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Professional Sports Leagues,
Antitrust, and the Single-Entity Theory:
A Defense of the Status Quo†

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INTRODUCTION

Professional sports are big business. Last year, Joan Kroc, the owner of the San Diego Padres baseball team, sold her club for $75 million.1 Three years ago, the Hartford Whalers Hockey Club, which plays in the National Hockey League’s smallest market, sold for $31 million.2 That same year, the State of Illinois voted a $60 million stadium subsidy to the Chicago White Sox baseball team, partly, no doubt, out of civic pride, but largely, it is thought, to avoid the loss of the estimated $100 million per year that the team contributes to the state and local economies.3 An average Major League Baseball player receives an annual salary of almost $500,000.4 The Columbia Broadcasting System (CBS) alone recently contracted to pay a

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1. N.Y. Times, Apr. 3, 1990, at B8, col. 2. The Padres entered the National League as an expansion team in 1969 and, with the exception of 1984, when they won the National League pennant, have had little success on the field. By contrast, the New York Yankees, the most successful franchise in the history of professional sports, are said to be worth well in excess of $250 million. Id.

2. N.Y. Times, June 29, 1988, at B10, col. 5.

3. See Verdi, Don’t Blame the Owners If White Sox Leave, Sporting News, June 27, 1988, at 12. The $60 million figure represented the amount of the initial bonding authority. Under the final bonding provision, the White Sox received $150 million. And the same legislature is currently debating whether to fund a new football stadium in Chicago for the National Football League’s Bears, a stadium whose estimated construction cost is at least $100 million. Wasson, Illinois, The Bond Buyer, Dec. 26, 1989, at 24.

4. In the past decade, the average salary of a player in the National Football League (NFL) has risen from about $80,000 to $300,000; that of a player in the National Basketball Association (NBA) from approximately $175,000 to $750,000; of a player in the National Hockey League (NHL) from around $90,000 to $220,000; and of a Major League baseball player from $143,750 to $497,254. At the start of the 1990 baseball season, six players—Kirby Puckett, Rickey Henderson, Mark Langston, Mark Davis, Robin Yount, and Joe Carter—had annual salaries of $3 million or more. When asked whether he was worth that much, Puckett replied, “I don’t know. But I know one thing: if they didn’t have it to give to you, you sure wouldn’t get it.” Los Angeles Times, Jan. 5, 1990, at P11, col. 1.

And the teams certainly have it to give. Over the past ten years, the revenues of professional sports teams have increased more rapidly than player salaries. From 1980 to 1990, Major League Baseball’s gross revenues went from about $350 million to $1.1 billion; the NFL’s from $415 million to $1.1 billion; the NBA’s from $110 million to $370 million; and the NHL’s from $100 million to $330 million. Id.
billion dollars to Major League Baseball and slightly more than that to the National Football League (NFL) for the rights to telecast certain games over the next four years.5

With the growth in the dollar value of professional sports franchises has come a commensurate increase in the number of lawsuits challenging certain business practices of the teams and the leagues as restraints of trade. Many of these lawsuits allege that the teams of the various professional sports leagues, by collectively adopting and implementing certain rules and regulations, have violated section 1 of the Sherman Antitrust Act.6 Players, for example, have attacked league rules that affect their mobility, such as the reserve clause and free agency, alleging that such rules wrongfully limit their salaries;7 aspiring players and others with whom the leagues have refused to deal have challenged the legality of the player draft and other league rules resulting in their exclusion;8 and owners of teams, would-be owners, and municipalities, eager to benefit from the presence of profes-

5. Asher, CBS Makes $1 Billion NFL Deal; A Four Year Package, Wash. Post, Mar. 9, 1990, at B1. Football and baseball are not the only beneficiaries of the television networks' largesse. The NBA has recently negotiated a four-year, $600 million television contract with the National Broadcasting Company (NBC), and the NHL has signed a three-year, $51 million pact with Sports Channel America. N.Y. Times, Nov. 23, 1989, at B1, col. 1.

These figures do not represent nearly the total amount paid by television networks for broadcast rights. For example, several other national networks (the American Broadcasting Company (ABC), NBC, Turner Network Television (TNT), and the Entertainment and Sports Programming Network (ESPN)) televise professional football, and the total value of the League's television contracts with all networks is more than $3.6 billion. N.Y. Times, Mar. 10, 1990, at A1, col. 1. ESPN also televises professional baseball, and many local networks televise the games of their hometown teams. The New York Yankees, for example, recently signed a $500 million, 12-year cable television contract with Madison Square Garden Network, a New York City broadcasting network. N.Y. Times, July 30, 1990, at B10, col. 1.


sional sports franchises, have challenged league decisions restricting franchise expansion and relocation.\(^9\)

The lawsuits spawned by the activities of the professional sports leagues have generated a lively debate in academic journals regarding the antitrust status of professional sports leagues. In particular, the debate focuses upon whether or not such leagues should be regarded as single entities for purposes of section 1 of the Sherman Act.\(^10\) The importance of the debate is clear. By prohibiting only those restraints of trade imposed by "combination, contract, or conspiracy," section 1 sets its focus clearly and exclusively on joint activity. Restraints of trade created by a single actor or a single firm are immune from its coverage.\(^11\) Therefore, if the member teams of a

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This is not, of course, to suggest that such restraints are completely immune from antitrust scrutiny. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988), provides in pertinent part that
professional sports league are regarded as a single entity for antitrust purposes, none of their joint decisions can be attacked under section 1, since the requisite plurality of actors will be absent. If, on the other hand, the member teams are viewed as separate entities, then their collective actions are properly subject to section 1 scrutiny.

In one sense, the debate over single-entity status seemed settled even before it began. Early courts that dealt with the legality of agreements between league members did not directly confront the single-entity defense but simply assumed that sports leagues were not single firms. Two later appeals courts that specifically dealt with the defense decisively rejected it. All of these cases, however, were decided before the opinion of the United States Supreme Court in Copperweld Corp. v. Independence Tube Corp., which overruled the intraenterprise conspiracy doctrine. Since the rationale

``[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.'' Section 2 is fully applicable to both unilateral and conspiratorial conduct. E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).


To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be adopted more for the protection of individual league members from competition than to help the league.

Id. at 1257.

The elimination of section 1 as a possible means of attacking league activity still leaves section 2 as an avenue of pursuit. See supra note 11. But challenges to league activities under section 2 have been infrequent and, for a variety of reasons, unsuccessful. See United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988); Seattle Totems Hockey Club v. National Hockey League, 783 F.2d 1347 (9th Cir.), cert. denied, 479 U.S. 932 (1986); Mid-South Grizzlies, 720 F.2d 772; American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963); San Francisco Seals, 379 F. Supp. 966.

Clearly, the single-entity defense would provide no protection, either to the league or to its member teams, for anticompetitive agreements made with firms outside the league.


But see San Francisco Seals, 379 F. Supp. 966, in which the court found, among other things, that the NHL is a single entity incapable of conspiring in violation of section 1 of the Sherman Act. This finding, however, was eroded, if not completely undermined, by the subsequent holding of the Ninth Circuit Court of Appeals that the National Football League is not a single entity. Los Angeles Memorial Coliseum, 726 F.2d 1381.


16. The intraenterprise conspiracy doctrine stood for the proposition that, for purposes of defining a "conspiracy" within the meaning of section 1 of the Sherman Act, intracorporate relationships, even close ones, were no bar to a determination that two related corporations
for the decisions specifically rejecting the defense seemed to some commentators to rely in part upon that doctrine,\(^\text{17}\) those commentators seized on the *Copperweld* decision as the basis for arguing that the appeals courts were wrong and that the applicability of the single-entity defense to professional sports leagues should be reconsidered.\(^\text{18}\)

The academic advocates of single-entity treatment all start from the same premise. First, they contend that a professional sports league is a unique business, containing an unusual but necessary mixture of interparticipant competition and cooperation not found in any other kind of partnership or joint venture. Second, they claim that the *Copperweld* decision requires that this uniqueness be recognized as a compelling reason for according a league single-entity status. Finally, they argue that treating a league as a single entity will advance "consumer welfare," the main purpose of the antitrust laws, and is therefore justified on broad policy grounds.\(^\text{19}\)

Curiously, the commentators conclude almost uniformly that the teams of a professional sports league should not be treated as a single entity all of the time. Even those commentators most strongly in favor of the single-entity defense concede that it should not apply to all of the conduct in which a league's member teams engage. For these commentators, it is proper, and even necessary, to regard a professional sports league as a single entity for certain purposes and as a plural entity for others.\(^\text{20}\)

Had conspiracies. Thus, in *United States v. Yellow Cab Company*, 332 U.S. 218, 227 (1947), the Court said "[t]he test of illegality under the Act is the presence or absence of unreasonable restraint on interstate commerce... [T]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." The Court repeated and reaffirmed this message in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, Inc., 340 U.S. 211 (1951).

17. *But see infra* text accompanying note 43.


And Professor Lazaroff, an avowed critic of the Roberts position and an early defender of the "separate entities" argument, seems to suggest that professional sports leagues might be deserving of special legislative treatment to help them surmount the hurdle posed by the inapplicability of the single-entity defense to those leagues. Lazaroff, *Antitrust Analysis, supra* note 10, at 984; Lazaroff, *Antitrust Implications, supra* note 10, at 216-20.

20. See Roberts, *Antitrust Status, supra* note 10, at 120 (the doctrine should apply only when "purely intraleague governance rules or decisions are being challenged"); Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rules of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 945, 983 (1988) [hereinafter Roberts, *Evolving Confusion*] (doctrine should be adapted to allow "league governance rules and practices" to be found lawful); Weistart, *supra* note 10, at 1061 ("some basic decisions" ought to be removed from antitrust scrutiny).
more curiously, over the past few years in particular, the debate about the single-entity defense has become increasingly one-sided, as both old and new critics of the defense have come to accept the propriety of its use in at least some circumstances. Advocates and opponents of the defense almost all agree on a mixed approach to sports leagues, in which the member teams are seen sometimes as single entities, incapable of violating section 1, and sometimes as separate firms, very much capable of violating that section.

