SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 10 SPRING 2021 ISSUE 2

SACRIFICE FLY: ADVANCING MLB OWNERSHIP POLICIES INTO THE POST-COVID ERA AT THE EXPENSE OF THE ANTITRUST EXEMPTION

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ABSTRACT

In Fall 2019, Major League Baseball (MLB) announced it would begin to allow private equity funds to acquire minority ownership stakes in its franchises. This announcement was met with reserved optimism by proponents of more public ownership opportunities in American sports. In the year since, a once-in-a-century pandemic has upended the United States economy, sparing none, including the sports community. As other segments of the economy have seen publicly-traded special purpose acquisition companies (or SPACs) explode in prevalence, the COVID-19 pandemic has caused SPACs to wade into the waters of professional sports. The SPAC model will undoubtedly be appealing to those seeking to invest in MLB franchises under the league's new policy but could also have serious repercussions on MLB's continued exemption under federal antitrust laws. An assault could, in theory, come via a federal courts system already skeptical of the exemption or via Congress. This Note explores implications these changes may have to existing ownership policies.

INTRODUCTION

Amid a once-in-a-century pandemic spreading across the globe, news in October 2020 that Boston Red Sox owner John Henry was in talks to sell a substantial stake in his team to the public represented the latest twist in what had already become one

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of the most turbulent years for professional sports on record.[1] The rumored deal would merge Henry's Fenway Sports Group with Redball Acquisition Corporation ("Redball"), a special purpose acquisition company (SPAC) led by private equity professionals and Oakland Athletics executive Billy Beane.[2] Redball shareholders would benefit by claiming an ownership stake in one of the most storied franchises in Major League Baseball (MLB), and Fenway Sports Group would receive an infusion of capital to finance the Red Sox and the purchase of another major North American sports franchise.[3]

A Fenway-Redball deal would represent the intersection of two key trends in the sports world spurred on by the COVID-19 pandemic: (1) the re-energization of decades-old calls for public ownership options in United States sports franchises;[4] and (2) a "boom" in the use of SPACs as an investment vehicle, rather than traditional initial public offerings (IPOs), to achieve more access to capital to fuel company growth across numerous economic sectors.[5]

Federal antitrust laws lurk in the background of this changing sports franchise ownership landscape. Significant changes to the ownership policies within a given sports league will likely alter the way courts view professional sports leagues in terms of antitrust. Given the Fall 2019 announcement that MLB

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[1] Cara Lombardo & Miriam Gottfried, *Red Sox Owner in Talks to Take Sports Holding Public*, WALL ST. J. (Oct. 9, 2020, 7:55 PM), https://www.wsj.com/articles/red-sox-owner-in-talks-for-deal-with-redball-acquisition-11602286661.

[2] *Id.*

[3] *See id.*; Chris Cotillo, *Boston Red Sox Owners 'Looking Into' Buying Another Major North American Sports Franchise (Report)*, MASSLIVE (Nov. 19, 2020), https://www.masslive.com/redsox/2020/11/boston-red-sox-owners-looking-into-buying-another-major-north-american-sports-franchise-report.html.

[4] *See e.g.*, Doug Vazquez, *Is Your Favorite Sports Team Publicly Traded?*, THESTREET (Feb. 26, 2020), https://www.thestreet.com/video/publicly-traded-sports-teams; Zachary A. Greenberg, *Tossing the Red Flag: Official (Judicial) Review and Shareholder-Fan Activism in the Context of Publicly Traded Sports Teams*, 90 WASH. U. L. REV. 1255, 1256–57 (2013) (calling for professional leagues to reconsider public ownership options in the aftermath of the Great Recession).

[5] Mike Bellin, *Why Companies Are Joining the SPAC Boom*, PRICEWATERHOUSECOOPER (Sept. 22, 2020), https://www.pwc.com/us/en/services/deals/blog/spac-boom.html.

will allow private equity funds to begin acquiring minority stakes in teams, MLB's longstanding "antitrust exemption" may face heightened scrutiny by either the courts or Congress. This Note examines such a policy change's repercussions within MLB with a heavy focus on the SPAC model being the preferred vehicle for acquiring ownership stakes and its consequences.

This Note will proceed in four parts. Part I explores trends over the last several months that have increased the appetite for public ownership in sports franchises. Part II briefly delves into MLB's antitrust exemption and the impact sports league ownership policies have historically had on courts' antitrust analysis of such leagues. Part III examines how the newly announced MLB policy may prompt action from the federal courts and Congress relating to baseball's antitrust exemption. Part IV concludes this Note by examining the trade-off between heightened antitrust scrutiny and expanded ownership options in light of the COVID-19 pandemic and by exploring other potential solutions to this impending problem while assessing the practicality of each.

I. OVERARCHING TRENDS CREATING AN IDEAL ATMOSPHERE FOR PUBLIC OWNERSHIP MODELS

While the Redball-Fenway prospective deal garnered significant media attention in Fall 2020, one of the earliest successful SPAC IPOs in the sports sector occurred in the period from December 2019 to April 2020, when DraftKings, the online fantasy-sports contest and sports wagering company, announced plans to go public in a three-way deal that ultimately increased the company's value to $3.3 billion.[6] This deal merged DraftKings, SBTech—a technology services provider for gaming companies, and Diamond Eagle Acquisition Corp. (DEAC)—a SPAC.[7] DEAC shareholders approved the merger on April 23, 2020, creating "the *only* vertically integrated U.S. sports betting and

[6] Rich Duprey, *DraftKings Files For 2020 IPO: Is This the Sports Betting Stock We've Been Waiting For?*, THE MOTLEY FOOL (Dec. 28, 2019, 11:44 AM), https://www.fool.com/investing/2019/12/28/draftkings-files-for-2020-ipo-is-this-the-sports-b.aspx.

[7] *Id.*

online gaming company."[8]

Although the DraftKings deal did not directly involve the purchase of interests in a sports franchise, it underscores trends beginning to form in this space. While private equity fund managers own numerous United States professional sports teams,[9] "the funds themselves largely have been prevented in the past from owning teams because leagues [have] required individual controlling ownership and limited debt leverage."[10] Over the past few years, however, American sports leagues have gradually loosened ownership restrictions, enabling private funds to acquire minority stakes in professional teams (mirroring their European counterparts, which allow investment funds to obtain controlling interests in sports teams).[11] For example, in Fall 2019, MLB announced it would allow investment funds to take minority stakes in multiple clubs.[12] In April 2020, the National Basketball Association (NBA), upon approval from its thirty owners, selected Dyal Capital Partners to form a fund to buy minority stakes in various teams.[13] Major League Soccer (MLS) followed suit with

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[8] Dave McNary, *DraftKings Cleared to Go Public After Merger With Harry Sloan's Diamond Eagle*, VARIETY (Apr. 15, 2020, 2:04 PM) (emphasis added), https://variety.com/2020/digital/news/draftkings-cleared-public-merger-diamond-eagle-1234581487.

