



Catalyzing Fans

Dan Markel,^{Z¹*} Michael McCann,** and Howard M. Wasserman***

For which team should basketball superstar LeBron James play? Where should celebrity statistician Nate Silver ply his craft of predictive wizardry? On which network should Jon Stewart flash his mordant wit? For some reason, the answers to these disparate questions are only indirectly related to the desires of third-party fans. Indeed, it is a puzzle that fans do not already have more influence on the recruitment or retention of their sports or entertainment heroes (“talent”).

This paper proposes that fans can adopt forms of crowdfunding to mobilize and empower fans to play a larger role in the decision-making associated with which “teams” the talent will work. By creating Fan Action Committees (“FACs”), fans could directly compensate talent or donate to

* 1972-2014. Dan Markel died in July 2014; at the time of his untimely and tragic death, he was the D’Alemberte Professor of Law at Florida State University College of Law. Dan was the driving force behind the idea of FACs and this use of crowdfunding. This article is published in his memory.

** Director of Sports Law Institute and Professor of Law, University of New Hampshire School of Law; Legal Analyst & Writer, *Sports Illustrated*, SI.com and NBA TV.

*** Professor of Law, FIU College of Law.

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charities favored by talent. We discuss both obstacles and objections from a variety of policy and legal perspectives ranging from competitive balance to distributive justice. Finally, we consider possible extensions of the FAC model as well as offer some ruminations on why FACs have not already developed.

Importantly, FACs create the potential for more efficient valuations of talent by registering not only the number of fans but also the intensity of their preferences. This insight, which stresses the upside of price discrimination, has relevance for a wide range of human endeavors where bilateral contracts have effects on third parties that are neither calibrated nor valued adequately.

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INTRODUCTION

Disappointment is endemic to fandom.¹ Clevelanders were stung that basketball hero LeBron James took his talents to South Beach, when he signed with the Miami Heat in 2010,² while Miami fans were equally disappointed when James returned to Cleveland in 2014.³ Many fans of TV’s “Downton Abbey” were crushed when actor Dan Stevens (the actor who played male romantic lead Matthew Crawley) left the show in 2013.⁴ Students, faculty, and alumni at the University of Chicago are undoubtedly still upset about losing one of the most prolific scholars, Cass Sunstein,⁵ to Harvard Law School a few years ago.

The choices of where high-profile talent “perform” in an organizational context—athletes, academics, chefs, network newscasters, actors, opera singers, faculty members—present a puzzle. On the one hand, “teams”—the organizations that employ talent⁶—try to anticipate the preferences of fans to capture their dollars. On the other hand, fans are largely

¹ See Daniel L. Wann et al., *Sports Fans: The Psychology and Social Impact of Spectators* (2001).

² Michael Lee, *LeBron James will Leave Cleveland Cavaliers to Join Dwayne Wade, Chris Bosh with the Miami Heat*, WASH. POST (July 9, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070806865.html>.

³ LeBron James (as told to Lee Jenkins), *I’m Coming Home*, SI.COM, (July 11, 2014), <http://www.si.com/nba/2014/07/11/lebron-james-cleveland-cavaliers>.

⁴ See Leslie Messer, *Dan Stevens Says His Exit from Downton Abbey Was An Emotional Experience*, ABC NEWS (Jan. 19, 2014), <http://abcnews.go.com/Entertainment/dan-stevens-calls-watching-downton-abbey-emotional-experience/story?id=21578846>.

⁵ Paul H. Edelman & Tracy E. George, *Six Degrees of Cass Sunstein*, 11 GREEN BAG 2D 19 (2007).

⁶ We say teams because our paradigm for this paper will be contract negotiations between an individual athlete and a professional sports team. But for purposes of the larger idea, the team represents the second party in the bilateral negotiation that controls where talent performs and under what conditions. So the team might be a television network, a law school, a restaurant, a couture house, a symphony, etc.

shut out of the conversations between talent and team. We wonder why fans are not more proximately involved in talent's choices. Even if disappointment for fans is inevitable, utter powerlessness is not—or so we argue here.

Instead, fans can overcome that powerlessness through crowdfunding.⁷ Crowdfunding empowers fans to collect and use money to influence the choices talent makes regarding where to perform or for what team. As we see it, groups of fans, what we call Fan Action Committees (“FACs”), would engage in coordinated influence mongering, raising and offering money in an effort to collectively affect the key choices made by stars or teams regarding recruitment and retention. FACs, in short, allow fans to put their money where their hearts are. A fancier way of saying this is that FACs can respond to and reflect the intensity of third-party preferences affected by bilateral contracts. Additionally, FACs will be particularly valuable when opportunities for price discrimination, which occurs when suppliers are able to charge different prices to different consumers for the same product, are unavailable or under-utilized under existing market conditions.⁸

This Article unfolds over three parts. Part I discusses the basic structure of FACs and how they differ from traditional crowdfunding projects. Under the conventional crowdfunding model, there is a bilateral arrangement between an artist or entrepreneur and the patron. To use a recent example, there was a bilateral relationship between Hollywood producer Rob Thomas and the Marshmallows, a.k.a. the fans of *Veronica Mars*, in Thomas's efforts to use Kickstarter crowdfunding to make a *Veronica Mars* movie. Our innovation is to extend the crowdfunding mechanism from bilateral relationships to trilateral contexts, where members of a bilateral relationship can be influenced by third parties—fans—with an interest in that relationship's texture or existence. We offer two approaches to designing FACs. One is direct compensation, in which fan money goes directly to the talent as supplemental income, comparable to endorsement deals. The other is charitable contributions, in which fan money goes to some charitable cause favored by the star.

⁷ Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1459 (2013).

⁸ Price discrimination was historically regarded with suspicion as evidence of a firm's monopolistic ambitions and capacities. In more recent decades, however, it has been understood also as a vehicle for consumer welfare inasmuch as it can increase efficiency and consumer surplus when it allows for competition among sellers at various stages of a product's life-cycle. See generally Joel B. Dirlam & Alfred E. Kahn, *Price Discrimination in Law and Economics*, 11 AM. J. ECON. & SOC. 281 (1952); LOUIS PHILIPS, *THE ECONOMICS OF PRICE DISCRIMINATION* (1981).

Part II considers a number of obstacles and objections to FACs under either structure. For reasons discussed below, we focus our discussion primarily on the professional sports context. In our view, sports leagues in particular may oppose FACs because they risk jeopardizing competitive balance across teams. More generally, however, FACs might be challenged as either pernicious (because they facilitate the rich getting richer) or futile (because of suspicions that they will get little done). We engage these and other challenges and explain how to surmount them. Part II also explains our reasons for preferring the charitable FAC model.

Finally, in Part III, we offer some big picture thoughts. First, we consider some of the incentives that might help make FACs more likely to occur. For the most part, we think that FACs could make markets for talent across a range of activities more efficient; in doing so, they can re-shape many areas in which bilateral contracts generate externalities to third parties who wish to promote or avoid those externalities. Second, we consider why, if FACs can create gains from voluntary transactions, we do not see them more often. Accordingly, we consider some of the transaction costs and social norms that are relevant to the discussion.

Two caveats should be issued before we proceed. First, as mentioned above, we focus our efforts on the domain of professional team sports. We do so because FACs in this domain would probably draw the most fan involvement, raise the most money, and have the greatest effect on talent choices. Professional team sports involve the paradigmatic trilateral relationship among an organization (such as a sports franchise), talent, and passionate, emotionally invested fans. Moreover, because of competitive balance concerns distinctively arising in professional team sports, that domain may present the most difficulty for FACs. Accordingly, we think that FACs have tremendous promise in the realm of professional team sports, but also some peril. That said, the institutional structures we envision are relevant for fans of virtually any form of coordinated activity where contractual arrangements generate substantial third party benefits—or harms.

Second, this is an “idea” paper, one meant to spur further conversation without attempting to provide the final word on the matter. As such, the recommendations and comments we make are somewhat tentative and yet, we hope, somewhat tantalizing too.

I. FAN ACTION COMMITTEES: AN OVERVIEW

A. *Crowdfunding in Bilateral Relationships*

Fans organizing into groups is nothing new. In the realm of sports, for example, fans unite by attending games (and pregame tailgates) or by watching and discussing them together at home, in bars, or in online forums. Many teams have official or unofficial fan clubs, some of which even outlast the team itself.⁹ Outside of sports, celebrity websites and fan clubs are ubiquitous, for everyone from chefs to actors. Fan networks preceded the Internet, but their presence has only exploded with the rise of social media. Websites allow fans to revel in their shared love of the team, personally experience the team's success and failure, and express devotion and frustration alike.¹⁰ Whether for Lady Gaga or the Chicago Bulls, fans express their enthusiasm or disdain by buying tickets and licensed t-shirts—or not.

Crowdfunding provides another vehicle through which fans can monetize that support and affection. This is already true for fans of emerging or struggling artists or entrepreneurs without ready access to capital. In a typical crowdfunding arrangement, fans use online websites such as Kickstarter and Indiegogo to pledge money to support an author or musician in some endeavor. In perhaps the most famous and successful example to date, more than 91,000 fans pledged more than \$5 million to help produce a *Veronica Mars* movie.¹¹ Crowdfunding is ripe for even more growth following revisions to federal securities laws allowing shares in start-up companies to be offered through crowdfunding mechanisms.¹² In short, crowdfunding arrangements already exist, are effective at filling market demand, and, because of the ways in which the Kickstarter-type intermediaries serve as trustworthy escrow agents, are essentially risk-free for contributors. They need not worry that FACs or the funded talent will simply abscond with the money.¹³

⁹ BARRY LEVINSON, *THE BAND THAT WOULDN'T DIE* (ESPN Films, 30-for-30, 2009) (telling story of Baltimore Colts Marching Band, which continued to perform in the decade after the Colts left Baltimore).

¹⁰ Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 555 (2006).

¹¹ VERONICA MARS (Rob Thomas Productions 2014); Jason Cohen, *Reviving an Old Series the New Way: Fan-Financing*, N.Y. TIMES, Apr. 27, 2013, <http://www.nytimes.com/2013/04/28/us/veronica-mars-will-return-thanks-to-fan-financing.html>.

¹² Schwartz, *supra* note 7 at 1458–59; *see also* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 301–05 (codified in 15 U.S.C. (2012)).

