THE FOOTBALL ANSWER TO THE BASEBALL PROBLEM: CAN REVENUE SHARING WORK?

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I. INTRODUCTION

"Baseball is poised for a catastrophe. And it might not be far off."[2]

Four years ago, then-Commissioner Fay Vincent referred to the current disparities between large and small-market teams when he issued this headline-generating statement. Ever since Peter Ueberroth had left office a few years earlier with all 26 teams profitable, warning flags had sprouted up among Major League baseball teams as small-market team after small-market team found it more difficult to compete financially for free agents. In just three years, baseball had gone from 100% profitability to a situation in which eight to ten teams claimed to have lost money.[3]

A few years later, Vincent is gone but the recent catastrophe is

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2. *A Simple Act - Federal Antitrust Laws Should Apply to Baseball*, Editorial, SEATTLE TIMES, Aug. 4, 1991, at A14.

3. *See* Alster, *Major League Socialism*, FORBES, May 27, 1991, at 138. However, as usual with major league finances, estimates always vary and owners prefer to portray themselves as poorer than they actually are. According to one high-ranking official in the Commissioner's office, "Of course, the owners are making big money these days. You don't need to be a financial genius to figure that out. And they'll continue to make big money for another three years [referring to the time remaining on the lucrative CBS television contract, which expired in 1993]." Nightingale, *Heading Toward a Black Hole? Salary Cap or Revenue Sharing Might Help Forestall Disaster*, THE SPORTING NEWS, Dec. 31, 1990, at 28.

See also ANDREW ZIMBALIST, BASEBALL AND BILLIONS 62 (1994) (quoting Paul Beeston, former Vice President of Business Operations for the Toronto Blue Jays as saying, "anyone who quotes profits of a baseball club is missing the point. Under generally accepted accounting principles, I can turn a $4 million profit into a $2 million loss, and I can get every national accounting firm to agree with me.") *Id.* at 70-71, 132-34 (detailing creative accounting by the Pittsburgh Pirates and Seattle Mariners).

Escalating player salaries and increasing disparities among team revenues have led many owners and team officials to echo the statements made by then-Montreal Expos General Manager Dave Dombrowski a few years ago:

> More and more, what we're seeing evolve is a two-level game. Baseball is moving rapidly in the direction of two 'different' leagues and I don't mean the American and National. I mean the big-market and small-market leagues.
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> Even with the network TV payoff, a team with a small local media market can't go after just any old number of top-line free agents. The big-market teams, they have more years to make mistakes without going broke; they can overpay athletes to tie them up. We (small-market clubs such as the Expos) can't do that.

Nightingale, *supra* at 28. Dombrowski himself soon left Montreal for the larger-market Florida Marlins.

probably far more devastating than Vincent could have imagined. Insistent on solving the market disparities and the resulting opportunity for large-market teams to outspend their smaller-market rivals, the owners demanded a salary cap. The result: the longest and most bitter strike in sports history and the cancellation of the 1994 World Series.

While the owners have focused their solution on a salary cap and later, a luxury tax, thus helping all clubs by directly restraining player costs, largely ignored as a solution has been revenue sharing among teams, the way in which the National Football League has leveled its playing field for years.[4] The baseball owners, in agreeing to the "Ft. Lauderdale Plan" in January 1994, proposed greater revenue sharing among teams, but only in conjunction with a salary cap, with the cap and its control over salaries receiving the primary emphasis.

One of the reasons the owners have been relatively unified in pressing for a salary cap is that taking from the players is a far easier concept for them to agree upon than sharing amongst themselves. The battle over revenue sharing would be more competitive and cutthroat than any pennant race ever. With teams like the New York Yankees receiving approximately $50 million per year through local cable contracts, the notion of revenue sharing can be as repulsive to some as socialism.[5]

Many questions exist as to revenue sharing. First and foremost is its necessity. Baseball has survived for over 100 years and there have always been the New Yorks and the Cincinnatis.[6] Will teams actually fold without revenue sharing? If not, will the competitive balance really be warped to a degree that the sport has never before seen? What makes baseball in the 1990's so different?

Second is the issue of how revenue would be shared. Proposals have been advanced calling for sharing all revenues, equalizing gate receipts, sharing only local broadcast contracts, or merely pooling a certain percentage of revenues. While revenue sharing has many potential benefits, there are substantial drawbacks as

4. The NFL has also recently adopted a salary cap. The focus of this article, however, will be on the NFL system of inter-club revenue sharing. Unless specifically noted, the term "revenue sharing" will be used herein to refer to inter-club revenue sharing, not a salary cap.

5. Peter Bavasi, former president of the Toronto Blue Jays and Cleveland Indians, described a typical owners' meeting in which revenue sharing was discussed - "I've been at meetings where the owner of a small market team will stand up and tell the other owners that, '[i]f the big-market teams don't share revenues, you will only have yourselves to blame.' Then one of the big market teams will stand up and begin his address, 'Comrade' and everybody will laugh." Baldo, *Secrets of the Front Office*, FINANCIAL WORLD, July 9, 1991 at 28.

6. Cincinnati, incidentally, has been profitable every year since 1984 (excluding strike-shortened 1994) despite playing in the smallest market in baseball and having a historically high payroll. ZIMBALIST, *supra* note 3, at 145.

well. Issues such as incentives, "sportsmen" owners and non-operating revenues are crucial to consider.

Third, and least considered by the average fan (for good reason) are the legal issues. Baseball has an antitrust exemption for now, but to what extent would a revenue sharing agreement fall within that exemption? Also worth considering is how far Major League Baseball could go (or refuse to go) before Congress or the Supreme Court might be tempted to remove the exemption.[7] Besides the antitrust issue, baseball must consider whether or not team owners actually have property interests in their broadcasting rights or revenues and whether these revenues can be claimed by the league. Either way, baseball needs to design an effective compensation package for the big-city teams that does not defeat the purpose of any revenue sharing agreement.

This article will begin with a historical look at Major League Baseball to determine the uniqueness of the current problems with respect to market disparities. It will examine any historical relationship between population and success and will compare the disparities in team revenues over time.

Next, the article will discuss the debate among economists as to the effect of free agency and the reserve clause on competition. It will also look at the economic arguments for and against revenue sharing. The article will examine revenue sharing's primary economic justifications, and potential dangers. Where applicable, comparisons with the National Football League, which shares over 90% of all revenues, will be made.

The article will examine some special considerations, including revenue sharing's potential effect on fan interest and contest legitimacy, the need for player approval, collective bargaining problems, and issues concerning monitoring and incentives.

The legal analysis will begin with a look at antitrust issues. It will focus primarily on baseball's antitrust exemption and on the Sports Broadcasting Act of 1961 (the "SBA").[8] It will look at the

7. Over the years, on numerous occasions, legislation has been introduced either to remove the antitrust exemption or to force baseball to take particular actions. From 1953 to 1972, more than 50 bills were introduced in Congress to remove or modify the antitrust exemption; none made it out of Committee. John Dodge, *Regulating the Baseball Monopoly: One Suggestion for Governing the Game,* 5 SETON HALL J. OF SPORT L. 35, 52 (1995). More recent attempts include the Professional Baseball Reform Act of 1993 sponsored by Sen. Howard Metzenbaum (D. Ohio) and bills introduced by Sen. Daniel Moynihan (D-NY), and Reps. Bilorakis (R-Fla.), and Conyers (D.-Mich.). However, given the battle in Congress and the opposition encountered over removing the exemption when the exemption is used as a weapon against players, it is highly unlikely that Congress would remove it when used to facilitate a non-adversarial solution.

8. The antitrust exemption has come from a trilogy of Supreme Court cases: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S.

scope of each and at the debate over their applicability to revenue sharing in light of several conflicting Circuit Court decisions in other areas of league governance.[9] These cases, and their actual or potential impact on baseball, will be analyzed. The paper will next examine the issue of property rights and the degree to which baseball owners can force dissenting owners to share revenue. It will also focus on the power of the Commissioner (if the baseball owners ever appoint a new one) to act against the wishes and interests of individual owners, briefly discussing the actions against Charles Finley, George Steinbrenner, Ted Turner and Marge Schott.

Finally, the article will attempt to develop a revenue sharing plan that best satisfies the disparate economic interests and overcomes the legal obstacles and other difficulties presented in theory or in practice by the National Football League.

II. The Need for Revenue Sharing

A. *The Role of Revenue*

Think of Major League Baseball from the 1920's to the 1960's and one team comes to mind: The New York Yankees. In a 40-year span, the Yankees appeared in the World Series 26 times and won an astounding 20 World Championships. The balance was so warped that one year, 81,841 people attended one doubleheader at Yankee Stadium, while a total of 80,000 people attended all St. Louis Browns games over the course of the entire year.[10] The National League was much better balanced competitively and, as a result, had significantly higher attendance.[11]

While there have been advocates of revenue sharing for years,[12] why has the issue received so much attention recently?

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200 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972). The Sports Broadcasting Act is codified in 15 U.S.C. § 1291.

9. Most notably, among these cases, are Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir. 1984) and Chicago Professional Sports Limited Partnership v. National Basketball Association, 961 F.2d 667 (7th Cir. 1992).

10. *See* Murray, *The Balance of Power is Tilted*, LOS ANGELES TIMES, Dec. 8, 1991, at 1.

11. *See* NOLL, *Attendance and Price Setting* in GOVERNMENT AND THE SPORTS BUSINESS 123 (1974). From 1955 to 1964, the American League, which was dominated by the New York Yankees, accordingly had a high correlation between propulation rank and winning percentage while the competitively balanced National League did not. Daly and Moore, *Externalities, Property Rights and the Allocation of Resources in Major League Baseball*, 19 ECONOMIC INQUIRY 77, 92 (1981).

12. *See, e.g.*, Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 680, n. 164 (1989). Ross stated that, "[i]n the 1950s, Chicago White Sox owner Bill Veeck proposed that the visiting team's share of the gate attendance increase to 40%." *Id.* Veeck observed the role big-city teams played in the vote against him in saying, "[f]ive clubs voted for the change I suggested and three voted against it. Since it takes six to make a change, I was licked. And who do you suppose lined up against me? You're right - the rich ones. The Yankees, Tigers and

There are a few answers to this. First, over the years, revenue sharing with respect to gate receipts has not remained static but has actually decreased among teams. For example, the National League originally split equally the base price on all tickets, with the premium charge for the better seats going to the home team. In 1892, this resulted in a 40% share of total gate receipts for the visiting team. However, as seat prices rose, the base price of tickets became a smaller and smaller percentage of the average ticket price. Thus, shared ticket revenues declined to 21% in 1929 and 14% in 1950.[13] American League base ticket prices experienced similar erosion; in 1965 the AL owners voted to stabilize the split at 20%.[14] Currently, the overall split in the major leagues is approximately 85-15 but differences remain between the two leagues.[15]

A second cause for the increased concern is the sharp rise in broadcasting fees, particularly the unshared local rights. In 1933, broadcasting rights accounted for a miniscule 0.3% of total revenues. They rose to 6.7% in 1943, 16.8% in 1956 and neared 30% by the late 1960's. Now, broadcast rights account for 44% of league revenues, totaling $775 million (out of $1.8 billion) in 1993, more than gate receipts (which accounted for 38%).[16] Whereas gate attendance is largely linked to the on-field success of a team, local television revenues are priced primarily according to population. Teams often sign long-term broadcasting contracts. As a result, these revenues are not very elastic, as attendance may be. Because a radio or television station cannot accurately predict the winning percentage of a team during the course of a long-term contract, population is necessarily used as a proxy. Thus, it is no surprise that the New York Yankees, one of the worst teams in baseball a few seasons ago, and which had relatively low attendance, nonetheless signed the richest local broadcasting contract ever.

Red Sox. Cleveland went along with us on this one because, though the Indians are a going concern, they don't have the financial backing of the other three clubs." DAVIS, *Self-Regulation in Baseball, 1909-71* in GOVERNMENT AND THE SPORTS BUSINESS 357 (1974).

13. *See* SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL 17 (1989).

14. *See* DAVIS, *supra* note 12, at 357.

15. While the American League shares 20%, the National League's 71 cent per ticket of shared revenue amounts to approximately 9% today. These percentages are somehwat overstated in that they represent the percentage of the shared base price per ticket, not the unshared premium associated with lucrative luxury box seats. ZIMBALIST, *supra* note 3, at 57.

Local television revenues, incidentally, are shared somewhat. The teams share a percentage (25 in the NL and 20 in the AL) of the "net receipts" from pay television. This is not a significant amount because it is limited to pay television and it is "net," which provides ample opportunity for teams to subtract costs and creatively contract. *Id.* at 50. Certain superstation fees are also paid into a league fund. *Id.*

16. *See* HOROWITZ, *Sports Broadcasting* in GOVERNMENT AND THE SPORTS BUSINESS 357 (1974); Michael Ozanian, *The $11 Billion Pastime*, FINANCIAL WORLD, May 10, 1994 at 50.

Furthermore, these disparities are growing at an astounding rate. The difference in local broadcasting revenues between the top and bottom teams increased from $13 million in 1964 to $15.3 million in 1987 to an incredible $52.6 million in 1990.[17]

A third reason for the rise in concern is the impact of free agency. While economists dispute the impact of free agency on the competitive balance, fans cannot help but notice when the star players consistently move to larger-market teams. The impact of free agency will be discussed at length in the next section.

So, revenue disparities are growing significantly. However, the primary question of whether that is truly affecting the game still exists. Can teams buy championships? Historically, the Yankees have, while the Red Sox have failed. Two recent studies correlate salary with winning percentage. The first, compiled by Kenneth Jennings, compares salary rank and league winning percentage rank for the years 1977, 1987 and 1988.[18] While there are some differences, some of the large-markets teams, such as the Los Angeles Dodgers; the New York Mets and New York Yankees show close relationships, as do the smaller-market Texas Rangers, Seattle Mariners and Cleveland Indians. The few teams that have managed to buck the trend and win championships with low payrolls (such as the Pittsburgh Pirates, Oakland Athletics and Minnesota Twins) have found that arbitration and free agency have made it extremely difficult to sustain their success.[19]

The second study, compiled by Gerald Scully, lists team salaries for 1978, 1980, 1985 and 1987 and compares the winning percentages for those teams. Only three teams in the top half of spending - the Pirates, Cubs and Rangers - had records below .500 (and all three were quite close) while only three in the bottom half of spending - the Orioles, Royals and Tigers - had winning records. Furthermore, of the nine teams in cities with the smallest populations,[20] seven were in the bottom half of spending (the Reds and Brewers being the only exceptions) and only one of those seven (the Royals) had a winning record. Scully concludes that "both club revenues and costs are positively related to team quality and that they tend

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17. *See* ZIMBALIST, *supra* note 3, at 150; SCULLY, *supra* note 13, at 109 (1989). Zimbalist observes that the ratio of the top to bottom clubs in local media revenues increased from 5.3 to 1 in 1964 to 18.5 to 1 in 1990. ZIMBALIST, *supra* note 3, at 150.