[9] *See e.g.*, David Newton, *David Tepper Signs Panthers Purchase Deal*, ESPN (May 15, 2018), https://www.espn.com/nfl/story/_/id/23509278/david-tepper-signs-carolina-panthers-purchase-deal; Kevin Dowd, *Private Equity is Dominating the NBA in 2020*, PITCHBOOK (Feb. 13, 2020), https://www.pitchbook.com/news/articles/private-equity-is-dominating-the-nba-in-2020.

[10] *As Sports Leagues Resume Play, Hogan Lovells' Sports, Media & Entertainment Group Identifies Seven Key Trends to Watch in the Sports Sector*, HOGAN LOVELLS LLP (Sept. 24, 2020) [hereinafter *Hogan Lovells*], https://www.hoganlovells.com/en/news/as-sports-leagues-resume-play-hogan-lovells-sports-media-and-entertainment-group-identifies-seven-key-trends-to-watch-in-the-sports-sector

[11] *Id.*

[12] Scott Soshnick, *Investors Get Path to Buy Into Major League Baseball Teams*, BLOOMBERG (Oct. 16, 2019, 2:00 AM), https://www.bloomberg.com/news/articles/2019-10-16/investors-get-path-to-buy-stakes-in-major-league-baseball-teams.

[13] Luisa Beltran, *Private-Equity Firm Seeks $2 Billion to Buy Stakes in NBA Teams*, BARRON'S (May 19, 2020, 12:19 PM), https://www.barrons.com/articles/private-equity-firm-nba-basketball-teams-stakes-51589905075?mod=hp_DAY_6.

a similar announcement in July 2020.[14]

The general relaxation of ownership restrictions is working alongside additional factors to create a favorable environment for private equity funds to successfully move into the professional sports ownership space. These additional factors include: (1) sophisticated sports professionals' increased willingness to take part in these efforts; (2) the flexibility afforded managers by the increasingly popular SPAC model; and (3) professional sports franchises' capital needs amid losses stemming from the COVID-19 pandemic.

A. SPORTS PROFESSIONALS WILLING TO ENGAGE

Managers' sophistication and qualifications at private equity funds are central to nearly all funds engaging in the sports space. The individuals recruited to join these efforts include executives from major sports franchises,[15] former league officials,[16] and even professional athletes.[17] Registration materials

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[14] Jabari Young, *Major League Soccer to Join Other Leagues in Allowing Private Equity Financing*, CNBC (July 11, 2020, 11:15 AM), https://www.cnbc.com/2020/07/11/mls-join-nba-mlb-in-private-equity-financing.html.

[15] Funds managed by current and former sports executives include RedBall Acquisition Corp. (Billy Beane, Oakland Athletics), Social Capital Hedsophia Holdings IV, V, and VI (Chamath Palihapitiya, Golden State Warriors), and BowX Acquisition Corp. (Vivek Randavivé, Sacramento Kings), among others. Brendan Coffey, *SPAC Recap: Sports-Related Investors Continue to March to Market*, SPORTICO (Sept. 28, 2020, 2:55 AM), https://www.sportico.com/business/finance/2020/every-sports-spac-now-1234613825; Young, *supra* note 14.

[16] Eric Grubman, the former executive vice president of business operations at the NFL, and John Collins, the former chief operating officer of the National Hockey League, formed Sports Entertainment Acquisition Corp. in September 2020. Sam Carp, *Ex-NFL and NHL Execs Form SPAC Focused on Sports and Entertainment*, SPORTSPRO (Sept. 15, 2020), https://www.sportspromedia.com/news/sports-entertainment-acquisition-corp-spac-ipo-eric-grubman-john-collins. The fund also lists NFL Commissioner Roger Goodell's brother, Timothy, as a member. Coffey, *supra* note 15.

[17] *See e.g.*, Joe Flint, *Shaq, MLK's Son, Former Disney Executives Team Up to Create SPAC*, WALL ST. J. (Oct. 8, 2020, 5:12 PM), https://www.wsj.com/articles/shaq-mlks-son-former-disney-executives-team-up-to-create-spac-11602188667.

filed with the SEC show fund organizers often point towards these sports-savvy managers as primary reasons for the public to invest.[18] To underscore this point with regard to MLB in particular, in addition to Billy Bean's involvement with Redball, SEC filings from November 2020 reveal that Chicago Cubs executive chairman Tom Ricketts will serve as Marquee Raine Acquisition Corp.'s cochairman as it seeks $325 million in a SPAC IPO slated for a future date.[19]

B. THE EXPLOSION OF THE SPAC MODEL

Though SPACs date back to the 1990s, SPACs have become increasingly popular over the past year because SPACs provide a more cost-efficient and time-efficient way to generate large amounts of capital and close deals, as compared to traditional IPOs.[20] Indeed, by the end of the third fiscal quarter of 2020, $54 billion had already been raised by United States-listed SPACs. During this quarter alone, SPACs made up nearly half the capital raised by United States IPOs.[21]

1. *SPAC OVERVIEW*

SPACs are "companies formed to raise capital in an initial public offering . . . with the purpose of using the proceeds to acquire one or more unspecified businesses or assets *to be*

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[18] RedBall Acquisition Corp., Registration Statement (Form S-1) (July 28, 2020) [hereinafter RedBall Form S-1], https://www.sec.gov/Archives/edgar/data/1815184/000119312520200354/d892615ds1.htm#tx892615_1 ("Our senior leadership has collectively owned or operated sports businesses currently worth over $11.5 billion in the aggregate over the last 25 years.").

[19] Michael Long, *Chicago Cubs Execs and Raine Group Latest to Create Sports-Focused SPAC*, SPORTSPRO (Nov. 30, 2020), https://www.sportspromedia.com/news/chicago-cubs-raine-group-spac-marquee-acquisition-baseball-mlb.

[20] Paul R. La Monica, *Why 2020 is the Year of the SPACs (And What the Heck is a SPAC?)*, CNN BUS. (Aug. 6, 2020), https://www.cnn.com/2020/08/06/investing/spacs-ipos-stock/index.html.

[21] Matt Egan, *Warning to Wall Street: SPACs May Be Out of Control*, CNN BUS. (Oct. 21, 2020), https://www.cnn.com/2020/10/21/investing/stock-market-spac-ipo/index.html.

identified after the IPO."[22] SPACs are often labeled as "blank check companies" because the target business is not identified until after investors have already purchased shares.[23] SPACs may also be derided as "public entit[ies] that [do not] have a purpose or business plan," though this is far from the truth in most situations.[24]

SPACs generally go through the ordinary IPO process.[25] This process entails filing a registration statement with the United States Securities and Exchange Commission (SEC), receiving and clearing SEC comments, and finally obtaining a firm commitment underwriting.[26] However, SPAC IPOs are distinguishable from traditional IPOs because the process is more streamlined. SPAC financial disclosures in SEC registration statements are shorter (largely because there are no historical financial results to be disclosed or assets to be described), and generally, SEC reviews produce fewer comments.[27] Ultimately, it is estimated that "[f]rom the decision to proceed with a SPAC IPO, the entire IPO process can be completed in as little as eight weeks."[28] Historically, legal commentators have pointed to IPO expenses—namely the legal fees billed by attorneys during the time-extensive registration process—as a key barrier to public ownership models in sports.[29] The SPAC model significantly lowers this barrier.