¹³ *Cf.* Brandon Gurney, *From Chicago to Provo? BYU Fans Plan T-shirt Campaign for Jabari Parker*, DESERET NEWS, (Nov. 2, 2012, 2:44 PM), <http://www.deseret.com>

B. *The FACs Innovation: Crowdfunding Trilateral Relationships*

Two things are notable about the typical crowdfunding situation. First, it is largely bilateral between funders and funded. Fans give money directly to the artist so the artist can perform her skill (writing the book, producing the CD, producing the movie, etc.) or so the entrepreneur can establish her company. Second, and relatedly, crowdfunding is frequently essential for the completion of these projects. Without fan contributions, the artist will usually be unable to complete her project or otherwise perform her art.

FACs extend the crowdfunding model from the conventional bilateral arrangement to a trilateral relationship involving a team, its fans, and a star talent. Using the same crowdfunding processes and mechanisms, fans can pledge, collect, and offer money to or for the benefit of that talent in exchange for him joining or remaining with “their” preferred team. Through collective effort, or even the effort of just one wealthy fan with an interest in the outcome, fans take an active and empowering role in recruiting and retaining talent.

Several features define the trilateral relationships at the heart of FAC activity. First, the primary relationship is between the team and the star. The team pays the star a (usually substantial) salary and the star performs even without FAC involvement. FAC-raised funds are not necessary for stars to ply their trade, but rather act as a supplement to the primary relationship. Second, fans’ strongest loyalty is primarily (if not exclusively) to the team; fans want the talent to join their team only so their team can win. Fans may previously not have cared about the player or even actively rooted against him on his old team, but quickly change allegiance once the player has changed affiliations.¹⁴ (This will not be the case in other domains.) Third, the talent and team control the conversation; if the team is not interested in signing or keeping the player, or if the player is utterly uninterested in playing for the team, the fans remain powerless. In most cases, FACs cannot overcome recalcitrant management or its refusal to recognize the value and benefit of signing the fans’ preferred player because the team typically must be the first mover.¹⁵ Finally, we expect FACs to be nonetheless

etnews.com/article/865565918/From-Chicago-to-Provo-BYU-fans-plan-T-shirt-campaign-for-Jabari-Parker.html (noting concerns of fans who raised money for t-shirts to be used in recruiting college basketball players to BYU).

¹⁴ As comedian Jerry Seinfeld put it, “you’re actually rooting for the clothes when you get right down to it.” *Seinfeld: The Label Maker* (NBC television broadcast Jan. 19, 1995).

¹⁵ It is possible that FAC efforts might help change the choices of team managers or players. Perhaps the FAC’s efforts convince a star to sign with an organization he

particularly effective in a sport such as basketball, which involves fewer players and in which one or two superstar players can make a team a champion. Fans thus can focus their crowdfunding efforts on those two stars, with some confidence that their presence will bring team success.

When FACs perform their intended function, fans no longer act as passive and inconsequential consumers. Rather, FACs provide, if not a seat at the bargaining table, a powerful and potentially influential voice in the process of recruiting or retaining talent by helping to create the most appealing offer and atmosphere and to convince the talent to come to (or stay in) their team's city. They do so by arranging a transaction directly with, or for the benefit of, the talent, rather than with the team. That this new voice may put teams in a difficult spot at times is precisely the point of allowing fans to develop this powerful, perhaps contrary, voice that actually may influence or change the behavior and preferences of teams and players.¹⁶

A FAC need not assume any particular form. It could be established either as a distinct organization or as an offshoot of an existing larger (unofficial) fan club. The FAC itself could be a formal legal organization or it could be one person or a group of individuals joined by physical or virtual space, reaching out and encouraging fundraising efforts among the fan base. It can utilize existing crowdfunding platforms and mechanisms, and the efficiency and security they provide, with fans pledging contingent funds, paid only if the recruitment effort succeeds. The FAC serves as advocate and accountant—publicizing recruitment and funding efforts, urging fans to contribute funds, tracking funds raised, and announcing the amounts pledged as part of media efforts to recruit talent. As with other mechanisms that channel money and influence, FACs likely would evolve over time, becoming more responsive, effective, and adaptable to changing free-agent markets and situations.

had not previously considered. Or perhaps the FAC's efforts convince the organization to reconsider its decision to fire or not re-sign a star.

¹⁶ We are aware that empowering FACs this way could disrupt the plans of management vis-à-vis compensation. For instance, management may wish to reward recently improving players more than players with equivalent statistics but who have plateaued or worsened over the years. FACs might have other objectives, which theoretically could conflict with management's strategy. In corporate law, shareholders are generally not the managers for various reasons, and perhaps there are similarly valid reasons to deny fans this kind of influence. Importantly, management is independent of the fans and can always resist their efforts if they think the fans are misguided, since the team remains wholly separate from the FAC. Whether epistemic deference to management is something that should be granted in the first instance is a more complicated question and we discuss some of the costs and benefits regarding epistemic deference to management, *infra* in Part II.B.7."

Payments to FACs could consist of a few large contributions from a small number of wealthy fans, many small contributions from a large number of non-wealthy fans, or even symbolic payments from the youngest fans.¹⁷ Most likely, it combines all of the above. If the *Veronica Mars* Kick-starter project is typical, then there is no reason to believe similar numbers of fans could not raise sufficient money, on top of the star's actual salary, to provide an additional incentive for the star to join their favorite team. Granted, it likely will not be sufficient to thoroughly replace the player's salary or to overcome a team's lowball offer. However, FACs are not intended to replace the organization, only to facilitate fans' influencing the organization's recruiting or retention efforts. When competing salary offers from competing teams are relatively close, the extra FAC money may provide a meaningful incentive to a player to sign with one team.

Moreover, while we initially envision this as a way to help attract talent to teams, fans could use FACs to express support for players and teams for any number of reasons, such as rewarding a current player for exceptional performance (perhaps the player is, relative to the league, "underpaid") or helping a player who has gotten in trouble with the league by collecting money to offset his fine.¹⁸ It even is conceivable that a group of anti-fans could use a FAC to express dislike for a player through negative incentives—say, by pledging money to convince a player to play for a different team or to retire.

The critical requirement—at least in the team sports context—is that FACs remain independent of the organization because, in some sports, league rules prohibit coordination or cooperation between fans and the team

¹⁷ Ohm Youunmisuk, *Brandon Jacobs Bonds with Fan*, ESPN.COM (June 21, 2012, 9:04 PM), http://espn.go.com/new-york/nfl/story/_/id/8080528/san-francisco-49ers-brandon-jacobs-refills-joseph-armento-piggy-bank (discussing a six-year-old fan who sent an NFL player \$3.36 upon hearing that the player's former team could not afford to pay him).

¹⁸ This is ripe for abuse, of course. If players suspect they would be immunized from the financial consequences of breaking rules, crowdsourcing would create a moral hazard in which bad behavior is incentivized. This sort of payment should be limited to league, rather than legal, trouble, and only when the fine was deemed "unjust." In a somewhat analogous example, fans of the University of Mississippi donated more than \$75,000 in a matter of hours to cover costs and fines the university incurred after fans ran on the field and tore down the goalposts following a football victory. Hugh Kellenberger, *Fans Have Covered Costs of Ole Miss' Goalposts, Fine*, THE CLARION-LEDGER, Oct. 8, 2014, <http://www.clarionledger.com/story/mississippi-statesports/2014/10/07/ole-miss-goalposts-fans-fundraising/16870129/>. This example lacks that moral hazard, since the fans were paying for costs they created through their misconduct, rather than indemnifying another's misconduct.

in putting together offers to players. Accordingly, there must be one exchange between team and talent, entirely independent of FAC-raised and -pledged funds; FAC funds operate independently of the primary relationship.

This raises the final issue: If crowdfunded money is a supplement to that basic agreement, where should these funds go? We see two likely options.

First is a *direct compensation model*, under which FACs pay the money directly to the star. This would comprise additional income for the player, comparable to outside income athletes regularly earn from endorsements and appearances. And that income would be taxable as such; it comes attached to a *quid pro quo* (“We will give you this money if you sign with Team X”), making it compensation to the player as part of a market exchange, not a mere gift from the fans.¹⁹

Alternatively, under what we call the *charitable model*, FACs could give the money to a charity associated with the talent. Many professional athletes and other entertainers establish charitable foundations, dedicated to causes ranging from at-risk youth to the quality of life for cancer patients.²⁰ Sometimes these charitable endeavors are quite personal to the star.²¹ Some athletes even negotiate contributions to their foundation as an explicit part of their contracts with teams or other entities with which they do business.²² In fact, with James’s free agency pending in 2014, two Miami radio hosts organized LeBron-a-thon, urging fans to donate money to Boys and Girls Club of Broward County (a cause with which James has long been involved) as a show of support and affection for the player.²³

The charitable model may provide the additional benefit that money donated by fans to a charitable foundation will not (likely) qualify as income to the star, assuming the star is not directly coordinating with the fans or

¹⁹ C.I.R. v. Duberstein, 363 U.S. 278, 285–86 (1960).

²⁰ PEYBACK FOUNDATION, <http://www.peytonmanning.com/peyback-foundation> (last visited Sept. 22, 2012); THE BREES DREAM FOUNDATION, www.drewbrees.com/foundation (last visited Sept. 22, 2012).

²¹ For example, one former football player’s foundation works with autism, in honor of the player’s son, who lives with autism. DOUG FLUTIE JR. FOUNDATION FOR AUTISM, <http://www.dougflutiejrfoundation.org/> (last visited Feb. 15, 2013).

²² DAVE WINFIELD, WINFIELD: A PLAYER’S LIFE (1988) (discussing conflicts with team ownership over payments team promised to pay to charitable foundation).

²³ WQAM’s Crowder Donates \$1000 to Keep LeBron James in Miami, 560 WQAM, (June 27, 2014), <http://wqam.com/2014/06/27/wqams-crowder-donates-1000-to-keep-lebron-james-in-miami/>; see also Howard Wasserman, *Catalyzing Miami Heat Fans*, PRAWFSBLAWG, (June 30, 2014, 9:01 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/06/catalyzing-miami-heat-fans.html>.

directing their contributions to any particular place.²⁴ And because the money is going to charitable organizations, there is even some possibility that fan contributions will be tax deductible, as would an ordinary independent contribution to the player's foundation.²⁵ The IRS might be suspicious of this arrangement, of course.²⁶ An alternative tax treatment would treat FAC donations as includable income to the talent, then tax-deductible (up to a point) by him as a charitable donation to his own foundation.²⁷

Either way, we ultimately doubt tax issues will substantially affect fans' willingness to either organize a FAC or contribute to it. First, typical fans are motivated more by love of their team than by tax benefits, so even non-deductibility is unlikely to deter participation. The general success of crowdfunding in other contexts shows that people are willing to spend on these sorts of efforts without needing tax benefits, especially when individual donations are relatively small. Second, many low- and middle-income fans that would make small contributions to support their favorite players and teams may not take itemized deductions; their inability to deduct the contribution would therefore not affect their tax situation. Seeing plausible arguments on both sides, we leave further exploration of the tax issues for another forum.

