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Fair or Foul? The Survival of Small-Market Teams in Major League Baseball

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FAIR OR FOUL? THE SURVIVAL OF SMALL-MARKET TEAMS IN MAJOR LEAGUE BASEBALL

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I. INTRODUCTION

"Remember what happened in 1965." That statement can be heard in any discussion regarding the importance of constructing a new baseball facility in my hometown of Milwaukee, Wisconsin. Local business and civic leaders understand the significance of 1965 to baseball fans in Milwaukee. To his credit, Bud Selig, the owner of the Milwaukee Brewers and Major League Baseball's current acting commissioner, has not used the painful memory of 1965 to gain public support for his most recent stadium proposal.¹ Nevertheless, many baseball fans in Milwau-

1. "After intimating relocation, Selig convinced the city, county, and state governments to contribute \$67 million (plus a \$35 million loan) toward the construction of a new stadium that he and other private investors will own. Selig plans to finance his share of the construction costs by selling luxury boxes in advance." ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* 139 (1992). See also Bruce Murphy, *Spring Fever*, *MILWAUKEE MAGAZINE*, Apr. 1993, at 82. More recently, Selig revealed plans to build a stadium with a "convertible roof" at a cost of

kee fear that what happened in 1965 will soon reoccur unless team revenues are increased by the construction of a new stadium with luxury boxes.² Most Milwaukeeans remember that 1965 was the year that the Milwaukee Braves left Milwaukee for Atlanta.³ Furthermore, they also understand that, if economic circumstances force the Brewers to abandon the city, Major League Baseball will, in all likelihood, vanish from the city for good.

The Braves franchise, which had originally moved to Milwaukee from Boston in 1953, initially prospered in its new locale.⁴ From 1953 to 1957, attendance averaged over two million fans a year, with a high of 2.22 million fans in 1957, when the team claimed its first World Series crown.⁵ After 1957, however, the team's attendance began to decline as its on-the-field performance soured.⁶ Thus, when the Braves' lease of municipally-owned County Stadium expired after the 1965 season, a "window of opportunity" existed for the team's new owners (led by Ray Bartholome), who claimed that the team was losing money, to relocate.⁷ Bartholome, lured by an attractive television deal, moved the franchise to Atlanta.⁸ The community would not lose the Braves without a fight; however, local efforts (led by Senator William Proxmire) to enjoin the team from leaving Milwaukee failed in 1966.⁹

approximately \$190 million; public funding may be sought through a statewide sports lottery. See, e.g., Jeff Browne, *Stadium Lottery has Wide Appeal*, MILWAUKEE JOURNAL, Mar. 21, 1994, at B6. One author estimates that the total government subsidy promised over the thirty-year mortgage of such facility may exceed \$350 million dollars. See Bruce Murphy, *Trade Secrets*, MILWAUKEE MAGAZINE, Apr. 1994, at 21.

2. It has been estimated that luxury box rentals may add up to six million dollars to a team's operating revenues each year. See Kathleen Morris, *The Gimmicks*, FINANCIAL WORLD, July 7, 1992, at 48.

3. For a brief recounting of the circumstances preceding the Braves' departure for Atlanta, see ZIMBALIST, *supra* note 1, at 128-29.

4. See *Id.* at 129.

5. *Id.*

6. From 1962 to 1965, the Braves finished no higher than in fifth place. *Id.*

7. *Id.*

8. After moving to Atlanta, the Braves' local television revenues tripled from 1965 to 1966. *Id.* at 225.

9. See *Id.*; The Wisconsin Supreme Court stated that it would enforce baseball's exemption from antitrust statutes as articulated by the Supreme Court. *State of Wisconsin v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). See JAMES EDWARD MILLER, *THE BASEBALL BUSINESS: PURSUING PENNANTS AND PROFITS IN BALTIMORE* 21-35 (1990) (detailing the attempts of St. Louis Browns owner Bill Veeck to move the team from St. Louis.) See *infra* Part III.

I was only two years old when Major League Baseball returned to Milwaukee in 1970 after a five-year hiatus.¹⁰ To this day, I am amazed by the number of former Milwaukee Braves fans in Milwaukee who still follow the franchise in Atlanta and prefer the style of play in the senior circuit over that of the American League.¹¹ Paradoxically, many of these individuals are also the most loyal supporters of the Brewers, frequenting games both in Milwaukee and at the team's spring training facility in Chandler, Arizona. As someone who grew up with the Brewer franchise, I often wondered how these "old-timers" could remain loyal to the Braves, especially when it was clear to me that the Braves had greedily "abandoned" Milwaukee and its fans for what its owners perceived as greener pastures elsewhere.¹²

Now, however, after listening to the debates raging over the new baseball stadium proposal for Milwaukee, I have gained some insight into the perspective of these "old-timers." Despite their divided loyalties, they have an appreciation for the presence of Major League Baseball in Milwaukee that is generally lacking in most younger baseball fans who have never experienced the hardship of losing a professional baseball franchise.¹³ While growing up, I remember the danger of discussing the Braves with more senior baseball enthusiasts, knowing that it would precipitate a lecture about the "good old days" and a reminder of how lucky I was to have a Major League Baseball team in my hometown. I also recall that, when attendance waned at Brewer games late in the sea-

10. For a brief recounting of the events leading to the return of Major League Baseball to Milwaukee, see *Selig v. United States*, 565 F. Supp. 524, 530-33 (E.D.Wis. 1983), *aff'd* 740 F.2d 572 (7th Cir. 1984).

11. One author, in fact, has concluded that "baseball fans are more loyal than in any other sport — or have clouded minds. Maybe the inherent beauty of the game has blinded them to reality." Dave Nightingale, *Give Us Back the Game: Start With a New Commissioner and Quick, and Then . . .*, THE SPORTING NEWS, Feb. 22, 1993, at 11.

12. For a telling description of the abandonment felt by baseball fans when a Major League franchise relocates, see ZIMBALIST, *supra* note 1, at 125-29 (describing the circumstances surrounding relocations by the Brooklyn Dodgers to Los Angeles in 1957, the New York Giants to San Francisco in 1957, and the Milwaukee Braves to Atlanta in 1965). It is interesting to note that the Dodgers' move in 1957, like many proposed relocations today, was precipitated by the owner's (Walter O'Malley) dissatisfaction with the Brooklyn Dodgers' home field (Ebbetts Field). In response to the fans' claim that O'Malley was motivated by greed, Buzzie Bavasi, O'Malley's right-hand man, noted that "If [O'Malley] . . . saw the California gold [and] went prospecting . . . so be it. He was entitled." *Id.* at 128 (citing BUZZIE BAVASI, OFF THE RECORD 82 (1987)). Regarding the Braves' move, Bill Veeck observed that it was "baseball's latest testimonial to the power of pure greed." *Id.* at 129 (citing BILL VEECK, VEECK—AS IN WRECK 301 (1962)). Finally, for an in-depth analysis of the move of the St. Louis Browns franchise to Baltimore in 1954, see Miller, *supra* note 9, at 21-35.

13. See ZIMBALIST, *supra* note 1, at 125-29.

son, these "old-timers" would quickly remind the community that a failure to support our local nine would force the team to move to a more "appreciative" locale.

At the time, however, most baseball fans in Milwaukee viewed such proclamations with a combination of disdain and bemusement. After all, the circumstances involving the Braves' move to Atlanta were much different than those involving the Brewers franchise. The Brewers, unlike the Braves, were *committed* to Milwaukee. The franchise was brought to the city from Seattle in 1970 by a local group formed for the specific purpose of bringing Major League Baseball back to Milwaukee.¹⁴ The Brewers' on-the-field performance would soon culminate in the franchise's first division title in 1981 and a World Series appearance in 1982. Furthermore, attendance had been rising steadily as the team's fortunes improved on the field.¹⁵ Given the success of the Brewers in the late 1970s and early 1980s, it seemed clear that Major League Baseball had, in fact, succeeded in Milwaukee and that the Brewers would remain a viable franchise in the foreseeable future.

So why do young baseball fans in Milwaukee now share the insecurity long held by old Milwaukee Braves supporters, fearing that, if a new baseball stadium is not built, the Brewers will abandon the community?¹⁶ Do these fears have a sound basis? If so, what, if anything, can (or should) community leaders and/or Major League Baseball do to ensure the survival of professional baseball in Milwaukee and other "small

14. See *Selig v. United States*, 565 F. Supp. 524, 531-33 (E.D.Wis. 1983), *aff'd* 740 F.2d 572 (7th Cir. 1984).

15. The average seasonal paid attendance for the Brewers from 1969-74 was 832,000. That figure rose to 1,372,000 for the years of 1975-79, and further rose to 1,744,000 from 1980-84. GERALD W. SCULLY, *THE BUSINESS OF MAJOR LEAGUE BASEBALL* 104 (1989).

16. While no Major League team has relocated since 1972, at least seven teams threatened to do so in 1990 and 1991; at least four of those teams may be properly classified as "small-market clubs" (Milwaukee Brewers, Montreal Expos, Seattle Mariners, and Cleveland Indians). See ZIMBALIST, *supra* note 1, at 129. Nor is the Brewers franchise alone in requesting government assistance to build a new facility. In the past six years, citizens of San Francisco, San Jose, Chicago, Detroit, Cleveland, Denver, Baltimore, Milwaukee, and Dallas-Fort Worth, "have been asked to go to the polls to approve issuance of a municipal bond and/or new taxes for the construction of new baseball stadiums. In each case there was the threat that if the bond and/or taxes were rejected, the city's baseball team would flee to greener pastures." *Id.* at xvi. Should a community fail to cave into an owner's demands, "there are club-hungry cities out there that realize the value of a major league franchise and are prepared to make deals—often at the taxpayers' expense." Alexandria Biesada, *Gimme A Break*, FINANCIAL WORLD, July 9, 1991, at 40 (1991). The citizens of Tampa-St. Petersburg, for example, voted to finance the construction of a new ballpark in an attempt to attract an expansion or existing team; so far, their effort has not borne fruit. See ZIMBALIST, *supra* note 1, at xvi.

markets"?¹⁷ These are some of the questions I will address in the remainder of this Article. In Part II, I analyze several arguments regarding the importance of small-market teams to the future success of Major League Baseball. I conclude that it is in the best interests of Major League Baseball to ensure that small market teams remain viable in order to discourage the formation of rival leagues, to preserve for the League the benefits of expansion opportunities, and to maintain the popularity of Major League Baseball throughout the country. In Part III, I analyze the viability of small-market teams given the current competitive structure of Major League Baseball and expected future trends. My conclusion is that the current governing structure of Major League Baseball inadequately addresses the needs of small-market franchises and seriously jeopardizes their future survival. In Part IV, I suggest the need for either increased revenue sharing or a salary cap as vehicles to ensure the survival of small-market clubs, with a preference for the former. I will also analyze relevant antitrust, labor, and contract issues. Finally, in Part V, I revisit the current status of the Milwaukee Brewers stadium proposal and offer some concluding thoughts.

II. DOES MAJOR LEAGUE BASEBALL NEED SMALL-MARKET TEAMS?

Why should it be important to Major League Baseball that franchises in Milwaukee and other small markets remain viable? After all, should not owners of individual franchises be free to relocate their teams at will whenever they believe that they can receive greater financial remuneration elsewhere?¹⁸ Would not such a "free and open market" for professional baseball franchises ensure that teams are located where consumers will derive the most benefit (as measured by their ability to pay)? Clearly, it would be an inefficient allocation of resources to require baseball franchises to remain in existing locations when, due to changes in economic circumstances, other locales offer more profitable opportunities. Before addressing these issues, it is important to articulate how the interests of franchise owners may conflict with the interests

17. For the purposes of this Article, I define "small-markets" to include cities with municipal populations of two million people or less. Under this definition, there are currently eight Major League Baseball franchises residing in small markets; the Cleveland Indians, Kansas City Royals, Milwaukee Brewers, Oakland Athletics, and Seattle Mariners of the American League, and the Cincinnati Reds, Colorado Rockies, and San Francisco Giants of the National League. The average population in these cities is approximately 1.6 million people, while the average population of the other twenty major league cities is approximately 3.3 million people. See SCULLY, *supra* note 15, at 144.

18. See ZIMBALIST, *supra* note 12 (citing BAVASI).

of other owners under the current governing structure of Major League Baseball and with society at large.

A. *Separating conflicts between the interests of baseball owners and the interests of society from conflicts among the interests of individual baseball owners:*

Clearly, the interests of franchise owners, as embodied by the Major League Agreement ("the Agreement"),¹⁹ and the interests of society in encouraging market competition may conflict in the franchising of professional baseball teams. In general, society disfavors the concentration of economic power when it allows a small number of economic actors to control the forces of supply or demand in a given industry or geographic location. This sentiment, of course, is enforced through the nation's antitrust policy as embodied by the Sherman Act.²⁰ Antitrust principles dictate that, absent proof that a market restraint is *reasonable*,²¹ any Major League Baseball policy that inhibits the "natural play" of market forces should be discouraged.²² Presumably, this would include any restraints on the relocation of franchises imposed by the Agreement.²³ Major League Baseball owners, on the other hand, may desire some restrictions on franchise movement that ostensibly conflict with the policies of the Sherman Act.²⁴ Because owners may disagree as to the wisdom of a proposed move given its effects on the profitability of the relocating franchise and the League itself, they may find it in their best interests to

19. The Major League Agreement acts as Major League Baseball's "constitution"; it is adhered to by all of the franchises in the major leagues. See PAUL C. WEILER & GARY R. ROBERTS, *CASES, MATERIALS, AND PROBLEMS ON SPORTS AND THE LAW* 2 (2d ed. 1993).

20. For a more complete discussion of antitrust policy as embodied by the Sherman Act and its implications for the policies of Major League Baseball, see *infra* Part III. For purposes of the discussion in Part II, however, it is sufficient to note that Section 1 of the Sherman Act proscribes "every contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . .," while Section 2 of the Sherman Act prohibits any person from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." 15 U.S.C. §§ 1-2 (1988 & Supp. 1993).

21. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 60-62 (1911).

22. See *infra* Part III, which discusses the exemption from antitrust that Major League Baseball, but no other professional sports league enjoys. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 270 (1972). For the purposes of Part II, however, it is sufficient to note the policies underlying antitrust legislation and defer consideration of the antitrust exemption itself.

23. Currently, three-fourths of the owners in the same league as a relocating team must approve the move; the Commissioner may block such a move under his or her "best interests" power. See ZIMBALIST, *supra* note 1, at 125, 131.

