

The Taxation of Bobbleheads: How the Sale for Resale Exemption Can Encourage Attendance at Major League Baseball Games

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I. INTRODUCTION

To the pessimistic observer, it may appear that baseball is on the decline. Games are becoming less exciting.¹ Baseball is becoming less popular among kids.² TV viewership for the World Series, the ultimate event in baseball, has been a mixed bag of successes and failures.³ But most worrisome is the fact that attendance at games is declining, falling under 70 million for the first time in fifteen years in 2018.⁴ One rough calculation valued the cost of this decline at \$355 million in ticket sales.⁵ With average attendance dropping 4% in 2018,⁶ this loss was more than double the average attendance fluctuation.⁷ Speculations over the cause of

1. This is largely attributed to two factors: the defensive shift (defined as three or more infielders playing on one side of the infield) and a dramatic rise in strikeouts as batters adopt an “all or nothing” approach to get more home runs. Patrick Saunders, *Banning the Shift in MLB Generates Growing, Heated Baseball Debate*, DENVER POST (Dec. 16, 2018), <https://www.denverpost.com/2018/12/16/banning-shift-mlb-baseball-debate/>. This has various evidentiary support: the 2018 season was the first in history with more strikeouts than hits, the combined batting average for the league in 2018 was the worst in 46 years, and there were 22,322 fewer singles hit than in any other season in the twenty-first century. *Id.*, Scott Boeck, *2018 MLB Season: 13 Statistics to Sum it Up, From Strikeouts to Home Runs*, USA TODAY (Oct. 2, 2018), <https://www.usatoday.com/story/sports/mlb/2018/10/02/mlb-season-home-runs-strikeouts/1449184002/>. See also Mike Axisa, *MLB’s Biggest Problem is Not Pace of Play, and It’s Only Getting Worse in 2018*, CBS SPORTS (Apr. 15, 2018), <https://www.cbssports.com/mlb/news/mlbs-biggest-problem-is-not-pace-of-play-and-its-only-getting-worse-in-2018/> (arguing that the 2018 drop in attendance, discussed *infra*, is largely due to an increase in strikeouts).

2. See Marc Fisher, *Baseball is Struggling to Hook Kids—And Risks Losing Fans to Other Sports*, WASH. POST (Apr. 5, 2015), https://www.washingtonpost.com/sports/nationals/basball-trouble-with-the-youth-curve--and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html; Laura Hanby Hudgens, *The Decline of Baseball and Why it Matters*, HUFFINGTON POST (Apr. 8, 2016), https://www.huffpost.com/entry/the-decline-of-baseball-a_n_9630782.

3. Joe Otterson, *World Series Ratings Fall 23% From 2017*, VARIETY (Oct. 29, 2018), <https://variety.com/2018/tv/news/world-series-ratings-2018-1202994171/>.

4. Maury Brown, *Why MLB Attendance Dropped Below 70 Million for the First Time in 15 Years*, FORBES (Oct. 3, 2018), <https://www.forbes.com/sites/maurybrown/2018/10/03/how-mlb-attendance-dropped-below-70-million-for-first-time-in-15-years/#3fbde45a61bf> (showing that MLB had 3,045,179 fewer fans in attendance in 2018 than in 2017).

5. Carson Kessler, *MLB Attendance Drops to Lowest Average in 15 Years*, FORTUNE (June 15, 2018), <http://fortune.com/2018/06/15/mlb-attendance-rate-declining/>. However, there is reason to believe the actual loss was smaller, as the average secondary market ticket price of \$76, multiplied by the actual decline in attendance (3,045,179) results in a projected loss of \$231 million. Chris Cabrera, *How Much Are MLB Ticket Prices 2018*, BARRY’S TICKETS, <https://www.barrystickets.com/blog/mlb-ticket-prices/>.

6. Brown, *supra* note 4.

7. Kessler, *supra* note 5.

the decline have been rampant—including the high cost of tickets,⁸ the weather (the official excuse of Major League Baseball),⁹ and a lack of competitiveness due to extreme disparities in teams' performance quality.¹⁰ Regardless of the causes, fewer people are showing up to watch baseball. The “decline of baseball” could be overblown,¹¹ but the drop in attendance should be concerning to any fan of the sport, not to mention clubs and their owners who have a strong financial interest in higher attendance.¹²

This Comment suggests an overlooked¹³ means by which the legal system can address this decline and overcome potential roadblocks, specifically by utilizing state tax systems. From Senate hearings¹⁴ to scholarly debates, there is no shortage of opinions about how baseball should be taxed. The issues surrounding baseball and taxation could likely fill an entire book. In an under-examined line of cases, baseball teams have

8. Matt Provenzano, *We Can't Deny Price When Talking About Baseball Attendance*, BEYOND THE BOX SCORE (June 18, 2018), <https://www.beyondtheboxscore.com/2018/6/18/17472832/mlb-attendance-us-cost-of-living-ticket-prices>. However, this does not make sense unless there was a large price increase that caused the change.

9. Brown, *supra* note 4.

10. In 2018, there were five teams that finished the season having won less than 40% of their games. This ties the all-time record for teams winning 40% or less of their games, and the poor performance could explain part of the decline. Jared Diamond, *Major League Baseball Sees a Sharp Drop in Attendance*, WALL ST. J. (June 15, 2018), <https://www.wsj.com/articles/major-league-baseball-sees-a-sharp-drop-in-attendance-1529063246>.

11. Tyler Kepner, *More Strikeouts Than Hits? Welcome to Baseball's Latest Crisis*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/sports/baseball-mlb-strikeouts.html> (“One thing you learn from studying baseball history is that people have always predicted the sport's demise. Over and over, the game weathers every perceived crisis and continues to thrive.”); Jason Gay, *Reports of Baseball's Popular Decline Are . . . Popular*, WALL ST. J. (June 21, 2018), <https://www.wsj.com/articles/reports-of-baseballs-popular-decline-arepopular-1529596455> (discussing that the most popular sports article during a given week was about how unpopular baseball is). See also Maury Brown, *Baseball Is Dying? Don't Be Stupid*, FORBES (Oct. 8, 2014), <https://www.forbes.com/sites/maurybrown/2014/10/08/baseball-is-dying-dont-be-stupid/#cc9df3b5e812>; Johnathan Mahler, *Is the Game Over?*, N.Y. TIMES (Sept. 28, 2013), <https://www.nytimes.com/2013/09/29/opinion/sunday/is-the-game-over.html>.

12. While clubs derive revenue from more than attendance, other revenue sources are impacted directly and indirectly by attendance levels. See Jeremy M. Evans, *In This Issue, We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, 20 ENT. & SPORTS L. 12 (2017).

13. At least one general counsel for an MLB team did not know about the issue of taxation of promotional items at games, despite ongoing litigation about the very topic within the league. Personal correspondence, September 2018.

14. Senator Christopher Bond once said that “[i]f the IRS wants to know why they are the most hated federal agency in America, they need look no further than [their] assault on America's baseball fans.” Andrew D. Appleby, *Ball Busters: How the IRS Should Tax Record-Setting Baseballs and Other Found Property Under the Treasure Trove Regulation*, 33 VT. L. REV. 43, 47 (2008).

been taxed on promotional items given away to fans—including the iconic baseball bobblehead—as a means of increasing attendance. Four state supreme courts have considered the issue, with two finding a tax was warranted and the others finding that no tax should be imposed. Various articles¹⁵ and books¹⁶ have noted this legal trend, but no one has endeavored to suggest what the law *should* be yet. The purpose of this Comment is to do just that.

In the first section, I examine the history and purpose of bobbleheads in baseball. The focus on bobbleheads is due to their singular novelty; however, the same analysis would apply to comparable promotional items—including those used in other sports leagues. The Comment will demonstrate that promotional items like bobbleheads lead to drastically increased ticket sales, thereby combatting the existing decline in attendance. Second, I examine how taxes on consumption (the taxes at issue here) operate – specifically the use tax, a companion to the sales tax. That discussion highlights the importance of taxes falling on the final consumer of an item within the U.S. tax scheme, as well as important exceptions to these taxes. Whether a baseball team can avoid paying a use tax on bobbleheads hinges on a showing that they are “reselling” the bobbleheads to fans, and therefore qualify for an exception. Third, I examine and compare each of the four cases that have been decided, highlighting the various reasoning for each decision. Fourth, I argue that teams should not be subject to tax on their promotional items. I support this conclusion with three lines of reasoning: (1) the economics of the transaction show that the bobbleheads are being resold; (2) the fan receiving the item is the final consumer; and (3) the U.S. legal system has a long history of granting preferential treatment to baseball, which should be extended here. Finally, I suggest both the limitations and the broader applicability of these arguments.

II. THE HISTORY OF BOBBLEHEADS AND BASEBALL

Bobbleheads—ceramic figurines whose heads bobble up and down when nudged—are a mainstay in baseball. The items are given to fans free of charge as they enter the stadium for certain games. Often, these

15. Jonathan L. Entin, *Taxation of Bobbleheads and Other Sports Promotional Items*, 35 J. TAX’N INV. 45 (2018) (discussing the interpretation of tax statutes as applied to promotional items); Rachel A. Sheridan, *A Home Run for the Sale for Resale Exemption to Use Tax: Kansas City Royals Baseball Corporation v. Director of Revenue*, 7 ST. & LOC. TAX L. 121 (2002).

16. WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION: CASES AND MATERIALS 651 (2014).

promotions are heavily advertised in advance to increase attendance. While bobbleheads are certainly not the only promotional item used by modern baseball teams, I use the terms “bobblehead” and “promotional items” essentially interchangeably—i.e., the same analysis that applies to a free bobblehead also applies to a free t-shirt.

By some measures, bobbleheads are the most popular promotional item used across all of Major League Baseball (MLB).¹⁷ The modern bobblehead era¹⁸ began when the San Francisco Giants gave fans a bobblehead of baseball legend Willie Mays on May 9, 1999,¹⁹ and has since grown to the point that there are multiple museums dedicated to bobbleheads around the United States.²⁰ The popularity of the figurines only continues to grow, with MLB teams holding a combined 153

17. David Broughton, *Bobbleheads' Hold on the Top Spot Isn't Shaky*, SPORTS BUS. J. (Nov. 30, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/11/30/Research-and-Ratings/MLB-promotions.aspx>; Maury Brown, *From Bobbleheads to Special Events: Here's Promo Counts for All 30 MLB Teams*, FORBES (Mar. 23, 2018), <https://www.forbes.com/sites/maurybrown/2018/03/23/from-bobbleheads-to-special-events-heres-promo-counts-for-all-30-mlb-teams/#30f209d03b49>.

18. Yes, there is a “modern era” of bobbleheads – odd as it may seem. They became largely obsolete for many years before the rebirth of their popularity in 1999. *The History of Bobbleheads*, NAT'L BOBBLEHEAD HALL OF FAME, <https://www.bobbleheadhall.com/history/>. A bobblehead from an earlier period sold at auction for over \$59,000 – the most expensive ever. *Id.*; *1961-62 New York Yankees Oversized Promotional Nodder*, HERITAGE AUCTIONS, <https://sports.ha.com/itm/baseball-collectibles/others/1961-62-new-york-yankees-oversized-promotional-nodder-14-one-of-two-known-/a/7135-82385.s?ic3=ViewItem-Inventory-BuyNowFromOwner-PreviousLot-081514> (accessed Jan. 11, 2021, 2:37 pm).