Our strong preference is for the charitable model. As we show in the next Part, both models are subject to various concerns and objections, which we hopefully show are unfounded. But the charitable model offers some comparative public policy and public-relations advantages, making it the normatively preferable approach to this type of crowdfunding.

²⁴ C.I.R. v. Giannini, 129 F.2d 638, 641 (9th Cir. 1942).

²⁵ 26 U.S.C. § 170 (2006).

²⁶ The tax law issues raised here are somewhat tricky. On one hand, one might question whether fan contributions should be deductible. The *sine qua non* of a charitable contribution is that money or property is transferred without adequate consideration, meaning only "unrequited" payments qualify for deduction. See Hernandez v. C.I.R., 490 U.S. 680, 690–91 (1989). This is determined by examining the external features of the transaction, without regard to the taxpayer's subjective motivations. *Id.* at 691; McLennan v. United States, 24 Cl. Ct. 102, 106 (Cl. Ct. 1991). FAC payments, even as charitable contributions, involve a *quid pro quo*—"here is money that we fans will donate to your foundation if you sign with the team."

That said, we can envision two arguments in favor of deductibility. First, any benefit to the donors is "intangible," merely the psychic benefit of having a great player on their team and giving their team a chance to win. Second, any such benefit is "incidental or tenuous," lacking any value so as to make the contributions a non-deductible purchase. 26 C.F.R. § 53.4941(d)-2(f)(2); William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 56 (2011).

²⁷ 26 U.S.C. § 170(b).

II. OBJECTIONS AND RESPONSES

This Part considers a variety of anticipated obstacles and objections to our proposal. Our hope is that we will reveal these impediments or challenges to be surmountable, particularly where funding efforts are directed to charity.

A. *League Reactions*

Outside of professional team sports, there is every reason to think that the FAC model could be used effectively to influence the choices talent make regarding where and whether to perform, teach, or cook, etc. But, professional team sports raise an unusual set of issues. The principal challenge is that leagues will invoke concerns about competitive balance, referring to their various regulations and contracts to generate arguments that might prevent FACs from affecting team relationships with the talent. That said, we can also imagine why leagues also might come to support FACs, in which case, it remains speculative as to what teams will think about FACs and crowdfunding.

1. An Optimistic Scenario for FACs

On the positive side, we could see why teams and leagues will embrace FACs, and even welcome and celebrate that level of involvement and influence. After all, it is not unprecedented for fans to hold a stake in the relationship between teams and talent. The NFL's Green Bay Packers, for example, are a community-owned team.²⁸ With a storied history and legendarily committed fan base, the Packers demonstrate that the public can be effective stakeholders in a team without running afoul of the law or disturbing competitive balance. Similarly, the Seattle Sounders FC, a professional soccer team, has invited input from season ticket-holders and official booster-club members on team matters that are far from ceremonial and that comprise significant operating decisions, including choosing a team nickname and deciding whether to retain the team's general manager.²⁹

FACs, of course, are distinct from both situations. A FAC seeks to encourage a player, who already shares mutual interest with the team, to

²⁸ See *Community: Shareholders*, PACKERS.COM, <http://www.packers.com/community/shareholders.html> (last visited Feb. 15, 2014).

²⁹ *Sounders FC First Fan Vote for General Manager*, SOUNDERSFC.COM, <http://www.soundersfc.com/news/articles/2012/09-september/gm-vote.aspx> (last visited Oct. 20, 2012).

make a choice about his place of employment. But it does not go much farther; the FAC is not seeking, for instance, to control the team's management of its concession stands. The basic logic remains the same, however: fans act as stakeholders and, through FACs, more directly try to influence the players, and thus, the team.

2. A Pessimistic Scenario for FACs

Less optimistically, teams may be apprehensive about fans linking themselves financially to players, particularly on the direct compensation model, where a FAC is essentially paying money directly to the talent. The basic objection rests with leagues' commitments to competitive balance and parity. The leagues' goal is to preserve an association of teams all possessing a reasonable chance to pay, attract, and retain top players, and thus to compete for championships. Without some efforts meant to achieve parity across teams, the competitive balance theory goes, fans will lose interest if their favorite teams cannot compete.³⁰ Accordingly, team owners divide revenue among teams and players and establish manageable annual increases in player salaries.³¹ Teams and leagues may fear that FACs, by offering players the possibility of substantial additional money, will upset that sought-after parity and balance.

The question before us is whether a league, under current rules, could do anything to stop FACs from forming and operating. The answer is "no," although the issue warrants discussion. We use the National Basketball Association (NBA) to illustrate the point, in part because fan funding of free agents likely would be most effective in that sport, where the addition of one or two great players, attracted to the team with the help of FAC money, may turn a team into a championship contender. Regardless, the analysis and conclusions should be substantially the same as to all major professional sports team leagues.

It is tempting to think of a sports league as an "it" that speaks with one voice. In truth, the major professional leagues are associations of inde-

³⁰ John R. Crooker & Aju J. Fenn, *Sports Leagues and Parity: When League Parity Generates Fan Enthusiasm*, 8 J. SPORTS ECON. 139, 141 (2007); Andrew S. Zimbalist, *Competitive Balance in Sports Leagues: An Introduction*, 3 J. SPORTS ECON. 111, 112 (2002).

³¹ Zach Lowe, *NBA Labor Negotiations Enter Crunch Time*, SI.COM (Sept. 28, 2011, 11:29 AM), <http://sportsillustrated.cnn.com/basketball/nba/blogs/nba-point-forward/2011/09/28/nba-labor-negotiations-enter-crunch-time/index.html>.

pendently owned franchises.³² For example, the NBA is an unincorporated association of thirty independently owned franchises, run by a board of governors comprised of one representative from each franchise.³³ The NBA's commissioner centralizes league operations and serves as the league's official voice.³⁴

In challenging FAC payments, the NBA could draw upon three sources of rules: 1) the collective bargaining agreement ("CBA") negotiated between the league and the players' union; 2) the uniform player contract between the individual player and his team, attached to and incorporated into the CBA;³⁵ and 3) the league constitution, particularly as it empowers the commissioner to act in the "best interests" of the game.³⁶

a. Conventional Agreements and Sources

For our purposes, it is safe to say that the CBA and uniform contract together control player compensation. Most notably, NBA teams can only pay players through their employment contracts.³⁷ They cannot offer investment opportunities, property and vehicle transfers, or other potential forms of services compensation. Teams are also barred from naming a player as a player-coach and paying him two salaries or from giving an equity stake in the team.³⁸

³² The exception is Major League Soccer, in which the league owns all the teams, then surrenders control of individual teams to certain investors only as to particular matters. *Fraser v. Major League Soccer*, 284 F.3d 47, 53–54 (1st Cir. 2002).

³³ See Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HARV. J. SPORTS & ENT. L. 40, 49 (2010) (discussing the league's corporate form and system of governance).

³⁴ *Id.*

³⁵ See NBA Collective Bargaining Agreement, art. II, § 1 (2011) (stating that a player contract must be a Uniform Player Contract) [hereinafter NBA Agreement].

³⁶ *Id.* at Exhibit A ¶ 5(d) (incorporating by reference Article 35 of League Constitution). Like other leagues and players' associations, the NBA and National Basketball Players' Association use CBAs to regulate players' working conditions. Leagues are motivated to collectively bargain rules because such bargained rules, so long as they relate to players' wages, hours and other working conditions, are exempt from Section 1 of the Sherman Act. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 740–41 (2010).

³⁷ NBA Agreement, *supra* note 33, § 12 (c), (d).

³⁸ NBA Agreement, *supra* note 33, art. XXIX, § 8 ("[N]o NBA player may acquire or hold a direct or indirect interest in the ownership of any NBA team.").

The CBA also imposes non-negotiable minimum and maximum boundaries on player salaries and contract length.³⁹ Even the best players can only sign for a maximum of five years with their team.⁴⁰ Although maximum salaries depend on several factors—including a player’s NBA service time and the amount of annual income received by the NBA and its subsidiaries—a “maximum” contract signed in 2012 was expected to be worth about \$19 million per season.⁴¹ Collective bargaining has also gently capped the total money teams can spend on player salaries, imposing a “luxury tax” on teams that spend beyond the cap.⁴² Teams and players are further prohibited from negotiating bonuses based on team success,⁴³ although the uniform player contract may be amended to provide monetary incentives for a player’s individual success, as defined from earning awards or achieving statistical benchmarks.⁴⁴

Importantly, the NBA has strictly enforced the prohibition on players receiving compensation from teams outside of their employment contract.⁴⁵ Penalties include fines of up to \$3 million, the loss of draft picks, and voiding of the player contract at issue.⁴⁶

While the uniform player contract and CBA primarily govern compensation matters, the NBA league constitution mostly controls internal operations and the relationship between teams and the league. Importantly, the constitution is drafted by league officials, owners, and their representatives, and it regulates their actions without touching players directly. That said, the constitution’s “best interests clause” is incorporated by reference in the uniform player contract, which itself is incorporated by reference in the CBA, thus binding the players. That clause empowers the commissioner to sanction any player who, in the commissioner’s determination, makes statements injurious to “the best interests of basketball or of the Association” or commits misconduct that conflicts with notions of morality and fair play.

³⁹ Ira Winderman, *NBA CBA: Official NBA Agreement Document*, SUNSENTINEL.COM (Nov. 27, 2011, 9:49 AM), http://blogs.sun-sentinel.com/sports_basketball_heat/2011/11/nba-cba-official-nba-agreement-document.html.

⁴⁰ See Larry Coon, *NBA Salary CAP FAQ: 2011 Collective Bargaining Agreement*, CBAFAQ.COM, <http://www.cbafaq.com/salarycap.htm#Q55> (last updated, July 9, 2014).

⁴¹ See *id.*

⁴² See *id.*

⁴³ NBA Agreement, *supra* note 33, at Exhibit A ¶ 3(c) (2005).

⁴⁴ *Id.* art. II, § 3(b).

⁴⁵ See Coon, *supra* note 40.