18. *See* JENNINGS, BALLS AND STRIKES: THE MONEY GAME IN PROFESSIONAL BASEBALL 230 (1990).

19. A perfect example is the Montreal Expos, the winningest team in the abbreviated 1994 season, but unable to retain many of its young stars and therefore, unlikely to repeat its performance.

20. *See* Drahozal, *The Impact of Free Agency on the Distribution of Playing Talent in Major League Baseball*, 38 J. OF ECONOMICS AND BUSINESS 113, 119 (1986) (population data).

to increase at about the same rate."[21] High payrolls, however, certainly do not guarantee success, as the Detroit Tigers of 1994 and the New York Mets and Cincinnati Reds of 1993 learned.

Finally, since the early 1970's, salaries have gradually risen as a percentage of team revenue.[22] When salaries were only a small percentage of revenue, even the poorer teams could afford better players if they so desired (and if they could find any available under the reserve system). However, as the percentage has increased from 17.6% in 1974 to a high of 41.1% in 1982,[23] teams with below average revenue have found salary competition more difficult.

Different economic studies have attempted to quantify the exact effect of population on team revenues. Andrew Zimbalist calculated that every additional person living in a city increases team revenue by $2.40. Further, every .001 increase in winning percentage increases revenue by $63,026, which would be the equivalent of 26,260 people in city population. As each victory adds .00617 to the team's winning percentage, he concluded that every additional victory offsets a population differential of 162,000 people.[24]

B. *The Role of Free Agency*

There is no shortage of economists and commentators equating population with winning.[25] However, there is much dispute over whether or not free agency has played a role in this correlation. The prevailing economic view is that it does not because under the reserve clause, teams sold players to teams for whom their marginal value was greater. Players were still allocated in ways that their marginal returns were greatest (generally with big-city teams having the most talent); small-market team owners realized the financial gains from these sales. With the advent of free agency, the distribution of talent was still the same but the players realized the windfall returns, instead of their former owners.[26]

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21. SCULLY, *supra* note 13, at 124.

22. *See* ZIMBALIST, *Salaries and Performance: Beyond the Scully Model* in DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 130 (1992).

23. ZIMBALIST, *supra* note 3, at 87. Salaries as a percentage of revenue declined to 31.6% in the ensuing years, presumably as a result of collusion and the huge CBS television contract but recent spending seems to indicate a return to the earlier trend.

24. ZIMBALIST, *supra* note 22, at 117.

25. *See, e.g.*, QUIRK AND EL HODIRI, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 58 (1974)(stating that "big city teams tend to win significantly more league championships than small-city teams, except in hockey, where Canadian teams, traditionally the high drawing-potential franchises, have dominated"); and DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 50 (1973)(reporting that "market population exerts a positive influence on the optimal input of athletic talent, and hence, on the absolute and relative quality of the club").

26. *See*, SCULLY, *supra* note 13, at 95 (describing cash sales as subsidies to weaker fran-

Furthermore, a number of studies have similarly concluded that there is "only a very weak positive relationship that was not statistically significant, over the entire ten-year period, between both temperature and population and a franchise's net success in signing - versus losing - players in the free agent market."[27]

However, there are flaws in these analyses. Many of these predictions were made in an "economic vacuum," without accounting for some of the realities unique to sports. Perhaps the most significant omission is the failure to consider "contest legitimacy," which is discussed at length by George Daly.[28] Daly argues that transactions which are theoretically efficient are often not consummated because "such exchanges can harm legitimacy by creating questions about the motivations of the selling party and thus can threaten the economic viability of the league and the wealth earned by its resources."[29] These considerations were paramount in Commissioner Bowie Kuhn's decision to void Charles Finley's sales of many of the star players of his Oakland Athletics in the mid-1970's.[30]

A second flaw in many of these studies concerns the data itself. The period immediately prior to the *Messersmith* arbitration decision (granting free agency to players) was one of domination by a few teams. The Oakland Athletics won three consecutive World Championships and the Big Red Machine outperformed the rest of the National League. By comparison, the quality of competition after free agency could not get much worse, particularly if players

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chises and rejecting the "hypothesis that free agency adversely affects league balance"); Dolan and Schmidt, *Assessing the Competitive Effects of Major League Baseball's Reentry Draft*, 29 AMERICAN ECONOMIST 21 (1985) (stating that "when George Steinbrenner wanted Dave Winfield to play for the Yankees, it was immaterial from a competitive standpoint whether millions of dollars had to be paid to San Diego or directly to Dave Winfield. It is in this sense that the revision of the reserve system implies rent redistribution, from the Padres to Winfield in this case, but not necessarily a different distribution of talent").

27. Ross, *supra* note 12, at 683. Ross reports that "[t]op players have not, on average, abandoned small city teams for big city teams under free agency, nor have big city teams increasingly dominated play." *Id.*, *See also* Drahozal, *supra* note 20, at 120; Dolan and Schmidt, *supra* note 26, at 28 (finding "no decline in field competition between [1969-76 and 1977-83]"). *But see* Daly and Moore, *supra* note 11, at 93 (determining that prior to January 1, 1980, approximately 2/3 of all free agents moved to larger cities and only 1/4 moved to smaller ones, and concluding that "[t]his evidence indicates a clear trend for free-agents to gravitate toward larger cities and suggests that the reserve clause apparently has served as a binding constraint that has, on the whole, increased the equality of competition").*See generally* SCULLY, *supra* note 13, at 96 (finding an increased correlation, post-free agency, between population and winning).

28. GEORGE DALY, *The Baseball Player's Labor Market Revisited* in DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL (1992).

29. *Id.* at 18.

30. BOWIE KUHN, HARDBALL 178 (1987). As Kuhn said at his press conference, "[n]or can I persuade myself that the spectacle of the Yankees and Red Sox buying contracts of star players in the prime of their careers for cash sums totalling $3,500,000 is anything but devastating to baseball's reputation for integrity and to public confidence in the game. . ." *Id.*

left these teams for other markets. Secondly, as disparities in local broadcasting revenues have widened significantly in recent years, earlier studies may not provide an effective comparison. Third, many of the studies, including the ones compiled by Ross and Daly & Moore, measure the number of free agents as opposed to the value of free agents. If the Mets sign Bobby Bonilla from the Pirates and lose Kevin Elster to the Pirates, these studies would incorrectly show no impact on competitive balance.

III. REVENUE SHARING AS THE ANSWER

A. *Arguments For Revenue Sharing*

1. Promotes Competitive Balance

Economists are nearly unanimous in stating that the closer to equality the levl of on-field competition, the greater the overall revenues for the league.[31] Unfortunately, Major League Baseball has a strong collective action problem. In the absence of an explicit revenue sharing agreement, each owner's personal incentives lead him or her to improve his or her own team regardless of the effect on competition. The argument is that "[a]lthough any given individual team may profit by becoming dominant, the rest of the league suffers from the resulting competitive imbalance. In economic terms, league balance, like national defense, is a 'public good.' Although balance benefits all teams, no individual team has any incentive to work toward it."[32]

31. *See, e.g.*, NOLL, *supra* note 11, at 122-23. Noll argues that "aggregate league attendance will be substantially higher if several teams alternate in winning pennants than if one team tends to dominate." *Id.*; Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League*, 15 CONN. L. REV. 183, 193 (1983) (reporting that "the creation of competitive balance will, in turn, increase fan enjoyment"); Atkinson, Stanley and Tschirhart, *Revenue Sharing as an Incentive in an Agency Problem: An Example from the National Football League*, 19 RAND J. OF ECONOMICS 27 (1988) (stating that "[w]e find revenue sharing to be a potentially powerful incentive scheme because in this setting it encourages an optimal distribution of resources among agents"); and Horowitz, *supra* note 16, at 303 ("an equal split that strengthens some of the clubs financially without hurting others will presumably tend to equalize competition, and thereby enhance the profits of all clubs").

32. Ross, *supra* note 12, at 687. Ross illustrates this in an example:

> In a free market, a player will go to the team that places the highest value on his services. For example, if Rickey Henderson were playing for the Seattle Mariners, but the New York Yankees valued him most highly, he would sign with the Yankees when his contract expires. Acquiring Henderson will, of course, please Yankee fans and further enrich the New York franchise. The acquisition might also, however, make the Yankees too dominant in the American League East, thereby decreasing the enjoyment, and possibly the attendance, of the fans in other American League East cities. In theory, if the adverse marginal effect of the trade upon the

The need for competitive balance has been acknowledged by the few court cases in this field. For example, the Eastern District of Pennsylvania cited the work of many economists affirmatively in stating, "[v]irtually all commentators on this subject agree that 'competitive balance' is a desirable goal for a sports league."[33]

2. Revenue Is Derived From All Teams

Although big-city teams supply the fan base that makes valuable television contracts possible, they provide no more of the game product than any other team. As it always takes two teams to put on a single contest, and numerous more to supply the league structure that gives significance to the game, revenue is really derived from the combined efforts of all teams.[34]

> Yankees' American League East rivals were greater than the marginal benefits to New York, then the Red Sox, Orioles, Blue Jays, Indians, Tigers, and Brewers could all get together and pay Seattle *not* to sell Henderson to the Yankees. In reality, however, the high transaction costs would prohibit this arrangement. An inefficient allocation of resources results: fans on the whole would be worse off if Henderson moved to the Yankees than if he stayed in Seattle. Maximizing fan interest may necessitate *some* generalized restraint to prevent players from moving freely to the team that values them most highly.

Id. at 698 (emphasis in original). *But see* Daly and Moore, *supra* note 26, at 80-81 (criticizing the argument of externalities because "team owners are surely aware of these effects; the number of teams is not large and, hence, free-rider effects are not inevitable; a central organization (the league) is available to coordinate activities and prescribe allocative rules; collusion among teams is, uniquely, legal in the industry and detection of violators of collusive agreements remarkably easy").

Economists have studied the effect of close pennant races on attendance. According to Henry Demmert, a franchise in a metropolitan area of 2.5 million people will attract 275,000 additional fans if the team is in a close pennant race. Ross, *supra* note 12, at 676. Demmert also calculated the average attendance when teams of varying caliber played each other in the 1971 season. He determined that when a good team hosted another good team, the average attendance was 24,610; when a good team hosted a poor team, it was 16,066; when a poor team hosted a good team, the average attendance was 11,349; and, finally, when two poor teams played, it was 9,806. Thus, it is more profitable for the league to have more good teams than a few great teams and many poor ones. *Id.* at 670.

33. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972). *See also Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1396 (holding that "[s]tability arguably helps ensure no one team has an undue advantage on the field"); Mid-South Grizzlies v. N.F.L., 550 F. Supp. 558, 568 (E.D. Pa. 1982) (stating that "a franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty"); and U.S. v. N.F.L., 116 F. Supp. 319, 323 (E.D. Pa. 1953) (finding that "[p]rofessional teams in a league, however, must not compete too well with each other in a business way").

34. Ira Horowitz argues:

> [t]here is very little economic justification for shares being other than equal. Broadcasting a game does not ordinarily generate any costs to the teams that are playing, so that a club's renumeration does not have to cover any costs that are related to the number of its home or road broadcasts. Only to the extent that some clubs have greater drawing power might there be a reason for unequal division of revenues, but this effect is mitigated by the fact that it takes two teams to play a game,

Even the court in *Los Angeles Memorial Coliseum Commission v. National Football League*,[35] acknowledged that a diversity of markets is important to league stability and financial success. The Ninth Circuit agreed that "the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets,"[36] but ruled against the NFL because of its belief that Rule 4.3's unanimity requirement for franchise relocation was too stringent and that the Raiders' proposed move would not adversely affect the health of the League.[37]

3. Place an Emphasis on Winning

Although there are many questions concerning the incentives to win under revenue sharing plans, similar incentive problems exist under the present system. After all, the Yankees signed a nearly $500 million cable television deal while they were a bad team. Merely by being in a large market, the Yankees (and a handful of other teams) are guaranteed profits. In fact, the only way they could potentially lose these profits is by spending exorbitant sums of money on free agents. Scully estimates the profitability of every team assuming a .500 record.[38] Not surprisingly, Detroit, Texas, Los Angeles, Houston, Philadelphia, and both New York teams would post profits. At the other end of the scale, Cleveland, Kansas City, Milwaukee, Oakland, Seattle, Cincinnati and San Francisco would suffer losses. Scully's figures are likely not as extreme as they should be. His computations are approximately six years old and while a few more teams - such as Toronto, Colorado and Boston - would also show a profit at .500, many of his "break-even" teams claim to be having a hard time doing so because of the overall escalation of salaries not commensurate with their own rise in local revenues.[39]

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and because success is to some extent unpredictable and temporary.

HOROWITZ, *supra* note 16, at 303. *See also* Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 U.C.L.A. L. REV. 219, 234, n. 41 (1984) (reporting that "[t]he proceeds derived from every game that is part of the integrated league product belong jointly to all the league coproducers").

35. 726 F.2d 1381 (9th Cir. 1984) (ruling against the NFL's attempts to prevent the Raiders' move to Los Angeles).

36. *Los Angeles Memorial Coliseum*, 726 F.2d at 1396.

37. *But see Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1402, n.1 (Williams, J., dissenting) (arguing that "[i]ndeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced").

38. *See* SCULLY, *supra* note 13, at 142.

39. Scully does, however, have some obviously incorrect calculations. *See supra* note 6. *But see* PHILLIP PORTER, *The Role of the Fan in Professional Baseball*, DIAMONDS ARE

The New York Mets' free agent acquisitions of Vince Coleman, Bobby Bonilla, Eddie Murray and Brett Butler in recent years are consistent with Porter's theory. According to a Peat Marwick Main study of fan support, the Mets' attendance is the most elastic in the league.[40]

Revenue sharing, if done properly, could increase incentives to win. By sharing fixed local television revenues which are determined almost entirely by population, but permitting home teams to keep most of their gate receipts (or by giving bonus compensation to the winning teams), teams would have a strong incentive to perform.[41] Peter Henderson and Thomas Bruggink advocate equalizing television revenues and eliminating gate sharing. Doing this, they say, "can reward winning ball clubs. If all clubs receive the same amount of TV revenue, fan attendance at home games will in part determine which teams have the highest net profit. To attract fans to the stadium, a good team and strong promotion are required. Both of these come about through intelligent management."[42]

To further overcome the incentive problem that many say

FOREVER: THE BUSINESS OF BASEBALL (1992) at 63-64. Porter contends that overall revenue differentials do not affect competition. Instead, he looks at fan elasticity and concludes that "[t]he more elastic the attendance response to wins, the greater the incentive of the owner to field a winning team." Porter argues that there exists a "minimum viable market size" but, beyond that, "teams in the most fickle markets tend to corner the scarce talent, that is, that the highest-quality teams will go where the greatest demand for high quality exists." *Id.* Ironically, this leads Porter to conclude that fans would best force their team into acquiring good players through being fickle rather than through loyalty. *Id.*

All things being equal, the bigger cities should feel a greater effect from fan elasticity. Assume an average person has a 10% chance of going to see a losing team but a 20% chance of going to see a winner. Thus, a team in a city with a population of 3 million can expect to see an increase of 300,000 fans by winning (10% of 3 million) while a winning team in a city of 1 million people can expect 100,000 more fans. There exists no economic data suggesting why a particular person in a large city should be more or less fickle than someone in a smaller market. Intuitively, however, there is a higher likelihood of larger-city fan interest being more elastic because of the greater number of substitutes - both other sports teams and other forms of entertainment. Were this true, elasticity would have a similar correlation to population (or geometrically so), meaning that Porter's research presents no novel ideas.