19. Darren Rovell, *More Bobbleheads to Nod at Ballparks*, ESPN (Feb. 20, 2015), http://www.espn.com/mlb/story/_/id/12352717/mlb-teams-feature-121-plus-bobblehead-promotions-2015; *The History of Bobbleheads*, *supra* note 18.

20. The best example of this is the National Bobblehead Hall of Fame and Museum located in Milwaukee, Wisconsin. <https://www.bobbleheadhall.com/>. Its collection started with a few hundred, and now has over 10,000 bobbleheads—including non-baseball ones. Carrie Antlfinger, *Milwaukee Museum Features Thousands of Bobbleheads*, A.P. NEWS (Feb. 5, 2019), <https://www.apnews.com/eed302cd449e4002879b3ca0fcf1f50>. There is also a museum at Marlins Stadium in Miami, Florida that has more than 1,000 bobbleheads. Doug Williams, *Marlins Create Own Bobblehead Museum*, ESPN (Aug. 15, 2002), http://www.espn.com/blog/playbook/fandom/post/_/id/8892/marlins-building-massive-bobblehead-collection; Matt Snyder, *Jeffrey Loria Takes His Bobblehead Collection From Marlins Park Bobblehead Museum*, CBS SPORTS (Oct. 2, 2017), <https://www.cbssports.com/mlb/news/jeffrey-loria-takes-his-bobblehead-collection-from-marlins-park-bobblehead-museum/> (noting that the Marlins owner donated 900 bobbleheads to the National Bobblehead Hall of Fame). The Cincinnati Reds held a “pop-up” bobblehead museum as well. MLB.com, *Bobbleheads: The Exhibit*, MLB.COM (Mar. 2, 2016), <https://www.mlb.com/reds/news/bobbleheads-the-exhibit-presented-by-dinsmore--shohl-llp/c-165949054>.

bobblehead nights in 2016,²¹ and new types of bobbleheads still being introduced to the public.²²

MLB's promotional use of the bobblehead has a clear purpose—driving ticket sales. As one baseball executive stated, “[if w]e give away a bobblehead, [the game] automatically becomes a sellout.”²³ The cost to teams for the giveaway is relatively low—around \$2.40 per bobblehead.²⁴ Given that low cost, bobblehead giveaways are profitable.²⁵ To decide which games should have a promotion, team management determines the games that are most likely to have low attendance by anticipating the expected record of the home team, its opponent, and the weather.²⁶ For example, lower performing teams are more likely to face bobblehead nights when they are on the road, as home teams try and incentivize fans to invest over three hours into a game against an inferior opponent.²⁷

The results of a bobblehead giveaway speak to how effective they can be in driving attendance higher. The Milwaukee Brewers, one of the smaller market teams in baseball, calculated that a bobblehead giveaway led to an average increase in attendance of 7,000 fans.²⁸ The games, often sold out, have substantially higher prices on the secondary ticket market (i.e., StubHub).²⁹ Corporate sponsors will often pay to have their name and logo included on the figurine, generating additional revenue for teams. Beyond this, bobbleheads can provide teams with a significant boost from a psychological and marketing perspective. When fans receive the item

21. Russ D'Souza, *Bobbleheads Still Prized by Baseball Fans, Drive MLB Ticket Prices*, FORBES (Aug. 2, 2016), <https://www.forbes.com/sites/russdsouza/2016/08/02/bobbleheads-still-prized-by-baseball-fans-drive-mlb-ticket-prices/#348e5f2a303f>.

22. Carolyn Toto & Chaz Hales, *On Baseball, Bobbleheads and . . . Blockchain?*, J.D. SUPRA (Oct. 24, 2018), <https://www.jdsupra.com/legalnews/on-baseball-bobbleheads-and-blockchain-15616/>.

23. Rovell, *supra* note 19.

24. For example, the Los Angeles Dodgers recently sued a bobblehead manufacturer for undelivered product. The contract for sale, an exhibit to the complaint, revealed that the team paid \$2.40 per unit for 42,000 bobbleheads, for a total purchase price of \$110,376. Exhibit A to Complaint, *L.A. Dodgers L.L.C. v. Plan P2 Promotions L.L.C.*, Docket No. 19STCV11225 (Cal. App. Dep't. Super. Ct. Apr. 2, 2019).

25. The Cincinnati Reds' CFO “testified that the increased ticket revenue more than offsets the cost of promotional items distributed— “[o]therwise we wouldn't do it.” *Cincinnati Reds, L.L.C. v. Testa*, 112 N.E.3d 1178, 1181 (Ohio 2018).

26. Rovell, *supra* note 19.

27. Broughton, *supra* note 17. This can have interesting effects. In 2018, the Cincinnati Reds, one of the worst performing teams in professional baseball, had higher road attendance than home attendance because of promotions when they were in town. Radio Transcript, *Dodgers v. Reds* (Sept. 12, 2018) [transcript on file with author].

28. Rovell, *supra* note 19.

29. D'Souza, *supra* note 21.

upon entering the stadium, they have a greater affinity for the team as a result.³⁰ That affinity can, in theory, lead to more concessions sold, more merchandise sales, and a greater willingness to attend future games.

Given the positive outcomes associated with bobbleheads, it makes sense that teams increasingly use them as a method of increasing attendance. Before turning to those cases, however, it is essential to develop a basic understanding of the fundamental tax theory that underlies the varying decisions.

III. TAX THEORY

This section discusses two basic ideas: (1) why states tax consumption (i.e., the use) of things like bobbleheads, and (2) how and why a sports franchise should be exempt from that tax. By understanding these foundational ideas, it will become clear that baseball teams—and other sports franchises—should not be subject to taxes on promotional items. First, I will examine what consumption is, why states choose to tax it, and how it applies to bobbleheads. This will show that inefficiencies and errors are common in the way that states impose taxes. Next, I will discuss statutory exemptions to taxes on consumption. Of particular note is the idea that a bobblehead is resold to each fan by the team, despite the notion that they are “free.”

A. *The Theory of Taxing Consumption*

Fundamentally, consumption is a broad term that includes things you can see, feel, eat, and use, along with services. Put simply, “[a] consumption tax essentially taxes people when they spend money.”³¹ Some of the earliest taxes assessed in recorded history were consumption taxes.³² Today, perhaps the most well-known type of consumption tax is the retail sales tax, which is a “single-stage levy on consumer

30. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 21–61 (2009).

31. Len Burman & William G. Gale, *The Pros and Cons of a Consumption Tax*, BROOKINGS INST. (Mar. 3, 2005), <https://www.brookings.edu/on-the-record/the-pros-and-cons-of-a-consumption-tax/>.

32. Alan Schenk, *The Plethora of Consumption Tax Proposals: Putting the Value Added Tax, Flat Tax, Retail Sales Tax, and Use Tax into Perspective*, 33 SAN DIEGO L. REV. 1281, 1290 (1996) (Egypt and Mesopotamia); Alan Schenk, *Choosing the Form of a Federal Value-Added Tax: Implications for State and Local Retail Sales Taxes*, 22 CAP. U. L. REV. 291, 296 n. 16 (citing Thomas Hobbes as believing it better to tax withdrawals from community resources than taxing contributions through income taxes).

expenditures, i.e., it applies only to personal use and consumption.”³³ The tax a consumer pays on an item at the grocery store is a common example.

While most people are familiar with a sales tax, there is seemingly less familiarity with the “functionally equivalent” use tax.³⁴ Each of the cases involving bobbleheads and other promotional items deal with the use tax. When sales taxes were first introduced, savvy businesses could purchase all of their products in a state that had *no sales tax* (like Oregon), transport them to their home state that *has sales tax* (like California), and avoid paying taxes altogether.³⁵ To prevent this type of scheme, states implemented a tax for the privilege of storing or consuming a good within the boundaries of a given state *if* it was not already subject to a sales tax when purchased—this new tax was called the use tax.³⁶ Thus, in most states, those who have not paid sales tax on an item that they consume must pay a use tax that is equal to what they would have paid in sales tax.³⁷ One is a substitute for the other, and as a result, sales and use taxes are “mutually exclusive” and cannot both be imposed on the same consumer by a single state.³⁸ The theory governing the operation of the sales and use taxes is similar for our purposes, and I will refer to them interchangeably.³⁹

33. WALTER HELLERSTEIN ET AL., STATE TAXATION § 12.01, 1 (2020). (hereinafter “STATE TAXATION”)

34. *Id.* at § 16.01; JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 51 (1983) (noting that retail sales tax is designed to apply to personal consumption only).

35. *See generally* STATE TAXATION, *supra* note 33, at § 16.01(2).

36. *Id.* at § 16.01 (citing *Woods v. MJ Kelley Co.*, 592 S.W.2d 567, 570 (Tenn. 1980), cert. denied, 447 U.S. 905 (1980)). For an excellent in-depth discussion of the use tax, its history, and its structure, see DUE & MIKESELL, *supra* note 34, at 245 et. seq. It addresses, among other things, the constitutional issues facing use taxes, credits for sales tax in other states, and key differences from a sales tax.

37. STATE TAXATION, *supra* note 33, at § 16.01.

38. *See, e.g.*, California State Board of Equalization, *Tax Rate FAQ for Sales and Use Tax*, (accessed Sept. 21, 2018, 2:39 pm), <https://www.boe.ca.gov/sutax/faqtaxrate.htm#1> (“The state sales tax and use tax are ‘mutually exclusive,’ which means either sales tax or use tax may apply to a single transaction, but not both.”).

39. One reason this is helpful is that data relevant to state taxation is often available in an aggregated fashion; use tax and sales tax are not displayed separately in some data sets. However, when viewed in the aggregate, their importance becomes clear. In 2017, Sales and Gross Receipts (which includes the retail sales and use tax) accounted for 47.63% of state tax revenue throughout the United States. U.S. Census Bureau, *2017 Annual Survey of State Tax Collections* at Table 1, <https://www.census.gov/data/tables/2017/econ/stc/2017-annual.html>; U.S. Census Bureau, *Tax Revenue Classifications*, <https://www.census.gov/programssurveys/stc/data/datasets.html>

(defining the term Sales and Gross Receipts to include retail sales and use tax). Sales and use tax have accounted for over 45% of total U.S. state tax revenue since 1932. U.S. Census Bureau, *State Taxation Collection Database* (last updated 2017), <https://www.census.gov/programs-surveys/stc/data/datasets.html>. The next closest source of revenue is state income taxes, which account for

Sales and use taxes are “designed to be a uniform tax on consumer expenditures” unless “there is justification for an exemption.”⁴⁰ The tax should reflect the amount actually paid by the consumer.⁴¹ And, they should be paid by the “ultimate consumer,” or the person who actually consumes the good or product.⁴² In practice, this means that a business should not pay sales or use tax on an item that it intends to sell to someone else. Each state takes its own approach to what specific goods are subject to a sales or use tax, with some states excluding food, housing, and clothing, and others excluding feminine hygiene products.⁴³ While the approaches may vary, it is absolutely clear that only the final consumer should be paying a consumption-based tax.

Only the final consumer should be subject to a sales or use tax, so an expenditure that does not lead to consumption should not be subject to tax. Things like ingredients or component parts of a final product (known as “business inputs”) should be exempt from taxes when purchased.⁴⁴ However, the current “haphazard” assessment of taxes is much messier in practice.⁴⁵ “[T]he states that use [a retail sales tax] have been singularly unsuccessful in ensuring that most business inputs are not subject to tax.”⁴⁶ In fact, most studies and evidence suggest that businesses bear 40% of the total sales tax paid due to taxes on business inputs—representing a major inefficiency in the way taxes operate.⁴⁷

When taxes are imposed at multiple points in the life cycle of a product—instead of only on the final consumer—a process called

41.59% of total state tax revenue. *Id.* Note, however, that some states (including Oregon) do not impose a retail sales tax.