This Article will argue that single-entity status is inappropriate and unnecessary for professional sports leagues. It will proffer that while professional sports leagues might initially appear to be significantly different from other joint ventures, the difference is functionally superficial and does not justify a fundamental departure from the antitrust rules applicable to other joint ventures. It will contend further that the Copperweld decision, so heavily relied upon by the advocates of single-entity status, does not support their argument, but refutes it instead. It will claim that the hybrid created by the commentators—the league that is at times a single entity and at other times a collection of separate actors—is neither a logical creation nor one that can be usefully defined. Finally, it will argue that the legal and economic logic of the Supreme Court's recent antitrust opinions strongly suggest that undiminished output is the best measure of consumer welfare under the Rule of Reason. When the Rule of Reason is applied to the governing rules and business decisions of professional sports leagues, it reveals that few of those rules and decisions serve to decrease the leagues' output, and therefore the single-entity treatment for those leagues is unnecessary to save them from antitrust condemnation.

I. FUNCTIONAL DIFFERENCE OF SPORTS LEAGUES AND OTHER TYPES OF JOINT VENTURES

One of the major premises of the advocates of the single-entity defense is that economic characteristics unique to professional sports leagues require that their member teams be regarded as one entity. There are, they argue,


Professor Goldman criticizes Roberts' arguments in favor of the single-entity defense but proposes nevertheless that multiple entities, such as the member teams of professional sports leagues, be treated as single entities if either "(1) a single entity has the right to exercise day-to-day control over all participants, or (2) the jointly created entity produces a new product and the co-venturers are acting on behalf of the joint entity without implicating any of their independent economic interests." Goldman, supra note 10, at 795-97. This is a novel and complicated proposal that would achieve substantially the same effect as the single-entity defense proposed by Roberts and that is difficult, if not impossible, to distinguish from the single-entity defense.
certain "fundamental facts" which distinguish such sports leagues from all other types of business firms in our economy and which compel unique antitrust treatment for "purely intraleague governance rules or decisions." This premise does not, however, withstand analytical scrutiny.

The NFL, the paradigm used by all of the commentators, seems to have many of the characteristics typical of joint ventures. It is comprised of twenty-eight independent, separately owned teams. Some of the clubs are corporations, some are partnerships, and some are sole proprietorships, but each is legally separate from the others. The clubs engage in some significant revenue sharing but do not share profits, losses, or capital expenditures. Each club is responsible for making its own managerial decisions, sometimes in direct competition with the others.

22. According to Professor Roberts, there are two such facts: "(1) that the product of a league cannot be produced by any one member team but rather is only produced by the complete integration and cooperation of each and every member of the league; and (2) that a league member team does not and cannot lawfully have any relevant independent productive function outside its existence as a wholly integrated member of the league." Roberts, Antitrust Status, supra note 10, at 120.

23. Id.

24. In North Am. Soccer League v. National Football League, 670 F.2d 1249, 1252 (2d Cir.), cert. denied, 459 U.S. 1074 (1982), the Second Circuit Court of Appeals characterized the NFL teams as "separate economic entities engaged in a joint venture," and in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387 (9th Cir.), cert. denied, 499 U.S. 990 (1984), the League contended that its structure was "akin to a partnership or joint venture."

25. The League was founded in 1920 under the name American Professional Football Association and adopted its current name in 1922. Its first championship game occurred in 1933, and the first player draft was held in 1935. From time to time, new leagues have been formed to compete with the NFL, most recently the United States Football League; but with the exception of the American Football League—founded in 1959 and joined by merger to the NFL in 1966 (see 15 U.S.C. § 1291 (1988), which, among other things, exempted that merger from the reach of the antitrust laws)—each of those other leagues failed. United States Football League v. National Football League, 842 F.2d 1335, 1343 (2d Cir. 1988).

26. The League itself is an unincorporated, not-for-profit, "association." It has a New York City office run by the Commissioner, and its primary functions include "scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations." Los Angeles Memorial Coliseum, 726 F.2d at 1389.

27. All of the clubs share equally the proceeds from the sale of pooled television rights. National Football League Constitution and Bylaws art. X, § 10.3 (1988) [hereinafter NFL Constitution]. They also share the gate receipts from league games but not equally: the home team receives 60% of the gross receipts after certain deductions. See id. art. XIX, § 19.1. Congress has granted the NFL an exemption from the antitrust laws for its pooled television rights. 15 U.S.C. § 1291 (1988).

28. North Am. Soccer League, 670 F.2d at 1252. Although circumstances—and in particular the size of television revenues—have changed significantly since 1977 and 1978, it is noteworthy that in 1978, 2 of the NFL teams lost money; and in 1977, 12 of the teams lost money. Id. at 1252. As late as 1952 there were NFL teams that declared bankruptcy, and NFL Commissioner Alvin R. "Pete" Rozelle once testified that "41 franchises failed in the first 41 years of the League's existence." United States Football League, 842 F.2d at 1343 (quoting Transcripts of Proceedings at 55, United States v. National Football League, No. 12808 (E.D. Pa. July 27, 1961)).

29. Los Angeles Memorial Coliseum, 726 F.2d at 1390.
Naturally, though, for the League to function smoothly the teams must cooperate on a multitude of matters. In some respects, the extent of this required cooperation is unusually broad. Among other things, procedural rules for administering the League must be announced; schedules of exhibition, regular-season, and playoff games must be established; rules must be created to govern the conduct of the games themselves; and a system of player allocation must be effectuated.

It is this apparently unique mixture of, and necessity for, competition on the playing field and administrative cooperation off it that, in the view of most commentators, distinguishes professional sports leagues from other joint ventures. For these commentators, the presence of extensive and

30. The relationship between the member teams is largely fixed by contract. The League's Constitution and Bylaws, a substantial document of 86 pages, sets out a detailed set of contractual obligations running between the teams and also between the teams and the league. NFL Constitution, supra note 27.

31. Since 1970, when the National and American Football Leagues merged, the League has been responsible for the national and international promotion of professional football, the granting of team franchises, the negotiation of network television contracts for broadcast rights to the games of the member teams, and the hiring of referees, in addition to the matters described above. North Am. Soccer League, 670 F.2d at 1251; Los Angeles Memorial Coliseum, 726 F.2d at 1389.

32. The system of player allocation for the NFL, for example, is embodied in the player draft, the "No-Tampering Rule," and the "Rozelle Rule."

Article XIV of the NFL Constitution and Bylaws ("Selection Meeting") provides for an annual draft of players who are eligible to play in the League and establishes a procedure for that draft that gives first priority in selection to the team with the worst record in the previous season and last priority to the team with the best record in the previous season, a procedure designed to strengthen the weaker teams and thus to maintain or improve competitive balance on the playing field. Smith v. Pro Football, Inc., 593 F.2d 1173, 1175-76 (D.C. Cir. 1978). Once drafted, a player is placed on the drafting team's reserve list. NFL Constitution, supra note 27, art. XIV, § 14.5.

Article IX, § 9.2 of the NFL Constitution, commonly known as the No-Tampering Rule, forbids a team from negotiating with or making an offer to a player who is on the active, reserve, or selection list of any other team.

Article XII, § 12.1 of the NFL Constitution, commonly known as the Rozelle Rule, has been described by the Eighth Circuit Court of Appeals as follows:

The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.


An extended discussion of the relationship between player restraints and antitrust law is beyond the scope of this Article, but it remains a very lively one, especially in light of the expiration of the latest collective bargaining agreement between the players and the clubs and the apparent decertification of the Players' Union as the players' exclusive bargaining agent. See Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987).

continuing cooperation in the midst of bitter rivalry and struggle makes professional sports leagues singularly unlike any other business and requires that they receive unique treatment under the antitrust laws.34 In a simple sense, of course, the commentators are correct. The NFL must relish the fact that football fans in the New York metropolitan area, for example, participate vicariously in the fierce on-field competition between the New York Giants and the New York Jets, yet neither team has any desire to put the other out of business. Every club, the courts have recognized, is keenly and directly interested in the economic well-being of every other club.35 Economic well-being depends in large measure upon the continued presence of healthy rivalry, not in name alone but in the form of close and well-contested football games. Only with such rivalry can the League attract and maintain the kind of enduring interest among consumers and sponsors that will make its business a profitable one. The creation and maintenance of that interest is, in turn, heavily dependent upon an approximate competitive balance on the field.36 The need to perpetuate relatively

Professor Roberts also argues that league sports are unique because no one team can produce even so much as a game without the agreement of another league team to act as its opponent. Roberts, Antitrust Status, supra note 10, at 131. This is true, of course, but only because the league members have chosen contractually to impose this requirement upon themselves and thus to produce league football games and not some other kind, such as intrasquad games or exhibitions not involving another league team. This "uniqueness" is not inherent to football games—as any fan of collegiate football knows, many of the most popular college teams do not belong to any league or conference—but is a format chosen by league members to make their product more attractive to consumers. The format certainly seems to be successful, but it is not the only format in which professional football games can be played and marketed.


35. North Am. Soccer League, 670 F.2d at 1253 ("[T]he economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damages to or losses by any league member can affect adversely the stability, success and operations of other members."); Smith, 593 F.2d at 1179 ("No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive."); United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953) ("If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league . . . would fail . . . ").