⁴⁶ *Id.*

Nevertheless, the clause has seldom been invoked, and it is typically limited to cases of player misconduct on (or off) the court.⁴⁷ That said, the expansive wording theoretically empowers the NBA to bar a player from taking money from fans on the grounds that doing so would undermine “fair play.”

The problem with such a broad reading is that it is impossible to realistically distinguish a range of unquestionably permissible outside income available to players from FAC income. As discussed earlier, a direct payment from a FAC would simply constitute another source of income for the player who signs with a given team. Players receive income from a range of sources beyond their teams, most obviously through commercial endorsements. In 2013, LeBron James, then the NBA’s best player, earned \$17.6 million per year from his team but \$39 million per year in endorsements.⁴⁸ Less obviously, players earn income through other activities, including appearances in films.⁴⁹ While these opportunities all trade on the player’s fame and athletic success, none of this income is deemed to contravene salary limitations or other league regulations.

One might try to distinguish FAC payments from ordinary endorsements because of differences in what the talent does to earn that money. Endorsement money is earned in exchange for endorsing a product, not for playing a sport, and an endorsement deal may last beyond the player’s contract with the team and even beyond his playing career. FACs give something to (or for the benefit of) the player purely in consideration of his playing the game for a particular team for a period of time—precisely what is covered by his playing contract. But this distinction is not inherent or necessarily true in every case. Endorsement deals (especially for players who are not the greatest superstars) could be structured to last only as long as the player remains an active player for the team. Moreover, a company benefits from having an athlete endorse its product only if he plays his sport at a high level, meaning the money is at least indirectly related to player performance.

⁴⁷ See, e.g., *NBA v. Nat’l Basketball Players Ass’n*, 2004 U.S. Dist. LEXIS 26244, *5–6 (S.D.N.Y. 2005) (discussing NBA’s use of best interests clause to punish Indiana Pacer Jermaine O’Neal for misconduct during a game).

⁴⁸ Craig Davis, *LeBron Second-Highest Paid Athlete in U.S.*, SUN-SENTINEL.COM (May 15, 2013), http://articles.sun-sentinel.com/2013-05-15/sports/sfl-lebron-second-highest-paid-athlete-in-us-20130515_1_lebron-james-endorsements-si-list.

⁴⁹ See *Ballers Being Actors*, OKLAHOMAN, Oct. 10, 2011, at 13B (listing NBA players who have appeared in movies, including Michael Jordan in *Space Jam* (Warner Brothers Pictures, et al. 1996), Ray Allen in *He Got Game* (40 Acres & A Mule Filmworks, et al. 1998), and Shaquille O’Neal in *Blue Chips* (Paramount Pictures 1994)).

No matter the league's concern for how FACs might affect competitive balance, current league rules and regulations do not preclude FAC payments to players. Of course, a league always could seek to change these rules in subsequent rounds of collective bargaining, but only with consent of the players' union.

b. Corruption and the Best Interests Power

Alternatively, the commissioner might assert the "best interests" power out of concerns for corruption. Professional athletes have historically not been above taking payoffs from gamblers to throw games.⁵⁰ The NBA is also especially sensitive in the wake of a former referee pleading guilty to charges stemming from corruption.⁵¹

On the margin, FACs might increase opportunities for organized crime to influence players. But flatly prohibiting fans from monetizing their support for their teams and their players out of fear of nefarious actors seems an unnecessary over-reaction. Players willing to engage with gamblers or organized crime do not need FACs as a vehicle to do so, just as organized criminals seeking to influence athletes do not need FACs as a vehicle to do so. Moreover, FACs present an ineffectual vehicle for gamblers or criminals seeking to influence sports. Their contributions would be mixed in with legitimate contributions from legitimate fans, diluting any connection or influence they hope to establish. Even with FACs, gamblers and criminals appear more likely to employ an existing method of influence: illegal direct payments to players to use less than best efforts.

c. Tortious Interference With Contract?

Even if a league's internal rules do not currently prohibit FAC activity, there remains the question of whether general principles of private law might give leagues or team owners a basis to object to FACs. A team might claim that, by offering something of value to the talent, the FAC tortiously interferes with the talent's contractual relationship or prospective business relations with that team.

But neither claim works. As to a contractual relationship, the players targeted by FACs would be free agents not in a contractual relationship with

⁵⁰ E.g., ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 5 (1998) (discussing Chicago Black Sox scandal, in which eight players threw the 1919 World Series).

⁵¹ Howard Beck, *Donaghy's Charges Weigh on a League*, N.Y. TIMES, June 12, 2008, at D1.

any team and free to make decisions about where and whether they perform.⁵² With regards to prospective business relations, most courts require overtly wrongful misconduct independent of the interference itself before finding tort liability.⁵³ On this understanding of the tort, mere persuasion (for example, a pledge to give \$ 5 million to a player's charitable foundation) to break a relationship is not sufficiently wrongful. Rather, the wrongful act must be "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard."⁵⁴ Furthermore, this argument is even less plausible when fan money goes to charity, such that the FAC is not giving the player anything.

B. *Policy Considerations*

Beyond existing league regulations and general principles of private law, FACs may be subject to a range of normative objections. That is, even if FACs (on either a direct compensation or charitable model) are permissible under law and league rules, they may simply be a bad idea.

In this section, we respond to a cluster of possible policy objections to FACs following the direct compensation model. Some of them are really only plausible in the professional sports team context while others are more generally applicable.

1. The Rich Get Richer . . . and What Do Fans Get? The Distributive Justice Objection

The obvious objection, particularly to a direct compensation scheme, is that there is something facially unseemly about little Timmy breaking open his piggybank to enrich already-wealthy basketball stars.

As between fans and particular athletes, the "rich getting richer" concern is not a decisive normative objection in a society that already distrib-

⁵² See Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980); Restatement (Second) of Torts § 766 & 767 (1979).

⁵³ Sections 766 and 767 of the Restatement (Second) of Torts, which govern these "interference" torts, require that the defendant's behavior be "improper." See also *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (1978) (interference with economic relations requires evidence that the "injury to another is wrongful by some measure beyond the fact of the interference itself."); *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 746, 755-57 (Cal. 1995) (Mosk, J. concurring in judgment) (arguing that interference torts are dangerous encroachments on values of free speech, free competition, and free association, and thus should be narrowly applied).

⁵⁴ *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954 (Cal. 2003).

utes many goods and services through markets. As philosopher Robert Nozick famously argued, one could begin with a perfectly egalitarian distribution of wealth, but if there is a great basketball talent (he uses the 1960s exemplar, Wilt Chamberlain) who wants to charge people a quarter to watch him play, then he will end up with more money from others because of the joy he provides them.⁵⁵ That inequality is not an obvious injustice. If fans knowingly, voluntarily, and intelligently make these payments, and do so with awareness that they may earn nothing tangible in return, there is little reason to stop them by blocking that exchange.

Nozick's position is not free of controversy, of course. After all, one must believe that, notwithstanding voluntary distributions, the quality of consumer deliberations and resource allocations is beyond question. If people are spending money foolishly or in tension with their prior commitments, the mere fact of voluntary exchange between consumer and supplier may be morally inadequate to support the new pattern of inequality.⁵⁶ Still, to block the free exchange between talent and fans acting through a FAC is presumptively problematic when viewed against the backdrop of all other voluntary market-based exchanges in professional sports and entertainment, many of which directly involve fans.⁵⁷

To be sure, we need not accept the current convention, which encourages sports fans to share their money with teams but not with talent as such. But as long as we permit fan-team transactions, along with other deals in which third parties reward players for endorsements or appearances, then the "rich getting richer" objection to FACs seems quite peculiar. It is hard to know why exchanges involving FACs and players would be uniquely unjust or morally undesirable compared with exchanges between a company and its professional-athlete endorser. At best, one can say that this is a set of free choices that, all other things being equal, makes the distribution of resources less equal. It is still not clear, however, why the fact of the resulting inequality is adequate to block this exchange.⁵⁸

Some might press the distributive justice option further by suggesting that FACs will only further shut out poor fans, since, on the margins, those with less money will have less influence on the exit or loyalty options of

⁵⁵ See Robert Nozick, *Anarchy, State and Utopia* (1974).

⁵⁶ These are two of the reasons traditionally raised in opposition to gambling.

⁵⁷ See MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 163–79 (2012) (discussing and critiquing the "skyboxification" of sports through named stadiums, luxury skyboxes, and autographed sports memorabilia).

⁵⁸ Presumably the tax system or other institutions could be used to alleviate the harms associated with these resulting inequalities too.

their favorite stars. Such concern is, at first blush, an understandable one.⁵⁹ However, we are talking about commercial sports and entertainment. As long as we have accepted a market for distributing access and influencing the decisions made in professional sports or restaurants or television broadcasting, we must accept that there will be patterns of inequality related to consumption and enjoyment. Distributive justice obligations are far more pressed to prioritize access to medical care, food, adequate housing, daycare, and education (and reasonably so). Put bluntly, creating opportunities for the poor to influence where Wilt Chamberlain (or to bring Nozick into the 21st century, LeBron James) plays is, comparatively speaking, hardly a moral urgency.

2. Will FACs Be Futile?

A second policy objection to FACs is the prospect of futility. Stated briefly, fan payments and pledges may have no material effect on a player's decision if competing FACs cancel one another out with equal competing offers. The talent then chooses whichever team offer is better, which means he lands precisely where he would have landed without FACs; fans will not have influenced the choice. If FACs from different cities are just competing against each other in pointless stalemates, then fans themselves may rationally forbear from forming or engaging with FACs. Alternatively, fans of one team might not agree on which player to support, so they organize and contribute to rival FACs dedicated to influencing different players; if the competition splits the team's fan base, neither FAC may have enough money pledged to influence the player.

Our principal response is that the futility objection is wholly speculative. The claim that FAC payments will lead to stalemates is an empirical

⁵⁹ For example, Sandel distinguishes our having a market economy to our being a market society. On his view, we must be wary of two concerns about market values pervading society. First, there is the unfairness to those less financially fortunate because they will be shut out from purchasing the goods or services that would otherwise be distributed along nonmarket values such as queue or luck or desert. Second, there is the concern that market-based thinking across various domains will somehow corrupt or injure the civic values and experiences associated with those goods. Thus, when companies hire homeless people to stand in line for lobbyists to get a seat at a congressional hearing, Sandel argues, we are exhibiting a misguided set of values that debases our political culture. SANDEL, *supra* note 57, at 10.

