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

CHASE BROWNDORF[∞]

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

[∞] J.D., Harvard Law School 2020. B.A., Government, The University of Texas at Austin 2017. The views and opinions expressed herein are solely those of the author.

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

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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.

terms of antitrust. Given the Fall 2019 announcement that MLB 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

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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.

registration statement required by the SEC for SPACs does not require the SPAC to identify a specific target but allows the SPAC 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

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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.

environment for purchasing these interests, it is no wonder why 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

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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).

issue by providing local fans and business owners with the 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

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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).

Board of Governor's rejection of his bid to buy the Boston Celtics 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

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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)

the other NFL owners.[89]

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

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[89] *Id.*

[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.

Part III discusses the types of ownership restrictions currently existing in MLB.

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

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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.

2012 bid to purchase the San Diego Padres before the owners' 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

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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.

via a public (like the 1998 Indians' offering) or private offering. 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

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

[118] *Id.*

the MLB would argue that prospective owners of securities in a franchise lack the requisite standing under the Sherman Act. In *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'

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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.

games and later sell these rights as a package to a television 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

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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.").

advancement of its ownership policies into a new era for American professional sports could both literally and figuratively pay dividends towards the league's continued success.

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CAN'T NOBODY TELL HIM NOTHIN': "OLD TOWN ROAD" AND THE REAPPROPRIATION OF COUNTRY MUSIC BY THE YEEHAW AGENDA

SOPHIE THACKRAY[∞]

ABSTRACT

This Note examines country music's cultural reappropriation by Black artists, using Lil Nas X's "Old Town Road" as a central example. This Note analyzes musical genre through an intellectual property lens and details the theoretical claims against "Old Town Road" by the country music establishment, including trademark, copyright, and the First Amendment. This Note also explores potential defenses to these claims and discusses whether policing genre through legal means is feasible, concluding conferring property rights in genre is unworkable and would stifle the very creativity that intellectual property law is designed to encourage.

[∞] Georgetown Justice Fellow, Housing Unit, Neighborhood Legal Services Program, Washington, D.C. The author would like to thank Professor Madhavi Sunder for her counsel. J.D., Georgetown University Law Center 2020. B.A. University of Oregon, Clark Honors College 2014. The author created a Spotify playlist while writing this Note which includes artists and music mentioned. The playlist can be found at: https://open.spotify.com/playlist/4nBYWvCcb1OXA1Jn1eZrcQ?si=nH8RX_FQS9qX6CY_nRMG4A.

INTRODUCTION

Cultural appropriation is "the act of taking or using things from a culture that is not your own,"[1] "without understanding or respecting the original culture and context."[2] Cultural appropriation primarily occurs when dominant cultural creators take disadvantaged and minority creators' innovations and pass off those ideas as their own, generating profit for themselves.[3] This process turned country music into an enormously popular symbol of white American identity, dominated by white artists and fans, despite its origins in African American music and culture.[4]

However, several Black artists and musicians have recently reintroduced country style and imagery into their work, a trend which has become known as the "Yeehaw Agenda."[5] This reappropriation[6] of country music and cowboy culture by Black artists is distinct from the ongoing appropriation of Black music and culture by white artists due to the unequal power distribution

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[1] *Cultural appropriation,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/cultural-appropriation (last visited Dec. 17, 2019).

[2] *Cultural appropriation*, DICTIONARY.COM, https://www.dictionary.com/e/pop-culture/cultural-appropriation/ (last visited Dec. 17, 2019).

[3] Brittaney Kiefer, *Cultural Appropriation: Don't Be An Invader*, CAMPAIGN, (Feb. 19, 2020), https://www.campaignlive.co.uk/article/cultural-appropriation-dont-invader/1672978.

[4] *See* Jordan Marie-Smith, *Tracing Country's Music Roots Back to 17th-century Slave Ships*, WASH. POST, (Aug. 2, 2019), https://www.washingtonpost.com/nation/2019/08/02/tracing-country-musics-roots-back-th-century-slave-ships/.

[5] Andrew R. Chow, *The Yeehaw Agenda Is About More Than Cowboy Hats. It's About American Identity,* TIME.COM (Nov. 21, 2019), https://time.com/5735430/yeehaw-agenda-black-artists-reclaiming-cowboy-image/.

[6] By "reappropriation" I mean the process of taking and repurposing a slur or cultural artifact "previously used exclusively by dominant groups to reinforce a stigmatized group's lesser status."; Adam D. Galinsky et al., *The Reappropriation of Stigmatizing Labels: The Reciprocal Relationship Between Power and Self-Labeling,* 24 PSYCHOL. SCI. 2020, 2020 (2013).

in the cultural marketplace.[7] Black, female, LGBTQ+, and other minority musicians are often passed over for recognition, or only receive recognition second-hand, through appropriation of their work by their white peers. The "Yeehaw Agenda's" reappropriation of country music disrupts this power dynamic by bringing minority creators, like Lil Nas X, to the genre's forefront.

In the music industry, the power to recognize and promote creative works lies with the industry's predominantly white gatekeepers, which include record labels, media groups (e.g., Billboard), the Recording Academy, digital streaming services, and radio stations.[8] These gatekeepers are entrusted with placing artists and songs into genres and onto charts, which is not typically accorded great significance.[9] This critical role gives gatekeepers the ability to determine musicians' exposure, audiences, and even their artistic identity, a potentially problematic power, particularly when the artist does not conform to a designated category's norms. Today, this power is merely a part of industry practice, not a distinct legal right. However, various music gatekeepers have asserted quasi-property rights over genre determination, as if they owned the genre itself.[10]

This Note considers and critiques the theoretical application of intellectual property to define and police genre in music. The debate over who owns the rights to musical genres recently came into the spotlight amid the removal of Lil Nas X's

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[7] Matthew D. Morrison, *Race, Blacksound, and the (Re)Making of Musicological Discourse*, J. AM. MUSICOLOGICAL SOC'Y 781—823, 784—85 (2019).

[8] *See, e.g.,* Kristin Corry, *The Music Industry Fails Black People Every Day*, VICE, (June 3, 2020), https://www.vice.com/en/article/ep4xv4/the-music-industry-fails-black-people-every-day; Neil Shah, *The Music Industry's New Gatekeepers*, WALL ST. J., (Nov. 15, 2017), https://www.wsj.com/articles/the-music-industrys-new-gatekeepers-1510761601.

[9] *See* Mark Laver, *Lil Nas X and the Continued Segregation of Country Music*, WASH. POST, (June 20, 2019), https://www.washingtonpost.com/outlook/2019/06/20/lil-nas-x-continued-segregation-country-music/?arc404=true.

[10] *See, e.g.,* Elias Leight, *Lil Nas X's 'Old Town Road' Was a Country Hit. Then Country Changed Its Mind*, ROLLING STONE, (Mar. 26, 2019), https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/.

"hick-hop"[11] track "Old Town Road" from Billboard's country music chart.[12] This Note argues the "Yeehaw Agenda" is not cultural appropriation, but rather cultural *re*appropriation emerging from Black musicians' persistent exclusion from the country music genre.

Part I examines gatekeeping in the music industry and the racial boundaries among genres. Part II briefly details country music's history and describes Billboard's theoretical intellectual property claims against Lil Nas X and similar artists based on its perceived right to define country music's boundaries. This Note also considers racial capitalism in the music industry—"the process of deriving social and economic value from the racial identity of another person"[13]—and mediating value through whiteness. Finally, Part III applies intellectual property and trademark law to conceptions of and decisions about genre, and describes the dangers of doing so.

I. BACKGROUND

A. RACIST GATEKEEPING IN THE MUSIC INDUSTRY

1. *HISTORY*

Throughout its history, country music has constantly wrestled with its identity and position within the music industry. In the early 20th century, a musician's race "defined their inclusion in the genre as much as the music itself."[14] Billboard's rhythm & blues (R&B) chart, jazz chart, and other music by Black artists was labeled "race music" while nearly identical music by white artists was categorized as "hillbilly," a precursor to country

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[11] "Hick-hop" is a term used synonymous with country rap. Rolling Stone, *Lil Nas X's A History of Hick-Hop: The 27 Year-Old Story of Country* Rap, ROLLING STONE, (June 27, 2014), https://www.rollingstone.com/music/music-country-lists/a-history-of-hick-hop-the-27-year-old-story-of-country-rap-22010/.

[12] Leight, *supra* note 10.

[13] Nancy Leong, *Racial Capitalism,* 126 HARV. L. REV. 2151, 2152 (2013).

[14] Jeff Manuel, *Will Ken Burns Whitewash Country Music's Multiracial Roots?*, WASH. POST (Sept. 15, 2019), https://www.washingtonpost.com/outlook/2019/09/15/will-ken-burns-whitewash-country-musics-multiracial-roots/.

music.[15] This racial boundary was aggressively enforced. For example, in 1927, Columbia Records mistakenly released songs by the Allen Brothers, a white duo, under the label's "race records" series.[16] The Allen Brothers sued Columbia "for damaging their reputation" and signed with a new record label.[17] Even after eliminating the "race records" classification in 1949, Billboard created the "rhythm and blues" genre to replace it.[18]

Billboard is not country music's only gatekeeper. Country radio stations and listeners also decide who is allowed into the genre.[19] Radio plays are crucial to artists' success; however, they are not equally allocated. Despite gatekeepers' claims the parameters are neutral, that music either contains certain country "elements" or it does not, these features are "almost inevitably shorthand for much deeper, more politically fraught issues,"[20] such as the musician's race or gender. For example, country radio "has come under fire in recent years for its narrow playlists, including an aversion to playing songs by women."[21] In 2015, country-radio consultant Keith Hill made waves by announcing, "[i]f you want to make ratings in country radio, take females out."[22] According to Country Aircheck, the percentage of "purely female country songs" dropped from an already dismal 13 percent in 2016 to a mere 10.4 percent in 2017.[23]

Mapping genre along race lines persists in the music industry today. In recent years, several Black artists have objected to the R&B and Hip Hop chart's restrictiveness, pointing out the

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[15] *Id.*; Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 594—95 (2010).

[16] DIANE PECKNOLD, HIDDEN IN THE MIX: THE AFRICAN AMERICAN PRESENCE IN COUNTRY MUSIC 21 (2013).

[17] *Id.*

[18] Arewa, *supra* note 15, at 595—96, 599.

[19] *See* Laver, *supra* note 9.

[20] *Id.*

[21] *Id.*

[22] Rob Harvilla, *How Bebe Rexha Broke the Country Charts*, THE RINGER (July 27, 2018), https://www.theringer.com/music/2018/7/27/17619720/bebe-rexha-meant-to-be-country-charts.

[23] Cindy Watts, *3 Years After 'Tomato-Gate,' There are Even Fewer Women on Country Radio*, THE TENNESSEAN (June 10, 2018), https://www.tennessean.com/story/entertainment/music/2018/06/10/women-country-radio-tomatogate-music-row-kelsea-ballerini-maren-morris/675471002/.

similarities to the past "race records" designation.[24] For example, FKA Twigs, whose avant-garde style does not neatly fit into a specific genre; Juice WRLD, whose musical style is "textbook rock and roll, awash in guitars;"[25] and Beyoncé, whose song "Daddy Lessons" is credited as starting a trend of "pop stars toying with American West and Southern aesthetics,"[26] have all been designated R&B artists.[27] As author and Professor of Women's and Gender Studies Diane Pecknold explained, "one reason race has remained so central to genre definitions is that racial crossover destabilizes the very concept of genre, reliant as it is on homological conceptions of audience cultures."[28]

It is particularly difficult for Black artists to escape the R&B label when they integrate rap into their music. A double standard exists for artists attempting to cross genre lines. "If you are considered a 'country artist making country-rap', it's OK," says Melanie McClain, a music content specialist.[29] "But if you're considered a rapper and making country-rap, the perception is a little different."[30] As "hick-hop" country rapper Cowboy Troy insists, "what sounds like rap to some people is in fact merely his updating of the 'recitation,' an established mode within country music itself."[31] Troy claims "he isn't so much hybridizing country with rap as he is highlighting a preexistent strain" within country music itself.[32] Unlike White artists, the music industry's

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[24] Briana Younger, *Black Musicians on Being Boxed in by R&B and Rap Expectations: "We Fit in So Many Things,"* PITCHFORK (Sept. 28, 2017), https://pitchfork.com/thepitch/black-musicians-on-being-boxed-in-by-randb-and-rap-expectations-we-fit-in-so-many-things/.

[25] Leight, *supra* note 10.

[26] Brittany Spanos, *Giddy Up! Here's What You Need to Know About the Yeehaw Agenda*, ROLLING STONE (Mar. 8, 2019), https://www.rollingstone.com/music/music-features/welcome-to-the-yee-yee-club-bitch-805169/.

[27] *See* Younger, *supra* note 24; *Chart History Juice Wrld*, BILLBOARD https://www.billboard.com/music/juice-wrld/chart-history/RBT; *Beyonce, BRITANNICA.COM*, https://www.britannica.com/biography/Beyonce (last modified Dec. 10, 2020).

[28] PECKNOLD, *supra* note 16, at 12.

[29] Myers, *infra* note 71.

[30] *Id.*

[31] PECKNOLD, *supra* note 16, at 240. Johnny Cash's "A Boy Named Sue" is a classic example of the recitation style.

[32] *Id.*

gatekeepers do not know where to place musicians of color who blur genre lines.[33]

In contrast, "there has been comparatively little controversy over the incorporation of rap into the [country music] genre if it comes via White artists."[34] For example, Florida Georgia Line's single "Meant to Be" spent fourteen weeks topping Billboard's country chart in 2018, and broke the all-time record for a song with a female lead, despite its snap-and-kick drum beat and a feature by Bebe Rexha, a primarily hip hop and R&B artist.[35] "[W]hite artists have infinitely more latitude when crossing genres than artists of color," however their music may sound.[36]

2. *NEW ERA OF MUSIC DEVELOPMENT AND PROMOTION*

Today's music industry is dominated by digital streaming services rather than record sales, which means "songs can go viral before [record] labels, radio programmers and playlist curators can sort them into genre buckets."[37] Billboard recently overhauled its chart methodology to accommodate these changes.[38] During the fifty years following its launch in 1958, Billboard's "Hot Country Songs" chart primarily measured songs' airplay on country radio.[39] However, beginning in 2012, Billboard put "more weight on streaming data, digital downloads, and in the case of the genre charts, crossover play on pop radio."[40] Because the genre determination is made after the music's release, this phenomenon exacerbates the already present "power struggle about who has the right to make what and whether Black artists can fit in predominantly white genres."[41]

Digital applications allowing users to create video clips set to music, such as Musical.ly and TikTok, are particularly

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[33] Leight, *supra* note 10.

[34] *Id.*

[35] Harvilla, *supra* note 22.

[36] Laver, *supra* note 9.

[37] Leight, *supra* note 10.

[38] Billboard, *Billboard Finalizes Changes to How Streams Are Weighted for Billboard Hot 100 & Billboard 200*, BILLBOARD NEWS (May 1, 2018) https://www.billboard.com/articles/news/8427967/billboard-changes-streaming-weighting-hot-100-billboard-200.

[39] Harvilla, *supra* note 22.

[40] Harvilla, *supra* note 22.

[41] Leight, *supra* note 10.

influential in elevating a song's popularity. Between November 2018 and November 2019, TikTok reported more than 750 million downloads, which is far surpasses the number of downloads of Facebook, Instagram, YouTube, and Snapchat during the same time period.[42] Memes created on these platforms often swiftly send a song to the top of the charts, such as Rae Sremmurd's "Black Beatles" in 2016 and Drake's 2018 hit "In My Feelings."[43] In early 2019, TikTok launched the career of a formerly unknown rapper Montero Lamar Hill—better known as Lil Nas X.[44]

When Lil Nas X first shared his banjo-based, cowboy lifestyle-praising, twangy hip hop hit "Old Town Road," he hosted it on the music-sharing website SoundCloud as a country record.[45] This was in part a strategic choice by Lil Nas X. As viral country sensation manager Danny Kang noted, this choice was "favorable versus trying to go to the rap format to compete with the most popular songs in the world."[46] After gaining some traction on SoundCloud, "Old Town Road" swiftly rose to meme status on TikTok through the "Yeehaw challenge," in which young users suddenly appear in full cowboy get-up from hat to boots as the beat drops.[47] In March 2019, "Old Town Road" matured from internet sensation to chart-topping hit, debuting on Billboard's cross-genre "Hot 100" chart, the "Hot Country Songs" chart, and the "Hot R&B" and "Hip Hop Songs" chart simultaneously.[48]

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[42] Jack Nicas, et al., *TikTok Said to Be Under National Security Review*, N.Y. TIMES (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/technology/tiktok-national-security-review.html.

[43] Harvilla, *supra* note 22.

[44] James Poniewozik, et al., *48 Hours in the Strange and Beautiful World of TikTok*, N.Y. TIMES (Oct. 10, 2019), https://www.nytimes.com/interactive/2019/10/10/arts/TIK-TOK.html?module=inline.

[45] Leight, *supra* note 10.

[46] *Id.*

[47] *Id.*; *see also,* TikTok, *I Got Horses in the Back Challenge Compilation*, YOUTUBE (Mar. 29, 2019), https://www.youtube.com/watch?v=diYDzpJYXVc.

[48] *The Hot 100: Week of March 16, 2019,* BILLBOARD, https://www.billboard.com/charts/hot-100/2019-03-16; *Hot Country Songs: Week of March 16, 2019,* BILLBOARD, https://www.billboard.com/charts/country-songs/2019-03-16; *Hot R&B/Hip-Hop: Week of March 16, 2019,* BILLBOARD, https://www.billboard.com/charts/r-b-hip-hop-songs/2019-03-16.

Despite his success, Lil Nas X's country chart domination was short-lived.

3. *THE DISAPPEARANCE OF "OLD TOWN ROAD"*

Soon after "Old Town Road" debuted and reached the number nineteen spot, Billboard quietly removed it from its "Hot Country" chart, stating:

> Upon further review, it was determined that "Old Town Road" by Lil Nas X does not currently merit inclusion on Billboard's country charts. When determining genres, a few factors are examined, but first and foremost is musical composition. While "Old Town Road" incorporates references to country and cowboy imagery, it does not embrace enough elements of today's country music to chart *in its current version*.[49]

"Old Town Road" contains hip hop elements, most notably trap-style 808 drums and bass, but it also, as Billboard notes, "incorporates references to country and cowboy imagery."[50] Although these elements make the song difficult to corral into one traditional genre, today's genres are not as distinct as they once were. Even still, "no genre wrestles with its identity as openly as country."[51] The country music gatekeepers in Nashville saw "Old Town Road" as a gimmick created by an outsider.[52]

Although rap's infiltration of country music is "ancient news,"[53] previous forays featured white male artists, who have the

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[49] Leight, *supra* note 10 (emphasis added).
[50] *Id.*
[51] *Id.*
[52] *See* Laver*, supra* note 9.
[53] *Id.*

power to admit outsiders to the genre.[54] Enter: Billy Ray Cyrus. A fellow country chart outcast, Billy Ray expressed support for Lil Nas X in a tweet:

> @LilNasX Been watching everything going on with ["Old Town Road"]. When I got thrown off the charts, Waylon Jennings said to me 'Take this as a compliment' means you're doing something great! Only Outlaws are outlawed. Welcome to the club![55]

Cyrus's tweet led to a legendary collaboration between the two outlaws—an "Old Town Road" remix—which peaked at number one on Billboard's "Hot 100" chart for a record-breaking nineteen consecutive weeks.[56] The remix also earned the Country Music Association (CMA) Award for "Musical Event of the Year," making Lil Nas X the first openly gay performer to win a CMA award.[57] Now a bona fide country music mainstay, Cyrus's collaboration is a prime example of "racial capitalism"[58] in the music industry and the ability of white artists to legitimize the work of their Black peers. Cyrus and Lil Nas X give a cheeky nod

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[54] *See, e.g.,* Nelly, *Over and Over (ft. Tim McGraw)* (Universal Records, 2004); Snoop Dogg, *My Medicine (ft. Willie Nelson)* (Doggy Style Records, 2008).

[55] Billy Ray Cyrus (@billyraycyrus), TWITTER (Apr. 3, 2019), https://twitter.com/billyraycyrus/status/1113531625336385536 (last visited Dec. 17, 2019).

[56] Gary Trust, *Lil Nas X's 'Old Town Road' Leads Billboard Hot 100 for 19th Week, Ariana Grande & Social House's 'Boyfriend' Debuts in Top 10,* BILLBOARD (Aug. 12, 2019), https://www.billboard.com/articles/business/chart-beat/8527171/lil-nas-x-old-town-road-number-one-hot-100-19-weeks.

[57] Nico Lang, *Lil Nas X Is First Out Gay Musician to Win Country Music Award*, OUT MAGAZINE (Nov. 14, 2019), https://www.out.com/music/2019/11/14/lil-nas-x-first-out-gay-man-win-country-music-award.

[58] "The process of deriving social and economic value from the racial identity of another person." Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013).

to Cyrus's racial capital in the music video for their remix, in which both men play Nineteenth Century outlaws:

> Lil Nas X: "The last time I was here they weren't too welcoming to outsiders."
> Cyrus: "Eh, you and me this time! Everything's gonna be alright."[59]

In the video, as in real life, Cyrus leverages his whiteness to give Lil Nas X entry into an arena in which he would not otherwise be welcome. While the original version was removed from Billboard's "Hot Country" chart "in its current version," Cyrus's addition was all it took to transform "Old Town Road" into a valid country song.

4. *MUSIC'S INCLUSION PROBLEM*

In the music industry, most genres are "still thought of as music by, and for, white people."[60] The R&B and Hip Hop chart is the exception and where the "vast majority of African American artists end up."[61] White artists, meanwhile, "can be placed there or anywhere else."[62] While white rappers like Eminem and Post Malone easily climb the hip hop charts, Black artists are often excluded from charts unless placed under the old "race records" designation.[63]

Lil Nas X is not the first Black artist to attempt to break into a genre other than hip hop or R&B. British singer FKA Twigs has lamented "the frustration of being creatively pigeonholed by the color of [one's] skin."[64] "When I first released music and no one knew what I looked like, I would read comments like, 'I've never heard anything like this before, it's not in a genre,'" she told *The Guardian* in 2014. "And then my picture came out six months

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[59] Lil Nas X, *Old Town Road (Official Movie) ft. Billy Ray Cyrus,* YOUTUBE (May 17, 2019), https://www.youtube.com/watch?v=w2Ov5jzm3j8.