36. Neither the League nor any of its teams would welcome, for example, a situation where two of the teams became so consistently powerful that none of the others could beat them. Fans and television sponsors would presumably be uninterested in seeing or televising one-sided contests; and a league that was eventually reduced to only two teams (or three or four or six)—even incredibly good ones—would have much less consumer and sponsor appeal than a larger league that was competitively balanced. Such a fate actually befell the All America Conference, a league that competed with the NFL in the 1940s. So totally did the Cleveland Browns dominate the Conference that consumer interest quickly waned, not only among the fans of the teams that were losing to the Browns, but also among the Browns' fans as well. Once the Browns' dominance became apparent, attendance at their home games over a four-year period dropped from an average of about 65,600 spectators per game to about 20,000. Ahern, Note, The NFL's Final Victory Over Smith v. Pro Football, Inc.: Single Entity—Interleague Economic Analysis, 27 CLEV. ST. L. REV. 541, 556 n.87 (1978).
balanced competition on the field through explicit and ongoing cooperation off it thus appears to differentiate sports leagues from most other joint businesses, where the prosperity of one company is enhanced—not diminished—by the failure of its rivals.\textsuperscript{37}

In another, more important sense, though, the commentators are wrong to dwell on these apparently special characteristics of professional sports leagues. The seemingly odd mixture of competition and cooperation is not so peculiar as might first appear. All joint venturers cooperate with each other in order to make and sell their products. Such cooperation is the very essence of a joint venture. Professional sports teams are no different. What distinguishes them from other businesses in this regard is that their product is a season's worth—many seasons' worth—of rivalry and meaningful competition, competition that will generate and sustain fan loyalties, television viewers, and commercial sponsors for years and years.\textsuperscript{38} But even the most natural rivalries and the most intense fan interest will fade if one team consistently dominates the others. Therefore, in order to make a product whose attractiveness to consumers will endure, the teams—like any other efficient joint venture—need to establish and implement mechanisms designed to promote quality control. In this business, the quality control—and the cooperation that it entails—is intended to assure a high degree of on-field competitive balance,\textsuperscript{39} because in professional sports the greater such balance the higher the quality of the product.

The cooperation that is so startling to many of the commentators thus seems to be no more, and no less, than a continuing form of quality control.\textsuperscript{40} Cooperating to produce competition seems no different function-

\textsuperscript{37.} The proposition that the financial success of the member teams of a professional sports league requires that they be approximate equals on the playing field has not been seriously debated, either by legal scholars critical of league practices, Weistart, \textit{supra} note 10, at 1018 n.17, or by economists who have examined the business characteristics of professional sports leagues, \textit{see} H. DEMMERT, \textit{THE ECONOMICS OF PROFESSIONAL TEAM SPORTS} 10 (1973); J. MARKHAM & P. TEPLITZ, \textit{BASEBALL ECONOMICS AND PUBLIC POLICY} 19-20 (1981); Neale, \textit{The Peculiar Economics of Professional Sports}, 78 Q.J. Econ. 1, 3 (1964).

\textsuperscript{38.} What is intuitive to most sports fans in this regard is also statistically true. Thus, according to Demmert, a game pitting one good team against another will sell more tickets than a game in which a weak team plays either a good team or another weak one. H. DEMMERT, \textit{supra} note 37, at 11.

\textsuperscript{39.} Since the competitive ability of any particular team is largely a function of the abilities of its players, and since the NFL, for example, has not yet placed any limit on player salaries, its rules regarding revenue sharing and restrictions on player movement are arguably necessary to prevent teams with wealthier owners or in larger markets from buying up all of the best player talent and thus distorting the league's competitive balance. Limits on the number of players that a team may have on its roster at any one time arguably serve the same goal.

\textsuperscript{40.} The Second Circuit Court of Appeals has described the business of the NFL as "providing public entertainment in the form of competitive football games." \textit{North Am. Soccer League}, 670 F.2d at 1251 (emphasis added). In a league whose teams operate in different markets and are owned and managed by people of differing degrees of wealth and talent, it should come as no surprise that extensive cooperation among league members is necessary to maintain the quality level—the competitive nature—of the league's product.
ally from cooperating to produce an automobile. The products are different, of course, but their respective methods of production appear strikingly similar. There is, consequently, no reason to regard professional sports leagues as economically unique or to accord them antitrust treatment different from that given to other joint ventures.\textsuperscript{41}

II. THE SCOPE OF \textit{Copperweld}: SINGLE-ENTITY TREATMENT FOR PROFESSIONAL SPORTS LEAGUES AND JOINT VENTURES

Even assuming for argument's sake that professional sports leagues are unique in some economically significant way, it does not follow that this uniqueness should form the basis for single-entity treatment under \textit{Copperweld Corp. v. Independence Tube Corp.}\textsuperscript{42} The opinion in \textit{Copperweld} does not make single entities of joint ventures, even arguably unique ones. Rather, \textit{Copperweld} stands for the simple proposition that corporations and their wholly owned subsidiaries, and only such firms, constitute one entity for antitrust purposes.

Neither the Supreme Court nor any of the appellate courts that have applied \textit{Copperweld} has extended its holding to joint ventures. Nevertheless, the advocates of the single-entity defense contend vigorously that the holding of \textit{Copperweld} should be extended beyond its specific and logical boundaries to encompass unique joint ventures, such as professional sports leagues. This contention has no doctrinal support, either in \textit{Copperweld} itself or in any of its appellate court progeny.\textsuperscript{43}

\textsuperscript{41} The "fundamental facts" cited by Professor Roberts in support of his argument for special treatment, \textit{supra} note 22, refer in part to the integration and cooperation discussed above. Professor Roberts also claims that the leagues are unique because no league member has or can have an independent productive function outside of its league membership. Roberts, \textit{Antitrust Status}, \textit{supra} note 10, at 120. This claim seems tautological: the reason that league members can produce nothing independently is that they have bound themselves contractually not to do so, not because it is inherently impossible. If they were not bound contractually in that manner, league members could theoretically conduct intrasquad exhibition games or games against teams that were not league members. Moreover, twenty or thirty years ago (before the cost of a franchise became prohibitive even for wealthy people) it would have perhaps been possible for a very wealthy entity to buy all of the teams in the league, staff them with players, coaches, and administrators, and run the league as a single firm. That this theoretical possibility did not actually occur probably owes more to the quality notions discussed above than it does to the impossibility argument of Roberts: the competitive vigor of a league run by one firm—even a league with many evenly balanced teams—would probably seem suspect to consumers. The present structure of professional football, however, is not the only legally permissible or economically viable one. It may be the best structure (though even that is only conjectural), but its adoption on the part of the team owners was never obligatory in any sense.

\textsuperscript{42} \textit{467} U.S. 752 (1984).

\textsuperscript{43} Nor, for that matter, does it find support in the appellate court antecedents of \textit{Copperweld}. The basic premise for reviving the single-entity argument, it will be recalled, is that the two appeals court decisions explicitly rejecting it had relied in significant part upon the intraenterprise doctrine later overruled in \textit{Copperweld}. See Roberts, \textit{Single Entity Status},
The issue before the Supreme Court in *Copperweld* was a narrow one. Independence Tube Corporation, a newly founded company, sued Copperweld and Regal, the wholly owned subsidiary, alleging, among other things, that they had conspired to harm Independence's business in violation of section 1 of the Sherman Act. The jury found for Independence on the Sherman Act claim. The defendants appealed, arguing that they were in effect one entity and that the intraenterprise conspiracy doctrine should be re-examined and repealed. After the Seventh Circuit Court of Appeals affirmed the jury verdict, the Supreme Court granted certiorari to determine "whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under section 1 of the Sherman Act."46

The answer to that issue was equally narrow. A parent corporation and its wholly owned subsidiary share a complete unity of interest, said the Court.47 The parent's exercise of decisional dominion over its exclusive property could not deprive the marketplace of any of the "independent centers of decisionmaking that competition assumes and demands," nor could the obedience of the wholly owned subsidiary, because it is both practically and legally obligated to obey the parent.49 To regard concerted activity between those kinds of firms as containing any potential for reducing competition would thus be to assume a view of the parent-subsidiary relationship that lacks any factual or theoretical support. For these reasons, the Court held that a parent and its wholly owned subsidiary are legally incapable of conspiring within the meaning of section 1.50

The importance of the *Copperweld* decision lies as much in what the Court excluded from its consideration as in what it included. In the first place, the Court specifically limited its inquiry to the relationship between a parent corporation and its wholly owned subsidiary and expressly refused to consider "under what circumstances, if any, a parent may be liable for

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supra note 10, at 586-90. But the commentators were wrong to find such reliance, at least in the opinion of the Ninth Circuit in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984). The court there evaluated the activity of the League and its members by reference to the Ninth Circuit's well-established exception to the intraenterprise conspiracy doctrine, an exception which provided in effect that concerted activity would not be found among "multiple corporations operated as a single entity' when 'corporate policies are set by one individual or by a parent corporation'"—a position that anticipated the *Copperweld* holding. *Id.* at 1388 (quoting General Business Systems v. North Am. Philips Corp., 699 F.2d 965, 980 (9th Cir. 1983)). The court, however, then found that the NFL and its member teams did not fit within that exception. *Id.*

45. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982).
47. *Id.* at 771-72.
48. *Id.* at 769.
49. *Id.* at 771.
50. *Id.* at 777.
conspiring with an affiliated corporation it does not completely own.” It implicitly refused to consider all other forms of business relationships and corporate arrangements and, in particular, made no mention whatsoever of joint ventures. In the second place, the Court was concerned only with the financial relationship between a parent corporation and its subsidiary. It displayed no interest in the nature of the businesses in which they were engaged. The specifics of Copperweld’s business were not discussed in any way, nor was there even the slightest suggestion that the applicability of the single-entity defense hinged on the type of products made by Copperweld and Regal or on the degree of their relative integration. All that impressed the Court was the ownership interest between those companies.

Copperweld thus provides no support whatsoever to the advocates of single-entity treatment for professional sports leagues. Its analysis focused entirely on financial ownership and control and ignored the so-called functional questions thought by those advocates to be so critical. Its inquiry was expressly limited to one form of business relationship, all others being specifically excluded from consideration. Its language does not intimate, even obliquely, that special treatment might somehow be in order for functionally unique joint ventures.