40. DUE & MIKESELL, *supra* note 34, at 23.

41. *Id.*

42. *Id.*

43. See Burman & Gale, *supra* note 31.

44. STATE TAXATION, *supra* note 33, at § 12.01; George R. Zodrow, *The Sales Tax, the VAT, and Taxes in Between—or, Is the Only Good NRST a “VAT in Drag”?*, 52 NAT’L TAX J. 429, 432 (1999) (stating that the percent of business purchases subject to taxation under a true consumption-based tax—like the retail sales tax—should be zero).

45. Zodrow, *supra* note 44, at 432.

46. *Id.*

47. For example, the Council on State Taxation publishes an annual study to determine the percentage of state and local taxes generated by businesses and they typically show an average of roughly 40% of sales tax being borne by business inputs. <https://www.cost.org/state-tax-resources/cost-studies-articles-and-reports/>. See also Robert Cline et al., *Sales Taxation of Business Inputs: Existing Tax Distortions and the Consequences of Extending the Sales Tax to Business Services*, STATE TAX NOTES (Feb. 14, 2005), 457, Doc 2005-1861; Raymond J. Ring, Jr., *Consumers’ Share and Producers’ Share of the General Sales Tax*, 52 NAT’L TAX J. 79-90 (1999).

pyramiding occurs.⁴⁸ Pyramiding goes against the idea of the final consumer bearing the tax and violates “rock-solid tax policy principles” in the process.⁴⁹ To understand how these taxes operate, imagine that a young parent purchases a loaf of bread for \$1.00 in a state that imposes a 10% sales tax. The total cost of the item would be \$1.10 (cost of item + sales tax). A true retail sales tax would view this as the correct assessment of tax because the parent is the final consumer of the good at issue.

However, in practice the government collects significantly more than \$0.10 in tax thanks to pyramiding. If the baker of the bread is taxed at 10% on her purchase of flour (at a cost of \$0.01 of tax per loaf produced), and the miller of that flour is taxed on her purchase of wheat (at the same cost of \$0.01 per loaf), the government collects an additional \$0.02 in tax revenue (or \$0.12 total after the consumer pays). While the difference is not noticeable to the parent, who still pays \$1.10 for the bread, the state collects an additional 20% in tax revenue, with multiple negative consequences: pyramiding creates “complexity and economic distortions,”⁵⁰ leads to higher consumer prices (or lower profit margins for producers of goods),⁵¹ incentivizes vertical integration,⁵² stifles economic development,⁵³ and shifts the retail sales tax towards a value added tax (VAT) system. All of these consequences would be avoided if the government only imposed taxes on the final consumer—the parent, in this example.

It should be noted that under some systems of taxation, it is normal to tax business inputs.⁵⁴ As many an international traveler can attest, the VAT is an alternative approach to taxing consumption that is found throughout the world.⁵⁵ While both the VAT and sales tax impose a levy

48. Cline et al., *supra* note 47.

49. *Id.* at 458. This article assumes that the theoretical goals of any tax are fairness, simplicity, equity, and efficiency. *Id.*

50. *Id.* (noting that many state tax systems under-tax household consumption while dramatically overtaxing business purchases, increasing the overall distortion).

51. If a baker pays more for flour due to tax, the increased costs will be likely passed on to the consumer in the form of higher prices. Thus, failing to only tax the final consumer functions like a “hidden tax”—ironically something that some proponents of the retail sales tax have opposed. Zodrow, *supra* note 44, at 434.

52. The baker and miller are more likely to merge (vertically integrate) into one company if they are in a close relationship and work together often, avoiding the layer of tax liability between them.

53. Cline et al., *supra* note 47.

54. See Zodrow, *supra* note 44, at 432.

55. *Id.* at 430.

on consumption, a key difference between them is *who* is assessed tax.⁵⁶ In contrast to the unique U.S. system,⁵⁷ the VAT seeks to impose a tax on every step of a product's life—intentional pyramiding. The amount a business or consumer is taxed on under a VAT (the “tax base”) is equal to the value that their transaction adds to the overall domestic product, as demonstrated below.⁵⁸

Returning to the example of the loaf of bread: if the baker buys ingredients for bread costing \$100, then sells the bread to a distributor for \$150, their tax base will be the amount of value they added to the economy, or \$50 (\$150 – \$100). When the distributor sells the bread it purchased for \$300, there will be a tax base of \$150 (\$300 – \$150 purchase price). Thus, when the parent goes to purchase the loaf of bread, they will still pay tax, but likely at a lower marginal rate. This allows a VAT to achieve the same overall taxation while spreading it across multiple parties.⁵⁹ A VAT approach may enable greater precision in the tax system by exempting business inputs,⁶⁰ but the U.S. remains committed to not following this approach.

Thus, if baseball were a European sport, there would be no question that bobbleheads would be subject to taxation as a business input. A side-by-side comparison of the two systems of taxation makes clear that when

56. See Tax Foundation, *Value-Added Tax (VAT)* (accessed Mar. 11, 2021, 9:45 pm), <https://taxfoundation.org/business-taxes/value-added-tax/>.

57. Some have attributed this as the vestiges of “American Exceptionalism” within the economy—the United States is the only OPEC country that does not use a VAT, and a total of 143 other countries currently use a VAT in some form. Robert Carroll & Alan D. Viard, *Value Added Tax: Basic Concepts and Unresolved Issues*, 126 TAX NOTES 1117 (Mar. 1, 2010), <https://www.taxnotes.com/tax-notes-today/accounting-periods-and-methods/value-added-tax-basic-concepts-and-unresolved-issues/2010/03/04/wfjb> (“A VAT is used by all OECD nations other than the United States and by at least 145 countries around the world.”). Multiple authors have suggested that the United States make the switch and the Treasury Department has also considered it. Schenk, *supra* note 32; John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CAL. L. REV. 2095, 2101 (2000).

58. Incidentally, this tracks well with the Haig-Simons definition of income [$I = C + \Delta W$]. For that reason, it has been suggested that the VAT would be an apt addition to the income tax, allowing for overall reduction in income tax rates. MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES (2008); Leonard E. Burman, *A Blueprint for Tax Reform and Health Reform*, 28 VA. TAX REV. 287-323 (Fall 2008).

59. Carroll & Viard, *supra* note 57.

60. For an excellent discussion on the merits of a VAT approach, see Zodrow, *supra* note 44, at 431-36 (“[I]t seems difficult to argue that the VAT is not, on balance, superior to the standard [retail sales tax].”).

a U.S. state shifts the sales tax from the final consumer to a corporate entity (like a baseball team), it violates the foundational principles of a sales tax, which is both inefficient and ineffective from a tax policy perspective. It becomes the role of courts and taxing authorities to protect entities like baseball teams from being improperly subject to these taxes. The next section discusses the statutory exemption available to bring that proper taxation to fruition.

B. Exemptions from the Retail Sales and Use Tax

States have created statutory exemptions from tax to determine which purchases are for consumption and which are business inputs. Broadly speaking, there are two exemptions: (1) the sale for resale exemption (the “SFR exemption”), and (2) the component ingredients exemption.⁶¹ In the context of a promotional item at a sporting event, the SFR exemption is most relevant. Currently, business purchases are taxed unless they qualify for an exemption, and states have been “very restrictive in determining which goods are eligible for exempt purchase” to avoid an erosion of the tax base through abuse.⁶² While no state has enacted a theoretically pure consumption tax on retail sales, these exemptions are “designed to achieve its underlying theoretical [purpose]” of focusing on the final consumer.⁶³

In most cases, the SFR exemption is contained in statutory language authorizing the imposition of the sales tax; often, it authorizes taxing of “sales for use or consumption *and not for resale*.”⁶⁴ In other words, a tax can be imposed on purchases that are not purchased to be resold to consumers; such purchases are exempt from taxation. Baseball teams argue that their purchase of promotional items is done for a later resale to fans, meaning the SFR exemption should apply, but states have rejected

61. DUE & MIKESSELL, *supra* note 34, at 51. Note that there is a fundamental difference between an exclusion and an exemption—the former refers to an item that is not a part of the tax base, while the latter that a state chooses to apply no taxes to. *Id.* However, because courts have referred to the exclusions herein in both an exclusion and exemption, I use exemption to refer to either.

62. Zodrow, *supra* note 44, at 432. One can assume that as states dealt with the effects of the Great Recession, this became more pronounced. However, a majority of states have recovered from those effects, suggesting that tax authorities have less justification for a restrictive interpretation of the exceptions. Barb Rosewicz & Daniel Newman, *Decade After Recession Began, Tax Revenue Higher in 34 States*, PEW CHARITABLE TRS. (May 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/02/decade-after-recession-began-tax-revenue-higher-in-34-states>.

63. STATE TAXATION, *supra* note 33, at § 12.01.

64. DUE & MIKESSELL, *supra* note 34, at 51.

this position. On the surface, this may not make sense—most fans believe they are getting the item for free. But in the realm of tax, “resale” is a broad concept.⁶⁵

To fully understand the why the SFR exemption applies to items that are free, we will consider two separate cases addressing the matter. First, *In the Matter of Rock-Ola Café*, a North Carolina court considered if snacks and matches offered free of charge to restaurant patrons were purchased for resale.⁶⁶ The court acknowledged that the individuals consuming the free items were likely not the patrons purchasing food, but still held that the SFR exemption applied. Commentators have pointed out multiple factors leading to that decision, including (1) the free items were offered to customers purchasing drinks at the bar, and (2) the cost of the free items were included in the overall price of food and beverages sold to customers.⁶⁷ As will be seen below, this is similar to the reasoning applied in exempting bobbleheads from tax. Note, however, that not every state agrees with this reasoning—when faced with almost identical facts, Colorado denied the SFR exemption.⁶⁸

Second, *McDonald’s Restaurants of Massachusetts, Inc. v. Commissioner of Revenue*, a Massachusetts case considering if toys included in Happy Meals were resold to customers or consumed by individual restaurants.⁶⁹ The Board of Appeals found that the promotional items were not simply used to induce the purchase of Happy Meals, but were an integral part of the transaction. The board looked at the dominant purpose of the transaction to make the determination, finding that the planning, marketing, and advertising surrounding the toys “established that the Happy Meal Toys were intended to be, and were, a popular commodity with intrinsic value to the customers of McDonald’s and its franchisees.”⁷⁰ Because the toys had intrinsic value to customers—thereby increasing the value of the meal to customers—the board found that the toys were resold and the SFR exemption applied.

65. See Claudia L. Kelley & Randal K. Edwards, *Giveaways Sometimes Get Away Without Sales Tax*, 58 TAX’N FOR ACCT. 169 (1997).

66. *In the Matter of Rock-Ola Café*, 433 S.E.2d 236 (1993).

67. Kelley & Edwards, *supra* note 65, at 170.

68. *Broadmoor Hotel, Inc. v. Dep’t of Revenue, State of Colo.*, 773 P.2d 627 (Colo. App. 1989) (finding that purchase of snacks was merely incidental to the ultimate use of the item, promoting the bar service within the hotel).

69. *McDonald’s Rests. of Mass., Inc. v. Comm’r of Revenue*, No. C262528, 2005 WL 941510 (Apr. 22, 2005).