While we may be sympathetic to those claims in the context of political contributions or who gets to attend congressional hearings, we don't think Sandel's two principal criticisms (unfairness and corruption) have much traction against FACs in professional team sports for reasons adumbrated later.

prediction, not a fact. As with political financing by crowds instead of centralized public financing, there is always the chance that crowdsourced financing in sports will allow for influence or surprises, and some of these might turn out to be for the better. Taken seriously, the futility objection also has no stopping point, as it would suggest that market distributions of virtually all goods and services are inappropriate because competing purchasers might refuse to buy above a certain price.

More importantly, we reject the suggestion that fans enjoy no benefits if they pledge money to an unsuccessful recruiting effort. Rather, fans still might enjoy the purely expressive benefit of having tried to lure or retain a favorite player on their preferred team, of showing support for their teams, and of being able to share in that process of trying to better their team. Fans are going to be talking and fretting about the team's efforts to sign free agents, which has absolutely no effect on the outcome; contributing money towards these efforts cannot have any less influence and just might have some.

Fans already spend a substantial amount of money on their love of sports—in tickets, merchandise, cable television packages, and even taxes to fund new stadiums and arenas.⁶⁰ And, as one study shows, their willingness to pay for games and merchandise increases when star players are in those games or associated with the merchandise.⁶¹ FACs would only enhance fans' connection to star players and capitalize on their willingness to spend for stars. If fans are willing to do so, it is because they value the expressive benefit of their expenditures independent of whether they actually tip the balance of a player's decision.

Importantly, FAC contributions measure not only fan support of the team and its player (which ticket sales or television ratings already do), but also the intensity of that support. The amount fans pledge is a financial indicator of *how much* fans want that player to join or remain on their team and *how much* they want their team to succeed. FACs, in other words, become economically useful or efficiency-promoting whenever firms are otherwise unsuccessful at engaging in optimal levels of price discrimination. When price discrimination occurs, it facilitates an increase in the likelihood of value-adding transactions between willing buyers and sellers.

Moreover, these transactions are all voluntary. Unlike taxpayers compelled to support a new stadium through mandatory taxes, fans who wish

⁶⁰ We might even think of such taxes as a form of crowdfunding, albeit indirectly with respect to the talent and potentially involuntary.

⁶¹ See Jerry A. Hausman & Gregory K. Leonard, Superstars in the National Basketball Association: Economic Value and Policy, 15 J. LAB. ECON. 586 (1997).

not to participate in a FAC need not do so. Those who do wish to participate gain an avenue for expression and influence that they do not currently enjoy. Given the various ways people spend their money foolishly, crowdfunding mechanisms to benefit talent (or their charities) constitute a relatively harmless perversion. On the upside, it may foster a sense of community or civic pride and generate money for charitable causes.

A final futility argument is that this simply will not work because the FAC will not raise sufficient amounts as to offer a meaningful incentive to the star. Again, this is speculative. More importantly, the success and growth of crowdfunding suggests reason for optimism. The producers of a movie raised money from 91,000 fans.⁶² If Los Angeles Lakers fans raised a comparable \$62 per person from a similar number of fans, that means \$5 million to offer for the benefit of a superstar player, on top of the \$19 million he gets from the team. That certainly may be significant enough to affect the player's calculus in choosing his team.

3. Do Bigger Cities Unjustifiably Get Better Teams?

The next objection has less to do with distributive injustices involving money and more with patterns that distribute talent unevenly. On this view, FACs will probably be more successful in larger cities with larger and wealthier fan bases, thereby unfairly disadvantaging teams in smaller markets.

To understand this concern better, consider how the NBA treats broadcasting revenue. While NBA teams equally divide national television revenue to the tune of approximately \$30 million per team, they keep their own local broadcasting revenue, which in some cases, is substantially larger.⁶³ This arrangement has led to enormous disparities; while the Los Angeles Lakers receive \$150 million in local broadcasting revenue, the Sacramento Kings snag just \$11 million.⁶⁴

It is probably true that teams in large cities will have more fans, on average, than teams in small cities, and more fans usually means more money. This is not an ineluctable truth; perhaps a billionaire such as Bill

⁶² See Cohen, *supra* note 11.

⁶³ See Steve Aschburner, *Revenue Sharing a Vital (Yet Secretive) Component to Talks*, NBA.COM (Sept. 21, 2011, 8:09 AM), http://www.nba.com/2011/news/features/steve_aschburner/09/20/revenue-sharing-still-vital/index.html.

⁶⁴ See Tom Ziller, *Sacramento Kings Win Second Life, and NBA's Economic Inequity Has Never Been More Important*, SB NATION (May 2, 2011, 1:51 PM), <http://www.sbnation.com/nba/2011/5/2/2149458/sacramento-kings-relocation-maloofs-anaheim>.

Gates is a fan of the poorest team and he is willing to bankroll a FAC. The original point does have an intuitive feel to it, however. Perhaps we should feel sheepish about creating yet another situation where teams from large cities benefit by virtue of the largeness of the city to which they are attached.

This is a complicated question and we do not hope to resolve it here with any firmness. But the answer again emphasizes the presumptively defensible virtues of allowing people to make their own free choices. Large cities become large in part because they are doing something right to retain or attract people to live there. In a world where jurisdictional competition (i.e., federalism) is a non-laughable explanation for why some cities and states succeed while others do not,⁶⁵ there might be reason to credit the claims of large cities (or, more precisely, their boosters) that such cities should be rewarded for creating attractive places to live. To the extent cities are able to draw and keep talent based on good governance; professional, educational, and economic opportunities; or other distinctive virtues, then it is not clear why FACs associated with teams in vibrant cities should be hindered. Preserving some market incentives for cities to innovate or govern well is an article of faith for the jurisdictional competition literature.⁶⁶ If more successful FACs are one way in which that good governance is rewarded, we should be leery of regulating them simply because they are associated with teams in large cities.

Moreover, the important consideration is not the size of the media market in which the team plays but the size of a team's fan base. The two are not necessarily co-extensive, particularly in the age of individual mobility, the Internet, and national media. "Red Sox Nation" extends well beyond New England; many small-market teams—such as the NFL's Green Bay Packers and the NBA's Oklahoma City Thunder—enjoy broad national followings. A FAC can reach fans in the diaspora, who may welcome the chance to contribute and to feel more closely connected to their team. Moreover, because crowdfunding works through many smaller contributions, the significant factor in a FAC's success may be the number of fans supporting the team, not the wealth of individual (or even average) fans. If, as we ex-

⁶⁵ The classic piece on jurisdictional competition is Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416 (1956). For other discussions, see generally, Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1833 (2005); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997).

⁶⁶ See sources cited *supra* note 65.

pect, fans of all teams will develop their own FACs, market competition among fan bases will bolster market competition among teams.

Two final points. First, as with the “rich get richer” objection, this one suffers from a baseline problem. That large cities may benefit more from FACs is not a persuasive reason to oppose them. After all, leagues and teams have never attempted to tie player salaries to outside income or to limit or prohibit players from earning as much endorsement income as possible. Nor have they suggested lowering the salary cap or salary-offer figures for teams in large cities because players can earn more in outside income by playing there.⁶⁷ Indeed, leagues and teams have made no efforts to preclude outside income at all, including outside income that is available precisely because the player is a star and his stardom may be enhanced by living in a media-drenched location. There is no reason to single out income paid directly by fans as uniquely subject to leveling.

In addition, talented stars consider a number of factors in choosing where to perform or play; these include state tax implications, opportunities to contend for championships or other prizes, proximity to family, desirable weather, and social opportunities. A league’s collective bargaining agreement, its uniform player contracts, and its constitution in no way regulate these considerations because they fall outside the collective bargaining relationship. A FAC payment is basically no different.

4. The Shibboleth of Competitive Balance: Does Wealth Disparity Diminish Competitive Enterprises?

The next objection is that, holding all else equal, competitive sports are more attractive or aesthetically enjoyable when the playing field is not distorted by wealth. Regardless of whether players receive anything, fan contributions are designed to persuade players to play for one team instead of others.

But as one sports economist has observed, competitive balance “is like wealth. Everyone agrees it’s a good thing to have, but no one knows how much one needs.”⁶⁸ Or what exactly it means. We try to unpack some of the difficulties of this claim as it touches the case for FACs.

First, assuming that competition is good and that competition is hurt by wealth disparity, this argument is less relevant in non-sports commercial

⁶⁷ In other words, the New York Knicks are not limited to paying their top player only \$15 million per year, because he can get \$4 million in endorsements playing in New York, while the Memphis Grizzlies are able to pay \$18 million because endorsement opportunities in Memphis are only worth \$1 million.

⁶⁸ Zimbalist, *supra* note 30, at 111.

entertainment contexts that are less directly competitive, such as the recruitment, retention, or direction of chefs, newscasters, musicians, stage actors, etc. If FACs emerge in those areas, there are no real competitive balance considerations worthy of extended deliberation.

Second, even focusing on professional team sports, the argument is merely that FACs make watching sports worse in some way. But many aspects of professional sports might have similar effects, so it again is not clear that FACs are distinctly unjust or deserving of specially unfavorable treatment. Ultimately, skepticism toward private ordering in this context must be justified, as must skepticism toward one particular form of private ordering.

Third, as economist Allen Sanderson argues, competitive balance is not solely a product of resource distribution and allocation.⁶⁹ Indeed, there are many non-pecuniary influences on competition—technology, demography, playing rules, playing conditions, science, and medicine. With respect to these influences, leagues and fans welcome and applaud adaptation and innovation, even when it gives some teams a competitive advantage.⁷⁰ Moreover, it is difficult to separate “natural” from “unnatural” benefits as they affect the development of skill and performance and, in turn, competitive balance.⁷¹ There is no reason that advantages gained from wise player evaluation are significantly different in kind than advantages gained from having a larger or more affluent fan base.

Consider, for example, the rise of sabermetrics, the use of more sophisticated statistical methods of player evaluation and game strategy, allowing teams to identify and exploit inefficiencies in conventional methods strategies.⁷² Increasingly, teams hire front office personnel with strong math and statistics backgrounds to maximize these strategies. As described in the book *Moneyball*, baseball teams playing in small markets and working with relatively modest budgets have outperformed larger-market, big-budget teams.⁷³ No one, however, has seriously asserted that “competitive balance” requires that teams be restricted in the hiring of front office personnel or in efforts to exploit inefficiencies. In that same vein, even if FACs would negatively affect competitive balance, the welter of other causes that also contrib-

⁶⁹ Allen R. Sanderson, *The Many Dimensions of Competitive Balance*, 3 J. SPORTS ECON. 204, 205 (2002).