After the SPAC IPO has occurred, the IPO proceeds are held in a trust account until released to fund the business

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[22] Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction (emphasis added).

[23] David Butler, *"Blank Check" IPOs: What Investors Need to Know*, THE MOTLEY FOOL (July 24, 2020, 8:56 AM), https://www.fool.com/investing/2020/07/24/blank-check-ipo-what-investors-need-to-know.aspx.

[24] *Id.*

[25] Layne & Lenahan, *supra* note 22.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Greenberg, *supra* note 4, at 1263; *see also* Jorge E. Leal Garrett & Bryan A. Green, *Considerations for Professional Sports Teams Contemplating Going Public*, 31 N. Ill. U. L. Rev. 69, 82 (2010) (noting that the Cleveland Indians incurred approximately $6.2 million in expenses out of the $60 million the team raised from their 1998 IPO).

combination.[30] This combination may take the form of a merger agreement, whereby the SPAC will secure necessary financing and undertake a shareholder vote or initiate a tender offer aimed at the target company, with the end result being the merger between the SPAC and the target company into a publicly-traded operating company.[31]

SPACs normally do not identify acquisition targets prior to the closing of the IPO, as this would require additional disclosures in the financial statements.[32] Normally, the SEC requires disclosure in the IPO prospectus that the "[SPAC] currently [does] not have any specific business combination under consideration . . . nor have [its directors or officers] had any discussions regarding possible target businesses among themselves or with underwriters or other advisors."[33] Nevertheless, to provide some insight, most SPACs will specify an industry or geographic focus for their target business to provide some insight to investors.[34] For example, RedBall Acquisition Corp. filed a registration statement before its IPO stating, "[w]hile we may pursue an acquisition opportunity in any industry or sector, we intend to focus on businesses in the sports, media and data analytics sectors, with a focus on professional sports franchises."[35] Investors, in effect, are making their investments based on their faith in the SPAC managers, rather than based on the SPACs' unknown future holdings.[36]

2. *REDUCED LIABILITY PROVIDED BY SPACS*

The SPAC model provides both flexibility and lowered liability risks to shareholders, making SPACs attractive to would-be managers wary of entering the sports space. The truncated registration statement required by the SEC for SPACs does not require the SPAC to identify a specific target but allows the SPAC

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[30] Layne & Lenahan, *supra* note 22.

[31] *Id.*

[32] *Id.*

[33] *Id.*; Greg Cope & Zach Swartz, *SPACS: An Alternative to the Traditional IPO for REITs and Other Real Estate Companies*, VINSON & ELKINS LLP, 13 (Oct. 30, 2019), https://media.velaw.com/wp-content/uploads/2019/11/28180430/6013ceea-197e-433f-a4f6-1c1bb247a354.pdf.

[34] Butler, *supra* note 23; *See e.g.*, RedBall Form S-1, *supra* note 18.

[35] RedBall Form S-1, *supra* note 18.

[36] Butler, *supra* note 23.

managers to generally describe the targeted industry.[37] As a result, suits alleging violations of Section 11 of the Securities Act (i.e. that a registration statement contained material misrepresentations or omissions of fact) do not typically arise from SPACs.[38] Furthermore, funds raised in a SPAC IPO are held in a trust, and investors have the ability to freely "opt out of the SPAC by redeeming their shares or by voting against future proposed acquisitions" even prior to a proposed deal.[39] As a result, much of the potential liability SPAC managers expose themselves to arises once the SPAC has acquired a target company, in the form of shareholder derivative suits alleging breaches of fiduciary duties.[40] This would surely be a major concern for not only the SPAC managers, as they would owe fiduciary duties to their shareholders, but also, after the acquisition of a minority stake by the SPAC, to owners of the majority stakes, as the treatment of minority shareholders by the majority could potentially also lead to allegations of fiduciary duty breach.[41]

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[37] *See* Layne & Lenahan, *supra* note 22.

[38] Priya Cherian Huskins, *Why More SPACs Could Lead to More Litigation (and How to Prepare)*, BUS. L. TODAY (June 25, 2020), https://businesslawtoday.org/2020/06/spacs-lead-litigation-prepare.

[39] *Id.*

[40] *Id.*

[41] While this two-fold fiduciary duty problem that could arise if the MLB were to allow publicly traded companies to acquire minority stakes is not the focus of this Note, such legal commentary will hopefully follow as professional sports leagues open their ownership ranks to more diverse actors and entities. *See, e.g.*, Greenberg, *supra* note 4, at 1266 ("[Fiduciary] duties immediately arm shareholders with a means to ensure that front office decisions are properly made, whether they are to re-sign a player, build a new stadium, or raise ticket prices."). *But see* Shlensky v. Wrigley, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (standing for the proposition that "fan activism" suits may fail upon applying the Business Judgment Rule). As SPACs acquire interests in European soccer league franchises, the treatment of these issues by judiciaries may first arise overseas. *See, e.g.*, David Hellier, *To Find Bargain Sports Teams, American Investors Are Crossing the Atlantic*, FORTUNE (Sept. 23, 2020, 5:58 AM), https://fortune.com/2020/09/23/investors-european-football-sports-teams.

C. CHALLENGES CREATED BY THE COVID-19 PANDEMIC

Finally, the sports industry finds itself embroiled in financial perils because of the pandemic. Although the full extent of the financial losses across American professional sports will be unknown for some time, it is estimated that revenue loss from ticket sales, alone, could cost the MLB as much as $5.13 billion, the NBA as much as $1.69 billion, and the National Hockey League (NHL) as much as $1.12 billion.[42] These astounding figures do not account for losses relating to media deals and advertising revenues as a result of shortened seasons.[43] Even as teams return to play, losses may continue well into the future as fans prove reluctant to attend events in-person.[44] As traditional revenue streams have been disrupted, owners may seek to offer team shares or to "get out" of the ownership business entirely.[45] In the case of the former, some estimates include a "potential 15% to 20% drop in team control and limited-partner positions."[46] Publicly offering ownership interests "enhances the ability of a current owner to liquidate part of his or her investment . . . [t]he freedom of transferability supplied by the issuance of shares provides an exit strategy."[47]

Private equity funds stand ready to seize sports ownership interests, where available, with many investors viewing sports assets as "high cash-flow businesses that, while mature, will still experience extraordinary growth."[48] Given the favorable environment for purchasing these interests, it is no wonder why

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[42] *Potential Ticket Revenue Loss in Selected Sports Leagues Due to the Coronavirus (COVID-19) Pandemic in the United States in 2020*, STATISTA (July 23, 2020), https://www.statista.com/statistics/1130000/ticket-revenue-loss-sports-leagues-corona.