70. *Id.* at 8.

Combined, these decisions show that the SFR exemption can apply in situations that may not appear as a resale at first blush, including where items are ostensibly given away for free. As we turn now to see how these principles have been applied in prior cases involving bobbleheads or other promotional items, it is important to remember that every state has its own unique tax law governing the SFR exemption. Indeed, a comprehensive analysis of how the eighteen states and two countries with an MLB team would address the taxation of bobbleheads is beyond the scope of this Comment.

IV. THE EXISTING CASES

In the past, multiple states sought to impose a use tax against baseball teams for the promotional items they use to boost attendance. Four states have taken the disputes to litigation, while others have been settled out-of-court.⁷¹ Each of the cases stems from similar facts: a baseball team purchased promotional items, including bobbleheads, and then did not pay sales taxes on that purchase. When a later audit by the state alleged a deficit in taxes paid, the state imposed a use tax. The teams all argued that the items were purchased for resale, making them exempt from any sales or use tax. Of the four cases, two did not impose the SFR exemption, while two did. I will first briefly discuss the cases that allowed the exemption to apply, as they are discussed in greater detail later. I will then turn my focus to the cases where the tax was imposed. Each case will be summarized in Table 1 at the close of the section.

A. *The Cincinnati Reds (2018)*

The Reds argued that a resale occurred because fans provided consideration by purchasing tickets and attending games in exchange for a promise by the Reds to receive a unique promotional item.⁷² The Board of Tax Appeals originally upheld the imposition of tax because fans did not pay more to attend a game with a promotion than a game without.⁷³ The Ohio Supreme Court disagreed, holding that ticket prices, set before the season, were meant to “cover the cost of promotional items along with other overhead associated with holding them as inventory and distributing

71. For example, one attorney represented a baseball team in Chicago against a use tax for promotional items. Eventually that was won based on an old ruling based on party favors. This was learned via personal conversation, as no public records of the settlement exist.

72. *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1182 (Ohio 2018).

73. *Id.* at 1182, citing BTA No. 2015-1707, 2017 WL 2324085, *2 (May 22, 2017).

them.”⁷⁴ The price of games with no promotion reflected this cost, in part, because the Reds “smoothed” ticket prices across games. Thus, “by including the cost of the promotional item in the ticket price, one portion of the ticket price accounts for the right to attend the less desirable game, and a separate portion of the ticket price accounts for the right to receive the promotional item.”⁷⁵ Because consideration changed hands, a resale occurred and the SFR exemption applied.

Importantly, the Court distinguished the items in question, which had been advertised to fans well in advance of gameday, from “unexpected, gratuitous items” like a foul ball or a t-shirt caught between innings.⁷⁶ In such a case, “the fan had no expectation of receiving the item and did not purchase a ticket under the assumption that the item would be provided by the team.”⁷⁷ This illustrates that in Ohio, the expectation of the fan at the time the ticket was purchased governs whether or not an item should qualify for the SFR exemption.⁷⁸

B. Kansas City Royals (2000)

The Royals’ case is largely similar to the Reds’ case, with a few notable exceptions. Under Missouri law, the SFR exemption applies if “there has been (1) a transfer, barter, or exchange (2) of the title or ownership of tangible personal property or the right to use, store, or consume the same (3) for consideration paid.”⁷⁹ The first two elements of the test are easily satisfied when a bobblehead or other promotional item is *transferred* from a team to *the possession of the fan*. Thus, only the consideration element remains. The court seems to have adopted the “smoothing ticket prices” argument, as it held that “[a]lthough the promotional items are ostensibly given away, the cost of purchasing those items is factored into the price charged for *each* ticket of admission to a Royals game. This is sufficient consideration to find that a resale has occurred.”⁸⁰ Thus, the SFR exemption applied, relieving the Royals of their use tax liability.

74. *Id.* at 1181.

75. *Id.* at 1184.

76. *Id.*

77. *Id.*

78. This decision—particularly the first paragraphs—are worth a read for any baseball fan: it is a judicial love letter to baseball in Ohio and chock full of great references.

79. *Kan. City Royals Baseball Corp. v. Dir. of Revenue*, 32 S.W.3d 560, 562 (Mo. 2000).

80. *Id.* at 563.

However, the court went a step further, stating that the SFR exemption would still apply in at least two situations: (1) not every paying attendee receives a promotional item, and (2) if sponsors have paid to have their logo placed on the promotional items.⁸¹ So long as the three statutory elements required to constitute a resale are met, these situations would not alter the decision. In stating these expansions, the court acknowledged that there must still be a “direct connection between the ticket price charged to paid attendees who received the promotional items and the promotional items themselves” for the SFR exemption to apply.⁸²

C. *Milwaukee Brewers (1983)*

The Brewers lost their case and were assessed over \$242,000 in additional use taxes for their promotional items. Along the way, the team made three discrete arguments to avoid taxation.

First, the team argued that “because the promotional items are tied to the price of admission, they are being sold at the retail level and are, therefore, already subject to the sales tax.”⁸³ This argument would, in effect, prevent any use tax from being assessed on the promotional items. However, in Wisconsin, admission to a baseball game was taxed as a service, and according to state law, “no part of the charge for the service may be deemed a sale or rental of tangible personal property.”⁸⁴ Thus, the court held that under the plain meaning of state law, a promotional item cannot be deemed sold at a baseball game, thereby making the SFR exemption inapplicable.

The court had the opportunity to rely on precedent that consumption sufficient to trigger a use tax was “the final and ultimate employment of the property which results in its withdrawal from the marketplace of goods and services.”⁸⁵ Under this view, a fan enjoying a bobblehead at their home was the “ultimate employment of the property,” meaning the Brewers should not be taxed. However, the court was confined by the statutory framework—because a baseball ticket was taxed as a service, items transferred in connection with that service could not be considered resold.

81. *Id.*

82. *Id.*

83. Wis. Dep’t of Revenue v. Milwaukee Brewers Baseball Club, 331 N.W.2d 383, 386 (Wis. 1983).

84. Wis. Stat. Ann. § 77.51(24) (West 1975).

85. *Milwaukee Brewers Baseball Club*, 331 N.W.2d at 387 (quoting Dep’t. of Revenue v. Milwaukee Refining Corp., 257 N.W.2d 855 (1977)).

Second, the Brewers argued that a specific statute denying the SFR exemption to items transferred without valuable consideration, including “advertising specialties distributed gratis apart from the sale of other tangible personal property or service,” did not apply to their purchased promotional items. The club argued that the statute applied only to *true* giveaways, such as free calendars, pens, or other items given away with no connection to the purchase of a ticket. However, the court disagreed with the attempted negative implication by the Brewers, holding that “a person who acquires property to give it away is a user or consumer as opposed to a reseller, and is liable for the use tax.”⁸⁶ Thus, the Brewers were the final consumer and were still liable for the tax.

Third, the final argument advanced by the Brewers was that a baseball game is a product. Under a Wisconsin administrative decision,⁸⁷ a free “premium” given “when that customer purchases another product which is subject to the sales tax” is treated as a part of the sale and qualifies for the SFR exemption.⁸⁸ The court was unmoved, holding that the items were given away to fans, not sold in a “two-for-one” sale.⁸⁹ “The fact that the promotional items were given only to fans of a certain age who had to use their tickets to gain admission to the game and who did not pay more than the usual admission charge makes the gratuitous nature of the transfer even more apparent.”⁹⁰ While this may not be the ideal result, the decision relies on logic and sound statutory construction.

D. *Minnesota Twins (1998)*

This case involves approximately \$31,000 of use tax and serves as the inverse of the Reds’ case.⁹¹ Here, the court considered the use tax imposed on both promotional items and the special paper on which tickets were printed;⁹² concerning the promotional items, the court denied the SFR exemption because “game attendees did not pay consideration to

86. *Id.* at 386.

87. *Id.* (quoting Wis. Technical Info. Memorandum S-52.1 (TIM)).

88. *Id.* at 387.

89. *Id.*

90. *Id.*

91. *Minn. Twins P’ship v. Comm’r of Revenue*, 587 N.W.2d 287, 288 (Minn. 1998).

92. Ultimately, the court denied the cardboard that tickets to games were printed on from qualifying for the SFR exemption in a manner similar to the Brewers’ case, via strict construction of prior holdings: “supplies purchased and used for the ‘sole purpose of providing services’ are ultimately used by the service provider, and thus it is the service provider who is responsible for sales or use tax on the items.” *Id.* at 289.

receive the novelty items.”⁹³ The court’s reasoning to support this conclusion was, at best, interesting.

Contrary to the Reds’ and Royals’ cases, the court focused on the fact that “not all attendees received a novelty item, and those who did receive novelty items paid no more consideration for admission to the game than those who did not receive the novelty items.”⁹⁴ Instead, the court chose to construe them as “free tokens of goodwill.”⁹⁵ Although goodwill is incurred when the promotional items are given,⁹⁶ the team is more focused on increasing attendance than popularity.

Most interestingly, the way that the Twins approached their payment for the items seemed to weigh heavily on the court.

[T]he Twins deducted . . . the novelty items . . . as expenses on its federal and Minnesota income tax returns. Other businesses sometimes paid money to the Twins in order to co-sponsor distribution of novelty items. The Twins accounted for money received from co-sponsors as income from advertising revenue. The cost of the novelty items was charged to the ‘Sales and Marketing Expenses — Game Day’ account,⁹⁷ rather than the ‘inventory’ account that the Twins use for items sold individually at retail, such as souvenirs.⁹⁸

To the court, this accounting practice suggested that the items were simply a gift.⁹⁹ It is unclear what the court would have the Twins do differently to change the result, however. This reasoning seems untenable; all a Major League Baseball team would need to do to avoid a use tax is change their accounting procedure. Of the four cases decided on this matter, this case appears to be the harshest and the most poorly reasoned. Indeed, it serves as an example of strict formalism in the interpretation of tax statutes.¹⁰⁰

93. *Id.*

94. *Id.* at 290.

95. *Id.*

96. Cialdini, *supra* note 30.

97. Interestingly, the Brewers covered the expenses of promotional items from a general revenue fund, not a specific fund, but the court was unmoved. *Kan. City Royals Baseball Corp. v. Dir. of Revenue*, 32 S.W.3d 560, 561-62 (Mo. 2000).

98. *Minn. Twins P’ship v. Comm’r of Revenue*, 587 N.W.2d 287, 288 (Minn. 1998).

99. *Id.* at 290 (“Thus, the Twins’ own accounting of the novelty items is consistent with our interpretation of the intended use of the items.”). This overlooks the fact that the very purpose of marketing is to increase attendance. All these facts clearly show that the team was trying to induce more fans to coming, not that a gift occurred.

100. *See, e.g., Entin, supra* note 15.

Table 1. Summary of the Bobblehead Cases		
<i>Case</i>	<i>Holding</i>	<i>Reasoning</i>
Reds	SFR exemption applies	Cost of promotional items built into all ticket prices; consideration exchanged.
Royals	SFR exemption applies	Cost of promotional items built into all ticket prices; consideration exchanged. Not all fans need to receive item for SFR to apply. Third party payment does not change analysis. Must be direct connection between promotional item and ticket price for SFR to apply.
Brewers	No exemption, taxed	Baseball is a service, and SFR does not apply to services when tangible property is given away in connection.
Twins	No exemption, taxed	Promotional items are a gift because no extra consideration paid by fans. Accounting of team indicates intent to resale.