24. *Id.*; See *supra* note 20.

agree ex-ante on certain restraints over each individual owner's power to unilaterally dictate where his or her team will be situated.

Apart from society's general interest in enforcing antitrust policy, the Agreement must also accommodate conflicting interests among individual owners. While franchise owners may covet the *power* to establish league policies that supersede the mandate of general antitrust principles,²⁵ they may nevertheless wish to maintain a significant level of free-market activity in the relocation of franchises within the Agreement itself. Because owners generally have an interest in maintaining the freedom to move their teams in response to changing economic incentives, we would expect them to create a system that would generally favor unfettered franchise relocations. Again, however, it is in each owner's interest to retain some degree of control over franchise movements by his or her brethren which adversely affect the financial position of his or her team or the League as a whole.²⁶ Presumably, the Agreement should accommodate these conflicting interests in a manner that best promotes the collective welfare of the franchise owners.

For several reasons, the above-referenced distinctions are significant when analyzing the importance of small-market teams to Major League Baseball. First of all, they have a direct effect on the decision over the types of measures (if any) that should be adopted to ensure the survival of small-market teams. Secondly, they help to answer the question of whether owners can be trusted to adopt the best measures, or if society, through antitrust policy and other laws, should also play a role. If society has a strong interest in promoting competition for Major League teams among cities, then antitrust policy should supersede self-regula-

25. ZIMBALIST, *supra* note 1, at 131.

26. Such a system may take one of two forms. The owners could grant teams the absolute power to relocate unless doing so would violate important League policies as expressly articulated in the Agreement (for example, a requirement that teams cannot move to a new locale within one hundred miles of an existing team). Or, the owners could create a system that, while potentially subjecting all franchise relocations to significant restraints, would nevertheless encourage the non-enforceability of such restraints under most circumstances (for example, a rule that all relocations are permitted without restrictions unless a specified number of teams object). The current Agreement, by requiring Commissioner and super-majority owner approval for franchise relocations, appears to fall under the latter regime. It is important to recognize that, under such a system, current owners have an incentive to approve most proposed moves in order to "create goodwill" in the event that they desire to relocate their teams in the future. For example, between 1952 and 1972, only two owner-proposed moves were rejected; in both cases, however, the persons involved were considered "outcasts among owners" and the moves were later approved when new parties assumed ownership. See Zimbalist, *supra* note 1, at 125. Similarly, in 1992, the sale of the San Francisco Giants to a group that intended to move the team to Tampa/St. Petersburg was disapproved by vote of the owners, who wished for the franchise to remain in San Francisco.

tion by owners,²⁷ and owners must justify as "reasonable" any restraints under the Agreement which were adopted to protect small-market franchises.²⁸ If, on the other hand, society has only a marginal interest in the policies of professional baseball, then the Agreement should supersede antitrust policy and the justifications for restraints adopted to protect small-market franchises need only be shown to be in the "best interests of baseball."²⁹ As discussed in Part III, Major League Baseball currently enjoys a special exemption from antitrust laws which gives owners more administrative discretion than owners in other professional leagues; however, we shall see that the exemption is by no means "iron-clad."³⁰ In light of this, and because the best interests of the Major League Baseball owners may obviously conflict with those of society, one should consider whether purported justifications for adopting market restraints to preserve the integrity of small-market teams satisfies antitrust review under either regime.³¹

B. The survival of small-market teams under the free-market model of franchise relocation:

So what are some of the justifications that may be given to baseball owners or antitrust courts for adopting measures to ensure the viability of small-market teams? Before discussing purported justifications for market restraints to protect small-market teams, we should first imagine the state of affairs that would exist if there truly were open competition among cities for Major League Baseball franchises.³² If other communities could freely bid with current Major League cities for franchises, the "proper" incentives would presumably be in place for owners and community leaders to determine whether moving a team would truly be economically efficient. The Brewers franchise, for example, would be encouraged to relocate under the free market model if Bud Selig could,

27. See *supra* note 20.

28. See *supra* note 21.

29. See *supra* note 23. Absent antitrust concerns, Major League Baseball owners would presumably be willing to adopt rules to protect small-market franchises if such restrictions contributed to the financial well-being of the majority of individual teams and, by implication, the League itself. As shown in Part III, however, the mere threat of intrusion of antitrust policy may be sufficient to compel compliance with such laws even though such action may not be in the owners' collective (or, for that matter, individual) financial interest.

30. *Id.*; See *infra* Part III.

31. See *supra* note 23.

32. See *supra* note 23 for a discussion of the current rules for Major League Baseball franchise relocation. Because franchise relocations require a three-quarters majority vote among owners and Commissioner approval, the Agreement clearly does *not* ensure a free market for teams.

in fact, find a more profitable location in which to operate. Under this model, the city of Milwaukee (as well as the state and other local municipalities) should subsidize the construction of a new stadium if the estimated six million dollars a year in increased revenue from luxury boxes and gate receipts adequately compares to the financial gain offered by a bidding locale *and* the cost of building the stadium is outweighed by the perceived benefits to the community.³³ If, on the other hand, the increased revenues from luxury box rentals and gate receipts are insufficient to keep the Brewers in Milwaukee, *or* the costs of building a new stadium outweigh the perceived benefits to the community, then the city should not subsidize its construction. In the latter scenario, the "invisible hand" of competition would channel the franchise to another city where it would be more highly valued by consumers as measured by their ability to pay.³⁴ While unfortunate for the baseball fans of Milwaukee, those in another city would be rewarded for presumably deriving more benefit from the "product" of Major League Baseball.

One should, however, also consider the creation of expansion franchises under the "free market model."³⁵ First of all, it is important to note that the free market model does not presuppose an optimal number of Major League Baseball teams. That is, a decision by an owner to move his or her team from a city does *not* prove that the city is unable to support a Major League franchise. Thus, a determination by Bud Selig that the Brewers franchise will be more profitable in another locale does *not* necessarily mean that the team is losing money in Milwaukee. The free market model only predicts that, absent the possibility of expansion and prohibitive transaction costs, Major League Baseball franchises will, over time, be located in the communities where owners expect to receive the greatest profits.³⁶ Major League Baseball is, in fact, a profitable venture in Milwaukee and other small markets, the removal of restrictions on expansion would result in the creation of new

33. See Zimbalist, *supra* note 1, at 135-140.

34. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Glasgow ed. 1801) (discussing the invisible hand theory of competition).

35. See ZIMBALIST, *supra* note 1, at 140-46.

36. In addition, Major League Baseball owners have an incentive to restrict the creation of expansion teams; for as long as the "demand for teams from viable cities [is] greater than supply, then existing teams have greater leverage in bargaining for new stadium construction, new luxury boxes, lower rent, or a greater share of concession and parking revenues. They can threaten to leave." *Id.* at 124.

franchises to meet such demand.³⁷ Presumably, then, the optimal number of Major League Baseball franchises would be achieved under a free-market model if expansion were unrestricted. As a result, justifications for preserving existing small-market franchises must also address the arguments typically given for restrictions on League expansion.

C. Altering the free-market model: justifications for owners to adopt measures to ensure the survival of small market teams:

Why, then, is the free-market model of franchise relocation, coupled with unrestricted expansion, an insufficient response to the viability issue involving small-market teams? What are some of the arguments advanced for adopting measures to ensure that existing small-market teams are financially viable in the future? How do these justifications relate to the distinctions made in section A of Part II? The remainder of Part II discusses three common justifications for adopting measures to ensure the survival of small-market teams, as well as their compliance with anti-trust policies and the interests of Major League Baseball owners.

1. The interest of baseball fans in keeping their local franchise:

One justification often given for protecting small-market clubs is that baseball fans in a team's current community have a significant interest in keeping their local franchise which should be factored into Major League Baseball's franchise relocation policy.³⁸ While not advocating that an owner be *forced* to continue operating in a non-profitable location, proponents of this view argue that an owner should not be permitted to move an existing franchise from one profitable location to another. They claim that, if an owner wishes to own a team in a different city, then he or she should sell his or her current team to someone willing to operate in its current city and then purchase or seek an expansion franchise in the desired locale. In discussing the relocation of the Dodgers franchise from Brooklyn to Los Angeles, one author argued this position as follows:

Why should an individual like Walter O'Malley, who happened to be in the right place at the right time, be able to rob Brooklyn, as

37. "Expansion to thirty-five or forty teams by the end of the century would mean that more cities would have their demand for a team satisfied, a more equitable relationship would develop between existing teams and host cities, and there would be a greater number of MLB players. This outcome sounds like something economists call a welfare maximizing solution. But economists never claimed that welfare maximization was a property of unregulated monopolies. A public policy is called for. . . ." *Id.* at 146.

38. See generally WEILER & ROBERTS, *supra* note 19, at 411-12.

Bill Veeck put it, of a part of its heritage? There is a perfectly clear legal answer to this question. O'Malley had a property right in the team that enabled him to do this without legal reproach. But should not the borough of Brooklyn or New York City at least share in this right? After all, the city nurtured the team during its development, conferred upon the franchise part of its trademark, gave the team what amounted to daily, abundant, free advertising through sports coverage in its newspapers and media, and provided a variety of subsidies to the club over the years.³⁹

This was likely Howard Cosell's view when, while testifying before the U.S. House of Representatives in 1981 regarding the lifting of Major League Baseball's antitrust exemption, he referred to Major League Baseball's policy regarding the movement of sports franchises as "the rape of the cities."⁴⁰

Obviously, this justification directly conflicts with the free-market model previously discussed. If Major League Baseball enforced a non-relocation and non-expansion policy, then franchises would presumably be forced to remain in non-wealth maximizing locations.⁴¹ That is, communities that value the presence of a Major League franchise more highly than existing Major League cities, based on their willingness to pay, would be denied the opportunity to attract an existing team or a new franchise.⁴² Such a regime would also violate our common understanding of property rights and the notion that, to maximize efficient use, an owner must have freedom to do with his or her property as he or she desires. Under the free-market model, the rights commonly associated with the ownership of property must be enforced in order for resources to be properly allocated. Presumably, society is made better off when producers are able to respond quickly and accurately to changes in consumer preferences, and producers are best able to react to changes in market incentives through unfettered ownership of the forces of supply. It was this notion that likely prompted Ted Turner's response to Howard Cosell's above-referenced criticism when, while testifying at the same hearings, he noted that "it is a pretty rampant case of socialism to say that [baseball owners] cannot move."⁴³

39. ZIMBALIST, *supra* note 1, at 128.

40. *Id.* at 123.

41. *Id.*; see ZIMBALIST, *supra* note 1, at 146.

42. ZIMBALIST, *supra* note 1, at 123.

43. ZIMBALIST, *supra* note 1, at 123. Not surprisingly, however, Cosell got the last word. In response to Mr. Turner, Cosell stated emphatically: "I find that argument really could not appeal to anybody over the age of six . . . they [baseball owners] talk out of both sides of their

This justification also loses force when we consider the possibility of a Major League Baseball policy encouraging expansion.⁴⁴ In such an environment, a community losing an existing franchise could seek a replacement through expansion; and assuming that Major League Baseball is viewed as profitable in that community, we would expect investors to bid for new teams.⁴⁵ Under this regime, it is likely that owners of existing franchises would, in fact, be unable to find more profitable communities in which to move their teams. With free expansion, astute investors would seek out "up and coming" communities in which to establish expansion franchises well before those areas developed to a point where they would be able to attract an existing team; this is especially true if the transactions costs in relocating an existing franchise are high. Unrestricted expansion, then, may be viewed as a reasonable accommodation between the interests of owners wishing to relocate their franchises and baseball fans desiring to keep Major League Baseball in profitable communities. This accommodation, of course, rejects the notion that baseball fans in a particular community have "a special moral entitlement" under every circumstance to keep an existing team, as opposed to securing an expansion team.⁴⁶ As antitrust policy considers the aggregate interest of all consumers, including those of a new locale, the "moral entitlement" approach is not likely to win favor as a reasonable market restraint.⁴⁷ This is important given continued erosion of Major League Baseball's antitrust exemption.⁴⁸

Apart from antitrust concerns, however, owners are not likely to find the "fan entitlement" justifications for adopting measures to protect small-market franchises persuasive. After all, no owner amassed his or her fortune by operating Major League Baseball franchises; they all accumulated wealth through other business ventures or inheritance. They are the "successes" of our capitalistic society; they have all mastered the nuances of the market and have learned how to react to market-created incentives in order to most efficiently allocate their resources to meet consumer demand. Given their success in these other markets, why

mouths. They have developed an everspinning spiral of hypocrisy and deceit that ascends up to the heavens." ZIMBALIST, *supra* note 1, at 129.

44. One antitrust issue involving expansion is whether a potential investor or city should have the right to *insist* that Major League Baseball offer a new franchise. See WEILER & ROBERTS, *supra* note 19, at 392-93. A federal court rejected such a claim in professional football. See *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3rd Cir. 1983).

45. WEILER & ROBERTS, *supra* note 19, at 392-393.

46. *Id.*

47. See *supra* notes 20-21.

48. See *infra* Part III.

should they be expected to adopt restrictions on their ability to react to consumer demand for Major League Baseball? Presumably, such restraints would lead to non-wealth maximizing behavior to the detriment of society. Furthermore, the skills most owners have developed in the market would be less useful in an environment characterized by restrictions on the use of productive resources. Finally, such restraints may also act as a disincentive for individuals wishing to enter the market in order to purchase Major League Baseball franchises. Potential owners would presumably be less inclined to purchase teams from existing owners if they were required to keep the team in its existing locale. Such a rule would increase the risks facing potential owners. As a result, some would exit the market and those remaining in the market would restrict the amount they would be willing to pay to purchase an existing or expansion franchise. Clearly, Major League Baseball owners would be reluctant to adopt such measures if they would decrease the value and liquidity of their holdings.

