looked? The League has given various excuses, but many suspect the reason was one of leverage. A key business strategy of all professional sports leagues is one of limited supply for a growing demand. So long as a market as influential as Washington, DC wanted a team, a club owner could threaten his hometown leaders with relocation to get them to succumb to his demands.

A franchise might re-locate to a market with greater broadcast potential (as did the Brooklyn Dodgers and New York Giants in the 50’s) or get a new stadium built. At the very least, a team’s lease would be favorably re-negotiated. Even those franchises that have limited local broadcasting revenue can increase their profits with a new stadium earning the team millions of dollars in seat revenue.

The escalation in rights fees that altered the competitive balance of baseball clubs was not the only major economic change occurring at the end of the century. Although local broadcasting had re-shaped the financial architecture of baseball to what we know of it today, a second relevant revenue stream had emerged that directly affected its business model and the inter-relationship of public policy and baseball -
revenues from their ballparks. Most new stadia are built with public funds, guaranteed by government bonds, or financed by some convoluted formula that draws most the money from anyone but the franchise. A little publicized facet of the League’s existing revenue-sharing arrangement allows big-market teams to deduct certain construction costs from their Luxury Tax contribution. Therefore, teams such as the New York Yankees announce they are willing to pay for their new stadium in return for the local and state governments to pay for infrastructure costs and parking facilities. Actually, the team will deduct most of the construction costs from the Luxury Tax they pay as the team with the highest payroll.

Public financing comes from local governments issuing federal-tax-exempt bonds to help pay for construction. Therefore, not only is the local municipality paying most the bill, but also the federal government subsidizes the venture. Many areas will invoke eminent domain to claim real estate used for the facility and surrounding businesses. Mass transit and highway infrastructure always accompanies a new park; the team usually collects most of the parking fees.

Since the 1992 opening of Camden Yards in Baltimore, 22 teams play in a newly built stadium. Four others are in some stage of construction. The remaining three (Boston’s Fenway Park, Chicago’s Wrigley Field, and Los Angeles’ Dodger Stadium) are landmarks that are undergoing major renovations.
Aside from reducing expenses, a new stadium generates revenue for its team through increased parking fees, better concession sales, and most of all in the licensing of Luxury Suites and Premium seats. Forbes Magazine projected in 2002, potential gross revenue from Luxury Suites and Premium seats for MLB to be $214,386,112.\textsuperscript{40} Since that time, nine more stadiums opened and seven are in construction; therefore, it is reasonable to expect the windfall to near a half-billion dollars. “The revenue disparity between the richest and poorest teams was around $30 million in 1989, but by 1999 it was $163 million... local revenues (including all stadium related and local media income) in 2001 ranged from a high of $217.8 million for the Yankees to a low of $9.8 million for the Expos.”\textsuperscript{41} Major League Baseball splits the ticket sales, or gate receipts, 80-90 percent to the home team and 10-20 percent to the visitor.

Luxury Suites are elaborately furnished areas, usually high up with optimal viewing of the playing field. They feature closed circuit televisions, fully stocked bars, couches, lounge chairs, and private bathrooms. Mostly, corporations license their use on a season-long basis and may pay in excess of $70,000 per year. A new stadium will have over 200 Luxury Suites and thousands of Premium seats that can sell for over

\textsuperscript{41} Zimbalist 2004, pg. 46
$100 per game. Suites have become favorite venues for political fund raising and providing access for lobbyists needing to consort with policymakers.
Chapter 4. Baseball and Media

Major League Baseball and the media are two industries that form a juggernaut when they combine forces. Sports organizations, as exhibited throughout this chapter, have become completely dependent upon the media. As such, they regularly utilize their resources to maintain the health of the partnership. Today, the political-economic nexus of sport/media commerce is potent not so much financially, but influentially. In an economy that features a Gross Domestic Product of $12.37 trillion, the two industries combined only contribute $96.2 billion in gross revenues. According to the 2002 U.S. Economic Census, the broadcasting industry, not including the Internet, annually generates $73.9 billion and employs over 291,300 Americans. Spectator sports generate annual receipts of $22.3 billion and employ over 107,700 paid employees. \(^{42}\)

Some of the foundational principles of communications policymaking in the United States are the public interest, universal service, and localism. Since the first government actions on broadcasting in the late 1920s, Baseball has wielded its most potent weapon, the antitrust exemption, whenever necessary to help both radio and television in its battle to show they promote these ideals.

\(^{42}\) \textit{2002 Census}
Grassroots’ movements are a foundation for constructing public policy action. Sports fans are passionate, sometimes obsessive, about their teams. The clubs use this emotional attachment to generate support for advantageous policy actions. In the context of communications policy, these actions range from tax benefits for commercial advertising to government-sanctioned monopolies for station owners, through spectrum apportionment and cable operators, via exclusive franchise allocation.

By tracing the evolution of baseball’s relationship with each medium as that platform emerges, one can appreciate the nuances of their reciprocal interests. Each relies on the strengths of the other as the circumstances warrant. Interestingly, the greatest benefits generated by one party’s support of the other at some point in the relationship results in conflict or harm. Nevertheless, ultimately both media and sport manipulate external forces to protect and promote their endeavors.

Newspapers

Within the newspaper industry, 73 percent of male readers – 60 percent of all adults - turn to the Sports section whenever they read the paper, third in popularity behind the Main and Local News sections. Advertiser revenues earned from the

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sports pages frequently rank higher than any other section on a newspaper’s income statement.

The first baseball box score appeared in a newspaper on October 22, 1845 in the New York Morning News. Originally, their purpose was to legitimize men’s concern for a boys’ game. Society deemed it not worthwhile for adults to read about, no less play, frivolous activities. When professionalism infiltrated the game in the late 1850’s and a star player commanded remunerations, box scores became the primary vehicle for disseminating statistics that owners used to calibrate the worthiness of the performer. In 1867, Father Henry Chadwick, a cricket player while growing up in his native England, published the first baseball weekly periodical, The Ball Players’ Chronicle, and the businesses of baseball and media commenced a peculiar and often contemptuous relationship. The relationship not only altered each industry’s existence, but all of American culture.

The modern American newspaper emerged in the late 19th Century and early 20th Century. The technologies that brought about the new economic model allowed the masses to afford daily purchases. Sweeping changes in American society such as urbanization and industrialization re-shaped commerce, and begat captains of industries that again altered the balance of influences on the public sphere. “Several

entrepreneurs, including Joseph Pulitzer, William Randolph Hearst, and Edward Willis Scripps, did much to capitalize on these larger social trends.\footnote{Gerald J. Baldasty, \textit{E.W. Scripps and the Business of Newspapers}, Chicago, University of Illinois Press, 1999, pg. 1 [hereafter, \textit{Baldasty}]} Pulitzer and Hearst introduced a plethora of content such as sports, fashion, and entertainment. E.W. Scripps focused on the publication of news as a business.

More than anyone, Scripps created the model of a modern newspaper organization. He pioneered the framework for a vertically integrated business empire. He created a telegraph news service; a news features syndicate; the first major chain of small, cheap, working-class newspapers in small and medium size cities and introduced a pioneering service - daily home delivery. His ability to minimize the price by these efficiencies and other cost-controls\footnote{Scripps was so cheap that one time he had his bureau managers cut toilet supply service. The staff started using newsprint instead. The resulting plumbing costs and water damage from clogged pipes exceeds the cost of the toilet paper thus rescinding the ban.} allowed him to limit the amount and types of advertisements that other publishers were forced to carry. “Limited reliance on advertising also reflected Scripp’s market segmentation strategy, and kept his publications closer to the working class rather than to upscale, big business interests.”\footnote{\textit{Baldasty}, pg. 90} The fierce competition that arose shrunk the number of newspapers, but also enforced the relationship between paper and sports.

As the number of newspapers declined, the survivors increasingly fell into the hands of large corporations that merged and/or pooled resources in joint-operating
agreements with former competitors. This trend continued throughout the 20th Century as consolidation and alternative information dissemination platforms emerged; a trend that also led to opportunity for future interdependencies between media and baseball. Throughout this transition period, except for boxing, baseball was the only game in the nation’s conscious.

Baseball entered into its first media deal in the 1890’s. In the process, they created their first confrontation with a media partner that aided in their growth. Baseball’s barons began seeing potential money in the public’s appetite for information on their games, so they sold to Western Union the right to relay game updates to saloons and poolrooms. Not wanting their resource given away free, they claimed infringement on their rights by newspapers publishing box scores. Meanwhile, baseball writers started to achieve celebrity status, and formed an association in 1887. The association’s mission was to standardize scoring and promote the game, but the writer’s un-announced purpose of organizing was really to strengthen their position with the owners. Whether by luck or design, resolution came by virtue of the more important relationship between the telegrapher and the newspaper industry. The success to Western Union was so great, that by 1913, it paid each team $17,000 per year over five years for the telegraph rights. The League demurred to their benefactor on the free rider problem for a while.
In the 1920s, sports emerged as the primary source of entertainment and bonding for middle class Americans. Advertising accounted for 75% of a newspapers revenues, and 80% of all male readers read the sports pages. Publishers believed that 25 percent of all newspapers were sold based on their sports sections,\(^{48}\) and Major League Baseball was still the premiere attraction. Boxing was big, and college football was entering the scene; but Baseball had Babe Ruth, the New York Yankees, and controversies like the Black Sox scandal that boosted circulation. The ballparks were full of advertiser’s placards and newspapers exhibited the enormous appetite merchants had for reaching the baseball-loving consumer. Already, Baseball had entered into agreements with the new motion picture industry by selling the right to film the 1910 World Series for $500; a year later, the price escalated to $3,500.\(^{49}\)

### Radio

In 1922, only one of four-hundred homes had a radio, but by decade’s end one-third of all American households had one. Baseball was the only major team sport\(^ {50}\)

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\(^{50}\) For the purpose of this argument, I define a major team sport as baseball (MLB), football (NFL), basketball (NBA), and hockey (NHL). Despite the enormity of soccer throughout the rest of the world, professional soccer has never established itself in the United States Market. For a comprehensive analysis of the parallel growths of baseball in America and soccer in other countries, see *National Pastime*
that was fully developed as a professional league prior to the advent of radio as a commercial medium. When the adoption of the electronic medium occurred, local and regional broadcasters realized the importance of baseball games to their role as news disseminators. Radio station owners and their latter television siblings quickly appreciated the League’s 154 game schedule and seven-month long season as a valuable and economical source of content. Furthermore, the local and regional nature of the game fit nicely into the mandate of promoting localism given to the media by government.

The first radio broadcast of a League game was on August 5, 1921 between the Pittsburgh Pirates and Philadelphia Phillies on KDKA, in Pittsburgh. Weeks later, a sportswriter from New Jersey reported the World Series between the Yankees and New York Giants from the Polo Grounds in Manhattan. He spoke through a telephone to the station, WJZ in Newark, NJ, which relayed the information over the air. A year later, the two New York teams met again for the championship series and 5 million Americans listened to the live radio broadcast. The teams were permitted to sell the rights; the first broadcast deal for a Major League Baseball World Series broadcast was $1500.

Radio represents the second paradox for Major League Baseball. The dysfunctional owners were slow in understanding the enormous potential of the
electronic medium; however, their lack of cohesiveness prevented them from destroying radio’s potential and fortuitously turned events to their favor. They discovered there was money to be made in the rights they held. During the first decades of broadcasting baseball games, the debate of whether radio weakened attendance overshadowed the issue of broadcasting exclusivity. Therefore, the League created no general broadcast policy, and allowed each team to proceed as it saw fit. The philosophy determined events for generations to come. In 1925, the Chicago Cubs invited any local station to broadcast its games without payment of a rights fee. The Brooklyn Dodgers did not contract with a local radio station until 1939.

As the radio broadcasting industry began to spread throughout the country in the mid-20s, it was essentially unregulated. Anyone could erect a transmitter wherever they desired and begin broadcasting whenever they wished on a frequency of their choosing - even if that interfered with someone else’s signal. The airwaves were in chaos. In the first legislation focusing on electronic media, Congress passed the Federal Radio Act of 1927. Together with its successor, the Federal Communications Act of 1934, government commenced regulation of the way radio stations operated.\footnote{Paul Starr, The Creation of the Media: Political Origins of Modern Communications, New York, NY, Basic Books, 2004 [hereafter, Starr]} Within a matter of months, Major League Baseball began their first of many legal actions in the broadcasting world.
Mr. A. E. Newton contracted with several radio stations to feed them a “re-creation” of the World Series between the Tigers and Cardinals. Working from his own home, he got his running accounts of the action by listening to the games on someone else’s station. Major League Baseball… looked askance at Mr. Newton’s efforts for two related reasons. In the first place, someone else had already paid for the rights to broadcast the series and didn’t appreciate the unexpected competition. Second (and, so far as baseball was concerned, more serious), Newton had neglected to pay for the privilege. Baseball, and the offended radio station, complained to the FCC and challenged his license renewal. The FCC renewed his license, but he was enjoined from further re-creations without permission of the rights holder. The decision introduced the notion that a property right existed for broadcast sports. That property was potentially valuable, and in certain circumstances at least, you needed to obtain the owner’s permission before using it. A good way to get the owner’s permission was suggested: offer to pay for it.52

A few years later, in 1938, the Pittsburgh Pirates took to court a local radio station that was reporting the news about the game in progress. The defendant, KQV Broadcasting Company, argued that the games were public events and therefore did not require a news station to pay a rights fee. The Pirates won in the end; “news, reports, descriptions or accountants”53 of the game were determined to be the property of the team. However, once again baseball alienated the very entities that supplied them with free publicity in the process.