[60] Leight, *supra* note 10.

[61] Laver, *supra* note 9.

[62] Laver, *supra* note 9.

[63] Laver, *supra* note 9

[64] Younger, *supra* note 24.

later, now she's an R&B singer."[65] In 2016, Beyoncé attempted to submit her track "Daddy Lessons" to the Grammy committee overseeing the awards given to country songs, "only to be shot down."[66] Newcomer Juice WRLD[67] listed the rock bands Fall Out Boy, Black Sabbath, and Megadeth among his greatest influences.[68] However, he is absent from Spotify's premier rock playlist, which is dominated by white artists.[69] Even some pop radio programmers acknowledge many peers are reluctant to play music by Black artists.[70]

Country music in particular has an inclusion problem, tending to shut out female artists and people of color. In 2018, Billboard's year-end "Hot Country Songs 100" featured only five songs by artists of color, three of which were by breakout, biracial star Kane Brown.[71] The same year, Brown tweeted (and later deleted): "Some people in Nashville who have pub[lishing] deals won't write with me because I'm black."[72] By comparison, more than half the "Hot 100's" year-end songs—dominated by hip hop songs—featured Black artists.[73] At the 52nd annual CMA Awards in 2018, the ceremony contained several performances by country's male stars, while women and artists of color were "by

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[65] Ben Beumont-Thomas, *FKA Twigs: "Weird Things Can be Sexy,"* THE GUARDIAN (Aug. 9, 2014), https://www.theguardian.com/music/2014/aug/09/fka-twigs-two-weeks-lp1.

[66] Leight, *supra* note 10.

[67] Juice WRLD (born Jarad Anthony Higgins) tragically died during the writing of this paper, on Dec. 8, 2019 at the age of 21.

[68] Alex Zidel, *Juice WRLD Reveals The Origin Of His Name & His Major Influences*, HOT NEW HIP HOP (May 24, 2018), https://www.hotnewhiphop.com/juice-wrld-reveals-the-origin-of-his-name-and-his-major-influences-news.50999.html.

[69] Leight, *supra* note 10.

[70] Elias Leight, *How Big Boi's 'All Night' Became 2018's Most Improbable Hit*, ROLLING STONE (Aug. 14, 2018), https://www.rollingstone.com/music/music-features/how-big-bois-all-night-became-2018s-most-improbable-hit-707444/.

[71] *Year-End Charts: Hot Country Songs*, BILLBOARD (2018), https://www.billboard.com/charts/year-end/2018/hot-country-songs.

[72] Owen Myers, *Fight for Your Right to Yeehaw: Lil Nas X and Country's Race Problem*, THE GUARDIAN (Apr. 27, 2019), https://www.theguardian.com/music/2019/apr/27/fight-for-your-right-to-yeehaw-lil-nas-x-and-countrys-race-problem.

[73] *Year-End Charts: Hot 100 Songs*, BILLBOARD (2018), https://www.billboard.com/charts/year-end/2018/hot-100-songs.

and large relegated to the fringes."[74] Notably, neither Kacey Musgraves (who won album of the year) nor Kane Brown ("one of country's most promising young stars") were granted a performance slot.[75]

Contemporary country songs often portray the white working class, illuminating the challenges of being poor in the southern United States.[76] However, popular country music as a genre has largely neglected to address "the way class and regional identity intersect with hierarchies of race and gender."[77] As Geoff Mann argues, country music voices a nostalgia that "suppresses specific histories of racism and domination" and paints white people as naïve victims, allowing them to "lament their own loss of privilege without acknowledging ever having held it."[78] To preserve this idyllic image, country music's white gatekeepers must exclude those who would disrupt it.

II. POTENTIAL LEGAL CLAIMS AGAINST "OLD TOWN ROAD" AND ITS PEERS

The United States' current legal system does not have a workable scheme to protect one group's cultural identity from the intrusion or degradation by another group. However, culture wars over identity persist, as does the struggle for control of their values, practices, and representation in popular culture. As Professor Madhavi Sunder notes in her article "Cultural Dissent," the "[l]aw's conception of culture matters. As cultures become more internally diverse and members appeal to courts to determine

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[74] Pedro Rosado, *Kane Brown, Pistol Annies, and Country Music's Inclusion Problem*, N.Y. TIMES (Nov. 17, 2018), https://www.nytimes.com/2018/11/17/arts/music/popcast-country-music.html.

[75] *Id.*

[76] Pecknold, *supra* note 16, at 3.

[77] *Id*.

[78] PECKNOLD, *supra* note 16 (citing Geoff Mann, *Why Does Country Music Sound White? Race and the Voice of Nostalgia*, 31 J. ETHN. RACIAL STUD., 73, 89 (2008)). Recently, some country artists have moved to disassociate themselves from the genre's history of racism; most notably the Dixie Chicks, who dropped "Dixie" from their name, and Lady Antebellum, who became "Lady A." Lisa Respers France, *Country Music's Race Issue is no Surprise,* CNN (Feb. 4, 2021), https://edition.cnn.com/2021/02/04/entertainment/morgan-wallen-country-race-issue/index.html

a culture's meaning, increasingly, it will be law, not culture, that regulates cultural borders."[79]

Without an applicable legal regime in place, people must imagine the grounds on which cultural groups might challenge intrusion against their perceived identity. In considering "Old Town Road," two main groups are fighting for the power to define and popularize a particular cultural product—country music. Billboard, a prominent country music gatekeeper, versus Lil Nas X, a 20-year-old Black rapper from rural Georgia who recently came out as gay.[80] To some, Lil Nas X embodies many things country music's gatekeepers assert the genre is not—diverse in race, sexual orientation, and musical style. These gatekeepers, primarily white men,[81] firmly objected[82] to Lil Nas X's breakout hit "Old Town Road" being associated with country music. In removing "Old Town Road" from Billboard's country chart, the gatekeepers asserted a property-like ownership claim over the genre by determining who can participate. This claim is complicated because country music was never owned by white gatekeepers.

A. BRIEF HISTORY OF COUNTRY MUSIC

Ironically, Black artists were integral to country music's birth and development.[83] Despite the genre's historical perception as the most "'pure white' of all American music forms,"[84] country music draws heavily on African American musical influences like the blues. The banjo, a quintessential country instrument, first

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[79] Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 496 (2001).

[80] Jon Blistein, *Lil Nas X Comes Out on World Pride Day,* ROLLING STONE (July 1, 2019), https://www.rollingstone.com/music/music-news/lil-nas-x-comes-out-on-world-pride-day-853892/.

[81] Amanda Petrusich, *Darius Rucker and the Perplexing Whiteness of Country Music*, THE NEW YORKER (Oct. 25, 2017), https://www.newyorker.com/culture/cultural-comment/darius-rucker-and-the-perplexing-whiteness-of-country-music.

[82] Leight, *supra* note 10.

[83] Arewa, *supra* note 15, at 593.

[84] PECKNOLD, *supra* note 16, at 1.

came to the United States from West Africa.[85] The instrument originated among enslaved people and their children "who defied restrictions on the drum by picking out beats" on the banjo.[86] Despite the racial boundaries defining music in the early 20th Century, at least fifty African American musicians played on hillbilly records before 1932.[87] In the 1950s, African American pianist Ray Charles changed the genre's sound by introducing blues, pop, and R&B influences to country music.[88]

Black cowboys also played a more significant role in American history than popular culture has acknowledged. Approximately one in four cowboys were Black.[89] Many African Americans turned to ranch work after the Civil War when "[b]eing a cowboy was one of the few jobs open to men of color who wanted to not serve as elevator operators or delivery boys or other similar occupations."[90] Unfortunately, "[f]ailing to acknowledge country music's multiracial origins has made it difficult to shake the perception that it is a genre by and for white people."[91]

III. CONCEIVING OF GENRE IN PROPERTY-LIKE TERMS

Today's culture wars are increasingly governed by property-like conceptions.[92] "The very concept of property is founded on ownership" with the three main principles being: (1) the right of absolute use; (2) the right to exclude or exclusive use;

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[85] Greg Allen, *The Banjo's Roots, Reconsidered*, NPR (Aug. 23, 2011), https://www.npr.org/2011/08/23/139880625/the-banjos-roots-reconsidered.

[86] RJ Smith, *Race and Country Music Then and Now,* NPR (Aug. 23, 2013), https://www.npr.org/sections/therecord/2013/08/23/213852227/race-and-country-music-then-and-now.

[87] *Id.*

[88] Myers, *supra* note 71.

[89] Katie Nodjimbadem, *The Lesser-Known History of African-American Cowboy*, SMITHSONIAN MAGAZINE (Feb. 13, 2017), https://www.smithsonianmag.com/history/lesser-known-history-african-american-cowboys-180962144/.

[90] *Id.*

[91] Manuel, *supra* note 14.

[92] Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 143 (1996).

and (3) the right of transfer or alienability.[93] Music genres are amenable to a property distinction because genres often "belong" to specific groups. For example, hip hop and R&B are the new "race records," and are dominated by Black artists. On the other hand, country music has become the new hillbilly genre primarily by and for white people. Informal property-like rights have been asserted over these genres as evidenced by the exclusion of "Old Town Road" from the country charts. Country music's gatekeepers—the genre's de facto owners—have asserted their right to exclude by determining which artists are allowed onto the genre's charts, radio stations, and streaming playlists. Only occasionally do these de facto owners confer rights to featured artists outside the country genre, such as Bebe Rexha on "Meant to Be."[94]

A. GENRE AS INTELLECTUAL PROPERTY: THE RIGHT TO FIX MEANING

Intellectual property is intangible[95] and thus more susceptible to cooption and corruption than real property. For this reason, intellectual property protects not only the use and exclusion of rights, but also the power to fix its meaning and representations.[96] Billboard asserted this power in its decision to remove "Old Town Road" from its country music chart. As provided in its official statement, Billboard felt Lil Nas X's song misrepresented country music as a genre and asserted its right to exclude the track.[97]

Country music represents more than a music genre—to many it is a way of life. Like hip hop, which originated in the Bronx, New York, and often "chronicle[d] and critique[d] the

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[93] Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, 4 J. GENDER RACE & JUST. 69, 71 (2000).

[94] Harvilla, *supra* note 22.

[95] *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[96] *See, e.g.,* Sunder, *supra* note 92 at 70—71.

[97] *Backlash After Lil Nas X's "Old Town Road" Removed From Billboard Hot Country Chart*, CBS NEWS (Apr. 10, 2019) https://www.cbsnews.com/news/old-town-road-lil-nas-x-billboard-removes-song-from-hot-country-critics-question-race-factor/.

black urban experience,"[98] country music has deep roots in American history and culture. However, country music's history is hotly disputed along racial lines. For White people, "the trope country music has often functioned much like the Confederate battle flag . . . as the 'expression of an ideological tradition'"[99] does not paint the genre's origins completely or accurately.

Intellectual property law can be a powerful tool for subordination and empowerment because these rights give the holder power to define and enforce cultural meaning in a way that conforms with the holder's ideology. "[M]any of the most popular cultural images, which generate far-reaching understandings of gender, race, sexuality, and dominance, are protected by copyrights and trademarks."[100] In particular, Professor Sunder has observed:

> Scholars and activists increasingly are seeking to use intellectual property law to provide subordinate groups with legal rights to exclusive control over cultural representation including, most importantly, the right to exclude unwanted or harmful images from being portrayed by 'non-owners' of the intellectual property.[101]

This new intellectual property conception is seen in cases brought by Native American tribes against professional football over teams' use of Native American images and practices.[102] Because the "right of exclusion at the heart of the concept of property is

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[98] Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 488 (2005).

[99] PECKNOLD, *supra* note 16, at 254.

[100] MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 66 (2012).

[101] Sunder, *supra* note 92, at 71.

[102] *See, e.g.,* Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D. Va. 2015) (holding the trademark registration of the Washington, D.C. football team name the Redskins should be cancelled, because it is disparaging to Native Americans).

ultimately about power," endowing subordinate groups with property rights in their culture would protect it from appropriation and thus provide empowerment.[103] The right to exclude becomes more complicated when, as with "Old Town Road," the cultural representation at issue is being reappropriated by the subordinate group's members.

In some circumstances, it is more advantageous for minority group's members when they appropriate. For example, in the recent United States Supreme Court case *Matal v. Tam*, the musical group "The Slants" sought legal action when the United States Patent and Trademark Office (PTO) denied its application to trademark the band's name.[104] The PTO denied the trademark application because the band's name was disparaging to people of Asian descent.[105] The basis for the application denial rests on a Lanham Act provision, which prohibits registering trademarks that may "disparage . . . or bring . . . into contempt or disrepute" any "persons, living or dead."[106] In denying its application:

> "[t]he government ignored the band's rationale for wanting the trademark: not to disparage Asian Americans for their 'slanted' eye but to transform the slur into a badge of pride – just as some gays, feminists, and blacks have attempted to reappropriate derogatory labels (such as 'queer,' 'bitch,' and even the N-word)."[107]

Distinct from the actions challenging trademarks using Native American imagery as football mascots, the individuals attempting to trademark the "disparaging" mark "Slants" were members of the disparaged group.[108] This affects the disparagement analysis significantly. The Slants' members, all

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[103] Sunder, *supra* note 92, at 74.

[104] Matal v. Tam, 137 S.Ct. 1744, 1747 (2017).

[105] *See id.*

[106] *Id.* at 1751; 15 U.S.C. § 1052(a).

[107] Gregory P. Magarian, et al., *Data-Driven Constitutional Avoidance*, 104 IOWA L. REV. 1421, 1422-23(2019).

[108] *See id.* at 1445.

Asian Americans, chose to adopt the slur as the band's name to "reclaim the term and drain its denigrating force."[109] In this way, the Slants reappropriated culture that was traditionally wielded to exclude them.

The appropriator's identity affects the appropriating act's perception and purpose. In the Slants' case, researchers found "Americans (Asians and non-Asians alike) construe the term 'Slants' differently depending on the context; they are more likely to believe a band's reappropriation motives when the band is Asian than when the band is non-Asian."[110] Therefore, the study's authors concluded, the ban on disparaging trademarks "simply lacked internal coherence."[111] The Supreme Court agreed, holding the reappropriation at issue had a commercial purpose and "expressed a view about social issues;" therefore, the Lanham Act's disparagement clause was facially invalid.[112]

Many viewed "Old Town Road" as disparaging country music because they perceived the song as having a sarcastic tone and stereotypical lyrics.[113] However, Lil Nas X leveraged his country music reappropriation through song to reclaim Black artists' membership in the genre. Like the Slants used its name "to supplant a racial epithet" and put cultural identity at the forefront of its creative product, Lil Nas X used "new insights, musical talents, and wry humor"[114] to assert his place as a Black artist in the genre pitted against its own Black cultural roots.

B. THE FIRST AMENDMENT AND CULTURAL DISSENT

In *Matal*, the Supreme Court emphasized the First Amendment principle, "[s]peech may not be banned on the ground that it expresses ideas that offend,"[115] and "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[116] The Court relied on the First

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[109] *Matal*, 137 S.Ct. at 1751.

[110] Magarian, *supra* note 106, at 1723.

[111] *Id.*

[112] *Matal*, 137 S.Ct. at 1764—65.

[113] E.g. "Ridin' on a tractor… Cheated on my baby… Bull ridin' and boobies… Wrangler on my booty."

[114] *Matal*, 137 S.Ct. at 1766.

[115] *Id.* at 1751.

[116] *Id.* at 1764 (citing United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

Amendment as its basis for striking down the disparagement clause in *Matal*, and denounced "the suppression of any speech that may lead to political or social 'volatility.'"[117] The holding in *Matal* supports Professor Sunder's argument that "[j]ust as the First Amendment recognizes the importance of political dissent, intellectual property law should acknowledge the importance of cultural dissent"—the right and ability to disagree with cultural traditions or norms.[118] Justice Kennedy alluded to this idea in his concurring opinion in *Matal*, calling the disparagement bar an "attempt[] to remove certain ideas or perspectives from a broader debate" and commending the Slants' trademark's "potential to teach."[119] These same principles emphasized in *Matal* can and should be used to protect the expressive rights of other traditionally marginalized groups.

In particular, "the liberty to contest hegemonic discourses has . . . profound possibilities for women and other minorities who traditionally have not had agency over the stories that dominate [their] lives."[120] For example, female rappers are erupting in the music industry, disrupting the traditionally male-dominated genre, and reappropriating the objectification of their bodies. Cardi B, one of the genre's current titans,[121] is known for her sexually explicit lyrics and pride in her former career as a stripper. The song "Bickenhead" from her Grammy-winning breakout album "Invasion of Privacy" includes the lyrics:

> Pop that pussy like you ain't
> pop that pussy in a while
> Pop that pussy like poppin'
> pussy is goin' out of style
> Pop that pussy while you work,
> pop that pussy up in church

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[117] *Id.* at 1765.

[118] SUNDER, *supra* note 99, at 80.

[119] *Matal*, 137 S.Ct. at 1767 (Kennedy, J., concurring in part and concurring in the judgment).

[120] SUNDER, *supra* note 99, at 66.

[121] Among her numerous awards and nominations, Cardi B won the American Music Award for Favorite Artist—Rap/Hip Hop in both 2018 and 2019. AMERICAN MUSIC AWARDS, *2018 Winners, https://www.theamas.com/winners/2018-winners/; American Music Awards, 2019 Winners, https://www.theamas.com/winners/2019-winners/.*

> Pop that pussy on the pole, pop
> that pussy on the stove[122]

By repeatedly using "pussy"—a term generally used to disparage and objectify women[123]—Cardi B reappropriates the offensive word in the same manner as the Slants: to assert power over her own story.

Intellectual property law should not stifle minority artists' ability to express dissatisfaction with cultural norms through music. Intellectual property "regulates the production and distribution of culture,"[124] and the ability to shape and influence culture confers great power.[125] Music implicates personal and group identity, constitutional freedom of expression, and modern culture as a whole. Therefore, suppressing minority artists' ability to express such cultural dissatisfaction through music would disempower the artists and deprive them of identity and expression.

C. TRADEMARK DILUTION

In removing "Old Town Road" from its country music chart, Billboard theoretically asserted a trademark dilution claim over the song for diluting its country music trademark. The Trademark Anti-Dilution Act of 1996 provides a trademark owner with a cause of action against the "use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark."[126] Dilution by blurring occurs when a mark or trade name is so similar to a famous mark that it "impairs the distinctiveness of the famous mark.,"[127] Dilution by tarnishment arises when a mark develops an association with a famous mark due to the marks' similarities, and the association must harm the reputation of the famous mark.[128]

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[122] Cardi B, *Bickenhead* (Atlantic Records, 2018).

[123] Recognizing the word "pussy" is also used to disparage men (in a different manner), I did not include this above because it is not relevant to my discrete analysis here.

[124] SUNDER, *supra* note 99, at 104.

[125] *Id.* at 91.

[126] 15 U.S.C. § 1125.

[127] *Id.*

[128] *Id.*

Both dilution by blurring and dilution by tarnishment must cause harm to the famous mark to be actionable.

Billboard's act of removing "Old Town Road" from its country chart could be based on both tarnishment and blurring dilution claims, arising out of the right to protect its genre from impaired distinctiveness and reputational harm. Some country artists objected to the song's "sarcastic representation of country music," believing that "the music should be taken seriously."[129] To protect country music's reputation as a genre, according to these critics, similar music damaging its reputation cannot be permitted to exist, and should not be allowed to comingle with "real" country music. Country music fans also weighed in online, calling for the denunciation of "Old Town Road" as cultural appropriation. These critics even went as far as claiming the song is an outright attack on country music.[130] As one anonymous commentator posted to the blog "Saving Country Music":

> There has definitely been a mission creep over the years to desensitize the country music listening public to accept anything as country. Now if you don't, you'll be accused of racism, sexism, be de-platformed and shunned . . . This is about subjugating country music to the monoculture, and if it doesn't acquiesce, destroying it.[131]

This is essentially an impaired distinctiveness argument: if "Old Town Road" can be a country song, then anything can. Thus, to avoid these negative associations, Billboard needed to make the

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[129] Randy Lewis, *Meet Luke Combs, the Country Superstar you Probably Haven't Heard of*, L.A. TIMES (Apr. 23, 2019) https://www.latimes.com/entertainment/music/la-et-ms-luke-combs-stagecoach-festival-20190424-story.html.

[130] *Opposing Lil Nas X's "Old Town Road" in Country Is Not "Racism,"* SAVING COUNTRY MUSIC.COM (Mar. 27, 2019) https://www.savingcountrymusic.com/opposing-lil-nas-xs-old-town-road-in-country-is-not-racism/.

[131] *Id.*

statement "Old Town Road" was not entitled to use its country music mark.

D. "OLD TOWN ROAD" AS PARODY OR CRITIQUE UNDER THE COPYRIGHT ACT

Country music gatekeepers, including artists, may also theoretically claim "Old Town Road" infringes on the country music copyright, to which Lil Nas X could assert a fair use defense. "Old Town Road" can be analyzed as a modern country music parody and a critique of the genre's historically racist gatekeeping. A parody is a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous."[132] Many critics allege "Old Town Road" was intended to and does ridicule country music and southern culture,[133] which is one argument advanced in support of the song's removal from the country music charts. However, even if Lil Nas X's intent was to make contemporary country music "appear ridiculous," his ability to do so is protected as fair use under the Copyright Act.[134]

In determining whether a use is a fair use, the following factors are considered:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[135]

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[132] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994) (holding the commercial character of song parody did not create presumption against fair use, and a parody's commercial character is only one element to be weighed in a fair use enquiry).

[133] Lewis, *supra* note 128.

[134] 17 U.S.C. §§ 101, 107.

[135] *Campbell*, 510 U.S. at 576-77.

Despite its commercial character, "Old Town Road"'s parodic nature keeps it within the scope of fair use, only borrowing certain discrete elements of the country music genre, and does not significantly affect the market for "traditional" country music.[136] Additionally, the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[137] Old Town Road's" creativity lies in its clever critique of country music excluding Black artists, and the genre's resistance to welcome new styles.