2. Preserving the benefits of expansion for the League:

A second justification for adopting measures to ensure the survival of small-market teams is to preserve for current owners the benefits of expanding into the most profitable markets. Major League Baseball can accommodate new geographic markets by either the relocation of an existing franchise from a different location or the creation of a new expansion team. When an existing team moves, the primary benefit of the relocation goes to that team's owner, who directly benefits from the increase in revenues of his or her team. Other owners may experience some residual effects in profits through changes in travel costs, gate receipts, and national television contracts. If the League feels that the abandoned locale is nevertheless profitable, it may approve an expansion team for that community and profit from the fee paid by the new owners, however, the expansion fee is likely to be less than the League could have charged for the right to secure a new team in the more desirable location.⁴⁹ On the other hand, if the League instead approved ex-

49. The factors underlying the calculation of expansion fees are often unclear. In theory, an expansion fee should be the present value of the annual profit loss (if any) to each of the existing clubs (primarily comprised of lost revenues from the national television contract and league profit sharing arrangements) plus the initial costs of organization and administration (for example, compensation to clubs for lost players). But while one source estimated such losses in Major League Baseball at between \$8 to \$9 million per year, the most recent National League expansion franchises (Colorado Rockies and Florida Marlins) paid \$95 million each to join the League, which appears well above the present value of the former income

pansion into the desired location, the benefits from that location would be captured by the current owners. In theory, the League could charge a higher expansion fee than it could if it instead permitted an existing owner to move his or her team to the desired location and then approved expansion in that less profitable site.⁵⁰

While again violative of the spirit of the above referenced free-market model, this justification may nevertheless carry some weight in a "reasonableness" analysis under antitrust law.⁵¹ Baseball owners may claim, for example, that the addition of new cities has a tremendous impact on the viability and financial health of Major League Baseball (and, secondarily, on each individual owner), a "public good" to which they have been entrusted. Therefore, any decision to alter the mix of teams should be made by the League itself and not by an individual owner whose judgment may be "justifiably clouded" by his or her own short-term financial interests or a court lacking expertise in this field. While this argument may explain why the League, and not individual owner, should decide whether or not to maintain the status quo, it does *not* explain why entry into a new market should be made through expansion rather than by encouraging an individual owner to relocate his or her existing franchise. The owners' response to this criticism may be that, as part of its analysis of the impact of new teams on the viability and financial health of Major League Baseball, the League should be allowed to consider the "reasonable expectations" of the general public. This is a "soft" version of the previously described "fan entitlement justification" for preserving small-market teams. While not claiming that the expectations of fans are determinative, owners would argue that, in circumstances where it is "reasonably clear" that a community will receive a Major League franchise in the near future, consideration should be given to the loyalty of baseball fans of existing Major League franchises. Such

stream. See Scully, *supra* note 15, at 147. Any payments above the theoretical amount would represent monopoly rents. Also note that expansion fees are often a poor measure of the actual value of the franchise created; if the theoretical value of a franchise is the value of its assets plus the present value of its expected profits, any expansion fee above that amount would also be evidence of monopoly profits in expansion fees. The \$50 million expansion fee charged by the National Hockey League for the right to operate teams in Ottawa and San Jose, for example, was more than the estimated value of over half of the established National Hockey League franchises. See Michael K. Ozanian & Stephen Taub, *Financial World's Valuation Scoreboard*, FINANCIAL WORLD, July 7, 1992, at 50-51. The ability to extract monopoly profits in expansion fees may allow the owners to collect the same amount irrespective of the "degree of attractiveness" of the location of the expansion team.

50. See SCULLY, *supra* note 15, at 147; OZANIAN & TAUB, *supra* note 49, at 50-51.

51. See *supra* notes 20-21. Again, remember that this analysis does not take into consideration baseball's current exemption from antitrust laws. See *infra* Part III.

a preference, the owners may argue, would best enhance the image of Major League Baseball, minimize disappointment among existing fans, and promote fan development for the new franchise. As a result, League policy would reflect a preference for existing franchises to remain in their current communities, with expansion into new markets reserved for the League itself.⁵² This outcome would, therefore, enhance the financial returns to current owners while appeasing those demanding removal of baseball's antitrust exemption.⁵³

3. Discouraging the formation of rival baseball leagues:

A third justification for adopting measures to ensure the future viability of small-market teams is the owners' interest in discouraging the formation of rival leagues. The likelihood that this would occur, of course, depends significantly on the policy adopted by Major League Baseball regarding expansion. If the League adopted a restrictive expansion policy, then the relocation of an existing franchise may create an opportunity for the creation or expansion of a rival league. A rival league, for example, may gain a foothold in Milwaukee if the Brewers franchise is permitted to move to another community and Major League Baseball is dilatory in "filling the void." With a more permissive policy on expansion, Major League Baseball would be able to enter such markets in order to discourage the formation of a rival league. As stated by one source:

Expansion into desirable cities targeted by a new league is a favorite tactic of established leagues, not only in hockey and in football, but also in baseball. Indeed, Major League Baseball, threatened in the late 1950's by Branch Rickey's proposed Continental Baseball League, hastily undertook its first expansion in this century, into New York and Houston in the National League and Washington and Kansas City in the American League.⁵⁴

It therefore may be in the best interests of Major League Baseball owners to have both a permissive expansion policy and to ensure the survival of existing (and proposed) small-market franchises in order to protect their "monopoly" position.

52. See *supra* note 49.

53. See *infra* Part III.

54. WEILER & ROBERTS, *supra* note 19, at 472. Weiler and Roberts also note that, despite the effectiveness of such "preemptive measures" in destroying rival leagues, judges are reluctant to prescribe them as "such a rule would forever deny fans in 'virgin' cities the opportunity to secure a team in the established major league." *Id.* (discussing whether a rival team could demand access to the stadium owned or leased by an established team). See also ZIMBALIST, *supra* note 1, at 128.

Note that, under this view, it may, in fact, be in the best interests of Major League Baseball owners to adopt measures facilitating the existence of otherwise unprofitable franchises. We would fully expect the Major Leagues to expand into profitable communities in order to discourage the formation of rival leagues. However, the same logic dictates that it also maintain franchises in "non-profitable" communities, for the profitability of operating a team in a given location will be perceived very differently by an established league and a new league. For example, given the minimal amount of revenue sharing that currently exists in Major League Baseball pursuant to the Agreement,⁵⁵ small-market clubs with much lower revenues must compete with teams in more prosperous areas for talent and resources. Not surprisingly, many observers question whether such clubs can, in fact, field competitive teams over time without incurring tremendous losses. If Major League Baseball had significant revenue sharing (for example, as is the case in the National Football League), new franchises in small-markets would lower the revenues of existing clubs if, as is likely, the income they "bring to the common pool" is less than the League average.

A start-up league, on the other hand, would view the profitability of operations in such a community very differently. Since the primary concern of a new league is establishing a foothold in significant metropolitan areas across the United States, its owners would likely agree to subsidize sites which were initially unprofitable. In addition, even if such a league institutionalized revenue sharing among teams, it would not share the existing league's reservations about accepting a city whose team would earn revenues below the league average as many of its franchises would develop in small markets neglected by the existing league. As a result, and especially in light of the precarious position of its antitrust exemption,⁵⁶ it appears that Major League Baseball owners would be wise to consider steps to ensure the viability of teams in small markets.

Questions remain as to the optimal number of Major League Baseball franchises and the best way to protect small-market clubs. Part IV of this Article addresses the latter issue. The question of "how many teams is enough," however, is more difficult to assess. In theory, Major League Baseball owners should encourage the operation of as many teams as necessary to satisfy consumer demand, thereby discouraging the entry of competitors into the market. Presumably, this would include the presence of franchises in small markets that, absent contribu-

55. *See infra* Part III.

56. *Id.*

tions from more prosperous teams, would not be profitable in the long run. But how many such teams would Major League Baseball need to subsidize in order to satisfy the desires of baseball fans? If the Brewers left Milwaukee, for example, would baseball fans in Wisconsin be content to follow clubs in Chicago and Minneapolis?⁵⁷ Or would Milwaukee then become a viable target for entry by a rival league? One method to determine the number of new markets that Major League Baseball would need to accommodate would be to review the number of cities vying for teams in Major League Baseball's latest round of expansion in the National League. According to one source, at least fifteen cities were originally interested in landing an expansion team; ultimately, Denver and Miami were chosen.⁵⁸ Out of the remaining thirteen regions, eight are generally considered to be financially credible. These regions would include: Buffalo, Indianapolis, Nashville, New Orleans, Phoenix, Tampa-St. Petersburg, Washington D.C., and Vancouver.⁵⁹ Of these cities, five have populations less than that of the smallest current Major League city (Buffalo, Indianapolis, Nashville, New Orleans, and Vancouver); two are similar in size to existing small-market teams (Phoenix and Tampa-St. Petersburg); and one, Washington D.C., has already lost two franchises (in 1960 to Minnesota and in 1971 to Texas) and is close in proximity to Baltimore, the home city of the Orioles franchise.⁶⁰

Clearly, Major League Baseball would not need to expand into each of the above-listed markets in order to deter the formation of a rival league. However, when faced with uncertainty over the number of communities they can "neglect" before aggrieved investors launch a rival

57. Speaking from experience, I know that Brewers fans in Milwaukee would never adopt their American League rivals, the Chicago White Sox, as their team of choice. It is also interesting to note that baseball fans in western Wisconsin, who are geographically closer to Minneapolis than Milwaukee, generally support the Brewers franchise over the Twins. In fact, a significant number of these fans travel to Minneapolis to root for the Brewers against the home team.

58. See ZIMBALIST, *supra* note 1, at 124.

59. See SCULLY, *supra* note 15, at 145-46.

60. *Id.* Scully noted that the winning percentage of expansion clubs averages about .440 for the first decade of their existence. According to Scully, only half of the proposed expansion sites would produce revenues comparable to the clubs located in the seven smallest existing Major League cities given such a winning percentage. Scully predicted that expansion clubs in Denver, Miami, Phoenix, Tampa-St. Petersburg, and Washington D.C. would be as financially viable as existing small-market teams at such a winning percentage; expansion clubs in Buffalo, Indianapolis, New Orleans, and Vancouver would have to play .500 baseball to produce comparable revenues. Scully then concluded that, under the current regime, expansion into these sites would create financial instability to the detriment of Major League Baseball. See *Id.* at 146-47.

league, it seems that Major League owners should, at a *minimum*, protect existing Major League franchises that are located in small markets. Some owners, of course, may question the likelihood that a rival league would ever arise to challenge the supremacy of Major League Baseball. These owners, however, may be placing too much confidence in the exemption from antitrust laws that Major League Baseball currently enjoys.⁶¹ Most consider baseball's antitrust exemption to be a historical anomaly,⁶² and many have recommended that it be lifted by Congress.⁶³ Recently, legislators from Florida, in light of the owners' disapproval of the sale of the San Francisco Giants to a Florida group intending to move the team to Tampa-St. Petersburg, have considered proposing legislation in Congress to have baseball's antitrust exemption removed.⁶⁴ Should this occur, under the previously discussed free market model, the creation of rival leagues should be encouraged to compete with the established league for consumer dollars. Competition may ensue from start-up leagues (both American and foreign), the entry of foreign leagues (for example, Japanese or Mexican) into the American market, or an upgrading in the level of play by existing minor league teams. It appears, then, that the competitive position of Major League Baseball vis-a-vis rival leagues is enhanced by the existence of franchises in small markets.

As indicated, this justification generally does not comport with anti-trust policy and the interest of society in promoting competition among producers in a given industry. However, instead of focusing on its purported goal of preventing competition from rival leagues, owners could argue that they are, in fact, enhancing consumer welfare by increasing competition among teams within the league. Owners may further emphasize that their superior position in competing with potential rival leagues in small markets is the result of an inherent advantage due to the

61. See *infra* Part III.

62. See ZIMBALIST, *supra* note 1, at xiv. See generally WEILER & ROBERTS, *supra* note 19, at 100-122.

63. More than fifty bills have been introduced in Congress seeking to remove or weaken Major League Baseball's exemption from antitrust laws. See SCULLY, *supra* note 15, at 13. Most recently, Bud Selig, Major League Baseball's acting commissioner and owner of the Milwaukee Brewers, testified at a March 21, 1994, congressional hearing before, among others, Senator Howard Metzenbaum (D. Ohio), a strong opponent of baseball's antitrust exemption. *Selig Spars with Senator at Hearing*, MILWAUKEE JOURNAL, Mar. 22, 1994, at C2.

64. See *supra* Part III. In a suit brought by the aggrieved purchasers of the Giants, the district court concluded that antitrust law was applicable to franchise relocation because Major League Baseball's antitrust exemption "is limited to baseball's reserve system." *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D.Pa. 1993).

long history of Major League Baseball and its corresponding enhancement of fan loyalty and interest. Whether these justifications pass anti-trust scrutiny, however, likely depends on whether or not a court believes that professional baseball is a "natural monopoly."⁶⁵ Also, with the essence of sports being competition designed to culminate in the crowning of a single champion, the owners may argue that, as history has shown, any rival league would ultimately be consumed by Major League Baseball.⁶⁶

III. THE VIABILITY OF SMALL-MARKET TEAMS UNDER MAJOR LEAGUE BASEBALL'S EXISTING REGIME

Once we conclude that small-market franchises are important to the future of Major League Baseball, we must determine whether or not such teams can survive under existing conditions. What are some of the special obstacles facing small-market franchises? How do the current rules governing Major League Baseball, as embodied by the Agreement,⁶⁷ address these challenges? What changes have occurred in the environment in which Major League Baseball franchises operate which threaten the viability of small-market teams, and what changes are likely to occur in the future? These are some of the questions addressed in Part III. We must first establish that the future viability of small-market franchises is, in fact, threatened within the current governing structure of Major League Baseball before considering measures that owners (or legislators) should adopt to ensure the viability of such teams.⁶⁸

A. Antitrust treatment of Major League Baseball:

Perhaps the best way to analyze the financial condition of small-market franchises is to first discuss the broader context in which Major League Baseball operates. This, in turn, will allow us to distinguish between those rules affecting small-market teams which are imposed by agreement among the owners, and those imposed by society, either directly or indirectly, on Major League Baseball. Baseball owners, of

65. See WEILER & ROBERTS, *supra* note 19, at 493 ("...the essence of sports is competition, the high point of athletic competition is the crowning of a champion, and the league whose champion is generally recognized by fans as supreme inevitably receives the lion's share of gate attendance and television revenues. . .").

66. See SCULLY, *supra* note 15, at 13-43 (noting the failed attempts of the Federal Baseball League and Continental Baseball League to compete with Major League Baseball).

67. See *supra* note 19.

68. See *infra* Part IV.

course, only have discretion to change the former.⁶⁹ If it is determined that the viability of small-market franchises is compromised under the existing regime, distinguishing between rules in this manner will allow us to identify those with the power to change relevant rules and enact measures to protect the integrity of such teams.⁷⁰

1. The historical development of Major League Baseball's antitrust exemption:

The general power of owners to act is limited primarily by principles of contract, tort, criminal, labor, and antitrust law.⁷¹ Of particular importance for this discussion is the influence of antitrust law on the policies implemented by Major League Baseball.⁷² The applicability of § 2 of the Sherman Act to Major League Baseball was first raised in a case brought against Hal Chase involving the legality of baseball's "reserve clause."⁷³ Although not vital to its holding, the *Chase* court noted that:

[It] cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act. . . . Baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce.⁷⁴

That sentiment was echoed by Justice Oliver Wendell Holmes, a former amateur baseball player,⁷⁵ in a celebrated case brought in 1922 by the Federal Baseball Club of Baltimore, a member of a new rival league, against Major League Baseball for denying access to the players' market through the reserve system.⁷⁶ Holmes observed that:

[t]he business is giving exhibitions of baseball, which are purely state affairs But the fact that in order to give the exhibitions

69. These "owner-controlled" restrictions govern teams' relationships with one another and with the players. See SCULLY, *supra* note 15, at 13. For the most part, I will be focusing on the former restrictions, although we will also see how the latter restraints affect relationships among teams.