Since Copperweld, almost all of the case law implicating the single-entity issue has dealt with commonly owned corporations, rather than with partnerships or joint ventures, and has reaffirmed the principle that single-entity status is appropriate only when the companies share a complete unity of interest and purpose, or when one firm exercises complete control over the other. In those cases where either the requisite unity of ownership interest or totality of control was found lacking, the post-Copperweld courts almost unanimously declined to grant the alleged conspirators single-entity status. Significantly, in none of the cases did the courts examine the nature

51. Id. at 767.
52. See, e.g., Century Oil Tool, Inc. v. Production Specialties, 737 F.2d 1316 (5th Cir. 1984) (commonly owned firms have complete unity of purpose); Hood v. Tenneco Texas Life Ins., 739 F.2d 1012 (5th Cir. 1984) (wholly owned subsidiaries and parent have a common purpose); H.R.M. Inc. v. Tele-Communications, 653 F. Supp. 645 (D. Colo. 1987) (parent and two subsidiaries all share complete unity of interest); Gucci v. Gucci Shops, Inc., 651 F. Supp. 194 (S.D.N.Y. 1986) (commonly owned corporations have a unity of purpose); Ford Motor Co. v. Lyons, 405 N.W.2d 354 (Wis. Ct. App. 1987) (parent and wholly owned subsidiary cannot conspire); see also, Directory Sales Management Corp. v. Ohio Bell Tel., 833 F.2d 606 (6th Cir. 1987) (wholly owned subsidiaries are not separate entities); Satellite Fin. Planning Corp. v. First Nat’l Bank, 643 F. Supp. 449 (D. Del. 1986) (parent and wholly owned subsidiaries are not separate entities); Hudson’s Bay Co. v. American Legend Coop., 651 F. Supp. 819 (D.N.J. 1986) (section I prohibition only applies to conduct of two or more entities).
54. See, e.g., Bhan v. NME Hospitals, 1987-2 Trade Cas. (CCH) ¶ 67,790 (E.D. Cal.
of the business in which the alleged conspirators were engaged when those courts decided the single-entity issue.

None of the post-\textit{Copperweld} cases has considered directly the single-entity status of professional sports leagues.\textsuperscript{55} There have been, however, some cases involving the single-entity status of other types of joint ventures. The most significant of these cases clearly rejected the single-entity defense. In \textit{Rothery Storage \& Van Co. v. Atlas Van Lines},\textsuperscript{56} plaintiff alleged that

\begin{quote}
1987) (no complete unity of interest between hospital and contract anesthesiologists), aff'd, 929 F.2d 1404 (9th Cir. 1991); \textit{Aspen Title \& Escrow v. Jeld-Wen, Inc.}, 677 F. Supp. 1477 (D. Or. 1987) (dismissal of claim inappropriate where subsidiaries not wholly owned); \textit{Sonitrol of Fresno, Inc. v. AT&T}, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. 1986) (less than wholly owned subsidiaries are separate actors because complete control and unity of interest are lacking). But cf. \textit{City of Mount Pleasant v. Associated Elec. Cooper.}, 838 F.2d 268 (8th Cir. 1988) (related companies are single entity despite lack of complete unity of interest).
\end{quote}

\textsuperscript{55} The NFL specifically sought to avail itself of the single-entity defense in cases decided by two different appeals courts in the early 1980s. \textit{See supra} text accompanying note 14.

In the first of those cases, \textit{North Am. Soccer League v. National Football League}, 670 F.2d 1249 (2d Cir.), \textit{cert. denied}, 459 U.S. 1074 (1982), a professional soccer league complained that section 1 of the Sherman Act was violated by the NFL's prohibition of cross-ownership, a ban that prevents league members from owning a team in another professional sports league. The NFL argued that it was shielded from the reach of section 1 by virtue of its status as a single entity, an argument that the Second Circuit unequivocally rejected. Relying for the most part on a large group of intraenterprise conspiracy and sports restraint cases, the court stated that the Supreme Court had consistently denied exemption from section 1 of the Sherman Act to joint ventures and that according single-entity status to the league would immunize its activities from antitrust scrutiny even when the net effect of those activities was anticompetitive. \textit{Id.} at 1257.

\textit{Copperweld} does not seem to have changed the view of the Second Circuit on this matter. In a recent case not dealing directly with the single-entity defense, the court stated:

\begin{quote}
[S]ports leagues raise numerous difficult antitrust questions involving horizontal restraints and group boycotts. The very concept of a league involving separate business entities (teams) requires concerted behavior among them and the exclusion of outsiders. Even the drawing up of a schedule requires that horizontal competitors (teams) conform to jointly made decisions and necessarily excludes others.
\end{quote}


In \textit{Los Angeles Memorial Coliseum}, 726 F.2d 1381, the Coliseum and the Oakland Raiders challenged the legality of rule 4.3 of the League's Constitution and Bylaws, which forbids any league member from relocating the site of its home games without the prior approval of at least three-fourths of the existing member teams. The League again raised the single-entity claim as a defense to the alleged violation of section 1, and the Ninth Circuit, like the Second, completely rejected it. The Ninth Circuit based its rejection of the defense on three separate arguments. First, it cited the precedent created by earlier cases finding that other League rules, such as the draft, the cross-ownership ban, and the so-called "Rozelle Rule," all violated section 1. Second, it found the League's argument inconsistent with Supreme Court pronouncements on the single-entity doctrine. Finally, it found for a variety of reasons that the League could not satisfy the Ninth Circuit's exception to the intraenterprise conspiracy doctrine. Among the reasons were that league policies were set not by a parent company but by the member teams acting jointly; neither profit nor loss was shared between the teams; and the need for substantial cooperation could not suffice to exclude otherwise independent concerns from section 1 scrutiny. \textit{Id.} at 1388-89.

\textit{See also} Association of Indep. Television Stations v. College Football Ass'n, 637 F. Supp. 1289, 1299 n.8 (W.D. Okla. 1986) (College Football Association denied summary judgment on its claim of single-entity defense).

Atlas, a national moving company, and its affiliated independent moving companies had collectively adopted a policy that constituted a "group boycott" in violation of section 1 of the Sherman Act. Before deciding the substantive boycott question, the court unequivocally rejected Atlas's argument that the single-entity defense should completely protect it and its joint venturers from any antitrust claim predicated on section 1. The Atlas policy challenged by Rothery, wrote Judge Bork, was placed into effect by "legally separate corporations," each of whom was "an actual or potential competitor" of Atlas. Moreover, "all but two members of the [Atlas] Board [of Directors] represented separate legal entities that competed in interstate commerce." For these reasons, Atlas and its affiliated companies were not entitled to avail themselves of the single-entity defense.

Professional sports leagues are functionally indistinguishable from the moving company joint venture examined in Rothery. Like the moving companies, the member teams of a sports league are "legally separate" from each other, and like those companies, they are "actual or potential competitors." The Rothery court suggested no other factor as significant to the resolution of the single-entity question. Consequently, for reasons similar to those announced in Rothery, it seems very probable that other post-Copperweld courts would refuse to permit the member teams of a professional sports league to use the single-entity defense.

57. Id. at 214.
58. Id. at 214-15. Of course, the finding that Atlas and its affiliates were separate firms for purposes of section 1 did not end the antitrust inquiry; it began it. Having found a plurality of actors to exist, Judge Bork then proceeded to apply the Rule of Reason to the alleged boycott, deciding that the practice was competitively reasonable. Id. at 229. In the process, Judge Bork noted, significantly from the perspective of the arguments made in this Article, that "[i]t is also a boycott if the Ivy League refuses to admit a new college to membership or the American League refuses to admit a baseball team." Id. at 215 n.1. It is not necessarily an unlawful boycott or a commercially unreasonable one, but a boycott nonetheless, because these two groups of joint venturers, consisting as they do of "legally separate corporations" and "actual or potential competitors," are not single entities within the meaning of section 1.

59. The Ninth Circuit specifically found that the member teams of the NFL did, and could, compete with each other in a number of significant ways. Los Angeles Memorial Coliseum, 726 F.2d at 1390.
60. Since Copperweld, a number of federal courts have treated professional sports leagues as if they were groupings of separate teams capable of conspiring within the meaning of section 1. In Powell v. National Football League, 888 F.2d 559 (8th Cir. 1988), cert. denied, 111 S. Ct. 711 (1991), and in Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987), cases dealing with the relationship between the nonstatutory labor exemption for certain collective bargaining activity and team antitrust liability for restraints in the market for player services, both courts clearly suggested that in the absence of labor law immunity, section 1 of the Sherman Act could apply to league restraints on the labor market.

A fuller discussion of the nonstatutory labor exemption is beyond the scope of this Article. For additional cases describing and analyzing it, however, see Connell Constr. Co. v. Plumbers Local Union No. 189 & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975); Amalgated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676,
Viewed then as joint ventures, even as "unusual" joint ventures, professional sports leagues and their member teams fail to satisfy either the *Copperweld* test or the most relevant post-*Copperweld* test for single-entity treatment. Since each of the teams is financially, legally, and managerially distinct from all of the others, the complete unity of interest and control required by *Copperweld* is lacking. Since the teams are truly separate legal entities who do compete with each other in a number of important ways, the *Rothery* test is not satisfied either. Neither *Copperweld* nor any of its progeny, therefore, seems to provide an appropriate basis for challenging the conclusions reached by the Second and Ninth Circuits in the earlier cases dealing with the applicability of the single-entity defense to professional sports leagues.61

Some of the legal commentators, however, think otherwise. For them, *Copperweld* unraveled the rationales of the earlier sports league cases and represented the major building block for the single-entity argument. Professor Roberts is one of these commentators.62 Roberts argues that *Copperweld* implicitly provides three bases for treating a professional sports league as a single entity. The message of *Copperweld*, he contends, is that the determination of single-entity status for a professional sports league should hinge not on whether the clubs "are separately organized, separately owned, or maintain separate accounting for profit and loss" but rather on "the inherent economic realities of the intraorganizational relationship" between and among them.63 For Roberts, matters of ownership, organization, and accounting are all questions of "organizational choice," apparently optional decisions that could easily be manipulated to satisfy the current antitrust rules. In his view, the economic realities that should dictate the resolution of the single-entity question are clear: since "[n]o single team is capable of producing anything of value, ... the league ... is the lowest form of ... entity capable of producing and marketing the league product";64 and because the league, logically enough, is the only entity able to produce league football, we should regard its members as having the same unity of interest and control as are possessed by a parent corporation and its wholly owned subsidiary.