V. THE CORRECT DECISION

With courts split evenly on the issue of whether bobblehead promotions should give rise to tax liability, there are justifications for and against imposing a tax. Arguably, the cases in favor of imposing a tax reached that result only because the statutory scheme mandated it—not because it was good tax theory. This is unsurprising, as ordinary judges are typically neither tax experts nor economists. Additionally, it has been suggested that the results favoring taxation are the result of a heavy reliance on formalism by judges instead of a focus on the economic realities of what is occurring.¹⁰¹ Stripping away the various statutory

101. *Id.* See also *Cincinnati Reds L.L.C. v. Testa*, 122 N.E.3d 1178, 1182 (Ohio 2018) (discussing fans belief that the bobblehead is a part of their purchase price, meaning it is being resold if the court focuses on economic realities).

schemes and focusing on the reality of the situation, we must answer the basic question—*should* a baseball team (or, for that matter, any sports franchise employing promotional marketing) be subject to tax?

I focus on three arguments in support of applying the SFR exemption. First, I consider the economics of the transaction. This will reveal that while teams advertise that the bobbleheads are free, there is an actual cost paid for the items. Additionally, the bobblehead or other promotional item is a valuable part of the transaction to both parties. Second, I consider if a team or a fan is the consumer of a bobblehead. This will involve consideration of what constitutes a consumer and consumption, relying on the intent of both parties to the transaction. Finally, we will consider the long history of deference provided to baseball by legal entities (both state and federal) to preserve “America’s Pastime.” I argue that, beyond the dictation of tax policy, public policy favors exempting teams from a tax on bobbleheads.

A. *There Ain’t No Such Thing as a Free Lunch (TANSTAAFL)*

Once merely an idea of science fiction,¹⁰² economists adopted the phrase “there ain’t no such thing as a free lunch” to describe the idea that nothing is free.¹⁰³ This concept has been described as a “fundamental [truth] about human behavior and the natural world that we ignore at our peril . . . as basic as the laws of gravity or humanity’s susceptibility to sin.”¹⁰⁴ This section illustrates that, despite the fact a fan does not nominally pay for a bobblehead, any promotional item given to a fan is not *free*, but rather is something for which the fan *pays* for via valuable consideration. Sports commentators have recognized this fact, making it the subject of discussion and cartoons.¹⁰⁵ Because a resale occurs, the baseball team cannot be the final consumer, and the SFR exemption should apply.

102. See Andrew P. Morriss, *The Necessity of Economics: The Preferential Option for the Poor, Markets, and Environmental Law*, 5 U. ST. THOMAS L.J. 183, 186 (2008).

103. Perhaps the most recognizable economist to do so is Milton Friedman, who used the phrase as the title of a book released in 1975. However, some economists were using the phrase as early as 1949. Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV. 327, 378 n.40 (2016).

104. Morriss, *supra* note 102, at 185.

105. E.g., Tom Hoffarth, *Do Dodgers, Angels Fans Know Giveaways Are Actually Takeaways?*, L.A. DAILY NEWS (last updated Aug. 28, 2017), <https://www.dailynews.com/2016/05/06/hoffarth-do-dodgers-angels-fans-know-giveaways-are-actually-takeaways/>.

Economics assumes that individuals, and entities like baseball teams, act rationally, or “in their best interest as they perceive it.”¹⁰⁶ For the ownership of a baseball team, their best interest, outside of winning a World Series (something controlled by luck),¹⁰⁷ is increasing revenue to generate profits for ownership and grow the value of the franchise. This happens, in part, as more fans attend games. Promotional items are specifically given away with the intent of increasing attendance.¹⁰⁸ It would not serve the best interests of a team to simply give away an item if it did not lead to profit for them.¹⁰⁹ Thus, distributing promotional items is an economically rational objective.

A team can increase attendance in two economically interchangeable ways: discounting tickets or including a promotional item. Essential to understanding why these different approaches reach the same result is the concept of a reservation price.¹¹⁰ The reservation price is the maximum amount that a consumer is willing to pay for a good or service—here, the most a fan is willing to pay to attend a given baseball game. It would be irrational for a fan to spend more to attend a baseball game than their own reservation price. Not surprisingly, this price can vary based on a variety of factors, including the quality of opponent, home team performance, stakes of the game (i.e., a playoff game will be worth more to fans than a regular season game), likelihood of winning, weather, time, personal demands, etc. When a team believes its fans have a low reservation price, it can add value to a game via a promotional item to justify the standard ticket price.¹¹¹ Alternatively, a team could recognize that fans had a lower reservation price and lower the cost of a ticket to account for that change.

Based on this understanding, we can demonstrate why the two different approaches suggested here would reach the same result using basic math. The price that a rational fan would pay for a baseball ticket during a promotional giveaway is represented as follows:

$$(1) \text{ Price Paid} \leq \text{RP} + \text{PV}$$

RP represents the reservation price, while PV represents the value assigned to the promotional item by the fan. Price paid represents the cost of the

106. Lawrence E. Blume & David Easley, *Rationality*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (3d. ed. 2018).

107. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* 274 (2004).

108. See *supra* section II.

109. *Supra* note 24 and accompanying text (noting \$110,000 cost for one promotion alone).

110. See Ian Steedman, *Reservation Price and Reservation Demand*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (3d. ed. 2018).

111. See *supra* section II.

ticket. If $RP + PV$ does not equal or exceed the cost of the ticket, the fan will not make the purchase. Alternatively, a discount on tickets in lieu of a promotion is represented as follows:

$$(2) \text{ Price Paid} \leq FV - (FV - RP)$$

FV represents the face value of a ticket. In effect, $FV - RP$ is the same as PV. Thus, a fan will not purchase a ticket unless the price they pay is discounted by at least as much as the difference between face value and reservation price.

To consider how this operates, imagine that a fan is willing to pay \$15 to attend a game against a lower quality opponent—their reservation price. However, the team charges \$20 for every game. Without something to change the calculus, a rational fan will not choose to attend. Thus, if a bobblehead were added, we can easily determine how it may affect attendance:

$$(1) \$20 \leq \$15 + PV$$

Based on this equation, any fan that believes that a bobblehead was worth \$5 or more would view the cost of attending the game as a rational choice and would be likely to purchase tickets. In the alternate, a team could respond by adjusting the price to a game to address the drop in reservation price for a low-quality opponent. Assuming the same regular ticket price of \$20, we would expect the following:

$$(2) \text{ Price Paid} \leq \$20 - (\$20 - \$15)$$

This leads to the conclusion that the same fan will purchase a ticket if it is discounted by \$5 or more. Stated another way, if a fan valued a bobblehead at \$5 and was provided the choice between (i) a \$15 ticket or (ii) a \$20 ticket with a bobblehead, they would be indifferent between the two choices. In such a case, the bobblehead would have an actual value (\$5) that is built into the price paid for the ticket.

By including a bobblehead or other promotional item to account for the diminished reservation price of fans, a baseball team is providing an item in exchange for value (the \$5 from above), consideration that constitutes a resale of the promotional item. This consideration, however, is not readily apparent to the fan when they purchase a ticket to a game with a promotion. The reason is that the price of the items is built into *all* ticket prices when they are originally set. As the Ohio Supreme Court stated, “the price of tickets to a particular game does not specifically reflect the items distributed at that game; the [teams] try to . . . smooth the ticket prices throughout the year.”¹¹² While this may appear unfair to fans that

112. Cincinnati Reds, L.L.C. v. Testa, 122 N.E.3d 1178, 1181 (Ohio 2000).

attend games without bobbleheads, this decision is based in simple business reasoning. “In setting ticket prices, the corporation considers all of the costs associated with its operations. For this reason, the ticket prices do not vary from game to game, although expenses, such as the cost of promotional items, do vary.”¹¹³ Presumably, ticket prices also account for promotions to be added throughout the course of a season.¹¹⁴

The Reds argued that the cost of their promotional items was built-in to the ticket price of every game. The court approved of the argument, stating that

*[R]ather than offering discounted ticket prices to these less desirable games, it stands to reason that by including the cost of the promotional item in the ticket price, one portion of the ticket price accounts for the right to attend the less desirable game and a separate portion of the ticket price accounts for the right to receive the promotional item. Based on this record, we accordingly conclude that the promotional items constituted things of value in exchange for which fans paid money that was included in the ticket prices.*¹¹⁵

Put simply, the Ohio Supreme Court recognized the economics of the transaction and found that consideration was provided because a bobblehead was given instead of a discount. “[T]he fans furnished consideration for the Reds’ promise to hand out these types of promotional items at the games.”¹¹⁶ Because Ohio law states that a sale is completed when a transaction is for “consideration in any manner,”¹¹⁷ the court found that a simple transaction occurred and applied the SFR exemption.

113. Kan. City Royals Baseball Corp. v. Dir. of Revenue, 32 S.W.3d 560, 562 (Mo. 2000).

114. Many teams add promotions as the season progresses; almost certainly, these contingent costs are accounted for when setting the ticket prices. For example, the Baltimore Orioles announced four additional promotional nights to their promotional schedule on Mar. 20, 2019—the first day of the season. Jared Watson, *Orioles Announce Four Additional Promotions for the 2019 Season*, MARYLAND SPORTS BLOG (Mar. 20, 2019), <http://marylandsportsblog.com/orioles-announce-four-additional-promotions-for-the-2019-season/>.

115. *Cincinnati Reds, L.L.C.*, 122 N.E.3d at 1184 (emphasis added). Note that in the Brewers’ case, the court also addressed this reasoning. There, it discussed the example of a retailer giving away a bike with every new TV purchase in order “to attract attention” rather than reducing the price of a TV set, finding there would be no tax on the bicycle. Wis. Dep’t of Revenue v. Milwaukee Brewers Baseball Club, 331 N.W.2d 383, 387 (Wis. 1983). However, the court disagreed that a bobblehead giveaway was the same thing due to baseball’s definition as a service in Wisconsin. *Id.*

116. *Cincinnati Reds, L.L.C.*, 122 N.E.3d at 1185.

117. Ohio Rev. Code Ann. § 5739.01 (West).

Similarly, when examining if a sale occurred, the Missouri Supreme Court determined the only real issue was if consideration had passed hands. It held that

[a]lthough the promotional items are ostensibly given away, the cost of purchasing those items is factored into the price charged for each ticket of admission to a Royals game. This is sufficient consideration to find that a resale has occurred and that the corporation, therefore, owes no use tax on the promotional items.¹¹⁸

The important distinction here is that, in the eyes of the Missouri Court, it did not matter if the fan thought they were providing consideration for the bobblehead. Rather, because it was simply built into the ticket price, the exchange of consideration occurred. This broad concept of consideration was taken further when the court held that “[i]t does not matter that not every paying attendee receives a promotional item.”¹¹⁹ The price of admission included the value of the bobblehead, again correctly reflecting the economics of the transaction, and the SFR exemption applied.

Even the Brewers’ case, which denied the SFR exemption, acknowledged the economics of promotional items. The Wisconsin Supreme Court used a confusing example (bikes being given away with TVs sold to generate customer interest instead of discounts on TVs) before accepting the premise that a discount and a giveaway are economically the same.¹²⁰ However, Wisconsin law classifies baseball as a service,¹²¹ and “no part of the charge for the service may be deemed a sale or rental of tangible personal property.”¹²² The court was bound by statute to deny the SFR exemption, but it acknowledged that a promotional item given away for “free” actually does carry real economic value.