⁷⁰ See *id.* at 205.

⁷¹ *Id.* at 220, 224.

⁷² Note, *Losing Sight of Hindsight: The Unrealized Traditionalism of Law and Sabermetrics*, 117 HARV. L. REV. 1703, 1710–12 (2004).

⁷³ Michael Lewis, *Moneyball: The Art of Winning an Unfair Game* (2003)

ute to that imbalance weigh against special objections to this one, new form of allocation.

Furthermore, as a legal matter, courts have been consistently skeptical of leagues' competitive-balance arguments. Where sports leagues are subject to antitrust limits, competing teams are expected to behave as competitors. For instance, the Seventh Circuit rejected the NBA's arguments for limiting the number of games that individual NBA franchises could broadcast on cable.⁷⁴ The league argued that its network television contracts would be less valuable if individual teams could enter into agreements to broadcast games to national audiences, and that some teams would enjoy an unfair advantage in placing games on cable.⁷⁵ But the competitive balance argument fell to the concern that the limitation would have diminished fan access to NBA games.⁷⁶ This same interplay motivated the Supreme Court to invalidate an NCAA rule, also motivated by competitive-balance concerns, limiting broadcasts of college games⁷⁷ and a federal district court to nix an NFL bylaw that called for teams to equally share television revenue.⁷⁸ These decisions emphasize that competition anticipates and expects winners and losers, an expectation that FACs advance.

Finally, competitive balance often is justified as a way to maintain fan optimism, thereby maintaining fan interest in their team, the league, and the sport. Fans "want to begin each season with hope and expectation."⁷⁹ And given the perceived link between league parity and fan interest in the league, a decline in the former could hamper the latter.⁸⁰

But FACs enable a level of direct fan involvement that overcomes this objection in two respects. First, if we are correct that many different fan

⁷⁴ Chicago Prof'l Sports L.P. v. NBA, 961 F.2d 667 (7th Cir. 1992).

⁷⁵ *Id.* at 675.

⁷⁶ Chicago Prof'l Sports L.P. v. NBA, 1995-2 Trade Cas. (CCH) P 71,253, at *27 (N.D. Ill. 1995); see also David A. Balto, *Networks and Exclusivity: Antitrust Analysis to Promote Network Competition*, 7 GEO. MASON L. REV. 523, 573-75 (1999) (providing a rich discussion of this litigation).

⁷⁷ NCAA v. Board of Regents, 468 U.S. 85, 104-15 (1984) (reasoning that rule designed to promote competitive balance of college sports programs cannot unduly harm consumers).

⁷⁸ United States v. NFL, 196 F. Supp. 445, 447 (E.D. Pa. 1961). Congress responded to that decision with the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291, which removed the NFL, along with the NBA, MLB and National Hockey League (NHL), from the reach of Section 1 of the Sherman Act with respect to sponsored sports broadcasting. See Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 574 (1995).

⁷⁹ Zimbalist, *supra* note 30, at 112.

⁸⁰ Crooker & Fenn, *supra* note 30, at 157-58.

bases will create and support FACs, FACs actually may help foster competitive balance by providing another incentive that teams can offer to prospective free agents. Second, even if FACs ultimately produce disparity, it is the fans themselves creating the purported competitive imbalance through the very interest they show for the sport and their teams. In other words, FACs might beget competitive imbalance precisely because they result from fans wanting their teams to succeed and wanting to express that desire monetarily. We can imagine a scenario where FACs cause fans of teams from smaller cities or with smaller fan bases to lose interest in the sport because some big-city/large-fan-base teams come to dominate. But we also can imagine FACs stimulating greater fan interest and more interesting professional sports if fans see themselves as competing for affection nationwide and trying to brand themselves in distinctive and quirky ways.

If it is not obvious, we will emphasize it again: we do not deny the concern for competitive balance altogether. Rather, we believe those concerns are over-emphasized, relevant as a critique only to professional team sports, and thus only one activity where FACs could be used. And even such limited concerns are generally outweighed by considerations of liberty, commerce, and the pleasure fans take in expressing their preferences.

5. Speech, Money, and Corruption

FACs embody the idea that there is an expressive component to at least some financial transactions,⁸¹ particularly charitable ones.⁸² Because this expression is articulated in shekels, some might be concerned for corruption. FACs merge political action committees (PACs) with booster clubs and bring that union to professional sports. PACs facilitate the gathering of resources and support for or against particular political candidates, parties, positions, and causes.⁸³ Booster clubs serve similar functions for high school and college sports.

At the simplest level, booster clubs are the vehicle through which parents contribute to schools to help buy uniforms or other equipment, making the clubs indispensable to cash-strapped public schools. On the other hand, booster clubs and high-profile individual boosters have had pernicious ef-

⁸¹ *Citizens United v. FEC*, 558 U.S. 310, 351 (2010); *N.A.A.C.P. v. Claiborne Hardware*, 468 U.S. 886, 908 (1982).

⁸² *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002).

⁸³ PACs are regulated to various degrees because of the several ways in which money corrupts the integrity of the political process. For a spirited overview of the problem, see LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* (2011).

fects on big-time college⁸⁴ and even high school sports.⁸⁵ Stories of illicit payments—whether in cash, merchandise, sex, or drugs⁸⁶—suggest that booster clubs are a problem for amateur sports. Given the negative perception of both PACs and booster clubs, why should we extend those models to professional sports or other areas of commercial entertainment?

To the extent that the infusion of money in politics and amateur sports is problematic, it is precisely because those are perceived as domains that should operate under different “spheres of justice.”⁸⁷ We understand the intuition that politics or amateur sport should be relatively immune from the influence of money. A college football team should not win a championship just because its boosters are wealthy, just as a candidate should not win an election because her supporters are billionaires willing to flood the airwaves with political ads. Professional sports, by contrast, are principally a form of commercial entertainment and thus should be amenable to arguments in favor of private ordering: no different than the norms governing restaurants, airport fiction, and network TV shows. As such, there is no intrinsic reason why the norms of commerce and private ordering should not govern in that domain.⁸⁸

For what it is worth, this vision of politics as being above or beyond money has been losing support in the political and legal arena.⁸⁹ The real concern with the influence of money in politics is corruption—that an elected official will be indebted to, and subject to undue influence by, his funders.⁹⁰ That concern seems inapplicable to fans giving money to talent (or their preferred charities) in professional sports and other fields of commercial entertainment. As discussed earlier, the only *quid pro quo* risk as to professional athletes—gamblers or criminals with access to the players—is unlikely to arise through FAC activities.

⁸⁴ Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011, 5:37 PM), <http://sports.yahoo.com/news/renegade-miami-football-booster-spells-213700753—spt.html>.

⁸⁵ H.G. Bissinger, *Friday Night Lights: A Town, a Team, and a Dream* (1990).

⁸⁶ Robinson, *supra* note 84.

⁸⁷ Michael Walzer, *Spheres of Justice* (1983). *See also* Sandel, *supra* note 57.

⁸⁸ And that is why we are largely unmoved by Professor Sandel’s complaints about the new markets in sports autographs, naming rights of stadiums, and skyboxes in professional sports arenas. *See* SANDEL, *supra* note 57, at 163–79.

⁸⁹ As a First Amendment matter, paupers and billionaires, not to mention corporations and unions, can spend lots of money with little restriction (or even transparency) in advancing their preferred political positions, issues, groups, and candidates. *See Citizens United*, 558 U.S. at 337–40; MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* (2002).

⁹⁰ *Citizens United*, 558 U.S. at 359–60.

6. Salary Concerns

One might object that FACs will hurt players by lowering their salaries, as teams leverage FAC pledges to reduce what they must pay. This is the same theory on which economists question the practice of tipping—that it causes restaurants to pay lower salaries, expecting workers to make up the difference in tips. This concern is unfounded for several reasons.

First, past experience demonstrates that teams do not reduce player salaries or contract offers based on potential outside income. LeBron James does not make less money, and no team would have made a lower contract offer to him, based on his outside endorsement income. Second, to the extent teams are competing to sign star players, such an attempt to lowball salaries would be unwise. If Team X offers less money to a player in reliance on anticipated FAC money, it may lose out to a higher offer from Team Y, as the player can choose to reject a lower offer that depends on the fortuity of FAC money. Again, the relationship between the team and the talent remains critical, with the FAC offering primarily a supplemental incentive to tip an equipoise in its favor. It is unlikely teams or talent will rely on that third party because of its speculative and contingent nature. Third, there is nothing inherently problematic with FACs causing teams to offer (and players to accept) less money. As discussed earlier, players join (or remain with) a particular team for a number of reasons, even at lower salary; the existence of FAC money would merely be one more reason to do so.

In any event, this concern arises only on the direct compensation model, and thus provides merely another reason to favor the charitable model. No team is likely to offer less money in salary because of some amount of money donated to the player's foundation. Of course, if a team did that, and the talent accepted the lower offer, that exchange would presumptively benefit the foundation and its charitable efforts while enhancing the talent's public reputation.

7. Fan Psychology and Epistemic Deference

A final set of issues relates to fan psychology and reactions. We spot them and briefly respond here, without necessarily resolving them in full.

First, one might argue that fans will quickly become disaffected when their money becomes directly intertwined with fickle player movements. Fans who contributed to a FAC to lure Player A may be angry when he returns to his original team four years later, or worse, when he asks the FAC for more money on threat of leaving. Feeling burned once, perhaps fans will

be reluctant to contribute to a FAC in the bidding for the next superstar to replace the departed Player A.

But fans' anger will not necessarily stop them from contributing in the future. Just as team management might be willing to "rent" star players for only a year or two if it means a chance to win, fans might similarly be willing to contribute their own money to FACs for that opportunity. Some fans will gladly pay for two championships, even if the player departs in year three; while disappointed by the player's departure, fans savor those two successful seasons and likely see it as being worth the cost. Those same fans might gladly contribute to the FAC the next time if they perceive a new chance for additional team success.

Second, one might fear that fans, teams, and talent may all be subject to psychologically hot and situational bargaining biases, such that FACs may end up creating a tax on foolishness. One might even suggest that the idea of fans becoming too attached to talent is irrational, especially in team enterprises. On this view, fans have a transient preference and are likely to mis-predict how sad they will be if their preferred player leaves, largely because people revert to their mean level of happiness over time. All this might be true. But again, if people can buy pet rocks, they can buy the chance to influence what star player they want on their favorite basketball team. Crowdfunding has developed and thrived on that very notion. In a free society with a market-based economy, where voluntary exchanges are already the dominant mode of distributing various goods and services, there is no distinctively persuasive reason to block one voluntary exchange in commercial entertainment or sports.