40. *See* Mark Potts, *Bonilla Deal Continues a Trend*, THE WASH. POST, Dec. 4, 1991, at B1. As mentioned above, however, this can be explained not by the Mets elasticity but simply by their location in the largest city in the nation.

41. 1991 attendance, for example, demonstrates that gate receipts are much more reliant on team performance than broadcast revenues are. Small-market American League teams such as Seattle, Kansas City, Minnesota and Oakland were able to outdraw the New York Yankees because of their better performances, while Cincinnati and St. Louis were able to do the same over the New York Mets in the National League. Furthermore, only four teams advanced in the standings without experiencing a gain in attendance (from 1990) and a mere two teams dropped in the standings while gaining attendance (curiously, four of these six teams were in the American League East).

42. Henderson and Bruggink, *Will Running Baseball as a Business Ruin the Game?*, 28 CHALLENGE 53, 56-57 (March-April 1985).

plagues the National Football League,[43] Scully proposes "award[ing] a substantial prize to the world champion [to] overcome the disincentive of equal revenue division during the regular season."[44]

4. Greater Fan Loyalty

There is another aspect to fan interest besides closer pennant races and more variation of winning teams. Many fans find it quite discouraging that their teams can struggle to build winning franchises only to see their players seek greener pastures. The age of free agency has led to fewer players than ever before who spend their entire career with one team.[45] The impact is greater with smaller-market teams, who simply cannot afford to sign all of their star players (and, thus, either lose them to free agency or trade them in the preceding year).

Revenue sharing could have the effect of increasing the number of players who spend an entire career with a team, as was much more common under the reserve rule. After all, if players could receive relatively equal wages in every city, they would be encouraged to lay roots in a community and more interested in staying, although other factors - such as weather, publicity, hometown, the desire for a fresh start or even disparate player valuations by teams - would still lead to some player movement.

Lower player turnover and the ability of teams to sustain quality teams should increase fan attendance. Players will be seen less as mercenaries and more as local heroes.

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43. *See Id.* at 56 (quoting Glen Waggoner, *Money Games*, ESQUIRE, June 1982). Waggoner quotes Oakland Raiders' owner Al Davis complaining:

> Football is a joke. The Giants have been total mediocrity for fifteen years; the Raiders have been a major factor; yet the Giants earn more than the Raiders. No one can say we haven't put an exciting team on the field. We've got the best record in football. It isn't fair that we should be earning less than a lot of clubs that don't feel the need to perform. They suffer no penalty for their incompetence.

Id.

44. SCULLY, *supra* note 13, at 80 (noting that the gate receipts for the 1987 World Series were over $10 million). Scully, however, disagrees with Henderson and Bruggink, and argues that gate receipts should be shared equally. *Id.*

45. A glance at 1995 Major League rosters reveals only four players 35 or older - Lou Whitaker, Alan Trammell, Cal Ripken and Tony Gwynn - who have spent their entire careers with one team. Many teams are without even a single veteran over 30 who has spent his entire career with that team.

B. Arguments Against Revenue Sharing

1. Lower Incentives to Win

As Al Davis noted,[46] the NFL system is not perfect.[47] With 100% of media revenues shared and 40% of gate receipts going to the visiting team (accounting for about 90% of all revenues), the most profitable teams are often those with the lowest payrolls. Gary Roberts argues that with 60% of gate receipts going to the home team, there is sufficient incentive to field a winner. He says that the NFL could divide these receipts equally but, "it does not so divide gate receipts because it wants to leave the participating teams, especially the home team, with an incentive to promote and market vigorously their games. If all gate receipts were divided equally among all the teams, no team would have much, if any, incentive to develop a quality football team or actively solicit local fans to buy game tickets."[48]

However, while Roberts' argument would apply to baseball, in which teams rarely play to capacity crowds, his reference to football seems incorrect. Football teams play to an average of 88% capacity and with only eight home games per team, all but the worst teams sell-out.[49]

Economic studies have similarly concluded that revenue sharing lowers incentives to win. For example, Scott Atkinson, Linda Stanley and John Tschirhart conducted a number of mathematical computations and concluded "that with equal revenue sharing, dR/dw [representing change in revenue over change in wins] becomes less important, and the i-th team may actually receive more revenue by losing to another team whose revenue it will share."[50]

However, as mentioned above, baseball can do certain things to minimize or counter this effect. Because baseball attendance is more elastic than that of other sports, by the league permitting teams to keep a large percentage of their gate receipts, winning

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46. *See*, Henderson and Bruggink, *supra* note 42, at 56.

47. From 1983 to 1986, the top seven NFL teams had 9.6 wins, a $156,400 average salary and $27.4 million in revenues while the bottom seven had 6.1 wins, a $142,800 average salary and $27.0 million in revenues. *See* Ross, *supra* note 12, at 677-78, n. 158.

48. Roberts, *supra* note 34, at 234, n. 134.

49. For example, the Washington Redskins and Denver Broncos have consecutive sellouts going back more than a decade (excluding strike games). Similarly, teams in other sports, such as the Boston Celtics (nearly every game since acquiring Larry Bird), the Portland Trailblazers (every game since 1977), the Montreal Canadians and the Toronto Maple Leafs, consistently play to sell-out crowds. *See* SALANT, *Price Setting in Professional Team Sports*, DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 83 (1992). These sell-outs are often not related to team quality, as the Redskins, Trailblazers and Maple Leafs have suffered through some periods of extremely poor play during this time.

50. Atkinson, Stanley and Tschirhart, *supra* note 32, at 31.

could still provide millions of dollars (an extra million fans is worth about $10 million in gate receipts plus concession and parking revenues).[51] As recent attendance statistics demonstrate, small-market teams are capable of outdrawing bigger-market teams if they can produce winners.[52] Second, as Scully proposed, the league should financially reward those who win championships.[53]

Maintaining an unequal division of gate receipts to counter the incentive problem is analogous to certain theories concerning insurance. Professor Steven Shavell argues that "[if] injurers will not be liable for accident losses, they generally will not reduce risk appropriately."[54] Thus, "although risk-averse injurers will purchase insurance policies, the policies will usually involve less than complete coverage."[55] Similarly, baseball should adopt less than complete revenue sharing through an unequal division of gate receipts.

2. Depress Salaries

Studies have also demonstrated that revenue sharing will lower player salaries. Two of the leading economists in the field, James Quirk and Mohamed El Hodiri, have concluded that, excluding local television revenues, "gate-sharing arrangements . . . determine the level of player salaries and bonuses and the purchase price of player contracts."[56] They further determined that "the higher the home team's gate share, the higher the costs of players and the smaller the chance of survival for franchises in low drawing-potential areas."[57]

Other economic studies have reached the same conclusion. For example, the Atkinson, Stanley and Tschirhart model determined that "increased revenue sharing decreases league costs by lowering the competitive wage c."[58]

51. *But see* DEMMERT, *supra* note 25, at 53. Demmert states that "the visitor's share of gate revenues may have the effect of mitigating these interclub differences in optimal team quality." *Id.*

52. *See supra* note 41.

53. *See supra* note 44.

54. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 208 (1987).

55. *Id.* at 211.

56. QUIRK AND EL HODIRI, *supra* note 25, at 37. Quirk and El Hodiri wrote this during the era of the reserve clause when the sale of player contracts was permitted. However, their position should be unaffected by free agency. *Id.*

57. *Id.* They warn, however, that "[t]he home team's gate share must exceed 50 percent in order for a steady state situation to exist." *Id.* This is likely because of the incentive problems which would develop if the home team did not receive any direct revenue from its acquistions (or received less than its opponents).

58. Atkinson, Stanley and Tschirhart, *supra* note 32, at 33. Understanding why this happens requires some discussion of marginal revenue product. Christopher Drahozal explained that:

> teams in markets with a larger demand for baseball will tend to have more talent

Because teams with the greatest potential to draw crowds are likely to be in the biggest cities, their players have the largest marginal revenue products. Players on small-market teams don't have as high MRPs.[59] If resources are equalized to too great an extent, the marginal revenue products of all players will be significantly lower.[60] Neither the big city teams nor the smaller-market teams will have an incentive to sign star players to expensive contracts. Atkinson, Stanley and Tschirhart's research concludes that "revenue sharing has moved the league toward an optimal distribution, and that . . . the marginal revenue products under equal revenue sharing are well below those in the absence of revenue sharing."[61]

> than those in markets with a smaller demand. Teams in larger markets will have greater financial resources than those in smaller markets because for a given amount of talent, teams in larger markets can attract more fans. As a result players on those teams will have higher marginal revenue products and thus higher salaries. So, in a league with a competitive labor market, such as that approximated by free agency, big city teams can attract better players and will be of relatively higher quality than small city teams.

Drahozal, *supra* note 20, at 115 (citations omitted). *See also* Henderson and Bruggink, *supra* note 42, at 54. Henderson and Bruggink argue that "[i]t is worth it for a club in a major city to acquire top-notch players, because it is only there that such players can generate a large enough MRP [marginal revenue product] to cover their salary demands." *Id. See also* DEMMERT, *supra* note 25, at 77. Demmert states that "[t]hose factors which produce winning teams, and hence profits, will tend to gravitate toward the markets which yield high returns to a winning club." *Id.*; NOLL, *supra* note 11, at 156 reporting that "the importance of having a good team increases with the size of the city, so that owners of teams in larger cities have a greater financial incentive to produce a winner." *Id.*

59. Andrew Zimbalist argues that large-market teams do not possess an additional advantage in competing for free agents because (1) media contracts are priced over a long period of time (a "tradition of winning"), and (2) many big-city teams are already close to capacity in attendance while small-market teams need strong performances to fill their parks. Zimbalist asserts that Barry Bonds, if valued at $7 million by both the Yankees and Pirates, should actually receive a lower offer from the Yankees because his value to the Yankees would have to be discounted by the value of the draft pick the Yankees would have to pay the Pirates as compensation. ZIMBALIST, *supra* note 3, at 102. I disagree with Zimbalist. While Zimbalist is correct in that media contracts rely heavily on population as a proxy, large-market teams often have more elastic attendance and, accordingly, would value star players more. Second, Zimbalist's Barry Bonds example overstates Bonds' worth to the Pirates. Just as the Yankees would have to lower the value of Bonds (or any other star free agent) by the value of the lost draft choice, the Pirates would similarly lower Bonds' value because, in signing Bonds themselves, they would forfeit the draft choice another team would give them. Stated otherwise, if the compensation is $X and both teams valued Bonds at $7 million, the Yankees would be willing to pay Bonds $7 million minus $X so that the total cost to the Yankees equals the $7 million they calculate he's worth. The Pirates would similarly pay Bonds $7 million minus $X, the incremetal value of Bonds above the $X they would otherwise receive.

60. While the individual player's marginal revenue product would be as great to the league (and maybe greater), no team would realize the player's full MRP because it would only receive a percentage of the additional revenue.

61. Atkinson, Stanley and Tschirhart, *supra* note 32, at 42.

Furthermore, citing Congressional hearing testimony of NFLPA Executive Director Gene Upshaw, USFLPA Executive Director Doug Allen, MLBPA General Counsel Donald Fehr, NFLPA Executive Director Edward Garvey, WHA New England Whalers Hockey Club

Although a few years ago, this sort of revenue sharing plan would have drawn an objection from the Major League Baseball Players Association ("MLBPA") because of its potentialy adverse impact on player salaries, perhaps it is just the solution to the recent labor strife. The owners would not only aid the smaller-market teams through revenue sharing, but the potential lowering of the marginal revenue products would serve as a "drag" on salaries. While the players are likely to be displeased with any such "drag," the absence of a salary cap or luxury tax would satisfy their primary concerns.[62]

The MLBPA, if opposed, would assert that a sharing arrangement which has the effect of lowering prices paid to free agents is in violation of the Basic Agreements, as they unsuccessfully contended in 1985 in challenging the "60/40 Rule" (that teams maintain that ratio of assets to liabilities). The owners prevailed in the arbitration of that dispute because the panel concluded that "the 60/40 test was designed not as a device for chilling long term player bargaining, but rather as an overall test of, and protection against, financial instability."[63] The owners, in implementing any such revenue sharing agreement, however, would have to be careful that their primary purpose be the financial stability of all teams through sharing and subsidization rather than depressing player salaries; the panel noted:

> [i]f devised with the clear intent of affecting players salaries, the amendments proposed by the owners might arguably be regarded as *per se* void. there can be little question, for example, that an outright salary cap agreed upon by clubs would have violated Article XVIII and would therfore have been subject to being set aside. It is also possible that the amendments, while not specifically aimed at free agent bargaining, would nevertheless have that impact. Under appropriate circumstances, such amendments might also be vulnerable to challenge. At a minumum however, for purposes of this analysis, there must be some demonstration of impact, either actual or reasonably forseeable.[64]

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owner Harrison Vickers and Milwaukee Brewers owner Edmund B. Fitzgerald, Stephen Ross acknowledged the argument that revenue sharing "eliminates the need to bid to obtain quality players." Ross, *supra* note 12, at 677-78, n. 158.

62. The most efficient way to implement such revenue sharing would be to do so along with the enactment of a salary cap and floor. This, particularly the floor from the players' standpoint, could not only control and limit the "drag," thus *protecting* the players, but also address certain other problems to be discussed shortly.

63. In the Matter of Arbitration between Major League Baseball Player Relations Committe Inc. and Major league Baseball Players Association, Panel Decision No. 66, Greivence 83-1 (Jan. 10, 1985) at 34.

64. *Id.* at 9-10. According to one observer, the owners may have expressed an intent to

Unlike with the 60/40 Rule, negative impact on salaries with respect to a revenue sharing plan is more easily demonstrated.[65]

On the other hand, even if media revenues are equalized, if sufficient gate receipt disparities remain, marginal revenue products may not be lowered. This is because, as discussed earlier, television revenues are relatively fixed and unrelated to on-field performance and, accordingly, rational actors would not let such revenues affect salaries whether they were shared or not. In such a case, unshared gate receipts and the need to maintain high attendance would lead to a maximization of marginal revenue products. However, owners have not been rational actors with respect to veterans (six or more years of experience) and have consistently payed them more than their marginal revenue products.[66] Therefore, owners likely have let media revenues enter into their calculations and, accordingly, the sharing of such revenues could provide a "drag" on salaries.