Lil Nas X highlights this exclusionary gatekeeping by juxtaposing rap and country music's conflicting styles. In his lyrics for "Old Town Road," Lil Nas X alternates between characteristically country turns of phrase and themes typically associated with modern rap and hip hop culture. For example, his seconds verse proceeds:

> Ridin' on a tractor
> Lean all in my bladder
> Cheated on my baby
> You can go and ask her
> My life is a movie
> Bull ridin' and boobies
> Cowboy hat from Gucci
> Wrangler on my booty[138]

While "[r]idin' on a tractor" is stereotypical country imagery, "lean," or "purple drank," is a popular drug among rappers, particularly those from the South.[139] Similarly, cowboy hats are

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[136] By "traditional" country music, I mean music that is today considered traditional (and that populates the contemporary country music charts).

[137] Iowa State Univ. Rsch. Found. v. Am. Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980).

[138] Lil Nas X, *Old Town Road* (Columbia Records 2018).

[139] *See* TAMARA PALMER, COUNTRY FRIED SOUL: ADVENTURES IN DIRTY SOUTH HIP-HOP 188 (2005). *See also,* Future, *Dirty Sprite* (101 Distribution Records 2011): "My purple stuff stay in my cup, Got drank on me I pour me up, Texas oil got me spoiled, Red and Yellow I'm leaning hard."

quintessentially country, but Gucci—a high-end designer brand—is one of the top three most name-dropped brands in rap songs.[140]

The "Old Town Road" music video for the remix featuring Billy Ray Cyrus extends the theme of juxtaposing country and hip hop imagery. The video portrays Lil Nas X as an outlaw transported from the 19th century old west to the year 2019.[141] In the video, Lil Nas X is chased into a tunnel by a white farmer seemingly protecting his daughter.[142] The tunnel then transports Lil Nas X forward in time and into a suburban Southern California Black neighborhood, where he is met with confusion.[143] Unwelcome in the country realm, as in real life, Lil Nas X is expelled to the Black block,[144] where he is reluctantly embraced.[145] Lil Nas X also makes a nod to the TikTok meme responsible for "Old Town Road"'s rise to popularity, sipping from a bottle labeled "Yee Yee Juice" at the end of the video before hitting the "whoa," a viral dance move.

Author and songwriter Alice Randall faced similar accusations following the publication of her book "The Wind Done Gone"—a parody of Margaret Mitchell's "Gone with the Wind."[146] The original novel's copyright owners brought an infringement action against Randall, seeking to enjoin her from publishing or distributing the book.[147] The Eleventh Circuit Court of Appeals stated it would "treat a work as parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work."[148] In her defense, Randall contended she

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[140] Jacob Gallagher, *These Are the Fashion Brands That Rappers Name-Drop the Most,* WALL ST. J. (Apr. 22, 2019), https://www.wsj.com/articles/these-are-the-fashion-brands-rappers-namedrop-the-most-11555943601. *See also,* The Game, *Gucci Flip Flops* (Fifth Amendment Records, 2019); Lil Pump, *Gucci Gang* (Warner Bros. Records, 2017).

[141] Lil Nax X, *Old Town Road (Official Movie) ft. Billy Ray Cyrus,* YOUTUBE (May 17, 2019), https://www.youtube.com/watch?v=w2Ov5jzm3j8.

[142] *Id.*

[143] *Id.*

[144] Slang for "neighborhood."

[145] *Id.*

[146] *Id.*

[147] Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001).

[148] *Id.* at 1268—69.

"appropriated the characters, plot, and major scenes" of "Gone With the Wind" to critique it's "depiction of slavery and the Civil War-era American South."[149] The court, adopting Randall's argument, held her novel to be a parody, and therefore a fair use.[150]

Randall also has ties to country music, as both a fan and an artist. She cowrote one of the first songs written by an African American woman to top the country charts about a girl who dreams of becoming successful in a man's world.[151] The song also references R&B and soul singer Aretha Franklin and country singer Patsy Cline, two influential crossover artists. In discussing country music, Randall has said, "No genre of music deals with a more diverse body of subject matter, provides a more mature perspective, or draws from a wider range of conflicting impulses."[152] As Randall recognizes, country music involves complex issues, including race, class, gender, and African American musical heritage.

Parody and the fair use doctrine are crucial elements of intellectual property law because they allow for artistic critiques created by Randall and Lil Nas X. As the court noted in the case against Randall, "copyright does not immunize a work from comment and criticism."[153] Rather, it "assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by the work."[154] These rights—to original expression and criticism—are fundamental and are at the core of the First Amendment.

CONCLUSION

As technology and culture advances, so does intellectual property law. In particular, music's digitization and the Internet's collaborative and participatory culture has created new challenges that intellectual property law must address. Modern technology also facilitates increased cross-cultural exchanges and creative ventures. This environment allowed "Old Town Road" to come to life, and also fueled the controversy surrounding the song. Lil Nas

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[149] *Id.* at 1259.

[150] *Id.* at 1277.

[151] Trisha Yearwood, *XXXs and OOOs (An American Girl)*, (MCA Records 1995). PECKNOLD, *supra* note 16, at 263.

[152] PECKNOLD, *supra* note 16, at 272.

[153] *Suntrust,* 268 F.3d. at 1265.

[154] *Id.* at 1264.

X, a 19-year-old aspiring rapper from Georgia, discovered and purchased a musical beat online, created by a Dutch producer of the same age, which sampled a ten-year-old recording by Nine-Inch Nails, a rock band from Ohio.[155]

Given the omnipresent cultural mixing and other social concerns, we must question whether genre is a realm over which the law can and should take control. Intellectual property is an inappropriate legal regime for policing genre because genres are closely tied to culture and "[i]ntellectual property rights in culture assume a cultural homogeneity that does not, in fact, exist in the modern world."[156] In addition to being improper, intellectual property law is also an unworkable regime because it requires clearer designations. Because of its amorphous and ever-developing nature, the challenge of defining a culture's bounds, owners, and authorized users is too great.

Intellectual property law should also function to protect marginalized groups and prevent their subjugation. As Professor Sunder writes, "A central concern of a cultural approach to intellectual property should be how to facilitate cultural production that involves inter- and intra-cultural borrowing in a socially just manner."[157] As such, the "[L]aw should put its weight on the side of those who would dissent from cultural authorities, or those who seek greater autonomy to play and share in cultural communities . . . ."[158] Allowing genres to be "owned" by one distinct cultural group, or company, will significantly inhibit artists' ability to dissent through their music, and will stifle the creativity intellectual property law is designed to encourage.

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[155] Philip Trapp, *'Old Town Road': Did You Know a Nine Inch Nails Song Spawned the Lil Nas X Hit?,* LOUDWIRE (Apr. 18, 2019), https://loudwire.com/old-town-road-nine-inch-nails-lil-nas-x/.

[156] Sunder, *supra* note 77, at 96.

[157] *Id.* at 94.

[158] *Id.* at 80.

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BUILDING A BASKETBALL ARENA ON TRIBAL LAND: A COLLABORATIVE APPROACH FOR AMERICAN INDIAN TRIBES AND THE NATIONAL BASKETBALL ASSOCIATION

LEIGH HAWLEY[∞]

INTRODUCTION

During the 2020 Coronavirus Pandemic, more professional athletes began using their platforms to voice concern and raise awareness about social justice issues.[1] Many professional athletes come from diverse racial and ethnic backgrounds. Through these athletes' voices, the concerns for the oppressed, underserved, and impoverished communities are heard and the missed socio-economic opportunities to further develop these communities are highlighted.[2] Arena renovations are

[∞] Leigh Hawley, Esq., Associate Counsel, Sports Business & Entertainment at Leopoldus Law. Leigh is an alumnus of the Sports Law & Business LLM program at Sandra Day O'Connor College of Law.

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[1] *See* Max Millington, *The Complete Timeline of Athletes Speaking Out Against Racial Injustice Since the Death of George Floyd*, COURIER (Sept. 8, 2020, 1:15 PM), https://couriernewsroom.com/2020/09/08/timeline-of-athletes-protesting-racial-injustice-george-floyd/.

[2] *Id.*

increasing, new arenas and stadiums are being developed, and teams are relocating.[3] This Article will explore how building an arena on tribal land could be used to facilitate the athletes' concerns for the oppressed, underserved, and impoverished communities. The Article examines the opportunities for collaboration with American Indian Tribes to develop arenas on tribal land and provides a general guideline for how a National Basketball Association ("NBA") team could build an arena.

I. HISTORICAL OVERVIEW: ATHLETE ACTIVISM, SELF-IDENTIFICATION AND FRANCHISE RELOCATION

A. ATHLETE ACTIVISM FOR SOCIAL JUSTICE IN SPORT

Social justice activism in sport is not a new phenomenon. The most memorable global social justice advocacy moment happened during the 1968 Mexico City Summer Olympic Games when Tommie Smith and Dr. John Carlos[4] raised their fists.[5] Not only did Smith and Carlos raise their fists to protest racism, but they removed their shoes to bring awareness to those in impoverished countries and communities around the United States without basic needs.[6] Smith's and Carlos's courage laid the foundation for athletes to speak up and find themselves at the social justice forefront, particularly over the last decade. In 2012, following Trayvon Martin's death, Lebron James and Dwayne Wade posted a team photo with the players in hoodies looking at the ground, accompanied by the hashtag,

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[3] *List of Major League's Franchise Relocations*, USA TODAY (Jan. 27, 2017, 2:53 AM), https://www.usatoday.com/story/sports/nfl/2017/01/27/list-of-major-sports-leagues-franchise-relocations/97125258/; *see also* Mike Sunnucks, *Could Salt River Site Be in the Mix for a New Suns Arena, New D-Backs Ballpark?*, PHOENIX. BUS. J. (Sept. 23, 2015), http://www.bizjournals.com/phoenix/blog/business/2015/09/could-salt-river-sites-be-in-the-mix-for-a-new.html.

[4] The author was honored to meet and speak with Dr. John Carlos personally.

[5] *Dr. John W. Carlos*, John Carlos 1968, https://www.johncarlos1968.com/home-about (last visited Mar. 22, 2021).

[6] *Id.*

#WeAreTrayvonMartin.[7] Similarly, in response to Eric Garner's death in 2014, NBA athletes wore black shirts with writing that said, "I CAN'T BREATHE."[8] More importantly, these shirts marked the first time the NBA indirectly supported its athletes by issuing a statement saying it would not fine athletes for wearing nonleague issued apparel.[9]

Later in 2016, National Football League ("NFL") player Colin Kaepernick peacefully protested during the national anthem by sitting and then famously kneeling before NFL games.[10] Most recently, a global rise in athlete protests has occurred in response to George Floyd's death.[11] English soccer player Jadon Sancho displayed his undershirt which read, "Justice for George Floyd." NBA, Women's National Basketball Association ("WNBA"), and Major League Soccer (MLS) athletes stood in solidarity with each other and refused to play.[12] Social justice, now more than ever, is at the forefront.

American Indians and the injustices American Indian tribes face are always at the forefront of social justice activism, including the most recent protests against the Dakota Access Pipeline.[13] Aaron Rodgers, a non-American Indian quarterback for the Green Bay Packers, has publicly called on the White House

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[7] *Heat Don Hoodies After Teen's Death*, ESPN (Mar. 23, 2012), https://www.espn.com/nba/truehoop/miamiheat/story/_/id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin.

[8] *Report: NBA Won't Fine Players for Wearing 'I Can't Breathe' T-shirts*, SPORTS ILLUSTRATED (Dec. 9, 2014), https://www.si.com/nba/2014/12/09/nba-i-cant-breathe-tshirts#:%7e:text=The%20NBA%20will%20not%20fine,July%2C%20reports%20ESPN's%20Jeremy%20Schaap.

[9] *Id.*

[10] Cork Gaines, *NFL Anthem Protests Began During a Meaningless Preseason Game Nobody Noticed and Are Now Everywhere*, INSIDER (Sept. 25, 2017, 6:25 AM), https://www.businessinsider.com/why-nfl-players-protest-anthem-colin-kaepernick-2017-9.

[11] Millington, *supra* note 1.

[12] *See* Millington, *supra* note 1; *see also* Ellen Cranley, *Athletes Speaking Out over George Floyd's Death Has Created a Movement of Reckoning for Politics in Sport*, INSIDER (June 10, 2020, 1:02 PM), https://www.insider.com/athletes-speaking-out-has-created-reckoning-moment-for-leagues-2020-6.

[13] *See* Dave Kolpack, *Corps Want Delay on Hearing to Shut Down Dakota Access Line*, ABC NEWS (Feb. 8, 2021, 10:24 PM), https://abcnews.go.com/US/wireStory/corps-delay-hearing-shut-dakota-access-line-75768712.

to terminate the Dakota Access Pipeline.[14] Additionally, Kyrie Irving continually protests the Dakota Access Pipeline,[15] and consistently supports his heritage, promotes his tribe, and provides food and personal protection equipment (e.g., masks) to those on the Standing Rock Sioux reservation.[16]

B. ATHLETE RACIAL AND ETHNIC SELF-IDENTIFICATION

American Indian athletes are beginning to speak out and self-identify to create awareness.[17] For example, Kyrie Irving, an athlete outspoken about George Floyd's death and systemic racism,[18] is Sioux.[19] As an American Indian athlete, he has dedicated both time and money to his tribe.[20] Additionally, Nike created an initiative dedicated to Native American Heritage called N7, founded in 2009.[21] The initiative's goal is to promote sport and its associated benefits through providing access to Nike products directly to Native American tribes to support health and disease prevention.[22] Many professionals, like Irving, come from nonwhite, diverse backgrounds.[23]

The Institute for Diversity and Ethics in Sport (TIDES) conducts an annual survey that provides data about diversity in five United States professional sports leagues, the NCAA, and

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[14] *Id.*

[15] Brian Windhorst, *Kyrie Irving Finds New Name and New Family on North Dakota Reservation*, ESPN (Aug. 23, 2018), https://www.espn.com/nba/story/_/id/24444427/kyrie-irving-embraces-native-american-heritage-sioux-naming-ceremony-nba.

[16] Net Income, *Kyrie Irving Donates Food, Masks to His Late Mother's North Dakota Reservation*, SBNATION (May 8, 2020, 9:49 PM), https://www.netsdaily.com/2020/5/8/21252768/kyrie-irving-donates-food-masks-to-his-late-mothers-north-dakota-reservation.

[17] *See* Windhorst, *supra* note 15.

[18] Dan Feldman, *Stephen Jackson: Kyrie Irving Has Been Calling Me Crying Since George Floyd's Death*, NBC SPORTS (June 16, 2020, 5:11 PM), https://nba.nbcsports.com/2020/06/16/stephen-jackson-kyrie-irving-has-been-calling-me-crying-since-george-floyds-death/

[19] Windhorst, *supra* note 15.

[20] Net Income, *supra* note 16.

[21] *N7 Community Giving*, NIKE, https://n7fund.nike.com/about/ (last visited Mar. 22, 2021).

[22] *Id.*

[23] White is used as reference to European decent of Caucasian American.

other sport entities.[24] In 2019, the five professional sport leagues' and NCAA's athlete nonwhite racial and ethnic make-up among athletes was as follows:

Major League Baseball (MLB): 39.8%[25]
NFL: 69.4%[26]
NBA: 83/1%[27]
WNBA: 82.7%[28]
MLS: 60.1%[29]
NCAA: 34.4%[30]

These statistics show over one-half of athletes in four out of five professional sports leagues identify as a nonwhite race or

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[24] The National Hockey League does not have a TIDES report card. Aaron Beard, *Study: College Sports Still Trail Pros In Diversity Hiring*, ASSOCIATED PRESS (Feb. 24, 2021), https://apnews.com/article/race-and-ethnicity-college-sports-7dba38e1314589801cf738df8820f7a2.

[25] Richard Lapchick et al., *The 2020 Racial and Gender Report Card: Major League Baseball*, INST. FOR DIVERSITY & ETHICS IN SPORT, https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/a4ad0c_b6693f8943394f2785328f1a992249a1.pdf (last visited Mar. 22, 2021).

[26] Richard Lapchick et al., *The 2020 Racial and Gender Report Card: National Football League*, INST. FOR DIVERSITY & ETHICS IN SPORT, https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b84c731ad8dc4e62ba330772b283c9e3.pdf.

[27] Richard Lapchick et al., *The 2020 Racial and Gender Report Card: National Basketball Association*, INST. FOR DIVERSITY & ETHICS IN SPORT, https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/7d86e5_9ed7a1185cc8499196117ce9a2c0d050.pdf.

[28] Richard Lapchick et al., *The 2020 Racial and Gender Report Card: Women's National Basketball Association*, INST. FOR DIVERSITY & ETHICS IN SPORT https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/7d86e5_78609389efa7471292ce8844703a310f.pdf

[29] Richard Lapchick et al., *The 2020 Racial and Gender Report Card: Major League Soccer*, INST. FOR DIVERSITY & ETHICS IN SPORT https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b206eccbe5a7467da6b05fcbddda16ea.pdf

[30] Richard Lapchick, *The 2019 Racial and Gender Report Card: College Sports*, INST. FOR DIVERSITY & ETHICS IN SPORTS, https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/7d86e5_d69e3801bb8146f2b08f6e619bcddf22.pdf (last visited Mar. 22, 2021).

ethnic background. As a marketing tool, teams may consider relocating or expanding to target a more diverse fan base, reflecting the athletes' diversity.

C. PROFESSIONAL SPORTS TEAMS AND RELOCATION

More professional sports teams are relocating, and no league has been exempt from these changes. Within the past twenty years, the following relocations occurred: one MLB team; five NBA teams;[31] five WNBA teams;[32]and three NFL teams.[33] Before this twenty-year period, three National Hockey League (NHL) teams relocated as well.[34]

Among the various sports teams, Indian Tribes have rightfully seized opportunities to expand tribes' enterprises into sport beyond Indian Casinos.[35] Tribes are now partnering with various businesses, including sports teams, through advertising, corporate partnerships, facility naming rights, and sometimes the sports facility itself.[36] For example, the Talking Stick Resort purchased naming rights to the Phoenix Suns' and Mercury's arena. [37] This purchase came after U.S. Airways' merged with American

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[31] *List of Major League's Franchise Relocations*, *supra* note 3. *See also* https://www.usatoday.com/story/sports/nfl/2017/01/27/list-of-major-sports-leagues-franchise-relocations/97125258/

[32] *List of Major League's Franchise Relocations*, *supra* note 3. Two teams were relocated multiple times which are the five relocated teams. The Detroit Shock relocated to Tulsa and became the Tulsa Shock. The Tulsa Shock then relocated to Dallas, now known as the Dallas Wings. The Utah Starzz relocated to San Antonio became the San Antonio Silver Stars. This was later changed to the San Antonio Stars. The Stars were then relocated to Las Vegas and are now the Las Vegas Aces. *See* Albert Lee, *What Are the Benefits Of WNBA Expansion and Which Cities Could Get a Team?*, SBNATION (May 22, 2018, 3:00 PM), https://www.swishappeal.com/wnba/2018/5/22/17378274/2018-wnba-expansion-benefits-cities-bay-area-houston-nashville-sacramento-toronto.

[33] *List of Major League's Franchise Relocations*, *supra* note 3.

[34] *Id.*

[35] *See* Sunnucks, s*upra* note 3.

[36] *Id.*

[37] Russ Wiles, *US Airways Center's New Name: Talking Stick Resort Arena*, ARIZ. REPUBLIC (Dec. 2, 2014, 2:18 PM), http:// www.azcentral.com/story/money/business/2014/12/02/us-airways-center-new--name-talking-stick-resort-arena/19793535/.

Airlines and decided not to renew their existing naming rights partnership.[38] However, the Phoenix teams may be considering relocating the Talking Stick Resort to Scottsdale, Arizona.[39] An NBA team relocation would include building a basketball arena on tribal land, which has never been done.[40] Currently, Talking Stick is home to the Salt River Fields Spring Training Facilities.[41] These facilities occupy a large portion of the Salt River Pima Maricopa Indian Community land.[42]

A long-standing issue is what rights tribes possess on Tribal Land.[43] Factors to determine rights include whether the tribe is federally recognized, whether the tribe has exclusive ownership rights to the land, or whether the tribe has rights to build on the land.[44] Building on tribal land can be done.[45] This Article will discuss the tribal land rights' historical development. It will then discuss best practices, such as agreements with sports entities, using an American Indian Nation's name, and current economic developments on tribal land. Further, this Article will explore the best practice models' applications and implications when building a professional sports arena on tribal land as it relates to relocating current NBA teams. Lastly, this Article will conclude with suggestions about how a team would relocate successfully and other options for NBA teams using arenas on tribal land.

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[38] *Id.*

[39] Sunnucks, *supra* note 3.

[40] *Id.*; Zach Spedden, *Arena Pitched Near Scottsdale Pavilions*, ARENA DIG. (Oct. 27, 2016), https://arenadigest.com/2016/10/27/arena-pitched-near-scottsdale-pavilions/. This does not include arenas previously in existence before the team began practice, play games, or host events.

[41] Sunnucks, *supra* note 3.

[42] *Id.*

[43] Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. B. ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.

[44] ROBERT T. COULTER, NATIVE LAND LAW (WEST ed., 2015).

[45] *Id.*

II. DEVELOPING TRIBAL LAND

A. NATIVE LAND LAW'S HISTORICAL DEVELOPMENT

Two interest types are commonly delivered to tribes and individual American Indians of the tribes.[46] One interest is the "Indian title" which "recognizes the American Indians as the 'rightful occupants of the soil, with legal as well as just claim;'" and another interest is "fee title," most recognizable by the discovery doctrine.[47] The "aboriginal title," or "Indian title," is given to land that American Indians occupy to retain until the American Indians' and tribes' aboriginal title interest has been terminated.[48] The discovery doctrine is credited with preventing alternate European settlers from claiming the right to purchase American Indian land.[49] The discovery doctrine, also known as the "right of preemption," vested a settler's or finder's "rights" to purchase or occupy the land inhabited by American Indians against "all others."[50] However, complications with this doctrine are known to arise when American Indians inhabited the land simultaneously to a fee simple title by a non-American Indian settlor.[51] The only method to acquire native land acquired unencumbered after a discovery doctrine controversy was by a sovereign act.[52]

Recent state supreme courts' decisions vary from the discovery doctrine's common law precedent.[53] Montana created a rule applicable to all navigable waterways, providing the United States government owns title to all navigable waterways.[54] In an attempt to create a sovereign act which overthrows the discovery doctrine, Montana's rule includes waterways traditionally owned by American Indian nations.[55] Despite the doctrine's precedent,

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[46] *Id.*

[47] *Id.* § 2:11 (quoting Johnson v. McIntosh, 21 U.S. 543, 574 (1823)).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* § 2:12.