[43] *See, e.g.*, *Sudden Vanishing of Sports Due to Coronavirus Will Cost at Least $12 billion, Analysis Says*, ESPN (May 1, 2020), https://www.espn.com/espn/otl/story/_/id/29110487/sudden-vanishing-sports-due-coronavirus-cost-least-12-billion-analysis-says.

[44] *See, e.g.*, *id.*

[45] Jabari Young, *With Sports on Pause, New Opportunities to Buy Stakes in Cash-Strapped Teams Could Arise*, CNBC (May 2, 2020, 11:27 AM), https://www.cnbc.com/2020/05/02/with-sports-on-pause-new-opportunities-to-buy-stakes-in-cash-strapped-teams-could-arise.html.

[46] *Id.*

[47] Greenberg, *supra* note 4, at 1262 (internal citations omitted).

[48] Hogan Lovells, *supra* note 10.

an explosion of private equity funds aimed at sports ownership, organized as SPACs such as RedBall and in other forms, is occurring.[49] Yet in making changes to existing ownership policies and enabling the shift of sports franchise ownership to publicly-traded funds, sports leagues must be wary of heightened antitrust scrutiny that may result. While the MLB is unique in that it has enjoyed a general exemption from antitrust scrutiny in most aspects of its business during the past century, significant changes to the MLB club ownership model as envisioned could have serious repercussions for the antitrust exemption's survival with regard to ownership restrictions. MLB's antitrust exemption and the historical treatment of sports leagues ownership policies under antitrust law are discussed, next, in Part II.

II. MLB'S ANTITRUST EXEMPTION AND HISTORICAL SCRUTINY OF SPORTS LEAGUE OWNERSHIP POLICIES

In the United States, most professional sports leagues are structured as "a type of unincorporated joint venture among individual teams."[50] Leagues operate from a "central office that oversees the individually owned teams," but each team "has a different financial bottom line produced through non-shared revenues and expenses."[51] The NFL, NBA, and NHL are structured as such, and as a result, each league falls within the purview of Section 1 of the Sherman Act of 1890, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[52] Legal commentators have noted that "because of the novel business form of [these] sports league[s]—every league action, every league business judgment and every league decision can be characterized as an 'antitrust issue[.]'"[53] Indeed, individual teams could not produce games without some level of cooperation or coordination

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[49] Coffey, *supra* note 15.

[50] Lacie L. Kaiser, *The Flight From Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1 (2004).

[51] *Id.* at 5.

[52] Sherman Act of 1890, 15 U.S.C. § 1 (1994).

[53] Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 157 (1984).

with others.[54] American sports leagues can dodge Section 1 of the Sherman Act in two situations: (1) when the league in question can establish that it is operating as a single entity for purposes of antitrust scrutiny; and (2) in professional baseball's unique case, via the "anomalous judicially created antitrust exemption."[55] This Note focuses exclusively on baseball's antitrust exemption, with its historical exemption discussed briefly below.

A. BASEBALL'S ANTITRUST EXEMPTION

1. *THE TRILOGY—FEDERAL BASEBALL*, TOOLSON, *AND* FLOOD V. KUHN

Scholarly interest in MLB antitrust exemption's origins have influenced significant legal analysis over the past 98 years.[56] The exemption traces its origins to a dispute between MLB and a lesser-known competitor, the Federal League, over the exhibition of the sport in certain areas in 1922.[57] The Federal League's contention that MLB was in violation of the Sherman Act was ultimately thwarted by Justice Oliver Wendell Holmes' opinion that baseball exhibitions represented purely intrastate affairs, and thus, were exempt from federal antitrust regulation.[58] When MLB's reserve system was challenged thirty years later in *Toolson v. New York Yankees*, the Supreme Court affirmed the league's antitrust exemption, stating that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[59] The Court's opinion in *Toolson* represents the backbone of MLB's antitrust exemption—the opinion "demonstrated that the exemption applied to the entire industry of professional baseball, not solely to the reserve clause" in question in that case.[60]

Nearly twenty years after *Toolson*, the Supreme Court

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[54] Kaiser, *supra* note 5247, at 5.

[55] Lazaroff, *supra* note 55, at 158.

[56] *See generally* Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption Is Hurting the Game*, 54 WM. & MARY L. REV. 587 (2012).

[57] *Id.* at 591-92.

[58] *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

[59] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

[60] Mann, *supra* note 56.

upheld the antitrust exemption again in *Flood v. Kuhn,*[61] on stare decisis and congressional inaction grounds. While characterizing the exemption as an "aberration," the *Flood* Court sought to remove itself from the dispute, instead inviting Congress to find a solution.[62] In response, Congress passed the Curt Flood Act in 1998.[63] This Act represents the only successful federal legislation directly aimed at curtailing one facet of MLB's antitrust exemption to date.[64] The Act "guarantee[s] major league players the right to file an antitrust action on matters regarding employment,"[65] but explicitly states that other facets of baseball, including franchise issues and the minor league system, remain unchanged.[66]

2. *TREATMENT OF THE EXEMPTION IN THE COURTS (POST-*FLOOD*)*

Since the Supreme Court's decision in *Flood v. Kuhn*, MLB's antitrust exemption has been applied inconsistently by the lower courts. In *Piazza v. MLB*, the United States District Court for the Eastern District of Pennsylvania refused to apply baseball's antitrust exemption to a suit alleging collusion among franchise owners involving franchise relocation.[67] But in *MLB v. Butterworth*, a case decided after the Curt Flood Act's passage, the United States District Court for the Northern District of Florida stood by the more expansive view, holding that the "business of baseball" was not limited to merely the reserve system.[68] In the past several decades, litigation has centered around one underlying issue: what exactly falls within "the business of baseball?" In the past two decades, courts have decided MLB's decision to contract the number of clubs in the

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[61] 407 U.S. 258, 283–84 (1972).

[62] *Id.* at 282–83.

[63] 15 U.S.C. § 26b (2006).

[64] Nathaniel Crow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747 (2008).

[65] Mann, *supra* note 56, at 599.

[66] *Id.* at 599, n. 69.

[67] 831 F. Supp. 420, 440 (E.D. Pa. 1993). *But see City of San Jose v. Office of the Com'r of Baseball*, 776 F.3d 686, 692 (9th Cir. 2015) ("The scope of the Supreme Court's holding in *Flood* plainly extends to questions of franchise relocation.").

[68] 181 F. Supp. 2d 1316, 1322 (N.D. Fla. 2001).

league,[69] the league's relationship with its professional scouts,[70] and the league's interaction with minor league players[71] fall within the "business of baseball," and are entitled to exemption. Ownership restrictions are noticeably absent from this list, and some explicitly argue that based on the *Piazza* Court's logic, a "potential threat to MLB should it unreasonably interfere with future franchise sales" exists.[72] The question remains as to just how far the federal courts believe that the "business of baseball" extends.