3. Tinkering with the Free Market

There are two aspects to this argument. The first is related to the preceding section. Although many economists say that greater equality of competition would lead to higher league revenues, there is another angle to consider. It is true that under revenue sharing league revenues would rise because interest would be broader and tighter pennant races would increase attendance in numerous cities. There would be a corresponding decrease in revenues, however, because shifting players away from their free market allocation would mean that the best players would no longer be going to the cities in which they have the ability to generate the most revenues. (Whether this is more or less than the increase is unanswerable at this point). Using the earlier Rickey Henderson example, (if Henderson remains in Seattle rather than going to New York, the league's competitive balance will be improved. However, his loss to

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affect salaries:

> [Richard] Ravitch [the owners' former negotiator] seems to have predicated his sales pitch to the big city owners on the assumption that whatever funds they give up to the small city owners will be replenished by reduced player incomes from the salary cap.

ZIMBALIST, *supra* note 3, at 216.

65. Donald Fehr, head of the MLBPA, sees revenue sharing in this manner, arguing that '[t]hey're seeking an artificial mechanism to drive players' salaries down. They admit they're doing that. We believe the whole (revenue sharing plan to which the owners agreed in January [1994] in Ft. Lauderdale, Fla.) would do that by itself . . . " Mark Maske, *Baseball Talks Remain at an Impasse: No Progress on Payroll Taxation System: Change of Unfair Labor Practice is Dismissed,* THE WASH. POST, Dec. 21, 1994, at F1.

66. *See* ZIMBALIST, *supra* note 3, at 90-93.

Seattle might cost them only 250,000 fans while New York might gain 500,000 new fans because of the greater potential fan base in New York. Under the current (relatively) free market system, players are allocated to those teams in which they can produce the most revenue on a team-by-team basis. Tinkering with that leads to certain inefficiences that are only balanced by predicted, and therefore uncertain, gains.[67]

The second problem concerns the question of when a team should legitimately move to a more profitable market. Under a plan involving significant sharing of gate receipts and media revenues, teams' only reason to move would be far more favorable stadium arrangements, a poor basis in that it has little to do with viability or fan support. Switching from a small media market to a large one, even if the change is substantial, would only cause the team to realize 1/28th (soon to be 1/30th with the addition of Arizona and Tampa Bay) of the additional revenue. Thus, teams would stay in their current cities regardless of the attendance or support.[68] However, in some instances, moves are appropriate. When a small-market team fails to get local support, moving to a larger market realizes gains to both that team and the rest of the league (through increased gate revenues and higher national television ratings).

Gerald Scully cites the research of William Holahan, which argued that inequalities were actually greater during the era of the reserve clause. The argument is that during this era, weaker clubs were subsidized through cash sales. "William Holahan then asked: What happens to competitive balance in the long run, if some of the marginal teams go out of business. Obviously, the elimination of weaker clubs will improve competitive balance, raise the average level of quality of play, and reduce the dispersion in quality among teams. The corollary of Holahan's argument is that the cash sale

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67. *See* Atkinson, Stanley and Tschirhart, *supra* note 32, at 42-43. Demmert states further:

> [c]onsider why revenue sharing is not used more extensively in other professional team sports. While increased revenue sharing increases league profit, some teams' revenues will decrease. If enough team owners expect reduced profit, revenue sharing will not be adopted. Unlike football, baseball and basketball teams rely heavily on gate receipts and local broadcasting, and they seldom have sell-out games. Therefore, if owners in these sports see an opportunity to increase revenues by increasing their own wins, and not anticipating the lower wages under revenue sharing, they have would little interest in a revenue sharing scheme.

DEMMERT, *supra* note 25, at 95. Demmert also states, "if the rich market clubs are risk averse, they may reject an uncertain future payoff in favor of their present profit situation, unless the expected value of future net gains is relatively large." *Id.*

68. This may not be true in an extreme case (such as when a team only draws a few thousand people per game and, thus, fails to get much unshared miscellaneous stadium revenue) but it is doubtful that any team would realize much profit by moving (under a scheme of revenue sharing), given current attendance figures.

subsidy from large city to small city franchises that was a feature of the players' labor market prior to 1976 actually promoted greater inequality of play than does free agency."[69] But the premise of this argument is that the weaker clubs will go out of business during a period of strong competition. Under a plan of equal revenue sharing, there is no mechanism to drive the weaker clubs out of the market. Thus, Holahan's argument fails in this context and competition (or overall revenues) may be weakened by the subsidized survival of the poorer teams.[70]

At some point, it must be reasonable for a team either to fold or to move. After all, is it really the best for baseball when a small-market team such as the Pirates wins its division, then fails to sell-out its stadium in the playoffs? If there are so few fans in Pittsburgh interested in attending a playoff game, why should the Pirates receive a subsidy so that they would have an equal chance as divisional-rival Chicago Cubs, who have hundreds of thousands of people who would go to the game and are willing to contribute their money to help the team get there (either through paid admissions or through television ratings)? The utility of winning is simply greater to a large-city team than to a smaller market team and pleases more fans overall.[71]

A danger of substantial sharing of television revenues and gate receipts is demonstrated by the Oakland Raiders' case. The Raiders were extremely successful in Oakland and always played before sell-out crowds.[72] However, because the NFL shared all television

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69. SCULLY, *supra* note 13, at 84.

70. David Davenport offers a counter-argument:

> [i]t might be argued that such egalitarian policies permit 'sick franchises' to survive through subsidization. But I think there are other indicators - such as basic attendance - to tell a management or league when it is time to shift. It doesn't require near bankruptcy and chronic last place finishes which merely lessen the competition of the field and the attraction of the entire sport to the consumer. Instead of folding, 'subsidization' gave the Cowboys the means with which to develop the strong franchise they are today with several championships and high attendance. These policies provide each club with a revenue base which leads to increased competition over the league. Beyond this base, profitability remains a function basically of attendance, the playing record and championship potential, and stadium plant.

Davenport, *Collusive Competition in Major League Baseball: Its Theory and Institutional Development*, 13 AMERICAN ECONOMIST 6, 10 (Vol II) (1969). This is only true when gate receipts are not equally divided.

71. On the other hand, that is only true if one compares fans in Pittsburgh with fans in New York. It is entirely plausible that, nationally, more fans were pleased when the Yankees lost the World Series to the Pirates in 1960 (or whenever smaller market teams won) because of a general interest in seeing the "Cinderella" teams succeed.

72. *See* Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L. J. 1013, 1021 (1984); and *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1393. "The Oakland Coliseum sold out for 10

revenues and 40% of gate receipts, owner Al Davis could not reap many of the benefits of his outstanding team. Because stadium revenues are virtually the only receipts that are not shared, Davis decided to move the team to Los Angeles where he would receive substantial income from luxury boxes and other benefits.[73] Similar moves in recent years in the NFL were made by the St. Louis Cardinals, Baltimore Colts and Los Angeles Rams.[74] These moves demonstrate that revenue sharing does not necessarily provide more stability but instead changes the reasons for a move.[75]

Unless baseball retains very unequal gate receipt division, equal sharing of broadcast revenues could lead to a very warped result - the moving of teams to smaller cities. This could result because the team would suffer only 1/28th of the loss of revenue due to the smaller television contract and gate attendance but might reap huge gains if a smaller city were willing to give it a better stadium package.[76]

4. Disparities in Stadium Revenues

Just as there are tremendous differences in the broadcasting fees that teams command, there are wide disparities in stadium revenues.[77] These can be viewed in two ways. First, stadium reve-

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consecutive years despite having some of the highest ticket prices in the League." *Id.*

73. *See* Roberts, *supra* note 34, at 258-59, n. 141. "Because the Raiders would receive 60% of the increased revenues from ticket sales in Los Angeles over those in Oakland and 100% of any other new revenue generated in Los Angeles, such as income from the rental of stadium loge boxes, parking, or food concessions, these financial incentives for moving to Los Angeles would be likely to overshadow the Raiders 1/28th share of whatever injury would be done to the league as a whole from the diminished goodwill, television ratings, or political fallout." *Id.*

74. During the last two decades, no baseball teams have moved.

75. A sampling of packages that football teams have received from their local cities includes no amusement taxes on tickets and a refund of most of tax revenue to the New Orleans Saints (these benefits total approximately $2.5 million) and skyboxes, deferred rent, city hired security guards and the retention of lease revenues from boxes for the Philadelphia Eagles (totalling approximately $30 million). Baseball teams get similar treatment. Philadelphia imposes no ticket tax, paid $1 million for a scoreboard, gives a $745,000 annual subsidy for debt service and constructed suites for the Phillies and permitted them to retain 60% of the revenues (totalling $2.5 million) and the City of Arlington purchased the Texas Rangers' broadcasting rights for ten years at $3 million more than valued, publicly funded the renovation of the stadium and gave the Rangers and advantageous lease (totalling $21 million). *See* Ross, *supra* note 12, at 650, n. 28.

76. A perfect example of this is the recent battle over the Los Angeles Rams move to St. Louis, initially rejected by the National Football League, but ultimately approved after the Rams offered a substantial payment to the other teams. The Rams will receive a significant financial gain by moving to St. Louis because of local incentives, but conversely the NFL may suffer by having to refund money to Fox on the current television contract, as Fox is demanding, because of the partial abandonment of the second largest television market.

77. *See* Ozanian, *supra* note 16, at 50. These revenues bear less of a relation to market size. For example in 1993, San Francisco received $15 million, nearly four times the $4 mil-

nues can be seen as fixed revenues, relatively unrelated to team performance and, thus, ignored when calculating how much to spend. Alternatively, stadium revenues can be seen as adding to the value of a team, as giving an owner more disposable income to use to purchase a winning team and, therefore, as important enough to be shared. Either of these characterizations reveal shortcomings in the argument for revenue sharing.

If these stadium revenues are regarded as fixed revenues which shouldn't affect the profit-minded owner, the same could be said for most of the local broadcasting fees. As discussed earlier, the Yankees received a big television contract regardless of performance and, if profit-oriented, should not spend much of this income to improve their team. If owners are profit-oriented with respect to this fixed stadium income, then there should be no difference with respect to relatively fixed television income and, therefore, sharing even broadcasting revenue would be largely unnecessary.

The alternative categorization is similarly problematic. If fixed income from stadium revenues gives an owner more resources to spend, then independently wealthy owners are similarly situated. Fixed stadium income adds no more incentive or ability to win than does owning a lucrative restaurant chain. However, there is certainly no way to compel independently wealthy owners to share their outside income to equalize the playing field, nor should there be. Forcing the sharing of fixed stadium income penalizes those owners who earn additional money from their stadiums rather than through other businesses.

While neither alternative is completely satisfactory, stadium revenues must be treated as unrelated income. These are revenues which are relatively unrelated to market size and any attempt to force the sharing of these revenues would deflate incentives to get stadium-related concessions or financing from the community. Even though the treatment of this income as fixed and unrelated to performance and, accordingly, as unlikely to affect competition for talent, results in the difference of treatment between stadium revenues and a percentage of media revenues, there is just no answer for that unless one could determine the exact component of broadcasting revenues that is fixed and that which is susceptible to the competitive strength of a team.[78]

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lion Detroit received, despite having a population merely one-third as large. The league average was $9 million. *Id.*

78. Of course, the favorable result from the owners' perspective of sharing all revenues except stadium income is that owners would likely be able to leverage stadium revenue disparities (and any correspondingly adverse on-field competitive impact, to the extent they can claim there is one) to wring more concessions from their local communities. The sharing of all

5. Fan Reaction to Cooperation

Any proposal to share revenue must proceed with some caution because of the potential negative fan reaction. As one group of commentators observed, "noncooperative behavior among teams is essential to maintain fan interest."[79] Gary Roberts noted that, "[b]ecause the league's product is athletic competition, it must ensure at least the appearance of honest and vigorous athletic rivalry among league members. Thus member teams are allowed to operate with a great deal of autonomy. It would look very suspicious to many fans and greatly diminish their enthusiasm if the clubs were largely controlled from league headquarters and seemed to lack financial incentive to perform well on the field and efficiently in the front office."[80] Henry Demmert, however, argues that there exist "more covert methods of profit sharing" with which leagues could maintain the appearance of independence.[81]

Although the National Football League shares all television revenues, baseball is quite different. For example, the NFL never had to deal with the issue of substantial local revenues. Most fans are either unaware of the revenue sharing arrangement in football or are unconcerned because the package is jointly negotiated between the league and the networks. On the other hand, baseball television rights have historically been local in character and any change would receive much publicity.

However, there is another aspect. Even though revenue sharing may have some initial negative impact with fans who believe that competition is decreased as a result of collusion, in the long term it will be offest by the increase in team balance.[82] Furthermore, as

revenues except stadium income heightens the necessity of teams receiving stadium upgrades, such as skyboxes, to keep pace with their rivals (again, to the extent they can demonstrate that this revenue is needed to sign players).

79. Atkinson, Stanley and Tschirhart, *supra* note 32, at 28.

80. ROBERTS, *Professional Sports and the Antitrust Law*, THE BUSINESS OF PROFESSIONAL SPORTS 145 (1991). *See* Roberts, *supra* note 34, at 263. "Because the attractiveness of the entertainment product depends to a large extent on the appearance of, and fan identification with, honest intraleague rivalry, sports leagues always have structured themselves to foster it." *Id.*, *See also* Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TULANE L. REV. 117, 138 (1989) (stating that "the league's product necessitates maintaining the appearance of honest and vigorous athletic competition between the league partners"); DALY, *supra* note 28, at 18 (arguing that "[a] league's legitimacy is enhanced by the independent ownership and management of individual teams and, conversely, is damaged by ownership integration and the potential conflicts of interests such arrangements might involve"); and DEMMERT, *supra* note 25, at 95. Demmert states that "[i]t is possible that the clubs feel that visible and explicit economic cooperation among league members compromise the facade of competition from which sport derives its ultimate appeal. If this competitive posture is to be maintained, it may necessitate at least nominal economic independence among the members of the league." *Id.*

81. DEMMERT, *supra* note 25, at 95.

82. *See* Ross, *supra* note 12, at 667 (arguing "[s]ports fans should prefer a system of allo-

revenue sharing hopefully will lead to greater league stability, the problem of fan disillusionment associated with franchise moves will be lessened, although, as noted earlier, there have been no baseball franchise relocations in over two decades.[83]

6. Uncorrectable Advantages

Some may argue that there is another shortcoming to revenue sharing. There are some advantages (or disadvantages) that cities may have that a revenue sharing plan cannot correct. These include weather, quality of living and publicity leading to endorsements. The argument goes that in a world in which all revenues were shared equally, teams such as those in New York, Los Angeles, or Chicago would still have a huge advantage.

However, there are three responses to this. First, to the extent that people may favor cities for non-monetary reasons, the impact is multiplied when those cities have additional revenue to spend. Second, just as people live all over the country for various reasons, athletes will have different preferences. Some may want the spotlight, others may wish to avoid it. Some may want a big city, others may want the smallest city. Even though, on the whole, bigger cities will remain favored, they will be somewhat less so under a scheme of revenue sharing. Third, a plan including a salary cap/floor should also help to correct this problem.