[55] *Id.*

"the [c]ourt never explained how the United States acquired title to the [navigable waterways] from the [American Indian] Nation."[56] Justice Cardozo best stated the United States government's illogical aboriginal title possession is, "[s]poilation . . . not management."[57]

American Indians are required to prove aboriginal title. The criteria to prove aboriginal title are like adverse possession: (1) "actual;" (2) "exclusive;" (3) "continuous occupancy;" and (4) "for a long time."[58] American Indian nations also have occupancy rights through trust where:

> "by an executive order public lands are set aside, either as a new Indian reservation or an addition to an old one without further language indicating that the action is mere temporary expedient, such lands are thereafter properly known and designated as an 'Indian Reservation' and so long … as the order continues in force, the Indians have the right of occupancy and the United States has the title in fee."[59]

Additionally, the Indian Gaming Restoration Act (IGRA) covers placing land in trust.[60]

How an American Indian nation holds title to land varies.[61] For example, the United States has codified that the United States held trust title to American Indian lands that have "never been ceded or transferred in any manner to the United States."[62] To rectify the way the United States held trust title to the American Indian land, treaties were ratified to reserve land for American Indian nations.[63] However, courts customarily refer to American Indian land under governmental authority as *trust land*

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[56] *Id.* (noting the United States gained title to the Big Horn Riverbed that the Crown Nation possessed aboriginal title to).

[57] *Id.* § 3.3 (quoting Shoshone Tribe of Indians of Wind River Reservation in Wyo. *v.* United States, 299 U.S. 476, 498 (1937)).

[58] *Id.* (quoting Sac and Fox Tribe of Indians of Okla. V. United States, 315 F.2d 896, 903 (1963)).

[59] *Id.* § 4.2 (citing Spaulding v. Chandler, 160 U.S. 394 (1896)).

[60] 25 U.S.C. § 2703(4) (2020).

[61] ROBERT T. COULTER, NATIVE LAND LAW, § 4:1 (WEST ed., 2014).

[62] *Id.*

[63] *Id.*

despite whether the land is actually held in trust by the United States.[64]

The Indian Trade and Intercourse Act does not require the land to be held in trust to qualify for "protections against alienation" whereas IGRA does.[65] These two federal statutes give trust title to the American Indian nations, but fewer allotment acts exist. Allotment acts include the General Allotment Act and the Indian Reorganization Act (IRA).[66]

The General Allotment Act passed in 1897, created a trust title for the United States to hold Native lands in trust for allotment. [67] The allotted Native land was then broken up into individual parcels of land. The "surplus" land that was not allotted was sold by the government.[68] The IRA, passed in 1934, rejected allotment policies and authorized the Secretary of the Interior to place American Indian lands in trust.[69] However, allotment acts that do not create trust title for the American Indian nations[70] are held in "restrictive fee," which restricts the owner's ability to "affect title."[71] These restrictions are premised on the notion the Federal Government has a "special obligation" to hold the title to the land, but the fee simple is held by the American Indian nations.[72]

Some statutes ceded land to the Indian nations and sold the land held in trust; the funds from the sale were deposited into accounts for the Indian nations.[73] Unsold land remained in trust.[74] In some instances, authority is given to the government to "exercise its power as trustee over lands held in *fee simple*."[75] For example, West's treatise on native land suggests that, in *Cherokee Nation v. Hitcock*, the Supreme Court found the American Indian nation could not manage the trust land on the tribe's behalf,

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[64] *Id.*

[65] *Id.*; 25 U.S.C. § 2703.

[66] ROBERT T. COULTER, NATIVE LAND LAW, § 4:3 (WEST ed., 2014).

[67] *Id.*

[68] *Id.*.

[69] *Id.*

[70] *Id.*

[71] *Id.* Restrictive fee refers to alienability that would affect title.

[72] *Id.* § 4:4.

[73] *Id.*

[74] *Id.*

[75] *Id.*

holding, the government had the duty to step in.[76] Duties imposed by the courts to the United States government are similar to a trustee's duties and include: "protect[ing] . . . preserv[ing] . . . inform[ing] the beneficiary about the condition of the resources . . . act[ing] fairly, honestly, and with prudence."[77] The trust land duties may also include management, operation, capitalizing on profits, and transparency with property accounts held in trusts for the American Indian nation.[78] Circumstances where the government does not actually control the land held in trust, is closely akin to a constructive trust, where the government has an "equitable duty" to handle the Indian land for the American Indian nations' benefit.[79]

Further, trust land is not taxable.[80] Therefore, trust land excludes the tribal government from taxing, leaving no local tax dollar funding to use toward building schools, roads, hospitals, and police forces.[81] Trust land is also inalienable and cannot be used as collateral for a loan, including a small loan for a home on tribal land.[82] Tribes are then forced to take advantage of laws that will create large capital for the tribe's benefit, most commonly, gas, tobacco, and gaming.[83] In today's economy, these opportunities extend to permits or licenses for tribal land usage and American Indian tribe naming rights.[84]

B. ECONOMIC DEVELOPMENTS ON TRIBAL LAND

Tribes open themselves to business development opportunities to accelerate social impact on the community.[85]

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[76] *Id.*

[77] *Id.*

[78] *Id.* § 4:1.

[79] *Id.* § 4:20.

[80] *Id.* § 4:4.

[81] *Oversight Hearing on Economic Development in Indian Country: Hearing Before the Subcomm. on Indian Affiars*, 109th Cong. 115–16, 115 (2006) https://www.congress.gov/109/chrg/CHRG-109shrg27563/CHRG-109shrg27563.pdf [hereinafter *Hearing*] (statement of Lance Morgan, CEO, Ho-Chunk, Inc.).

[82] *Id.* (discussing the effect of trust land limiting the tribes' biggest resource for financial gain, land).

[83] *Id.*

[84] *Id*.

[85] Lance Morgan, *The Accidental Tribal Economic Development Model and the Rise of Tribal Institutions,* Ariz. State

Tribal government's business operations ownership generally harms a tribe's development.[86] Lance Morgan, a professor and Ho-Chunk tribe member, states tribes are unintentionally creating tribal economies that replicate nontribal governments, similar to those used by the states and community economic development procedures.[87] Ho-Chunk Inc., a Winnebago tribe in Nebraska, exemplifies replicating community economic development. Ho-Chunk Inc. has won the Harvard Honoring Nations Award after the tribe created a tribal-owned and chartered holding company to stimulate a nongaming economy.[88] Ho-Chunk Inc. then assisted in developing a Tribal College and a community development corporation.[89] The community development corporation was created as a 501(c)(3), which created a limit on the oversight by the tribal government.[90]

Each tribe has a different political and economic structure because of its location, tribal political and cultural beliefs, and the number of tribal members.[91] According to Morgan, tribes that succeed in the gaming industry have a lesser need for economic development, and as a result, have greater monetary resources to create other successful business developments.[92] Economic development among the tribes include grants, nonprofits, entrepreneurship, tribal corporate economic development, and business recruitment.[93] For example, the Ute tribe's economic

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University, (March 2016); *see also* Memorandum of Understanding between the Ute Indian Tribe and the University of Utah, (March 3, 2020) http://admin.utah.edu/ute-mou/ (discussing the importance of assisting the tribes' children to social achievements).

[86] Hearing *supra* note 81, at 115.

[87] Hearing, *supra* note 81, at 115.

[88] Nalini Bikkina, What the Tribal Peoples Displaced by Development in India Can Learn from the Resilience of the Winnebago Tribe in Nebraska, 34 J. OF DEVELOPING SOC'Y 351, 365 (2018).

[89] *Id.* at 364.

[90] *Id.*

[91] SHAWN BORDEAUX, THE TRIBAL ECONOMIC DEVELOPMENT "A TOTAL APPROACH", https://ots.gov/topics/consumers-and-communities/community-affairs/resource-directories/native-american-banking/bordeaux.pdf (last visited Apr. 4, 2021). *See generally* Annette Alvarez, Native American Tribes and Economic Development, URBANLAND (Apr. 19, 2011), https://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/.

[92] BORDEAUX, *supra* note 91, at 5.

[93] *Id.* at 4—6.

developments include grocery stores, gas stations, bowling alleys, feedlots, technology companies, and water systems.[94] The main businesses stimulating the Ute tribe's economy are cattle raising, mining oil, and natural gas.[95]

Tribal corporate economic developments vary and are commonly formed as single purpose or general entities, such as for selling tobacco and gas.[96] Another type of tribal corporate economic development is government contracting, where the tribe leverages its sovereign immunity to promote financial and employment gain.[97] Business recruitment is a tribal economic development commonly seen in sports. For example, the tribe may use its sovereign status to encourage a non-American Indian business to relocate a venue. The tribe can also promote the tribe's reservation business developments through business recruitment by attracting non-American Indians to invest in the reservation, like with casino gaming and resorts.[98]

C. EXISTING JURISDICTION ON TRIBAL LAND

Preliminary issues that arise for a professional sports team to build on American Indian land include personal jurisdiction and subject matter jurisdiction over the players, team, and its affiliates. The United States Constitution provides federal courts jurisdiction over all cases and controversies arising under the Constitution, United States laws, or treaties.[99] This means federal courts would adjudicate matters arising under treaties made with American Indian tribes. However, few exceptions exist which would likely impact the jurisdictional concerns faced when building on tribal land and inviting non-American Indians onto the land. Federal law provides American Indian tribes are only subject to suit where Congress provides or the tribe's immunity has been waived.[100]

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[94] *See Economic Development*, UTE MOUNTAIN UTE TRIBE, http://www.utemountainutetribe.com/economic%20development.html (last visited Apr. 5, 2021).

[95] *Id.*

[96] BORDEAUX, *supra* note 91, at 2—4.

[97] *Id.*

[98] BORDEAUX, *supra* note 91, at 2—4.

[99] U.S. CONST. art. III § 2.

[100] Kiowa Tribe of Okla. v. Mfg. Tech., 523 U.S. 749, 754 (1998) (citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986); Santa Clara Pueblo v.

American Indian tribes, although identified in the Constitution,[101] do not fall under Article III, Section 2 of the United States Constitution.[102] In 1831, the Supreme Court noted American Indian tribes are not foreign states, but are more akin to sovereign states.[103] Over 100 years later, the Court recognized American Indian tribes are "separate sovereigns pre-existing, the Constitution."[104] Tribes are not exempt from suit in United States courts by sovereign immunity but rather by federal common law immunity.[105] The Court acknowledged "[American] Indian tribes retain inherent sovereign power to exercise some forms of jurisdiction over non-[American] Indians in their reservations, even on non-[American] Indian fee land."[106] In *Kiowa,* the Court upheld prior American Indian tribe immunity rulings and deferred to Congressional legislation, which provides specific suits that may be brought into non-American Indian courts.[107] In the same ruling, the Court upheld the American Indian tribe's immunity because "Congress failed to abrogate [the immunity doctrine]" in efforts to promote American Indian tribes' self-government and economic development efforts.[108]

American Indian tribes are communities with independent political bodies, as a separate and distinct body, that "possess the power to regulate their internal relations over their citizens and their territories."[109] The regulations by tribes to the American Indians, persons on the tribal land, and the land the tribes possess creates sovereignty no different than a state within the United States.[110] Indian tribes have created governments like those within

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Martinez, 436 U.S. 49, 58 (1978); and United States v. U. S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940).).

[101] Joshua Jay Kanassatega, *The Discovery Immunity Exception in Indian Country—Promoting American Indian Sovereignty by Fostering the Rule of Law*, 31 WHITTIER L. REV. 199, 238 (2009).

[102] *Id.*

[103] *Id.* at 239.

[104] Santa Clara Pueblo, 436 U.S. at 56.

[105] *Id.* at 58.

[106] Montana v. United States, 450 U.S. 544, 565 (1979).

[107] Kiowa Tribe of Okla. v. Mfg. Tech., 523 U.S. 749, 751—52 (1998).

[108] *Id.* at 760.

[109] Joshua Jay Kanassatega, *The Case for "Expanding" the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes*, 47 GONZ. L. REV. 589, 617 (2011).

[110] *Id.* at 611.

the United States and have delegated certain authorities to persons associated with the tribal government.[111]

Special Counsel to the Menominee Tribal Enterprises has suggested any person engaging in activity under an American Indian nation or tribe's authority then becomes subject to that Indian tribe's court process.[112] The tribe's court would have the power to exercise jurisdiction, and that tribe's law is applied.[113] "When business deals are negotiated, Indians and non-Indians alike focus on dispute resolution issues, including in what jurisdiction, form, and under what law the parties should litigate disputes if they arise."[114] Dispute resolution and jurisdictional issues are raised when building an arena on tribal land.

III. TRIBES AND SPORTS

A. CURRENT USAGE OF INDIAN TRIBES' NAME, LIKENESS, PROPERTY, AND LAND

Few sports entities have used or built on tribal land. The most common use for tribal land is by permit for those seeking to have a temporary use for individual sports.[115] Additionally, many sports teams carry disapproval from American Indian nations and dismiss the negative connotations associated with American Indians as mascots.[116] The debate surrounding politically correct mascots has brought attention to many mascots that historically have brought pride to their home teams.[117] People still hotly dispute whether the land some arenas and stadiums are built on are originally American Indian lands taken unjustly by the United

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[111] *Id.* at 612.

[112] *See generally* Joshua Jay Kanassatega, *The Case for "Expanding" the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes*, 47 Gonz. L. Rev. 589 (2011).

[113] *Id.* at 649.

[114] *Id.* at 653.

[115] *See* JAN ELISE STAMBRO ET AL., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH 30 (Utah Bureau of Econ. & Bus. Research ed. 2014).

[116] *See* Allison Torres Burtka, *Native American Mascots—Honoring Culture or Symbol of Disrespect?*, GLOB. SPORTS MATTER (Apr. 24, 2018), https://globalsportmatters.com/culture/2018/04/24/native-american-mascots-honoring-culture-symbol-disrespect.

[117] *Id.*

States government.[118] However, some sports teams and tribes have reached agreements to embrace the Indian Nations' name.[119]

B. AMERICAN INDIAN LAND PERMIT AND SPORT

American Indian tribes commonly license land sharing divides with state governments through usage permits for private entities that request access for individual sports.[120] Non-American Indian governments have the authority to manage lands sharing waterways with tribal land because various codified management acts exist.[121] Examples of shared waterways include the Navajo Nation, Navajo Indian Reservation on the San Juan River's south side, Ute Indian Tribe, and the Uintah and Ouray Indian Reservation on the Green River's east side.[122]

The Bureau of Land Management authorized Disabled Sports USA use public and private lands sharing waterways for physical activities adapted for disabled individuals.[123] The San Juan River, Westwater Canyon of the Colorado River, and Desolation and Gray Canyons of the Green River, are managed by the Bureau of Land Management, and share the San Juan River's south side and the Green River's east side with the American Indian nations.[124] Because of these shared waterways, Disabled Sports USA is required to obtain permits from each American Indian nation to camp and host activities on the tribal land.[125]

C. NAME USAGE AND SPORT

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[118] *Id.*; *see, e.g.,* United States v. Super. Ct. in & for the Ctny. of Maricopa, 144 Ariz. 265 (1985).

[119] Jim Litke, *Teams Say Indian Names Show Respect, History Says Otherwise*, LAKE NEWS ONLINE (Dec. 17, 2020 3:17 PM), https://www.lakenewsonline.com/story/sports/2020/12/17/history-indian-names-sports/3947474001/.

[120] Memorandum of Understanding between U.S. Dept. of Interior Bureau of Land Management and Disabled Sports USA, BLM MOU UT 930 FY 2014-01 (2014).

[121] *Id.* at 1.

[122] *Id.* at 8.

[123] *Id.* at 1.

[124] *Id.* at 2

[125] *Id.* at 8.

Non-American Indians also use tribes' names.[126] The University of Utah and the Ute Indian Tribe of the Uintah and Ouray Reservation entered into a memorandum of understanding ("MOU") for using the name "Ute."[127] The agreement states, among many other benefits, cultural awareness and tribal pride are valuable.[128] Utah is home to the Uintah and Ouray Reservation, the second-largest Indian Reservation at over 4.5 million acres, and named after the Ute tribe.[129]

The University of Utah uses the Ute name for its athletic organizations.[130] In the agreement, the University incorporated a design chosen by the Ute tribe on team uniforms worn once a year to honor the tribe and its members' during Native American Heritage month.[131] The agreement also provides the University will allow the Ute tribe to present its flags at a home game opening ceremony held by Ute tribe Honor Guards.[132] Using the Ute name is a "source of pride to members of the Ute Indian Tribe" and helps bring notoriety to the tribe through a higher education institution.[133]

Similarly, the Spokane Indians, a Northwest minor league team, collaborated with the Spokane Tribe of Indians.[134] In 2006 during a rebrand, the front office went directly to the Spokane Tribe of Indians for permission to use the name.[135] The collaboration continued beyond the team name and went on to developing a team logo approved by the Spokane Tribe of Indians,

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[126] Memorandum of Understanding, *supra* note 85 (The agreement was updated and revised on March 3, 2020 to include more educational outreach programs for the Ute community and additional funds allocated to the Ute community).

[127] Memorandum of Understanding, *supra* note 85.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Rodney Harwood, *Spokane Indians Take Historic Step with Logo in Salish Language*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 27, 2013) (article on file with author); *See also* Paul Caputo, *Authenticity, Collaboration, Respect: The Story Behind the Spokane Indians*, SPORTSLOGOS.NET (July 19, 2020), https://news.sportslogos.net/2020/07/19/authenticity-collaboration-respect-the-story-behind-the-spokane-indians/baseball.

[135] *See* Hardwood, *supra* note 134.

in an effort to show respect to the local tribe and avoid negative context associated with Indian imagery.[136] The partnership originally resulted in a team logo in the traditional Salish language, giving the Spokane Tribe of Indians a great pride.[137] Later, the partnership expanded to include signs at the arena written in traditional Salish language and an initiative to raise awareness to redband trout conservation efforts.[138]

D. NAMING RIGHTS PARTNERSHIP

Tribes also enter into agreements with professional sports teams or arenas to provide the naming rights of the field, court, entryway, facility, and often premier signage.[139] Arenas, generally owned by the cities, are leased to sports teams or management companies which in turn are leased to sports teams owners or the sports entity.[140] Facility naming rights not associated with a management company are contractually acquired by the sports teams leasing the facility.[141] Larger corporations commonly contract with the lessor team for these naming rights.[142]

Arizona is a marketable state with many opportunities to partner with an Indian Tribe.[143] Specifically, the larger Phoenix, Arizona area has many tribes with flourishing casinos that wish to continue their brand's growth by supporting the teams their

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[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *About Gila River Arena*, GILA RIVER ARENA, http://gilariverarena.com/arena/about/ (last visited Mar. 27, 2021).

[140] *Id.*

[141] Craig Morgan, *Coyotes, Gila River Casinos Agree to Naming Rights Deal for Arena*, FOX SPORTS (Aug. 13, 2014, 3:14 PM), http://www.foxsports.com/arizona/story/coyotes-gila-river-casinos-agree-to-naming-rights-deal-for-arena-081314.

[142] *See* Matthew E. Eisler et al., *Insight: Sports Sponsorship, Naming Rights—Takeaways for Getting a Name in Lights*, BLOOMBERG (Aug. 12, 2019, 1:01 AM), https://news.bloomberglaw.com/us-law-week/insight-sports-sponsorship-naming-rights-takeaways-for-getting-a-name-in-lights.

[143] Tommi Goodman, *In Limited Market, Phoenix Teams Turn to Native American Communities to Sponsor Arenas*, CRONKITE NEWS (Apr. 29, 2016), http://cronkitenews.azpbs.org/2016/04/29/in-limited-market-phoenix-teams-turn-to-native-american-communities-to-sponsor-arenas.

consumers support.[144] In 2000, the Salt River Pima-Maricopa Indian Community was the first Indian Tribe to enter into a marketing partnership with the Phoenix Suns.[145] This partnership was extended in 2005 when the Community purchased the naming rights to the lobby entrance of the arena, currently known as Casino Arizona Pavilion.[146] Subsequently, the Arizona Rattlers, an arena football team, partnered with the Ak-Chin Indian Community to name the Rattlers' field Ak-Chin Field.[147] The partnership included the tribe's seal on the field and premier placement of Ak-Chin advertising around the arena.[148] The Rattlers currently play in PHX arena, formerly Talking Stick Resort Arena.[149]

The City of Glendale was the first city to enter into an agreement with a federally recognized tribe, the Gila River Indian Community, for naming rights and premier advertising signage indoors at a professional sports venue.[150] The Arizona Coyotes entered into an agreement with the Gila River Indian Community for the naming rights to the facility owned by Glendale and managed by Global Spectrum.[151] Glendale leased the facility to the Arizona Coyotes for fifteen years and gave the team the right to terminate contracts, including naming rights, subject to Glendale City Council approval.[152] Additionally, the Glendale City Council approved a name change for Jobing.com arena to be

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[144] *Id.*

[145] *A Team of Their Own: Ak-Chin Inks Sponsorship Deal with Arizona Rattlers*, INDIAN COUNTRY TODAY (Mar. 28, 2013), https://indiancountrytoday.com/archive/a-team-of-their-own-ak-chin-inks-sponsorship-deal-with- arizona-rattlers.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] Richard Obert, *Rattlers Return to Suns Arena for 2021 Indoor Football League Season, Release Schedule*, AZCENTRAL.COM (Nov. 17, 2020, 3:20 PM), https://www.azcentral.com/story/sports/ifl/rattlers/2020/11/17/rattlers-return-suns-arena-2021-ifl-season-release-schedule/6330452002.

[150] *Id.*

[151] Goodman, *supra* note 143.