To be sure, the desirability of promoting athletic or other performance-related virtues may limit the spaces in which FACs are tolerable. Indeed, inasmuch as society should promote non-commercial virtues, the question of whether to encourage FACs becomes, at least partially, a question of expertise and deference.

This raises a distinct point: who likely better predicts what makes a good team: fans or team management? If the latter, and if we think epistemic deference to those who know is warranted, perhaps FACs are unwise. This is plausible. But consider two responses. First, as noted above, in most cases, FACs depend on the choices of the team in question to retain or recruit the talent; fan preferences will not trump those of management. For example, a FAC would have been useless for Jeremy Lin if he wanted to stay

with the New York Knicks once the Knicks decided they did not want to keep him on the team.⁹¹

Moreover, we can question how relevant epistemic deference should be in commercial enterprises. If the owners of the professional sports team want to manage their team poorly, that is their choice. If fans believe management is doing a bad job, one solution is to abandon the team in protest by not attending or watching games or otherwise giving money and support to the team. FACs offer another way: influence (or try to influence) management's decisions by influencing (or trying to influence) players through payments to or for their benefit, hoping to produce better results.

C. Policy Concerns Unique to the Charitable Contribution Model

As previously stated, we think the more attractive approach is for FACs to donate money to the talent's charitable foundation or other preferred cause. In addition to the arguments we canvassed concerning FACs above, two additional considerations specifically support the charitable model.

1. Distributive Justice and Charitable Contributions

The distributive-justice objection to FACs largely disappears under the charitable model. Talent, already making a lot of money, is not financially enriched at the expense of fans, especially fans of lesser means. In fact, contributions to charitable foundations usually affirmatively advance the cause of distributive justice, because charities presumably will do, on average, more good with the money than a private person would.⁹² What is more, the opportunity to contribute through a FAC might encourage charitable engagement from people who do not otherwise do much giving.

Talent also may prefer this model, using the charitable benefits to boost their public image. A charitable FAC allows a star to proudly proclaim, "I am sorry to leave Team X behind, but Team Y's offer was unbeatable when its wonderful fans pledged another \$5 million to my foundation.

⁹¹ Of course, we can also envision a third FAC model that might develop, in which the FAC gives money to the team rather than the talent, enabling the funded organization to defray its costs or change its priorities. For example, imagine if billionaire Michael Bloomberg said to the New York Knicks management, "Keep Jeremy Lin, and I'll give you \$50 million." The league would no doubt have something to say about such an arrangement.

⁹² This assumption explains why charitable contributions are tax-advantaged. See 26 U.S.C. § 170; cf. Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777, 785–812 (2012) (discussing welfarist arguments in favor of subsidizing charitable giving).

I must do what I can for the kids I have long been committed to helping.” We readily imagine that substantial donations to the talent’s favored cause coupled with a public-image victory may affect the choices of at least some talent. Of course, a player might object to such charitable FAC contributions for similar reasons, complaining that fan contributions make it impossible to turn down Team Y, thereby negating that \$5 million donation and creating a public-image problem.

There also is a chance that one distributive justice objection would persist, even under the charitable model. Because charitable giving is finite, the charity-focused FACs could engender a distribution of goods that is worse than in a world without FACs. For this scenario to unfold, charitable FACs would have to crowd out normatively better charitable giving. For example, if stars choose wasteful or misguided charities, then on the margins we might see a sub-optimal distribution of charitable dollars that would otherwise have gone to better places.⁹³ Rather than mitigating distributive justice concerns, perhaps the player’s charities only benefit the wealthy (e.g., the Center for the Study of Dressage). Moreover, concerns have been raised about the management of some athletes’ charitable foundations and the percentage of funds actually going to charity.⁹⁴ One also might question the motivation behind these donations—the commitment is not really to the charitable cause, but to getting the star player to join or remain with the team.

But the premises of crowding-out remain speculative. We have no reason to believe fans would not give generously to both their usual charities and to the charities of their sports heroes; on the margin, they might simply buy fewer shoes, lipsticks, or tennis balls. Moreover, we have no reason to assume that the current distribution of voluntary charitable dollars is correct or that the talent’s choice of charities are, as a whole, much worse.

2. Sports Leagues and the Charitable FAC

Although stars do not receive anything from fan donations, FACs still are offering something of value to the player (even if the value is purely psychological or moral) to persuade him to play for one team over another. This still may appear to leagues as third-party intrusion into player movement and distribution of talent. Our response remains the same—neither

⁹³ Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 557 (2010).

⁹⁴ Paul Lavigne, *Athlete Charities Often Lack Standards*, ESPN.COM (Mar. 31, 2013, 9:05 AM), http://espn.go.com/espn/otl/story/_/id/9109024/top-athletes-charities-often-measure-charity-experts-say-efficient-effective-use-money.

private law nor internal league rules prohibit fans from collecting and spending money in a way that might influence an athlete's choices.⁹⁵

Indeed, the league would stand on even weaker ground in objecting to charitable FACs. After all, the talent is not receiving anything directly and fans are not entering into any sort of direct business relationship with the talent. The only people acting are the fans themselves and the foundations, neither of which is subject to league control. Indeed, it is impossible to see a difference between a group of fans raising \$10,000 to give to a player's foundation and a group of fans spending \$10,000 to rent a billboard or an airplane to fly a banner urging him to sign with the team.⁹⁶ The league simply lacks any authority to regulate the expenditure of independent fan money.

It also is unlikely that a league could or would try in future collective bargaining to prohibit charitable contributions. It would suffer a public-relations disaster in even suggesting limits on fans' charitable contributions or on what money foundations could accept. Even if fans explicitly attempt to tie their contributions to the talent joining (or remaining on) their favorite team, leagues will quickly realize that such efforts are not worth trying to regulate.

Moreover, opposition to charitable contributions would strike the league's key constituencies, including ticket-holders and corporate sponsors, as hypocritical. It would be at odds with most leagues' own charitable ventures, which have raised substantial money for various causes.⁹⁷ For example, since its creation in 2005, NBA Cares boasts that it "has raised more than \$200 million for charity, provided more than 1.9 million hours of hands-on service, and built more than 720 places where kids and families can live."⁹⁸ The NBA could not repudiate fans' donations to players' causes while simultaneously championing its signature charitable enterprise.

Charitable donations are also unlikely to resemble a zero-sum game, where a donation to one charity means another charity does not receive that

⁹⁵ See *supra* Part II.A.

⁹⁶ Anticipating James's 2014 free agency, Cavs fans organized several recruiting efforts, including renting a billboard near James's old high school in Akron and distributing t-shirts to fans and asking them to tweet photos of themselves. Dan Favale, *Cavs Fans Create 'Come Home LeBron' Campaign to Lure James Back to Cleveland*, BLEACHER REPORT (Nov. 25, 2013), <http://bleacherreport.com/articles/1864744-cavs-fans-create-come-home-lebron-campaign-to-lure-james-back-to-cleveland>.

⁹⁷ *NFL and Players' Union Donating \$1 Million*, SI.COM (Nov. 1, 2012, 7:41 PM), <http://www.si.com/nfl/2012/11/01/sandy-nfl-union-donations-ap> (noting donations by the major sports leagues and players' associations to hurricane relief).

⁹⁸ *Overview of NBA Cares*, NBA.COM, <http://www.nba.com/cares/overview.html> (last visited Sept. 12, 2012).

donation.⁹⁹ For one, NBA Cares' core activities focus on team and player charitable activities and on partnerships with other enterprises in complex community ventures.¹⁰⁰ For example, in 2012 NBA Cares briefly partnered with the "Hoops 4 Hope" charity, through which customers at NBA-owned stores could donate used sneakers in exchange for a store discount.¹⁰¹ This charitable program certainly warrants support. But, a fan who donates money to a player's foundation as part of free-agent recruiting is not less likely to donate old sneakers in exchange for a store discount. For that reason, FAC money for foundations favored by talent would neither diminish nor endanger the league's civic outreach efforts.

III. FACs EVERYWHERE AND NOWHERE

A. *FACs Everywhere?*

Our focus has been on professional team sports because that is where money and attention are most likely to flow. Professional sports present the most obvious trilateral relationships, and sports fans are uniquely aware of and interested in athletes' comings and goings, providing the information necessary to allow a FAC to form and to raise money in a recruiting effort.

Similar crowdfunding efforts might likewise succeed in other trilateral relationships. We do not aim to exhaustively describe the extensions of the FAC model to other areas of human activity; instead, we just sketch some suggestions for use in other areas of commercial entertainment.

FACs are likely to succeed only where the obstacle to a deal is not the organization's ability or willingness to pay the talent, but the talent's willingness to join the organization. In those situations, FAC crowdfunding serves not to make the talent-team relationship financially possible so much as it serves as an expression of fan support and affection and thus a monetized reason for the talent to want to join. Crowdfunding offers a supplemental incentive, especially when fan money is going to the talent's preferred charitable causes. That said, we can also see how FACs might be

⁹⁹ See *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 355 (4th Cir. 2005) (Duncan, J., dissenting) (explaining the impact of charities competing for "the finite charitable donation dollar").

¹⁰⁰ *NBA Cares Community Partners*, NBA.COM, <http://www.nba.com/cares/partners.html> (last visited Sept. 12, 2012).

¹⁰¹ *Recycling Dreams*, NBA.COM, http://www.nba.com/nycstore/footwear_drive.html (last visited Sept. 22, 2012).

used to completely alter the incentives of a team that was not otherwise interested in signing a particular talent.¹⁰²

Consider the following circumstances in which fans could, through crowdfunding efforts, help facilitate a desired relationship between talent and team/organization.

- Fans of the symphony or opera in one city want to help attract a renowned conductor, violinist, or soprano from another company or city.
- Fans of Nate Silver's statistical analysis may attempt to influence his decision about whether to stay at the New York Times or to decamp to ESPN.¹⁰³
- Patrons of a restaurant can help it attract or retain a celebrity chef.
- Fans of TV's "Downton Abbey" might organize and offer money to actor Dan Stevens (who played the leading male role in the show's first three seasons, but no longer wanted to be on the show) to convince him to remain with the show.
- Fans of "The Daily Show" might collect money to convince Jon Stewart not to take a sabbatical from the show, as he did in the summer of 2013,¹⁰⁴ whether out of love for Stewart or aversion to his replacement.
- FACs might even be used to recruit or retain academic talent, such as legal luminaries Larry Lessig or Cass Sunstein.¹⁰⁵

¹⁰² See *supra* note 91.