53 Sound familiar? Viewers of all sports telecast hear this phrase every time.
Eventually, the League as a whole began to appreciate the potential of radio to enhance the game. In 1934, with the industry dominated equally by two networks, NBC and CBS both broadcasted the 1934 World Series. Major League Baseball decided to collect a share of the monies available with Ford Motor Company paying $100,000 for sponsorship. For the next 15 years, until a $200,000 television agreement surpassed its value, radio broadcasting of the World Series remained the greatest source of revenues to the League. Today, the League earns in excess of $50 million from broadcast radio and recently signed an 11-year, $650 million contract with XM-satellite radio.

If Baseball’s revenues from radio drastically altered the economics of the business, the effects of television are Ruthian (see Appendix A.) Broadcast revenues for the sixteen clubs rose from virtually nothing in 1929 to $884,500 in 1939 and $3,365,500 in 1950.54

Television

During World War II, in 1941, the FCC officially sanctioned commercial television by granting license to NBC and CBS to operate privately owned stations in New York City. Once the war ended, the true industry began and it was not long before baseball became a mainstay for programming. Most television historians

consider NBC’s coverage of the 1947 World Series as one of three watershed moments for the adoption of television in America.\(^{55}\) Generating the medium’s first mass audience, the games were carried in New York, Philadelphia, Schenectady, and Washington, DC, and seen by an estimated 3.9 million people, 3.5 million of them in bars. “The TV set over the corner bar was a first introduction to the new medium for many people, and it helped to sell thousands of sets for the home. After that, TV ownership was contagious.”\(^{56}\)

In 1946, two of the New York teams broadcasted games, and the Yankees signed the first local television contract for $75,000. Important to note, is that most all of the television sets in the country were in New York.\(^{57}\) In 1948, there were only 190,000 television sets in the entire country. A year later, an estimated 10.5 million sets were in use.

By 1953, 15 of baseball’s 16 teams have local television deals and ABC introduced its national game of the week format. The number of television households continue to grow throughout the 50s, reaching 34.9 million in 1955 and 45.8 million (87% of US households) in 1960.\(^{58}\)

\(^{55}\) Along with the two political parties’ national nominating conventions.


\(^{58}\) National Pastime, pg. 148
Advertisers immediately took notice of the American infatuation with TV. Most network programming - specifically sitcoms, variety shows, and quiz shows - were geared to attract the female audience. Sponsors exhibited products for the kitchen, housekeeping, and the like. Therefore, the independent local television station immediately relied upon baseball to reach large numbers of men in their 20s and 30s. Young men tended to have high levels of disposable income, and at the time dictated the purchasing decisions for such big-ticket items as automobiles and household appliances, in addition to their beer and razor blades. Television needed the advertisers, and the advertisers needed baseball. Baseball quickly became addicted to television for revenues and exposure.

In the early years of network television, NBC had the largest audiences. Its top programs were Milton Berle, Kraft Television Theater, Your Show of Shows starring Sid Caesar, and Dragnet. So far behind were its competition, CBS and Dumont, that NBC was forced to divest itself of a second network it operated. Known as the Blue Network, the entity became ABC, which struggled for its first 10 years until altering its business model to focus much of its programming on television sports. By the mid-1950s, CBS came to rival NBC with hit shows such as I Love Lucy, Ed Sullivan and some carryovers from its top radio shows, Arthur Godfrey and Jack Benny. Dumont and ABC constantly fought for survival. There were a limited number of stations
throughout the country outside of New York and a few other large cities. Most areas had only two, or perhaps three, stations and NBC and CBS always got the best stations in each city (often they had radio stations to affiliate with) leaving ABC and Dumont to fight for the scraps, or share.

These early circumstances complicated the local broadcasting opportunities for major league clubs. Radio and television contributed only 3 percent to Baseball revenues in 1946, but rose to 16.8 percent by 1956. At these new ratios, disparity between large market teams with television opportunity and small market clubs without an outlet for their broadcast rights perpetuated the differing outlooks on the benefit of broadcasting.

Further complicating the landscape was the effects on the minor league teams. The one reality everyone could agree upon was that the broadcast of games was sharply lowering the attendance of minor league clubs. Therefore, Major League Baseball instituted a policy in which their games would be blacked out in any area housing a minor league team. Ironically, the Justice Department, seeing this as a restraint of trade, forced a change to this policy in 1949. Still to this day, blackout policies for the telecasting of professional sporting events are an issue debated in public policy.
Meanwhile, regulatory changes taking place in Washington altered the number of television stations throughout the country. The validation of UHF and the rapid adoption in cities brought about many independent stations. Baseball offered them inexpensive content and served as counter-programming to the female oriented shows aired on the networks and their affiliates. Furthermore, since many local advertisers already had a successful relationship with the sports teams - through stadium signage, ads in programs and the newspaper’s sports section - the local club served as a conduit to these commercial buyers. From the onset of the television industry in America, baseball and broadcasting were interdependent.

The League split all national television revenue equally, but local agreements went to the home team. Further complicating things was that wealthier clubs refused to yield their advantage from market size and corresponding value in rights fees despite the adverse effects on their fellow clubs. Over the years, the League attempted to address the disparity by legislating revenue sharing, pooling certain superstation earnings, and recently by levying a luxury tax on salaries. Nevertheless, Baseball maintains its local-oriented structure relative to radio and television. Decades later, this structure altered the dynamics of a new technology that emerged, cable television.

Baseball’s structure was different from other professional sports leagues due to the length of its season, the antitrust exemption, and because its clubs resided in mostly
large markets.\textsuperscript{59} As such, no other league had its cumulative revenues from local broadcast fees surpass the national television package. For some baseball clubs, these local fees still surpass their share of the national packages. College football, and later its professional sibling, had rivaled baseball in popularity and economic value to broadcasting, but each played a dozen or so games per season compared to the 150 – 175 games played in baseball. The SBA determined that all leagues may contract with over-the-air, sponsored broadcasters as cartels (government-sanctioned monopolies). Baseball’s existing antitrust status predated granting the privilege.

So great was the importance of local television revenue to clubs that it created another issue, which arguably has the biggest challenge to the political-economic nexus of the sports industry. Beginning in the mid-1950’s, clubs residing in smaller markets looked to relocate to surroundings with greater earning potential. Teams even left large cities in search of growing areas in which they could become the sole baseball proprietor. One of the two Boston teams left for Milwaukee; one of the St. Louis teams went to Baltimore and a Philadelphia franchise migrated west to Kansas City. In what became one of the most notorious relocation events in the history of all sports took place in 1958 when two New York teams simultaneously departed from the

\textsuperscript{59} “As recently as 1957, the National Basketball League had only 8 franchises, including such cities as Fort Wayne, Indiana; Minneapolis, Minnesota; Rochester, New York; and Syracuse, New York” from Susan Tyler Eastman and Timothy P. Meyer, “Sports Programming: Scheduling, Costs, and Competition,” \textit{Media, Sports, & Society}, ed. by Lawrence A. Wenner, Newbury Park, Sage Publications. 1989, pg. 127
largest city in the country out west to California. The Brooklyn Dodgers went to Los Angeles and the New York Giants left for San Francisco; both were highly successful franchises with enormous support from their fans. It was the lure of television revenues from the third and twelfth largest markets, respectively, that motivated the moves. The interdependency between television and baseball strengthened, and in the ensuing five years, the two industries began using their newfound power to re-shape public policy to their advantage and compel Congress to do as they pleased.

At first, Major League Baseball stumbled and bumbled through their relationship with television. In 1949, in their first deal for live television coverage of the World Series and All-Star Game, the Commissioner did not negotiate directly with the network but with a sponsor, Gillette whom agreed to a six-year contract for $1 million a year. In turn, Gillette sold the right to NBC for $4 million a year thus prompting one of the owners to brand the Commissioner, former Kentucky Senator Happy Chandler, a “bluegrass jackass.”

Throughout the 50’s, except for the World Series and All-Star Games, there were no actual national television broadcast agreements. Early in the decade, ABC started airing Saturday games, and some contests still staged by the woman’s professional league that rose in popularity during the war. ABC assembled a 17 station
network to telecast a Game of the Week, but some local teams refused to participate due to their local agreements.

The 1960’s was the decade in which the television/sports partnership exploded. ABC was the most aggressive network as it launched Wide World of Sports in 1961, and continued to ride the wave of notoriety it created within the industry from its landmark agreement with the American Football League a few years earlier (that precipitated the SBA.) It also commenced coverage of the quadrennial Olympic Games thus re-casting the event into a worldwide media phenomenon.

The year 1966 became a watershed moment for the baseball-television relationship. During the previous few years, the League made various proposals to the networks for an enhanced regular-season national television agreement. Hindering efforts was primarily the non-inclusion of the Philadelphia Phillies and New York Yankees. The Yankees were so popular – having appeared in the World Series 12 out of the first 14 times it was nationally broadcast on television (winning 9 of them) – that they had their own agreement with CBS. Further complicating matters, CBS bought the team in 1964, and broadcasted their home games on weekends. In 1965, ABC cited poor ratings – especially in New York – from its ad-hoc network of weekend games (which had escalated in value to $5.7 million) and declined to exercise its option for the following year. Major League Baseball ceased having any regular-season
national television agreement, and despite Congress’ reiteration of its blind-eye to their peculiar practices a few years earlier in the SBA, concerns arose about a conflict in interest and renewed scrutiny of the antitrust exemption.

For the next three decades, NBC and ABC alternated in contracting with Major League Baseball for broadcasting rights to its contests. Each subsequent agreement increased in value despite often lessening the number of games shown on TV. Starting in 1984, the national television broadcasting rights for professional baseball exceeded $100 million for the first time. “In the late 1980’s, the 26 MLB teams play more than 2,200 games per year…about 1,800 games were televised annually. Of these, only about 75 games (just over 3% of all games) appeared on the broadcasting networks…” In 1990, CBS paid $1.1 billion for a three-year agreement. The same year, the League entered into its first national cable deal, 3 years with ESPN for $400 million, and a radio deal for $50 million.

The rapid growth in rights fees for Baseball is miniscule relative to the growth in television itself. In terms of revenues, television surpassed radio in 1954 with $593 million generated compared to $449.5 million. In 1960, it earned more than double the revenues of its senior electronic sibling, generating $1.268 billion. By decades end,

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combined revenues for radio and television were $4 billion ($2.8b: < $1.2b); 95.2 percent of households in the United States had a television set in 1970.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number* of Television Households in U.S.</th>
<th>Percentage of Households With Television</th>
<th>Total Radio Revenues**</th>
<th>Total Television Revenues**</th>
<th>MLB National TV Revenues*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>3,880</td>
<td>9</td>
<td>444.5</td>
<td>105.9</td>
<td>825</td>
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<td>1955</td>
<td>30,700</td>
<td>64.5</td>
<td>453.4</td>
<td>744.7</td>
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<td>1960</td>
<td>45,750</td>
<td>87.1</td>
<td>597.7</td>
<td>1,268.6</td>
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<td>1965</td>
<td>52,700</td>
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<td>95.2</td>
<td>1,136.9</td>
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<td>1975</td>
<td>68,500</td>
<td>97.0</td>
<td>1,725.0</td>
<td>4,100.0</td>
<td>18,000</td>
</tr>
</tbody>
</table>

Sources: Cobbett Steinberg, *TV Facts. Facts on File*, 1985; SABR, *MLB Revenues*
* in thousands. ** in millions.

As Robert McChesney notes, sports had a role in this growth:

During the seventies, the annual number of network hours of sports programming increased from 787 to 1356; by 1984 the annual hours of sports programming was 1,700, double the figure for 1974. Advertisers were increasingly delirious with the sports market. A Simmons market research survey conducted in 1981 found that six times as many affluent males aged 18-49 watched pro football as watched *Dallas*. By the mid-1980s the three networks were selling over $1 billion in advertising for their sports programming, which was not much less that the gross revenues of the various professional sports leagues.61

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The economic relationship between television and professional sports is not one of equality. Television can exist without sports and ultimately holds power over all its content providers. In terms of revenues, other genres of programming are equally important to the medium. Nevertheless, especially with Baseball and its lengthy season and antitrust exemption, and football with its Super Bowl television inherits access to an important part of the population, as well as influence over government.

However, with the emergence of cable television as a prominent delivery mechanism came a change to the power relationship. Those media moguls that vertically integrated with cable maintained strong ties with Baseball; however, the new actors within electronic media, the cable operators, learned from television’s history and adopted the League as a partner that could bring to them similar benefits with Congress, its commissions, and the courts.