61. See supra text accompanying note 55.
62. This Article focuses largely on the work of Professor Roberts because his scholarship is the most extensive, see supra note 10, and the most articulate and authoritative of the recent academic discussions of the single-entity issue.
64. Id.
65. Id. at 589.
Professor Roberts argues first that *Copperweld* takes a functional, production-based approach to the single-entity issue, and not the structural approach described above. The *Copperweld* Court, however, did not adopt the approach attributed to it by Professor Roberts. In fact the Court paid no attention whatsoever to the "economic realities" of the relationship between Copperweld and its subsidiary. For the Court, the critical fact was surely Copperweld's complete ownership of its subsidiary. Ownership had critical functional relevance to the question of conspiracy: because Copperweld owned Regal, it could lawfully dictate—was required to dictate—Regal's policies and actions. Regal also could do nothing of which Copperweld disapproved. Thus, treating Copperweld and Regal as two entities would be tantamount to treating the same individual as two separate beings, while treating them as one not only seemed logical but also could result in no loss of independent decisionmaking.

Roberts' second point about *Copperweld*, that the league is the only form capable of producing anything of value, also seems questionable. It seems clear that a firm such as Copperweld—about to acquire an independent company and faced with the decision whether to organize its purchase as a wholly owned subsidiary or as a division of the parent—has certain organizational choices available to it. It seems equally clear that the Supreme Court was correct in deciding that whether Copperweld absorbed its new purchase or allowed it to stand free should not be the dispositive factor in answering the single-entity question. If Regal lacked functional independence—as it surely did—separate corporate status would not confer any on it. But Copperweld had real choices that are not even remotely available to the NFL.

Although organizing the NFL as one corporation with twenty-eight wholly owned subsidiaries when the league was formed in 1920 might have been theoretically possible, though highly unlikely, the prospect of undoing the present ownership structures of the teams and replacing them with a parent-subsidiary model or some other form seems impossible now. The independent team owners, though they have over the years ceded a good deal of their autonomy to the league and the Commissioner, have nevertheless

66. Professor Roberts acknowledges this but argues that the "essence" of *Copperweld* is to regard a joint venture as a single-entity unless "the integration of its subunits brings together inherently independent sources of 'economic power that [were] previously pursuing divergent goals.'" *Id.* at 588 (quoting *Copperweld*, 467 U.S. at 769). This statement is itself difficult to parse: first, on the level of meaning (what is an "inherently independent" source of economic power? what is a "divergent" goal?); and second, on the level of rationality (if we knew what constituted a "divergent" goal, what would we do about joint venturers who had previously been pursuing a variety of goals, some divergent and some not?).

67. The NFL Constitution and Bylaws, for example, imposes numerous restrictions on the owners of the member teams. To recite but a few, player contracts must be executed on a standard form adopted by the League, NFL Constitution, *supra* note 27, art. XV, § 15.1; the
retained a large share of it. Additionally, though no data exist showing the attitudes of the team owners to the idea of corporate reorganization, it seems intuitively unlikely that the prospect of relinquishing independent ownership and merging their various legal structures would strike them as being a true "organizational choice."

The third prong of Roberts' argument about the implications of Copperweld for professional sports leagues is based upon three related ideas. The first is that Copperweld, despite all of its language to the contrary, is not concerned with ownership or organization, but is focused instead on examining the "economic realities" of the corporate relationships in question and, in particular, on seeking out the smallest economic unit capable of producing something of value. The second is that that unit, no matter how many separately owned corporate subunits it might contain, should be treated as a single-entity for section 1 purposes. The third is that the league is the smallest unit capable of producing league football.

Let us ignore for a moment the tautology that the league is the smallest entity capable of producing league football. Let us assume as well that league football is the only kind of professional football attractive to consumers and that professional league football is a separate product unto itself. In order to agree with Roberts' reading of Copperweld, one must

Commissioner must approve any amendments to the form, id.; and the League has the power to review any team decision affecting players or team operations if that decision is arguably "detrimental to professional football," id. art. VIII, §§ 8.6, 8.13, 8.14, art. XV, § 15.4, a power analogous to that of the Commissioner of Major League Baseball. See Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir.) (Commissioner has power to prevent sale of players), cert. denied, 439 U.S. 876 (1978).


70. This assumption is not necessarily acceptable to all commentators. Professor Lazaroff, for example, has argued forcefully that while the game of football certainly requires two teams for its production it need not be produced inevitably in league format and is capable of being marketed in the form of exhibition games, either regularly scheduled or as part of a barnstorming tour. Lazaroff, Antitrust Analysis, supra note 10, at 958-60. And according to Goldman, the truth of this proposition is borne out not only by history—before there was a NFL, for example, there were independent teams playing schedules of their own devising against other such teams—but also by the continuing example of the Harlem Globetrotters, who for years have profitably played exhibition games against an opponent selected and paid by the Globetrotter organization. Goldman, supra note 10, at 771.

71. There has been a lively academic debate on this topic as well. See Glick, supra note 10, at 77-78; Lazaroff, Antitrust Analysis, supra note 10, at 975; Roberts, Evolving Confusion, supra note 20, at 1013; Roberts, Single Entity Status, supra note 10, at 564 n.8.
find in that opinion some indication that the smallest entity capable of producing a desirable product is immune from section 1 coverage—even when the subunits of that entity are separately owned, separately incorporated, and active competitors in some areas directly pertinent to the production of the joint product. There is, however, no such indication.

We have already examined *Copperweld's* focus on common ownership and control,72 arguing that those two factors were central to the Court's holding. For the *Copperweld* Court, complete common ownership and control meant that two nominally separate firms could be treated as one. Because real competition between parent and wholly owned subsidiary is not a practical possibility, no competition would be lost by treating the two firms as a single entity. Treating a grouping of true competitors as a single entity has an obviously different impact, however, on the competition quotient. Courts that have examined the workings of the NFL, for example, have found that its member teams compete in a variety of meaningful ways.73 According single-entity treatment to those teams would potentially reduce or eliminate that competition and make future competition less likely. This prospect, however, runs directly counter to the rationale behind *Copperweld*.

There seem to be two logical fallacies in this aspect of Roberts' treatment of *Copperweld*. On the one hand, Roberts agrees with part of the rationale behind *Copperweld*: he considers single-entity treatment to be appropriate only when it would not result in a lessening of real competition.74 On the other hand, he seems to believe that competition can never be lessened, in any way, by the creation of a joint venture among the smallest group of firms capable of producing a particular product. It is not at all clear, though, why the members of that group should be regarded as being incapable of competing with each other as a matter of law when it has already been judicially recognized that they are economic competitors as a matter of fact.

III. THE WISDOM OF SINGLE-ENTITY TREATMENT FOR PROFESSIONAL SPORTS LEAGUES

*Copperweld* is definitive in its antitrust treatment of the relationship between a parent company and its wholly owned subsidiary. The two

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72. See *supra* notes 43-50 and accompanying text.
73. See *supra* note 29 and accompanying text.
corporations are one for antitrust purposes, all of the time and for all relevant antitrust purposes. The opinion does not even consider the possibility that a group of related firms might be a single entity at certain times and a combination of separate entities at others. Professors Roberts and Weistart, however, take the position that the member teams of a sports league should be viewed as a single entity when they engage in particular activities related to the business of the league but not when they engage in activities unrelated to "league governance rules and practices." 75 This position is both analytically and logically unsatisfying.

In particular, Professor Roberts argues in his latest article that courts should adopt the single-entity defense, or one of its doctrinal analogues, in order "to allow leagues to win on dispositive pretrial motion when only purely intraleague governance rules or decisions are being challenged." 76 Professor Roberts does not distinguish either in that article or elsewhere between those rules and decisions that concern "purely intraleague governance" and those that do not; nor, for that matter, does he ever define the term "governance." 77

Professor Roberts' contention that a league of professional sports teams can and should be viewed as one entity sometimes and as a group of entities at others is both confusing and impractical. If a league and its member teams are one entity, then logic would seem to indicate that they would be one entity all of the time and not just for some of it. If, as Roberts suggests, the league is a single entity when it discusses "purely intraleague"
matters but not when it discusses other things, then the nature of the league would change as the particular topic under discussion shifted and not because any fundamental change had occurred in the league structure. Nowhere else in law does the nature of an entity depend upon the particular subject matter that it happens to be considering but not upon its form or its general function.

Moreover, it is very difficult to craft a workable definition of "purely intraleague governance." Perhaps at the extremes, it is not too hard to separate "purely intraleague" matters from those affecting "outside" interests. The collective adoption by the league members of the rules governing the play of a football game, for example, might properly be considered a "purely intraleague" matter. A rule preventing an agreement among those team owners with interests in the oil business to raise the pump price of their high octane fuel might properly be considered a "purely external" one. As the rule under discussion, however, moves from one of those extremes toward the middle of the analytical spectrum, it becomes increasingly difficult to catalogue.