70. See *supra* Part IV.

71. See generally WEILER & ROBERTS, *supra* note 19, chs. 2-7, 11.

72. For a summary of initial attempts to apply antitrust laws to the policies of Major League Baseball, see ZIMBALIST, *supra* note 1, at 8-10; SCULLY, *supra* note 15, at 5-7.

73. *American League Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6 (1914). For a detailed discussion of Major League Baseball's reserve system and its treatment under antitrust policy, see WEILER & ROBERTS, *supra* note 19, at 100-109.

74. *Chase*, 149 N.Y.S. at 16-17.

75. See ZIMBALIST, *supra* note 1, at 10.

76. *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922).

the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out a member to argue a case, does not engage in such commerce because the lawyer or lecturer goes to another State . . . If we are right the plaintiff's business is to be described in the same way and [this case does not involve] an interference with commerce among the States.⁷⁷

Thus, Major League Baseball was held to be exempt from coverage under the Sherman Act.

With subsequent changes in the Supreme Court's interpretation of Congressional power under the Commerce Clause,⁷⁸ it was clear to many observers that baseball's antitrust exemption would soon be overruled.⁷⁹ Baseball's owners (and lawyers), anticipating a judicial response to Congress' failure to grant a statutory antitrust exemption, prepared themselves for the worst.⁸⁰ The Supreme Court, however, threw owners another curve when, in 1953, it held that it was up to Congress, and not

77. *Id.* at 208-09.

78. See e.g., *Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that Congress may regulate activity which has a "substantial economic effect" upon interstate commerce); *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264 (1981) (explaining that Congress may regulate activity when there is a "rational basis" for its finding that the activity affects interstate commerce).

79. In one case, a former Major League player who had jumped to the Mexican League in 1946 found himself blacklisted by a policy adopted by Commissioner Chandler, and sued for damages and reinstatement. In overruling the district court, the Second Circuit ruled that baseball's involvement in radio and television had clearly involved baseball in interstate commerce and, as a result, subjected it to Sherman Act coverage. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). See ZIMBALIST, *supra* note 1, at 13. In 1951, the House of Representatives conducted hearings to determine whether baseball's antitrust exemption should be legislatively enacted. When the "Cedar Hearings" concluded without adopting any legislation, it was clear to observers that the Committee had, in fact, determined that *Gardella* had superseded *Federal Baseball* and, by not adopting contrary legislation, had intended that baseball be subject to the Sherman Act. See *id.* at 13-14.

80. *Id.* at 15.

the courts, to remove baseball's antitrust exemption.⁸¹ Specifically, the Court noted that:

Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under [antitrust] laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of [*Federal Baseball*] so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.⁸²

Congress and the Supreme Court, then, were both inclined to pass the buck. "Congress did not enact legislation because it believed the [*Gardella*] decision removing baseball's antitrust exemption was good law, not the [*Federal Baseball*] decision. . . [while] the Supreme Court putatively did not reverse the precedent of the Holmes decision because it interpreted congressional inaction in [the 1951 Cellar Hearings] as an endorsement of [*Federal Baseball*]."⁸³

In 1972, the Supreme Court revisited the issue and again upheld the validity of baseball's antitrust exemption.⁸⁴ In *Flood*, the Court noted that:

the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century. . . We continue to loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively. . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. . . Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.⁸⁵

81. *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

82. *Id.* at 357.

83. ZIMBALIST, *supra* note 1, at 15.

84. *Flood v. Kuhn*, 407 U.S. 258 (1972).

85. *Id.* at 283-84.

As a result, Major League Baseball continues to enjoy a unique exemption from antitrust legislation, based on an erroneous assumption made by the Supreme Court in 1922, not applicable to any other professional sports league.⁸⁶ As previously indicated, however, this exemption has come under increasing attack, and its continued viability is very much at issue.⁸⁷

2. The antitrust exemption and labor law in Major League Baseball:

Not surprisingly, Major League Baseball's antitrust exemption has had a significant impact on the development of its policies towards players and among teams. Because of *Federal Baseball* and its progeny, baseball's player reserve system, including the rookie draft and veteran free agency, are exempt from the antitrust laws applicable to other professional sports leagues.⁸⁸

Presumably, this protection would shelter Major League Baseball from antitrust scrutiny should it adopt a salary cap,⁸⁹ revenue sharing, or any other measure typically thought of as "non-competitive" in nature. At this point, however, it is again important to distinguish between owner-adopted measures affecting the teams' relations with one another, and those affecting the relationship between players and the League.⁹⁰ Though many owner-adopted rules may be properly categorized under

86. "Baseball's exemption from antitrust statutes, based on the notion that it was not involved in interstate commerce, erroneous back in 1922 and more so in the 1950s, became even more anomalous in 1957, when the Supreme Court declared football to be subject to antitrust statutes and stated that baseball's antitrust exemption was 'unreasonable, illogical and inconsistent.'" ZIMBALIST, *supra* note 1, at 15 (citing, in part, LEE LOWENFISH AND TONY LUPIEN, *THE IMPERFECT DIAMOND: THE STORY OF BASEBALL'S RESERVE SYSTEM AND THE MEN WHO FOUGHT TO CHANGE IT* 187 (1980)).

87. See *supra* notes 63, 64.

88. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979) (finding that the National Football League's draft as it existed in 1968 constituted an unreasonable restraint of trade and therefore violated § 1 of the Sherman Act); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (finding that the National Football League's "Rozelle Rule" requiring a team that signed a veteran free agent to provide "fair and equitable" compensation to the player's former team violated § 1 of the Sherman Act). Veteran free agency did, however, arrive to Major League Baseball in 1975 through collective bargaining with the Andy Messersmith and Dave McNally grievances. See Nat'l & Am. League Professional Baseball Clubs and Major League Baseball Players Ass'n, 66 Labor Arbitration 101 (1975). For a detailed discussion of these cases and the issues they pose regarding the application of antitrust policy to professional sports, see WEILER & ROBERTS, *supra* note 19, at 127-164.

89. See, e.g., *Brown v. Pro Football, Inc.*, 1992 U.S. Dist. LEXIS 2903 (D.D.C. Mar. 10, 1992) (holding that the National Football League's salary cap for players on each team's developmental squad violated § 1 of the Sherman Act). See also WEILER & ROBERTS, *supra* note 19, at 201-05.

90. See *supra* note 69.

either category, owners are, of course, constrained in adopting the latter types of measures by agreement with the Major League Baseball Players' Association.⁹¹ The Supreme Court has held that collective agreements whose terms are principally felt by the immediate parties, and not outside competitors, are immune from antitrust scrutiny.⁹² This "labor exemption" from antitrust scrutiny applies to any professional sports league where owner/player relations are governed by a collective bargaining agreement.⁹³ Since every major professional sports league in the United States is currently governed by such an agreement, and therefore exempt from antitrust law, the Major League Baseball's historical exemption may seem devalued. However, given this "special exemption," Major League Baseball players, unlike athletes in other professional leagues, are unable to seek antitrust protection by decertifying their union should they become dissatisfied with their gains in collective bargaining.⁹⁴ Major League Baseball's historical antitrust exemption, then, continues to define the contours of negotiations between the owners and the players' union by limiting an otherwise important option available to the players. As a result, it has great value to baseball owners, who currently have significantly more leeway than their brethren in other sports leagues in their power to adopt market restrictions affecting team rela-

91. In general, proper union activity, such as strikes, also enjoy an exemption from antitrust laws. See *United States v. Hutcheson*, 312 U.S. 219 (1941) (finding that Clayton Act protects labor disputes from substantive antitrust liability). Similarly, collective agreements whose terms are principally felt by the immediate parties (and not outside competitors) are immune from antitrust scrutiny. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). As a result, collective agreements in the sports context also receive the labor exemption from antitrust. See e.g. *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (finding that although labor exemption from antitrust is available to terms of collective agreement, "Rozelle Rule" was found not to be exempt from the coverage of antitrust laws since it was not the "product of bona-fide arm's-length negotiations"). For an illuminating discussion of the labor exemption and its role in professional sports, see WEILER & ROBERTS, *supra* note 19, at 164-205.

92. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

93. See note 91 (referencing *Mackey*).

94. The National Football League Players' Association, for example, "declared itself no longer a union representing players in collective bargaining and instigated another antitrust suit against the NFL's player restraints" after a court ruled that the labor exemption prohibited judicial review of a provision of the collective agreement where the parties had not yet bargained to an impasse. *Powell v. Nat'l Football League*, 888 F.2d 559 (8th Cir. 1989); but see *Brown v. Pro Football, Inc.*, 1991 Trade Cases (CCH) 69, 454 (D.D.C. 1991) (holding that the labor exemption ends at the expiration of the collective bargaining agreement, not "at some indeterminable point beyond expiration which is labelled 'impasse'"). This move by the NFLPA prompted an antitrust suit brought by a player, Freeman McNeil, against the NFL regarding the League's free agency policy, precipitating the arrival of free agency to the League. See *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D.Minn. 1992). See generally WEILER & ROBERTS, *supra* note 19, at 188-205.

tions, such as franchise relocations, and their bargaining position in labor negotiations.⁹⁵

B. The current state of small-market teams in Major League Baseball:

So what effect (if any) has the antitrust exemption for Major League Baseball had on the profitability of small-market franchises? How have the rules adopted by Major League Baseball owners (after negotiating with the players' union) affected the competitive position and viability of small-market teams? Can small-market franchises survive in the future under Major League Baseball's current governing structure? In answering these questions, we must begin by comparing the current financial position of small-market teams with that of franchises with greater resources. Should we uncover significant disparities in financial health, we can then investigate whether they result from the policies enforced by Major League Baseball. Furthermore, should we conclude that the future viability of small-market franchises is at risk, we can propose measures that may be taken by owners to ensure the economic survival of such teams in the future.⁹⁶

1. Franchise values in Major League Baseball:

Major League Baseball owners profit from their franchises through appreciation in market value and the generation of income. Clearly, estimating the value of any business is an inexact science; this is especially true in Major League Baseball, where the profitability of a given franchise is often difficult to ascertain.⁹⁷ In general, the value of a franchise should "approximate the discounted value of future estimated profits, where profits are conceived broadly to include all forms of return."⁹⁸ Average franchise values in the 1980s were nearly seventy times greater than they were in the 1910s, and one small-market team, the Seattle Mariners, which was purchased for \$13 million in 1981, was sold for \$77 million in 1988.⁹⁹ Franchise values in all sports, in fact, grew at an annual rate of 20% per year during the latter portion of the 1980s.¹⁰⁰ With such a tremendous appreciation in value of baseball franchises over the last decade, it seems that owners have found it profitable to operate

95. See *supra* notes 63, 64.

96. See *infra* Part IV.

97. See generally ZIMBALIST, *supra* note 1, at 61-73.

98. ZIMBALIST, *supra* note 1, at 62.

99. *Id.* at 67-68.

100. Ozanian & Taub, *supra* note 49, at 50-51.

teams in small markets even if they experienced annual losses on their financial statements.¹⁰¹

These trends, however, are not likely to continue in the future. According to one source, the average franchise value in the Major Leagues *decreased* by 4.2% from 1990 to 1991, and the average value of five of the seven "small-market franchises"¹⁰² declined over the same period.¹⁰³ In 1992, the average franchise value in the Major Leagues further decreased by 16.24%. The average value of six of the seven "small-market franchises," however, increased slightly due to "baseball's determination to redistribute local TV revenues."¹⁰⁴ Nevertheless, the overall decline in franchise values may be attributed to two sources: player costs continue to rise faster than revenues (causing operating income to decline), and owners are faced with a potential cut in national television broadcasting revenues of 20%.¹⁰⁵ As we shall later see, both factors will likely continue to negatively affect franchise values in the future, and also have a significant effect on the operating profits of Major League franchises. At this point, it is sufficient to note that any decline in the rate of increase of franchise values makes owners more reliant on operating income for profits, just as a decline in the rate of appreciation of a stock would make an investor more reliant on dividend payments in order to recognize investment profits. This effect is compounded when the value of Major League franchises decreases, as it did from 1990 through 1992.

2. Operating profits in Major League Baseball:

As noted above, the second part of the owners' "profit equation" involves profits recognized from operations; this is what most people have in mind when referring to the profitability of baseball franchises. Again, one should keep in mind that it is extremely difficult to accurately

101. A major reason that franchise values increased rapidly during the 1980s was the ability of the League to control player salaries in the market for free agents through collusive practices under former Commissioner Peter Ueberroth. For a summary of what happened, see WEILER & ROBERTS, *supra* note 19, at 277-288.

102. See *supra* note 17.

103. Ozanian & Taub, *supra* note 49, at 50-51. Among small-market franchises, only Cleveland and Seattle experienced a gain in franchise value over the preceding year; however, Cleveland's gain was only \$2 million and Seattle's gain of \$8 million can, for the most part, be attributed to the sale of the franchise to a group of investors in 1991.

104. See Michael K. Ozanian & Stephen Taub, *Foul Ball*, FINANCIAL WORLD, May 25, 1993, at 20.

105. Michael K. Ozanian & Stephen Taub, *Big Leagues, Bad Business*, FINANCIAL WORLD, July 7, 1992, at 35-38. After the 1994 season, each club should expect a drop in national broadcasting fees from over \$15 million a year to around \$9 million. See Ozanian & Taub, *supra* note 104, at 20.

measure the actual profits from operations of a franchise, especially given the malleability of accounting principles, specialized tax treatment, and specialized rules regarding the depreciation of player salaries.¹⁰⁶ By carefully considering each of the elements affecting the team's income statement and profitability, we can gain some insight into the status of small-market clubs, vis-a-vis franchises operating in larger communities. Operating profits equal revenues less operating expenses; from this figure, owners subtract depreciation from players' salaries, taxes, and interest to arrive at net income.¹⁰⁷ It is within this framework that we can ascertain relevant distinctions between small-market and large-market teams in order to better determine whether small-market clubs will remain profitable in the future.