In sharp contrast, the Minnesota Supreme Court ignored the economics of the transaction and applied a rigid and formalistic concept of consideration. In denying the SFR exemption, the court relied on the fact that fans did not pay a separate charge for promotional items—never considering that the price could be reflected in the overall pricing.¹²³

118. *Kan. City Royals Baseball Corp.*, 32 S.W.3d at 563.

119. *Id.* at 663.

120. *Milwaukee Brewers Baseball Club*, 331 N.W.2d at 387.

121. This classification is still valid today. Wis. Stat. Ann. § 77.52(2)(a)(2)(a) (West) (2018).

122. Wis. Stat. Ann. § 77.51(24) (West) (1975).

123. *Minnesota Twins P’ship v. Comm’r of Revenue*, 587 N.W.2d 287, 290 (“At many games, not all attendees received a novelty item, and those who did receive novelty items paid no more consideration for admission to the game than those who did not receive the novelty items.”).

Instead, the promotional items were construed as “free tokens of goodwill” that were distributed as “part of the service of admission to the baseball games.”¹²⁴ Somewhat ironically, the court made this decision by citing another case involving promotional items—which stated that “on tax questions a court is free to look to the substance, not just the form, of a transaction.”¹²⁵ The court failed to do so here, and incorrectly denied the SFR exemption by overlooking the economics of promotional items.

So where does this leave the economics of the bobblehead? A court cannot afford to ignore the basic economics of a transaction. This is true in preventing the avoidance of a tax,¹²⁶ and there is no reason it should not be true in the assessment of a tax, as well. Basic economic principles clearly state that the cost of admission includes consideration for the promotional item included. Because consideration is changing hands, a sale is occurring—meaning that the fan, not the consumer, is the final consumer of a bobblehead. As a result, under generally applicable principles of tax law, the SFR exemption should apply.

There are some limitations to this conclusion. It does not account for “free” items that are unexpected (i.e. unadvertised items like a growl towel or a caught home run ball), where use tax should be imposed.¹²⁷ Nor does it include certain promotional packages, where fans choose to pay an additional fee to obtain a specific item not given to all fans, in addition to their full-price admission ticket, where a clear resale occurs and the SFR exemption should apply.¹²⁸ Finally, courts and practitioners should avoid focusing their attention on how a team paid for or acquired the

124. *Id.* Because baseball is viewed as a service in Minnesota, other issues arise, such as the applicability of the true object test. Additionally, it could be subject to bundled transaction rules under the SSUTA. However, such analysis is beyond the scope of this comment.

125. *Midwest Fed. Sav. & Loan Ass’n. v. Comm’r of Revenue*, 259 N.W.2d 596, 599 (Minn. 1977).

126. Those familiar with basic principles of income taxation will recognize the Substance Over Form Doctrine. It states, generally, that courts should look to the economic substance of a transaction to determine how to apply a given tax statute when tax avoidance may be suspected.

127. As the Reds’ court noted, “[T]he promotional items at issue in this case are distinct from unexpected, gratuitous items that fans might receive when attending a game. For instance, a fan might catch and bring home a foul ball hit by a player or a t-shirt tossed into the stands. In these instances, the fan had no expectation of receiving the item and did not purchase a ticket under the assumption that the item would be provided by the team.” *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1184 (Ohio 2018).

128. The Texas Rangers, for example, call these promotions “theme nights.” They tell fans that “[i]n order to receive these giveaways, you MUST purchase your tickets through this special Theme Nights page.” *Theme Nights*, MLB.COM, <https://www.mlb.com/rangers/tickets/specials>.

bobbleheads, but on the transaction with individual fans instead.¹²⁹ Otherwise, teams will be encouraged to make small accounting and business changes to avoid tax, an unnecessary distortion in corporate behavior.

B. Tax Theory Dictates That Fans—Not Teams—Are the Final Consumers of Promotional Items

As previously discussed, the SFR exemption should apply to any purchase of personal property made by an entity that is not the final consumer. This section will discuss what is meant by “consumer” and “consumption.” In light of that discussion, I argue that a baseball team can never be considered the final consumer of promotional items, particularly bobbleheads. Because the team is not the final consumer, tax theory dictates that the SFR exemption should always apply to the purchase of promotional items.

The definitions of key tax terms demonstrate that a recipient’s intent when obtaining an item generally controls the classification of the purchase. A consumer is “the ultimate user... who will make use of the product purchased as long as it lasts or until he desires to do away with it.”¹³⁰ Use has been defined as “a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional.”¹³¹ Importantly, “state statutes generally define use, storage, and consumption in sweeping terms for use tax purposes.”¹³² Many states require that the item must be “personal property” or “tangible personal property” (i.e., not real property). The Streamlined Sales and Use Tax Agreement defines personal property as “personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses.”¹³³

129. Namely, this addresses the concerns of the older Twins’ and Brewers’ cases, where both courts focused on the accounting practices of the firm to deny the SFR exemption. This overlooks the notion that tax should be based on the substance of what occurs.

130. *What Amounts to a Sale at Resale Within Tax Statutes or Ordinances*, 139 A.L.R. 372 § 1.a (1942, 2018).

131. *Id.*

132. STATE TAXATION, *supra* note 33, at § 16.02 (collecting state definitions).

133. Streamlined Sales and Use Tax Agreement (SSUTA), p. 101 (last updated Dec. 14, 2018).

As an initial matter, a bobblehead or other promotional item is clearly personal property—it can be seen, touched, felt, and weighed.¹³⁴ Control of the promotional item passes from the team to the fan upon exercise of the right to enter the game, allowing them to make use of the item. Yet courts have reached divergent decisions on imposing a tax because of differing views on what the intended use of a bobblehead or promotional item might be.¹³⁵ Courts that impose the tax are more likely to focus on the team’s purpose for the item, with bobbleheads “consumed” by the team as they attempt to induce higher attendance.¹³⁶ Courts that do not impose a tax, however, acknowledge that a promotional item carries its own value to a fan, either as a collectible item or as memorabilia.¹³⁷ I will address these possible uses in turn.

1. The Team Focused View—Inducing Attendance

Baseball teams have clearly acknowledged that the purpose of bobbleheads is to increase attendance.¹³⁸ The marked increase in attendance on promotional days demonstrates that, to fans, the promotional item is important enough to draw them out to a less-desirable, three-hour sporting event. Some may argue that the “purpose for which the bobblehead is adapted,” upon which the concept of use hinges, is simply generating higher attendance. This would make teams the final consumers and deny them the SFR exemption. However, the circumstances surrounding each bobblehead exchange shows this view is incorrect.

There are many similarities between arguing that the SFR exemption should not apply because a team only wants to increase attendance and the argument advanced by Massachusetts in *McDonald’s Restaurants of Massachusetts*, discussed above. As a reminder, the decisive factor in

134. Admittedly, however, this could become unclear in the future. The Los Angeles Dodgers held the first-ever “Crypto-Bobblehead” giveaway, providing fans the opportunity to add a digital bobblehead to their crypto wallet. Toto & Hales, *supra* note 22 and accompanying text. However, it would seem that the digital bobblehead is something that can be seen and is “perceptible to the senses” – bringing it within the SSUTA definition of personal property.

135. See generally section IV, *supra*.

136. *Id.*

137. *Id.*

138. *E.g.*, *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1181 (Ohio 2018). (“The Reds’ chief financial officer . . . testified that the purpose of distributing promotional items is to drive ticket revenue at games that would otherwise be attended by fewer fans.”); Rovell, *supra* note 19.

exempting Happy Meal toys from taxation was that the toys had an intrinsic value to customers that made their purchase more valuable in their eyes. The state argued that the toys were an *ancillary giveaway* to induce a purchase, but the board of appeals held that the toys were an *integral component* of the transaction and applied of the SFR exemption. Two specific similarities between bobbleheads and Happy Meal toys support finding that a bobblehead is an integral component of the transaction.

First, baseball teams, similarly to McDonald's, engage in significant TV, digital, radio, and print advertising to build excitement for their promotional items. This is designed to show consumers that the item has value and generates willingness to purchase tickets. These promotional items are often planned out far in advance to ensure enough time is available to advertise the item. For example, a legal dispute between the Los Angeles Dodgers and its bobblehead provider revealed that the team was accepting delivery for a planned 2019 bobblehead giveaway in early December 2018, three months before the season started.¹³⁹ This time frame indicates a team is planning its promotions strategically; such an approach allows the team to maximize the perceived value of items via advertising. This is similar to the approach taken in advertising Happy Meal toys.

Second, as the economic discussion identified above, a bobblehead has an actual value to fans that can be measured. The more advertising surrounding a promotional item, the more likely that the item has a higher value to fans, as in *McDonald's*. Thus, in the baseball context, including a promotional item increases the overall value of attending a game to meet or exceed a fan's reservation price, enabling them to purchase a ticket while still acting rationally. Like a Happy Meal toy, a bobblehead adds independent value to the transaction rather than merely inducing a purchase. As a result, a team does not "consume" a bobblehead as a marketing expense, and, as in *McDonald's*, the SFR exemption should apply.

Additional support for applying the SFR exemption under a team focused view comes from considering the economic realities of promotional items. A team intends its promotional items, such as a t-shirt, to be used as a comparable product would be on the open market. When a promotional item is actually used (e.g., a shirt is actually worn), a baseball team is able to generate additional revenue by selling sponsorship of the

139. Exhibit A to Complaint, *L.A. Dodgers L.L.C. v. Plan P2 Promotions L.L.C.*, Docket No. 19STCV11225 (Cal. App. Dep't. Super. Ct. Apr. 2, 2019).

items (i.e., a company covers partial costs of the promotional item in exchange for having their logo printed on the item as advertising). Consider the 2018 Promotional Schedule for the Tampa Bay Rays: it includes a tropical shirt (sponsored by Hooters), a photo viewer (sponsored by Sagicor Life Insurance Company), and a Carl Crawford bobblehead (sponsored by DEX Imaging), among others.¹⁴⁰ One of the team's selling points is therefore that the item will actually be used—providing sponsors with exposure whenever a shirt, a photo viewer, or bobblehead is used.¹⁴¹ In this way, the promotional item is not simply a method to increase attendance, but a vehicle for generating independent revenue.¹⁴²

The role of these sponsorships is crucial. The cost of one order of bobbleheads can exceed \$100,000.¹⁴³ It is fully possible that additional ticket revenue does not surpass this mark; in such a case, the use of sponsors makes the transaction profitable.¹⁴⁴ This naturally supports the conclusion that from the team's perspective, the "purpose for which [the promotional item] is adapted" is two-fold: (1) increasing attendance and (2) providing a usable item to generate revenue through corporate sponsorships. Indeed, use by fans is key; in an ancillary giveaway meant to merely increase attendance, the team would be indifferent to what fans would do with the item after they purchased their ticket. Thus, baseball teams cannot be the consumers of the item, as how a fan uses (i.e., consumes) the item is integral to the business strategy behind the promotion. Because the intended use of promotional items includes adding independent value and providing sponsorship opportunities through usable items, a baseball team is not the consumer of the promotional items and the SFR exemption should apply.

140. *Rays Announce 2018 Promotional Schedule*, MLB.COM (Feb. 8, 2018), <https://www.mlb.com/rays/news/rays-announce-2018-promotional-schedule/c-266113426>.

141. *Kan. City Royals Baseball Corp. v. Dir. of Revenue*, 32 S.W.3d 560, 563 (Mo. 2000) ("Nor does it matter that sponsors sometimes pay the corporation to have their logos displayed on promotional items; the occasional payment by sponsors does not defeat the fact that the [SFR exemption] requirements have been met.")