C. Special Considerations

1. Owners as "Sportsmen"

Many of the economic theories would work quite well if team owners were, like most other businesspeople, profit-maximizers. However, that is often not the case. Quirk and El Hodiri discussed the falsehood of the basic premise of their research. "The assumption that the actions of franchise owners are motivated solely by profits from the operation of their franchises is admittedly somewhat unrealistic. Owning a major-league franchise carries with it prestige and publicity, and a wealthy owner might view it simply as

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cating players among teams that gives their own favorite team the opportunity to win the championship, but at the same time provides for close, competitive games. To maximize both fan attendance at games and ratings for broadcasts, thereby maximizing revenue, leagues have an incentive to establish player allocation systems that create the greatest fan interest").

83. *Id.* at 653-54 (alleging "franchise moves may decrease fan loyalty to the detriment of the league as a whole"). Even though no teams have moved in 25 years, future stability is nonetheless potentially threatened by growing disparities in media revenues. The challenge, however, would be to ensure that revenue sharing does not create instability by encouraging teams to relocate based upon stadium deals and other incentives. *See supra* note 76.

a type of consumption; for such a 'sportsman'-owner, winning games rather than making money might be the motivating factor."[84]

This phenomenon has been borne out in economic studies as well. Computing the marginal revenue products of players in the National Football League in 1982, Atkinson, Stanley and Tschirhart calculated salaries to be seven times greater than marginal revenue products. As they found the equality of salaries and marginal revenue products to be a "necessary condition for profit-maximizing behavior," they "fail[ed] to accept profit maximization as the sole motivation for the owners' behavior."[85]

A consequence of such non-profit maximizing behavior is that revenue sharing may not correct the problem of team disparities. If some owners are willing to spend money on players regardless of revenues, the entire league will feel the effect of the imbalance (just as if a few teams have extra media revenues that they are willing to spend). The danger of richer owners outspending their poorer brethren is arguably worse when it is outside income that drives up prices rather than revenues. This is because when disparities are due to team revenues, there is some efficiency in that the dominant teams are the ones which produce the most. On the other hand, when the disparities are caused by outside wealth, the dominant teams may be in smaller markets, leading to a significantly greater loss in the revenues of the big-city teams (and the rest of the league) than the corresponding gains for the winning teams.[86] To prevent the danger of "sportsmen" owners, the best solution would likely be some form of salary cap/floor, as discussed earlier.[87]

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84. QUIRK AND EL HODIRI, *supra* note 25, at 42. *See also* Atkinson, Stanley and Tschirhart, *supra* note 32, at 28, who state that "for the owner of a sports team there is a private, nonmonetary benefit: the enjoyment and prestige of winning contests, which is distinct from the profit that winning may generate." *Id.*

85. Atkinson, Stanley and Tschirhart, *supra* note 32, at 39. *See also* ZIMBALIST, *supra* note 3, at 90-93. Zimbalist had five explanations for why players might be paid in excess of their marginal revenue products: (1) misjudgment by owners, (2) additional value of a player beyond statistical performance (i.e., team impact), (3) long term contract was signed for stability even though MRP would decline, (4) "sportsmen" owners and (5) specific fan interest that brings in additional revenue. *Id.*

86. If there must be dominant teams, economically it makes sense for these teams to be located where the marginal returns are greatest. Thus, the televisor makes a substantially greater profit (or lesser loss) when teams from New York, Chicago, Boston or Los Angeles are in the World Series and fears a Minnesota-Atlanta match-up (although the 1991 World Series proved that there is no substitute for exciting competition). The idea of revenue sharing is to equalize competition, not realign the balance of power. *See* ZIMBALIST, *supra* note 3, at 104.

87. The general profitability of most teams despite the tremendous wealth and external resources of most owners indicates that this problem is not too serious.

2. Owners of Other Business Ventures

This is related, in a more serious way, to the issue of "sportsmen" owners. The principle of revenue sharing can only work if teams report and share all relevant revenue. But under the current system, teams often can understate income. This is largely due to joint ownership of other business ventures which interact with the baseball clubs (such as television stations or advertisers). Gerald Scully reported on the problems related to joint ownership, saying, "[j]oint ownership with affiliated businesses has implications for the analysis of sports profitability. The profits of the Cardinals, the Cubs, or the Braves are not independent of the profits of the parent companies. Theoretically, part of the profits of Anheuser-Busch Breweries, WGN, and WTBS, ought to be allocated to the clubs, since in the absence of club ownership the parent companies would have had lower profits. Second, the revenues derived from related party transactions might be lower than their fair market value. For example, WGN or WTBS may pay local radio, television, and cable fees to the clubs lower than the market price for these rights."[88]

This is a problem for two reasons. First, as with the "sportsmen" owner, if a team is willing to sustain losses in order to "maximize joint profits rather than maximize on their baseball operations alone,"[89] the balance could shift from favoring big-city teams to favoring teams owned by television stations or breweries (or teams whose owners also own these other interests). In such case, revenue sharing would not balance the league, but shift the power.[90] As mentioned above, a combination of revenue sharing with a salary cap/floor would serve to correct partially this problem.

The second problem concerns the opportunity for cheating among owners. If, as commentators note, teams such as the Braves,

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88. SCULLY, *supra* note 13, at 133. *See also Id.* at xiii. (Ted Turner's sale of his club's broadcast rights to his own television station at a price below their market worth transfers income from the Braves to WTBS-TV"); HOROWITZ, *supra* note 16, at 296 ("the broadcast revenues of Baltimore and St. Louis consistently diverged from the amounts predicted by the statistical analysis, but in both cases the president of the team was also the president of the brewery that owned the rights to the team's braodcasts"); ZIMBALIST, *supra* note 22, at 131-32. Zimbalist states, "[b]aseball may be a vehicle to enhance other business ventures. The better a team performs, the more it promotes the individual or corporate owner, and, hence, the more it promotes other activities" ZIMBALIST, *supra* note 3, at 212-13. Zimbalist estimates that WTBS pays the Braves $9 million for television rights worth over $30 million and notes that over the last five years, at least 18 teams have engaged in related party transactions. *Id.*

Andrew Zimbalist observes that even those owners who do not have other business ventures may instead loan money to their teams and, therefore, extract their financial returns in the form of interest, rather than profit. *Id.* at 213.

89. ZIMBALIST, *supra* note 22, at 131-32.

90. And, as discussed above, reduce overall revenues because the dominant teams may not be the ones located in markets which would produce the greatest revenues.

Cubs, and Cardinals receive considerably less money for their broadcast rights than the true market value, this unpaid money could not be shared. Thus, these teams would profit at the expense of their fellow owners because the extra unpaid value of their broadcasting rights would remain with their local owners.[91]

Because monitoring would likely be far too complicated and relationships between teams and affiliated interests may be difficult to detect, the best solution to this problem would be for the league to assume control over all broadcast rights, national and local.[92] The league could then sell its national rights, as it does. With local rights, the league could solicit bids from television and radio stations throughout the country. Doing so would have the following benefits.

First, all deals would be arms-length transactions; thus, broadcasting contracts would be for their full value. Second, this proposal could solve the current predicament with superstations. The current system of compensation for superstation broadcasts[93] serves to restrict output.[94] Under this system, not only would output likely be increased, but the compensation would be more appropriate. This is because under the present system, superstation broadcast surcharges go into a general pool to be divided equally even though each broadcast may affect individual teams that have to compete with the broadcast differently.[95]

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91. If WTBS pays too little for the rights to broadcast Atlanta Braves games, the Braves would only contribute that smaller amount into the league pool. However, Ted Turner, who owns both WTBS and the Braves, gains because WTBS has received rights valued at greater than the amount paid and shared.

92. Of course, this would have to be done after present contracts expired (unless they contain escape clauses). A danger exists that if an owner like Ted Turner senses that such a proposal could be implemented, he might have the Braves sign a long-term contract with WTBS. Should something like this happen, the owners could request an appraisal of the Braves broadcast rights and reduce Atlanta's share of the joint revenue by the amount of the shortfall.

93. *See* Chicago Professional Sports Limited Partnership v. National Basketball Association, 754 F. Supp. 1336, 1343 (N.D. Ill. 1991); ZIMBALIST, *supra* note 3, at 50.

94. Surcharges raise the cost of production which necessarily reduces output.

95. For example, if the Braves-Dodgers game is televised on WTBS in Cleveland, where the Indians are playing the Brewers, it is likely that the home game will receive somewhat lower television ratings. As a result, the Indians may receive less money when they negotiate their next television package. As compensation for this direct loss, they are only entitled to receive an equal share of the income from the surcharge WTBS or the Braves pays, even though their relative losses might be greater than that of other teams, such as those teams on the West Coast which don't have many games televised at the same time as those on WTBS.

Under this new proposal, the Indians need not fear the loss of their television ratings because, presumably, the increased revenue they will receive from their 1/28th interest in WTBS' broadcast will more than offset their 1/28th share of the loss in the revenue from their own game.

Furthermore, output should be increased because it would be profitable for all teams to

Finally, central coordination would permit the league to create its own "networks." By negotiating contracts for the entire league, it could sell the rights for over-the-air stations to televise out-of-town games. For example, for an extra fee, a station in Boston could be permitted to show Blue Jays-Yankees games in September, if it so desired.[96] During pennant races (which should be closer after revenue sharing), the interest in the games of rivals is nearly as great as that for the home team. Under the current system, coordination among teams for these broadcasts is simply too difficult and costly. But under this proposal, the league benefits by capturing additional revenue and fans benefit by seeing more exciting and meaningful games.

3. Compensation to Owners

As one can expect, such proposals for revenue sharing are likely to meet substantial opposition on a number of fronts; for example, (i) big-city team owners will be reluctant to lose their competitive edge and huge profits, (ii) owners such as Ted Turner and Tribune Company (the owner of both the Cubs and WGN, the Cubs' local broadcaster) will be loath to lose an opportunity to manipulate corporate revenues among entities, and (iii) average teams may fear the uncertainty associated with revenue sharing.[97]

Given the current voting requirement of a three-fourths majority in each league, the first obstacle is likely to be the greatest. To convince big market teams to go along with such a plan, an adequate system of compensation must be devised.[98] Jeff Smulyan,

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encourage additional broadcasts because the revenue gains from extra broadcasts will be greater than the revenue losses suffered as a result of fans choosing not to watch the home team (because all of those fans, plus additional viewers, would be captured by the alternate broadcast).

96. If the leagues were concerned about the effect on the live gate, it could limit these broadcasts to times when the local team were not at home.

97. *See* DEMMERT, *supra* note 24, at 95. "Perhaps more important is the uncertainty with which clubs may regard the effects of policies designed to increase competitive equality. Our model suggests the rational course of action only on the assumption of complete information regarding the possible outcomes of various strategies, and the absence of such information may preclude the league's ability to pursue jointly optimal behavior." *Id.*.

98. Otherwise, big-market teams would unfairly suffer a huge drop in value. For example, the Phillies' Bill Giles once responded to a revenue sharing proposal of then-Orioles owner, Edward Bennett Williams, by saying, "[w]ell, of course, if I were Edward Bennett Williams, I would feel that way, too. But I have a responsibility to the people who invested $30 million in this ball club and we would not have paid so much if we had to share our TV revenue to a greater degree." ZIMBALIST, *supra* note 3, at 177. *See also* Don Shacknai, *Sports Broadcasting and the Antitrust Laws: Stay Tuned for Baseball After the Bulls Romp in Court*, 1 SPORTS LAW J. 1 (1994) at 40. Shacknai states, "[a]rguably, however, Steinbrenner paid for this additional value when he purchased the Yankees instead of say, the Milwaukee Brewers." *Id.*

the beleaguered former owner of the Seattle Mariners at the forefront of those calling for revenue sharing, had a compelling idea for a compensation scheme. Smulyan proposed appraising each club. "Next, each of the 'big clubs' [those valued at greater than the average team] should be paid either all or a percentage of the appraised difference in values. If the average team is appraised at x and the largest team is appraised at three times x, this large team would be in line for a one-time check for as much as two times x."[99] Smulyan next stated that Major League Baseball should be organized as a corporation with responsibility for all revenues and expenses (and, in effect, the 28 owners would be equal shareholders and team operators).[100]

One weakness of Smulyan's plan is that while the teams with above average values are compensated for the difference between them and the average, for obvious reasons, Smulyan doesn't go the next step by proposing that the teams that are appraised at below average values should pay extra for the gains they will realize.[101] Thus, an average team such as the St. Louis Cardinals, valued at $105 million, would be treated equally to the Mariners, despite currently being worth $25 million more.

Adjusting Smulyan's plan slightly, I would adopt a system whereby every team is appraised and the league "buys" all of the teams for that value. Then, owners are given the opportunity to "buy back" their franchises at a newly determined value (adjusted upward for the positive effect of revenue sharing). Teams which suffered losses in value would be entitled to receive net payments from the league while those teams whose values have increased would be required to chip in extra money to purchase their teams.[102]

I would also keep independent ownership rather than set up one corporation. As discussed earlier, the greater the centralization of control, the more skepticism among fans. Furthermore, owners likely would get much more utility out of owning their franchises

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99. Jeff Smulyan, *Full Overhaul is Best Hope to Maintain Balance*, USA TODAY, Mar. 5, 1991, at 10C.

100. *Id.*

101. Not surprisingly, Smulyan's Mariners, subsequently sold to Nintendo of America, were appraised by FINANCIAL WORLD at $80 million, one of the lowest valuations in the Major Leagues. For 1993 Major League Baseball revenues, expenses and franchise values, *see* Michael Ozanian, *supra* note 16 at 50.

102. Owners who owe money could finance this fee through future revenues. As these "buy back" costs would be fixed (like expansion fees), they should not affect player salaries.

The league would actually wind up with a surplus through this method. This is because the average value of teams would be greater after a plan of revenue sharing than before. Thus, teams would be spending more money on the average to buy back their team than to sell them. This revenue can be refunded equally to the owners.

than being 1/28th shareholders and merely operating their teams (particularly since owners rarely participate in team decisions but instead merely prefer the prestige of being a local team owner). Finally, I would not recommend a complete sharing of gate receipts in order to maintain some incentive to win; likewise, central control and equal sharing of profits would not be wise.[103]

Such a system of compensation should satisfy owners of both large and small-market teams. In exchange for giving up their future advantage in revenues (which expected revenues surely affected the higher purchase prices paid by the big-market owners), big-city team owners would receive the lump sum value of that difference.[104] On the other hand, small market owners (who likely paid less for their teams because of the lower anticipated revenue streams) would pay an amount commensurate to the immediate rise in the value of their teams[105] and would be given a chance to compete as they've never had before. This additional payment certainly is not burdensome as these small market owners would be left with teams valued at much greater amounts.

D. Other Proposals

Commentators and economists have made various proposals concerning how major league baseball should share revenue. A few of them deserve comment.