In general, reported operating profits in Major League Baseball increased throughout the 1980s, from a \$66.6 million loss in 1983, to a gain of \$214.5 million in 1989. This figure, however, subsequently declined to approximately \$142.9 million in 1990, \$138.6 million in 1991, and \$87.8 million in 1992.¹⁰⁸ Thus, according to industry figures, baseball first became profitable during the tenure of former Commissioner Peter Ueberroth, due in large part to the collusive practices of owners in the salary offers made to veteran free agents.¹⁰⁹ The decline in reported profits during the 1990s resulted from the end of collusive practices among the owners, which precipitated higher player salaries and compensatory payments which the owners were required to make to the players under the settlement agreement.¹¹⁰

106. Paul Beeston, former vice president of business operations for the Toronto Blue Jays, noted that "[a]nyone 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." The "Beeston principle" was in full swing from the years 1975-79, when, despite reported book losses in every year, Major League Baseball had "substantial and growing operating profits." ZIMBALIST, *supra* note 1, at 62-63. Much of the discrepancy is due to the depreciation of player salaries by owners, discussed later in Part III. Owners have also been known to participate in "accounting chicanery" in order to affect the bottom line. For example, the Turner Broadcasting System, which is owned by Ted Turner and owns the Atlanta Braves, paid the club \$1 million in 1984 for television broadcasting rights, well below the league average of \$2.7 million that year. Given the Braves' large geographic following, national exposure, and the number of games broadcast, the Braves made a bad deal. However, while the Braves lost money, Ted Turner received tax benefits from the transaction. For a detailed analysis of the Turner deal and other examples of the accounting games that baseball owners play, see ZIMBALIST, *supra* note 1, at 64-67.

107. See Ozanian & Taub, *supra* note 105, at 44.

108. See ZIMBALIST, *supra* note 1, at 64; Ozanian & Taub, *supra* notes 104, at 20; Ozanian & Taub, *supra* note 105, at 34-35.

109. See ZIMBALIST, *supra* note 1, at 64; *supra* note 101.

110. *Id.* See ZIMBALIST, *supra* note 1, at 64; *supra* note 101.

For our purposes it is significant to note how Major League Baseball's operating profits are distributed among franchises to analyze the *disparity* between small-market and large-market teams. In 1990, for example, five Major League teams recognized operating losses, including three small-market franchises: the Kansas City Royals (\$9.8 million), Cleveland Indians (\$6.8 million), and Seattle Mariners (\$3.1 million).¹¹¹ Of the remaining twenty-one teams, the most profitable were the New York Yankees (\$24.5 million), New York Mets (\$15.8 million), Toronto Blue Jays (\$13.9 million), Oakland Athletics (\$12.4 million), Boston Red Sox (\$12.3 million), Philadelphia Phillies (\$11.1 million), and Cincinnati Reds (\$11.0 million).¹¹² In 1991, on the other hand, twelve clubs reported operating losses, including five small-market teams: the Milwaukee Brewers (\$11.4 million), Kansas City Royals (\$7.2 million), Cleveland Indians (\$4.8 million), San Francisco Giants (\$4.4 million), and Oakland Athletics (\$1.7 million).¹¹³ The most profitable teams in 1991 were the New York Yankees (\$30.4 million), Toronto Blue Jays (\$26.3 million), New York Mets (\$20.7 million), Chicago White Sox (\$18.0 million), Houston Astros (\$14.5 million), Texas Rangers (\$13.9 million), St. Louis Cardinals (\$12.7 million), Baltimore Orioles (\$11.1 million), and Boston Red Sox (\$10.7 million).¹¹⁴ Finally, in 1992, thirteen clubs reported operating losses, including six small-market clubs: the Milwaukee Brewers (\$12.8 million), Oakland A's (\$12.8 million), Cincinnati Reds (\$11.8 million), San Francisco Giants (\$11.1 million), Kansas City Royals (\$5.1 million), and Seattle Mariners (\$2.4 million).¹¹⁵ The most profitable clubs that year were the Baltimore Orioles (\$34.2 million), New York Yankees (\$25.0 million), Chicago White Sox (\$16.7 million), Texas Rangers (\$14.8 million), and Los Angeles Dodgers (\$14.7

111. See Michael K. Ozanian & Stephen Taub, *Secrets of the Front Office*, FINANCIAL WORLD, July 9, 1991, at 42-43. Commissioner Fay Vincent, on the other hand, claimed that ten teams actually lost money in 1990. See ZIMBALIST, *supra* note 1, at 69.

112. *Id.* Note that in 1990, the small-market teams listed, the Oakland Athletics and Cincinnati Reds, each won their division and advanced to the World Series where the Reds defeated the A's, four games to none.

113. See Ozanian & Taub, *supra* note 49, at 50-51. The other teams reporting operating losses included the California Angels (\$7.6 million), Montreal Expos (\$4.2 million), Minnesota Twins (\$4.1 million), Pittsburgh Pirates (\$4.0 million), Detroit Tigers (\$2.8 million), Atlanta Braves (\$0.5 million), and the San Diego Padres (\$0.4 million); of the small-market teams recognizing operating profits, the Seattle Mariners netted \$2.9 million, while the Cincinnati Reds netted \$0.2 million. *Id.*

114. *Id.*

115. See Ozanian & Taub, *supra* note 104, at 28.

million).¹¹⁶ While not necessarily an accurate measure of the actual profits accruing to baseball owners,¹¹⁷ these figures do suggest both a wide discrepancy between the profitability of small-market and large-market teams and a growing trend where small-market teams are finding it more and more difficult to recognize operating profits at all within the current economic environment of Major League Baseball.¹¹⁸

Before investigating possible sources of this discrepancy, one important factor affecting the actual profits recognized by the owners needs to be discussed: the unique tax treatment given to the depreciation of player salaries.¹¹⁹ In purchasing a team, an owner acquires three sets of assets: player contracts (constituting a club's major asset), a franchise right, and a set of contracts necessary for operations (for example, leases, concession agreements, and broadcast agreements).¹²⁰ Under the Internal Revenue Code, owners may treat player contracts as depreciable intangible assets.¹²¹ As a result, player contracts are depreciated over the average length of a player's career.¹²² This, in effect, forces the government to subsidize the purchase of the franchise by an amount equal to the present value of the amount allocated to players' contracts

116. *Id.*; The only small-market franchise in this category, the Cleveland Indians, realized \$13.6 million in operating profits due to its inordinately low player costs, which approached one-fourth that of most other teams. The Cleveland management has professed its commitment to fielding young players whom they sign to low-cost, long-term contracts.

117. *See supra* note 106.

118. Zimbalist claims that the losses recently suffered by at least three small-market franchises (the Pittsburgh Pirates, Seattle Mariners, and Kansas City Royals) may be due more to "accounting gimmickry" and owner-based preferences than true cost overruns. Nevertheless, while some teams that experience real operating losses may be able to turn profits the following year through shrewd management, "ominous signs are on the horizon. . . Most troubling . . . is the projected drop in national media revenues." ZIMBALIST, *supra* note 1, at 69-73.

119. *See generally* ZIMBALIST, *supra* note 1, at 34-36; SCULLY, *supra* note 15, at 130-32 (indicating that no other industry is permitted to depreciate employee contracts).

120. *See* SCULLY, *supra* note 15, at 130.

121. *Id.*; *see* 26 U.S.C. § 167(a) (1992).

122. *See* SCULLY, *supra* note 15, at 130. Note that "[t]he percentage of the purchase price of a franchise that may be allocated to player contracts and the estimated useful life of the players are subject to negotiation with the IRS. Until the mid-1970s, generally 90% of the franchise purchase price was allocated to player contracts in baseball and the useful life was set at seven years." *Id.*; *see, e.g.,* Selig v. United States, 740 F.2d 572, 580 (7th Cir. 1984) (approving district court ruling that it was proper for Bud Selig, when purchasing the Seattle Pilot franchise in order to move it to Milwaukee in 1970, to allocate \$10.2 million of the \$10.8 million purchase price to player contracts). Under Section 212 of the Tax Reform Act of 1976, however, a rebuttable presumption exists that no more than 50% of the purchase price of a sports franchise should be allocated to player contracts. 26 U.S.C. § 1056(d) (1992); *see also* Selig, 740 F.2d at 579, n. 17 (finding that Section 212 did not apply retroactively to the Selig purchase).

multiplied by the corporate tax rate.¹²³ However, as observed by one author:

[f]rom an economic point of view, the loophole makes little sense. First, it is obvious that the overwhelming share of the value of a franchise belongs to the monopoly rent that is generated by belonging to Major League Baseball and the exclusive territorial rights membership confers, not to the players' contracts. The value of these rights does not depreciate over time. Second, baseball players do not depreciate as does a machine. In fact, most players reach their peak performances well after the midpoint of their careers. That is, for five years or more players appreciate in value from their on-the-job training before they begin to depreciate. Third, baseball players do not produce a net income stream unless the additional revenue they generate for a team (their marginal revenue product) is greater than their salary. In this sense, a ballplayer should be considered a depreciable asset no more than a factory production worker. Fourth, players can be replaced simply by promoting a player from the minors. If anything, the depreciable investment in players should be the amount spent on player development in the minor leagues, but this sum is expensed (the related expenses are fully deducted in each year) so it cannot also be amortized.¹²⁴

The practice of amortizing player contracts, then, seems nothing more than "a taxpayer subsidy to franchise owners and consumers of sports."¹²⁵ Not surprisingly, the depreciation of players' contracts, first utilized in 1959 by owner Bill Veeck, has been called "his most important contribution to the baseball business."¹²⁶

How should the depreciation of players' contracts factor into our analysis of the special problems facing owners of small-market clubs?

123. To recognize this tax shelter, an owner must have operating profits from the franchise or other holdings equal to or greater than the amount of depreciation taken for players' salaries. See Jennifer Reingold, *When Less is More*, FINANCIAL WORLD, May 23, 1993, at 38. The shelter was greater, of course, when the top corporate tax rate was higher (for example, 46% until 1987) and before the IRS capped the maximum amount allocable to players' salaries at 50%. See ZIMBALIST, *supra* note 1, at 34-35; WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 4 (1991); 26 U.S.C. § 11(b) (1992). For an example of how this tax shelter worked for Bud Selig and initial investors of the Milwaukee Brewers, see Murphy, *Trade Secrets*, *supra* note 1, at 21.

124. ZIMBALIST, *supra* note 1, at 35-36.

125. SCULLY, *supra* note 15, at 132.

126. ZIMBALIST, *supra* note 1, at 34. Commenting on the fairness of this special tax shelter for owners, Veeck smugly replied: "Look, we play the 'Star-Spangled Banner' before every game. You want us to pay income taxes too?" *Id.* at 35; See also SCULLY, *supra* note 15, at 130.

First of all, just as they have considered removing baseball's antitrust exemption in response to increasing dissatisfaction with the way Major League Baseball is run, Congress may also consider eliminating this unique tax treatment given to the owners of professional sports franchises.¹²⁷ Secondly, the size of the tax shelter owners receive due to the depreciation of players' contracts, because it depends on the purchase price of a franchise, will be greater for large-market teams than for small-market teams. Thirdly, we should also remember that, because owners may only depreciate the value allocated to players' contracts *upon purchasing the franchise*, its value to owners "diminishe[s] to zero after the players' [contracts are] fully depreciated [typically, over five years]."¹²⁸ Thus, the tax savings realized by owners due to the depreciation of players' contracts is, in fact, short-lived.¹²⁹ Finally, this sheltering effect underlines the importance of basing financial analysis of franchises on book profits rather than operating profits as a team can clearly "suffer book losses but have positive cash flows."¹³⁰

3. Elements contributing to the decline in profitability of small-market franchises:

So what has caused the recent decline in the profitability of small-market franchises? Should we expect this downward trend to continue in the future? Perhaps the best way to answer such questions is to look at the elements underlying "operating profits" to uncover sources of divergence between small-market and large-market teams. As noted earlier, operating profits equals the difference between operating revenues and operating expenses. Revenues in Major League Baseball are primarily derived from three sources: broadcasting revenues, gate and stadium revenues, and licensing revenues.¹³¹ Costs, in turn, are mainly attributable to team costs (primarily player salaries), player development costs, game costs (primarily stadium operations), promotional ex-

127. See *supra* notes 63, 64.

128. ZIMBALIST, *supra* note 1, at 35.

129. Note, however, that the tax shelter also has a long-term benefit for owners because in theory, it increases the value of each franchise by the present value of the expected tax savings. In addition, while the tax shelter should induce rapid turnover of club ownership as its short-term benefits to owners are fully realized, restrictions on franchise sale imposed under the Major League Agreement deter prospective investors from purchasing a team solely to recognize these gains. See *Id.*

130. SCULLY *supra* note 15, at 132.

131. See ZIMBALIST, *supra* note 1, at 48; SCULLY, *supra* note 15, at 117.

penses, and general and administrative expenses.¹³² Each will be discussed in turn.

a. Broadcasting Revenues:

Broadcasting revenues currently account for approximately 50% of the total revenues in Major League Baseball.¹³³ Each team receives such revenues from both local and national sources.¹³⁴ Small-market franchises, however, derive a much greater percentage of broadcasting revenues from national sources.¹³⁵ This is because national broadcasting revenues are divided equally among the franchises, while local broadcasting revenues are not.¹³⁶ As a result, not only do small-market franchises receive significantly less in broadcasting revenues than large-market teams, but they are also much more dependent on national sources. In 1992, for example, the teams receiving the most total media revenues were the New York Yankees (\$61 million), New York Mets (\$50 million), Boston Red Sox (\$40.1 million), Los Angeles Dodgers (\$33 million), Detroit Tigers (\$28.8 million), California Angels (\$28.2 million), Toronto Blue Jays (\$28 million), and Chicago Cubs (\$28 million).¹³⁷ The teams receiving the least in total media revenues, on the other hand, were the Atlanta Braves (\$17.3 million), Milwaukee Brewers (\$19.8 million), Minnesota Twins (\$20 million), Kansas City Royals (\$21 million), Seattle Mariners (\$22 million), and Cleveland Indians (\$23 million).¹³⁸ The disparity in broadcasting revenues becomes even greater when we exclude the approximately \$15 million each club received under the national television contract in 1992.¹³⁹ The New York Yankees, for example, realized over \$40 million more in local broadcasting revenue than the Milwaukee Brewers in 1992 (\$46.0 million to \$4.8 million), a ratio of almost 10 to 1.