142. The fact that a third-party may help to finance the promotional items has no bearing on the analysis of if the SFR exemption applies. *Id.*

143. Exhibit A to Complaint, *L.A. Dodgers L.L.C.*, Docket No. 19STCV11225.

144. For example, if these fans all purchased tickets in the "cheap seats" at a hypothetical cost of \$15, there would be a total of \$105,000 in extra revenue. This would not cover the cost of the transaction, \$110,000 plus marketing costs.

2. The Fan Focused View—Collectible Items

The analysis from the perspective of a fan is much more direct. The SFR exemption applies if a business purchases an item but disposes of it in such a way that another engages in “a long-continued possession and employment of [that item].” Fans seek out promotional items for various reasons, ranging from collecting them to obtaining items with everyday use. Often, specialty bobbleheads¹⁴⁵ are available on secondary markets like eBay for prices exceeding the cost of a ticket. The very existence of secondary markets for promotional items demonstrates that fans intend to possess, employ, and enjoy promotional items in a way that an ordinary person would imagine, as a collectible item or otherwise. Fans are much better positioned to put a beach towel to its intended use than the abstract business entity of a baseball team. Indeed, the fan, not the team, is the “ultimate user or consumer who will make use of the [promotional item] as long as it lasts.”¹⁴⁶ As such, fans are the final consumer, leaving no theoretical ground upon which imposing a consumption tax on a baseball team for bobbleheads would make sense, and the SFR exemption should apply.

C. *The United States Has a Long History of Protecting America’s Pastime*

The sport of baseball has long been regarded as “America’s Pastime” or the “National Pastime.”¹⁴⁷ Whether fueled by nostalgia or other reasons, the love of baseball is present throughout public policy and legal decisions that serve to protect America’s pastime. Like other sports, MLB teams have received taxpayer dollars and subsidies to build new stadiums¹⁴⁸—

145. Consider, for example, a bobblehead of the Atlanta Braves’ icon Chipper Jones saving upcoming star Freddy Freeman on an ATV. Gemma Kaneko, *The ‘Chipper Rescues Freddie’ Bobblehead is Finally Real, and It Can Soon Be Yours*, MLB.COM (Apr. 29, 2016), <https://www.mlb.com/cut4/photo-the-chipper-rescues-freddie-bobblehead/c-175242834>.

146. *Supra* note 130 and accompanying text.

147. See Bryan Curtis, *Debating America’s Pastime(s)*, N.Y. TIMES (Feb. 1, 2009), <https://www.nytimes.com/2009/02/01/sports/01iht-01curtis.19835372.html> (“The term ‘national pastime’ was first given to baseball in the 1850s... to connect baseball to the public’s health and well-being.”).

148. The federal government alone lost \$1.59 billion dollars of revenue between 2000 and 2016 through subsidies to baseball stadiums. Alexander K. Gold et. al, *Why the Federal Government Should Stop Spending Billions on Private Sport Stadiums*, BROOKINGS INST. (Sept. 8, 2016), <https://www.brookings.edu/research/why-the-federal-government-should-stop-spending-billions-on-private-sports-stadiums/#federal-subsidy>. For a student-generated history and examination of public-financed baseball stadiums, see Adam Davidson, *The Economic Impact*

despite evidence that the economic impact of MLB teams and stadiums is questionable¹⁴⁹ and the lack of versatility of those stadiums compared to basketball arenas and football stadiums.¹⁵⁰ However, members of Congress have rushed to protect baseball's fans,¹⁵¹ judges have sung praises of the sport,¹⁵² and academics have found ways to use the sport as a vehicle for legal analysis.¹⁵³ Considering some of the legal deference provided to baseball reveals a third ground upon which a court could choose to forego the imposition of tax: public policy. Indeed, as will be shown, courts and legislatures have allowed legally questionable rules to promulgate to protect baseball, while the SFR exemption, a legally sound doctrine, has been overlooked.

VI. THE BASEBALL RULE

A baseball can be a deadly projectile to both players and fans—foul balls have killed multiple people, as recently as 2018.¹⁵⁴ Despite this

of Baseball Stadiums on their Surrounding Development (2011), SYRACUSE U. HONORS PROGRAM CAPSTONE PROJECTS 278, https://surface.syr.edu/honors_capstone/278.

149. There are an extremely high number of studies reaching this conclusion. *See, e.g.*, Courtney Gesualdi, *Sports Stadiums as Public Works Projects: How to Stop Professional Teams from Exploiting Taxpayers*, 13 VA. SPORTS & ENT. L.J. 281, 287–89 (2014). For an interesting methodology of measuring the impact of an MLB franchise, see Victor Matheson & Robert Baade, *Striking Out? The Economic Impact of Major League Baseball Work Stoppages on Host* (2005), ECON. DEP'T WORKING PAPERS 86, http://crossworks.holycross.edu/econ_working_papers/86. Finally, some have questioned the accuracy of the only official estimates of economic impact by MLB itself – the All-Star Game. Patrick Rishe, *MLB All-Star Games and Economic Impact: The Difficulty of Non-Uniform Analyses*, FORBES (Dec. 15, 2014), <https://www.forbes.com/sites/prishe/2014/12/15/mlb-all-star-games-and-economic-impact-the-difficulty-of-non-uniform-analyses/#2d78e77d44d8>.

150. *See* Zach Spedden, *The Rise and Fall of the Multi-Purpose Stadium*, FOOTBALL STADIUM DIG. (May 15, 2017), <https://footballstadiumdigest.com/2017/05/the-rise-and-fall-of-the-multi-purpose-stadium/>.

151. Appleby, *supra* note 14.

152. *E.g.*, *Cincinnati Reds, L.L.C. v. Testa* 122 N.E.3d 1178 (Ohio 2018); *Flood v. Kuhn*, 407 U.S. 258 (1972).

153. Perhaps one of the most celebrated examples of this is a semi-satirical student piece concerning baseball's infield fly rule. *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975). The piece has spawned many copy-cat pieces with real legal substance, has been cited by multiple courts, and has its own Wikipedia page. *See The Common Law Origins of the Infield Fly Rule*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Common_Law_Origins_of_the_Infield_Fly_Rule (accessed Jan. 11, 2021, 3:42 pm).

154. William Weinbaum, *Coroner: Fan Struck in Head by Foul Ball During Dodgers Game Died of Blunt Force Injury*, ESPN (Feb. 5, 2019), http://www.espn.com/espn/otl/story/_/id/25926592/fan-struck-head-foul-ball-dodgers-game-died-blunt-force-injury#Correction. Teams and fans have known of the dangerous nature of the baseball itself since at least 1920, when Yankees pitcher Carl Mays killed Ray Chapman of the Cleveland Indians when he hit him in the

danger, multiple courts and state legislatures have adopted what has been termed “the baseball rule.”¹⁵⁵ It states, in essence, that teams and owners are not liable for harms caused by a foul ball hit into the stands because the fan assumed the risk when entering the stadium, so long as some form of protection (netting) is available for fans in the most dangerous parts of the ballpark. This rule has been widely accepted;¹⁵⁶ however, as modern incidents have gained more publicity, the rule has increasingly become the subject of academic criticism¹⁵⁷ and public discourse.¹⁵⁸ MLB has issued recommendations to improve fan safety,¹⁵⁹ but deaths and injuries have continued despite improvements to netting¹⁶⁰ and the exemption from liability has remained.

I fully concede—a foul ball is an amazing souvenir.¹⁶¹ But is making that souvenir available and avoiding any obstruction to the view of fans

temple with a pitch. Thomas C. Gallagher, Jr., *A Most Dangerous Ball*, in *COURTING THE YANKEES: LEGAL ESSAYS ON THE BRONX BOMBERS* 82–86 (Ettie Ward, ed., 2003).

155. For an excellent discussion of the history and evolution of the Baseball Rule, including relevant cases, see *Edward C. v. City of Albuquerque*, 241 P.3d 1086, 1092–1098 (N.M. 2010); PATRICK K. THORNTON, *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* 217–32 (2012).

156. See, e.g., *NEW JERSEY BASEBALL SPECTATOR SAFETY ACT OF 2006*, 2005 N.J. P.L. C. 362 (“[S]pectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games. These risks are defined as injuries which result from being struck by a baseball or a baseball bat anywhere on the premises during a professional baseball game.”); Restatement (Second) of Torts § 496C, cmt. g, ex. 4. *But see Coomer v. Kan. City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo. 2014) (holding the assumption of risk had limitations and did not cover an injury to a fan from a mascot throwing a hot dog that struck him in the eye); Garrett R. Broshuis, *Death to the Crazy Hotdog Vendor? The Continued Erosion of the Baseball Rule After Coomer v. Kansas City Royals*, 31 ENT. & SPORTS L. 21 (2014) (discussing the impact of Coomer). Note that not every jurisdiction has elected to follow the Baseball Rule. *Rountree v. Boise Baseball, L.L.C.*, 296 P.3d 373 (Idaho 2013).

157. Mohit Khare, *Foul Ball! The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events*, 12 TEX. REV. ENT. & SPORTS L. 91 (2010); David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339 (2003).

158. E.g., Gabriel Baumgaertner, *MLB Must Mandate Expanded Protective Netting Before It's Too Late*, SPORTS ILLUSTRATED (Sept. 20, 2017), <https://www.si.com/mlb/2017/09/20/new-york-yankees-fan-injured-todd-frazier> (discussing incidents and criticism of teams by players and coaches). *But see* Peter Funt, *How Much Stadium Netting Is Too Much?*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/opinion/baseball-stadium-netting.html> (discussing objections to increased netting).

159. Paul Hagen, *MLB Recommends Netting Between Dugouts*, MLB.COM (Dec. 9, 2015), <https://www.mlb.com/news/mlb-issues-recommendations-on-netting/c-159233076>.

160. Wallace Matthews, *All 30 M.L.B. Teams Will Have Extended Netting Next Season*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/sports/baseball/baseball-netting.html>.

161. As an aside for the curious reader, balls entering the stands (mostly home runs) have been the subject of litigation and a surprisingly large body of scholarship, both tax and otherwise. These citations represent a fraction of the available sources. *Popov v. Hayashi*, No. 400545, 2002 WL 31833731 (Cal. App. Dep’t. Super. Ct. Dec. 18, 2002) (ruling on the legal ownership of Barry Bonds’ record-setting homerun, discussed in-depth in THORNTON, *supra* note 155, at 5–20); Paul

worth the cost? By properly applying the SFR exemptions, states allow teams to continue building the sport of baseball. In contrast, protecting teams from liability for preventable injuries and deaths goes directly against the concept of public welfare. If states can justify a policy that puts lives at risk, they should have problem applying a much more palatable (and legally sound) rule: the SFR exemption.

VII. THE ANTITRUST EXEMPTION¹⁶²

Perhaps the most well-known example of the law favoring baseball is the sport's exemption from antitrust law.¹⁶³ In 1922, the Supreme Court held that baseball was not subject to the Commerce Clause because baseball games were not interstate events—meaning that the Sherman Antitrust Act could not apply.¹⁶⁴ When the then-existing interpretation of the Commerce Clause changed, the Court still upheld its original ruling by citing a lack of congressional action to the contrary.¹⁶⁵ Finally, the Court continued to uphold the exemption in *Flood v. Kuhn*, where a player failed in challenging his team's ability to restrict players from signing with other teams.¹⁶⁶ Multiple attempts to limit these holdings have been met with resistance.¹⁶⁷

Thus, Major League Baseball has been permitted to do things other sports leagues have not. For example, the Oakland A's were denied a planned move to San Jose, California because the league wanted to protect

Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609 (2002); Steven Semeraro, *An Essay on Property Rights in Milestone Home Run Baseballs*, 56 SMU L. REV. 2281 (2003) (responding to Finkelman); Kelly A. Moore & Adam J. Poe, *Home Run Baseballs and Taxation, an Open Stance: How A H.R. Can Be I.R.D.*, 3 EST. PLAN. & CMTY. PROP. L.J. 79 (2010).