Roger Noll suggests that teams should have the right to broadcast their games to any other cities.[106] Noll argues that "[t]hese practices would probably reduce the revenues of teams in big cities, but the benefit to teams in smaller areas could more than offset the losses they would suffer from losing national and local monopoly positions. In any event, the net effect would be to narrow the spread in financial resources among teams."[107] However, Noll seems to ignore the reality that given the choice of two broadcasts of the same game, fans will choose their home team's broadcast simply because of the familiarity with the announcers and the desire to listen to the broadcasters' "home-town" bias. Furthermore,

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103. Just as most insurance schemes provide for some deductible amount to discourage risky behavior, a certain level of gate receipt disparity will provide sufficient incentive to field a successful team.

104. In effect, receiving the present value of expected future income.

105. Actually, because of the refund, they pay less.

106. This is different from the proposal presented above because Noll does not include any central coordination or complete pooling of these revenues. Noll's two-pronged proposal would permit teams to broadcast into the city of their opponent ("giving small city teams access to big city audiences") and also allow teams to broadcast into all other cities. NOLL, *Alternatives in Sports Policy* in GOVERNMENT AND THE SPORTS BUSINESS 419-20 (1974).

107. *Id.* at 419.

although this factor is not likely to be a motivating factor because of a lack of knowledge of the financial intricacies of baseball, educated fans should listen to their home team's broadcasts because it improves the team's ratings, which increases its income, which in turn gives the team greater resources with which to purchase players. Finally, any gain experienced by a small-market team in succeeding in having its games viewed in bigger cities could be offset by a corresponding loss when better-quality big-city teams broadcast games into its home market.

As an alternative to wide open broadcasting rules, Noll also suggests the opposite: granting only the home team the right to broadcast a game. Under such a system, when a big-market team plays in a small city, it would be required to carry the home team's broadcast if it wished to televise the game. That way, small-city teams would have access to large markets for some of their games.[108] The problem with such a rule is that team revenues are somewhat equalized by a reduction in overall league revenues. The transaction costs for a Kansas City station to contract with stations throughout the country, broadcast its game back to New York and re-sell commercial advertising, and do so with every other market in the league, would certainly be greater than the transaction costs associated with centrally coordinated activities.

Noll further recommends sharing both broadcast revenues and gate receipts and either having 60% of each go to the home team and 40% to the visitor or having 50% go to the home team, 25% to the visitor and 25% divided equally among the entire league.[109]

This idea is good. By sharing revenue, but not equally, teams will still have an incentive to market themselves and acquire quality talent. Furthermore, with the revenue percentage divisions that Noll proposes, there will be a greater move to revenue equality. While disparities between teams would still exist, they would be much narrower than they are currently.[110] However, equalizing media revenues but maintaining a disparity in gate receipts is preferable given the large media revenue differences which would

108. *Id.*

109. *Id.* at 420.

110. Under the present system of retention of most local revenues, in 1993 the average team received $27.7 million from national and local broadcasting rights combined. However, although the figures ranged from the Mariners' and Royals' $21.0 million to the Yankees $63.0 million, 21 of the 26 teams were within $7 million of the average (five teams - the Mets, Yankees, Red Sox, Cubs and Braves - were above that range and none were below, excluding the expansion Rockies and Marlins which did not share national television revenue). *See* Ozanian, *supra* note 16. Under Noll's plans, the Yankees' media revenues would be reduced to approximaely $45-50 million and the Mariners' and Royals' would rise to about $24-25 million.

still exist under Noll's proposal.

Senator Slade Gorton (R - Wash.) a few years ago introduced legislation, similar to Noll's proposal, that requires revenue sharing. Stating that "[b]aseball unifies the entire country,"[111] Senator Gorton proposed forcing teams to share approximately half of their local revenue with the rest of the league. According to his research assistants, 19 teams would benefit while seven would suffer (this proposal was made before expansion to Florida and Colorado.[112] Under the Senator's bill, the range of broadcasting revenues in the American League would have been from the Yankees $47.8 million to the Mariners $22.2 million.[113] While I support revenue sharing, I do not believe it should be mandated by congressional legislation.[114]

James Quirk and Mohamed El Hodiri advocate locating franchises in a way that "equalize[s] drawing potential."[115] Henry Demmert reaches the same conclusion. He writes that there should be "league action to relocate franchises in a way that more accurately reflects market population. For example, New York might have four clubs, Chicago and Los Angeles two clubs each, Cincinnati one club, and so on."[116]

Andrew Zimbalist, however, believes that such a solution would not be appropriate. Arguing against the traditional practice of economists of dividing city populations by the number of teams in performing their calculations, Zimbalist, an advocate of greater expansion, says that "teams do not split cities and to be a fan of one team in not mutually exclusive of being a fan of the other team in the city."[117]

One interesting proposal that would reduce greatly the need for revenue sharing was presented by Stephen Ross. Ross advocated small-market teams splitting their seasons between warm southern cities in the spring and colder, northern cities in the summer. This

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111. Walters, *Bill Would Help Poorer Teams*, USA TODAY BASEBALL WEEKLY, Sept. 27, 1991, at 3.

112. Senator Gorton's Mariners, with the least local broadcasting revenues at the time, would have benefited the most.

113. *See* Schaefer, *Strikeout Legislation - Gorton Concedes his Baseball Bill Won't Be Instant Hit*, SEATTLE TIMES, Sept. 19, 1991, at C1.

114. *Compare* Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. OF SPORT L. 321, 334 (1994) (stating as a possible solution for Congress to "legislatively mandate a minimal level of revenue sharing for every major professional sports league").

115. QUIRK AND EL HODIRI, *supra* note 25, at 37.

116. DEMMERT, *supra* note 25, at 93-94.

117. ZIMBALIST, *supra*, note 2, at 117. He continues, "[i]n fact, having two or more teams in one city might deepen the baseball culture in the area and thereby increase the number of fans. Finally, a teams' output is not homogenous. For example, Yankee fans cannot watch Dwight Gooden pitch at Yankee Stadium or on Madison Square Garden cable network." *Id.*

would have a number of positive effects. First, ticket sales would increase because of fewer games in each city, further increasing gate attendance greater population bases from which to draw. Third, local broadcasting revenues would rise because the team would have a substantial following in two cities. Fourth, it would bring baseball to more fans, making up for the relatively slow pace of expansion. Finally, it would increase the national scope of the American pastime, thus favorably impacting overall television ratings.[118] While this proposal would have some obvious complications, perhaps it is a solution to a few of baseball's problems.[119]

IV. Legal Analysis

A. *Antitrust Issues*

1. Exemptions

As everyone knows as a result of so much recent Congressional debate, baseball has an antitrust exemption.[120] The key considerations, then, are how far this exemption extends to off-the-field agreements such as revenue sharing and whether either the courts or Congress would consider altering (or removing) the exemption. The difficulty Congressional proponents recently faced in efforts to end the baseball strike leads one to doubt that Congress would act to prevent revenue sharing.

There are an increasing number of courts and commentators who would argue that revenue sharing would be outside baseball's antitrust exemption.[121] Scott Hoffman, for example, argues that,

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118. Ross, *supra* note 12, at 661-62, n. 85. For example, the Mariners could become the "Northwest Mariners" and split their games among Seattle, Portland and Vancouver or the Pittsburgh Pirates could play some games in baseball-hungry Buffalo. splitting hometowns is not novel in other sports, as the Boston Celtics have played home games in Hartford, while the Green Bay Packers until last season split their home games between Green Bay and Milwaukee. In fact, recent media reports indicate that the Mariners are currently considering precisely such a proposal.

119. As this is relatively unrelated to revenue sharing, I will not delve any deeper into this proposal, but remain quite intrigued by and interested in its advantages.

120. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972).

121. *See e.g.,* Henderson Broadcasting Corp. v. Houston Sports Assoc., Inc., 541 F. Supp. 263 (S.D. Tex. 1982) (holding radio broadcasting contracts to be outside the scope of the antitrust exemption); Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) (finding the antitrust exemption to be limited exclusively to the reserve clause); Butterworth v. National League of Professional Baseball Clubs, 644 So.2d 1021 (Fla. 1994) (following *Piazza*). *See also* Scott Hoffman, *Pooling of Local Broadcasting Income in the American Baseball League - Antitrust and Constitutional Issues,* 32 SYRACUSE L. REV. 841, 869 (1981). *But see* Finley v. Kuhn 569 F.2d 527 (7th Cir. 1978); New Orleans Pelicans Baseball, Inc. v. National Assoc. of Professional Baseball Leagues, Inc., 1994 WL 63144 (E.D. La. March 1, 1994) (stat-

"[u]nder the 'necessarily dependent' test of the lower courts, the antitrust exemption does not extend to local broadcasting revenues of major league clubs."[122] He refers to the 1952 House Subcommittee on the Study of Monopoly Power, which "expressed its disapproval of any legislation that would result in 'the sale of radio and television rights . . . as well as the aspects of baseball which are solely related to the promotion of competition on the playing field . . . [becoming] immune [from antitrust law] and untouchable.'"[123]

Hoffman characterizes the "*Federal Baseball-Toolson-Flood*" umbrella as applying only to practices that are necessary to avoid placing "a serious burden on the league structure" and not those that merely affect profitability.[124] Thus, because "[t]he local broadcasting pooling proposal is not necessary to the successful existence of baseball," it would not survive scrutiny.[125]

Hoffman's analysis is flawed for a few reasons. First, he cites a 1952 Committee report which was expressly contradicted nine years later by the SBA.[126] Second, it is questionable whether the SBA was even necessary for baseball. Baseball began marketing itself through national contracts four years earlier and thè legislative history of the Act makes it clear that its primary purpose was to

ing that "although *Piazza* presents an impressive dissent from precedent, this Court associates itself with their weight of authority"); Professional Baseball Schools and Clubs v. Kuhn, 693 F.2d 1085 (11th Cir. 1982).

122. Hoffman, *supra* note 121, at 869 (1981).

123. *Id.* at 867, n. 141 (quoting *Organized Baseball: Report of the Subcomm. on Study of Monopoly Power of the Committee on the Judiciary*, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 17-18 (1952)).

124. *Id.* at 868.

125. *Id.* at 870. *See* Stephen Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L. J. 463, 471 (1990) (stating that the *Flood* Court's reasons for maintaining baseball's antitrust exemption do not support extending *Flood*'s application from agreements among baseball owners about the internal conduct of their sport to agreements between baseball owners and third parties that restrain trade in the broadcast market"); Ross, *supra* note 12, at 739-40 (arguing that "Congress passed an antitrust exemption to facilitate package sales. This exemption covers only the sale of rights to 'sponsored telecasting,' however, which arguably does not apply to package sales to cable networks").

126. 15 U.S.C. § 1291 (1961). The text of the SBA reads, in relevant part:

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

Id.

Hoffman acknowleges not only the SBA itself but also the Senate report which stated that "the statute was necessary to insure 'weaker clubs of the league continuing television income and television coverage on a basis of substantial equality with the stronger clubs." Hoffman, *supra* note 121, at 843, n.13 (citation omitted).

permit the National Football League to compete effectively with the American Football League, which already had a national television contract.[127]

Stephen Ross argues that a strict reading of the SBA restricts its application to network sales.[128] All other collective league sales fail to pass muster. Ross asserts that package sales to cable companies are markedly different both from those exempted by Congress in the Act and those permitted by the Supreme Court in *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, (BMI)[129] Ross contends that the rights sold in *BMI* were non-exclusive, whereas baseball broadcasting rights are exclusive. "The rights to show sporting events can be sold easily by individual teams on a game-by-game or team-by-team basis. No league-wide sale is essential for the product to be sold, and no 'new product' is created by the package sale."[130]

However, the crucial difference between Major League Baseball and *BMI* is the need for the organization in the first place. The blanket license at issue in *BMI* was marketed for efficiency. Without the blanket license, each artist would continue to produce music and sell albums. Each musician was not reliant on any other musician for survival. Thus, the Court needed to find another rationale to uphold its use - the non-exclusive, new product. On the other hand, baseball teams are already linked together in the production of one product making their collective marketing a reasonable by-product.[131]

Even assuming that the antitrust exemption and the SBA do not apply to permit the pooling of local revenues, it is extremely unlikely that courts would invalidate a revenue sharing agreement. There seems to be little doubt that the SBA was enacted to protect small-market teams.[132] As this rationale is sufficient to permit the

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127. *See* Ross, *supra* note 12, at 469. On the other hand, it can be argued that because baseball was specifically included in the text of the statute, Congress did not believe that the general antitrust exemption was broad enough to cover broadcasting. *See Henderson*, 541 F. Supp. at 269. A persuasive counter-argument to this is that baseball was included to cover it in the event that a subsequent court decision or statute removed the braoder exemption.

128. *See also* Roberts, *supra* note 34, at 327; Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. OF SPORT L. 287, 311 (1994).

129. 441 U.S. 1 (1979).

130. Ross, *supra* note 12, at 484.

131. *See* single entity discussion, infra notes 136 to 161.

132. *See, e.g.*, Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 UNIV. OF MIAMI L. REV. 729, 770 (1987) (stating that "[t]he Sports Broadcasting Act ensures that even the weaker teams will participate in and profit from the resulting contract. Without such a 'pooling' of rights among existing franchises, it is likely that network sponsors would show interest only in the very best of league offerings"). *See also* Hoffman, *supra* note 121, at 850 (arguing that "[i]n the paid television and national network coverage exceptions of the American League Broadcasting Agreement, the league members have agreed that a limited sharing of broadcasting rights and

pooling of national broadcast revenues, there is no legal difference concerning local revenues when changing economic circumstances dictate the necessity of such sharing.[133] Furthermore, "[t]he antitrust injury doctrine . . . requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers."[134] The revenue sharing proposal advocated herein would likely increase broadcast output and have no negative effect on prices.[135] It is important to note, however, that revenue sharing, in itself, could decrease output and so reducing its incentive to maximize output by forcing a team to share its income. Thus, it is imperitive to couple revenue sharing with league coordination to televise games outside the local cities and, accordingly, increase total output.

2. The Interdependence of League Members

One of the fiercest ongoing debates concerns the interdependency of league members and whether or not they merit single entity status under the antitrust laws.[136] In a controversial decision, the Ninth Circuit in *Los Angeles Memorial Coliseum Commission v. National Football League*,[137] held that the National Football League was not a single entity and that the NFL restricted competition in violation of antitrust laws by prohibiting the Oakland Raiders from moving to Los Angeles. The court held that "[w]hile the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or

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revenues is necessary to the success of the sport of baseball").

133. There is reason to believe that the standard that need be met is only one of reasonableness, rather than necessity. *See* National Football League v. North American Soccer League, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting) (holding that "[t]he antitrust laws impose a standard of reasonableness, not a standard of absolute necessity").

134. *Chicago Professional Sports Limited Partnership*, 961 F.2d at 669. *See also* Sullivan v. National Football League, 34 F.3d 1091, 1096-97 (1st Cir. 1994) (antitrust injury is "usually measured by a *reduction in output* and an *increase in prices* in the relevant market") (emphasis in original).

135. Indeed, Ross' primary quarrel with cable television packages was that they "limit the ability of each individual team to sell rights to networks, syndicates, or individual television stations or cable operators." Ross, *supra* note 125, at 467. His fear was that the exclusive contracts with cable companies serve to prevent teams from televising their own games in competition with the cable game (which would be unavailable to some fans). *See Id.* at 48. However, if the league negotiates local contracts in the same way each local team would, Ross' fear would be unrealized.

136. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (stating joint action by parent corporation and wholly-owned subsidiary does not violate Section One of the Sherman Act). *But see* McNeil v. National Football League, 790 F. Supp. 871, 879-80 (D. Minn. 1992) (rejecting *Copperweld's* application to the NFL).

137. 726 F.2d 1381 (9th Cir. 1984)

parent corporation, but by the separate teams acting jointly."[138] Among the factors cited by the court in reaching its decision was the wide disparity of profits and losses between the teams.[139] The court also disputed the league's contention "that each club can produce football games only as an NFL member."[140]

Standing alone, *Los Angeles Memorial Coliseum Commission* struck a strong blow against league autonomy. John Weistart noted, with some alarm, that "parts of the opinion suggest that all league actions should be judged from the premise that individual clubs within a league are independent businesses and are free to pursue their own economic advantage".[141]

Los Angeles Memorial Coliseum Commission has produced a flood of scholarship in the antitrust field. Beginning with Judge Spencer Williams' stinging dissent, scholars have eagerly criticized the opinion.[142] Judge Williams argued that the "profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor."[143] He disagreed with the majority's contention that merely finding single entity status would make the N.F.L. immune to Section One complaints, arguing that such immunity only applied to "those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result."[144]

One of the Ninth Circuit's decision's most vocal critics has been Gary Roberts. Professor Roberts argues that the league is the "lowest indivisible economic unit, or firm, capable of producing the

138. *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1389.

139. *Id.* at 1390.

140. *Id.*

141. Weistart, *supra* note 72, at 1024. Weistart observes that, even under the decision, exceptions would exist based on necessity, which would include, "insur[ing] the economic viability of the component parts." *Id.* He criticizes the decision and argues that what "the court apparantly fails to appreciate is that the collective concern for the financial stability of individual franchises is at odds with its assumption that there will be free and robust competition." *Id.* at 1028.

142. *See, e.g.*, Weistart, *supra* note 72, at 1057; Roberts, *supra* note 34. *But see* Daniel Lazaroff, *Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*, 20 ARIZ. STATE L. J. 953 (1989).

143. *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1405 (William, J., dissenting) (citing North American Soccer League v. N.F.L., *670 F.2d 1249, 1251 (2d Cir. 1982)*, Smith v. Pro-Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978), Mackey v. N.F.L., 543 F.2d 606, 619 (8th Cir. 1976), Mid-South Grizzlies v. N.F.L., 550 F. Supp. 558, 562 (E.D. Pa. 1982) and U.S. v. N.F.L., 116 F. Supp. 319, 323-324 (E.D. Pa. 1953) in support of the statement that, "[v]irtually every court to consider this question has concluded that N.F.L. member clubs to *not* compete with each other in the economic sense")(emphasis in original)).

144. *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1409 (Williams, J., dissenting).

league product."[145] Weistart observes, with surprise, that the court never referred to any economic research.[146]

However, if Roberts and Weistart are correct, even under the *Los Angeles Memorial Coliseum Commission*, decision, revenue sharing would be permissable. While *Los Angeles Memorial Coliseum Commission* involved collective league action to deny a member an economic opportunity left unexploited by any of the other teams,[147] revenue sharing is markedly different.[148] The court failed to see any harm to the league if it permitted the Raiders to move to Los Angeles. On the other hand, given the amount of economic research which has been conducted, Major League Baseball would have a much less difficult time demonstrating the harm to the league if a revenue sharing plan were voided.

Both Weistart and Roberts argue that the decision in *Los Angeles Memorial Coliseum Commission* was possible only because of the NFL 's league structure. Roberts argues that had they so chosen, "[n]o antitrust principle prevents [teams] from distributing, in any way they elect, the revenues generated by each game carrying the league imprimateur and trademark."[149] Weistart agrees that when a franchise is financially threatened, "the clubs within the league would be permitted to intervene and save the weakened franchise from ruin. There must, of course, be corporate authorization for such action, but as far as the antitrust laws are concerned - *even in the majority's ultimate analysis* - there appears to be no principle that requires co-venturers to sit by and accept the worst consequences of interclub competition."[150]

Lewis Kurlantzick argues that a sports league is unique in that unlike supermarkets, or any other businesses that are independent,

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145. Roberts, *supra* note 34, at 231. Daniel Lazaroff disagrees, noting that "barnstorming versus league play is a matter of choice, not an economic imperitive. Individual teams must cooperate to produce a *league* product, but the same degree of integration is not essential to produce a sport for profit. It is truly a matter of choice." Lazaroff, *supra* note 142, at 962 (emphasis in original). However, whether or not barnstorming is a realistic option, no court has held that a league cannot act to preserve its existence.

146. Weistart, *supra* note 72, at 1030.

147. Also at issue was the breadth of Rule 4.3, which originally required unanimity.

148. Indeed, the court agreed that "[j]oint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks." *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1396.

149. Roberts, *supra* note 34, at 234, n. 41. Roberts concludes that the court in *Los Angeles Memorial Coliseum Commission* was able to make its decision only because "leagues choose to divide gate receipts between the two participating teams rather than among the entire league membership. Any effort by one member within the league framework to posture itself in a way that would increase its individual gains is not economic competition, but only an internal league dispute over how to divide jointly derived revenues." *Id.*

150. Weistart, *supra* note 72, at 1032 (emphasis added).

teams are interdependent and the failure of a team's rivals can jeopardize its own standing.[151]

The view that sports teams are not economic competitors has the support of Chief Justice Rehnquist. Dissenting from the Court's denial of certiorari in *National Football League v. North American Soccer League*,[152] the Chief Justice (then Justice), argued that, "[a]lthough individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace."[153]

Although some commentators cite *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, (NCAA)*[154] for the proposition that sports leagues do not merit single entity status,[155] there are several crucial differences with Major League Baseball. First, unlike the NCAA, which "does not . . . act as a selling agent for any school or conference of schools,"[156] the professional sports leagues do negotiate contracts and organize marketing. Second, the NCAA does not rely on the economic viability of its member schools for the product of college football to exist. Indeed, it is not uncommon for schools to leave or enter Division I status.[157] On the other hand, professional sports "teams do not compete with each other economically, and . . . without a competitively balanced league 'product,' each individual team would have little commercial value on its own."[158] Professor Gary Roberts concludes that, "the structures of amateur college football and a professional sports league, and the nature of the product produced by each, are fundamentally different, thus making the antitrust rules applicable to the NCAA inappropriate for the professional league setting."[159]

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151. Kurlantzick, *supra* note 31, at 189-90 (arguing that "[w]hile the supermarket owner stands to gain from, and therefore is not troubled by, his competitors' folding, in a sports league, the failure of several franchises could jeopardize the other teams and, perhaps, the entire league. Accordingly, it is not surprising that professional sports leagues will step in to support a failing team until new ownership can be found for the floundering franchise").

152. 459 U.S. 1074 (1982)

153. National Football League v. North American Soccer League, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting). *See also Chicago Professional Sports Limited Partnership*, 754 F. Supp. at 1340 (finding that "[i]t is not disputed, and it is plain from the financial figures, that the prosperity of the league currently depends on the volume of the shared revenues generated by the league's economic activity on behalf of the teams and particularly on the revenues generated by the broadcast contracts with the national networks").

154. 468 U.S. 85 (1984)

155. *See, e.g.*, Lazaroff, *supra* note 142, at 962.

156. *NCAA*, 468 U.S. at 113.

157. *See* Weistart, *supra* note 72, at 1057, n. 143, who states that "the number of entrants is so large - even within Division I - that worthy opponents will emerge without cross-subsidization. In short, good teams can find lively competition even without having to finance it." *Id.*

158. Rosenbaum, *supra* note 132, at 780 (citation omitted).

159. Roberts, *supra* note 34, at 244.

Furthermore, even if a professional league is like the NCAA, revenue sharing, as proposed herein, would differ substantially from the prohibited collaberation in *NCAA* because here there would be no restriction in output, a determining factor for the *NCAA* Court.

Likewise, *Associated Press v. United States*,[160] is different. In *Associated Press*, newspapers joined together for efficiency. While the existence of the Associated Press made news gathering cheaper and more efficient, even without the Associated Press, the newspapers would still exist. Unlike newspapers, sports teams need the institution of the league.[161]

B. *Property Rights*

The second major argument advanced by Scott Hoffman against the sharing of local broadcasting revenues is that it would infringe upon the property rights of the individual teams.[162] Hoffman contends that "[i]ncome earned from the sale of broadcasting rights is regarded as a property right of each individual league club."[163]

However, while the property right is undisputed here, there is disagreement as to the extent to which the league can appropriate the right. Hoffman analogizes the league taking the right to a "forfeiture."[164] However, Roberts concludes that the property right belongs not only to the home team but to all teams in the league. Thus, "because *every club* has an economic interest and property right in *every league game*, each could be required to share equally

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160. 326 U.S. 1 (1945)

161. *See* Weistart, *supra* note 72, at 1056-57 (stating that "[t]he need for cooperation in *Associated Press* is quite different from that claimed by a sports league. . . the collective effort of the Associated Press was largely a device to make news gathering more convenient. The claim of clubs within a sports league, however, is a claim of true necessity"). *But see* Lazaroff, *supra* note 142, at 961 (arguing that "[m]ost people spend their entire lives viewing professional sports in a league context and perhaps find it difficult to envision it any other way. . The organization of sports leagues has created a new, improved product that is arguably superior to the product resulting from an *ad hoc* method of providing sports entertainment. Although cooperation among separate teams is essential to create the league product, this should not immunize the teams from section 1 of the Sherman Act").

162. While the compensation of large-market teams would likely end this inquiry because there would be no taking without just compensation, this section will proceed under the assumption that a challenge is issued on the basis of inadequate compensation or absolute right.

163. Hoffman, *supra* note 121, at 850-51 (1981). *See also* Ross, *supra* note 125, at 466 (citing Liberty Broadcasting Systems v. National League Baseball Club of Boston, Inc., 1952 Trade Cas. (CCH) 67,278 at 67,499 (N.D. Ill)) (holding that "[e]ach team has a property right in licensing the broadcasting of games played in its home park."); ZIMBALIST, *supra* note 3 at 164. Zimbalist fears that unilateral implementation by a Commissioner of revenue sharing could result in litigation over property rights. *Id.*

164. Hoffman, *supra* note 121, at 850-51.

in the costs of an receive an equal share of the revenues from every league game."[165]

This latter view seems to be predominant among the courts. One of the more recent decisions on this subject is the Seventh Circuit's decision in *Chicago Professional Sports Limited Partnership v. National Basketball Association.* Although it ruled for the Chicago Bulls and WGN, the court was clear that "[t]he NBA could acquire a property interest in all broadcasting rights but has not done so."[166] Central to the court's reasoning, in dicta, that the NBA had means available to enact these restrictions (if done properly) was the court's desire to adhere strictly to the meaning of the SBA. The court reasoned that because the SBA was an exemption, it must therefore permit some restrictions that would otherwise violate antitrust laws. These permitted restrictions are the league's power to bar broadcasting. However, "the SBA applies only when the league has 'transferred' a right to 'sponsored telecasting.'"[167] Because the rights in question were not transferred by the NBA in any of its contracts, under the league's articles and bylaws these rights were reserved to the individual teams.[168]

The court then surmised that "[p]erhaps the reason the NBA has not commandeered all of the telecasting rights and sold limited numbers of games to superstations is that it cannot obtain the approval of the clubs to do this - for a change in the allocation of

165. Roberts, *supra* note 34, at 138 (emphasis added).

166. *Chicago Professional Sports Limited Partnership*, 961 F.2d at 673. The court held that the NBA restrictions on the number of games televised by superstations violated Section One of the Sherman Act.

Bowie Kuhn, former Commissioner of Major League Baseball, described his concern over the effect of superstations: "Our concern was that if Braves games began going into other professional baseball markets in large numbers, clubs were going to lose fans at the gate and local broadcasting revenues. This could prompt franchise moves and otherwise destabilize an industry that was entering its first year of free agency with foreboding." KUHN, *supra* note 30, at 289. In one clash, Major League Baseball and ABC successfully obtained an injunction to block WTBS (owned by Ted Turner) from broadcasting the 1982 National League playoffs (in which Turner's Braves were participating). *Id.* at 291.

167. *Chicago Professional Sports Limited Partnership*, 961 F.2d at 675.

168. The court acknowledged that had the NBA specifically appropriated all broadcasting rights for the league or put the desired restriction of superstations into one of its network contracts, it would have been valid. Specifically, the court stated that:

> "[w]hat if the league had assumed control of all broadcast rights and licensed only 20 of the Bulls' games to WGN? That would have been a 'transfer' by a 'league of clubs.' What could be the point of forbidding a different mechanism (the rule limiting to 20 the number of games teams may sell to superstations) that leads to the same result? Other mechanisms to achieve similar outcomes abound. The league might have put a cap of 20 superstation games in its contracts with NBC and Turner, or it might have followed the path of professional baseball and allowed unlimited broadcasting over superstations while claiming a portion of the revenues for distribution among the clubs."

Id. at 670-71.

rights is apt to affect the allocation of revenues, making the bargaining problem difficult with 27 clubs."[169] Roberts agrees with the notion that leagues can organize themselves centrally and decide what revenues to distribute and how to do so.[170]

The District Court in *Chicago Professional Sports Limited Partnership v. National Basketball Association*,[171] found that there was substantial revenue sharing within the NBA and failed to find any antitrust violation nor an improper taking of a property right in such sharing.[172] The court even characterized the pooling agreements as a "nonagression pact among all the teams, an agreement not to compete in an area where they otherwise might."[173] In fact,

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169. *Id.* at 672. Interestingly, in 1984, Professor Roberts hypothetically described the conflict that developed years later in this case. Roberts wrote:

> [t]he one situation in which league and individual club interests could diverge is one in which each club is allowed to sell the rights to its games and then to keep the revenue generated or share the revenue only with the other participating team. In this situation, a club with a significant following in areas other than its home territory might seek to sell rights to its games that would be telecast in the home territory of another club when that club was playing at home, thus competing with that club's ticket sales, or would be telecast in the same area in which another league game was being telecast, thus competing with the other telecast. In either case, the league might seek to restrain such intraleague rivalry by imposing certain restrictions on individual clubs' telecasting practices. In instances of proposed league action involving such restraints, the individual clubs' interests might not be in the overall league interest.

Roberts, *supra* note 34, at 296-98, n. 264. Roberts apparantly would favor permitting the league to restrain the individual team but under the Seventh Circuit's holding, that must be done through a league transfer of rights or explicit contractual restriction under 15 U.S.C. § 1291.