132. See SCULLY, *supra* note 15, at 123; ZIMBALIST, *supra* note 1, at 59-60.

133. See Ozanian & Taub, *supra* note 49, at 50-51; see also ZIMBALIST, *supra* note 1, at 48.

134. ZIMBALIST, *supra* note 1, at 48.

135. *Id.*

136. *Id.*

137. See Ozanian & Taub, *supra* note 104, at 28; see *supra* note 106 (teams such as the Atlanta Braves and Chicago Cubs, which share ownership with the local television network covering their games, receive less in local media revenues than otherwise expected).

138. Ozanian & Taub, *supra* note 104, at 28. Note that, excluding the Atlanta Braves (see *supra* note 106), four of the six teams listed qualify as "small-market teams;" the Oakland A's derived \$25 million in media revenues in 1992, while the San Francisco Giants saw \$24.5 in such revenues.

139. *Id.*

This does not give the complete picture. The above figures include an agreement between the clubs with superstation broadcasting agreements (Atlanta Braves, Chicago Cubs, New York Mets, and New York Yankees) and Major League Baseball to make compensatory payments to a central fund to be distributed among the remaining teams.¹⁴⁰ Furthermore, they also include a "modest revenue sharing [agreement among teams to share] 'net receipts' from pay television."¹⁴¹ As a result, the actual disparity in local (and total) broadcasting revenues generated by small-market and large-market teams is even greater than indicated by the above figures. Finally, national television broadcasting revenues will decrease significantly in the future. CBS agreed to pay Major League Baseball \$1.06 billion, which was divided equally among teams, for the right to broadcast nationally sixteen weekend games during the regular season, the All-Star game, the playoffs, and the World Series each year from 1990 to 1993. ESPN made a similar agreement to broadcast 175 regular-season games for \$100 million a year during those years.¹⁴² Both networks, however, lost a significant amount of money,¹⁴³ and Major League Baseball is bracing for a 20-30% drop in its new national television contract which will have to be divided among twenty-eight, rather than twenty-six, teams.¹⁴⁴ For reasons previously discussed, this will have a much greater impact on small-market clubs than large-market clubs. Coupled with the prospect of continued growth in local broadcasting revenues,¹⁴⁵ we can expect the disparity in total broadcasting revenues between the "haves" and the "have nots" to increase dramatically in the next several years.

b. Gate and Stadium Revenues:

As expected, small-market teams are also disadvantaged as compared to the large-market teams regarding gate and stadium revenues. In general, the percentage of total operating revenues in Major League Baseball attributable to gate and stadium receipts has fallen from 74.3%

140. See ZIMBALIST, *supra* note 1, at 50.

141. *Id.*

142. *Id.* at 148, 158.

143. CBS claimed after-tax losses of \$55 million in 1990 and estimated losses of \$170 million over the term of the contract. Its profits were, no doubt, hurt by the fact that the World Series over those years generally involved small-market teams and few games. ESPN estimated that it lost at least \$36 million in 1990 and \$24 million after taxes in 1991. *Id.* at 159-60.

144. See *Id.* at 160.; see Ozanian & Taub, *supra* note 104, at 20.

145. See ZIMBALIST, *supra* note 1, at 161-65 (also noting that pay-per view will likely be a primary source of increased local broadcasting revenues in the future).

in 1975 to approximately 33% in 1992, due in most part to increases in broadcasting revenues over that same period.¹⁴⁶ The absolute amount of gate and stadium revenues has also grown dramatically over that same period due to rising attendance, higher ticket prices, higher parking and concessions prices, and luxury box revenues.¹⁴⁷ Gate receipts, of course, are a function of attendance and ticket prices, which are both affected by team quality. Not surprisingly, small-market teams fare worse, on average, than large-market teams on both counts.¹⁴⁸ Stadium receipts, on the other hand, depend on many factors; including whether the team owns or leases, the terms of the lease agreement, and the existence of luxury box revenues. Typically, the small-market teams fare worse than those in large-markets. In 1990, for example, the teams with the highest revenues from gate and stadium receipts were the Toronto Blue Jays (\$47.3 million), New York Mets (\$40.6 million), Oakland Athletics (\$34.5 million), Los Angeles Dodgers (\$32.5 million), Boston Red Sox (\$32.2 million), and Kansas City Royals (\$32 million).¹⁴⁹ That same year, the teams with the lowest revenues from gate and stadium receipts were the Atlanta Braves (\$11.2 million), Cleveland Indians (\$12.5 million), Montreal Expos (\$13.1 million), Detroit Tigers (\$13.5 million), Houston Astros (\$13.6 million), and Seattle Mariners (\$14.8 million).¹⁵⁰ In 1991 the teams with the highest gate and stadium revenues were the Toronto Blue Jays (\$56.5 million), Chicago White Sox (\$46.8 million), Los Angeles Dodgers (\$44.6 million), New York Mets (\$38.9 million), and Boston Red Sox (\$38.8 million); the teams with the lowest amounts were the Montreal Expos (\$13.7 million), Cleveland Indians (\$16.1 million), Milwaukee Brewers (\$17.2 million), Houston Astros (\$18.6 million), Atlanta Braves (\$19.2 million), Seattle Mariners (\$20.5 million), and San Francisco Giants (\$20.5 million).¹⁵¹ Finally, the most profitable teams in this area in 1992 were the Toronto Blue Jays (\$54.3 million), Baltimore Orioles (\$52.1 million),¹⁵² Chicago White Sox (\$46.3 million),

146. See Ozanian & Taub, *supra* note 104, at 28; ZIMBALIST, *supra* note 1, at 50-51.

147. See Ozanian & Taub, *supra* note 49, at 50-51; ZIMBALIST, *supra* note 1, at 50-51.

148. One author noted that, "holding ticket price and team quality constant, an extra one million in population size is worth 180,000 fans or \$1,135,800 in ticket revenues to a club." SCULLY, *supra* note 15, at 114.

149. See Ozanian & Taub, *supra* note 111, at 42-43. Note that, in 1990, the Oakland Athletics advanced to the World Series before losing to the Cincinnati Reds, four games to none. The Kansas City Royals, on the other hand, have a free-spending owner. See ZIMBALIST, *supra* note 1, at 72.

150. Ozanian & Taub, *supra* note 111, at 42-43; see *supra* note 106.

151. See Ozanian & Taub, *supra* note 49, at 50-51; see *supra* note 106.

152. 1992 marked the opening of Oriole Park at Camden Yards.

Boston Red Sox (\$45.6 million), and Los Angeles Dodgers (\$44.8 million); those with the lowest receipts were the Cleveland Indians (\$13.0 million), Houston Astros (\$15.3 million), Detroit Tigers (\$17.8 million), San Francisco Giants (\$18.6 million), Montreal Expos (\$18.9 million), and Seattle Mariners (\$19.5 million).¹⁵³ Thus, assuming that owners set ticket prices at a profit-maximizing level,¹⁵⁴ we should expect that the approximately \$30 million disparity in gate and stadium revenues between small and large-market clubs will continue in the future. Furthermore, because the above figures include the gate sharing policy in effect in both the National and American Leagues, the absolute disparity between the gate revenues of small and large-market teams is actually much higher.¹⁵⁵

c. Licensing Revenues:

The third primary source of operating revenues for teams, licensing revenues, brought approximately \$77 million to Major League Baseball in 1990 and approximately \$102 million in 1991.¹⁵⁶ Divided equally among teams, these funds do not contribute to the existing income disparity among teams, and added roughly \$2.7 million to each team in 1990 and \$3.7 million in 1991.¹⁵⁷

d. Total Operating Revenues:

So what is the total disparity in operating revenues between small-market and large-market franchises? In 1990, the teams with the highest revenues were the New York Yankees (\$98 million), New York Mets (\$81.1 million), Toronto Blue Jays (\$77.5 million), Boston Red Sox (\$68.5 million), and the Los Angeles Dodgers (\$64.4 million). The lowest-revenue producing teams were the Seattle Mariners (\$34 million), Cleveland Indians (\$34.8 million), Montreal Expos (\$35.3 million), Atlanta Braves (\$35.4 million), Detroit Tigers (\$38 million), and the Mil-

153. See Ozanian & Taub, *supra* note 104, at 28. The figures for other small market teams were as follows: Milwaukee Brewers (\$21.6 million), Kansas City Royals (\$26.6 million), and Oakland A's (\$33.0 million).

154. See SCULLY, *supra* note 15, at 113.

155. The National League splits gate revenues between the home and visiting teams at approximately a 90 to 10 ratio (specifically, the home team must share 71 cents per admission; 22 cents to the league office and 49 cents to the visiting team); the American League uses an 80 to 20 split. Significantly, luxury box revenues and concession revenues are *not* included. See ZIMBALIST, *supra* note 1, at 57.

156. ZIMBALIST, *supra* note 1, at 57-58.

157. *Id.*

waukee Brewers (\$38.4 million).¹⁵⁸ In 1991, the top revenue producing teams were the New York Mets (\$91.1 million), New York Yankees (\$90 million), Toronto Blue Jays (\$88.7 million), Boston Red Sox (\$81.5 million), Los Angeles Dodgers (\$79.3 million), and Chicago White Sox (\$78 million). The teams with the lowest operating revenues were the Milwaukee Brewers (\$38.8 million), Montreal Expos (\$39.4 million), Atlanta Braves (\$40.3 million), Cleveland Indians (\$42 million), Minnesota Twins (\$44.1 million), and the Seattle Mariners (\$44.7 million).¹⁵⁹ Finally, the teams with the highest operating revenues in 1992 were the New York Yankees (\$94.6 million), Boston Red Sox (\$90.6 million), Toronto Blue Jays (\$87.7 million), New York Mets (\$86.9 million), and Los Angeles Dodgers (\$84.2 million). Those with the lowest figures included the Cleveland Indians (\$39.9 million), Houston Astros (\$43.3 million), Milwaukee Brewers (\$45.3 million), Seattle Mariners (\$45.4 million), Montreal Expos (\$46.7 million), and the San Francisco Giants (\$47 million).¹⁶⁰ Large-market franchises bring in approximately twice the operating revenues of their small-market competitors, and as previously noted, this gap will likely increase as Major League Baseball's new national television contract becomes effective during the 1994 season.

e. Player Salaries and other Operating Expenses:

Despite vast disparities in operating revenues, every Major League franchise faces similar operating costs since each club is in the same market for players.¹⁶¹ While operating expenses¹⁶² for baseball franchises also include costs for player development and training, stadium operations, sales and promotion, and general administrative expenses, the primary source of operating expenses in baseball is player salaries.¹⁶³ In 1992 player costs constituted 58 percent of Major League Baseball's gross intake, and averaged just over \$35 million per team.¹⁶⁴

There is a significant disparity in player salaries between small-market and large-market teams. In 1990, for example, the highest paying franchises were the Kansas City Royals (\$23.6 million), Boston Red Sox (\$22.7 million), San Francisco Giants (\$22.5 million), Oakland Athletics

158. See Ozanian & Taub, *supra* note 111, at 42-43.

159. See Ozanian & Taub, *supra* note 49, at 50-51.

160. See Ozanian & Taub, *supra* note 104, at 28.

161. See generally Ozanian & Taub, *supra* note 111, at 42.

162. As previously indicated, operating expenses does not include costs for depreciation, amortization, taxes, and interest.

163. See generally SCULLY, *supra* note 15, at 123-26; ZIMBALIST, *supra* note 1, at 59-61.

164. See Ozanian & Taub, *supra* note 104, at 28.

(\$22.3 million), New York Mets (\$22.2 million), and the California Angels (\$21.9 million); the lowest-paying teams were the Baltimore Orioles (\$8.1 million), Seattle Mariners (\$12.6 million), Texas Rangers (\$12.7 million), Minnesota Twins (\$14.2 million), Atlanta Braves (\$14.2 million), and the Philadelphia Phillies (\$14.2 million).¹⁶⁵ In 1991, the teams with the highest player salaries were the Oakland Athletics (\$39.2 million), Los Angeles Dodgers (\$36 million), Boston Red Sox (\$35.4 million), New York Mets (\$35.2 million), and the California Angels (\$34.2 million); those with the lowest figures were the Houston Astros (\$12.1 million), Seattle Mariners (\$17.4 million), Atlanta Braves (\$20.4 million), Philadelphia Phillies (\$21.7 million), Cleveland Indians (\$21.8 million), and the Montreal Expos (\$21.8 million).¹⁶⁶ In 1993, the top paying teams were the Toronto Blue Jays (\$59.3 million), Oakland Athletics (\$53.2 million), New York Mets (\$50.8 million), Boston Red Sox (\$49.3 million), Los Angeles Dodgers (\$46.3 million), and the New York Yankees (\$43.5 million); the "stingiest" were the Cleveland Indians (\$10.1 million), Houston Astros (\$11.4 million), Montreal Expos (\$18.4 million), Baltimore Orioles (\$27.4 million), Philadelphia Phillies (\$27.9 million), St. Louis Cardinals (\$28.9 million), and the Seattle Mariners (\$29.0 million).¹⁶⁷ Not surprisingly, a handful of large-market teams, with higher operating revenues, are able to appropriate more money toward player salaries than their small-market brethren; strangely, however, the lowest paying teams seem to include an equal number of small-market and large-market clubs. Nevertheless, the *ability* of large-market clubs to, on average, designate for players' salaries nearly twice the amount of small-market clubs is important in considering the viability of the latter, given that, while operating revenues in Major League Baseball increased by nearly 18% between 1990 and 1992, player salaries increased over 103% during that same period.¹⁶⁸

165. See Ozanian & Taub, *supra* note 111, at 42-43. The Oakland and San Francisco franchises were, no doubt, paying for their success in 1989, where both teams advanced to the World Series, while the owner of the Kansas City Royals, Ewing Kauffman, was "perceived by some to be baseball's last big-spending sportsman owner . . . in baseball to massage his passions, not his profits." ZIMBALIST, *supra* note 1, at 72.

166. See Ozanian & Taub, *supra* note 49, at 50-51. The significant jump in player salaries from 1990 to 1991 is attributable to the big increase in national television broadcasting and the end of collusive practices by baseball owners in veteran free agency. See *supra* note 101.

167. See Ozanian & Taub, *supra* note 104, at 28.

168. See Ozanian & Taub, *supra* note 104 at 28; Ozanian & Taub, *supra* note 105 at 34. A major factor affecting the increase in players' salaries over this time was the demise of collusive practices by the owners. See *supra* note 101.