162. For book length examinations of the antitrust exemption, see STUART BANNER, *THE BASEBALL TRUST* (2013); NATHANIEL GROW, *BASEBALL ON TRIAL: THE ORIGIN OF BASEBALL'S ANTITRUST EXEMPTION* (2014).

163. This exemption has been the subject of multiple pieces of legal scholarship and does not require an in-depth explanation here. *E.g.*, Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255 (2008) (discussing over-broad application of the exemption).

164. *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922).

165. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam).

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

167. *See, e.g.*, *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686 (9th Cir. 2015); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978). *But see* *Piazza v. Major League Baseball*, 831 F. Supp. 420, (E.D. Pa. 1993) (declining to dismiss antitrust claim due to MLB's rejection of a proposed move); *Butterworth v. Nat'l League of Prof. Baseball Clubs*, 644 So.2d 1021, 1023–24 (Fla. 1994) (following *Piazza*).

the “exclusive operating territory” of the San Francisco Giants under the antitrust exemption.¹⁶⁸ Yet, in the same period of time, multiple NFL teams chose to move—and were able to do so without monopolistic league control interfering.¹⁶⁹ Additionally, a class action lawsuit against MLB by former scouts was dismissed due to a broad reading of the exemption.¹⁷⁰ Finally, in 2018, the U.S. Congress seemed to further entrench the antitrust exemption by passing a bill¹⁷¹ allowing minor league baseball teams to pay below minimum wages, a controversial move described by a notable commentator as “a river of molten sewage.”¹⁷² The bill followed \$2.6 million of lobbying by MLB.¹⁷³

The antitrust exemption has been critiqued judicially¹⁷⁴ and academically.¹⁷⁵ It has been discussed as the “most widely criticized of the Supreme Court’s antitrust decisions.”¹⁷⁶ Yet, approaching a century after its inception, it still stands as good law. Why? Because Americans protect baseball. As one commentator noted, “[w]hatever the legal reasons for the Supreme Court’s decision to preserve baseball’s unique exemption from antitrust law, a crucial motivating factor was the special place that baseball

168. *City of San Jose*, 776 F.3d 686.

169. See Louis Bien, *Rams, Raiders and Chargers File for Relocation to Los Angeles*, SB NATION (Jan. 4, 2016), <https://www.sbnation.com/2016/1/4/10712988/los-angeles-relocation-chargers-raiders-rams>.

170. *Wyckoff v. Off. of the Comm’r of Baseball*, 211 F. Supp. 3d 615 (S.D.N.Y. 2016).

171. Save America’s Pastime Act, H.R.1625, 115th Cong. (2017–2018). An excellent article describing the impact of the law and the legislative history of the legislation was published in 2019. Nathaniel Grow, *The Save America’s Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1013 (2019).

172. Grant Brisbee, *Here’s Why the Save America’s Pastime Act Is a River of Molten Sewage*, SB NATION (June 30, 2016), <https://www.sbnation.com/mlb/2016/6/30/12068178/save-americas-pastime-act-minor-league-salaries> (commenting on the original version of the law proposed in 2016). The impact of the law has been felt already, with players and staff commenting that their future in the game may be untenable. Emily Waldon, *‘I Can’t Afford to Play This Game’: Minor-Leaguers Open Up About the Realities of Their Pay, and its Impact on Their Lives*, THE ATHLETIC (Mar. 15, 2019), <https://theathletic.com/830452/2019/03/15/i-cant-afford-to-play-this-game-minor-leaguers-open-up-about-the-realities-of-their-pay-and-its-impact-on-their-lives/>.

173. Waldon, *supra* note 165.

174. Famously, Justice Douglas dissented to the *Flood* decision by describing the exemption as “derelict in the stream of law.” 407 U.S. at 286 (Douglas, J., dissenting). And the Second Circuit has stated that, “[w]e freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes’ happiest days, that the rationale of Toolson is extremely dubious and that, to use the Supreme Court’s own adjectives, the distinction between baseball and other professional sports is ‘unrealistic,’ ‘inconsistent’ and ‘illogical.’” *Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).

175. See, e.g., Morgen A. Sullivan, *“A Derelict in the Stream of the Law”: Overruling Baseball’s Antitrust Exemption*, 48 DUKE L.J. 1265 (1999).

176. Colleen Ganin, *With San José at Bat, Federal Baseball Is in the Bottom of the Ninth*, 56 ARIZ. L. REV. 1129, 1132 (2014).

has long occupied in American life.”¹⁷⁷ To see this is correct, one must simply look at the majority opinion in *Flood*:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage... Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one [sic] to keep it there.¹⁷⁸

This excerpt follows a detailed recapitulation of baseball's history, discussing players who “have sparked the diamond” and “recaptured thrills.”¹⁷⁹ While some judges have written that “baseball is everybody's business,” a love of baseball should not be sufficient to justify a legally unsound doctrine, yet it was.¹⁸⁰

If a highly criticized, legally *unsound* doctrine that is being used to monopolize a market, control franchises, and prevent suits from negatively affected individuals can be justified by baseball's place as America's pastime, why should states not apply a legally *sound* doctrine: the SFR exemption?

VIII. FEDERAL INCOME TAX AND LIKE KIND EXCHANGES

Finally, the public policy protecting baseball has recently expanded into the tax arena. The Tax Cuts and Jobs Act (TCJA) of 2017 made a change to the “like kind exchange” rules that could have drastically and negatively impacted baseball teams. Under these rules, a taxpayer may defer recognizing gain or loss in income from trading “property of a like kind” with another taxpayer.¹⁸¹ So, if X traded a piece of property purchased at \$100 that is now worth \$500 with Y, whose property was

177. PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 170 (2000).

178. *Flood*, 407 U.S. at 266–67 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

179. *Id.* at 260–64.

180. *But see* BANNER, *supra* note 162, at 248–49 (arguing that legal strategy, not baseball's “unique cultural status,” led to the exemption).

181. 26 U.S.C. § 1031(a)(1) (2017).

purchased and is worth the same amounts, neither would have to pay taxes on the \$400 of gain when swapping property. This doctrine was used to exempt baseball teams from paying taxes on the increased value of players when they would be traded to other teams.

TCJA, however, restricted the application of the like kind exemption to real property only. Some commentators feared this could lead to massive tax implications for baseball teams, as they would be taxed upon increased player values.¹⁸² The Chief Legal Officer of Major League Baseball was concerned about how teams were supposed to figure out how much they gained in a trade, commenting that “[t]here is no fair-market value of a baseball player.”¹⁸³ MLB promised they would “lobby hard” to undo the “inadvertent” change.¹⁸⁴

That lobbying was successful. In April 2019, the IRS announced the creation of a safe harbor for sports teams, treating the value of a player or draft pick as \$0 when traded to avoid any income tax.¹⁸⁵ The IRS wrote about the difficulty of valuing players at length, stating that

[d]uring the term of a personnel contract, the value of that contract may fluctuate based on a variety of factors, including player performance, the changing needs of the team, the changing needs of other teams, a player’s effect on fan attendance, . . . the number of years until a player becomes a free agent and is able to sign a contract to play for any team in a league . . . the size of the team’s market . . . ,the cost of player development, and the impact of injuries and slumps on player performance. Players may underperform or outperform the expectations of their teams, and the performance of other players on the team, or future prospects, may cause the team to develop a different view as to the value of the player and the contract.¹⁸⁶

The IRS apparently did not want to devote administrative resources to the matter, stating that the safe harbor was meant to “avoid highly subjective, complex, lengthy, and expensive disputes.”¹⁸⁷ This was a major win for all

182. Sheryl Ring, *How Tax Reform Impacts Baseball*, FANGRAPHS (Mar. 13, 2018), <https://blogs.fangraphs.com/how-tax-reform-impacts-baseball/>; Becky Sullivan & Ailsa Chang, *Change Delivers a Blow to Professional Sports*, NPR (Mar. 21, 2018), <https://www.npr.org/2018/03/21/595610804/professional-sports-leagues-go-head-to-head-with-new-tax-code>.

183. Jim Tankersley, *A Curveball from the New Tax Law: It Makes Baseball Trades Harder*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/politics/baseball-tax-law-.html>.

184. *Id.*

185. Rev. Proc. 2019-18, I.R.B. 2019-18. <https://www.irs.gov/pub/irs-irbs/irb19-18.pdf>.

186. *Id.*

187. *Id.*

sports teams, but particularly baseball, where teams have begun to engage in bidding wars for the best players, resulting in record-breaking contracts. While baseball's cultural role was not a clear factor in the creation of the safe harbor, the IRS was certainly quick to throw its hands in the air. The role of sports—particularly baseball—within American culture, combined with intense lobbying, likely pushed the IRS to try and avoid being painted as the bad guy.

These tax treatments further emphasize how U.S. policy is replete with examples of baseball receiving a high degree of deference under the law. While this should not be the determinative reason in granting the SFR exemption (economic theory and the idea of fans as consumers are sufficient reasons on their own), it should give courts pause before subjecting teams to an arbitrary tax burden that cuts against long established tax policy.¹⁸⁸ Baseball matters, and while teams should still pay their fair share of taxes, states imposing a tax upon efforts to increase attendance and aid the sport overlooks a rich history of preserving the sport of baseball.

IX. CONCLUSION

The SFR exemption should apply to sports franchises that purchase promotional items intended to increase attendance. It is the correct conclusion as a matter of economics and tax policy. However, this conclusion is not without limitation. As previously acknowledged, the SFR exemption should not apply where fans pay a separate charge for exclusive promotional items or receive an unexpected item, like a foul ball. Additionally, it is unclear how the SFR exemption would apply to other types of promotions that do not include giving away items—such as special fireworks displays or movie screenings in the ballpark after the game. In such situations, the fan is not using anything—making the promotion look like an ancillary promotion, not an integral part of a purchase. Arguments could be marshalled on both sides and deserve careful consideration in such a situation.

Generally, this reasoning should be applicable to other sports leagues, including the National Football League, the National Basketball Association, the National Hockey League, and Major League Soccer.

188. I state the tax is arbitrary because some teams are subject to it while others are not, simply because of the state they play in. A more uniform application of the SFR exemption would protect horizontal equity between the franchises.

Fundamental differences exist between baseball and these sports—most importantly, a long schedule with 81 home games that could lead to fan fatigue—that make promotions more important for baseball than other sports. Nevertheless, promotional giveaways should be subject to the same reasoning, no matter the sport. The SFR exemption applies to promotional items, regardless of what sport is being watched.

Baseball is one of America's greatest treasures. Using legal mechanisms to protect it is not new by any stretch of the imagination. Economics, tax policy, and public policy all support finding that the SFR exemption should apply to promotional giveaways—the very items that help fight against a concerning broad decline in attendance across MLB. Courts, tax authorities, and practitioners should address each of these considerations when faced with the choice to allow the SFR exemption or impose a use tax. I believe that the answer should be clear: bobbleheads should not be taxed.