The NFL Constitution and Bylaws contain several rules that forbid league members from engaging in certain activities that appear not to be purely internal to the league. For example, no member team may own any financial interest in any minor league football club, a prohibition which clearly restricts the total amount of professional football available to consumers without directly touching on the operation of the league itself. A separate section prevents any new team from entering the league without the affirmative approval of three-fourths of the existing membership. This section has an undeniable impact on the league itself, but it also has the obvious potential to affect would-be owners, residents, and businesses in the cities represented by those would-be owners and consumers in those cities and elsewhere who would presumably like to see more professional football. Finally, the NFL Constitution contains a set of so-called "Television Restrictions" which limit the areas into which the member teams may broadcast their games and require that all television income, regardless of source, be divided equally among all member teams. Again, while it is

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78. NFL Constitution, supra note 27, art. XI.
79. For example, Lamar Hunt, owner of the Kansas City Chiefs, and Leon Hess, owner of the New York Jets, have substantial interests in the oil business.
80. NFL Constitution, supra note 27, art. IX, § 15.
81. Id. § 3.3(C). This approval may apparently be denied or withheld for any reason whatever.
82. The listing in this paragraph of rules that might arguably affect matters that are not "purely intraleague" in nature is by no means exhaustive but is demonstrative only.
83. NFL Constitution, supra note 27, art. X, provides in pertinent part as follows:
clear that restrictions on television income indirectly serve to maintain competitive balance on the playing field, it also seems clear that they create bureaucratic and financial disincentives to the broadcasting of professional games, implicate many other businesses, and probably result in fewer televised games than consumers desire, all of which tends to indicate that those restrictions affect more than "purely intraleague" matters.\footnote{It seems no less difficult to define "governance." For example, the NFL's Constitution and Bylaws might be viewed as the League's own description of "governance" questions. However, it is not clear either from the Constitution itself or from any other source that that document is meant to encompass all such questions. Nor is it clear that the League's own definition of those questions is the only appropriate one or that it ought to be generally adopted.}

On the one hand, if these restrictions, and others, encompass matters that are deemed to be clearly outside the bounds of the "purely intraleague," then Roberts' proposal for single-entity treatment would apply to a very limited set of rules and decisions, so limited as to make his proposal impractical. On the other hand, if these restrictions are regarded as not clearly outside those bounds, then Roberts' proposal would require a court to establish criteria for determining when a particular rule is "purely intraleague" in nature, to apply those criteria in a preliminary hearing of some sort in which the characteristics and effect of the rule or decision would be at issue, and to spend the very time and energy deciding these matters that Roberts seeks to save through the application of the single-entity defense. Roberts' proposal is thus useful only if the nature of the league's rules and decisions is clear. Since the nature of those rules and decisions is at best ambiguous, and since efforts to define or classify them would require the same expenditure of judicial time and effort that Professor Roberts wishes to save, the proposal for allowing the single-entity defense for challenges to matters of "purely intraleague governance" appears unworkable.

\footnote{Television Restrictions}

10.2 (a) No club shall cause or permit a game in which it is engaged to be telecast into any area included within the home territory of any other club on the day that such other club is engaged in player [sic] a game at home. (b) No telecast of a home game within the home territory of a club shall be caused or permitted, except by agreement between the participating clubs. (c) Each home club grants to the visiting club the exclusive right to permit or license the telecast of the game being played between them back to the home territory of the visiting club . . . .

\footnote{Television Income}

10.3 All regular season (and pre-season network) television income will be divided equally among all member clubs of the League regardless of the source of such income, except that the member clubs may, by unanimous agreement [sic], provide otherwise in a specific television contract or contracts.
IV. THE NEW TOUCHSTONES FOR LEGALITY UNDER THE RULE OF REASON: "CONSUMER WELFARE" AND "UNDIMINISHED OUTPUT"

Over the past fifteen years, the United States Supreme Court has undertaken to answer most, if not all, of the crucial questions in antitrust jurisprudence by applying to those questions a method of analysis that makes substantial use of the teachings of neoclassical economics. This approach has been the subject of much comment and criticism, particularly from scholars who believe that the antitrust laws were designed at least as

85. Prior to this time, two more or less distinct approaches had evolved to determine whether a challenged business practice constituted an unreasonable restraint of trade: the Rule of Reason and the per se approach. Recent Supreme Court rulings have blurred the functional differences between these approaches, but it is necessary, nevertheless, to discuss them, at least briefly, in order to place in context the arguments set forth in the remainder of this Article.

The Supreme Court has defined as per se violations of the Sherman Act certain types of business conduct so inherently and regularly destructive of competition that they almost invariably result in unreasonable restraints of trade. The per se definition, however, is reserved for "manifestly anticompetitive" practices, Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49-50 (1977), a term that has been judged to embrace price fixing, tying arrangements, horizontal group boycotts, and territorial divisions of markets. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). And the Court has been reluctant to expand the coverage of that definition, declaring that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations." United States v. Topco Ass'n, 405 U.S. 596, 607-08 (1972). The Court has even cautioned against an "unthinking application" of the per se rule:

[E]asy labels do not always supply ready answers. . . . Literalness is overly simplistic and often overbroad. . . . [I]t is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be an easy matter.


The Rule of Reason is the method typically used to judge business conduct allegedly in violation of the Sherman Act. This method focuses "directly on the challenged restraint's impact on competitive conditions," National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978); and requires the finder of fact to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., 433 U.S. at 49. The application of this test requires that the plaintiff first show that the challenged conduct has an anticompetitive effect on the relevant market; if the plaintiff makes such a showing, the burden then shifts to the defendant to justify its acts and to demonstrate that they have a procompetitive effect. If the defendant does so, the factfinder must then decide if the practice is unreasonable or not. National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 113 (1984).

Typically, therefore, an antitrust court must examine both the challenged practice and the particular industry affected before deciding whether the Rule of Reason should be applied or the practice should be condemned as a per se violation. See, e.g. id. at 104 n.26 ("Indeed, there is often no bright line separating per se from Rule of Reason analysis."). The critical factor in determining an act's legality is its "effect on competition," a phrase which until recently lacked meaningful content. If, after sufficient inquiry, it appears that the practice falls into the per se category, no further analysis is necessary. Otherwise, the practice must be judged by the Rule of Reason and subjected to its competitive-effects test.
much to preserve certain political and social goals as to promote purely economic ones.\textsuperscript{86} Despite this criticism, the Supreme Court seems to have moved in recent years very much in the direction suggested by economic theory. The Court's antitrust opinions of the past fifteen years have consistently stressed the importance of the "market impact" and of the "demonstrable economic effect" of a challenged business practice.\textsuperscript{87} The Court has in each case closely examined the economic circumstances of the businesses whose practices have been challenged.\textsuperscript{88} This new, economic approach to antitrust analysis has been applied to the entire spectrum of antitrust issues, from price-fixing\textsuperscript{89} to vertical nonprice restraints,\textsuperscript{90} and from tying arrangements\textsuperscript{91} to the presence of a section 1\textsuperscript{92} conspiracy.\textsuperscript{93} As to all of these issues, the Court has answered antitrust questions primarily, if not exclusively, by moving away from a reflexive application of the per se standard of review and by examining the effect of the challenged business practice on "competition." For this purpose the Court has largely equated "competition" with what the Court has termed "consumer welfare\textsuperscript{94} and

\textsuperscript{86.} For years, there has been serious scholarly disagreement about the broad policy goals that underlie the antitrust laws and the emphasis that each should receive in the interpretation and enforcement of those laws. This debate is lengthy and continuing. However, it is not the purpose of this Article to summarize it or to attempt to resolve it but simply to make reference to it and to some of the many articles that it has generated. \textit{See} Blake & Jones, \textit{In Defense of Antitrust}, \textit{65 COLUM. L. REV.} 377 (1965); Blake & Jones, \textit{Toward a Three-Dimensional Antitrust Policy}, \textit{65 COLUM. L. REV.} 422 (1965); Elzinga, \textit{The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?}, \textit{125 U. PA. L. REV.} 1191 (1977); Kaplow, \textit{The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative}, \textit{95 HARV. L. REV.} 1817 (1982); Sullivan, \textit{Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?}, \textit{125 U. PA. L. REV.} 1214 (1977); Wiley, \textit{"After Chicago": An Exaggerated Demise?}, 1986 \textit{DUKE L.J.} 1003.


\textsuperscript{89.} \textit{See} \textit{National Collegiate Athletic Ass'n}, 468 U.S. 85; \textit{Broadcast Music}, 441 U.S. 1.

\textsuperscript{90.} \textit{See Business Elecs. Corp.}, 485 U.S. 717; \textit{Monsanto Co.}, 465 U.S. 753.


\textsuperscript{92.} \textit{15 U.S.C. § 1 (1988)}.


\textsuperscript{94.} The Court has not described consumer welfare as the only goal of antitrust policy, but it has in recent years bestowed upon it a certain primacy. \textit{See}, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) ("[T]he rule of the marketplace . . . promotes the consumer interests that the Sherman Act aims to foster."); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (floor debates in 1890 about the Sherman Act suggest "that Congress designed the Sherman Act as a 'consumer welfare prescription'")(quoting R. BORK, \textit{THE ANTRUST PARADOX: A POLICY AT WAR WITH ITSELF} (1978)); \textit{Continental T. V.}, 433 U.S. at 53 n.21 ("[A]n antitrust policy divorced from market considerations would lack any objective benchmarks.").
has defined "consumer welfare" generally in economic, rather than in social or political, terms.

Despite its adoption of "consumer welfare" as the primary goal of the antitrust laws, the Supreme Court has given remarkably little content to that term. The Court has neither specifically defined "consumer welfare" nor described it with sufficient detail to allow a working definition to emerge.\(^9\) The Court has, however, given some relatively clear indications of how the term is to be used, and those indications argue strongly in favor of defining "consumer welfare" in terms of undiminished output.

In several important ways, the Court has articulated its view of the meaning of "consumer welfare." For the Court, business practices that increase the output of a particular product and thus lower its price enhance consumer welfare and are therefore lawful. Conversely, practices that reduce the product's output and thus raise its price diminish consumer welfare and are therefore unlawful.\(^9\) Practices that have no effect on output or price have never been specifically evaluated by the Court, but in light of its recent decision in *Atlantic Richfield Co. v. USA Petroleum Co.*,\(^9\) the Court would likely view output-neutral and price-neutral activities as lawful.\(^9\)

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\(^9\) All of the recent advocates of single-entity treatment for professional sports leagues agree that "consumer welfare" has become the central concern of the antitrust laws. Roberts, among others, argues that "consumer welfare" will be advanced by affording single-entity treatment to the various sports leagues. Roberts, Single Entity Status, supra note 10, at 589. This argument, however, seems flawed in two significant respects. First, Roberts never describes what he means by "consumer welfare," assuming instead that its meaning is obvious. This failing makes it difficult to follow Roberts' consumer welfare analysis. Second, Roberts links this general idea of "consumer welfare" to his analysis of the single-entity issue in a manner that is both confusing and illogical. It is confusing because the Supreme Court has used "consumer welfare" to resolve disputes about the reasonableness of challenged business practices, disputes whose substantive legality is at issue only because the threshold question of conspiracy has presumably been answered in the affirmative. It has never used "consumer welfare" as a criterion for resolving the single-entity issue, nor has it ever suggested that it should be so used. And it is illogical, because whether two firms should be treated as one seems logically to hinge on an analysis of the interrelationship between the two firms, not on an analysis of whether their business advances some undefined notion of consumer good.