[152] Mike Sunnucks, *Arizona Coyotes Sign Gila River Casinos to Arena Naming Rights Deal*, PHX. BUS. J. (Aug. 13, 2014), http://www.bizjournals.com/phoenix/news/2014/08/13/arizona-coyotes-sign-gila-river-casinos-to-arena.html.

renamed Gila River Arena.[153] This same agreement also provided for a long-time sponsorship agreement for advertising and marketing set to expire in 2023.[154]

Similarly, the downtown Phoenix arena, which hosts the Phoenix Suns and Phoenix Mercury basketball teams, entered into a multiyear naming rights agreement changing the name from the US Airways Center to Talking Stick Resort Arena.[155] Professional teams outside Arizona have followed its example and entered into partnerships with other tribes. The Los Angeles Clippers partnered with the Agua Caliente Band of Cahuilla Indians as an official and exclusive casino partnership.[156] This partnership included exclusive broadcasting the Los Angeles Clippers games at the resort, as well as premier advertising signage in the Staples Center during the Clippers' home games.[157] This partnership expanded in 2017 to include a naming rights partnership with the Los Angeles Clippers' G-League affiliate team.[158] The Agua Caliente Clippers currently play in the Toyota Arena owned by the City of Ontario in California.[159]

E. TEAM OWNERSHIP

In 2003, the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe") entered into a membership agreement with the WNBA to purchase the Connecticut Suns' team ownership

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[153] *Id.*

[154] *Id.*

[155] Sue Doerfler, *US Airways Center Becomes Talking Stick Resort Arena on Oct. 7*, AZCENTRAL.COM (Sept. 17, 2015, 6:06 PM), http://www.azcentral.com/story/money/business/2015/09/17/us-airways-arena-talking-stick-resort-arena/72366148. The arena is currently named PHX Arena since the expiration of the Talking Stick Resort partnership. Obert, *supra* note 149.

[156] Marcus Fong, *L.A. Clippers Announce Agua Caliente Casino Resorts as Presenting Sponsor of 2015/16 Season*, NBA.COM (Nov. 19, 2015) http://www.nba.com/clippers/la-clippers-announce-agua-caliente-casino-resorts-presenting-sponsor-2015-16-season.

[157] *Id.*

[158] C. Mendez, *L.A. Clippers Bring NBA Development League Team to Ontario, CA*, NBA.COM (July 12, 2017), https://agua caliente.gleague.nba.com/news/l-a-clippers-bring-nba-development-league-team-to-ontario-ca.

[159] *About Us*, TOYOTA ARENA, https://www.toyota-arena.com/arena-info/about (last visited Jan. 17, 2021).

rights.[160] First, the Mohegan Tribe created a Limited Liability Company to purchase the team. The company, Mohegan Basketball Club, LLC ("Basketball Club") a subsidiary of the Mohegan Tribal Gaming Authority ("Gaming Authority"), was formed according to the tribe's laws.[161] The Gaming Authority is a tribal owned business.[162] The Mohegan Tribe, the Basketball Club, and the Gaming Authority were all necessary signatories to the agreement.[163]

The original agreement included the WNBA's standard membership requirements for ownership groups such as compliance with the collective bargaining agreement ("CBA"), league rules, prohibitions against sports gambling, rights to territory for advertising, community outreach programming, sponsorship restrictions, and broadcasting rights.[164] It includes approval for using the Mohegan Sun Arena, which is located on the tribe's land.[165] Some specific provisions relate exclusively to the Connecticut Sun. One provision is consenting to using the Sun name. Consent for the Connecticut Sun team's operations was acquired by the WNBA from the Phoenix Suns.[166] The Mohegan Tribe, Basketball Club, and the Gaming Authority were required to agree to specific limitations and waive some sovereignty as it relates to tribal matters.[167] The Mohegan Tribe is a signatory because the agreement required the tribe to not amend, update, pass, or enact legislation that would modify, nullify, or affect the agreement between the WNBA and the tribe's affiliates.[168] The agreement is governed and construed by New York law.[169]

Additionally, the tribe's affiliates agreed to waive all rights to asserting sovereignty as it related to any claims asserted by the WNBA or against the WNBA in relation to the agreement or the League Rules.[170] Further, the agreement includes specific

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[160] WNBA Membership Agreement (Jan. 28, 2003), https://www.sec.gov/Archives/edgar/data/1005276/000092701603000332/dex101.htm.

[161] *Id.* at 1.

[162] *Id.* at 29.

[163] *Id.* at 1.

[164] *Id.* at 9—10.

[165] *Id.* at 5.

[166] *Id.* at 14.

[167] *Id.* at 11—12.

[168] *Id.*

[169] *Id.* at 21.

[170] *Id.*

provisions referencing waiving rights to claims that may fall under the jurisdiction of the Mohegan Tribe Gaming Disputes Court or other tribal courts.[171] The waiver to claims that fall under the jurisdiction of the Mohegan Tribe Gaming Disputes Court or other tribal courts includes waiving the right to exhaust remedies in tribal courts prior to filing in the U.S. court system.[172] Additionally, if the WNBA chose to arbitrate, the tribe's affiliates are required to arbitrate in New York under the Commercial Rules of American Arbitration Association.[173] In return, the WNBA agrees no recourse exists against the tribe or its affiliates, except for the Basketball Club or Gaming Authority.[174]

F. ARENAS AND FIELDS

Arizona has expanded its opportunities from partnerships with tribes to building fields on American Indian land.[175] Teams such as the Phoenix Rising FC and the Arizona Diamondbacks use fields built on tribal land. Teams' relationships with tribes represent opportunities to build their brands and strengthen ties with American Indian communities.

1. *PHOENIX RISING FC FIELDS*

The United Soccer League (USL) team, Phoenix Rising FC, privately financed a stadium on Salt River Pima–Maricopa Indian Community land in hopes to expand from the USL to the MLS.[176] This training facility and soccer stadium was built for the 2017 season[177] to host 6,200 individuals.[178] This field was built in

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[171] *Id.* at 22.

[172] *Id.*

[173] *Id.* at 23.

[174] *Id.* at 22.

[175] *About Gila River Arena*, *supra* note 139.

[176] Alejandro Barahona, *Arizona United SC Reveals New Name and Logo Plus Stadium Plans for 2017 Season*, AZCENTRAL (Nov. 28, 2016, 7:02 PM), https://www.azcentral.com/story/news/local/scottsdale/2016/11/28/arizona-united-sc-reveals-new-name-and-logo-plus-stadium-plans-2017-season/94569050.

[177] *Id.*

[178] Mike Sunnucks, *Phoenix Rising Soccer Team Wants to Build New MLS Stadium on Salt River*, PHX. BUS. J. (Feb. 2, 2018, 8:54 AM),

collaboration with the Solanna Group,[179] an American Indian family-owned real estate investment firm.[180] In 2019, Phoenix Rising FC and the Salt River Pima–Maricopa Indian Community entered into a stadium naming rights deal.[181] The former Phoenix Rising Sports Complex was renamed the Casino Arizona Field, after the sister property to Talking Stick Resort, the Casino Arizona.[182] Phoenix Rising FC recently announced it is relocating to the Wild Horse Pass located in the Gila River Indian Community[183] that is being built by the Wild Horse Pass Development Authority, a Gila River Indian Community enterprise.[184] Governor Berke Bakay of Phoenix Rising expressed his deepest gratitude to the American Indian communities for the ability to provide a home for the teams initial success.[185] The field will increase seating capacity by 35% and make its debut in the 2021 season.[186]

2. *SALT RIVER FIELDS*

Continuity and tradition play large roles in tribal decision-making. Like the Ute tribe's partnership with the University of Utah, the Salt River Pima–Maricopa Indian Community partnered

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https://www.bizjournals.com/phoenix/news/2018/02/02/phoenix-rising-soccer-team-wants-to-build-new-mls.html.

[179] *About Gila River Arena*, *supra* note 139.

[180] *Multi-Billion-Dollar Akimel 7 Planned at Loops 101 and 202*, AZ BIG MEDIA (Jan. 4, 2020), https://azbigmedia.com/real-estate/commercial-real-estate/multi-billion-dollar-akimel-7-planned-for-loops-101-and-202.

[181] Phoenix Rising Comm's, *Phoenix Rising FC Partners with Casino Arizona for Stadium Naming Rights*, PHX. RISING FC (Mar. 15, 2019, 2:45 PM), https://www.phxrisingfc.com/news_article/show/1004535.

[182] *Id.*

[183] Phoenix Rising Comm's, *Phoenix Rising FC Moves Stadium and Professional Training Center to Wild Horse Pass*, PHX. RISING FC (Dec. 10, 2020, 11:25 AM), https://www.phxrisingfc.com/news_article/show/1136579.

[184] *Gila Community Likely Site for New Soccer Stadium*, AHWATUKEE FOOTHILLS NEWS (Dec. 17, 2020), https://www.ahwatukee.com/news/article_e3a937e8-3fcb-11eb-87f8-179b7ee60cf5.html.

[185] *Id.*

[186] *Id.*

with the Arizona Diamondbacks and the Colorado Rockies to build a spring training facility on tribal land.[187] The Salt River Pima tribe's President announced the tribe's excitement to support baseball's continuity and tradition and to bring "baseball home to our community."[188] The agreement will stand for twenty-five years.[189] The spring training stadium has an 11,000 seat capacity and is surrounded by twelve practice fields, accompanying clubhouses, training facilities, and team offices.[190]

Specific architecture for the facilities and specialty grass for the fields were among the terms included in the agreement between the tribe and baseball teams.[191] The Salt River Pima–Maricopa Community was required to pass an ordinance to establish the Salt River Fields enterprise.[192] This ordinance exists to "develop[] and operat[e] the Community's spring training and Community recreational facility."[193] The ordinance also allowed Salt River Field to "enter into, make[] and perform [on] contracts" including the current agreements with the professional baseball teams.[194] However, some limitations in the ordinances required approval from the tribe's Community Council to lease the facility and for expenditures beyond the budget provided for the fiscal year.[195]

The Arizona Diamondbacks lease Salt River Fields as their primary spring training facility from the Salt River Pima–

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[187] Media Release Salt River Pima Maricopa Indian Community Announces Location for New Spring Training Site for Arizona Diamondbacks & Colorado Rockies (July 16, 2009) (on file with author). *See also Teams to Share Spring Site on Tribal Land*, ESPN (Jul. 16, 2009), https://www.espn.com/mlb/news/story?id=4332013.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.* (explaining that HKS Architects, which previously designed the Cowboys Stadium (now AT&T Stadium) in Dallas and facilities for the Los Angeles Dodgers and Chicago White Sox, will design the complex.)

[192] SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, CODE OF ORDINANCES § 1-322(c) (2012) (establishing Salt River Fields as a subordinate economic enterprise "in the business of developing and operating the Community's spring training and Community recreational facility.").

[193] *Id.*

[194] *Id.* § 1-322(e)(1).

[195] *Id.* § 1-322(e)(1)(a),(b).

Maricopa Indian Community. This agreement is like the leases held by the Arizona Coyotes and the Phoenix Suns. The Code of Ordinances for the Salt River Pima–Maricopa Community provides the tribal Community Court retains original jurisdiction over matters falling under subject matter jurisdiction.[196] Subject matter jurisdiction includes contract and tort matters. Because dispute resolutions are required in business deals among American Indians and non-American Indians alike,[197] special ordinances were passed to protect the tribe's community, the professional sport teams, the athletes, and team staffs.[198] The ordinance below protects the Salt River Pima–Maricopa Indian Community from financial liability incurred by Salt River Fields.[199] The ordinance reads:

> Under no circumstances shall the Community be responsible for any debt, liability, or obligation of Salt River Fields. Instead any debt, liability or obligation of Salt River Fields shall be paid and discharged exclusively by Salt River Fields and from assets or accounts held in the name of Salt River Fields, as provided in this article.[200]

A subsequent ordinance specifies Salt River Fields is a "subordinate economic organization of the Community," and is entitled to the protective immunities including suit in the tribal, state, local taxation, and federal courts.[201] However, Salt River Fields may waive immunity under two specific sub-sections requiring a written waiver.[202]

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[196] *Id.* § 4-1 (jurisdiction).

[197] Joshua Jay Kanassatega, *The Case for "Expanding" the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes*, 47 Gonz. L. Rev. 589 (2011).

[198] SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, CODE OF ORDINANCES § 1-322(c) (2012).

[199] *Id.* § 1-322(d).

[200] *Id.*

[201] *Id.* § 1-323(b) (capitalization and financial responsibility of Salt River Fields).

[202] *Id.* § 1-323(b)(1)–(2).

Another tribal ordinance prevents liability for any matters regarding the players, team, and league. This ordinance eliminates liability for injuries to a spectator that may occur during a game.[203] The ordinance is intended to limit the team owners' civil liability, and "help contain costs" because baseball is "a wholesome and healthy family activity which should be encouraged."[204] The ordinance provides notice that spectators attending the facility for baseball games should know about the injuries that could occur during a game.[205] Further, the ordinance states entrance into the facility means spectators have agreed to the game's natural consequences, such as unintentional physical contact from in-game equipment, or items associated with normal in-game activity.[206] These activities are "inherent risks" associated with baseball and have a broad scope. A spectator injuring another spectator or their property is the only exception to these "inherent risks."[207]

Lastly, the ordinance states individuals assume a baseball game's inherent risks:

> [B]e a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risk . . . an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a baseball activity.[208]

This defense's exception is an owner's intentional conduct to injure a spectator.[209] The term 'owner' includes both the Salt River Pima–Maricopa Community and the legal entities that control the Arizona Diamondbacks and Colorado Rockies.[210] The term

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[203] *Id.* § 1-324(b) ("Spectators of baseball activities are presumed to have knowledge of and to assume the inherent risks of observing baseball activities.").

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* § 1-324(e).

[208] *Id.* § 1-324(c).

[209] *Id.* This paper does not discuss the jurisdictional differences between criminal and civil liability for tortious or criminal acts).

[210] *Id.* § 1-324(f)(1)–(2).

'owner' also includes the owner's affiliates, such as players, managers, and employees.[211]

3. *BRAND BUILDING FOR PHOENIX RISING FC AND THE ARIZONA DIAMONDBACKS*

Since relocating to Casino Arizona Field, Phoenix Rising FC acquired a consistent fan base and sold out the last three games prior to COVID-19 cancellations.[212] Relocating to Wild Horse Pass will further improve the fan experience by including more than one entrance, paved parking, family sections, and possibly tailgating areas.[213] Although the new stadium is not as central to Phoenix as was Casino Arizona Field, Phoenix Rising Governor, Berke Bakay, believes this change is offset by the stadium's updated infrastructure.[214] "It pained us to watch our fans try and get out of the stadium," says Governor Bakay.[215] General Manager, Bobby Dulle, believes the research conducted for stadium improvements will cater to the fan base and create a stronger brand for Phoenix Rising FC.[216]

Upon relocating the Diamondbacks and Rockies to Salt River Fields, the Phoenix Valley now has fifteen Major League Baseball teams in the Cactus League.[217] Spring training is a major attraction in Arizona. Before the Salt River Fields construction, the Cactus League brought in $360 million in revenue for the state, with 1.57 million fans attending on average each spring.[218] The new spring training facility not only provides a tourist attraction, but also provides a local attraction for Arizona Diamondback fans

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[211] *Id.*

[212] Phoenix Rising Comm's, *supra* note 183.

[213] Jake Anderson, *Phoenix Rising's Move to Wild Horse Pass is All About Fan Experience*, ARIZ. SPORTS (Dec. 11, 2020 12:10 PM), https://arizonasports.com/story/2475670/phoenix-risings-move-to-wild-horse-pass-is-all-about-fan-experience.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *See* Rudy Rivas, *2015 Cactus League Spring Training: Salt River Fields (Dbacks and Rockies)*, ABC 15 (Feb. 24, 2015 12:38 PM), https://www.abc15.com/sports/sports-blogs-local/2015-cactus-league-spring-training-salt-river-fields-dbacks-and-rockies.

[218] *Spring Cactus League Attendance Up*, SPORTS NEWS (Mar. 30, 2011 8:29 PM), https://www.upi.com/Sports_News/2011/03/30/Spring-Cactus-League-attendance-up/69911301531365/.

and creates an opportunity for the team to build a stronger fan base. Derrick Hall, President and CEO of the Arizona Diamondbacks, noted, "[we] ultimately found this site to be superb. This will prove to be the finest and most fan-friendly complex in all of baseball, with the most accessible location that features the Valley's most breathtaking views in existence."[219] In addition, Colorado Rockies President, Keli McGregor, stated, "we know that this shared home will be one of the finest year-round training facilities in all of Major League Baseball and something that our organizations, fans, and the Community will be proud of for decades to come."[220]

As noted, constructing a sports facility on tribal land is only one of many issues to consider in an economic development with an Indian nation. Economic development with American Indian nations is in high demand and not limited to casinos.[221] Permits and licenses to use a tribe's land will continue to develop for outdoor activity consumers.[222] Licenses between American Indian and non-American Indian organizations represent partnerships. These partnerships strengthen relationships in communities with a high American Indian population, but are not located on tribal land.[223] Naming rights partnerships are grounding the tribes' status within the non-American Indian community and creating opportunities for a community once considered an underdog by non-American Indians.[224] These partnerships are now evolving to build facilities that create further legal considerations such as dispute resolution clauses, jurisdiction of patrons, and jurisdiction of the team, tribe, and affiliates of each.[225]

IV. REQUIREMENTS TO BUILD AN ARENA FOR A NATIONAL BASKETBALL ASSOCIATION TEAM

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[219] *Salt River Pima-Maricopa Indian Community Announces New Spring Training Site For Arizona Diamondbacks & Colorado Rockies*, MLB (July 16, 2009 12:28 PM), http://mlb.mlb.com/content/printer_friendly/ari/y2009/m07/d16/c5891404.jsp .

[220] *Id.*

[221] *See generally* Hearing*, supra* note 81.

[222] MOU, *supra* note 120, at 8.

[223] MOU, *supra* note 85; *see also* Hardwood, *supra* note 134.

[224] About Gila River Arena, *supra* note 139.

[225] Kanassatega*, supra* note 197.

Professional basketball team owners must follow the NBA Constitution and Bylaws to relocate to a new city or arena.[226] According to the NBA's Constitution and Bylaws, a team may relocate as provided in Article 10, only as permitted by Article 7, and if applicable must meet requirements set out in Article 8, Article 9, or both.[227]

A. RELOCATION TO AN ALTERNATE ARENA

An NBA member team must file an application with the Commissioner to relocate to a different location within its existing territory or to an existing location outside its territory.[228] An existing territory is the "seventy-five air mile distance of the corporate limits of the city of operation." [229] Unless otherwise agreed, a team does not have the right to operate its team in another NBA team's territory.[230] The application process for relocation must be made in writing, identify the proposed relocation territory, and be submitted with a $50,000 variant fee in territory or a $250,000 fee outside of territory.[231] These costs offset the NBA's relocation investigation; fees exceeding these amounts will be reimbursed by the Member team.[232] After investigating, a five-person Relocation Committee, appointed by the Commissioner, will make a binding decision approving or denying the relocation.[233]

The Relocation Committee considers nine factors:

> 1. Support from the "fans, telecasters, broadcasters, and sponsors" by evaluating the Member teams' "performance in the management and operation" in the current city.[234]

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[226] Nat'l Basketball Ass'n Const. and Bylaws, Const. art. 7 (2019).

[227] *Id.* at art. 7—10.

[228] *Id.* at art. 7(a).

[229] *Id.* at art. 10(a).

[230] *Id.* at art. 7(a).

[231] *Id.*

[232] *Id.*

[233] *Id.* at art. 7(b).

[234] *Id.* at art. 7(b)(i).

2. Current support the Member team facilitates for the NBA in the current city by evaluating the "existing and projected population, income levels, and age distribution; existing and projected markets for [network] transmission of [NBA] games; exiting and projected business environment;" the current occupied arena and arenas in the territory; and "the presence, history, and popularity" of professional sports and entertainment in the current city.[235]

3. Support from the suggested relocation city by evaluating the same criteria as above listed in 2.[236]

4. The Member team's current and projected financial status and financial resources to support relocation.[237]

5. The Member team's past performance in operation and management with the NBA.[238]

6. The relocation's effect on the NBA and the ability for the NBA to promote and market basketball to a diverse demographic nationwide.[239]

7. The relocation's effect on the NBA and the current or potential contractual obligations to network providers.[240]

8. Any disadvantages posed by relocating such as "adverse laws or regulations" and travel or schedule incompatibilities.[241]

9. Teams' interest in the NBA to transfer to the requested city.[242]

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[235] *Id.* at art. 7(b)(ii).
[236] *Id.* at art. 7(b)(iii).
[237] *Id.* at art. 7(b)(iv).
[238] *Id.* at art. 7(b)(v).
[239] *Id.* at art. 7(b)(vi).
[240] *Id.* at art. 7(b)(vii).
[241] *Id.* at art. 7(b)(viii).
[242] *Id.* at art. 7(b)(ix).

After the Relocation Committee makes a recommendation, the Board of Governors approve or deny the relocation.[243] The Board of Governors may condition the relocation, including financial conditions and indemnity to the NBA for such a relocation.[244] Of these factors, only numbers seven, eight, and nine have legal implications to be considered in the move. These factors will be discussed in the analysis below.

B. RENOVATED ARENA VS. NEWLY CONSTRUCTED ARENA

For a team to consider relocating to an unconstructed arena or a constructed arena, the arena must meet the substantial compliance standards.[245] The NBA Commissioner is entrusted with the power to establish "minimum standards" for the arena's design to ensure the NBA has the ability to properly operate and produce for network televised games and the ability to regulate such in-game events.[246] The Commissioner is also endowed with the power to regulate the policies and procedures to "ensur[e] compliance" and enforce these provisions.[247] However, the Member team has the sole responsibility to ensure the arena complies with local, state, and federal statutes, regulations, and ordinances.[248]

A Member team may relocate to an unconstructed arena or an existing arena.[249] Relocating to an unconstructed arena require that "all designs, plans, and specifications" must be submitted to the Commissioner and receive a written approval at least thirty days before a team begins construction *and* the arena substantially complies with "minimum arena standards."[250] To relocate to an existing arena that may or may not require substantial renovations, the member team must acquire written approval from the Commissioner stating the existing arena or the plans to modify and renovate the arena to substantially comply with the "minimum arena standards" thirty days before the

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[243] *Id.* at art. 7(d).
[244] *Id.* at art. 7(e).
[245] *Id.* at art. 8(a).
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.* at art. 8(b).
[250] *Id.* at art. 8(b)(i)(A)(B) (*emphasis added*).

meeting with the Board of Governors to consider the pending application.[251] In both relocation scenarios, the Commissioner has the discretion to determine "*substantial compliance*" for the "NBA's minimum arena standards."[252]

C. POTENTIAL CITIES FOR RELOCATION

In 2004, economists from the University of San Francisco and Sports Economics conducted a study evaluating the viability of an NBA team expansion or relocation.[253] The two models used to forecast the preferential cities were based on location and revenue potential formulas.[254] The location formula was based on the market characteristics and revenue potential, whereas, the revenue potential formula was based on market characteristics and team characteristics.[255] Market characteristics were factored based on city population, public's income, competition with other sports franchises, public support for a publicly financed arena in that city (fanaticism), and corporate depth.[256] Winning percentage, arena quality, and prices related to attending a game were used to make up the team characteristics.[257]

The study concluded Louisville, Kentucky; San Diego, California; Baltimore, Maryland; St. Louis, Missouri; and Norfolk, Virginia would be ideal cities for expansion or relocation.[258] Rascher updated his research in 2015 and compared the viability results to the relocations made by the Charlotte Hornets to New Orleans[259] and the Seattle Sonics to Oklahoma City.[260] Rascher found the Hornets' move to New Orleans was

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[251] *Id.* at art. 8(b)(ii).