3. *TREATMENT OF THE EXEMPTION IN CONGRESS (POST-*FLOOD*)*

Without judicially narrowing the antitrust exemption, congressional attempts both before and after the Curt Flood Act's passage have failed to gain traction. In the lead-up to and amidst the 1994-95 MLB labor strike, three proposed bills were introduced: the Professional Baseball Antitrust Reform Act of 1993,[73] the Baseball Fans Protection Act of 1994,[74] and the Baseball Fans and Communities Protection Act of 1994.[75] Each of the three mid-1990s bills was either withdrawn or abandoned due to the expiration of the congressional session in which it was considered or a lack of support from a significant number of representatives or senators.[76]

New attempts to reign in baseball's antitrust exemption occurred in 2001, at the height of speculation that the league was considering contraction. Two federal bills sought to address this issue by providing local fans and business owners with the

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[69] *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003).

[70] *Wyckoff v. Office of Comm'r of Baseball*, 705 F. App'x 26, 29 (2d Cir. 2017).

[71] *Miranda v. Selig*, 860 F.3d 1237, 1242 (9th Cir. 2017).

[72] Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 252 (2012).

[73] Professional Baseball Antitrust Reform Act of 1993, S. 500, 103rd Cong. (1st Sess. (1993).

[74] Baseball Fans Protection Act of 1994, S. 2380, 103rd Cong. (2d Sess. (1994)).

[75] Baseball Fans and Communities Protection Act of 1994, H.R. 4994, 103rd Cong. (2d Sess. 1994).

[76] Alison Cackowski, *Congress Drops the Ball Again: Baseball's Antitrust Exemption Remains in Place*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 147, 150 (1995).

opportunity to "save" their hometown teams by collectively purchasing interests in the teams.[77] The Give Fans a Chance Act of 2001 would have removed the MLB's broadcast-rights antitrust exemption if the MLB continued to prohibit a community or its fans from owning a team.[78] Likewise, the Fairness in Antitrust in National Sports Act of 2001 (the "FANS Act"), sought a piecemeal approach akin to the Curt Flood Act, by eliminating the antitrust exemption in one specific area: contraction or relocation of MLB franchises.[79] However, both bills failed to garner significant support, even amidst very realistic fears of MLB contraction in the St. Paul-Minneapolis market.[80] The Give Fans a Chance Act's second iteration was introduced in the House of Representatives in 2011, but the bill failed to make it out of committee.[81]

A. HISTORICAL ANTITRUST SCRUTINY OF LEAGUE OWNERSHIP POLICIES

Generally, the relaxation of ownership restrictions is viewed as a positive development in terms of American sports leagues' antitrust vulnerabilities. However, two suits have been brought in federal courts alleging that a league's ownership restrictions violated antitrust law. Each case produced a somewhat different outcome. Although neither suit involved the MLB, because of the daunting challenge of asserting the antitrust exemption's inapplicability, examining both cases provides insight into how courts have historically scrutinized ownership restrictions.

1. *LEVIN V. NATIONAL BASKETBALL ASSOCIATION*

In *Levin v. National Basketball Association*, the United States District Court for the Southern District of New York examined an allegation by an aggrieved plaintiff that the NBA Board of Governor's rejection of his bid to buy the Boston Celtics

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[77] Brad Smith, *How Different Types of Ownership Structures Could Save Major League Baseball Teams from Contraction*, 2 J. INT'L BUS. & L. 86, 105 (2003).

[78] *Id.*

[79] *Id.*

[80] *See id.* at 104—05.

[81] H.R. 3344, 112th Cong. (2011).

violated antitrust law.[82] The prospective buyer asserted that then-NBA Commissioner J. Walter Kennedy had told him privately that other owners opposed his bid because of his friendship with then-Seattle Supersonics owner Sam Schulman.[83] The fear was that if allowed to purchase the Celtics, he would "side with Sam Schulman . . . and cause the league more troubles than they now have with Sam as it is."[84] The owners that dissented from the proposed sale asserted that the would-be buyer's past business dealings with Schulman made approval untenable under the NBA's then-existing conflict of interest policies.[85] The Court ultimately upheld the relevant ownership restriction requiring supermajority approval from the league's existing owners for a transfer of ownership in a somewhat sparse opinion which pointed toward "total failure to demonstrate any adverse effect on competition."[86]

2. *SULLIVAN V. NATIONAL FOOTBALL LEAGUE*

The most salient case on this distinct issue is the First Circuit's landmark decision in *Sullivan v. National Football League*, in which the-then owner of the New England Patriots William H. Sullivan challenged the NFL policy prohibiting him from selling shares of the franchise to the public as anticompetitive.[87] The NFL Constitution, which remains largely unchanged since *Sullivan* was decided, prohibits nonprofit corporations from owning a team via stringent rules concerning ownership.[88] These include requirements that any interest holders (majority or minority) provide their names, addresses, and written financial statements to the league, as well as prohibitions on ownership interest transfers without approval from a majority of the other NFL owners.[89]

The NFL Constitution had and still contains a "grandfather clause," allowing teams operating like a public

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[82] 385 F. Supp. 149, 150 (S.D.N.Y. 1974).

[83] *See id.* at 15051.

[84] *Id.* at 151.

[85] *Id.*

[86] *Id.* at 152.

[87] *Id.* at 1095.

[88] Genevieve F.E. Birren, *NFL vs. Sherman Act: How the NFL's Ban on Public Ownership Violates Federal Antitrust Laws*, 11 SPORTS L. J. 121, 122 (2004)

[89] *Id.*

corporation when the Constitution was adopted to continue to operate as such.[90] The Green Bay Packers have been the most notable beneficiaries of this clause; in the time since the NFL-American Football League (AFL) merger, they have held five stock sales without first obtaining league approval.[91] On the contrary, though the Patriots had publicly sold shares at the time of the NFL-AFL merger, when Sullivan purchased the team in 1976, he had also purchased all public stock, effectively removing the Patriots from the collection of "grandfathered" teams and reducing the number of publicly-traded NFL teams to one.[92] Years later, the antitrust suit against the NFL arose amidst Sullivan's financial difficulties, as he sought to maintain control of the team but eliminate financial pressure by selling shares to the public.[93] The Court ultimately dismissed Sullivan's challenge on procedural grounds.[94] However, the Court deferred to the District Court's finding "that NFL teams . . . compete against each other for the sale of their ownership interests."[95] While this represents mere dicta, it offers a strong suggestion that the NFL's and likely other leagues' ownership policies are subject to review under the Sherman Act.

Each United States major professional sports league has some degree of restrictions as to whom may obtain ownership interests in that league's franchises. These restrictions often include approval from a majority or supermajority of existing owners prior to any sale and/or limitations or flat-out bans on public ownership.[96] The rationale behind the latter largely originates from fears that "[the] availability of greater funds would give publicly owned teams an unfair competitive advantage."[97] Part III discusses the types of ownership restrictions currently existing in MLB.

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1096.

[94] *Id.* at 1109.

[95] *Id.* at 1096.

[96] *See League Constitutions*, PA. ST. L., 3 https://pennstatelaw.psu.edu/sites/default/files/Doc%20Supp%20League%20Constitutions%20and%20Rules.pdf (last visited Feb. 7, 2021).