**Cable Television**

In 1994, Baseball experienced the first decrease in revenues from its national television contract. The drop coincided with the emergence of local cable contracts entered into by many large market clubs. In 1993, the CBS agreement paid $365 million to the League’s coffers. The following year, MLB signed deals with both NBC and ABC totaling 60 percent less.
Cable television originated in the 1950s bringing local and network programs to communities in the mountainous terrain of Pennsylvania and Oregon. Almost immediately, sports programming appeared on the new platform. The first sporting event on cable occurred on November 28, 1953 with 200 subscribers in Palm Springs, California witnessing Notre Dame’s football team beat USC, 48-14. Cable’s diffusion was slow at first since the initial investment in infrastructure, building the underground network, was enormous. By 1962, there were 800 cable systems serving 850,000 subscribers. Nevertheless, its popularity grew when municipalities began granting operators exclusive franchising arrangements. By 1977, over twelve million households in the United States had cable TV; just fewer than forty million in 1985.

Once the platform showed signs of viability, cable’s reliance on sports programming was swift and comprehensive. In 1971, upon its inception, the pay-cable service Home Box Office (HBO) aired its first regional sportscast, an NHL contest between the New York Rangers and Vancouver Canucks. HBO’s original business plan was for the service to be heavily reliant on sporting events. A large segment of its

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programming was purchased from a venture called Madison Square Garden Network (MSG).  

The singular event to raise the conscious of Americans to cable television was HBO’s 1975 presentation of *The Thrilla’ In Manila*, the rubber match of three boxing events between Muhammad Ali and Joe Frazier. Despite the match re-broadcasted the following weekend on ABC, the sports world immediately recognized the potential of pay-per-view/cable delivered sporting events. Soon thereafter, HBO tried to lure Major League Baseball (and later the NFL), but once again the owners feared a new communications technology. They thought it would be a negative effect on ticket sales!

The potential impact of cable was not lost on Congress, either. The SBA specifically states the exemption given a professional sports league is for sponsored telecasts. In the legislative hearings at the time, NFL Commissioner Pete Rozelle was asked whether he understood “that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV?”  

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64 Charles Dolan, a New York entrepreneur that started the city’s first cable operation, Sterling Manhattan Cable TV and Time-Life, Inc., initially finances HBO. MSG also owned by Dolan and financed by Time-Life, originally launches in 1969 and immediately contracts with HBO. In 1977, MSG merges with a channel partly financed by United Artist and Columbia Pictures called the USA Network. MSG is created to market for television certain events staged at the arena of the same name that houses the local New York basketball and hockey teams as well as many prestigious events.

“Absolutely” at the time, but also his successor confirmed the League understanding twenty years later when asked the same question.\textsuperscript{66}

Regardless of the contradiction that arose in various Congressional hearings (a principle topic of Chapter 5,) sports programming has become a mainstay of programming on cable television. For the leagues, cable was more a replacement than a new vehicle for transmitting its product. In baseball, the total number of games broadcast over-the-air has decreased continually since 1987. Conversely, cable television’s total games exhibited have increased (see Appendix B.) Today, most cable operators and satellite providers also offer a subscription package from MLB in which a viewer can receive other market’s games (originating from cable and/or broadcast,) thus further increasing the number of games available through cable.

In September 1979, a father/son team from suburban Connecticut conceived of an idea to extend coverage of University of Connecticut basketball games. Driving along the New England Thruway, the two came up with the idea of renting transponder time on a satellite so that more of its fans could view the games. Since it costs no more to transmit a program from the satellite to more than one location, the audience could

be local, regional, or national. Furthermore, they could carry any sporting event. From this concept was ESPN born.\textsuperscript{67} Early on, ESPN paid no fees for the events it carried. Its early programs included events the networks wouldn’t look at even once. Slow pitch softball, secondary college sports, FILA, wrestling, hurling, sports-talk and news shows were staples on the early ESPN, many of which were repeated in the wee hours of the morning.\textsuperscript{68}

At first, ESPN paid cable operators to carry the network. Unlike HBO, it was advertiser supported, and struggled at its early stages. Ironically, the breakout event that helped launch ESPN to prominence came from an unexpected source. In 1983, the America’s Cup yacht race caught a wave of interest throughout the country, especially with the hard-to-reach elite and affluent in the Northeast. Ten unconventional advertisers, such as Rolex watches, spent more than $4 million to sponsor over 80 hours of coverage from Australia. Radical production techniques eventually were used by filming from helicopters, using miniature cameras, and strategically placed microphones. The combination of upscale advertisers and un-commonly large ratings for cable attracted attention to ESPN, and the rest of Madison Avenue took notice.

In 1987, ESPN surprised everyone by winning a portion of the NFL television contract. Three years later, it added baseball to its schedule. Today, the all sports network has seven domestic networks and twenty-nine internationally. It airs over

\textsuperscript{67} Sports for Sale, pg 55
\textsuperscript{68} Id.
5100 hours of sports programming per year and reaches 90.3 million viewers.\textsuperscript{69} The network charges cable operators an estimated $2.80 per subscriber.\textsuperscript{70} “Revenues alone this year [2005] could be about $5 billion, with operating earnings of nearly $2 billion...about 60% from distribution fees and 40% from advertising - would represent about 15% of Disney's total.”\textsuperscript{71} In September 2005, it renewed its MLB cable package for eight years starting with the 2006 season. For the right to present regional games on three nights-per-week, ESPN will pay Baseball $2.4 billion.

According to A.C. Neilson Media Research, when Baseball entered into its first national cable contract, 54,871,000 households in the United States had cable television. That represented 59 percent of all homes with a television. In 1995, when Baseball’s third cable agreement was negotiated for Wednesday night double-headers, an exclusive Sunday night game, and all postseason games not aired on broadcast the price was $440 million for four years. Just shy of 63 million households then subscribed to cable representing 65.7 percent of all homes with a television.\textsuperscript{72} According to a FCC report submitted to Congress on February 10, 2006, as of June 2005, there were 65.3 million households getting their programming from cable

\textsuperscript{70} Business Week Online, \textit{In the Zone}, 17 Oct 2005, 8 Apr 2006, \url{http://www.businessweek.com/magazine/content/05_42/b3955001.htm}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} A second cable deal was signed with Fox/Liberty Media Cable for three years at $172 million for two games per week on any weeknight other than Wednesday.
operators (28.7 million from other multichannel video providers such as direct broadcast satellite, telecos, etc.), out of 109.6 million TV households.\textsuperscript{73}

Local cable-oriented channels are gradually replacing the local independent television station as the licensor of telecast rights. These carriers take the form of a local station that has evolved into a superstation; a channel owned and carried by the local cable operator; or a RSN that is either co-owned by the operator and/or a multi-system operator. Starting in 2000, a new trend began with the New York Yankees – the YES Network, a regional sports network owned by the team. These developments have resulted in team revenues from local cable deals to escalate from roughly $200 million in 1999 to $275 million in 2000 and to $350 million in 2002 – an annual growth rate of 20.5 percent over the three years.\textsuperscript{74}

YES is not a totally new concept, rather a variation of recent developments in which media companies, or the primary shareholder of a company, own clubs. The Tribune Company has owned the Chicago Cubs since 1981. Ted Turner owned the Atlanta Braves until he sold it with his other media holdings to Time-Warner. Rupert Murdoch, founder and majority owner of FOX, owned the Los Angeles Dodgers. In 2001, a media conglomerate or major stockholder of a media company owned seven

\textsuperscript{74} Zimbalist 2004, pg. 148
major league teams. Eight other clubs had some type of minority ownership arrangement that included a cable or media company. These related-party transactions generate numerous advantages for the club. When the owner negotiates with himself for the rights fees to his team, he can charge anything he wants and assign whatever expenses he chooses to deduct from the profits. These conditions lessen the taxes paid to government and the revenue sharing levied by the League. It also lessens the net income/loss of the franchise so that bargaining with the players becomes less onerous.

**Superstations**

Although re-transmitting the signal of an over-the-air station occurred in different parts of the country for decades, the architecture of cable television brought new significance to the concept. In 1975, a young maverick from Atlanta, Georgia who had previously inherited his father’s outdoor billboard sign business, owned a small local station, WTCG. Witnessing the rapid success of HBO in New York, the independent station owner, Ted Turner, decided to join the pay-service in transmitting his station over the SATCOM I satellite. Knowing that it cost no more to air the programming nation-wide than it did to his Atlanta audience, he calculated that the

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75 Since 1965, a common carrier named Eastern Microwave retransmitted the signal of New York City independent station WOR. The station, which traditionally carried the New York Mets baseball games, never objected. In 1981, when the team was bought by Doubleday Sports, the team sued for Copyright infringement. *Eastern Microwave, Inc. v Doubleday Sports, Inc.* 691 F.2d 125, 133, (1982)
additional advertising revenues generated from the larger audience far outweighed the
cost of using the satellite. WTCG was re-named WTBS as Turner launched the first
superstation. At the time, Turner was programming old movies, re-runs of sitcoms and
local shows. Within a year, he purchased the Atlanta Braves baseball team and the
Atlanta Hawks of the NBA. He added their games to his station’s programming fare
and a new generation of televised sports began.

From the inception of the medium, cable operators were not required to pay
broadcasters for the right to retransmit their signal. Therefore, copyright issues were
contested until the mid-seventies when Congress addressed the concern by passing the
Copyright Act of 1976. “As part of a wholesale revision of copyright, cable finally
was held responsible for the use of broadcast programming. The compulsory license
was adopted for all broadcast signals, local and imported. Cable operators would pay a
royalty based on system size, market, and use of each imported signal.”

MLB testified on behalf of the Act. The new owner of the Atlanta club had
introduced a wrinkle in the League’s television practices, and other owners were quick
to emulate him (first WGN and the Cubs, then WSBK and the Red Sox followed by
WWOR and the Mets.) As in the past, the League found it easier to have others fight
its internal struggles. Therefore, it aggressively lobbied Congress to require

76 Patrick R. Parsons and Robert M. Frieden, The Cable and Satellite Television Industries,
Needham Heights, Allyn and Bacon, 1998, pg. 55 [hereafter, Parsons]
superstations to pay the League for retransmitting its content, baseball games despite three of its owners being culprits. Congress established a Copyright Royalty Tribunal to collect fees and distribute them to claimants such as broadcasters, movie studios, and Major League Baseball.\textsuperscript{77}

In 1982, Major League Baseball had an arrangement with ABC that contributed in excess of $175 million to the League’s coffers. Interestingly, ABC had to take a club owner to court rather than turn to the League for assistance.\textsuperscript{78} Such are the ways among Major League Baseball. Its own in-depth study of finances and operations, published as the book, \textit{Baseball Economics and Public Policy}, warned of the “complicat ion by both technology and institutional agreements…the growth of cable-television systems has added a new dimension of complexity and a new opportunity for competition.”\textsuperscript{79} Essentially, the two largest superstations in the country were part of conglomerates that also owned the baseball club it covered, WGN/Tribune/Chicago Cubs and WTBS/Time-Warner/Atlanta Braves. Others had close ties and the transactional bonds that wed cable operators, networks, and teams.

\textsuperscript{77} An Arbitration Panel replaced the Tribunal in 1993. Baseball eventually incorporated a tax for those teams that re-transmitted games on superstations through a convoluted formula. The proceeds go into the Central Revenue Fund that has existed since the 1903 merger.

\textsuperscript{78} ABC owned the rights to the playoffs. At the time, League policy and the ABC agreement also permitted a team’s local television station to televise the games to viewers in its home city. The Atlanta Braves made the playoffs. Superstation WTBS reached 21 million homes across the country and ABC had to sue to stop the re-transmission.

Regional Sports Networks

The other evolutionary track of cable and baseball is the Regional Sports Network. “In most areas there is only one regional sports network. We have, then, a monopoly (team) selling to a monopoly (programmer), which then sells to a monopoly (cable company), which then sells to the public.”80

The Telecommunications Act of 1996 escalated the viability of regional sports networks. One feature of the Act was the loosening of restrictions on cross-ownership and market penetration. A single media company could increase its ownership of television transmission into multiple markets. Therefore, the conglomerate could distribute one program to a wider viewership. This new development was ideal for the sports-media complex. Since Major League Baseball restricts its number of clubs, each team maintains a fan base outside of their home territory. The media company could map out a distribution network to reach into any area that featured a large fan base for the team to which it owned the rights. These regional networks translated into millions more in profits to baseball teams and a new revenue source for cable companies by yielding a larger audience for programming it controlled, or co-owned.

80 Zimbalist 2004, pg. 148
The emergence of regional sports networks represented a quantum shift in the alliance between Major League Baseball and the media. What once was merely a mutually beneficial alliance became an official partnership. These relationships were structured in three ways: a media company co-owned a sports network with a club (or at times had an ownership position within the club,) a club owned a network and entered into agreements with multiple operators (or one MSO,) or as in the traditional architecture – a media company licensed the rights from a club.

An example of co-ownership is Comcast SportsNet Chicago. The Chicago White Sox (together with the Cubs, the NBA Bulls, and the NHL Blackhawks) co-own the network with Comcast Cable Corporation. Yankee Global Enterprises LLC, a holding company that also owns the Yankees, owns the YES Network and contracts with various operators to carry their channel. Lastly, several regional Fox sports networks purchase the rights to teams.