[252] *Id.* at (b)(iv) (*emphasis added*).

[253] Daniel Rascher & Heather Rascher, NBA Expansion and Relocation: A Viability Study of Various Cities, 18 J. OF SPORTS MGMT. 274 (2004).

[254] *Id.* at 274—75.

[255] *Id.* at 277.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 274—75.

[259] Daniel A. Rascher, *The Optimal Location for an NBA Franchise* 3 (Sept. 7, 2015) (unpublished article) (on file with author). The Charlotte Hornets relocated to New Orleans in 2002. Rascher provided viability predictions for the Charlotte Hornets (now New Orleans Pelicans) franchise based on 1998 to 2000 data.

[260] *Id.*

consistent with the previous findings proving New Orleans was not an ideal market for relocation.[261] In 2010, the New Orleans Pelicans were purchased by the NBA because the team had financial hardships.[262] Rascher predicted the move to Oklahoma City would not yield high revenue.[263] This updated study states Louisville, Kentucky and Austin, Texas are optimal cities for relocation.[264] For this paper, other cities in the study located near tribal land[265] were selected for comparison to cities with NBA teams.

D. TOPICS NOT ADDRESSED IN THIS ARTICLE

Many other issues give rise to building an arena on tribal land. However, this Article will not analyze how to create an expansion team or league for the arena. Likewise, this Article will not discuss sports gambling and implications related to sports betting. Lastly, arena funding will only be discussed regarding who will build the arena and how the team will use the arena. This Article will not discuss costs to build the arena and tax exemptions associated with such a project.

IV. APPLICATION OF BUILDING AN ARENA ON TRIBAL LAND

Many economic development opportunities exist between a professional sports team and an American Indian nation. For a professional basketball team to relocate to an arena on tribal land, a business recruitment[266] to build a venue would likely be the best option. Building a venue would provide the sports team with some economic privileges associated with the tribe's status. Also, it removes the burden of hiring a management company for the

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[261] *Id.*

[262] Ken Belson & Howard Beck, *Debt Escalating, Hornets Are Purchased by N.B.A.*, N.Y. TIMES (Dec. 6, 2010), https://www.nytimes.com/2010/12/07/sports/basketball/07hornets.html.

[263] *Id.*

[264] *Id.*

[265] Indian Lands of Federally Recognized Tribes of the United States (illustration), *in* BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/sites/bia.gov/files/assets/public/webteam/pdf/idc1-028635.pdf, (last visited Dec. 22, 2020).

[266] BORDEAUX, *supra* note 91.

facility, and promotes the tribe's economic and business development.[267]

A. IDENTIFYING A TRIBAL LAND LOCATION

The first step in building an arena on tribal land is to identify the states with large tribal populations and land. The Northwest, West Coast, and South West United States have the most federally recognized tribes.[268] Next, identifying tribal land centrally located or near a major metropolitan city provides for a promising fan and attendee market. Using the Rascher study, this analysis proposes teams relocate tribal land near Tampa, Florida; Albuquerque, New Mexico; and Tucson, Arizona. These three cities are less than a thirty-minute drive from the tribal land. Additionally, Tampa is the temporary home to the Toronto Raptors during the COVID-19 pandemic.[269]

B. IDENTIFYING THE TEAM(S) TO RELOCATE[270]

Based on predictions from the attendance analysis, gate revenue analysis, and total revenue analysis,[271] both Albuquerque and Tucson are projected to do equally well, if not better than some cities that currently have teams. Albuquerque[272] and Tucson[273] have a higher predicted attendance than the Milwaukee

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[267] *Id.*

[268] Lands in the United States (illustration), *in* BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc013422.pdf, (last visited Aug. 21, 2016).

[269] *Toronto Raptors to Play Home Games in Tampa to Open NBA Season*, ESPN (Nov. 20, 2020), https://www.espn.com/nba/story/_/id/30354415/toronto-raptors-play-home-games-tampa-open-nba-season.

[270] The identifications of these teams do not consider current leasing agreements with the arenas that currently house the NBA teams. For the exclusive purpose of the analysis of relocation to tribal land, the subsequent teams were identified and suggested as relocation teams.

[271] Rascher & Rascher, *supra* note 253 at 11—16. Rascher used three regression models for his predictions that removed, replaced, or adjusted variables for each model set of data.

[272] *Id.* at 13. Albuquerque's Attendance Analysis regression model estimates are 17,628; 17,881; and 15,100.

[273] *Id.* Tucson's Attendance Analysis regression model estimates are 17,452; 17,591, and 14,849.

Bucks[274] in all three regression models used in the study.[275] In two regression models, Albuquerque and Tucson have a higher predicted attendance than eight other cities that currently have teams.[276] The gate revenue analysis predictions are consistent with Albuquerque[277] and Tucson[278] having higher gate revenue generation than the Milwaukee Bucks[279] in all three regression models.[280] Referring to only two predicted regression models increases the Albuquerque and Tucson positioning above eleven other cities.[281] However, the total revenue analysis predictions brings some variant results in regard to the three regression models used. Albuquerque's[282] total revenue is predicted slightly below the Milwaukee Bucks[283] in two regression models, but

[274] *Id.* The Milwaukee Bucks' Attendance Analysis regressions model estimates are 16,084; 16,187, and 14,733.

[275] *Id.* "Regression analysis is a way of mathematically sorting out which . . . variable[] does indeed have an impact." In a regression analysis, a researcher gathers data on the relevant variables, plots the data on a chart, and draws a line that bests fits the plotted data. Amy Gallo, *A Refresher on Regression Analysis*, HARV. BUS. REV. (Nov. 4, 2015), https://hbr.org/2015/11/a-refresher-on-regression-analysis#.

[276] *Id.* The cities with teams that have a less predicted attendance in two regression models are the Philadelphia 76ers, New Orleans Pelicans, Minnesota Timberwolves, Phoenix Suns, Detroit Pistons, Sacramento Kings, Orlando Magic, and the Cleveland Cavaliers.

[277] *Id.* at 15. Albuquerque's Gate Revenue regression model estimates are $37,361,998; $36,626,882; and $18,225,821.

[278] *Id.* Tucson's Gate Revenue regression model estimates are $40,189,936; $39,200,313; and $21,244,749.

[279] *Id.* The Milwaukee Bucks' Gate Revenue regression model estimates are $30,702,889; $30,098,994; and $14,535,100.

[280] *Id.*

[281] *Id.* The cities with teams that have a less predicted gate revenue in two regression models are the Philadelphia 76ers, New Orleans Pelicans, Minnesota Timberwolves, Detroit Pistons, Sacramento Kings, Orlando Magic, Cleveland Cavaliers, Washington Wizards, Indiana Pacers, Memphis Grizzlies, and Atlanta Hawks.

[282] *Id.* at 17. Albuquerque's Total Revenue Analysis regression model estimates are $129,754,390; $140,413,914; and $113, 240,542.

[283] *Id.* The Milwaukee Bucks' Total Revenue Analysis regression model estimates are $131,104,298; $139,126,420; and $114,954,275.

above in one.[284] Tucson's[285] total revenue is predicted below in only one regression model by a difference of $212,403. Consistent with the previous predictions, both Albuquerque and Tucson have a higher total revenue analysis, in two regression models, than ten other cities with NBA teams.[286]

However, Tampa is not as high on the viability list; its viability factors are predicted to be under some cities with teams. For example, Tampa's[287] predicted attendance for two regression models are close to the Philadelphia 76ers[288] and the New Orleans Pelicans.[289] The predicted gate revenue analysis for two of Tampa's[290] totals were higher than the Atlanta Hawks[291] and two of Tampa's totals were close to the Detroit Pistons.[292] The total revenue analysis for Tampa[293] was only higher than the New Orleans Pelicans[294] for two regression's models.

C. FOUR STEPS TO BUILDING AN NBA ARENA ON TRIBAL LAND

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[284] *Id.*

[285] *Id.* Tucson's Total Revenue Analysis regression model estimates are $131,298,668; $140,483,454; and $114,741,82.

[286] *Id.* The cities teams that have a less total revenue in analysis in two regression models are Philadelphia 76ers, New Orleans Pelicans, Minnesota Timberwolves, Detroit Pistons, Sacramento Kings, Orlando Magic, Washington Wizards, Indiana Pacers, Memphis Grizzlies, and Atlanta Hawks.

[287] *Id.* at 13. Tampa's Attendance Analysis regression model estimates are 14,745; 15,309; and 11,502

[288] *Id.* The Philadelphia 76ers' Attendance Analysis regression model estimates are 14,951; 14,990; and 15,110.

[289] *Id.* The New Orleans Pelicans' Attendance Analysis regression model estimates are 15,181; 14,903; and 15,174.

[290] *Id*. at 15. Tampa's Gate Revenue Analysis regression model estimates are $19,629,449; $19,979,285; and $4,523,750.

[291] *Id*. The Atlanta Hawks Gate Revenue Analysis regression model estimates are $17,515,002; $16,969,945; and $27,558,011.

[292] *Id*. The Detroit Pistons' Gate Revenue Analysis regression model estimates are $19,832,975; $19,861,711; and $26,410,907.

[293] *Id*. at 17. Tampa's Total Revenue Analysis regression model estimates are $113,935,166; $132,637,914; and $105,421,737.

[294] *Id*. The New Orleans Pelicans' Total Revenue Analysis regression model estimates are $111,959,691; $115,851,700; and $129,301,171.

First, the tribe must decide if it will develop a team from an existing partnership or create a new partnership between a tribe and team. Second, the tribe must create a holding company similar to the previously discussed Ho-Chunk Inc., Mohegan Basketball Club, LLC and Salt River Fields.[295] Third, the tribe must determine which jurisdiction applies to the team, and assess what ordinances needed to limit civil and financial liability. [296] Fourth, the tribe and team will apply for relocation and collaborate to construct the arena in accordance with the "minimum standards" compliance requirement set forth by the NBA for team relocation.[297] To demonstrate these steps' application, the Seminole Tribe of Florida ("Seminole Tribe") will be referenced as it relates to the Tampa Reservation.

First, the Seminole Tribe must decide if it will expand upon an existing partnership or create a new partnership with a team. It appears the Seminole Tribe does not have existing name usage, naming rights partnership, or corporate and sponsorship agreements with a professional team.[298] The Seminole Tribe of Florida has five gaming facilities[299] and two reservations that offer other tourism experiences.[300] Through these facilities, the Seminole tribe may consider entering into a partnership with a team like the Los Angeles Clippers, where the tribe broadcasts the team's content exclusively during game days and grants rights to use the tribe's name for the G League.[301] This partnership type will serve as a strong foundation for the tribe to create a leveraged fan base for future partnerships.

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[295] BORDEAUX, *supra* note 91.

[296] SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, CODE OF ORDINANCES § 4.1; *see also*, KAREN J. ATKINSON & KATHLEEN M. NILLES, TRIBAL BUSINESS STRUCTURES HANDBOOK I-4, III-1 to III-9 (2008) https://www.hklaw.com/files/Uploads/Documents/Practices/IndianLaw/TribalBusinessStructureHandbook.pdf..

[297] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226, art. 8.

[298] *See generally* SEMINOLE TRIBE OF FLA., https://www.semtribe.com/stof (last visited Jan. 28, 2021).

[299] *Gaming Facilities*, SEMINOLE TRIBE OF FLA., https://www.semtribe.com/stof/enterprises/gaming-facilities, (last visited Jan. 28, 2021).

[300] *Big Cypress Citrus*, SEMINOLE TRIBE OF FLA., https://www.semtribe.com/stof/enterprises/big-cypress-reservation/big-cypress-citrus (last visited Jan. 28, 2021).

[301] Fong, *supra* note 156.

Political issues closely surround economic development with American Indian nations.[302] If handled thoughtfully, this type of partnership will promote the tribal community's brand and the team's brand. The Seminole Tribe has created a brand representing "community and a valuable legacy of Florida's rich and diverse heritage and a national leader among American Indian tribes striving for self-reliance."[303] This reputation can be exhibited by a sports team. Innovative collaboration between the team and tribe will stretch far beyond naming partnerships and limited baseball seasons, helping develop a connection between American Indian and non-American Indian commerce that will bring sustainable economic development to the tribal community.

As the Seminole Tribe is located in Florida – a state known for warm weather – the teams will attract patrons all year, from Spring training to basketball season.[304] The teams could agree to recognize and honor the Seminole Tribe during Native American Heritage month in November, which would help connect the NBA team's fans to the tribe's overarching brand. This partnership will strengthen the bonds between the NBA team's fans, the Seminole Tribe, and proud Florida residents.

Second, the tribe must create and own a chartered holding company[305] or a subordinate economic enterprise to stimulate a nongaming economy.[306] The chartered holding company will be created through the tribe's laws and ordinances, in the same way the tribe usually prepares to build a casino, hotel, or resort.[307] Because each tribe has a different economic or political structure, the tribe must consider how much oversight will be provided by the chief counsel, to prevent any critical harm to the tribe and

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[302] *See generally* Annette Alvarez, *Native American Tribes and Economic Development*, URBANLAND (Apr. 19, 2011), https://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/.

[303] *The Future*, SEMINOLE TRIBE OF FLA., https://www.semtribe.com/stof/history/the-future (last visited Jan. 22, 2021).

[304] Basketball season tends to run during the colder fall and early winter seasons, especially on the east coast.

[305] *See* Shane Plumer, *Turning Game Dollars into Non-Gaming Revenue; Hedging for the Seventh Generation*, 34 MINN. J.L. & INEQ. 515, 530 (2016); *See generally* Atkinson & Nilles, *supra* note 296 at I-4, III-1 to III-9 (2008).

[306] *See* Plumer, *supra* note 305, at 534.

[307] *Id.* at 523.

prevent the government from owning the business.[308] This economic enterprise will then provide a mechanism for the tribe to enter into an agreement with a professional basketball team to use an arena and bring business to the reservation.[309]

Although Indian gaming is a newer revenue source for many tribes, it has facilitated extreme economic growth.[310] As mentioned above, the Seminole Tribe of Florida has five gaming facilities[311] and two reservations that offer other tourism experiences.[312] Outlet malls on and near tribal land are on the rise, creating an entertainment hub similar to Salt River Fields, providing ample opportunity for additional economic development.[313] Because the Seminole Tribe has many economic enterprises in Florida, including the Hard Rock Hotel & Casino, the ordinances and structures to create a new chartered holding company or subordinate economic enterprise may already be in place.[314] Therefore, the Tribal Council would only have to create ordinances for arena construction.

An arena built and managed by the Seminole Tribe will generate revenue with a lease and will also create jobs for tribe members. This arrangement will also benefit the teams, who will be able to reduce their expenses. By managing the building, the tribe could reduce the team's outgoing expenses. Expenses for managing the building and the employees that work for the facility would be included as part of the leasing fee. Teams that own arenas generally have to hire staff to manage the arena, contract

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[308] *Id.* at 532—33.

[309] *Id.* at 516—20; *see also* Tommi Goodman, *Cronkite News: Sports Teams Turn to Tribes for Naming Rights Deals*, INDIANZ (May 3, 2016), https://www.indianz.com/News/2016/05/03/cronkite-news-sports-teams-tur.asp (discussing similar relationships between Native American communities and professional sports teams in the Phoenix area.).

[310] James I. Schaap, *The Growth of the Native American Gaming Industry: What Has the Past Provided, and What Does the Future Hold?*, 34 AM. INDIAN Q. 365, 368—69 (2010).

[311] *Gaming Facilities*, *supra* note 299.

[312] *See Big Cypress Citrus*, *supra* note 300.

[313] Patric Hedlund, *Tejon Tribe Casino Confirmed*, MOUNTAIN ENTER., (July 4, 2014), https://mountainenterprise.com/story/tejon-tribe-casino-confirmed-2/.

[314] *Tampa Reservation*, SEMINOLE TRIBE OF FLA., https://www.semtribe.com/stof/enterprises/tampa-reservation, (last visited Jan. 28, 2021).

with a third-party management company to manage the arena, or contract a third-party concessionaire company. Here, the Seminole Tribe would hire staff for management, concessions, security, ushering services, retail operations, and ticketing staff for arena operations. However, the NBA's sponsorship agreements, like its agreement with Pepsi Co., could conflict with the Tribe's existing vendors the Hard Rock Hotel & Casino require franchisees to use.[315] Sponsorship conflicts will not negatively impact the revenue or employment opportunities generated by the arena.

Conversely, the NBA team may experience a decrease in revenue initially and possibly continuously overall. Spring training facilities in Arizona are revenue generating because many retirees frequent Arizona during spring.[316] Like Salt River Fields, where a casino is central to a city known for its shopping centers, yet only twenty miles from a city, building an arena in Arizona is a prime opportunity for consistent revenue generation. Here, it is slightly difficult to determine whether basketball game attendees on tribal land in areas such as Tucson, Albuquerque, or Tampa are like retirees attending Arizona's spring training. Additionally, it is difficult to determine if fans frequenting University of Arizona games in Tucson, New Mexico State games in Albuquerque, and Buccaneers games in Tampa Bay would attend a basketball game on the nearby tribal land. However, the Seminole Tribe's existing outlet stores and restaurants may help make the area around the arena an ideal environment for tourism.

Based on the Rascher studies (which are not specified to the tribal land demographic), teams would likely significantly increase the tribe's revenue. The team may be able to capitalize on this opportunity and enter into an agreement with the Seminole Tribe to exclusively broadcast the team's games in the five other

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[315] Darren Rovell, *PepsiCo Partners with NBA, Has Deals with Four Major Sports Leagues*, ESPN (Apr. 13, 2015), https://www.espn.com/nba/story/_/id/12678602/nba-announces-partnership-deal-pepsico.

[316] *See* Michael Pollick, *In Contest for Retirees, Arizona Bets on Baseball*, HERALD-TRIBUNE (Mar. 15, 2009, 12:01 AM), https://www.heraldtribune.com/news/20090315/in-contest-for-retirees-arizona-bets-on-baseball; *see also* Thomas Barrabi, *MLB spring training an economic home run in Florida, Arizona*, FOX BUS. (Feb. 13, 2020), https://www.foxbusiness.com/sports/mlb-spring-training-economic-impact-florida-arizona.

gaming facilities, which may require the NBA's approval. These broadcasts would create a larger fan base for the team.

Third, the Tribe must assess the existing jurisdictional limitations that could restrict the team's ability to function as a non-Indian enterprise. Additionally, the Tribe must consider the ordinances and liability limitations necessary to protect the tribe and provide an incentive for a team to relocate. Conflicts of law exist because the tribes have their own court system and are not subject to state law.[317] Initially, the tribe and team must enter a Memorandum of Understanding ("MOU"). This agreement must delineate: (1) the tribe's separate subordinate economic enterprise from the Tribe; (2) ordinances will be created or are in existence which limit liabilities to the team, NBA, and tribe, and the tribe will not change any ordinance or tribal law that would affect the status of the agreement or team; (3) the relocation cost and who will cover it (the team, the tribe, or both); (4) fees related to the facility such as adjustments to the facility required by the league will be covered by the tribe; and (5) if the relocation is denied, which party will pay during the relocation investigation conducted by the NBA. However, if relocation is denied, the MOU could include an alternate plan to build a smaller facility to house the team's G League. An MOU ensures both parties will engage in fair business dealings during negotiations and building the arena.

Once the MOU is in place, the Seminole Tribe would create a separate subordinate economic enterprise from the tribe and the gaming facility on the Tampa reservation. The ordinances created or altered to ensure adequate safeguards are in place to limit any liabilities to the team, NBA, and Tribe.

The Tribe must then determine the limitations for financial liability to protect the tribe from debt, tort, or contract disputes.[318] Determining the limits to financial liability ensures if the facility acquires debt, if the facility breaches the contract with the team and does not provide services, or if any other financial liabilty arises based on the facilities' actions, the tribe's greater collective is protected from financial liability. Ordinances protecting the tribe, the team, the athletes, and owners are then

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[317] Ryan Dreveskracht, *Doing Business in Indian Country: A Primer*, A.B.A. (Jan. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/01/05_dreveskracht/.

[318] *See* Atkinson & Nilles, *supra* note 296.

passed and limit liability occurring during a game.[319] However, the tribe and its affiliates may be required to waive all rights to assert sovereignty in these ordinances as it relates to claims asserted by the NBA or against the NBA pursuant to the League Rules.[320] Conversely, if the Tribe passed ordinances like the laws in the states, the need to waive sovereignty in litigation for failure to comply with League Rules could become moot. The tribe may require conflicts be resolved in mediation, arbitration, or some other forum, rather than a federal court.[321] Mediation or arbitration may assist in repairing the relationship between the team and the tribe if a dispute occurs, as well as save litigation costs.

Many professional sports leagues and player's associations are collectively bargained, as are their jurisdictions. Jurisdictions predetermined by a CBA create conflicts because American Indian jurisdiction is not accounted for in a CBA. Likewise, jurisdictional conflicts subject athletes, teams, employees, and owners to different civil and criminal liabilities. The MOU entered into between the team and tribe must specify the tribe will comply with the CBA, league rules, prohibitions against sports gambling, rights to territory for advertising, outreach programming, sponsorship restrictions, and broadcasting rights.[322] Facility employees leased by the teams generally enter into employment agreements with specific contract provisions, subjecting the employee to a state's jurisdiction. However, if the tribe manages and employs the staff for the arena, ordinances would only include exemptions for the players, employees, and team owners.[323]

Ordinances limiting civil liabilities, such as inherent risks of the game or alcohol consumption limits on a reservation, should

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[319] BORDEAUX, *supra* note 91, at 4. This is the method agreed to between the Salt River Pima Maricopa Community and the Arizona Diamondbacks. *See also* SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, CODE OF ORDINANCES § 1-324(b) (2012).