170. He argues that:

> [t]here is no inherent barrier to a sports league's organizing itself with a central office that makes all operating decisions for each member club. The league office could hire and negotiate employment contracts with the athletes and then allocate them to the various teams as it chose. It could collect all revenue - from television, radio, gate receipts, concessions, parking, etc. - and distribute it equally, after all expenses were paid, to the clubs in accordance with any agreed upon formula. The plaintiffs in the Raiders case even acknowledged this organizational option for leagues. In short, any autonomy that league members have exists only because the league, for reasons of enhancing the league product quality and thus league efficiency, elected to organize itself in a way that allowed it.

Roberts, *supra* note 34, at 237, n. 56. In fact, some sports leagues have been organized this way. For example, the Arena Football League was set up so that the investors are stockholders rather than individual owners. The league commissioner collects all of the revenues and pays all of the bills. *See* Neff, *Mutiny in the Arena*, SPORTS ILLUSTRATED, Mar. 20, 1989, at 16.

171. 754 F. Supp. 1336 (N.D. Ill. 1991).

172. However, while the Circuit Court restricted its decision to the limitation on superstation broadcasts, it acknowledged that the Bulls were considering challenging local television revenue sharing. The court stated, "[p]laintiffs have hinted that they will ask the district court to ban all revenue-sharing procedures for telecasting. Because of the way in which issues have become separated in this litigation, we do not decide whether revenue-sharing from superstation broadcasts is consistent with the antitrust laws." *Chicago Professional Sports Limited Partnership*, 961 F.2d at 676.

173. *Chicago Professional Sports Limited Partnership*, 754 F. Supp. at 1340. The court

"[i]n several areas, the league has virtually preempted economic activity by the individual teams. In marketing, for instance, the merger of the teams into the league is almost complete."[174]

Beyond Hoffman's initial contention that individual teams' property rights would be violated, one would need to find some state action to invoke the Fourteenth Amendment. Hoffman advances a few novel arguments to overcome this state action hurdle. He argues that *Burton v. Wilmington Parking Authority*,[175] applies because, just as the state leased the building in *Burton*, many local governments own and lease stadiums.[176] However, this argument fails because, unlike the racially discriminatory conduct in *Burton*, revenue sharing has redeeming virtues. A court may try to extend the Constitution to redress an egregious wrong that harms a member of the public facing discrimination, but will be much more reluctant to do so in a purely private dispute.

Hoffman next cites *Jackson v. Statler Foundation*.[177] The Second Circuit adopted a five prong test for state action that rested on "the degree of dependence upon governmental assistance by the private entity; the extent and intrusiveness of the governmental regulation; whether the governmental regulatory scheme suggests approval of the activity by the private association; whether the organization serves a public function; and whether the association is a legitimate private association under associational and constitutional terms."[178]

Hoffman then refers to *Ludtke v. Kuhn*,[179] in which the court applied that five prong test to find state action. The *Ludtke* court held that "the New York Yankees Baseball Club is totally dependent upon the City of New York for the use of Yankee Stadium;

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considered these agreements to be subsidies of the weaker teams who would lose out to "strong teams like the Bulls, the Detroit Pistons, the Los Angeles Lakers and the Boston Celtics" *Id.*

Other revenue arrangements in sports, in addition to the exorbitant expansion fees paid in every sport, include the Colorado Rockies $12.5 million payment to the Philadelphia Flyers, New York Islanders and New York Rangers as compensation for moving to New Jersey, *See* Kurlantzick, *supra* note 31, at 203, n. 74; the World Hockey Association's pooling of resources to pay for Bobby Hull's signing bonus with the Winnipeg Jets, *See* Rosenbaum, *supra* note 132, at 743-44; the USFL's assuming control of the financially ailing Chicago Blitz franchise and the WFL's support for its Portland franchise, *See* Weistart, *supra* note 73, at 1025, n. 40; and the $18 million fees paid by the New York Jets and Oakland Raiders to the New York Giants and San Francisco Forty-Niners, respectively, upon the merger of the NFL and the AFL, *See Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1393.

174. *Chicago Professional Sports Limited Partnership*, 754 F. Supp. at 1339.

175. 365 U.S. 715 (1961).

176. Hoffman, *supra* note 121, at 872.

177. 496 F.2d 623 (2nd Cir. 1974).

178. *Id.*

179. 461 F. Supp. 86 (S.D.N.Y. 1978)

New York City possesses the power to regulate the activities of the baseball team; the lease of Yankee Stadium to the Yankees is unique because the City renovated the stadium for use of the club; even though the Yankees are not performing a public service by operating the stadium, the New York legislature recognizes the stadium as devoted to a public use; the New York Yankees Baseball Club ceases to be private when the interest of the club to be private is outweighed by the public harm involved."[180] However, the facts of the case are once again quite distinguishable. *Ludtke* involved a civil rights action resulting from the prohibition of female reporters from the locker room (leased by the city). Because an important Constitutional right was involved and the "private" actor was affecting the rights of an "outsider" (on state-leased property) the court was more willing to find state action. But, as with *Burton,* I find it unlikely that a court would find state action with regards to a dispute between two private actors within the same organization.[181]

Finally, Hoffman argues that "[b]ecause the Supreme Court has granted a complete monopoly to the baseball leagues, sufficient state action may exist to invoke the guarantees of the fourteenth amendment based upon the grant of monopoly status."[182] However, this argument was subsequently raised and explicitly rejected in *Piazza.*[183]

V. IMPLEMENTATION

The league has a few ways to enact revenue sharing. First, either league can implement such a plan by a three-quarters vote of the owners. This vote would face considerable opposition unless the big city owners in New York, Boston, Philadelphia, Chicago and Los Angeles could somehow be swayed (otherwise, four owners in each league are all that is needed to defeat a plan).[184] Of course, if it is

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180. *Id.* at 873 (citations omitted).

181. Another persuasive argument distinguishing the *Burton* and *Ludtke* decisions is that were it not for the state's lease or support of the facilities, the actor would not have been in a position to injure the third party. But with revenue sharing, the alleged violation has no connection to the physical premises which arguably provides the state nexus.

182. Hoffman, *supra* note 121, at 876 (citing Public Utilities Commission v. Pollack, 343 U.S. 451 (1952) and Moose Lodge v. Irvis, 407 U.S. 163 (1972)).

183. The *Piazza* court stated that "the governmental involvement alleged here can, at best, be viewed as mere acquiescence, as opposed to the 'significant,' active encouragement required to link defendants' actions to the federal government. *Piazza,* 831 F. Supp. at 425-26. The court then cited Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974), which dismissed a § 1983 proceeding and rejected the plaintiff's contention that "the private utility was a state actor because it enjoyed state created monopoly status under the antitrust laws." *Id.*

184. *See* Ross, *supra* note 13, at 699 (arguing that "a minority of baseball owners from the larger markets repeatedly has rejected proposals to increase revenue sharing despite the

just a matter of a few holdouts, the league could use private sanctions. Roberts argues that "the league always has the inherent power to require that all gate revenues be divided equally (or any other way) among the members, just as the NFL divides the network television revenues from all NFL games equally. If any team refused, the other teams could simply refuse to play it or include it in the league standings."[185]

A second means of implementation could come from the Commissioner, if baseball ever appoints one again. As Bowie Kuhn used his power of edict to impose a $400,000 ceiling on player sales during the Finley fire sales, a Commissioner could force revenue sharing upon owners based upon his determination of the "best interests of baseball."[186]

A number of recent examples demonstrate the power of the Commissioner to override the wishes of individual owners. In addition to voiding Finley's attempted cash sales of Vida Blue, Joe Rudi and Rollie Fingers,[187] Kuhn suspended Braves owner Ted Turner for one year for tampering with outfielder Gary Matthews Former Commissioner Fay Vincent banned Yankees owner George Steinbrenner for life, (a term later reduced to two years) for associations with a gambler and suspended Reds owner Marge Schott for one year for racial epithets.[188]

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sports leagues' contention that revenue sharing promotes competitive balance and thus is good for the sport."); SCULLY, *supra* note 13, at 303 (stating that "[b]ig city teams have relatively little interest in subsidizing small city franchises. League voting rules give the big city franchises a minority blocking coalition."); and Roberts, *supra* note 34, at 259 (reporting that "[t]he peculiar nature of the league product requires revenue-dividing incentives that on infrequent, yet significant, occasions give individual clubs a strong financial motive to vote contrary to the league's best economic interests").

185. ROBERTS, *supra* note 80, at 151, n. 15. *See also* HOROWITZ, *supra* note 16, at 276-77, n. 4 (arguing that dissenting teams "[s]ometimes under pressure as, for example, in 1952, when the Browns and the White Sox resisted a reciprocal agreement in the American League (AL) to broadcast away games. Their capitulation was undoubtedly assisted by such league actions as a scheduling 'quirk' that left the Browns without any lucrative weekend and night games in New York"); Roberts, *supra* note 34, at 267-68 (alleging "offenders would be sanctioned by not being included in the league schedule. These incentives and sanctions do not flow because the member clubs voluntarily combine their normally independent market power. Rather, they exist because the inherent coproductive nature of the league product makes it impossible for any one club to operate without the full cooperation of the others").

186. Kuhn explained his use of the edict in the Lindblad case in his recent book, HARDBALL. He wrote:

> I did it by edict rather than by seeking the votes to adopt a new rule. I usually preferred the democratic voting process but sometimes an edict was the only way to get the job done. I knew I could not have gotten the votes to adopt the $400,000 limit, because too many clubs would put their own self-interest ahead of what was best for the game.

KUHN, *supra* note 30, at 184.

187. *See* Finley v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

188. *See* KUHN, *supra* note 30, at 259-64.

If a Commissioner can banish owners from the game or prevent them from disposing of their players in any way they see fit, there would be no obstacle to the imposition of a revenue sharing agreement that is determined to be in the best interests of the game. However, as a political matter, as Bowie Kuhn learned, when a commissioner makes difficult decisions and isn't afraid to push the owners around a bit, you pay the price when it comes time for re-election (as with rule changes, a three-fourths majority in each league is required for re-election).[189] Given the ouster of Fay Vincent for wielding the power of his position, it is unlikely that a future commissioner will even have the unilateral power to act in the "best interests of the game" if his actions are contrary to the owners' wishes.

Roberts provides one other scenario whereby revenue sharing could be implemented. As noted earlier, he argues for sports leagues' single entity status. However, he has one exception: "when a proposed league action (or inaction) would have the effect of increasing or maintaining league revenues, but at the same time would cause a small minority of individual clubs to lose or forego an increase in revenues," a conflict exists.[190] In this case, the league would lose its single entity status if the decision is vetoed by a small minority.[191] Roberts' test would not only permit revenue sharing but would actually grant the league (or the proponent owners) a legal cause of action against a small group of dissenters who might block revenue sharing.[192]

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189. Hoffman asserts that revenue sharing is not in the best interests of baseball but, in fact, may violate the league constitution. Citing the American League of Professional Baseball Clubs Constitution, Article III, § 3.14(b), he argues "the local braodcasting pooling proposal also may be invalidated... based upon the prohibition against finacial interdependence between the members of a league." Hoffman, *supra* note 121, at 853. However, from a legal standpoint, the sharing of local broadcast revenues makes teams no more financially interdependent than any gate sharing agreement or national television revenue sharing. The financial interdependence provision of the league constitution most likely refers to some old-time arrangements wherby owners might actually have had a stake in more than one team and, thus, create a danger of self-dealing.

190. Roberts, *supra* note 34, at 296.

191. Roberts says that there are only four situations in which such a conflict might arise:

> (a) a franchise location where gate and other day-of-game revenues are allocated only to the home or both participating teams; (b) television and radio practices which allow each team rights to its games and separately to retain the revenue generated; (c) the manner in which some other type of significant league revenues are allocated; or (d) a league rule having an extraordinary disproportionate adverse impact on the league product's marketability in the home territory of one or a few member clubs, again assuming gate receipts are not equally shared among league members.

Id. at 296-98.

192. While there may be some merit to this argument, one hypothetical exposes a serious problem with granting a cause of action against the minority dissenter. Even though Roberts

A fourth option would be for Congressional legislation. Congress clearly has the power to enact such legislation, if only because it can "persuade" baseball to decide for itself to share revenues by enacting a law which merely threatens to remove the antitrust exemption if revenue sharing is not adopted.[193] However, this is the least desirable alternative, as too much mixing between sports and government is undesirable.

VI. Conclusion

The revenue sharing plan that I would adopt, then rests on the following proposals:

1) Have the league "purchase" every team for its appraised value.

2) "Sell" each team back to its original owner at the estimated new value after calculating the impact of revenue sharing. For owners that choose not to re-purchase their teams, solicit outside bids.

3) Allow teams that owe money (due to the increased value of their team) to finance the purchase through future income (but keep the period of time relatively short to avoid draining available resources over a long time).

4) Assume central league control for negotiating all local broadcasting contracts. Attempt to cross-market by permitting multiple games to be broadcasted into each market, particularly during the September pennant races.

5) Share all national and local broadcasting revenues equally.

6) Divide gate receipts unequally - a split of approximately 67-33 seems fair (33% should go to the visitor, not the league; this rewards good teams who are in demand in other cities). This will

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envisions the cause of action benefiting the league by giving it the power to stop the selfish objector from unfairly preventing the league from increasing its overall revenues, it potentially could be used to enforce a tyranny of the majority. Suppose the other 27 owners decided (correctly) that the league would make more money as a whole if the Kansas City Royals moved to Washington, D.C. because of the increase in the value of the television rights. However, if the Royals opposed the move because they would lose their significant stadium revenues, it would be exactly the situation Roberts described - a proposed action that would increase league revenues but cause an individual club to lose revenues. A court decision supporting the league in an action to force the Royals' move would be shocking and quite inappropriate, even though the Royals would be acting contrary to the best interests of the league.

193. This is the simplest way for Congress to impose revenue sharing without facing a potential constitutional challenge.

ensure that a sufficient incentive to win remains.

7) Attempt to negotiate some form of revenue sharing with players to avoid potentially decreasing salaries and other potential externalities as discussed herein.

8) Ignore fixed income such as stadium revenues for now, unless many owners choose to forsake profit-maximizing behavior and spend this revenue to the disadvantage of teams with less favorable lease arrangements.

Such a revenue sharing plan can increase overall league revenues and, through compensation, big city team owners will be fully reimbursed for the drop in their franchises' value.

However, if the baseball owners decide not to adopt such a revenue sharing plan, will there be a catastrophe? It is worth mentioning that even during the four decade reign of the Yankees, the sport survived.

Will baseball adopt this (or a similar) revenue sharing plan? Well, as reported in *Sports Illustrated*:

> An agent joke making the rounds of major league baseball may say a lot about the state of the game:
>
> An agent was out taking a walk when God came up alongside him. The two started to chat about baseball.
> "God, when will we ever see another .400 hitter?" the agent asked.
> "Not in your lifetime," answered God.
> "What about a 30-game winner. When will that happen again?"
> "Not in your lifetime," answered God.
> "What about revenue sharing? When will the big-city owners agree to revenue sharing to help the teams in smaller cities?"
> God smiled and said, "Not in my lifetime."[194]

194. Kurkjian, *Inside Baseball*, SPORTS ILLUSTRATED, Apr. 27, 1992, at 55.