What impact does the ability of large-market franchises to pay more in player salaries than small-market teams have on the viability of small-market teams? Does this mean that small-market teams are at a competitive disadvantage on the field? Because each Major League team is in the same market for player talent, it stands to reason that small-market teams lack the financial resources to attract the same number of proven quality players as large-market clubs. With fewer funds to work with, small-market clubs are generally less active in the market for veteran free agents, have a harder time resigning their own veteran free agents, and must rely more heavily on their minor league systems to supply Major-League caliber players.¹⁶⁹ Thus, it would seem that the rosters of small-market teams should be dominated by younger, less experienced, and lower-salaried players with, perhaps, a handful of highly-paid stars. Moreover, we should expect this state of affairs to worsen as the rate in growth of players' salaries continues to dwarf that of operating revenues. Thus, if veteran players are generally more productive than their inexperienced cohorts, large-market franchises should, on average, field more competitive teams than those in small markets.¹⁷⁰ Yet, naturally, poor performance on the field results in still lower attendance, gate, and stadium revenues.¹⁷¹

There are several criticisms to this market analysis linking the level of player salaries to success on the field. One is that either quality management or an owner's willingness to lose money can compensate for the financial disadvantages faced by small-market teams.¹⁷² However, as small-market teams clearly do not have a monopoly over quality management or philanthropic ownership, such factors cannot be relied upon

169. Apart from ability to pay, we would still expect large-market franchises to attract the best players because such players would bring more additional people to the ballpark, enlarge the local media contract by a greater amount, and attract more promotional income than they would in a small market. See ZIMBALIST, *supra* note 1, at 101.

170. See SCULLY, *supra* note 15, at 125 (concluding that, based on salary figures and team performance from 1978-87, "clearly, average player pay and average club record are linked"). But see ZIMBALIST, *supra* note 1, at 96 (concluding that, from 1984-89, average team salary has been related only tenuously to team performance, as it explained less than 10% of the variance in team win percentage and less than 12% of the variance in team standing). Note, however, that the salary figures used by Zimbalist occurred during the height of owner collusion in the veteran free agency market, which significantly decreased the disparity in player salaries among teams, thereby undermining his conclusion.

171. See SCULLY, *supra* note 15, at 113 (noting that, based on the 1984 season, each additional game won by a team brought in an additional 21,511 fans or \$135,730 in ticket revenues based on average ticket price).

172. See, e.g., ZIMBALIST, *supra* note 1, at 69-72 (noting that Ewing Kauffman, the owner of the Kansas City Royals, is "perceived by some to be baseball's last big-spending sportsman owner," who "is in baseball to massage his passions, not his profits").

to preserve the viability of such teams once we determine that their survival is important to Major League Baseball. Another critique observes that, because veteran free-agency has proven to be an inefficient manner of securing a player's services, large-market teams do not have a competitive advantage over small-market clubs despite their wealth. Using a model devised by economist Gerald Scully for determining the value of a player's contribution to a team's winning percentage and team revenues ("marginal revenue product"), Andrew Zimbalist concluded that franchise owners typically pay veteran players, especially free agents, more than their marginal revenue product.¹⁷³ However, whether an owner does this because he or she misjudges the player's actual value to the team, wishes to prevent the player from being signed by another club, wants to use a popular player to "lure" baseball fans to the ballpark, or simply prefers winning over profits,¹⁷⁴ the result is the same: a player is added who contributes, in some small degree, to the team's winning percentage.

In an environment where large-market teams have the financial resources to attract the greatest number of quality free agents, small-market clubs must again operate at a competitive disadvantage. Thus, assuming that each franchise is equally skilled at developing its own players, wealthier teams may seek incremental gains in winning percentage through the veteran free agent market; over time, this should hurt the profitability of small-market teams. But why then, some critics argue, has competitive balance increased, rather than decreased, since the institution of free agency in 1976?¹⁷⁵ One answer, of course, is that competitive bidding in free agency has made it harder for any successful team to keep its nucleus of players. Again, however, players are generally lost to large-market clubs. Other potential explanations include the effect of long-term contracts on player performance, the compression of

173. See ZIMBALIST, *supra* note 1, at 90-94 (also noting that the marginal revenue product of a star player will be higher in a large market than a small market); see SCULLY, *supra* note 15, at 154-58.

174. See ZIMBALIST, *supra* note 1, at 93-94. See also Andrew Zimbalist, *Salaries and Performance: Beyond the Scully Model*, DIAMONDS ARE FOREVER 107, 130-132 (Paul M. Sommers ed. 1992).

175. See ZIMBALIST, *supra* note 1, at 95-101 (noting that, since 1976, twelve different teams have won the World Series, and sixteen different teams have qualified for the World Series [those figures have since increased to thirteen and seventeen, respectively]; only three teams have failed to win division titles; and team winning percentages have narrowed over time).

baseball talent, and (of course) poor judgment by owners in signing free agents.¹⁷⁶

While it is not possible to quantify into a specific number of wins per season the advantage enjoyed by large-market teams over their small-market brethren in offering larger salaries, it is important to note that its effects are likely to increase in the future. As previously noted, a decline in national television broadcasting revenue will increase the discrepancy between revenues of small-market and large-market teams. This, coupled with the explosion in players' salaries realized through the end of owners' collusion in the veteran free agency market, will increase the discrepancy between small-market and large-market teams in the ability to pay competitive salaries to attract and keep quality players. Because they will, on average, be less competitive on the field than large-market clubs, small-market teams will experience further declines in gate and stadium revenues. Whether this cycle has already begun or will manifest itself in the future is not clear, however, now is the time for Major League Baseball leadership to take steps to prevent the demise, and utter collapse of, small-market franchises. As noted by Andy MacPhail, vice president and general manager of the Minnesota Twins who has long predicted that playing field inequality will emerge from the extreme disparity in revenues among teams: "Up to this point, I can't back that [prediction of imbalance] up, but do you have to have a nuclear bomb dropped on you to want some sort of disarmament?"¹⁷⁷

IV. MEASURES THAT MAJOR LEAGUE BASEBALL OWNERS MAY ADOPT TO ENSURE THE VIABILITY OF SMALL-MARKET TEAMS

What are the alternatives available to Major League Baseball owners once they have determined that the viability of small-market franchises is important and they have analyzed the precarious position of small-market teams under the existing framework? Which alternative will be most effective, and who will bear the costs? Finally, what are the legal impediments facing owners in adopting each measure? These are the questions addressed in the remainder of this Article. As reflected in Part III, Major League owners may take one of three approaches in dealing with the "small-market problem"; they may maintain the status

176. See *id.* at 96-97. Zimbalist also suggests that, what may initially appear to be "ownership stupidity" in the signing of free agents, may actually be a conscious attempt to maintain competitive balance with small-market teams to escape pressure to share revenues. *Id.*

177. *Id.* at 99.

quo, reduce the revenue disparity among teams, or reduce the cost disparity among teams. Each option will be discussed in turn.

A. Maintaining the status quo and community responses:

While acknowledging their common interest in ensuring the viability of small-market franchises, Major League Baseball owners may conclude that, despite the above-referenced revenue and cost disparities, such teams can survive in the existing governing structure. As a result, owners may decide that the current rules governing Major League Baseball are adequate to ensure on-the-field and financial competition among teams and that, therefore, the existing scheme requires no revision. If owners take this approach, what is likely to happen to small-market teams in the future?

1. Likely future trends:

As previously noted, small-market teams will suffer an inordinate decline in operating revenues under the new national television broadcasting contract, increasing the disparity in total revenues between small-market and large-market teams. This will permit large-market teams to further exploit their advantage over small-market clubs in signing players with proven talent through veteran free agency, further increasing the disparity in players' salaries. Over time, small-market teams will find it harder to compete on-the-field, which will decrease gate and stadium revenues and further contribute to the variance in wealth between small-market and large-market franchises.

Some may argue that small-market clubs can remain competitive if they learn to operate more "resourcefully" than other teams. Clearly, any team with quality management or a free-spending owner should, on average, outperform other teams lacking on either front. As previously noted, however, there is no reason to expect that small-market teams will necessarily usurp such advantages. Also recall that, while we determined that small-market teams will be more reliant on their farm systems to develop talented players than will large-market teams due to their limited ability to enter the free agency market for proven talent, they will similarly have fewer financial resources to devote to this important player resource. One should expect that the small-market teams will compensate for their financial disadvantages by making better decisions than large-market clubs in player acquisition and development. Moreover, because small-market franchises lack the financial resources to enter the market for free agents to "shore-up" weak spots resulting

from previous personnel decisions, any mistakes they make in player development or player selection will be magnified.¹⁷⁸

2. Luxury box revenues:

Small-market franchises will be forced to find some way to increase operating revenues in order to remain competitive with large-market clubs in the search for quality players. Because gate and stadium revenues are linked to ticket prices and attendance, which are dependent on team performance, they are an unlikely source of increased revenue. Similarly, small-market teams will not be able to look to national or local broadcasting revenues as an increasing source of funds. As a result, many owners perceive that the revenues generated by luxury boxes is the best way to reduce the revenue disparity among clubs. In general, luxury boxes may add as much as \$6 million a year to a team's revenues. For some teams, this constitutes over forty percent of total gate receipts.¹⁷⁹ In addition, luxury box revenues need not be shared with other teams.¹⁸⁰ With luxury boxes contributing so significantly to the revenues of many teams, it is not surprising that many communities, including Milwaukee, are faced with the choice of either using taxpayers' money to build a new stadium with luxury boxes or losing their teams to other cities willing to do so.¹⁸¹

Revenues from luxury boxes, however, are not a panacea. First of all, as of 1991, all but two baseball stadiums already contained luxury boxes.¹⁸² For most teams, therefore, the incremental gain in revenues from building a new stadium with luxury boxes are much smaller than that of the Milwaukee Brewers. Secondly, there is often weak corporate demand for luxury boxes in small-market communities. Plans for constructing a new stadium in Milwaukee, for example, were stalled when the team had trouble pre-selling skyboxes to finance construction,¹⁸³ while weak demand for luxury boxes at the Kingdome contributed to the

178. Milwaukee Brewers management, for example, claimed that costly free-agent acquisitions and long-term signings of ineffective and injured players precluded them from resigning their best player, veteran Paul Molitor, in 1993; Molitor joined the World Series champion Toronto Blue Jays through free agency. See, e.g., Murphy, *supra* note 123, at 25.

179. See *supra* note 2; Ozanian & Taub, *supra* note 104, at 28. The amount of money generated from luxury boxes, of course, depends a great deal on the obsolescence of the stadium involved and the affluence of the surrounding community.

180. See ZIMBALIST, *supra* note 1, at 57.

181. See *supra* note 16; see Murphy, *Trade Secrets*, *supra* note 1, at 21.

182. See ZIMBALIST, *supra* note 1, at 55.

183. See Morris, *supra* note 2, at 48; Murphy, *Trade Secrets*, *supra* note 1, at 22.

financial troubles of the Seattle Mariners.¹⁸⁴ Thirdly, most teams are unwilling, or, in the case of small-market clubs, unable, to construct a new stadium without a subsidy from taxpayers, many of whom "have grown weary of being held hostage by teams that threaten to move."¹⁸⁵ This has not proven to be the case in Milwaukee, where state and local government have already agreed to provide \$67 million and a \$35 million loan for the Brewers' proposed new stadium.¹⁸⁶ Finally, proposals to increase revenues from luxury boxes are probably best viewed as temporary solutions to long-term problems. We saw earlier that the disparity in operating revenues between small-market and large-market teams is likely to continue growing in the future, giving the latter an increasing advantage in attracting quality players. While temporarily closing the gap, luxury box revenues do not address the long-term trend of "richer teams getting richer faster than the poorer teams," with its resulting disparity in financial and on-the-field competitiveness.

B. Increased revenue sharing in Major League Baseball:

If reliance on luxury-box revenues to save small-market teams is misguided, then what alternatives are available to ensure their future viability? A second approach that Major League Baseball owners may take is to reduce the income disparity through increased revenue sharing. As previously noted, Major League Baseball currently divides licensing and national broadcasting revenues equally, and divides gate revenues between home and visiting teams by a ratio of 80 to 20 in the American League and 90 to 10 in the National League.¹⁸⁷ However, each team keeps 100% of its local media revenues. We saw that the continued increase in local broadcasting revenues is a primary source of income disparity between small-market and large-market teams. Clearly then, the existing level of revenue sharing is inadequate in dealing with the problems confronting small-market clubs.

Major League Baseball could implement several measures to further revenue sharing in decreasing the income disparity between small-mar-

184. See Anthony Baldo, *Edifice Complex*, FINANCIAL WORLD, Nov. 26, 1991, at 36.

185. *Id.* at 34 (noting that stadium referenda in San Francisco, Oakland and Miami have failed in recent years, while civic groups have opposed new projects in Detroit and Chicago). To get around taxpayer disapproval, some areas have created "sports authorities," which "provide public financial support to stadiums—without public consent" (for example, the Georgia Dome in Atlanta and Oriole Park at Camden Yards in Baltimore). *Id.* at 35. See *supra* notes 1, 16.

186. See Murphy, *Spring Fever* *supra* note 1, at 82; Murphy, *Trade Secrets* *supra* note 1, at 21.

187. See *supra* note 155.

ket and large-market teams. Owners could agree to divide gate receipts more equally among teams, include luxury box revenues in the distribution of gate receipts, and/or share local broadcasting revenues.¹⁸⁸ The first two proposals, while reducing the current size of the income disparity among teams, does not address the increasing income gap between small-market and large-market teams given the growing disparity in local broadcasting revenues. As a result, the third option would appear to be the optimal long-term solution to the problem of revenue disparity in Major League Baseball. Owners must also determine the level at which revenue disparity between small-market and large-market teams no longer acts as an impediment to the on-the-field and financial competitiveness of small-market teams. In theory, the equal division of all sources of League revenues (with "cost-of-living adjustments" between large and small markets) would provide the optimal level of financial and on-the-field competitiveness within professional baseball. But achieving this standard of "perfect competition" is clearly not necessary. Even holding factors such as quality of management and ownership benevolence constant, lower-revenue franchises can surely survive as long as their competitive position reasonably approximates that of large-market teams. Deciding how much of an operating revenue disparity is too much, however, is a question best left to knowledgeable Major League Baseball insiders. Nevertheless, "it seems inevitable that some additional revenue sharing will be necessary" in the future.¹⁸⁹

1. Labor law issues in revenue sharing:

Revenue sharing in Major League Baseball presents several important labor and antitrust law issues. Obviously, changes in the amount of revenue shared among teams will affect the ability of each team to pay players and therefore affect the dispersion of veteran and young players throughout the league. Presumably, these are changes in the "wages, hours and other terms and conditions of employment" which must be negotiated with the players' union through collective bargaining.¹⁹⁰

188. In particular, "because the clubs can no longer rely on the reserve system to insulate equality of team playing talent from inequality in team earnings, there is considerable interest in league-wide revenue sharing in major league baseball — particular sharing of local broadcast revenue." WEILER & ROBERTS, *supra* note 19, at 438-39.