\(^9\) See infra text accompanying notes 98-108.

\(^9\) See infra text accompanying notes 98-108.

\(^9\) The main issue in this case was whether USA, a competitor of Arco admittedly injured in its business by Arco's decision to have its retail dealers sell gasoline at "below market" but nonpredatory prices, had standing to sue under section 4 of the Clayton Act, which requires a private antitrust plaintiff to allege and prove "antitrust injury." The Supreme Court
The Court's focus on consumer welfare in general and on undiminished output in particular appears most clearly in *Broadcast Music* and in *National Collegiate Athletic Association (NCAA)*. In *Broadcast Music*, the Court was asked to rule on the question of whether, by issuing "blanket licenses" to copyrighted musical compositions at fees negotiated by them, the petitioners, Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, and Publishers (ASCAP), had engaged in a form of price-fixing that was per se unlawful under section 1 of the Sherman Act. The court of appeals had held that since both BMI and ASCAP were membership organizations representing thousands of copyright holders a blanket fee setting a unitary price for all copyrighted compositions was by its nature an agreement among competitors—the individual holders of the copyrights—to fix the price at which their products would be sold. The appellate court explained that earlier decisions of the Supreme Court generally condemned all forms of price-fixing and the facts of this case compelled the conclusion that the blanket licensing practiced by the defendants was unlawful.

The Supreme Court refused to hold blanket licensing unlawful per se, despite its recognition that such licensing was indeed a form of collective price-fixing. In some measure, this refusal had to do with the Court's lack of familiarity with the musical copyrighting industry and with that industry's peculiar history of legislative and judicial oversight. In large part, however, the Court's willingness to put aside the per se rule and to use the Rule of Reason to examine an admitted group price fix was explained by its determination to assess the actual economic effect of the price fix.

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99. 441 U.S. 1.
100. 468 U.S. 85.
101. According to the Court, a blanket license gave the licensees "the right to perform any and all of the compositions owned by the members or affiliates [of the petitioners] as often as the licensees desire for a stated term." *Broadcast Music*, 441 U.S. at 5.
105. Congress and the courts had supervised that industry and its practices for years prior to 1977.
rather than simply to condemn it on the basis of its existence alone.\textsuperscript{106}

The Court's holding in \textit{Broadcast Music} helped to create a new methodology for the resolution of price-fixing claims and at the same time to provide antitrust analysis with a new perspective. As before, the resolution of a challenge to an alleged price fix started with a determination of whether the per se rule should be used to decide the case. However, while past antitrust doctrine would have required the application of that rule to any group decision to fix price, the Court in \textit{Broadcast Music} held that henceforth the characterization of certain conduct as a price fix would be insufficient by itself to invoke the per se doctrine. The per se rule would apply, the Court said, only when the conduct in question threatened the proper functioning of "our predominantly free-market economy—that is, [where] the practice facially appears to be one that would always or almost always tend to restrict competition and \textit{decrease output}."\textsuperscript{107}

Admittedly, the Court in \textit{Broadcast Music} employed some of the same ambiguous antitrust vocabulary that it had used for decades. For example, if a price-fixing agreement was clearly a "naked restraint of trade with no purpose except the stifling of competition,"\textsuperscript{108} the agreement was unlawful per se. However, if the agreement was arguably part of an amalgam of joint activities, the net effect of which was to "increase economic efficiency and render markets more, rather than less, competitive,"\textsuperscript{109} then the agreement would be tested by the Rule of Reason. This old language, though, was accompanied by something new and important: for purposes of antitrust methodology, the term "competition" was no longer to be so vaguely or generally defined but was to be given instead a specific economic meaning. A practice would be deemed to restrict competition if it "would always or almost always tend to . . . decrease output"\textsuperscript{110} and, by obvious implication, would be found not to harm competition if it had no such effect on output.

Five years later, the Court reaffirmed its commitment to the general economic approach that it had adopted in \textit{Broadcast Music} and reiterated its reliance on undiminished output as the crucial index of consumer welfare and thus of enhanced competition. In \textit{NCAA},\textsuperscript{111} the universities of Oklahoma and Georgia, two members of the College Football Association,\textsuperscript{112} to the commencement of the CBS suit and had left undisturbed the very practices challenged by CBS. \textit{Id.} at 10-16. It seems clear, however, that these peculiarities would not have mattered to the outcome of the case unless the Court had been prepared to depart from the apparently unbending rule proscribing price-fixing that was announced in \textit{Socony-Vacuum}, 310 U.S. 150.

\textsuperscript{106} \textit{Broadcast Music}, 441 U.S. at 19-23 ("[O]ur inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy . . . ").

\textsuperscript{107} \textit{Id.} at 20 (emphasis added).

\textsuperscript{108} \textit{Id.} (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

\textsuperscript{109} \textit{Id.} (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} 468 U.S. 85.

\textsuperscript{112} The College Football Association was established by five major football-playing
suited the NCAA for having established a so-called Television Plan (Plan) that allegedly restricted the total amount of televised intercollegiate football, the number of appearances on television that any one school's team could make, and the compensation to be received by a school for each of its team's televised games.\footnote{113}

As in Broadcast Music, the NCAA was clearly a combination of would-be competitors. In the absence of the Plan each school would presumably have been free to sell as many of its games for telecast as the television networks were willing to purchase and to receive in compensation as much money as the networks were willing to pay. By jointly selling the television rights to their football games, the members of the NCAA had collectively substituted a fixed price per game for the price that the market would have reached had there been separate and independent bargaining and reduced the total number of games that would otherwise have been broadcast.

The court of appeals held that the NCAA television plan constituted illegal per se price-fixing.\footnote{114} The Supreme Court, while recognizing that price-fixing and output limitations are "ordinarily condemned as"\footnote{115} unlawful per se, decided nevertheless to apply the Rule of Reason to the NCAA plan, because the Court found that the industry in question—intercollegiate amateur football—needed horizontal restraints on competition if its product was to be available at all.\footnote{116} As in Broadcast Music, the Court bypassed the per se rule in circumstances where it would previously have been determinative and resorted instead to the Rule of Reason. The Court also reiterated that a challenged business practice would be viewed as lawful only if it was responsive to "consumer preference," which the Court described as a "fundamental goal of the antitrust law."\footnote{117} "Consumer preference," though not specifically defined, was characterized almost exclusively in terms of lower price and undiminished output. "Restrictions on price and output," said the Court, "are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."\footnote{118} Finally, the Court's holding—that the NCAA's particular constellation of restraints was unreasonable—was explicitly premised upon the presence in

\bibliography{notes 7-10}
the Plan of what the Court found to be "rules that restrict output." The clear message of these cases is that "reasonableness" under the antitrust laws has come to mean undiminished output. This is a logical message, both legally and economically. Decreased output would seem to be an obvious harm for consumers. Economic theory informs us that with decreased output comes higher prices, and common sense advises that decreased output also brings with it the prospect of a smaller variety of goods, as well as a smaller number, and thus the prospect of diminished consumer choice.

Moreover, if "consumer welfare" is to mean anything in measurable economic terms, logic and the process of elimination strongly suggest that its meaning be linked to output, and to output's corollary, price. The measurable factors that contribute to, or account in some way for, consumer welfare are limited. Apart from price and output, very few seem even arguably appropriate. Along with cost, the Supreme Court has listed quality, service, safety, and durability as the "elements of a bargain," but those last four elements are practically impossible to measure. Higher quality, moreover, has been described by the Court as an inappropriate justification for allegedly anticompetitive conduct. And Judge (then Professor) Bork has persuasively argued that competition—either as defined by the number of firms active in a particular market or viewed abstractly as some unmeasurable concept of "vigorous" competition—is neither a good measure of consumer welfare nor an appropriate goal of antitrust policy. Thus, output and price remain as the only logical and, arguably, measurable economic criteria of consumer welfare.

V. PRESENT STATUS OF PROFESSIONAL SPORTS LEAGUES UNDER THE SUPREME COURT'S NEW TEST

If, as I have suggested, the new litmus test for antitrust legality under the Rule of Reason is undiminished output, it seems clear that almost all

119. Id. at 113.
120. See P. SAMUELSON & W. NORDHAUS, ECONOMICS 64 (13th ed. 1989).
121. National Soc'y of Professional Eng'rs, 435 U.S. at 695.
122. See id. at 693-95, where the government sued to nullify the Society's canon of ethics prohibiting competitive bidding, charging that the practice fostered by the canon served to suppress competition. The Society's defense rested in large measure on its contention—accepted for argument's sake by the Court—that the canon was intended to improve product quality, which would be eroded by price competition between and among professional engineers. The Court squarely rejected this contention as a defense to a section 1 price-fixing claim, stating in effect that the Society could not impose its views of quality—no matter how well intentioned—on the consuming public, which might well wish to trade off higher quality against lower cost and increased output.
124. These are only arguably measurable because of the occasional difficulties, see infra text accompanying notes 109-15, in arriving at an acceptable definition of "output" and the relatively constant difficulties in ascertaining whether price increases (which can certainly be measured by themselves) result from increased costs (which are not always so easy to measure) or from some other, presumably less innocuous, activity.
of the activities of a professional sports league pass this test. Practically all of those activities serve either to increase the league's output or to hold output constant. Consequently, a section 1 challenge to league activities would most probably result in a finding that such activities are "pro-competitive" and are therefore reasonable and lawful. The single-entity defense is unnecessary to achieve this result.

The output of the teams of a professional sports league is a professional athletic contest sanctioned by the league, in other words, a league game. Although the member teams of a sports league also make money from such things as souvenirs, concessions, and stadium parking, all of these items are derivative of the game itself, and none would have much value apart from its association with a league game. There are two major markets of buyers for this product: the fans who attend the game in person (and purchase a ticket for it from the team) and the television or radio networks who buy broadcast rights to the game from the league (and then sell advertising time on their broadcasts to commercial sponsors). All other things being equal, the league's teams will maximize their revenues by selling as many tickets as possible and by receiving the highest possible price for the broadcast rights to the games.