Until recently, there was a growing trend for media companies to buy teams. However, many have sold off their share of the club while retaining the broadcast rights. An official partnership with a media company has problems. One difficulty is that of transparency. Media companies tend to be publicly traded conglomerates. As such, their books are open to inspection. Baseball franchises abhor the idea of players, fans, and government seeing the accurate financial makeup of their enterprise. In
addition to exposing the true profits generated, the creative design of tax benefits are not something well received when placed under a spotlight.

Regional sports networks are beneficial to both clubs and cable operators. The networks shield clubs from revenue sharing, and increase penetration into markets outside the home territory. “When an owner does business with himself he can charge whatever prices he likes.”

A variety of expenses can be associated with the network. Responsibilities related to the network are added to employees’ job descriptions. Teams create cross-promotions with the broadcast element, and attribute some portion of travel, advertisement, or business entertainment to the network operation.

For the media side, although the team plays games only during seven months of the year, a media company gets to receive twelve months of fees from subscribers who are fans of a particular club. The cable operator is unencumbered from positioning the regional sports network into any tier it designates. Therefore, it can increase the number of subscribers for a service that yields greater profits. The club - co-owned by the operator or not - receives fees from subscribers that have no interest in baseball, yet subscribe to the package. “In 2001, NESN [Boston Red Sox] went from premium to expanded basic; revenues rose from approximately $39 million to $50 million.”

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81 Zimbalist 2004, pg. 61
82 Zimbalist 2004, pg. 65
In 1998 Rupert Murdoch, majority owner of Fox broadcasting properties, purchased the Los Angeles Dodgers. His purchase of the team gained him control of the regional sports network in Southern California (in most markets there is only demand for one regional sports network.) Murdoch's purchase of the Dodgers gave him needed leverage in not only launching his Fox Sports Net West regional sports network, but also preempted Disney from emerging as a viable competitor. In 1998, Disney - owner of its own team, the Angels, and an NHL franchise the Mighty Ducks - signed a 10-year cable contract with Fox for the below-market-value of $12 million per year. The only logical explanation for such an odd transaction was that Disney obtained other benefits; perhaps advantageous terms for carrying Disney's multiple cable channels on News Corp.'s vast worldwide satellite distribution systems.

Six years later, Murdoch sold the team while arranging for Fox to retain control of the broadcasting rights. For Murdoch, he showed appreciation that his core business was media; running a baseball team, and the shenanigans played out by a league, were best left for others. Currently, Fox sports network's controls local cable television rights to 71 of the 76 United States-based teams in baseball, basketball, and hockey.

For an owner, even if they do not collaborate with Comcast, the mere threat of starting such a network gives the owner advantage in negotiating with others. “Instead
of dealing with Fox sports networks, who then dealt with Comcast, we are now dealing directly with Comcast,” said Jerry Reinsdorf owner the Chicago White Sox.83

Comcast Cable Corporation does not own any sports team, but they invest as a controlling partner of regional sports networks with clubs. The cable industry estimates that 20 million homes equal the critical mass for a new cable channel. To reach this penetration, either Comcast (ranked first among MSOs with 21.5 million subscribers84) has to agree to be involved or the channel owner needs to combine a selection of the other top-five operators. To launch a regional network requires much less of a base, but the logic remains the same. In 2005, of the 96 regional networks identified by the FTC, 44 (45.8%) were vertically integrated with at least one MSO. There are 37 regional sports networks, representing 38.5% of all regional networks; 17 are vertically integrated with a cable MSO.85 Except for the Chicago Cubs, which are owned by the Tribune Company, all United States MLB franchises that reside on cable have partnerships with Comcast (#1), Time Warner (#2), Cox (#3), Cablevision (#5), or Fox.

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83 Squeeze Play, Broadcasting & Cable, 1 Nov. 2004
The revenue to individual clubs from regional networks has become enormous. It is estimated that the YES Network generated for the Yankees $62 million in 2005.86 The network, of which Yankee ownership controls 80%, is valued over $1 billion. Nevertheless, not all franchises have the opportunity that the New York metropolitan area provides. Therefore, a greater imbalance has emerged among clubs. “The revenue disparity between the richest and poorest teams was around $30 million in 1989, but by 1999 it was $163 million… in 2001 [the disparity] ranged from a high of $217.8 million for the Yankees to a low of $9.8 million for the Expos”87

In a rare display of constructive internal policymaking, MLB altered its revenue sharing formula in 2003. The League raised the share of local revenues that big market clubs pay to the pool from 20% to 34%.

Last season [2005] baseball transferred $300 million from 14 rich teams to 16 teams with the lowest revenues. Of that amount the Yankees, with revenues of $354 million kicked in $77 million, while the second-largest contributor, the Boston Red Sox, chipped in $51 million. On last season’s league-high payroll of $223 million, George Steinbrenner also paid a tax of $34 million.88

However, the League does not properly enforce the revenue sharing, resulting in a wasted opportunity for promoting competitive balance. Teams receiving funds are

86 This is after the creative accounting previously mentioned. Steinbrenner’s Tax Shelter, Forbes.com, 8 May 2006, 22 Apl. 2006
87 Zimbalist 2004, pg. 65
88 Steinbrenner’s Tax Shelter, Forbes.com, 8 May 2006, 22 Apl. 2006
required to invest their proceeds into the operation of the club; specifically, towards payroll related expenses. For example, the Tampa Bay Devil Rays received $33 million in 2005. The club’s season ending payroll was $26.6 million. Again, the owners cannot cooperate with each other for the betterment of the League.

Whether a club owns a regional sports network, or not, this new era for the sports-media complex has once again altered the architecture of Major League Baseball. The overall value of franchises, due to the alliance of Baseball and the media, is at a level that no one would have imagined a century ago. (see Appendix E)
Chapter 5. Public Policy

The overarching goal of public policy is to act as a bridge spanning from where society is at a particular moment of time, to the ideal place where that society wants to be. Three ideals represent that destination for communications in America: the public good, a healthy public sphere, and a prosperous marketplace. Conflicts often arise in people’s interpretation of what constitutes the three ideals, especially which is more important, and how to achieve them. As a result, we have a complex set of public policies that often succeed, and all too frequently, fall short of their intended goal.

The United States’ communication system is the most complex and diverse in the world. Policymakers traditionally take a very “technologically particularistic” approach. As society adopts a new media platform, public policy decisions construct its architectural design. To assure that the design serves the three ideals, a number of foundational principles exist to guide the regulation of these media technologies. They are the First Amendment, the public interest, the marketplace of ideas, diversity, competition, universal service, and localism.\textsuperscript{89} The First Amendment and the pursuit of a marketplace of ideas do not really fall into this analysis; despite baseball’s

ethnocentrism, diversity is more prevalent elsewhere. However, recognition of the other principles does. Each policy enacted and case decided identifies promoting a prosperous sports industry as within the public interest. Sports programming supposedly contributes to a competitive and universally available communications marketplace. Lastly, localism is a key underpinning of baseball’s relationship with electronic media.

The Public Policy Model

Creating policy occurs through Congress establishing laws and its committees and commissions regulating them. The Courts assure that whatever policies and regulations Congress establishes, they do not interfere with the foundational principles. When assessing Congressional action the Courts set a particular level of scrutiny to apply, predicated upon the characteristics and physical architecture of the media platform. Printed materials enjoy the strictest level of scrutiny, inferring that any action set by Congress must be narrow in scope and as least intrusive as possible when interfering with the medium’s ability to function. When implementing action, it must be narrowly tailored so that the necessary interference is precisely defined and sensitive to citizen’s rights as established in the Constitution.
A convolution of interests, interpretations, and constitutive choices go into the creation of public policies of communication. Although intentions are usually pure, often those that speak loudest and maintain greatest access influence a policy’s outcome. Ultimately, the main objective is to promote two constructs, democracy and the marketplace. To do so, government establishes public policy through laws, rules and directives; and it contributes economically through direct investment, procurement, and tax policies. Government acts unilaterally by way of big initial investments or in partnership with the private sector by subsidization. It creates a more efficient marketplace by enforcing patents, copyrights, and standardizations.

The foundations of most policies in the communications arena originate from two parts of the Constitution, the First Amendment and the Commerce Clause. The First Amendment’s protection of civil liberties is principal to applying Madisonian values to the three ideals. Its interpretation scrutinizes government interference to Freedoms of the Press and Speech. This is often predicated on analysis of the physical characteristics of a media platform. The Commerce Clause establishes the marketplace in which rules and standards are set for interstate commerce, financial participation, and ownership.

Since the birth of the Republic, government has often invested in the physical infrastructure of communication channels to assure a free flow of information.\textsuperscript{91}

Information is fundamental to a competitive market as well as to a thriving democracy. For example, The Postal Service Act of 1792 created what is one of the largest functions of our government. Through the postal system, anyone can distribute or receive printed materials containing a diversity of ideas. Government builds and maintains public roads that facilitate the delivery of the mail. The most recent government investment was in the establishment of the Internet. However, as its usefulness to commerce grew, government abandoned the system to where the Internet now operates commercially.\textsuperscript{92} Collectively, these structures comprise a part of the public sphere.\textsuperscript{93}

Through conveyance of copyright and patents, regulation of interstate commerce, allocation of the electromagnetic spectrum and the access of right of way, government has enacted rules and laws that create an open environment for a healthy communications marketplace. Nationwide reception of broadcast radio and television (through free spectrum allocation), and the laying of fiber-optic cable all exist through private investment subsidized by government action. Regulations and standards

\textsuperscript{91} In \textit{Starr}, he gives a comprehensive analysis of the history of public policy decisions in America.

\textsuperscript{92} I refer to the World Wide Web; I believe that the Federal Government continues to maintain a separate system for Defense purposes.

\textsuperscript{93} \textit{Starr}, adapts Jürgen Habermas’ term as “the sphere of openly accessible information and communication about matters of general social concern.” pg. 24
benefit private enterprises, as do franchise licenses and/or monopolistic authorizations. Tax relief and incentives are policy initiatives that prime the economic pump. Advertising is a tax-deductible business expense. When the government acts as a consumer, its largess enables private enterprise to build and grow to serve the public good.

At varying stages of the century, different philosophies apply to the government’s role in the marketplace. Depending on events and cultural trends, the people select conservative representatives whose priorities are for policies to promote competition and establish a fruitful marketplace. At other times, they opt for more liberal policymakers whom focus attention to the balance between an unencumbered market and the public's interest. In a democratic and open society, the characterization of what involves the public interest constantly changes, as well; two prominent factors that steer its evolution are cultural events and technological advancements. It is within this context that I analyze policy decisions that have affected the growth of the sports-media complex.

**Baseball in the Public Policy Arena**

Baseball is more than just a sport to many Americans. As a dominant institution for the transmission of cultural values, baseball has served as a moral, quasi-
religion. Its specialized lexicon has entered everyday language, its stars have gained mythical status, and a team’s relationship to its host city represents a shared culture and ideology. Professional baseball is a network of intersecting spheres of differing business interests and personalities. As such, it maintains an ideal architecture in which its inhabitants can further their interests and promote their standing in society. The first half of the century, the Barons of Baseball were men whose principal business interests were elsewhere. Their role as team owners resulted from either a desire for Baseball to help promote their primary business, or their standing in society. Politicians utilized this network to project a positive image and establish themselves in a favorable light to their electorate. What resulted was an effective environment in which bonds formed and ties strengthened. In turn, the club owners used access to the policymakers to lobby for favorable treatment. Everyone benefited from the status quo.

The media are the gatekeepers of information for society. They control the flow of communication from government to the people, and commerce to consumer. Government representatives are dependent upon the media to explain governments’ accomplishments, and to exhibit themselves in a positive light so that they can raise campaign funds and get re-elected. As such, they look favorably on both the baseball owners’ and the media owners’ interests in hope of increased visibility. Collectively,
this represents a cyclical relationship within the public sphere. There is a reciprocal relationship between the communication environment and on public policy. Baseball supplies an ideological backdrop that frames public scrutiny.

Congress has proposed hundreds of pieces of sports legislation. Throughout the later part of the 20th Century, Congress has wavered in its perception of baseball as a sport or as big business. Occasionally, it has threatened to take action that would adversely affect the League. Nevertheless, usually these actions result in bluster and headlines, and rarely in legislation.

To analyze Baseball’s ventures into public policy, we must begin with its unique exemption from antitrust scrutiny. After appreciating its evolution, we can better understand the making of other policies that affect the sport. From this point of departure, we can understand subsequent actions in fields such as property rights, tax codes, stadium construction, or the design of business models within the communications arena.

**Antitrust**

The most prevalent characteristic of Major League Baseball as a business is its status as a government sanctioned monopoly. Almost all business decisions made and
conflicts mediated are done under the auspices of the League being the only American industry comprehensively exempt from scrutiny of anti-competitive practices.