[320] BORDEAUX, *supra* note 91. This is the method agreed to between the Mohegan Tribe and the WNBA. *See also* WNBA Membership Agreement, *supra* note 160, at 22.

[321] *See* WNBA MEMBERSHIP AGREEMENT (Jan. 28, 2003), https://www.sec.gov/Archives/edgar/data/1005276/000092701603000332/dex101.htm.

[322] *See* Atikinson & Nilles, *supra* note 296.

[323] *See* WNBA Membership Agreement, *supra* note 321.

be passed.[324] This protects the team and the team affiliates from liability during a game for conduct such as loose balls entering the crowd, players falling into attendees, or physical disputes between attendees. Additionally, alcohol consumption limits protect the tribe from attendees that may be temporarily impaired and unable to drive in a safe manner on the reservation and the outlying city. The Board of Governors may condition the relocation to indemnify the NBA from liability, which may be included in the ordinances or the agreement itself.[325] Like Salt River Fields, ordinances relieving athletes, teams, and leagues from any liability incurred by a patron, are necessary to codify patrons engaged in tort or other violations will be subject to the tribe's law and jurisdiction.[326] Providing the tribe with jurisdiction over a patron's conduct promotes the independence that exists on tribal land and honors the systems in place in the tribal courts.

Fourth, the tribe and team will apply for relocation and collaborate to construct the arena in accordance with the "minimum standards" compliance requirement set forth by the NBA for the team's relocation.[327] To achieve this, the tribe must initially decide whether the business recruitment and negotiations with a team will occur before constructing the arena or after constructing the arena. To negotiate with a team prior to construction, both parties' best interests are to enter into agreements like those entered between Indian and non-Indian businesses, such as the Arizona Diamondbacks and the University of Utah with the tribes.[328]

Once the MOU is executed, the tribe must submit construction plans for the arena to the NBA accompanied with the formal written request from the relocating Member team thirty days prior to construction, subject to the Commissioner's

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[324] *See* Michael P. O'Connell, *Fundamentals of Contracting by and with Indian Tribes*, 3 AM. INDIAN L.J. 159, 159 (2014).

[325] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 7; *id.* art. 8.

[326] SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, CODE OF ORDINANCES § 1-324 (2012).

[327] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 8.

[328] *See* Memorandum of Understanding Between the Ute Indian Tribe and the University of Utah, *supra* note 85; Media Release, *supra* note 187.

approval.[329] A tribal economic development, such as an arena for a professional basketball team, can be constructed before or after business recruitment. Here, the tribe's best interest would be to build the arena after business recruitment. Waiting ensures the team has agreed to become a tenant in the MOU, whether it be for practice, G League, or as the home arena.

After the Commissioner approves the construction, the tribe may commence building an arena that complies with the minimum standards design requirements. Alternatively, the tribe can construct an arena, then recruit the NBA team to lease the facility. This would only require the NBA team acquire written approval from the Commissioner stating the arena's modifications or renovations, if any, comply with the minimum standards thirty days before the NBA team meets with the Board of Governors to determine whether the team may relocate.[330] A downside to a preconstructed arena is the team has limited input for the design and team's fanbase's specific needs. An arena constructed post-MOU is designed with collaboration and guidance from the NBA team. The tribe's and team's best interests would be to collaborate regarding the specifications for arena construction to ensure the team's and community's needs are met.

As with many other professional sports leagues, the NBA must approve a team's relocation.[331] The team must first consider whether relocating is in its existing territory.[332] The tribe that engages an NBA team for a business recruitment may consider subsidizing or covering proposed relocation's costs to offset any inconvenience to the team.[333] It is ideal to choose a tribe (or for the tribe to make the decision) within a metropolitan city to support the NBA's nine factors to be considered in the relocation process.

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[329] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 8.

[330] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 8.

[331] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 7.

[332] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 8.

[333] *See* Atkinson & Nilles, *supra* note 296.

Here, the Tampa Reservation is less than eight miles from the Amalie Arena, temporary home to the Toronto Raptors.[334] Additionally, Tampa is outside the seventy-five air mile territory[335] of the Miami Heat and Orlando Magic, which ensures a territorial dispute will not occur.[336] Tampa is outside the team's territory because no team exists within the seventy-five air mile Tampa territory. Relocation to Tampa would not qualify for the in-territory $50,000 application fee. The relocation application fee for the NBA's relocation investigation to Tampa will be $250,000.[337] This fee may be split between the tribe and the team, or otherwise negotiated in the MOU.

The Relocation Committee will consider all nine factors listed in Article 7 of the NBA's Constitution and Bylaws. The two factors with legal implications which will be discussed in this analysis are:

> 1. The current or potential contractual obligations to network providers and the relocation's effect on these contractual obligations;[338] and
> 2. The conflicting laws or regulations applicable on tribal land.[339]

The NBA has the exclusive right to broadcast on television and cable, NBA games, and requires the teams to

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[334] *Compare* Tampa Reservation, *supra* note 314, *with* Tim Reynolds, *We the South: Raptors Settling into Their Tampa Home*, NBA.COM (Dec. 22, 2020, 11:59 AM), https://www.nba.com/news/we-the-south-raptors-settling-into-their-tampa-home (showing the locations of the Tampa Reservation in relation to Amalie Arena.).

[335] The mileage was calculated based on air mileage to the Tampa Reservation from the current arenas.

[336] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 10(a). *Compare* Tampa Reservation, *supra* note 314, *with Municipalities (map)*, MIAMI DADE CTY. (Sept. 6, 2012) http://www.miamidade.gov/planning/library/maps/municipalities.pdf (showing the locations of Tampa Reservation and Miami city limits, which are 199 miles apart.).

[337] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 7.

[338] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 7.

[339] *Id.*

reserve the copyright to the NBA.[340] Relocation may affect the current contractual obligations to network providers. For example, if the Minnesota Timberwolves were to consider relocation to Tampa, Fox Sports North has the exclusive right to broadcasting games in the area.[341] This agreement would be affected by the move and may cause an expense to the Timberwolves for early termination. Methods to offset the cost could include transferring to Fox Sports in the Tampa area, or potential network providers paying for early termination to acquire the exclusive rights to broadcast. Additionally, marketability for potential contract obligations to broadcast games would be considered. The current local NFL team, the Tampa Bay Buccaneers, may have a wider range of viewers and networks providing their content. Broadcasting the Tampa Buccaneers games could create some additional contention during negotiations with the network providers seeking to broadcast an NBA game. Ideally, the potential contractual agreement would ensure the opportunities for viewership would not be less than Minnesota. Minnesota only has one NBA team for the whole state, while Florida has two,[342] arguably creating more viewers. However, if the broadcasting agreement was in place with the Seminole tribe, then the viewership may be significantly greater throughout Florida. As a result of this larger viewership, the current and potential contractual obligations' revenue would be a non-issue.

Tribal land laws and jurisdiction are exclusive to the tribe where the land sits, based on how the land was distributed by the United States government. A tribe negotiating with a team to protect the NBA, the team, and its employees (inclusive of players), then reduces the risk of the tribe's laws being known as "adverse laws or regulations"[343] as suggested in the last relocation factor. Therefore, if the negotiations between the tribe and team are properly executed as listed in the order above, the tribe's laws

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[340] *See* Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Bylaws § 9.01(a).

[341] FOX Sports North PLUS Channel Information, FOX SPORTS (Dec. 11, 2020, 7:32 PM), https://www.foxsports.com/north/story/fox-sports-north-plus-channel-information-011214.

[342] *All Teams*, NBA.COM, https://www.nba.com/teams (last visited Mar. 15, 2021).

[343] Nat'l Basketball Ass'n Const. and Bylaws, *supra* note 226 at Const. art. 7.

and regulations would not be adverse, and this factor would be a nonissue.

CONCLUSION

Building a basketball arena on tribal land is a viable project. Promoting tribal land development also promotes the home city's cultural identity. Based on the current usages of tribes' names' and land, many teams are broadening their fan base to become more diverse. To successfully implement building an arena on tribal land, an NBA team must decide if it will expand on an existing partnership or a new partnership. The tribe's location, dependent on the purpose for the facility to be developed, is critical to sustain a sports team's revenue. A team with an existing tribal partnership is the best option because this will create a stronger bond that differentiates both organizations' identities from competitors. However, using the above data and analysis, Tucson, Albuquerque, and Tampa do not have partnerships with NBA teams. A new partnership must be created to support fans in the relocation city.

Once the partnership is created, the tribe will create a chartered holding company. This company will be the arena's owner and fiscally responsible for constructing the arena. Once the holding company is entered, the jurisdictional limitation negotiations begin between the tribe and NBA team. The tribe may preserve its independence as it relates to anyone who comes onto the land other than for a business purpose related to the NBA team's scope of business. The NBA team and the tribe then enter an MOU with these agreed-upon terms. The MOU will serve as protection for both organizations to develop and build a strong partnership. This agreement will cover jurisdictional and civil liability limitations, facility construction, and fees associated with reaching the agreement.

These steps will lead into the fourth and final approval step, which is the NBA's nine factor test. Even though the business aspects of the team's relocation were not intimately discussed, from the regression models performed by Rascher,[344] sufficient data exists to reasonably believe the nonlegal factors would be met. The revenue forecast models are slightly higher in Tucson and Albuquerque than other cities. The legal issues of

[344] Rascher & Rascher, *supra* note 253.

contractual obligations to the network provider could easily be managed through a buy-out or transferring content to a sister network. Additionally, concerns with adverse laws would be resolved prior to the relocation review in the MOU for constructing the arena.

If the NBA team relocation is denied, the NBA team has agreed in the MOU to lease the facility for an alternate purpose such as a G League. This partnership type could incorporate the tribe's name and seal into the design and branding, similar to the Agua Caliente Clippers, Spokane Indians and Ute tribe.[345] This creates a larger fan base for the team, even if it is outside the NBA team's immediate geographic location, by expanding the NBA team's market to G League fans. An alternative use for the arena is an expansion team for the NBA. Two tribes engaging in similar projects to build arenas for NBA expansion teams would create a larger demographic of fans and a healthy competitive rivalry between cities. Further research could include expansion teams for other professional sports building arenas and stadiums on tribal land. Building an arena on tribal land is viable.

[345] C. Mendez, *supra* note 158; Caputo, *supra* note 134; Memorandum of Understanding Between the Ute Indian Tribe and the University of Utah, *supra* note 85.

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HOOPS, GRIDIRON, AND MEDICAL MARIJUANA: A BLUNT ANALYSIS OF HOW A HALF-BAKED NCAA REGULATION MAY SOON GO UP IN SMOKE

KELSEY MISSELDINE[∞]

INTRODUCTION

The National Collegiate Athletic Association ("NCAA") generates over a billion dollars in revenue each year; this billion-dollar business grants the NCAA significant power. The NCAA permits colleges to participate in its lucrative organization; both parties subsequently profit millions of dollars.[1] This contractual relationship binds participating institutions and their student-athletes to the NCAA's rules and regulations. Accordingly, student-athletes are deprived of their constitutionally-guaranteed due process rights to question these regulations.

The NCAA, as a private association, has thus far been allowed to enact bylaws contradicting public policy. The policies significantly affect athletes' lives, including their wellness and preferences for medical treatment.[2] Collegiate institutions, and by extension their student-athletes, consent to this governance as the price to participate in the organization. Although the NCAA lacks legal recourse as enforcement, it may impose sanctions or revoke schools' ability to participate in the NCAA entirely. Schools and student-athletes are therefore left with no meaningful opportunity and little bargaining power to alter the NCAA's regulations if they wish to profit from participating.

NCAA regulations reach further than a football field's sidelines and the 94 feet of a basketball court. For example, medical marijuana is currently banned as a medical treatment option for those who elect to participate in the NCAA, even if that

[∞] J.D. Candidate, Class of 2021, Sandra Day O'Connor College of Law at Arizona State University

[1] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

[2] *Id.*

treatment is legal within the state.[3] Although this restriction is within the NCAA's purview, the NCAA should not have the unfettered power to dictate medical treatment options for athletes, specifically treatments that do not improperly enhance performance.[4] Ultimately, collegiate institutions and state governments are ceding too much power to the NCAA. A student-athlete lacks meaningful bargaining power and subsequently must abide by the NCAA's rigid ban on medical marijuana. Intervention, whether through legislative efforts, contractual limits, or personal rights regarding medical choices, needs to be considered.

The NCAA medical marijuana ban is based on insufficient data and outdated public sentiment.[5] Because the government has strictly controlled marijuana over the past century, marijuana's medicinal benefits have not been properly analyzed. In the past decade, numerous states have passed laws allowing medical marijuana use.[6] Subsequently, further testing and data have slowly become available. The ban was originally enacted in response to the United States' "War on Drugs," an arguably minority-focused program.[7] The basis for such an intrusive rule should be grounded in the protection of student-athletes, not perpetuation of an outdated and racially discriminatory federal focus.

Federal and state governments have the power and obligation to protect citizens from exposure to severely unhealthy practices that could affect the user or those around them.[8] Laws are enacted to ensure these protections. Implementing new laws is

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[3] Abby Schnable, Tim Edmonds, Lu Calzada & Nick Schultz, *Even with Legal Pot, Student-Athletes Face Sober Future*, LOYOLA PHOENIX, (Apr. 16, 2019, 9:50 AM), http://loyolaphoenix.com/2019/04/even-with-legal-pot-student-athletes-face-sober-future/.

[4] *Performance-Enhancing Drugs*, NCAA, https://www.ncaa.org/sport-science-institute/performance-enhancing-drugs (last visited Apr. 11, 2021). The NCAA bans specific drugs to protect athletes' health and promote fair play.

[5] *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/brief-history-drug-war (last visited Mar. 5, 2021).

[6] *Id.*

[7] *Id.*

[8] *See generally What Does the FDA Regulate*, U.S. FOOD AND DRUG ADMINISTRATION, https://www.fda.gov/about-fda/fda-basics/what-does-fda-regulate (last visited Mar. 5, 2021).

necessary when, based on reliable data, individuals have inadequate bargaining power to protect choices regarding their own health. This type of protective legislation is presently evidenced by restrictions on using certain medications while driving, accreditation requirements for physicians, and seat belt laws. However, the NCAA should not play a protective role without rational justification and limits. Medical diagnoses and treatments are private matters.[9] An amateur sports organization should not have the power to unilaterally deprive student-athletes the right to use a legally permissible medical treatment supported by qualified medical professionals. Further, as public sentiment and state laws regarding medical marijuana continue to develop and advance, the NCAA should be required to reconsider its ban and to develop workable guidelines. Student-athletes are citizens endowed with certain rights, including making their own medical decisions. Compelling athletes to give up a decision-making right regarding medical treatments that do not impact athletic performance as the price for their participation in college athletics needs to be re-examined.

This Note analyzes the NCAA conduct rules prohibiting student-athletes' medical marijuana use when participating in NCAA-sanctioned athletics. The first section focuses on the history of medical marijuana usage in the United States. The next section discusses medical marijuana use's legal history and presents the current laws, which shape the modern landscape for this emerging and controversial issue. Subsequently, this Note will focus on the specific rules, regulations, and implications of the NCAA controlling medical marijuana usage by student-athletes. The legal protections and reasoning both for and against the NCAA ban on medical marijuana are debated and resolved. Ultimately, a proposal for state action, specifically by California and its powerhouse schools, is presented as a prototype means of abolishing this overreaching NCAA rule currently depriving student-athletes the right to obtain legal medical treatment.

[9] 42 U.S.C. § 1320D (2010)

I. HIGH TIMES: MEDICAL MARIJUANA'S HISTORIC USAGE IN THE UNITED STATES

A. MARIJUANA'S DEEP ROOTS IN AMERICAN HISTORY

The debate over marijuana legalization is long-standing and deals with major concerns regarding federalization.[10] Federal and state legislation allowed legal marijuana cultivation and consumption for a majority of American history.[11] The cannabis plant played a significant role in the United States' early economy.[12] The hemp industry accounted for a large portion of United States exports and created numerous jobs.

In the mid-1800s, American botanists and physicians realized marijuana's medicinal effects and started actively researching its medical potential.[13] Subsequently, medical marijuana was commonly prescribed throughout the United States for almost a century. In the late 19th century, a United States medical agency published hemp extracts' medical benefits and commonly prescribed uses, encouraging widespread public use.[14] At this time, cannabis extracts were prescribed openly and produced by leading pharmaceutical manufacturers, such as Eli Lily and Squibb.[15] These pharmaceutical companies marketed marijuana products as miracle drugs, sparking further interest and research.[16] By the 1840s, pharmaceutically produced cannabis products were readily available at local drug stores and pharmacies across the United States. Researchers were free to use cannabis plants in determining their beneficial medical uses. Further, the government implemented taxes based on marijuana

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[10] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 1 (2010).

[11] *Id.*

[12] Adam Rathge, *Pondering Pot: Marijuana's History and the Future of the War on Drugs*, ORGANIZATION OF AMERICAN HISTORIANS, https://www.oah.org/tah/issues/2015/august/pondering-pot/ (last visited Jan. 26, 2020).

[13] *Id.*

[14] H. C. Wood, Joseph P. Remington & Samuel P. Sadtler, THE DISPENSATORY OF THE UNITED STATES OF AMERICA 341 (15th ed. 1885).

[15] Adam Rathge, *supra* note 12.

[16] *Id.*

distribution and required detailed recordkeeping—similar to the practices used today by states that have legalized marijuana.[17]

B. BREAKING BUD: THE DARK AGE OF MARIJUANA IN THE UNITED STATES

Government influenced change in public sentiment halted medical marijuana use and research. Widespread use was terminated, sending medical marijuana into a dark age where little progress in research and understanding of its medicinal properties were thoroughly explored. In the early 1900s, states began to criminalize marijuana. Scholars have noted this change in policy was strongly influenced by prevalent racism.[18] Marijuana was commonly associated with crime and migrant workers of color.[19] The then-Commissioner of the Federal Bureau of Narcotics, Henry Anslinger, heavily pushed a campaign against marijuana.[20] Anslinger claimed marijuana incited minority unrest, and blamed the drug for heinous crimes committed by minorities.[21]

Criminalization's effects exemplify this dubious intent through the disparate impact on racial minorities.[22] Most charges for marijuana possession and usage are against racial minorities.[23] Additionally, proponents supporting criminalization believed

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[17] *Id.*

[18] *See, e.g.*, Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 325 (2011) ("U.S. marijuana prohibition has long been motivated largely by racism").

[19] *See, e.g.*, THE NATIONAL COMMISSION ON MARIJUANA DRUG ABUSE, *Marihuana: A Signal of Misunderstanding* 16 (1972), available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015015647558;view=1up;seq=5 ("As the Mexicans spread throughout the West and immigrated to the major cities, some of them carried the marihuana habit with them. The practice also became common among the same urban populations with whom opiate use was identified.").

[20] *Taxation of Marihuana: Hearing on H.R. 6385 Before the H. Comm. on Ways & Means*, 75th Cong. 14 (1937).

[21] *Id.*

[22] Carcieri, *supra* note 18, at 325.

[23] *Marijuana Arrests by the Numbers,* ACLU, https://www.aclu.org/gallery/marijuana-arrests-numbers.

other superior alternatives existed, even though research and case studies available at the time did not support this reasoning.[24]

In 1937, the United States government attempted to regulate marijuana usage through the Marijuana Tax Act.[25] The Act removed marijuana from the list of federally encouraged medical treatments.[26] Marijuana use was taxed and regulated, but the legislation did not make medical marijuana use illegal.[27] However, the legislation discouraged doctors from prescribing the drug because significant taxes were levied on its distribution. These taxes led to a rapid decline in prescribing and using medical marijuana in the United States.[28] The stringent regulations and skewed public perception started the decline in researching marijuana's potential medical benefits and its true effects on users. This decline marked the beginning of the Dark Age for medical marijuana research.

C. MARIJUANA FEDERAL DRUG CLASSIFICATION: BUZZ KILL

New major marijuana regulations did not appear until the 1970s.[29] President Richard Nixon initiated the infamous United States "War on Drugs," which the modern government still perpetuates.[30] The Controlled Substance Act of 1970 ("CSA") was

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[24] Martin A. Lee, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA-MEDICAL, RECREATIONAL AND SCIENTIFIC, 3—5, 13—14, 20—21 (2012).

[25] Lisa N. Sacco & Kristin Finklea, CONG. RSCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 3 (2013) ("Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marihuana Tax Act of 1937. . . .").

[26] MARIHUANA TAX ACT OF 1937 § 6(b)(1)–(2), 50 Stat. 551 (1937).

[27] *Id.*

[28] Martin A. Lee, *supra* note 25.

[29] CONTROLLED SUBSTANCES ACT OF 1970, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012).

[30] *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/brief-history-drug-war (last visited Nov. 10, 2019).

passed during this "war" and is still in effect today.[31] The CSA classified drugs in a tiered system, containing five drug "schedules," each with their own regulations. The Drug Enforcement Agency ("DEA") created this tiered system based on a drug's potential for abuse and medical value.[32] A drug's potential for abuse is determined according to personal health hazards and the potential to create risks to society.[33] The medical value is based on reliable research into the substance's medical uses.[34] A major flaw in this classification scheme is medical marijuana research had essentially ceased over the past few decades. Furthermore, the research available at the time was incomplete, primarily due to the government-induced negative public sentiment, rendering available research outdated and essentially useless.[35]

In this system, a Schedule I narcotic is deemed to be the most dangerous and faces the strictest limitations.[36] A Schedule I classification means no medical uses for the substance exist, and it has a high potential for abuse.[37] Schedule II-V drugs are deemed to have some beneficial medical uses, but range in classification because the substance has the potential to be abused.[38] Marijuana was classified as a Schedule I drug along with serious narcotics such as heroin and LSD.[39] Marijuana is classified as Schedule I because of high likelihood of addiction, no safe dosage, and *no accepted medical use*.[40] It is questionable how the DEA concluded

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[31] CONTROLLED SUBSTANCES ACT OF 1970, Pub. L. No. 91–513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012).

[32] German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana (last updated Aug. 11, 2016).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Drug Scheduling*, UNITED STATES DRUG ENFORCEMENT ADMIN., https://www.dea.gov/drug-scheduling (last visited April 11, 2021).

[38] *Id.*

[39] *Id.*

[40] 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2012); *see also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1133 (D.C. Cir. 1994) ("A drug is placed in Schedule I if (1) it 'has a high potential for abuse,' (2) it has 'no currently accepted medical use in treatment in the United States,' and (3) 'there is a lack of

marijuana had no medical use considering medical marijuana's robust history in the United States. The factors and influences leading to marijuana's classification were based primarily on the unsubstantiated negative public and government sentiment as opposed to the drug classification scheme that bases determinations on benefits versus harm.