189. See ZIMBALIST, *supra* note 1, at 173. Recognizing this, the owners, after much debate, unanimously agreed on a plan to share local broadcasting revenue on January 18, 1994; that plan, conditioned on approval of a salary cap by the players' union, promises small-market clubs between \$5 and \$9 million a year in additional revenue. See Bob Berghaus, *Revenue Plan a Victory for Selig to Savor*, MILWAUKEE JOURNAL, Jan. 19, 1994, at A1.

190. See 29 U.S.C. § 158(d) (1993).

However, because revenue sharing would increase competition among teams in bidding for the services of players, salaries should rise; as a result, it should not be difficult for owners to negotiate desired changes in existing revenue sharing provisions. Revenue sharing is best viewed, then, as a method of redistributing profits among teams, rather than as a measure to limit player salaries.

2. Antitrust law issues in revenue sharing:

Finally, one should consider the treatment of revenue sharing arrangements under antitrust policy. We saw that, while Major League Baseball currently has a special exemption from antitrust not given to other professional sports leagues, this exemption is by no means "iron-clad."¹⁹¹ Without this exemption, the players, if dissatisfied with their gains under collective bargaining, could seek antitrust protection by decertifying the players' union, thereby eradicating the labor exemption from antitrust.¹⁹² As a result, it is important to consider the implications of antitrust law on any agreement among owners to share revenues.

The Sherman Act makes unlawful "every contract, combination . . . or conspiracy in restraint of trade" in interstate commerce, and also prohibits monopolizing, attempts to monopolize, and combinations or conspiracies to monopolize any part of interstate commerce.¹⁹³ An initial issue, is whether Major League Baseball "consist[s] of a group of inherently economically competitive clubs who have come together to cooperate in some aspects of otherwise autonomous businesses, [thereby invoking § 1 of the Sherman Act], [or] a single integrated entity . . . which is thus incapable of *conspiracy* in restraint of trade when it establishes its internal operating rules and structure, [thereby invoking § 2 of the Sherman Act]."¹⁹⁴ Because antitrust challenges to revenue sharing in Major League Baseball would likely originate from players (rather than rival leagues), § 1, rather than § 2, of the Sherman Act seems applicable.¹⁹⁵ As a result, because revenue sharing does not involve *per se*

191. See *supra* Part III, notes 63, 64.

192. *Id.*

193. 15 U.S.C. §§ 1,2 (1993).

194. WEILER & ROBERTS, *supra* note 19, at 353. At least one court held that the National Football League was not a "single entity" for purposes of § 1 of the Sherman Act and, in fact, constituted "separate economic entities engaged in a joint venture." *North American Soccer League v. National Football League*, 670 F.2d 1249, 1254 (2d Cir. 1982).

195. See generally Gary R. Roberts, *Professional Sports and the Antitrust Laws*, THE BUSINESS OF PROFESSIONAL SPORTS 135, 136-48 (Paul D. Staudohar & James A. Mangan eds. 1991) (historically, interleague disputes have involved § 2 of the Sherman Act, while in-

price fixing or other unlawful activity,¹⁹⁶ it would have to pass a "reasonableness" test administered by a reviewing court to survive antitrust scrutiny.¹⁹⁷

What are some factors that Major League Baseball owners could use to convince a court that its revenue sharing arrangement is "reasonable" for purposes of antitrust review? In general, courts focus on the impact that the challenged restraint would have on competitive conditions, considering the structure of the industry, facts peculiar to a firm's operation within an industry (including power and position), the history and duration of the restraint, and the reasons why it was adopted.¹⁹⁸ With increased revenue sharing, baseball owners would emphasize its effects on the financial and on-the-field competitiveness of small-market teams. Such measures, they would argue, are necessary to the success of their "joint venture," and benefit consumers to the extent that they increase on-the-field competition, limit franchise instability and relocation, and bring financial stability (and, perhaps, lower ticket prices) to the League. This especially holds true if baseball is regarded as a "natural monopoly" resulting from fans' desire to crown one champion.¹⁹⁹ Deflecting attention from the effects that revenue sharing may have in discouraging the creation of rival leagues, this view emphasizes its perceived pro-competitive effects on team performance and consumer welfare.²⁰⁰

C. *Adopting a Salary Cap in Major League Baseball:*

A third approach that owners could take in ensuring the viability of small-market teams is to reduce the widening discrepancy in player salaries by adopting a salary cap. While revenue sharing "distributes the total income pie" equally among owners, a salary cap is designed to "redivide the portions of the pie" received by owners and players. Thus, "the term 'cap' is actually something of a misnomer for this arrangement. . . [which] really . . . is an agreement between clubs and players associations about what 'share' of league revenues is to be spent on player salaries and other kinds of compensation."²⁰¹ A salary cap, of

traleague disputes have involved § 1 of the Sherman Act); WEILER & ROBERTS, *supra* note 19, at 445-456.

196. See, e.g., *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 212-18 (1939).

197. See generally *Board of Trade v. United States*, 246 U.S. 231 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

198. *Id.*

199. See *supra* note 65.

200. See *supra* Part II.

201. WEILER & ROBERTS, *supra* note 19, at 303.

course, may be instituted in several ways; owners may set a maximum amount that each team may pay in total player salaries, a maximum amount that any team may pay a particular player, or some combination (or derivation) of both measures. Again, it may not be necessary for baseball owners to establish the same salary maximum for every franchise in order to achieve competitive balance within the Major Leagues.²⁰² However, if we hold management quality and owner benevolence constant among teams, then on-the-field competition should increase as player costs are brought into uniformity.²⁰³ Nevertheless, as in the case of revenue sharing, the optimal method of implementing a salary cap, and whether or not it should be uniform among teams, is best left to the expertise of baseball insiders.

1. Labor law issues and the salary cap:

A salary cap and revenue sharing involve similar labor law issues. A salary cap would obviously affect the "wages, hours, and conditions of employment," thus qualifying as a mandatory subject of collective bargaining between owners and the players' union.²⁰⁴ Intuitively, players typically resist the notion of a salary cap given its restrictions in the market for player talent and explicit goal of limiting the total share of revenues meted out to players. However, a salary cap may also inflate player salaries for teams below the cap, especially if the owners also incorporated a "salary floor."²⁰⁵ Thus, the coupling of a salary minimum with a salary maximum may increase the overall share of team revenues allocated for player salaries.²⁰⁶ Because the salary maximum must be set no higher than the amount that the least-wealthy teams can afford to pay, the players' union is not likely to accept a salary cap without increased revenue sharing among baseball owners.²⁰⁷ Baseball owners recently

202. Salaries may be adjusted, for example, based on the cost of living and promotional income in different locales.

203. *See id.* As previously noted, players are also attracted to teams by the number of endorsement opportunities available in a given location. As a result, if an unadjusted uniform salary cap was applied to every team, the best players would generally migrate to large-market teams. *See ZIMBALIST, supra* note 169.

204. *See supra* note 190.

205. The National Basketball Association, for example, has, in principle, both a team salary maximum and team salary minimum. Its principles are outlined in WEILER & ROBERTS, *supra* note 19, at 300-304.

206. *See id.*

207. According to one observer, "[t]he union has always been ready to listen to proposals on revenue sharing and a salary cap—one based on equal sacrifice, not just as a means of saving owners money." Larry Whiteside, *Baseball Owners in a Sharing Mood*, BOSTON GLOBE, Feb. 18, 1993, at 39, 41.

agreed on such a proposal, which they will present to the players' union in their next round of collective bargaining.²⁰⁸ Its palatability to the players, ultimately hinges on the percentage of revenues shared among teams.

As previously indicated, full revenue sharing would presumably adjust player salaries to a market-clearing rate. A salary cap, while offering little in terms of restoring fiscal equality to baseball, may nevertheless be acceptable to the players if set at or near the market rate. As the level of revenues shared diverges from this equilibrium point, however, the players are likely to become increasingly resistant to a salary cap which, is set based on the least-wealthy teams' ability to pay. Under such circumstances, the players receive a lower share of total revenues, with the difference accruing to the wealthiest teams (who can no longer use such funds to price other teams out of the free agent market). Moreover, even with partial revenue sharing, a salary cap offers little in terms of restoring fiscal and competitive equality, for teams, assuming that the amount of revenue shared by the owners allows small-market teams to reasonably bid with their brethren in the players' market. Under such circumstances, the players would receive a "cut" of the above-referenced excess revenues accruing to the wealthiest teams. If the amount of revenues shared is inadequate to allow small-market teams to competitively bid for players' services with their large-market brethren, a salary cap becomes vital to restoring fiscal equality among teams. Under such circumstances, the players receive a yet lower share of total revenues, with the difference again accruing to the wealthiest teams. Baseball owners, then, can likely solve the "small-market problem" through significant revenue sharing without the imposition of a salary cap on players. Their current proposal, linking both measures, may result from, (1) an inadequate degree of revenue sharing (thus necessitating a salary cap for fiscal competitiveness), (2) pressure by large-market owners reluctant to further share revenues *with players* through free agency, (3) pressure by small-market owners desiring equal competition in the bidding of players, and/or, (4) the owners' awareness of the pressure on the players' union to pass such proposal for fear that they will be viewed by the public as greedy, pampered athletes who killed the return of fiscal sanity to the game. Ultimately, the union is likely to condition acceptance of the owners' proposal on increased revenue sharing among teams.

208. See *supra* note 189.

2. Antitrust law issues and the salary cap:

Finally, just as in the case of revenue sharing, owners should consider whether justifications of a salary cap are "reasonable" under the laws of antitrust.²⁰⁹ But while a salary cap, like revenue sharing, may increase competition on-the-field and preserve the financial integrity of small-market teams, some courts may determine that alternative measures are available to owners that are less restrictive on market forces.²¹⁰ A court may decide, for example, that owners, through redistribution of revenues generated from their "joint venture," rather than players, through salary limitations, should bear the burden of ensuring the survival of small-market teams. Owners, on the other hand, may argue that restrictions of player costs, as pro-consumer measures, actually demand less scrutiny under antitrust analysis because they bring lower ticket prices to baseball fans.²¹¹ Ultimately, of course, any decision by the players' union to decertify for purposes of seeking antitrust protection would depend on the likelihood that a reviewing court would find a salary cap to be a pro-consumer measure, rather than a naked price-fix by owners, as well as their negotiating position in collective bargaining.²¹² Nevertheless, it seems clear that a court would more closely scrutinize an owner-adopted measure directly impacting a labor market than such a measure involving a mere redistribution of League revenues.

V. CONCLUSION

In 1951, William Wrigley observed that baseball was a "very peculiar business."²¹³ That observation, made over forty years ago, seems equally applicable today. As we have seen, Major League Baseball has experienced tremendous changes in its competitive environment in recent years regarding the rate of increase of player salaries and various sources of operating revenues. These trends have magnified the competitive disadvantages of small-market franchises both on-the-field and on the balance sheet. Many experts believe that recent growth in the rate of increase of the revenue disparity between small-market and large-market teams will accelerate in the future. Absent significant changes, the

209. See *supra* Part III; notes 63, 64, and 197.

210. See, e.g., *Board of Trade*, 246 U.S. at 239.

211. See, e.g., *Kartell v. Blue Shield of Massachusetts Inc.*, 749 F.2d 922 (1st Cir. 1984) (finding no antitrust violation where the health insurer's practice of requiring all doctors who performed patient services to accept its fee schedule because it held medical and insurance costs down for consumers). See also *WEILER & ROBERTS*, *supra* note 19, at 127-131.

212. See *supra* Part III, notes 63, 64.

213. See *MILLER*, *supra* note 9, at 1.

owners of small-market franchises can expect to operate in a still harsher environment in the years to come. I have suggested two measures, increased revenue sharing and a salary cap, that Major League Baseball owners may take to preserve the integrity of small-market teams. The former would be more palatable to the players' union and more likely to withstand antitrust scrutiny by a reviewing court.

Whatever measures baseball owners ultimately adopt to protect small-market teams, it is important that they act now. As the existing policies of Major League Baseball become less and less responsive to the problems confronting the game, an increasing number of people will become disenchanted with baseball's current governing structure and seek external review.²¹⁴ We also saw that, not only could removal of Major League Baseball's antitrust exemption subject owner-adopted market restrictions to court review, but it may also adversely affect their ability to negotiate desired changes with the players' union in collective bargaining. Finally, we saw that absent action by the League to preserve small-market franchises, community-based measures designed to help increase team revenues, such as financing the construction of a new stadium and luxury boxes, are inadequate to ensure the long-term survival of such teams.

It may offer little solace to baseball fans in Milwaukee (and other small markets) that their fears of losing their franchise are well-grounded if the community cannot generate substantial public funding for the construction of a new stadium with a convertible roof and luxury boxes.²¹⁵ Under Bud Selig's latest stadium proposal, this entails a \$35 million loan, \$67 million for infrastructure costs, and over \$250 million in tax exemptions and other costs over the stadium's thirty year mortgage. The franchise, in turn, would recognize an estimated \$9.6 million in annual revenue.²¹⁶ These same fans, however, would probably be quite surprised to find out that this substantial community subsidy is not enough to guarantee the survival of the Brewers franchise in Milwaukee. Clubs competing in small and large markets will also take steps to maximize operating revenues through stadium construction and luxury box rentals. This will minimize the ability of small-market teams to use luxury box revenues as a method of decreasing the disparity in total operating revenues. With the increasing disparity in operating revenues

214. *See supra* notes 63, 64.

215. *See supra* note 1.

216. *Id.*; Daniel P. Handley Jr., *Selig Intent on Another Big Victory*, MILWAUKEE JOURNAL, Feb. 27, 1994, at A1.

between small-market and large-market teams, the initial boost in operating revenues created by a new stadium and luxury boxes represents a short-term solution to a long-term problem. At best, the Milwaukee community, by subsidizing the construction of a new stadium, is simply taking a calculated risk to “buy time” until Major League Baseball owners implement measures to ensure the financial integrity of small-market teams. Owners have recently taken the first step by unanimously approving a revenue sharing agreement contingent on the players’ union acceptance of a salary cap.²¹⁷ Approval is not guaranteed, however, and the clock is still ticking; only time will tell if baseball owners have done enough.

217. See *supra* note 189.