As reviewed earlier, in 1922 the Supreme Court ruled that Major League Baseball was exempt from the Sherman Act, the United States’ primary legislation addressing the evils of monopolies and trusts in corporate America. In *Federal Baseball Club v National League* (1922), Justice Oliver Wendell Holmes represented the majority by stating that the business of baseball was not interstate commerce (as the Act requires); therefore, unless Congress decided to elaborate on the specifics of its legislation, Major League Baseball was not subject to antitrust restrictions. Thirty years later, in *Toolson v New York Yankees, Inc. et al.* (1953), by virtue of such inaction by Congress, the majority opinion upheld the exemption that the original case determined.

A Supreme Court decision that a particular business is not within the scope of the federal antitrust laws will not be overruled to give those laws retrospective application to such business where Congress, with knowledge of the earlier decision, has not seen fit to bring such business under the antitrust laws by legislation having prospective effect, but has left the business for 30 years to develop on the understanding that it was not subject to existing antitrust legislation.94

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94 346 U.S. 356 (1953)
In the dissenting opinion, Justice Burton questioned the conclusion. He noted a substantial change of the playing field: in 1922, television & radio did not exist to the extent it did currently; he states that the media makes Baseball interstate.

In its third antitrust related baseball case, *Flood v Kuhn (1972)*, the Supreme Court re-focused the antitrust exemption on the reserve clause. Although Flood ultimately lost, it was determined that the basis of the antitrust exemption was not the interstate commerce factor, but the special place baseball held in American culture and its need for control over its competitive balance.

The Congress has convened numerous committees that have conducted hearings on the special antitrust status of Baseball. No major legislation has resulted from these hearings, and on some occasion, as this chapter exhibits, the procedures have mysteriously just faded away. Often, Baseball itself has commissioned position papers, blue-ribbon panels, and in-depth analysis’ in preparation or response to these hearings. Solicited for these reviews were former Senators, representatives of the media and other noted personalities. Put forward were a plethora of recommendations and candid commentaries. Nevertheless, most are ignored, and the contents are eventually leaked to the public years and decades later.
Television Programming Policies

Government involvement in baseball dates as far back as the 1920s, but in terms of programming for television action was not seen until the 1950s. Indeed, government did not involve itself in television programming at all until then. The event that attracted government interaction centered on quiz shows. Government regulation, generally limited to licensing and technical issues, started to focus on content. New laws specifically tailored to television were enacted, causing television programming to come under a microscope.

In the summer of 1955, The $64,000 Question premiered. In this show, contestants would posture themselves as experts in a particular field of knowledge and then be asked a question, which, if answered correctly, would result in a cash prize. Following each success, contestants had to choose whether to take their accumulated prize money and exit the show or remain to try to answer progressively more difficult questions for more money. Revlon, the sponsor of the program, provided the Revlon Isolation Booth in which contestants remained while contemplating their answers. Following The $64,000 Question’s meteoric rise to the number one show on television, fifteen quiz shows were developed and aired in primetime slots on the three networks the following season.95

95 Brooks, pg 1363
Ed Hilgemeier was a substitute contestant on a show called *Dotto*. While he waited backstage for his turn to compete, he found a notebook left by the contestant who was currently on air that contained the questions that were being asked and the correct answers. Meanwhile, on a different show, *Twenty-One*, the reigning champion was a Jew from the outer boroughs of New York named Herb Stempel. He was approached by the executives of the show and told to lose to his competitor, Charles Van Doren. Van Doren was a handsome, sophisticated Anglo-Saxon professor from Columbia University. There had been rumors and a few magazine articles questioning the integrity of the shows, but few had taken any notice. Both Hilgemeier and Stempel came forward with their knowledge of the shows being fixed, and a huge scandal broke that had enormous repercussions on the television industry for many years.

No laws were actually broken in the process of fixing the shows. It was during the investigation and its resultant cover-up that trouble ensued. When the issue reached Congress, everyone involved denied the accusations. It was not until Hilgemeier and Stempel came forward that it was discovered that many people had committed perjury.96

There was more to the public reaction than merely anger at the deception practiced by some quiz shows, and this explains the volatile reaction from Congress.

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96 Subsequent to the investigations, many contestants sued the shows, their sponsors and the network for financial damages. The courts consistently denied any awards.
and their subsequent activism regarding programming, including sports. The country’s cultural conflict at that time was an important contributing factor. Many in society were not prepared for the enormous power of television. Furthermore, since the end of World War II, the nation’s economy had been in tumult. The Supreme Court decision in *Brown v. Board of Education* had ruled against racial segregation in public schools. Labor unions were enjoying enormous gains while the Republican administration attempted to compensate big business by increasing military spending. Citizen confidence and trust in government was at its lowest point since the Depression.

Once the scandal broke, every pundit weighed in. John Steinbeck wrote to his friend Adlai Stevenson, “On all levels American Society is rigged. I am troubled by the cynical immorality of my country. It cannot survive on this basis.”

The scandal represented yet more proof of how American society was being deceived on a grand scale. Four years earlier, Richard Nixon had broadcast his famous Checkers Speech; the McCarthy Hearings were still vivid in American minds. When it became known that 100 out of 150 witnesses had lied to a grand jury, the collective American psyche went into shock. These were not corporate executives or politicians that had perjured themselves but average Americans.

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97 Lewis Lord, “When the Winning Answers were Rigged: Quiz Show Scandal,” *U.S. News and World Report*, 127.22, pg. 72.
The legislative repercussions of the scandal were tremendous. Directly and indirectly, the quiz show scandals are responsible for the Federal Communication Commission’s regulation of television broadcasting to this day. Although few actual infractions have been levied against networks and programmers in the fifty years since the scandal, the bluster that appeared intermittently during these years stems from the quiz show scandal. Congress passed a bill in August 1960 making it a crime to give or receive assistance on quiz shows and the like. An outgrowth of this bill was the justification for investigations of the recording industry and its “payola” practices to DJs at radio stations.\textsuperscript{98} The Federal Trade Commission used sections of this bill against advertisers in cases of false and deceptive advertising.

The new approach of government regarding sports program on television emerged under this backdrop. A year later, Congress took up the Sports Broadcasting Act of 1961.

**Sports Broadcasting Act of 1961**

The Sports Broadcasting Act of 1961 represents the centerpiece of public policy by Congress about professional sports on television. The bill is only two paragraphs long, but is extensively written about and interpreted by scholars, industry leaders and various government entities. Ironically, in the 45-years since its passage,

\textsuperscript{98} Soon thereafter, Congress outlawed recording companies from compensating on-air personalities for playing an artist’s release.
the Act has generated more debate than that given to the original contradiction it was intended to clarify. Some argue that the bill, as written, makes many agreements involving subsequent media platforms illegal. Others believe that its authors intended it to be interpreted in a way to encompass these future technologies. A third school argues that it is a redundancy - superseded by other acts and judicial precedents. Regardless, it has altered the existence of all of professional sports and the television industry.

To comprehend fully the discourse taking place, a review of what the bill states, its history, and the subsequent attention paid to it must be analyzed. Furthermore, as much can be told by the amendments to the Act that was not passed, as those that has.

The Act provides a limited antitrust exemption to enable clubs of professional sports leagues to pool jointly their separate rights in the sponsored telecasting of their games. When the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives began hearings on the bill, Major League Baseball participated under the auspices that their existing exemption superseded anything this action might cover. Throughout the relatively short time span (a mere 72 days between convening the first hearing and the voting on the bill) Baseball always projected itself as friendly council, and felt it could benefit from Congress’ conferring similar antitrust benefits in the broadcast rights arena to other leagues. The legislators, although

showing special reverence to Baseball throughout the hearings, took particular care in
establishing their jurisdiction over all four leagues, “The antitrust subcommittee has
met this morning to receive the views and comments of interested witnesses on H.R.
8757, introduced by the Chair, a bill to amend the antitrust laws to authorize leagues of
professional football, baseball, basketball, and hockey teams to enter into certain
television contracts, and for other purposes.”

Actions conducted by the NFL in the early 1950s, led to two court cases that
precipitated the act. At an annual owners meeting, the NFL Commissioner amended
the League bylaws to give him control over national television negotiations. The
League had agreements with a national network, and some teams sold their own rights
to competing networks. The change in authority resulted in the Justice Department
filing suit, charging a variety of antitrust violations. Judge Alan K. Grim of the
District Court for the Eastern District of Pennsylvania heard one case involving the
commissioner's decision about blacking-out games. Grim determined that the
telecasting of outside games into the home territories of other teams on the days when
those other teams were playing in their home stadia was not permissible. The Judge
agreed that the NFL was a "unique kind of business" which would be harmed by a
classical interpretation of antitrust law, and he upheld the League’s right to impose
blackouts of home games. Nevertheless, he rejected the commissioner having

\[100\] Celler Hearings, pg. 1
sweeping control and warned him not to level any restriction on an individual franchise’s television rights.

In 1960, the new American Football League signed an agreement with ABC in which they combined the rights of all teams thus increasing the profitability of the entire package. The contract called for an equal distribution of revenues to all franchises. In response, the NFL agreed to phase out the television deals of the two remaining teams that contracted on their own. They entered into an agreement with CBS in which the network determines the games to be telecast and where they would appear. On July 20, 1961, Judge Grim ruled that the agreement violated his prior decision. According to Grim's findings, the AFL and other non-football leagues were free to package their television rights, but the NFL was under court order not to do so. Citing confusion in how professional sports leagues were able to negotiate with broadcasters, the NFL petitioned Congress for clarification.

All the leagues testified that in a business sense their member clubs were not competitors of one another. “In the League's view, the members of a sports league are engaged in a joint venture where their business interests are closely intertwined and each club is jointly in business with every other club in its league.”101 By pooling their resources, and sharing the proceeds, they were promoting parity thereby assuring competitive balance. In dissent, the National Association of Broadcasters argued

101 Celler Hearings, pg. 9, Rozelle statement.
against the Act. They feared that leagues would be able to concentrate their rights with one network thereby creating a bidding war. Furthermore, they did not want to give a league (or government) the ability to dictate the areas to which games should be telecast. The legislators agreed that should weaker teams fail because of disparate rights fees, eventually the whole League would fail. Therefore, they sided with the leagues.

Baseball’s commissioner, Ford Frick, testified that each club in baseball dealt separately with television stations, networks, and sponsors for the sale of their individual rights. Although the League only sold rights to the World Series and All-Star game, “baseball at some future time may wish to consider the practice which organized professional football contends is necessary for its economic health.”

Furthermore, Frick reminded, “however, I do want to make clear that baseball's ultimate objective, of course, is to obtain some time, somehow, legislative ratification of the present-day exemptions from the antitrust laws which we now enjoy under judicial decisions.”

The final bill read,

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

\[\text{102 Celler Hearings, pg . 65}\]
In reviewing the transcripts of the hearings, a couple of points stand out. The representatives are concerned about granting unfettered latitude to the leagues. They seek assurance that the NFL would not intrude on the college football season. They are concerned about maintaining localism in broadcasting, and worry about preserving professional sports’ role in promoting that localism. Most of all, they want a clear understanding of what the bill covers. Herbert N. Maletz, chief counsel for the committee asks Pete Rozelle, NFL commissioner, “You understand, do you not, Mr. Rozelle, that this bill covers only the free telecasting of professional sports contest, and does not cover pay TV?” Mr. Rozelle’s reply is, “Absolutely.” This exchange is the genesis for much of the debate.

The central question regarding the language is the phrase, “…in the sponsored telecasting of the games…” By considering the language on its own, there is no way of knowing whether its authors intended for the leagues to enjoy antitrust exemption in cable or satellite, where subscribers pay a fee. Today, the leagues charge an annual fee for special access to games broadcast via the Internet, and charge for access to retransmitted local telecasts on cable and satellite. Are these free telecasts?

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103 SBA, 15 U.S.C. 1291
In 1961, Congress was already aware of cable television and technologies that could transmit video signal via telephone lines. In the House Report noting the exemption given, it states, “The bill does not apply to closed circuit or subscription television.” Elsewhere in the public sphere, a discourse was taking place about sponsorship and the Quiz Show scandal. Legislators would not use the term sponsored frivolously.

Seven years later, a different NFL Commissioner testified before Congress - Paul Tagliabue, formerly NFL Counsel when the SBA became law. At the Professional Sports Antitrust Immunity, hearings conducted by the Senate Committee on the Judiciary, Tagliabue re-confirmed that the Act “does not authorize us to pool and sell to pay cable.”

Congress asked the question again in 1987. Senator Howard Metzenbaum chaired a subcommittee looking into a package of Sunday evening NFL games sold to ESPN. To determine its legality, he sought an interpretation of the SBA from both the Federal Trade Commission and the Justice Department. The FTC concluded, “It is arguable that Congress did not intend to provide an antitrust exemption for the type of service offered by ESPN” (see Appendix C.) The Department of Justice went further,

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“our view is that it [the ESPN deal] is not [free telecasting] and thus does not come within the Act’s exemption” (see Appendix D.)

In addition to citing the comments made in the hearings, the conclusions were partly based on a Supreme Court doctrine. The Supreme Court declared that statutory antitrust exemptions are to be narrowly construed. To do so, the exemption would cover only the situation that Congress had in mind when it created the exemption. Therefore, if Congress wanted to extend the exemption to other media, it needs to pass subsequent amendments to the bill. In summery, the Act has been repeatedly reviewed in court cases, reports by Commissions, and by Senators, yet no subsequent amendments have been enacted.