¹⁰³ Marc Tracy, *What Nate Silver's Move Means for the 'Times' and ESPN*, NEW REPUBLIC (July 22, 2013), available at <http://www.newrepublic.com/article/113967/what-nate-silvers-move-means-times-and-espn>. The element of fan loyalty to the entity is arguably absent here—few readers have intense loyalty to a particular media outlet itself (certainly not loyalty comparable to a sports team) and many Silver fans will read him whether he is at ESPN or the Times. On the other hand, Silver would be expected to write more about sports at ESPN, so perhaps a group of fans wanting to read more of his sports analysis would try to encourage him to switch to a sports-oriented outlet.

¹⁰⁴ Lauren James, *Jon Stewart Returns to 'The Daily Show' After Summer Sabbatical*, CONTRACTMUSIC.COM (Sept. 4, 2013), http://www.contactmusic.com/article/jon-stewart-daily-show-return-2013_3848865.

¹⁰⁵ This extension of the FAC model might be the most controversial of the bunch. Unlike commercial entertainment and professional sports, the academy might hold itself out as ungoverned by market considerations and more bound by a set of norms appropriate to knowledge-building and dissemination. While higher education is different from commercial entertainment in that far fewer "firms" are motivated by profit maximization, it does not mean that academic institutions are not substantially participating in markets to hire leading academics for their ser-

In each of these situations, as with team sports, the money is not necessary to make it financially feasible for the targeted star to join or remain with the organization; the organization can and will pay the talent to perform.¹⁰⁶ In fact, FACs might be more effective in these contexts than in professional sports, because these industries do not require or encourage individual firms to be concerned with the preservation of competitive balance—there is no National Restaurant Association ensuring that each restaurant has similar amounts to spend on chefs and a similar opportunity to succeed. Furthermore, none of these industries or markets have rules barring coordination or cooperation between the production team and the fans or between the talent and the fans.

FACs are valuable because they provide a mechanism for talent and team to capture gains based on intensity of preferences. Comedy Central, for example, makes money from “The Daily Show” through advertisements whose pricing varies based on viewers within large demographic groups said to be watching the show. In other words, the number of viewers matter significantly (even exclusively) in some markets. By contrast, FACs provide an opportunity for talent to capture gains based on the intensity of preferences belonging to particular individuals. If Bill Gates, or 50,000 individual fans, love Stewart so much, they might be willing to use a FAC to persuade him not to go on sabbatical. Markets must be conducive to that possible exchange if they are to effectively engage in wealth maximization.

FACs could even extend beyond sports and commercial entertainment. The literature on jurisdictional competition already addresses the problems and possibilities of cities or states trying to lure businesses to site their factories in particular places.¹⁰⁷ One could imagine how FACs and crowdfunding might impact these decisions. Perhaps Seattle is trying to lure Smelly Corp. and its 200 jobs to the area by offering \$10 million in tax breaks or other advantages. Smelly Corp. could also announce that it is amenable to being persuaded to go somewhere else—and there is no reason a FAC (per-

vices. Charles T. Clotfelter, *The Familiar but Curious Economics of Higher Education: Introduction to a Symposium*, 13 J. ECON. PERSPECTIVES 3 (1999).

¹⁰⁶ If some organizations (such as the symphony seeking a violinist or a law school seeking a cyberlaw professor) find themselves short on funds, they likely would turn directly to their donor “fans” to fill any monetary shortage, obviating the need for fans to work independently through a FAC. But we also imagine situations where the artistic director of a symphony or dean of a law school has interests and priorities at odds with the fans, and the fans might be able to alter the incentives through its FAC and the intensity of preferences it announces. The FAC cannot put a gun to the artistic director’s head, obviously; but crowdfunding might affect her balance of reasons in favor or against a course of action.

¹⁰⁷ See sources cited *supra* note 65.

haps supported in part by a wealthy local) could not offer them \$11 million to go elsewhere, if the FAC supporters think Smelly Corp. is bad for Seattle. Citizens often speak out against government efforts to attract businesses to the area; FACs allow them to speak with their dollars.¹⁰⁸

In sum, the use of charitable donations or direct payments by third parties to motivate behavior is not limited to a few discrete areas of endeavor. Instead, it is applicable to any area where members of a committed base are willing to express themselves financially to try to influence relevant decision-making with respect to an organization about which they care. FACs provide a vehicle for voluntarily reassigning one's comparative abundance to achieve goals held in common with others, efforts that have failed in the past because of a lack of coordinated organization. These means can be used to achieve positive ends or to avoid negative ones, although we recognize that what counts as positive or negative will often be in the eyes of the beholder.

B. *FACs Nowhere?*

So where are the FACS, whether in team sports, commercial entertainment, or elsewhere? As the old economics joke goes, if a ten-dollar bill is lying on the ground, then it must not really exist because someone would have picked it up already.¹⁰⁹ Perhaps FACs are the equivalent of that ten-dollar bill. As with any innovation, sometimes ingenuity happens, which explains why demand for some products is higher than it is for others. Crowdfunding itself has existed for only about five years and its parameters and potential applications are still being discovered. Even so, we have seen a few small-scale efforts in this direction, especially in connection with team sports.¹¹⁰

¹⁰⁸ FACs might even enter slightly more peculiar markets, such as offering money, directly or to charity, to encourage a public official (Supreme Court Justice, congressman, cabinet official) to step down. Our sense is that federal ethics rules would make this an impermissible quid pro quo, even if one might view the retirement from office as more like a cessation of official action than an official action itself. Cf. Ross E. Davies, *The Judiciary Fund: A Modest Proposal that the Bar Give to Judges What Congress Will Not Let Them Earn*, 11 GREEN BAG 2D 354 (2008) (arguing that the organized bar can collectively provide financial support for underfunded judges and judiciary); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387 (1998) (arguing that check-off boxes on tax returns can be used as a polling measure to gauge intensity of preferences with respect to contested policies).

¹⁰⁹ See, e.g., ROGER A. ARNOLD, *ECONOMICS* 472 (8th ed. 2008).

¹¹⁰ See Favale, *supra* note 96; WQAM, *supra* note 23.

As much as we would like to believe the absence of ingenuity is the reason for the current absence of FACs, we must be open to other explanations.

1. Coordination Costs

One possibility is that FACs require coordination across a number of actors—talent, agents, teams, leagues, along with the fans who organize and participate in the crowdfunding efforts. These coordination costs are high. This highlights a more general commercial problem—consumers' voices are often not heard clearly or correctly. Even taking into account the pervasiveness of marketing research through focus groups, the intense preferences of some viewers might be economically relevant when deciding whether to cancel a television show or trade a popular player.¹¹¹ FACs can respond to this problem; in some ways, fans become more like spectators in a Roman arena, where the pitch and yaw of the crowd's mood had an intensely meaningful impact on the gladiators' well-being.

2. Information Hurdles

There are information costs as well. The public knew that LeBron James was a free agent (twice) who wanted to take his talents elsewhere—this is the main reason team sports are the most obvious context for initial FAC efforts. The public may be less aware that Maria Callas is looking for a new opera home or that Jon Stewart is thinking of taking a hiatus from his show. For FACs to work, there must be a way for stars to credibly signal that they are interested in being wooed by another entity so that the recruiting entity does not feel that it is wasting too much of its agents' time. That signal from the talent must reach fans who will undertake their own fundraising efforts.

3. Social Norms

A third variable includes the stickiness of social norms. As discussed earlier, FACs do not raise plausible claims of tortious interference with contract. But, the penumbra of that tort shades social norms surrounding the supposed sanctity of privity in contract and social inertia against tampering

¹¹¹ Of course, had the show been more popular—that is, had more fans watched the show—it likely would not have been canceled. But that show might be valuable to a few very devoted watchers and the intensity of their preferences might matter to the show's producers if there's a way of monetizing them.

with contractual relationships. There also remains the awkwardness of ordinary fans spending money to benefit or influence wealthy stars and teams.¹¹² These social norms might impede the emergence of FACs.

One way to overcome that inertia is to organize FACs in a way that incentivizes entrepreneurs to surmount those hurdles. A FAC might absorb a small percentage of the money that is raised to cover administrative costs and furnish some profit or financial return for the person spearheading the effort. Moreover, online crowdsourcing platforms lower the costs of these efforts, much as technology has facilitated the lowering of costs associated with increasingly standardized legal instruments.¹¹³

CONCLUSION

Fans currently do not financially direct or even influence where stars choose to perform; fans instead are left to scream about it from the sidelines. They deserve better. The same people who devote mental and emotional energy and passion for talent and teams also spend their hard-earned salaries buying tickets and knick-knacks. This makes them stakeholders in the various choices made by talent. By harnessing imagination, resources, and energy, FACs are a catalyst for the realization of fan power.

FACs are not the only way to bring fans into the decision-making mix. Teams could be capitalized and directed through publicly traded stocks under affiliated rules of corporate governance; alternatively, they could be organized as community cooperatives. Those structures would also empower fans, although we leave the merits of such competing models for another day.

In our view, whether enriching stars through direct payments or facilitating contributions to charitable causes, FACs are permissible and easily created. While their existence might impose some costs, FACs should spur some important conversations about professional entertainment and sports, and what we expect from these fields of endeavor and why. Finally, when structured under the charitable model, FACs can incidentally lead to im-

¹¹² This criticism has been levied at several well-known artists who have undertaken crowdfunding efforts despite personally possessing sufficient money to make their projects happen. See Kathryn Shattuck, *The Roar Over the Funds of the Crowd*, N.Y. TIMES, July 9, 2014, <http://www.nytimes.com/2014/07/13/movies/the-roar-over-the-funds-of-the-crowd.html> (discussing criticism of Hollywood star using Kickstarter to fund movie).

¹¹³ See, e.g., LEGALZOOM, <http://www.legalzoom.com> (last visited Feb. 17, 2014) (providing low cost options for wills, family law, incorporation of LLCs, trademarks, and other areas of “mass” or store-front law).

proved access to medicine and the arts and the alleviation of other social inequalities, all while helping the local team win. FACs, in short, offer promise to a vision that empowers fans, greases commerce, directs money to charities, and, in so doing, very likely effects positive social change.