[97] Smith, *supra* note 81, at 94.

III. CHANGING MLB OWNERSHIP POLICIES AND THE IMPACT ON BASEBALL'S ANTITRUST EXEMPTION

A. MLB'S CURRENT OWNERSHIP POLICIES

MLB policy has two restrictions concerning franchise ownership: (1) supermajority (three-fourths) approval from existing team owners prior to the sale of a majority interest; and (2) no more than 49% of a club's ownership interest may be publicly traded and any such shares must contain voting restrictions.[98] Because of the antitrust exemption's unquestioned applicability to these restrictions to date, neither of these restrictions have been the subject of an attempted antitrust challenge in the courts. However, critics argue that "MLB uses th[ese] rule[s] to manipulate the bidding process for teams that are for sale, both in order to ensure that the desired ownership group is selected and to prohibit public or municipal ownership of MLB franchises."[99] Each restriction is discussed in turn.

1. *SUPERMAJORITY APPROVAL*

Absent the antitrust exemption, an unsuccessful MLB franchise buyer could make the argument that collusion or conspiracy among some franchise owners prevented their purchase, violating the Sherman Act. However, in recent times, by the time buyers reach this particular stage, the ownership purchase is already *fait accompli*. Nevertheless, opposition from other owners, for a variety of reasons, can present a formidable obstacle.

The eventual sale of the New York Mets to Steve Cohen, for example, was met with speculation that the other owners might oppose Cohen's acquisition because, as the would-be richest owner in the league, he could cause player contracts to go up across the league,[100] a worrisome development given MLB's lack of a salary cap.[101] Similarly, Jeff Moorad ultimately dropped his 2012 bid to purchase the San Diego Padres before the owners'

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[98] Grow, *supra* note 75, at 251.

[99] *Id*.

[100] Kyle Newman, *MLB Owners Might Not Approve New York Mets Sale to Steve Cohen (Report)*, ELITE SPORTS NY (July 13, 2020), https://elitesportsny.com/2020/07/13/new-york-mets-sale-mlb-owners-might-not-approve-sale-to-steve-cohen.

[101] Greenberg, *supra* note 4, at 1262-63.

vote amidst vocal opposition from a number of majority owners, despite already owning 49% of the franchise and serving as the team CEO.[102] In perhaps two of the best examples of the potential for antitrust scrutiny absent the exemption, Miles Prentice's 1999 bid to purchase the Kansas City Royals was rejected by the owners by a twenty-nine to one margin, despite approval from the then-Royals' board of directors because of the large number of proposed members in his group.[103] Prentice's group included many prominent Kansas City residents—UMB Financial Corp. Chairman R. Crosby Kemper, Negro League's Baseball Museum Chairman Buck O'Neil, and professional golfer Tom Watson.[104] Prentice subsequently sought to purchase the Boston Red Sox for $750 million—the owners ultimately approved a sale to current owner John Henry for $90 million less.[105] When Prentice cried foul, he briefly caught the attention of Massachusetts Attorney General Thomas Reilly, who hinted at an investigation into collusion by stating, at the time of the sale, that "[i]t is clear that major league baseball and particularly the commissioner's office played a major role in who would be the next owner of the Red Sox."[106] The changes to ownership policies contemplated in the Fall 2019 announcement could move the antitrust exemption in the area of ownership sales and transfers into an even more precarious position.

2. *PUBLIC OWNERSHIP*

Unlike the NFL, MLB has not been a league which has banned public ownership of its franchises—a team has been able to offer shares in its franchise on public markets for over two decades, so long as the offered shares would not exceed more than

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[102] Rob Neyer, *Jeff Moorad Drops Bid To Purchase Padres*, SB NATION (Mar. 22, 2012), https://www.sbnation.com/2012/3/22/2895927/jeff-moorad-san-diego-padres-ownership.

[103] ESPN, *Baseball Rejects Prentice Bid for Royals*, ESPN BASEBALL (Nov. 11, 1999), https://a.espncdn.com/mlb/news/1999/1111/165380.html.

[104] *Id.*

[105] Associated Press, *Massachusetts AG Asks to Meet with Selig*, ESPN BASEBALL (Jan. 2, 2002), https://www.espn.com/mlb/news/2002/0102/1304487.html.

[106] *Id.*

49% of the ownership interest and contained voting restrictions.[107] The Atlanta Braves are, in a sense, one of the franchises that has reaped the benefits of this policy. The team is "owned" by the Liberty Braves Group, a subsidiary of Liberty Media Corporation, and the "Liberty Media" entity established a tracking stock, which allows investors to buy a portion of the company that tracks only the Braves' revenue and profits, not other company assets, on NASDAQ in 2015.[108] Those who purchase shares in the tracking stock, however, do not get a shareholder vote and have no influence in the company's day-to-day operations.[109]

The Cleveland Indians undertook a public offering in accordance with MLB policy in 1998, selling 600,000 shares at a price between $14 to $16 per share.[110] While the shares offered and the capital obtained seemed impressive, the team's then-owner Richard Jacobs retained almost 99% control from a voting perspective, fully complying with MLB policies.[111] The IPO ultimately proved to be a "quick fix" for Jacobs to regain some of his investment from his prior purchase of the team; a year later, Jacobs sold his majority stake to Larry Dolan, who promptly cashed out existing minority shareholders via a merger.[112] The shareholders received a $22.61 cash consideration per share—a net profit on their investment.[113]

Under the currently proposed changes to MLB ownership policies, the Indians' IPO experience likely does not provide a useful blueprint. In the 1998 Indians instance, it was the team selling shares *itself*. Under the private equity SPAC model, share purchases would instead be a step removed—the public would be purchasing shares in a company which would only subsequently purchase franchise shares, which could be made available either via a public (like the 1998 Indians' offering) or private offering.

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[107] Smith, *supra* note 81, at 95.

[108] Paul R. La Monica, *Want to buy the Atlanta Braves?*, CNN BUS. (Nov. 12, 2015, 12:29 PM), https://money.cnn.com/2015/11/12/investing/atlanta-braves-stock-john-malone-liberty-media/index.html.

[109] *Id.*

[110] Randall J. Schultz, *Indians IPO a sinker?*, CNN MONEY (June 3, 1998, 6:53 PM), https://money.cnn.com/1998/06/03/markets/q_indians.

[111] Mark Veverka, *IPO by Cleveland Indians Not Exactly a Hit with Investors / Baseball team's stock falls 25 cents in first-day trading*, SF GATE (June 5, 1998), https://www.sfgate.com/business/article/IPO-by-Cleveland-Indians-Not-Exactly-a-Hit-With-3004516.php.

[112] Garrett and Green, *supra* note 29, at 91.

[113] *Id.* at 92.

Likewise, the Indians' 1998 Registration Statement listed as risk factors the team's on-field success, the arrival or departure of talented players, and the risk of player injuries.[114] An IPO of a sports SPAC would not need to list any of these risk factors; the SPAC would not be definitively acquiring a team, nor would it be required to do so.