126. This describes what the league's output is now, and not what it could be if the league members chose to organize themselves differently. See supra note 41.

Roberts contends that the league's product is a season of league games, Roberts, Sports Leagues and the Sherman Act, supra note 10, a contention apparently based largely on an article by Neale, The Peculiar Economics of Professional Sports, 78 Q.J. Econ. 1 (1964). Neale argues that sports leagues produce "an indivisible product" (a season of league games) from the separate activities of two or more firms (the teams). "But the product itself is a peculiar mixture: it comes divisible into parts (games), each of which can be and is sold separately, but it is also a joint and multiple yet indivisible product (the season)." Id. at 2-3.

I do not share this view. Certainly, the games have more value to their potential buyers because they are part of a league season. Divorced from that season, however, professional football games could still be played and would not lose all of their appeal—college football games do not lack for consumers.

Moreover, viewing the season as the league's output would make a tautology of antitrust analysis: since there could never be more or less than one football season, for example, the league members would presumably be free to reduce the number of games and telecasts available to consumers without fear of antitrust liability; there would still be one football season per year, as always, and the output of the league could never be deemed to have been diminished.

The Second Circuit has described the business of the NFL, for example, as "providing public entertainment in the form of competitive football games between its member teams." North Am. Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir.) (emphasis supplied), cert. denied, 459 U.S. 1074 (1982).

127. It is important, however, to understand that output cannot be defined in terms of tickets sold or of income from the sale of broadcast rights. To the extent that some teams do not sell all of their game tickets in advance of the start of the season, the sale of the remaining tickets will depend in part on the success of that year's team and also of its opponents. These factors change from year to year and cannot be directly controlled by the team owners. By the same token, the income from the sale of television rights is at least partly dependent on
but their output—the major money-making item that they produce—is the game.\textsuperscript{128}

If league games are the output of a professional sports league, then it is only collective decisions designed to reduce the number of such games that threaten\textsuperscript{129} to diminish "consumer welfare" within the meaning of Rule of

the perceived popularity of the particular sport and on the willingness of commercial sponsors to purchase time for advertisements, a willingness that itself must be dependent in part upon the sponsors' views of the efficacy of such advertisements.

128. For purposes of this discussion, I am assuming that the appropriate definition of the product market for a professional sports league should be confined to the output of the league, to its games only, and should not be extended to include a broader market that would encompass other professional sports or other forms of entertainment.

This submarket approach is not attractive to everyone: several commentators, for example, have argued that courts have defined the product market in sports cases much too narrowly. See Roberts, Single Entity Status, supra note 10, at 554 n.8; Roberts, Sports Leagues and the Sherman Act, supra note 10, at 257 n.135; Glick, supra note 10, at 77-78; Rosenbaum, supra note 10, at 786, 800, 822; Weistart, supra note 10, at 1037-38. Some cases have also opted for a more expansive definition. See Theatre Party Assocs. v. Shubert, 1988-2 Trade Cas. (CCH) ¶ 68,251, at 59,558 (S.D.N.Y. 1988) (the most popular Broadway shows do not constitute a separate submarket but are instead part of a broader entertainment market that might also include sports); Henderson Broadcasting Corp. v. Houston Sports Ass'n, 647 F. Supp. 292 (S.D. Tex. 1986) (radio broadcasts of only one baseball team are not a relevant market).


The narrow approach to market definition obviously makes it more difficult for the leagues' practices to pass antitrust muster. In a broader market, such as all sports—professional and collegiate—or all entertainment, the impact of one league's business practice on total output would be quite small. In the narrow market, however, if the league restrains output the effect of that restraint will be much more visible to courts and much more damaging to consumers. It is beyond the scope of this Article to discuss all of the implications of product market definition in Rule of Reason cases. The Supreme Court has discussed and analyzed the subject on several occasions. See, e.g., NCAA, 468 U.S. 85, 111 (1984); United States v. Grinnell Corp., 384 U.S. 563, 571-76 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 396 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

129. Of course, under Rule of Reason analysis, the threat to consumer welfare can be outweighed by an appropriate competitive justification. See, e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761-64 (1984). A reduction in the number of games, for example, could conceivably be justified by "business necessity"—the teams can survive economically only at the reduced level of output—if the facts supported the defense.
Reason analysis. Very few such decisions come to mind. Presumably, the teams could agree to shorten the league season. The likelihood of such an agreement, however, seems small, partly because the number of regular season games in all professional sports leagues has consistently expanded over the past thirty years and partly because a season containing a relatively stable number of games permits fans to make the kind of performance comparisons that add to their enjoyment of the product. Conceivably, in order to maximize their revenue from the sale of broadcast rights to games, the teams could agree to reduce the number of televised games—thus depriving the viewers of those games of a number of opportunities to watch televised football. But it is practically inconceivable that a profit-maximizing league would not already be maximizing its revenue from this quarter, so the likelihood of this kind of agreement also seems very low. No other decision designed to reduce output seems plausible. Professor Goldman suggests several kinds of agreements between and among team owners which, in his view, could lessen consumer welfare.

130. From this perspective, it becomes clear why the policy reasons for promoting "consumer welfare" cannot fairly require increased output from firms subject to antitrust scrutiny. If the professional sports leagues were required by the antitrust laws to justify every joint action that might arguably restrain trade by increasing their output, a parade of horribles could ensue. The league seasons, already much longer than their high school or college equivalents, would become longer still (the teams in the NBA, for example, open their preseason training camps in August and conclude their playoff games in June), overlapping one upon the other, competing more directly for the same consumer dollar, threatening the league with overexposure and loss of popularity, and jeopardizing the health of the teams' most important capital assets, their star players, who would presumably be placed at greater risk of injury or loss of skill by the additional number of games that they would be required to play. In this way, a legal directive to expand output could eventually threaten the economic viability of the leagues.


132. The viewers of televised games are arguably not the consumers of those games; the broadcast rights are purchased by the television networks. Rather, the viewers are consumers twice removed; the networks buy the games in order to sell air time to commercial sponsors, who buy the air time in order to sell their products to the viewers.

133. The league members could agree on a change in the rules of the game that would have the unintended effect of reducing attendance at games. In 1969, for example, immediately following Denny McClain's 31-win season and Bob Gibson's 1.12 earned run average, the Major League Baseball owners, believing that fans preferred high-scoring games to low-scoring ones, lowered the height of the pitcher's mound by 10 inches in an effort to bring more run scoring to the game. Kornheiser, No Rhyme, No Reason To No-Hitters, Wash. Post, July 3, 1990, at E1, col. 1. Their decision seems to have been correct, but viewed ex ante it might not have been. The effect of the decision on attendance, however, should not have any antitrust consequences, because attendance is not output and a reduction in attendance, occasioned by whatever reason, is not the same thing as a reduction in the number of games.

134. Goldman, supra note 10, at 770.
First, he says that an agreement to fix ticket prices would not benefit consumers. This is certainly true, but this particular harm to consumers would probably be one that the antitrust laws are not designed to remedy: if the price-fixing agreement were not accompanied by a reduction in the number of games, it would hurt the teams just as much as the consumers. Presumably an increase in the price of a game ticket would result in fewer tickets being sold. However, since the total number of the games and the marginal cost of the games would remain the same, the teams' reduced income would not be offset by any reduction in their costs, and they would suffer as much as their consumers. This is not the behavior of monopolists.

Second, Goldman hypothesizes that the teams could agree on a reduction in the "output" of televised football, in order to enhance league revenues. A reduction of output, however, would enhance league revenues only if, for reasons unexplained by Goldman, the leagues are currently acting irrationally. This assumption of irrationality does not seem very plausible because it assumes the leagues are not currently maximizing revenues.

Third, Goldman claims that the player restraints already adopted by the leagues, such as the player draft or the reserve clause, could "limit league output and reduce consumer welfare" by discouraging quality players from undertaking a career in professional sports. Assuming that the effects of such restraints could somehow be measured, it is quite possible that player restraints could serve to lower the quality of league play. The antitrust laws, though, do not require any firm either to achieve or to maintain any particular level of product quality.

Finally, Goldman suggests that franchise expansion decisions may implicate consumer welfare concerns. An expanded league, of course, would play an expanded schedule, and the output of the league would thus be increased by expansion. The league, however, should not be obliged by the antitrust laws to increase output; it should be required only to refrain from decreasing it. By itself, a joint decision not to expand the size of the league would not reduce output. Moreover, a requirement that sports leagues add new members would burden the leagues in a uniquely unfair manner. No other private joint venture has ever been obligated—either in the name of consumer welfare or of anything else—to take on additional venturers against its will. For these reasons it seems unlikely that franchise expansion decisions could properly evoke consumer welfare concerns.

135. It is important in this regard to keep in mind the difference between affirmatively benefiting consumers—a result that the antitrust laws do not seem to require, see supra note 98—and not harming them.
136. Goldman, supra note 10, at 796.
137. See supra notes 127-28 and accompanying text.
140. See supra note 130.
There are, then, very few agreements, decisions, or rules made by the member teams of professional sports leagues that could serve directly and intentionally to reduce the leagues' output. The antitrust issues raised by those few that might be found to exist can certainly be resolved by the application of the Rule of Reason without placing in jeopardy the continuing viability of the leagues themselves and without using an inordinate amount of judicial time and energy. The single-entity defense is not necessary to achieve either of those results.

CONCLUSION

The application of the single-entity defense to the member teams of professional sports leagues is not consistent with existing antitrust doctrine. It would represent not only a marked and unwarranted deviation from the clear line established by Copperweld and its progeny, but would also create unworkable distinctions between league rules and decisions arguably affecting matters of "purely intraleague governance," on the one hand, and all other matters, on the other, and would require as well that the antitrust bench expend substantial time and energy attempting to resolve those distinctions.

Moreover, the value of that defense—both to the leagues themselves and to the antitrust judiciary—is questionable. If, as I argue, undiminished output is the proper measure of consumer welfare for purposes of Rule of Reason analysis, almost all league decisions that affect some aspect of the game will successfully pass antitrust muster. Those few that do not can be comfortably resolved by traditional Rule of Reason analysis.