Congress has proposed legislation, but never has passed an amendment. For example, on two occasions, Congress proposed language to include other circumstances in the SBA, an indication that it should not be interpreted to cover all media. In 1981, Representatives Pete Stark (D-Cal) and Don Edwards (D-Cal)

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106 For example, in Chicago Professional Sports Limited Partnership and WGN v National Basketball Association, 754 F. Supp. 1336, 1342 (N.D.111. 1991) the judge interprets the act both ways in differing sections of his decision.
107 For example, FCC in Final Report and the Committee on the Judiciary, again, in S. Rpt. No. 1087, supra 16, when it writes “public interest in viewing professional league sports warrants some accommodation of the antitrust principles.”
108 For example, by Arlen Specter (R-Pa.) “sponsored telecasting” is a “term of art which…meant free network television.”
introduced a bill to expand the SBA to include cable and pay television.\textsuperscript{109} The action originated from the NFL’s Oakland Raiders move to Los Angeles. The broadcasting clause was included with legislation that would permit the League to restrict clubs from relocating without approval. Secondly, the \textit{Stadium Financing and Franchise Relocation Act of 1999} \textsuperscript{110} was introduced to amend the Sports Broadcasting Act. It would “expand, modify or clarify antitrust law exemptions applicable to football, baseball, and other professional sports leagues, and to require Major League Baseball and professional football leagues to contribute 10\% of national TV revenues to a trust fund that would finance 50\% of stadium construction and renovation activities, as a condition for receiving antitrust exemptions.”\textsuperscript{111} Neither amendment was brought to the floor for a vote.

Congress acted in the SBA with a purpose to promote viewership of games – especially by fans of the local team in the “home” market. Within two years of the SBA’s passage, media revenues for the NFL and MLB tripled while the numbers of

\begin{footnotesize}
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broadcast games had cut in half. Therefore, by shifting games to cable – where less local games are seen, contradicted the sense of the Act.

Copyright Act of 1976

From the inception of the medium, cable operators were not required to pay broadcasters for the right to retransmit their signal. Therefore, copyright issues were contested up to the mid-seventies when Congress addressed the concern by passing the Copyright Act of 1976. “As part of a wholesale revision of copyright, cable finally was held responsible for the use of broadcast programming. The compulsory license was adopted for all broadcast signals, local and imported. Cable operators would pay a royalty based on system size, market, and use of each imported signal.”

Major League Baseball testified on-behalf of the Act. The League aggressively lobbied Congress to require superstations to pay the League for retransmitting its content, baseball games. A compulsory licensing system for programming was created and Congress established a Copyright Royalty Tribunal to collect fees and distribute them to claimants such as broadcasters, movie studios and sports leagues. Until 1992,

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113 Parsons, pg. 55

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when Congress established retransmission consent in the Cable Act, Baseball enjoyed a new separate revenue stream.

**Cable Act of 1984**

The primary purpose of The Cable Communications Policy Act of 1984 was to deregulate the cable industry. Among other things, it preempted local, state, or federal governments from setting rate controls. The local cable monopolies, granted special status through franchise agreements entered into with municipalities when building an area’s infrastructure, were permitted to set their own programming and pricing policies without oversight.

Four years earlier, Ronald Reagan became the 40th President of the United States. One of the principle campaign issues of his candidacy was his economic policy. What later came to be known as, Reaganomics, focused on supply-side economics, lower taxes, increased deficits, and deregulation. Deregulation is the removal of government regulations that impose restrictions on business. Conservative economists theorize that deregulation encourages competition and allows the marketplace to operate efficiently. Those with a more liberal perspective believe this a myth; that deregulated competition result in monopolies. Liberal theory is that deregulation only promotes competition in the early stages. In the latter stages, it
actually eliminates competition as rivals are driven out of business or at the very least that the big get bigger.

Among the initiatives the Reagan administration put forth was deregulation of the cable industry. The outcome was the Cable Act of 1984. It was not long before the effects of the Act were felt in numerous areas. The average cable-subscription price increased at an annual rate of over 12% in the first five years. The value to a cable system tripled from less than $700 per subscriber to over $2400 per subscriber.114 The Cable Act’s effect on Baseball’s local agreements was even greater. For example, the New York Mets entered into an agreement just prior to the enactment for $4 million per year; immediately following the Act’s implementation, the New York Yankees signed its local broadcast agreement for $42 million per year. Although the Yankees historically command a bigger following than their cross-town rivals do, in the mid-1980s the Met’s outdrew the Yankees in attendance.115

Legislators who supported deregulation anticipated increased competition from satellite, microwave transmissions, and telephone companies.116 Yet, for each of these distribution systems there was a technological or regulation-based problem. The satellite industry was in its infancy and maintained limited coverage. Microwave

115 Mets: ’84-1.842; ’85-2.267; ’86-2.767, Yankees: ’84-1.821; ’85-2.214; ’86-2.268 all in (000)
116 Nevertheless, for the purpose of the Act, their definition of competition was if households in an area could receive at least three over-the-air broadcast signals with a roof antenna.
transmissions did not work in urban areas where line-of-sight was impossible. Lastly, regulations had not been changed to permit telephone companies from carrying television signals; therefore, the upcoming $200 billion investment in fiber optics had barely commenced.

Another factor that limited opportunity for these potential competitors was lack of available key programming. The cable operators had the ability to sign exclusive agreements with sports teams for their broadcast rights. The emerging technologies did not. Cable companies had two sources of revenue to compensate for their preemptive bids for sports rights, advertising revenue and unregulated subscriber fees. None of their competitors could match these resources, and it was a prudent business model for cable to spend more to attract new subscribers while blocking competitor’s entry to the marketplace. Not even the established local broadcasters could compete with the business plan. As seen in Appendix B, migrations from over-the-air local broadcasters to cable increased dramatically. Furthermore, team owners began to enter into new type agreements with cable operators who had vertically integrated into programmers and distributors.

Deregulation did more than open vertical opportunities for cable operators; also, it permitted horizontal integration. Systems merged thereby creating multiple
system operators (MSO). Today, the top two MSOs service 37.5 million

Comcast and Time Warner will control access to approximately 6 in 10 of the nation’s cable subscribers and almost half of all pay-TV subscribers. Of greater concern…create concentrated regional monopolies across the country where one of the companies will become the single dominant video provider…I can assure you that Comcast and Time Warner will deny key regional programming – especially local sports…\footnote{Daniel Fawett, VP DirecTV, Written Testimony before the Senate Committee on Commerce, Science, and Transportation, 31 Jan 2006}

Horizontal integration created a new business model that not only drastically altered the earnings potential for a cable operator/team partnership, but also threatened the status quo of territorial exclusivity. By 1987, there were 20 regional sports networks.\footnote{Sports for Sale, pg. 61} The same year, concerned with this new development and its possible negative effects to competitive balance, the Television Committee of MLB issued a recommendation that clubs not be permitted to own television stations. Although the rule passed, it did nothing to stem the tide of teams aligning themselves with media conglomerates that maintained either a superstation or regional sports network.
Cable Act of 1992

The Cable Act of 1984 gave cable operators a similar opportunity to that which the antitrust exemption gave Baseball 70-years earlier. Just at the most opportune time, government granted the industry unfettered growth at a pace of its own choosing. Cable operators could contract with anyone at anytime regardless of its effects on others. The systems were unencumbered from dictating the terms to their customer, and competition was blocked by public policy from entering the market.

However, cable television’s barons could not match the Lord’s of Baseball in their influence on policymakers. Whereas Baseball continues to maintain its exemption, cable lost its exemption less than ten years later. The industry was well represented through lobbying efforts by a powerful trade association in Washington. Cable television enjoyed substantial First Amendment protections, and politicians showed similar deference to cable as they did to other media. Furthermore, cable possessed substantial financial support and technological advantage. Nevertheless, Congress reregulated the industry in The Cable Television Consumer Protection & Competition Act of 1992.

Public opinion towards the cable industry was low in the 1990’s. The impetus behind re-regulating was the mood in the public sphere that operators went too far in their monopolistic practices. Among the provisions of the new Act were standards such as how quickly a service center answered its phone and the time it took for
installation into the home. Cable systems joined other publicly sanctioned monopolies such as the phone company and electric utility as the bad guys. Congress reregulated cable charges.

While the 1984 act culminated a period of the regulations in the industry, it left one long-standing requirement in place, the obligation of cable systems to carry local television stations... Carriage of all available local signals, including the weaker independents, ate up channel capacity and occasionally prevented operators from adding new networks.... In 1986 and again in 1988, a Federal Appeals Court struck down the FCC's must carry rules primarily on [First Amendment] grounds... \(^{120}\)

During the hearings, broadcasters played the role of victims. In what is referred to as program access, they lobbied to have the new law require systems with more than 12 channels to set aside up to one third of their capacity for local signals.\(^{121}\)

Broadcasters would negotiate compensation for the retransmission or demand carriage, not both. Therefore, those broadcasters with stations that subscribers insisted on having often chose to ask for non-monetary benefits such as additional channel space for a second or third network. Of additional importance was where on the systems sequence of channels the network would reside. By negotiating a position on a tier with more subscribers, the network owner could charge more for commercials. Thus, the network made more money.

\(^{120}\) Parsons, pg 58  
\(^{121}\) Localism is still a major concern of Congress.
It seems the power of being the “National Pastime” generated more leverage than the philosophy of deregulation even in a ‘Small Government’ administration. Therefore, operators turned to Major League Baseball to mediate some of the policy changes instilled by the new legislation. For example, the 1992 Cable Act gave broadcasters control over the use of their signals and permitted them to seek compensation from cable operators for carriage of their signals – known as retransmission consent. Furthermore, the cable system was required to carry certain stations, must carry. Baseball’s exemption enabled them to offer exclusivity. Therefore, cable operators contracted with the club directly instead of being forced to share advertiser revenues with a local broadcaster that the cable operator was required to carry. Depending upon in which package the operator offered the channel carrying the games, it made more revenue and blocked competition.

The Act also addressed Congress’ concern about sports programming. It called for two reviews of the Act’s effects (the Interim and Final Reports.) Titled the *Sports Programming Migration Study and Report*, it

(A) requires the Federal Communications Commission to conduct an ongoing study on the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services. The study shall investigate and analyze, on a sport-by-sport basis, trends in the migration of such programming from carriage by broadcast stations to carriage over cable programming.

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122 Supplying cable subscribers with one or more program services beyond the basic offerings at an extra charge. Each additional price increment is called a tier. (As defined by NCTA)
networks and pay-per-view systems, including the economic causes and the economic and social consequences of such trends. (B) The Federal Communications Commission shall, on or before July 1, 1993, and July 1, 1994, submit an interim and a final report, respectively, on the results of the study required by subsection (a) to the Committee on Energy And Commerce of The House of Representatives and The Committee on Commerce, Science, and Transportation of the Senate. Such reports shall include a statement of the results, on a sport-by-sport basis, of the analysis of the trends required by subsection (a) and such legislative or regulatory recommendations as the commission considers appropriate. 123

The FCC received input from the leagues, broadcast and cable networks, and trade associations. Both reports found that even though broadcasters aired more events than ever, cable was growing at a rapid pace. Ratings on many national broadcasts were declining in correlation with cable’s growth, and policymakers should be concerned with a shift in sports programming from over-the-air to pay TV. One group contributing comments, the Association of Independent Television Stations, “asserted that taxpayers have helped finance professional sports teams through construction of new arenas, stadiums, and peripheral infrastructures as well as tax advantages. It also reminded the Commission of the antitrust exemptions professional sports enjoyed. As a result, INTV argued, taxpayers should be entitled to reciprocal treatment from

123 98 USC 549
professional sports through receiving free over-the-air telecasts." No action was taken by Congress, its committees, or the commission subsequent to either report.

In summary, the Cable Television Consumer Protection & Competition Act of 1992 represented a reorientation of Congress’ attitude on the terms in which Americans received television. Broadcasters won their argument for preserving localism. Congress’ regard for the consumer was stronger than for the cable industry. However, their acquiescence to Baseball’s interests remained tantamount. Despite its own two reports that found the reciprocal causation of cable television and Baseball’s unencumbered ability to foment self-interest, Congress did nothing.

Nevertheless, within the next decade, they changed their minds again regarding cable. They enacted the Telecommunications Act of 1996 as competing lobbying interests – including Major League Baseball - continued to sway opinion, and attempted to position themselves best to exploit emerging technologies.

**Telecommunications Act of 1996**

Congress decided again that competition not only needed promotion, but active endorsement. Therefore, they passed the Telecommunications Act of 1996. Satellite service did not become the competitive force during the past decade as Congress

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envisioned. The telephone industry was in turmoil, and merger-mania was contributing to a booming stock market. Opportunities abounded and many interest groups had something for which to lobby.

The Act contained three essential features affecting the professional sports industry. Some helped cable operators but hurt broadcasters; some helped both. Nevertheless, Baseball and other sports leagues benefited by each. The Act once again relaxed regulations on the cable operators’ packaging and pricing. Immediately, rates increased nearly 20% and more money was available for rights fees to leagues.