3. *CHANGES CONTEMPLATED BY THE FALL 2019 ANNOUNCEMENT*

The proposed MLB ownership policy change announced in Fall 2019 would not eliminate the two aforementioned restrictions. A successful Redball-Fenway deal would reportedly grant only a 25% ownership stake in Fenway Sports Group to Redball,[115] and supermajority approval would still be required for changes in majority ownership. Yet the fundamental ownership regime will be altered and the pool of actors with a seat at the table will be expanded. As such, the possibility of heightened scrutiny of baseball's antitrust exemption rises significantly. Under existing policy, with the exemption, there is more or less "no recourse to challenge such a[n ownership] rule in federal court;"[116] *Sullivan* represents the closest relevant precedent, but that matter involved a league without a century's reliance on an antitrust exemption. Whereas eliminating ownership restrictions presenting a barrier to entry into the league would seemingly block off one avenue of attack from plaintiffs on antitrust grounds, by permitting publicly-held companies to acquire minority interests in league franchises, MLB may be opening the door for the erosion of its antitrust exemption by either the courts or Congress. The manner in which the antitrust exemption could be eroded by each of these actors is discussed, in turn.

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[114] Schultz, *supra* note 115.

[115] Hayes Rule, *"Money"Ball is Back*, HARV. J. SPORTS & ENT. L. (Oct. 17, 2020), https://harvardjsel.com/2020/10/a-new-take-on-moneyball-billy-beane-red-sox.

[116] Alison Cackowski, *Legislative Updates: Congress Drops the Ball Again: Baseball's Antitrust Exemption Remains in Place*, 5 DEPAUL-LCA J. ART & ENT. L. 147, 154 (1995).

B. THE COURTS

Aggrieved plaintiffs could bring suit against the MLB on antitrust grounds similar to *Sullivan*—challenging the restrictions that only a minority interest may be publicly sold concerning the ownership and that supermajority approval is required to obtain a majority interest. Under the new policy, arguments that baseball's antitrust exemption should not apply may be strengthened.

Plaintiffs could argue that the sale of ownership interests is not within the "business of baseball," such that the antitrust exemption would apply. As discussed, *supra*, in the period post-*Flood v. Kuhn*, lower courts have historically applied the "business of baseball" test liberally. Yet all of these applications have constituted facets of the game or the promotion and sale of the product, that is, baseball exhibitions—the player reserve system, scouts, and broadcasting. The sale of ownership interests is, arguably, incidental to both the game and its promotion. Indeed, plaintiffs could assert that the "business of baseball" is not implicated, that *Sullivan* (although representing a different league and somewhat different ownership policies) is the most salient case, and that ordinary antitrust scrutiny under the Sherman Act is required.

Additionally, when securities are offered on national exchanges and across state lines (as is the case with SPACs, such as Redball), asserting that the action in question constitutes "wholly intrastate" activity would likely fall on deaf ears. The District Court in *Sullivan* ultimately determined that the relevant geographic market to which the NFL's purportedly anticompetitive behavior extended was the "nationwide market for the sale and purchase of ownership interests in the National Football League member clubs."[117] The First Circuit deferred to the trial jury's finding on this issue.[118]

1. *STANDING ISSUES*

Given the federal court system's reluctance to address baseball's antitrust exemption in recent decades, it is likely that the MLB would argue that prospective owners of securities in a franchise lack the requisite standing under the Sherman Act. In

[117] Sullivan v. Nat'l Football League, 34 F.3d 1091, 1097 (1st Cir. 1994).

[118] *Id.*

McCoy v. MLB, the issue of standing was addressed by the United States District Court for the Western District of Washington, when baseball fans and restaurant owners operating near baseball stadiums alleged anticompetitive behavior by the MLB owners during the 1994-95 labor strike.[119] The *McCoy* Court ultimately held that the plaintiffs lacked standing, as their injury "[could] be fairly characterized as an indirect 'ripple effect.'"[120] Nevertheless, in a more recent case, the Seventh Circuit seemed less focused on the standing question in an antitrust suit brought by a business selling tickets to watch Cubs' games on rooftops overlooking Wrigley Field.[121] Prospective MLB franchise share purchasers would certainly be more closely impacted by the League's ownership restrictions than the plaintiffs in *McCoy*. If the Wrigley Field Rooftops case indicates that the federal courts may favor plaintiffs in standing arguments, then plaintiffs may proceed to arguing the merits of their case—that the antitrust exemption should not shield MLB in regards to its ownership policies.

While it is currently unknown whether the federal courts system would actively apply antitrust law to MLB ownership restrictions in light of recent changes, meritorious arguments certainly exist that the Fall 2019-announced changes remove MLB ownership policies from the "wholly intrastate" standard. At least one sitting United States Supreme Court Justice has indicated support for the erosion of the antitrust exemption in certain situations—then-Tenth Circuit Judge Neil Gorsuch in his concurrence in *Direct Marketing Association v. Brohl* likened the exemption to an "island . . . that manage[s] to survive indefinitely even when surrounded by a sea of contrary law."[122] Then-Judge Gorsuch would go on to underscore his belief that the exemption "would never expand but would, if anything, wash away with the tides of time."[123] Now, Justice Gorsuch could be in a prime

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[119] McCoy v. Major League Baseball, 911 F.Supp. 454, 456 (W.D. Wash. 1995).

[120] *Id.* at 458.

[121] *See generally* Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 870 F.3d 682 (7th Cir. Sept. 1, 2017).

[122] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

[123] *Id.*

position to oversee this steady erosion he hinted at in *Brohl*.

C. CONGRESS

If the court system proves unwilling to step in and declare baseball's antitrust exemption inapplicable to the sale of ownership shares, the issue could be pushed onto the congressional agenda. As discussed *supra*, federal bills have tried to tie the survival of baseball's antitrust exemption to changes to MLB's ownership policies.[124] These bills have largely failed as a result of legislative inertia, as well as opposition from a key interest group—the owners, themselves. Congress is undoubtedly "influenced by the lobby of the team owners and the necessity of keeping [them] happy."[125] Additionally, amidst fears of contraction in the mid-1990s, members of Congress were fearful that the erosion of the antitrust exemption could create "the possibility of their hometown teams leaving . . . [as a consequence of owners] no longer [being] able to control the alienability of their franchises."[126]

Now, however, in the 2020s, contraction is no longer a real threat; indeed, the MLB is actively considering expansion.[127] Pressure on legislators in Congress to act to protect prospective investors' interests—which, under the new MLB policy, could range from sophisticated businesspeople to ordinary fans—could certainly grow. Congress could take a piecemeal approach, similar to the Curt Flood Act, asserting that the antitrust exemption does not apply in regards to: (a) the limited issue of ownership restrictions; and/or (b) only to those teams that actively choose to offer securities on a national exchange, or sell a substantial interest to a SPAC or other publicly-held company.

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[124] Smith, *supra* note 81, at 105.

[125] 139 CONG. REC. S2417 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).

[126] Cackowski, *supra* note 79, at 150.

[127] Mike Axisa, *Why the coronavirus shutdown could lead to MLB expansion in the near future*, CBS SPORTS (May 21, 2020, 10:19 AM), https://www.cbssports.com/mlb/news/why-the-coronavirus-shutdown-could-lead-to-mlb-expansion-in-the-near-future.

IV. CONCLUSION

Ultimately, MLB will likely face an important decision: is it willing to allow for increased ownership opportunities at the cost of potentially opening the door for the erosion of its antitrust exemption? As of Fall 2020, the league's thirty teams have amassed a collective $8.3 billion in debt because of the pandemic, teams are expected to lay off hundreds (if not thousands) of employees, TV ratings have significantly declined, and yet another season without fans in the stands looms.[128]

A. POTENTIAL SOLUTIONS WITH LESS ANTITRUST-RELATED RISK

The potential solution to these problems (especially losses of capital and declining fan engagement) highlighted in this Note is for the MLB to permit publicly-traded private equity funds, including SPACs, to obtain ownership interests in franchises, offering fans a unique opportunity among professional sports leagues to own a fraction of their favorite team. If the MLB, however, were to decide that the risks of such a change would jeopardize its antitrust exemption to an unacceptable extent, the league could consider other options.

First, MLB could double-down on its existing regime and raise the needed capital via targeted offerings from the teams, themselves, aimed at private equity—either by tracing the Indians 1998 experience or the tracking stock utilized by the Braves. This

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[128] Barry M. Bloom, *MLB Debt Totals $8.3 Billion As Manfred Mulls Options For Next Season*, SPORTICO (Oct. 26, 2020, 2:20 PM), https://www.sportico.com/leagues/baseball/2020/mlb-debt-2020-manfred-1234615474; *See e.g.*, Alex Coffey, *A's inform employees of a wave of layoffs at the end of 2020*, THE ATHLETIC (Oct. 23, 2020), https://theathletic.com/2157970/2020/10/23/oakland-athletics-layoffs; *See* Will Leitch, *Why Are Pandemic Sports Ratings So Terrible?*, NEW YORK MAGAZINE (Oct. 6, 2020), https://www.nymag.com/intelligencer/2020/10/why-are-pandemic-sports-ratings-so-terrible.html; Jared Diamond, *MLB Finished Its Pandemic Season—but 2021 Would Be 'Devastating' Without Fans, Commissioner Says*, WALL ST. J. (Sept. 28, 2020, 7:00 AM), https://www.wsj.com/articles/mlb-finished-its-pandemic-seasonbut-2021-would-be-devastating-without-fans-commissioner-says-11601290800.

approach, however, would likely result in less profitable outcomes, as the investing public may favor highly experienced sports professionals, such as Billy Beane, acquiring interests via a SPAC, where he would at least have *some* say in the franchise's affairs (as opposed to an IPO by the team or a tracking stock where an acquirer does not obtain voting rights). Additionally, if the trading price of the Braves' tracking stock during the pandemic offers any insight, this solution could rake in significantly less capital than a sports SPAC IPO. In Fall 2020, the Braves found themselves one game away from a World Series appearance, yet in October, the team's tracking stock shares hovered around $21—a third of its all-time high.[129]

Second, to bolster its argument that ownership policies represent wholly intrastate activity, the MLB could limit public offerings of shares in its franchises to only investors residing in the relevant state under intrastate offering rules. Section 3(a)(11) of the Securities Act, Rule 147, and Rule 147A remove such offerings from the SEC's purview but carry along burdensome restrictions on offers and sales, resale securities, and "doing business" requirements.[130]

Finally, MLB could follow in the NBA's footsteps in selecting one singular private equity fund to be "the league's sole pre-approved institutional buyer" of minority stakes.[131] As the NBA achieved with its partnership with Dyal Capital Partners, this approach would create a more unified approach to the purchase and sale of minority interests and allow one entity to own stakes in numerous franchises as opposed to fragmentation which, in theory, could lead to more antitrust violation allegations. This approach would allow MLB to avoid antitrust scrutiny by pointing to *United States v. NFL*—a 1961 case, in which the NFL's decision to pool all television rights of the individual teams' games and later sell these rights as a package to a television

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[129] Brendan Coffey, *Braves Playoff Run Unlikely To Please Owners of Rare Publicly Traded Team*, SPORTICO (Oct. 15, 2020, 2:55 AM), www.sportico.com/business/finance/2020/atlanta-braves-stock-1234614919.

[130] *See Intrastate offerings* U.S. SEC. & EXCH. COMM'N (Mar. 12, 2020), https://www.sec.gov/smallbusiness/exemptofferings/intrastateofferings.

[131] Alex Lynn, *Championship rings and GP-leds: Inside Dyal's NBA strategy*, SECONDARIES INVESTOR (Sept. 24, 2020), https://www.secondariesinvestor.com/championship-rings-and-gp-leds-inside-dyals-nba-strategy.

network was held to not violate the Sherman Act.[132] There, the Court held that by pooling their TV rights, "the member clubs . . . eliminated competition among themselves in the sale of television rights for their games."[133] The similarity between the NFL member clubs pooling their TV rights and MLB (or any other league's) clubs pooling their minority interests and selling this package to one investment fund is clear. From a practical standpoint, however, Dyal is not publicly traded, and while its investment resources are undoubtedly strong, its pool of potential investors is more limited than that which a SPAC could potentially muster.

B. FUTURE DIFFICULTIES HOLDING BACK THE PUBLIC OWNERSHIP TIDE

The decision to allow for some degree of public ownership of MLB franchises—beyond that presently permitted—will not be made lightly. Indeed, as asserted in this Note, even if the League limits private equity funds to acquiring minority interest *only*, because of the increased prevalence of publicly-traded SPACs in the sports space, the pressure on the courts and Congress to erode MLB's antitrust exemption as it currently applies to ownership restrictions may reach a point of no return.

However, if this phenomenon were to occur, it would not necessarily result in the death knell for private ownership in the MLB. Without the exemption, the League would likely be subjected to "rule of reason" scrutiny like other sports leagues, and it is extremely likely that the courts could find MLB's policy restricting public ownership to no more than 49% of a franchise to be reasonable.[134] Overall, the MLB—weighing its options—may be open to sacrificing its antitrust exemption as applied to ownership restrictions. In light of present challenges, the advancement of its ownership policies into a new era for

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[132] United States v. Nat'l Football League, 196 F.Supp. 445, 446–47 (E.D. Pa. 1961).

[133] *Id.* at 447.

[134] *See, e.g.,* Birren, *supra* note 92, at 128 ("[T]o prevail under the rule of reason, the plaintiff must prove that there was (1) [a]n agreement among two or more persons or distinct business entities; (2) [w]hich is intended to harm or unreasonably restrain competition; (3) [a]nd which actually causes injury to competition.").

American professional sports could both literally and figuratively pay dividends towards the league's continued success.