Telephone companies were permitted to enter the videocasting field, and cable was allowed to offer telecommunications services. Rules were instituted so that Direct Broadcasting Satellite (DBS) could realize the potential it showed for the past decade. Under the auspices of providing universal service, the Act encouraged building a more robust broadband digital highway to serve rural areas and individuals. All contributed to more potential markets for sports programming. Competition in distribution would result in higher bids for rights.

Most of all, the FCC was instructed to loosen the restrictions on cross-ownership. Previously, a predetermined amount of market penetration limited any singular company’s reach. By conglomerates entering the cable, network, and local station markets, they could enjoy a greater economy of scale. In turn, these mega-
media companies would seek out acquisitions that could better supply their multiple
distribution channels with programming. Regional sports networks became even more
valuable. For the first time, communication legislation not only enhanced revenues for
clubs, it boosted the value of the franchise, itself.

**Actions Not Taken**

The House of Representatives and Senate each contain committees that in turn
have subcommittees devoted in part to communications, antitrust, and other policy
issues pertaining to professional sports. To name a few, within the Senate, its
Commerce Committee has the Subcommittee on Communications. In the House, its
Commerce Committee has subcommittees on Telecommunications, Consumer
Protection, and Finance. The House also has within its Committee on the Judiciary, a
Subcommittee on the Study of Monopoly Power.

Each has dedicated a considerable amount of attention on baseball over the last
55 years. Between the years 1950 to 1978, nearly 300 pieces of legislation pertaining
solely to professional sports were introduced in Congress.\(^{125}\) Since then, short of a
thousand hearings have been held just pertaining to Baseball’s relocation/contraction,

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property rights, antitrust, and siphoning of games by cable from broadcasting.126 Few result in bills that reach the floor for a vote or set policy. Those in communications that do, always restrict the media concern, not the League. Instead, they voice displeasure with the management of issues such as steroids and plans for contraction or relocation of teams. Otherwise, they proclaim honor to dead players or the Negro Leagues.

In the 1950’s and 1960’s, most activity about professional baseball on Capital Hill centered on anti-trust. For example, in 1952 the Subcommittee on the Study of Monopoly Power of the House of Representatives’ Committee on the Judiciary, after extended hearings, issued a report dealing with organized baseball in relation to the Sherman Act. It said,

Organized baseball is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico.

Inherently, professional baseball is intercity, intersectional, and interstate…Of the 52 leagues associated within organized baseball in 1951, 39 were interstate in nature.

After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly

126 Lexus-Nexus® and Thomas Search terms used (in various combinations): Major League Baseball, professional sports, sports programming, stadium, antitrust, and contraction.
Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball.127

The hearing, convened a few years prior to the Toolson case, could have done what the Supreme Court eventually recommended, to repeal the antitrust exemption. Congress chose to do nothing.

In the 1970’s, whenever MLB actions caused fans to feel they had been taken advantage of, some member of Congress called for hearings to look into the business practices of the League or its media partners. Almost exclusively, the investigations centered on the partner not the League. Twice in the early 70’s legislation was introduced by Les Aspin (D-Wis) to protect free television by prohibiting teams from selling to closed circuit television. In late 1973, Senator J. Glen Beall (R-Md) introduced *The Preservation of Free Television Act of 1973*.128

In April 1976, the House established a *Select Committee on Professional Sports*, to evaluate the stability of professional sports leagues. On January 3, 1977, the Committee recommended that Baseball’s exemption from the antitrust laws be removed. Furthermore, the report called for a successor committee to be established to propose legislation to do just that. No new committee convened; no action was taken.

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128 *Cox*, pg. 579
Legislation to create a Federal Sports Commission was introduced by Republican Senator Marlow Cook of Kentucky in 1972. Senator Cook’s bill met the fate of all such legislation; it did not make it out of committee.

The 1980’s was relatively quiet while representatives weighed in on cocaine use by major leaguers and continued to study cable’s effects on siphoning as well as antitrust. Subsequent to the lawsuit between ABC and WTBS, Senator Peter Rodino (D-NJ) conducted hearings in which Ted Turner testified that he foresaw the World Series and Super Bowl migrating off free TV. Pete Rozelle stated later on in the hearings, “if we tried to go off free television [then Congress should act] to protect the fans.”

The Sports Team Community Protection Act was introduced in March 1984 to control franchise relocation. Although the bill made it out of committee, it was so watered down in conference that it was never voted on in the full Senate.

The player’s strike and the rash of new stadiums coupled with relocation threats caused Congress to rattle the sword over the Leagues antitrust exemption throughout the 1990’s. Many of the telecasting issues were debated through the cable legislations in which MLB actively participated. Section 26 of The 1992 Cable Act established a Sports Programming Migration Study and Report to determine the effects of sports leagues broadcasting antitrust exemptions. Two themes repeatedly arose in their

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reports: concern for a massive wealth transfer from sports fan to sports league and
cable owners, and that there were less over-the-air games when clubs agreed to sell a
combined package of exclusive broadcasting rights to cable companies. The reports
asserted that legislation was called for, but nothing came.

A Congressional Task Force on Baseball Expansion was formed in 1990 to set
a goal of six new baseball teams by the year 2000. Two of the task force's most active
members, senators from Colorado and Florida, stopped calling for meetings after their
home state received a baseball team—the Rockies and Marlins. The representatives do
try to be creative. For example, the Stadium Financing and Franchise Relocation Act
of 1999 was introduced to amend the Sports Broadcasting Act. It would “expand,
modify, or clarify antitrust law exemptions applicable to football, baseball, and other
professional sports leagues, and to require Major League Baseball and professional
football leagues to contribute 10% of national TV revenues to a trust fund that would
finance 50% of stadium construction and renovation activities, as a condition for
receiving antitrust exemptions.”

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131 Zimbalist 1992, pg 184-85
133 Id.
The first six years of the new millennium has seen over 160 hearings convene. Except for a bill permitting the Cuban baseball team to come to America to play in the World Baseball Classic, no legislation has actually been enacted. However, the frustration and anger over two self-inflicted crises, contraction of two teams in 2001 and the ongoing steroids problem have resulted in some classic Capital Hill bellicose. On December 6, 2001, Congressman John Conyers, Jr., ranking Member of the House Judiciary Committee, briskly summarized what so few other government officials have said for over a century. He issued the following statement regarding a bill with an appropriate title that represents an underlying principle of the public interest: Fairness in Antitrust in National Sports (FANS) Act of 2001,

I am here today to tell you, Mr. Selig, that baseball's antitrust exemption should be repealed. It may not happen this year or even this Congress, but one way or another, baseball's antitrust exemption - an historical anomaly which cannot be justified on any economic or legal grounds - will be eliminated.

The blame for this repeal will not lie with the players, the fans, or the Congress. It will lie with Major League Baseball, which by its actions has tarnished our great national pastime and in effect, lost the right to its own exemption.

Baseball lost the right to its exemption when they treated Curt Flood like a piece of property, leading to a long and unnecessary legal fight and the ruin of a good man's career.

Baseball lost the right to its exemption when the owners colluded
among themselves to reduce free agent salaries and were forced to pay a record 280 million dollars in damages.

Baseball lost the right to its exemption with their unacceptable record of minority hiring - no minority owners, and only a single minority general manager.

Baseball lost the right to its exemption when they unceremoniously dumped Faye Vincent as Commissioner, when he tried in vain to put the public interest ahead of the owners' private interest.

Baseball lost the right to its exemption by tolerating eight work stoppages in the last 30 years, more than every other professional sport combined, including, in 1994, the longest work stoppage in professional sports history.

And baseball lost the right to its exemption with its shoddy treatment of the Minnesota Twins and its fans. The Twins have done everything they could to place a competitive team on the field and live within their means in a small market. Yet less than two days after one of the greatest World Series in history, baseball issued a non-appealable death sentence to the city of Minneapolis and a slap in the face to their loyal fans.

Please don't tell me that repealing the exemption will do more harm than good by leading to more relocation. I might believe that if baseball hadn't permitted eleven relocations in modern times- including one by Mr. Selig - or if the case law wasn't clear that under the antitrust laws a sports league can impose reasonable restrictions on franchise movements. But those relocations have occurred, and the law on franchise movement is clear, so with all due respect. I can't buy into bit of propaganda.

There is only [one] industry in the entire nation that is exempt from the antitrust laws without being subject to an alternative regulatory authority - Major League Baseball. It is time to end this injustice, and we can begin the process with today's hearing.\footnote{U.S. Senate, Committee on the Judiciary, \textit{Stadium Financing and Franchise Relocation Act of 1999}, Hearing to consider S. 952, Washington, D.C. Government Printing Office, 1999.
80 days earlier, baseball resumed playing games after canceling contests due to the attacks of 9/11; only once before had Major League Baseball suspended more than one-day’s games because of something not related to owner-player strife - in 1918, at the height of World War I. As far away as Sydney, Australia, the resumption of games was reported, “With tears flowing, flags flying and tighter security at stadiums, US Major League Baseball made an emotional return after a six-day hiatus following terrorist attacks. Moments of silence, the singing of "God Bless America" and videotaped tributes to the memory of victims of terrorist attacks in New York and Washington were conducted at all six National League games played yesterday. All major league players wore US flag patches on their uniforms.”

The FANS Act never attracted much attention, nor was a vote ever taken on its passage. This is not to suggest that the League intentionally commenced these ritualistic displays by MLB that continue to this day. For example, “God Bless America” is performed during the seventh inning intermission and no telecast breaks away for commercial interruption.

The FANS Act never attracted much attention, nor was a vote ever taken on its passage. This is not to suggest that the League intentionally commenced these

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practices to influence legislation. However, once again the “National Pastime” and its media partners shut out Congressional action.
Chapter 6. Conclusions

The polity subsidizes both the media and professional sports through public policies. The construction of stadia uses public funds. Broadcasters license the public airwaves to transmit their signal, and cable operators invest in infrastructure in return for restrictions to competition. Tax policies encourage and promote advertising that translates to profits.

Major League Baseball will always struggle with its owners needing to cooperate and compete simultaneously. Because of this paradox, the League requires special latitude by government in setting restrictions in the way it operates. For example, traditional marketplace rules of supply and demand are not always applicable to professional sports. It is not realistic for a league to establish a club wherever a city can support one. Furthermore, it is not in the public interest to allow unrestricted franchise movement away from smaller markets to meet the demand from larger areas. The New York City metropolitan area has over 20 million people; St. Louis metro has 2.8 million citizens. No sports enthusiast wants New York to have seven teams or Missouri to have none. The Cardinals have been around for over a 100 years.

Baseball is a business. Its owners want to maximize profits and rightfully take advantage of all opportunities offered them to enhance their bottom-line. Nevertheless,
so long as the public subsidizes Baseball’s existence, the League should not be able to act without restraint. The environment in which baseball exists today is not the same as it was at its origin. Due to the emergence of the electronic media, Major League Baseball is not only interstate, but also global. Therefore, the rules established through antitrust exemption no longer apply; nor are some of the regulations established during the evolution of the sports-media complex. Being a peculiar industry is the only remaining justification for Major League Baseball maintaining its antitrust exemption, and that is not sufficient.

Technologies in mass communication have re-shaped the marketplace. More distribution channels and increased efficiencies in delivering product to the consumer are just two consequences of technological advancement. Emerging innovations call for new rules in establishing the market, but Congress is not capable of altering its regulations fast enough to keep pace with new conditions.

The result of these realities is a conundrum for policymakers. On one hand, our society needs a healthy marketplace of ideas and a fair environment for capitalism. On the other, the market cannot be left open to unchecked opportunism and guile. As a result, government has constructed sanctioned monopolies in media. When mixing in the complexities of the nation’s affection for its National Pastime, policymakers face conflicts of interest.
I have shown that when they need to, Baseball’s owners can effectively influence politicians. Furthermore, they adroitly promote their product as a cultural icon, the National Pastime. Nevertheless, it is not in the public interest to allow these Barons of Baseball to use their privileged status to align themselves with media conglomerates to further an alliance that hurts consumers. Laws exist to compensate the public for their contribution to both professional sports and the media. Two objectives of these laws are greater access to contests and security for municipalities that invest hundreds of millions of dollars in keeping their teams. Not for the sports-media complex to enjoy the gargantuan growth it has realized in the past few decades while receiving public subsidy.

Congress should repeal Major League Baseball’s antitrust exemption. However, the League should not exist in a completely unrestricted marketplace because it needs to self-determine its supply of product. Furthermore, it should be able to regulate competitive balance. At the urging of numerous Supreme Court justices, the Justice Department, and its own select committees Congress considered dozens of pieces of legislation concerning Baseball's exemption and possible regulation. Nevertheless, it has never enacted anything. The principal reason is that MLB has lobbied effectively to preserve its privileged position and there is no countervailing lobby from those adversely affected - the fans or the cities.
Likewise, deregulation of media consolidation has created an imbalance in the public sphere. A handful of conglomerates control most of the media; each has the ability to create a regional network of distributors to deliver product of its own choosing. The reciprocal causation of this deregulation and Baseball’s influence over elected officials creates too powerful of a force for effective policymaking.

The Sports Broadcasting Act of 1961 prohibits professional sports leagues from contracting with media platforms that charge for access. Yet, games migrate to subscriber based distribution channels. Regional sports networks prevent fans from watching the games featuring their local teams, so that media conglomerates can enhance the value of their own product. Already, Internet websites featuring professional sports earn more than $500 million. Meanwhile, Major League Baseball franchises are now valued in excess of $1 billion. All occur while taxpayers fund stadia construction and subsidize business expenses.

The sports-media complex and the regulating thereof represent a paradigm in which three haloed institutions of our society intersect. To understand why the public interest is not effectively served in mitigating the ill effects of their actions is a valuable lesson in bettering government.
Appendix A

The 1962-1966 contract with NBC includes radio.
There was no cable deal between 1982-1990; in 1980, 22 teams entered into a 2-year experiment with UA-Columbia that aired 45 games per year. The first ESPN deal starts in 1990.
All Local revenues are estimates considering the creative accounting teams practice.
XMRadio 2004: 11-yr.@$650 million
2006 ESPN deal gives cable 80 regular games a year and some playoffs (Sunday, Monday, & Wednesday nights)
MLB is looking for a 20% increase for the new 2007 national over-the-air broadcast deal.
## Appendix B

### Baseball’s Migration to Cable, 1987 - 2002

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<th>Year</th>
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<th>Avg. Games per Team</th>
<th>Total Games</th>
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Appendix C

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies,
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Metzenbaum:

Thank you for your letter of September 25, seeking the Federal Trade Commission's views concerning the antitrust implications of the Sports Broadcasting Act (the "Act") on the National Football League's (the "NFL") recent contract with ESPN. The Commission was informed last week of the Subcommittee hearing scheduled for October 6, 1987. Although the time we have been given to reply is limited, we will comply with your request to the extent that we are able.

The Act provides in part that the antitrust laws "shall not apply to any joint agreement by or among persons engaging in or conducting ... [certain sports, including professional football ...] by which any league of clubs participating ... [in those 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...." 2 The NFL contract in question grants to ESPN the exclusive right to broadcast nationally certain Sunday night NFL games. The Act was passed in 1961 in response to the decision of a U.S. District Court that the NFL's exclusive contract with CBS violated a 1951 consent order that prohibited the league or individual clubs from agreeing to restrict the area of telecasts of games. 3 The NFL purportedly believed at that time that an exclusive agreement to sell all telecast rights of all clubs was necessary in order to equalize television revenue received by the clubs. If such revenue were not equalized, the league thought that clubs in smaller cities would derive less revenue than the clubs in larger broadcast markets and would, over time, become less competitive, perhaps to

2 Id. § 1291 (emphasis added).
the point of extinction through bankruptcy. It could be argued that the league is a joint business venture that markets competition among its members, the product supplied depends upon the continued operation of the clubs. In a typical competitive environment, of course, the loss of a firm would not have an adverse effect on its competitors or consumers.

Based on the statute and legislative history, it is arguable that Congress did not intend to provide an antitrust exemption for the type of service offered by ESPN. In interpreting the antitrust laws and statutes that circumscribe those laws, we believe that it is important to consider the intent of Congress in enacting a particular exemption, as well as the Supreme Court's clear admonition that exceptions from the antitrust laws should be narrowly construed. However, too narrow a reading of the language of the exemption may result in unexpected consequences. Without further study, for example, it is unclear whether a strict limitation on the exemption could have the unanticipated effect of reducing the willingness of the NFL to deal with alternative transmitters of football games and whether this in turn might have the effect of reducing competition among alternative suppliers of sports to fans.

I hope that these comments aid the Subcommittee in its deliberations. The Commission's staff intends to study the economic and legal implications of the sale of broadcasting rights by professional sports leagues. If you are interested in the results of this analysis, we would be happy to provide them to you at a later time.

By direction of the Commission.

Emily M. Brock
Secretary
Appendix D

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APPENDIX B

U.S. Department of Justice
Antitrust Division

Office of the Assistant Attorney General
Washington, D.C. 20530

MARCH 30, 1988

Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your November 20, 1987, letter requesting the Antitrust Division to study and report to the Subcommittee on the telecasting practices of the National Football League (NFL). Both your letter and the Subcommittee's October 6, 1987, hearing indicate particular interest with regard to the NFL's agreement with the Entertainment and Sports Programming Network (ESPN), a cable television service, for ESPN to carry a number of NFL games on Sunday nights. More generally, you are interested in the question whether the antitrust exemption contained in the Sports Broadcasting Act covers agreements between sports leagues and those entities such as ESPN that carry league games via cable or some other means different from traditional over-the-air, "free" TV. Your inquiry raises a basic issue of how best to apply a statutory antitrust exemption in the context of an evolving industry.

Background

The NFL-ESPN contract covers the 1987-1989 seasons and provides that each season ESPN will carry 1 regular season game on each of 8 Sunday nights, 4 preseason games, and the Pro Bowl (the league's all-star game). The contract requires every game carried by ESPN to be simultaneously offered for telecast to a broadcast TV station in the home city of the visiting team, and, if the game is sold out in advance, in the city of the home team. All other NFL regular season games remain with the three major television networks. All Sunday afternoon games continue to be televised by CBS and NBC--most regionally and some nationally--and the one Monday night game per week.
continues to be televised nationally by ABC. Post-season playoff games, including the Super Bowl, also remain on network TV.

It is our understanding that ESPN is provided to viewers by participating cable television systems as part of "basic cable," for which cable subscribers pay a monthly fee. ESPN, which is currently provided to approximately 44 million households in the United States, receives a portion of its revenues from advertising and a portion from fees paid by cable systems.

The Sports Broadcasting Act ("the Act"). 15 U.S.C. §§ 1291-95, exempts from the antitrust laws joint agreements among professional sports teams within a league (football, baseball, basketball, hockey), selling the rights for "sponsored telecasting" of games. 1/ The Act was enacted in response to a 1961 judgment that prohibited the NFL from granting telecasting rights to CBS on behalf of all teams. See United States v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961). 2/ The purpose of the Act was to enable the member clubs of a professional sports league "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. 1 (1961).

1/ The exemption has two principal limitations. First, it does not cover agreements that restrict the area into which a game may be telecast except to protect a team playing at home. 15 U.S.C. § 1292. Second, the exemption does not cover agreements that permit professional football telecasts on Friday nights or Saturday afternoons during the high school and college football seasons. 15 U.S.C. § 1293.

2/ The court found that the CBS/NFL contract in question violated a 1953 judgment that prohibited the NFL and its teams from entering into any agreement "having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made." The 1953 judgment had been entered after the court found that an agreement among league members restricting the televising of games into an NFL city on a day when the team located in that city was playing on the road constituted a violation of Section 1 of the Sherman Act. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).
The legislative history of the Sports Broadcasting Act reveals that Congress was concerned that a sports league—and in particular, the NFL, which was the only league subject to the 1961 judgment—be able to assure an adequate amount of television coverage and income to its member teams that had limited local television markets, on a basis of substantial equality with the stronger clubs. Otherwise it was feared that the financial weakness of some teams in a league could imperil the league’s continued operation. H.R. Rep. No. 1178, 87th Cong., supra, at 2–3; S. Rep. No. 1087, 87th Cong., supra, at 1–3. Congress concluded that “the public interest in viewing professional league sports warrants some accommodation of antitrust principles...” H.R. Rep. No. 1178, supra, at 3; S. Rep. No. 1087, supra, at 3.

Analysis

The question that arises under the Sports Broadcasting Act with regard to the NFL-ESPN agreement (and other agreements between a sports league and someone presenting games to television viewers by means other than traditional over-the-air “free” television) is whether the agreement is for “sponsored telecasting” within the meaning of 15 U.S.C. § 1291. If what is involved is not “sponsored telecasting,” the Act’s antitrust exemption does not apply. Failure to come within the meaning of “sponsored telecasting” does not make an agreement illegal. That Congress was concerned that the agreement is subject to the antitrust laws, as is most commercial conduct.

In construing the term “sponsored telecasting,” which is not defined in the Act, we begin by recognizing the settled rule that exemptions to the antitrust laws are to be construed narrowly. 1/ The Supreme Court has, in construing a variety of statutory antitrust exemptions, recognized and applied the rule of construing such exemptions narrowly. See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (McCarran-Ferguson Act); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11–14 (1976) (Nonprofit Institutions Act); PMC v. Seatrain Lines, Inc., 411 U.S. 724, 733 (1973) (§ 15 of the Shipping Act); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956) (Miller-Tydings Act and McGuire Act).

3/ See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (“It is well settled that exemptions from the antitrust laws are to be narrowly construed... This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.”).
Our analysis is also aided by in general the legislative history of the Act and in particular two statements that, while not going into detail on the meaning of "sponsored telecasting," do give some indication as to what Congress intended. First, the House Report, noting that the exemption applies to the sale of rights in the sponsored telecasting of games, states: "The bill does not apply to closed circuit or subscription television." H.R. Rep. No. 1178, supra, at 5. Second, in an exchange between NFL Commissioner Rozelle and the chief counsel to the Antitrust Subcommittee of the House Judiciary Committee, Commissioner Rozelle was asked: "You understand, do you not, Mr. Rozelle, that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV?" Commissioner Rozelle responded: "Absolutely." Telecasting of Professional Sports Contests: Hearing Before the Antitrust Subcomm. of the House Judiciary Comm., 87th Cong., 1st Sess. 36 (1961). Our reading of these two statements in the legislative history is that Congress was, by using the term "sponsored telecasting," trying to distinguish between advertiser-supported programming (such as traditional over-the-air TV) that is in a sense "free" to viewers and viewer-supported programming (such as the closed circuit and subscription television that existed in 1961 and is referenced in the House Report).

ESPN does not fit neatly into this dichotomy. It is something of a hybrid, deriving a portion of its revenue from the sale of advertising and a portion from cable systems that reseal it and thus indirectly from the monthly basic cable fee paid by cable subscribers. 4/

Congress in 1961 could not of course have foreseen the changes that have occurred in technology and in the marketplace for delivering television programming. ESPN (as well as other cable program services) and other options available today for receiving programming were not then in existence. In view of the evolution of the industry, it is thus not surprising that the term "sponsored telecasting," even if clear in 1961, has some ambiguity as applied today.

While we believe there is some question as to whether programming such as ESPN's NFL games that is partly supported by advertisers and partly by viewers is "sponsored

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4/ While cable viewers do not pay a separate charge to receive ESPN, they cannot receive ESPN via cable without paying the cable operator's monthly fee for basic service.
telecasting. Our view is that it is not and thus does not come within the Act's exemption. This conclusion is consistent with Commissioner Rozelle's agreement with Subcommittee counsel in 1961 (quoted above) that the legislation covers "only the free telecasting" of games.

Our conclusion is also consistent with the settled rule that antitrust exemptions are to be construed narrowly. Where the evolution of an industry has rendered the wording of a statutory antitrust exemption ambiguous as applied to new situations, there are basically two approaches toward construing the exemption. First, the exemption can be construed narrowly, as covering only those situations that Congress clearly had in mind when it created the exemption. Second, the exemption can be construed more broadly by attempting to determine whether the Congress that created the exemption would have exempted the conduct in question had it been able to foresee the industry's evolution and thus consider that conduct. We believe that the narrow construction is both required by the Supreme Court cases cited above and preferable on policy grounds. Where Congress, through a statutory antitrust exemption, has created an exemption to that policy for certain practices of an industry, Congress can, if it sees fit to do so, update or expand the exemption that it created in order to meet new and unforeseen situations.

We emphasize again that a conclusion that certain conduct (such as the NFL-ESPN agreement) is not exempt from the antitrust laws does not make such conduct presumptively unlawful and means only that such conduct is subject to those laws. While we have concluded that the NFL-ESPN agreement is not exempt under the Sports Broadcasting Act, we have not found cause to investigate that agreement under the antitrust laws. The Antitrust Division's general standards for conducting a formal investigation require both that the facts presented appear to support a legal theory of an antitrust violation and that the investigation not duplicate other efforts, including those of the Federal Trade Commission. It is our understanding that the Federal Trade Commission has an investigation underway that is looking at the facts and circumstances surrounding the NFL-ESPN agreement. Based upon our review, we do not believe the facts warrant inquiry into competitive issues beyond those under consideration by the FTC.

5/ The question arises of how much advertiser support (or how little viewer support) is enough to satisfy the exemption. There seems to be no definitive answer.
I hope that this letter is responsive to your inquiry. Your interest in this matter and in the enforcement of the antitrust laws is greatly appreciated.

Sincerely,

Charles F. Rule
Assistant Attorney General
13 teams sold in '90s; 10 teams sold since 2000. Figures are “values,” defined as current stadium deal (unless new stadium is pending,) without deduction for debt and reported revenues. These figures should not be associated with a sale price. For example, the Boston Red Sox is listed to have a value of $533 million; in 2002 the team was purchased for approximately $720 million. Likewise, the average includes the Montreal Expos @ $145 million; a sale for the Washington Nationals (formally the Expos) is pending at $450 million.

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