Because marijuana was classified as a Schedule I narcotic, doctors could no longer prescribe marijuana as a medical treatment. Schedule I drugs are only available for research.[41] Unfortunately, researchers must go through complicated bureaucratic processes to obtain marijuana for research, which inhibits progress in testing and understanding marijuana's potential medical benefits.[42] Accordingly, research and testing of medical marijuana was stagnant for many decades. Until the past few years, only one location, a University of Mississippi farm, had federal authorization to cultivate marijuana, and it was limited to specific research.[43] This Dark Age period in marijuana's history has allowed for public opinion and criminalization to run awry from the truth.

Numerous attempts to modify the laws and misinformed Schedule I classification have been pursued, but all have failed.[44] Congress can pass a law to change marijuana's scheduling, but has declined to exercise its power. The United States attorney general also has the power to initiate a review process to reconsider

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accepted safety for use of the drug . . . under medical supervision.'") (quoting 21 U.S.C. § 812(b)(1) (1988)).

[41] *Id.*

[42] *See* Lindsay Stafford Mader, *The State of Clinical Cannabis Research in the United States*, 85 HERBALGRAM J. AM. BOTANICAL COUNCIL 64, 64—67 (2010) (describing the DEA and NIDA's obstruction of medical marijuana research).

[43] German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana (last updated Aug. 11, 2016).

[44] *See, e.g.*, Marijuana Revenue and Regulation Act, S 776, 115th Cong. (2017) (requiring the decriminalization of marijuana); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017) (proposing the federal deregulation of marijuana and removal from drug schedules); H.R. 2020 115th Cong. (2017) (reclassifying marijuana from Schedule I to Schedule III, thus permitting medical use).

marijuana's classification as a Schedule I narcotic.[45] In such a case, evidence could be submitted regarding more accurate and updated research into marijuana and its medical value. This process has been successfully used in the past. In 2014, this exact process led to hydrocodone products, or opioid-based prescription painkillers, to be rescheduled from a Schedule III drug to a Schedule II drug. Updated research showed the increased potential for abuse and thus led to its reclassification. Thus, if modern research regarding marijuana's medical benefits were presented, marijuana could be properly reclassified.[46] However, this research is dependent on scientists and health professionals obtaining enough marijuana to perform proper research; this ability is hindered as a result of the Schedule I classification and subsequent bureaucratic limitations. Marijuana is stuck in limbo due to the overreaching restrictions enacted by the federal government.

D. BUDDING LEGISLATION: THE EVOLUTION OF UNITED STATES MARIJUANA LAWS IN THE PAST TEN YEARS

In the past ten years, numerous states have legalized medicinal and recreational marijuana.[47] Thirty-four states and the District of Columbia passed legislation permitting medical marijuana use.[48] Additionally, fifteen states and the District of Columbia have extended marijuana reform to allow for recreational marijuana use.[49] Medical marijuana is currently recognized as a treatment for decreasing pain and inflammation, muscle control issues, epileptic seizures, glaucoma, mental illness, and addiction.[50]

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[45] German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana (last updated Aug. 11, 2016).

[46] *Id.*

[47] *Cannabis Policy in the United States*, MARIJUANA POLICY PROJECT https://www.mpp.org/issues/legalization/map-of-state-marijuana-laws/ (last visited Mar. 5, 2021).

[48] *Id.*

[49] *Id.*

[50] *Marijuana as Medicine*, NATIONAL INSTITUTE ON DRUG ABUSE, https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine (last revised July 2019).

The Food and Drug Administration ("FDA") has not approved marijuana as a medicinal plant, but it has approved two medications containing cannabinoids based on modern research.[51] Research continues to help determine more viable medical uses for marijuana. The National Institutes of Health ("NIH"), one of the world's foremost medical research centers, is currently funding and conducting such research. New studies have shown success in utilizing marijuana to treat cancer, immune diseases like HIV and multiple sclerosis, and further address mental disorders.[52]

There is a common stigma in America that marijuana users seek medical marijuana for illegitimate illnesses.[53] This stigmatization should not prevent individuals who will legitimately benefit from marijuana use from obtaining necessary medical treatment. The same argument could be used regarding legal opioids and their abuse by patients; this should not discount all the people who legitimately need the medical treatment.[54] The argument for potential abuse and illegitimately obtaining marijuana is not enough to impose a complete ban on a potentially beneficial medical treatment.

Despite federal limitations, states have recognized the benefits medical marijuana can provide to its citizens and have worked hard to allow its usage. The decriminalization process in each state is not simple or cheap.[55] States have invested millions of dollars through legislation, drafting, research, voting, and implementation processes to ensure its citizens have access to medical marijuana.[56] The great lengths taken by state governments speak to the importance and value citizens and states place in medical marijuana use. Many medical marijuana critics claim the costs to the state far outweigh the tax benefit and revenues

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[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See generally* James G. Hodge, Jr. et al., *Redefining Public Health Emergencies: The Opioid Epidemic*, 58 Jurimetrics J. 1—15 (2017).

[55] CENTENNIAL INSTITUTE, ECONOMIC AND SOCIAL COSTS OF LEGALIZED MARIJUANA 3—4 (2018), https://centennial.ccu.edu/wp-content/uploads/2019/03/Economic-and-Social-Costs-of-Legalized-Marijuana-v1.3.pdf

[56] *Id.*

generated for the state.[57] Even if those claims are true, it is further evidence that while costs increased, the state and its citizens find legalization worth the cost due to marijuana's medicinal value.

Although medical marijuana has been legalized by certain states, employers and private organizations may still prohibit employees from using marijuana and enforce these policies through random drug testing.[58] Thus, medical marijuana users are put in a tough situation. At the state level, their medical use is protected, but federally they have no protection. As more states begin to legalize marijuana, the impact on private associations will increase and these changes must be addressed, particularly in sports.

II. NCAA RULES AND REGULATIONS REGARDING MEDICAL MARIJUANA

A. NCAA'S HALF-BAKED HANDBOOK POLICIES REGARDING MEDICAL MARIJUANA

In 1986, following the United States' policy implementing a "War on Drugs," the NCAA passed legislation requiring its student-athletes to submit to drug testing.[59] Walter Byers, the then-NCAA Executive Director, strongly advocated for the new legislation. During the 1986 NCAA Convention, Byers quoted Attorney General Edwin Meese's statement that the Justice Department was losing the "War on Drugs."[60] Evidently, the NCAA's marijuana ban was more related to the federal government's new focus on combating drugs than protecting student-athletes. Thus, as public sentiment regarding medical marijuana changes, the NCAA must adjust its policies to reflect these changes.

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[57] Kenny Chan, *The Highs and Lows of the Marijuana Industry: Weeding Through the Legal History, Financial, and Bankruptcy Issues That Marijuana Businesses Face*, 4 Bus. & Bankr. L.J. 115 (2016-2017).

[58] *State-By-State Workplace Drug Testing Laws*, AMERICAN CIVIL LIBERTIES UNION ("ACLU"), https://www.aclu.org/other/state-state-workplace-drug-testing-laws (last visited Mar. 7, 2021).

[59] Tracy Dodds, *NCAA Ratifies Drug Tests for Championship Events*, LOS ANGELES TIMES (Jan. 15, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-01-15-sp-28305-story.html.

[60] *Id.*

To participate in an NCAA sport, every student-athlete is required to sign the Student-Athlete Statement.[61] By signing the Statement, student-athletes verify they meet NCAA eligibility requirements and consent to NCAA bylaws. Each school year, students are also required to sign a drug testing consent form.[62] If a student fails to sign the Student-Athlete Statement or the drug testing consent form, he or she is ineligible to participate.[63]

The NCAA bylaws ban cannabinoid uses.[64] Cannabinoids are defined to include marijuana, tetrahydrocannabinol ("THC"), and synthetic cannabinoids.[65] The ban is not limited to an athlete's respective NCAA-scheduled season. Many sports require student-athletes to participate in off-season conditioning and training.[66] Accordingly, the NCAA authorizes student-athletes to be drug tested year-round to ensure compliance with its regulations.[67] Ultimately, students are required to abstain from using prescribed medical marijuana year-round if they wish to participate in an NCAA sport.

Either the NCAA or the academic institution can implement random drug testing.[68] When players sign the Student-Athlete Statement, they waive the right to refuse a drug test.[69] From the outset, student-athletes forfeit any ability to question the NCAA regulations or implementation processes.

Pursuant to NCAA Bylaw 18.4.1.4.2, a student-athlete is ineligible to compete in any sport for at least 50% of the season if they test positive for a cannabinoid.[70] Thereafter, the student-athlete remains ineligible until he or she tests negative for a

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[61] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2019-2020 NCAA MANUAL 10 (2019), http://www.ncaapublications.com/productdownloads/D120.pdf [hereinafter NCAA MANUAL].

[62] *Id.* at 80.

[63] *Id.*

[64] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2019-2020 NCAA BANNED SUBSTANCES (2019), http://www.ncaa.org/sport-science-institute/topics/2019-20-ncaa-banned-substances [hereinafter NCAA BANNED SUBSTANCES].

[65] *Id.*

[66] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA COUNTABLE ATHLETICALLY RELATED ACTIVITIES (2019), https://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf.

[67] NCAA MANUAL, *supra* note 61, at 332.

[68] *Id.*

[69] NCAA MANUAL, *supra* note 61, at 8.

[70] *Id.* at 351-52.

cannabinoid.[71] Studies show marijuana can remain at a detectable level in a person's system for more than thirty days, depending on usage rates.[72] Student-athletes using legal medical marijuana thus must suspend their use for up to a month before a season begins to qualify for participation. However, many sports are "in-season" for most of the year, including the summer recess. Therefore, student-athletes cannot freely use their medical prescriptions without fearing consequences.[73]

A student-athlete is permitted to appeal a positive drug test.[74] However, the appeal process takes several months, during which the student-athlete remains ineligible to participate in his or her respective sport. The NCAA does allow a student-athlete to apply for a medical exception to use banned drugs.[75] However, the Board of Governors can grant or deny an exception.[76] Notably, no medical professionals are required to be on the Board of Governors. Therefore, whether the Board has the qualifications to make medical determinations for student-athletes is questionable at best.

Further, the concern regarding unqualified decision-makers is essentially void in relation to medical marijuana appeals because the Bylaw specifically disallows medical exemptions for cannabinoids.[77] Student-athletes will not be granted a medical marijuana exemption. The medical exception rule, 18.4.1.4.7, was revised in January 2019.[78] At the time, more than half of the states already legalized medical marijuana usage, yet the NCAA knowingly failed to adjust its policies.[79] To date, student-athletes cannot participate in the NCAA while simultaneously using medical marijuana.

The NCAA bylaws reach into many health aspects aside from medical marijuana. For example, the bylaws technically

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[71] *Id.*

[72] Zawn Villines, *How Long Can You Detect Marijuana in the Body*, MED. NEWS TODAY (Jan. 29, 2019), https://www.medicalnewstoday.com/articles/324315.php#marijuana-detection-windows.

[73] NCAA MANUAL, *supra* note 61, at 332.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 353.

[79] *State Marijuana Laws - U.S. Map*, GOVERNING (June 25, 2019), https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html.

require a student-athlete to report the use of over-the-counter cold medicine.[80] Additionally, under the current bylaws, a player may not receive anesthesia without consent, as it is classified as a "drug."[81] In practice, a student-athlete is technically required to inform the NCAA about an upcoming surgery and obtain an exemption before undergoing the operation. This bylaw oversteps the boundaries typically maintained by private organizations. Overall, these restrictions are particularly concerning, as the restrictions affect teenagers and young adults who are unable to properly advocate for themselves. Student-athletes deserve the opportunity to make informed medical decisions without having to consult with a private athletic organization.

The NCAA's medical marijuana policy was created decades ago, based on an outdated government-focus on drugs in the United States. A policy with such wide-reaching implications should be rooted in protecting student-athletes, modern laws, and public policy.

B. INAPPROPRIATE POSITIONS OF POWER INDICA(TE) IMPROPRIETY IN NCAA

The marijuana ban was established by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.[82] Twenty-three members comprise the Committee; only three of whom are medical professionals. The Committee also includes an expert in drug testing and another in drug education. Less than 25% of the Committee is comprised of professionals with any medical understanding or rationale for the marijuana ban. Further, none of the required medical professionals or other committee members are scientists, researchers, or doctors with specialized knowledge regarding marijuana's medical effects on a student-athlete.[83] Thus, what authority does this committee have to be making medical decisions on the student-athletes' behalf?

The NCAA's legislation requires a student-athlete check with the athletic training staff before using any substance,[84] yet

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[80] Karen E. Crummy, *Urine or You're Out: Student-Athletes' Right of Privacy Stripped in Hill v. NCAA*, 29 U.S.F. L. Rev. 197, 224 (1994-1995).

[81] NCAA MANUAL, *supra* note 61, at 332.

[82] NCAA MANUAL, *supra* note 61, at 80.

[83] *Id.*

[84] NCAA BANNED SUBSTANCES, *supra* note 64.

another inappropriate exercise of power over the student-athlete's health. Physical therapists usually comprise an NCAA institution's athletic training staff.[85] A primary physician should be on-staff or contracted, but it is not required. Therefore, the medical professionals most likely to be advising the student about medical marijuana use are Doctors of Physical Therapy ("DPT"), not Doctors of Medicine ("MD"). While physical therapists have some understanding of pain management, they are not situated to question a doctor's proscribed treatment for a student. It is inappropriate and unreasonable for the NCAA to expect underqualified staff to make recommendations regarding unfamiliar treatment options.

C. NCAA'S HIGH-HANDED INTEREST IN CREATING THE MEDICAL MARIJUANA BAN

As a private trade association, the NCAA has the right to create bylaws banning substances they deem harmful.[86] Therefore, the NCAA, as a private entity, does not need to support its bylaws with legal rationale. However, NCAA policies may more easily be applied and enforced if they mesh with legitimate legal principles. The NCAA's power to make and enforce regulations is limited by federalism, ethical concerns, and required due process.

The NCAA has no power to enforce a regulation contrary to federal or state law.[87] When a state law legalizes medical marijuana, the NCAA should not have the power to enforce their ban against students in that state. States are in a better position to enact regulations in their citizens' best interests; citizens, not private associations with an ulterior agenda, vote on state regulations. The NCAA's ban mimics existing federal medical

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[85] *Athletics Health Care Administration Best Practices*, NATIONAL COLLEGIATE ATHLETICS ASSOCIATION, http://www.ncaa.org/sport-science-institute/athletics-health-care-administration-best-practices-0 (last visited Nov. 11, 2019).

[86] Marc Edelman, *Why NCAA Likely Can't Keep California Schools From Allowing Athletes to Profit from Their Names and Likeness*, FORBES (Jun. 25, 2019, 11:10 AM), https://www.forbes.com/sites/marcedelman/2019/06/25/ncaa-cant-legally-ban-california-schools-for-allowing-athletes-to-profit-from-their-names-images-and-likenesses/#79874476273f.

[87] *Id.*

marijuana legislation, which legitimizes the NCAA's policy to some extent but not entirely. No legal basis permits the NCAA's regulations to transcend state law.

A trade association must enact regulations in good faith.[88] Good faith is a common expectation in contracts and business law.[89] Generally, "good faith" requires parties to participate in fair dealing, and maintain an honest purpose, faithful performance of duties, and observing fair dealing standards.[90] The NCAA's ban on medical marijuana does not entirely adhere to the good faith standard.

The medical marijuana ban's purpose is questionable. The NCAA alleges the marijuana ban exists because marijuana is classified as a Schedule I banned substance, but this rationale neglects evolving state laws.[91] The NCAA policy should aim to protect student-athletes, not take away their right to make medical decisions.

The NCAA Board of Governors, the highest governance body in the NCAA, is responsible for ensuring the NCAA operates in a manner consistent with its stated purposes, policies, and principles.[92] Any legislation enacted by the NCAA must be designed to advance one of their stated sixteen principle objectives.[93] The stated principles include student-athlete well-being (specifically including health and safety),

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[88] *Id.*

[89] *Good Faith,* Legal Information Institute: CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/good_faith (last visited Mar. 5, 2021).

[90] Catherine Pastrikos Kelly, *What You Should Know about the Implied Duty of Good Faith and Fair Dealing*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/duty-of-good-faith-fair-dealing.

[91] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SUBSTANCE ABUSE PREVENTION AND INTERVENTION: AN ATHLETICS TOOL KIT, 22 (2017), https://www.ncaa.org/sites/default/files/Substance%20Abuse%20Prevention%20Tool%20Kit_WEB_20170720.PDF.

[92] *NCAA Board of Governors*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/governance/committees/ncaa-board-governors (last visited Nov. 13, 2019).

[93] *The 16 Principles of Conduct for Intercollegiate Athletics*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/about/16-principles-conduct-intercollegiate-athletics (last visited Nov. 13, 2019).

nondiscrimination, sportsmanship and ethical conduct, and competitive equity.

It is not in the student-athletes' best interests to prohibit the use of medical marijuana legally prescribed by a doctor. Moreover, restricting marijuana use is discriminatory. If the NCAA is truly concerned with student-athletes' health and well-being, it should not deny them the ability to receive treatments prescribed by a doctor.

A former NCAA athlete, Treyous Jarrells, was required to make the difficult decision between participating in the NCAA or continuing medical marijuana use.[94] Jarrells decided to no longer participate in the NCAA and continue to receive the medical treatment he required. In an interview, Jarrells noted his teammates would take ten ibuprofen pills a day, destroying their livers. The NCAA accepts this questionable medical decision that could severely impact athletes' health, while Jarrells's legal medical marijuana usage is still prohibited.

Ethically, the NCAA is overstepping its bounds and doing a disservice to their student-athletes. The NCAA is an athletic association, not a medical association. If the NCAA is truly concerned about its students' health and well-being, it would not deny them the right to a doctor's prescribed medical treatment.

II. LEGAL CONSIDERATIONS ADD STRAIN ON NCAA'S MEDICAL MARIJUANA BYLAW

A. FEDERAL LAW

Marijuana is a Schedule I banned substance in the United States,[95] designating it as one of the most highly dangerous and regulated illegal substances. Marijuana's Schedule I drug classification means the federal government recognizes no medical marijuana uses. The United States Drug Enforcement

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[94] Javier Hasse, *From NCAA Outlaw to Medical Marijuana Entrepreneur: Treyous Jarrells Talks Opioids, Weed and Changing the Stigma*, BENZINGA (April 20, 2017, 9:53 AM), https://www.benzinga.com/news/17/04/9318859/from-ncaa-outlaw-to-medical-marijuana-entrepreneur-treyous-jarrells-talks-opioids.

[95] Drug Enforcement Agency & U.S. Dep't. of Just., DRUGS OF ABUSE: A DEA RESOURCE GUIDE 74, 74—77 (2017), https://www.dea.gov/sites/default/files/sites/getsmartaboutdrugs.com/files/publications/DoA_2017Ed_Updated_6.16.17.pdf.

Administration is charged with determining medical drug uses and has yet to issue an official policy or statement favoring medical marijuana.[96] However, numerous states across the United States have exercised their right to pass legislation and govern their own state via conflicting laws regarding medical marijuana usage.[97]

The United States was established with federalism as a guiding force.[98] Federalism creates a government where power is divided between the national government and other governmental entities.[99] It aimed to avoid granting absolute power to one central governmental authority.[100] Thus, state and federal governments' powers are separate, but unequal.[101] Accordingly, the federal government is the superior power and federal law preempts state law.[102] However, the federal government is confined to enforcing its own laws and cannot use states or state employees to that effect.[103] The federal government cannot force states to enact laws that would further enforce federal laws. Similarly, the federal government cannot prohibit states from repealing federal legislation because the government would essentially be commandeering the state legislature for federal purposes.[104] Therefore, states may enact their own legislation, even if contrary to federal law.

Through this power delineation, states have the right, power, and duty to enact laws they see fit and in their citizens' best interests. States can create laws contrary to federal laws, including the federal ban on medical marijuana.[105] State governments can more readily enact laws reflecting their smaller populous. The federal government may have the power to

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[96] *Id.*

[97] *State Marijuana Laws Map*, GOVERNING (June 25, 2019), https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html.

[98] THE FEDERALIST NO. 45, at 256 (James Madison) (Clinton Rossiter ed., 1999) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[99] *Id.*

[100] *Id.*

[101] Printz v. United States, 521 U.S. 898, 935 (1997).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

supersede these laws, but that does not limit the state's duty to actively protect its citizens' wills and desires.[106]

B. CITIZENS' RIGHTS: FLOWER TO THE PEOPLE

1. *BODILY AUTONOMY*

United States citizens have a fundamental right to bodily autonomy.[107] A fundamental right can only be limited based on a justifiable "compelling state interest."[108] The Supreme Court has held legislation limiting citizens' fundamental right to control their own bodies is unlawful.[109] The NCAA regulation banning marijuana is a private association's bylaw, thus holding even less weight and no compelling state interest—particularly in states where medical marijuana is legal.

The Constitution does not explicitly grant citizens the right to personal privacy, but implicitly does so through the Due Process Clause of the Fourteenth Amendment.[110] The term "liberty" includes personal rights that are "fundamental" or "implicit in the concept of ordered liberty."[111] Personal privacy was extended to decisions affecting a person's right to control their body and decisions affecting their body. Accordingly, choosing to use medical marijuana is also reasonably protected as personal privacy; a private association should not have the power to thwart this right.

Only one person in the United States has been granted an exception to the federal ban on medical marijuana. [112] In *United*

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[106] *Federalism*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/federalism (last visited Apr. 1, 2021).

[107] *See generally*, Roe v. Wade, 410 U.S. 113 (1973).

[108] *Id.* at 155.

[109] *Id.*

[110] *Id.* at 152. *See also,* Griswold v. Connecticut, 381 U.S. 479 (1965).

[111] *Roe*, 410 U.S. at 152; *Griswold*, 381 at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

[112] Randall v. United States, 353 A.2d 12 (D.C. 1976) (Claiming his defense was the criminal theory, necessity. The defense was paralleled with the famous case *Regina v. Dudley and Stephens*. The defendants were castaways that resorted to eating one of the fellow crewmembers in to avoid starvation. This defense did not work in that case, but was persuasive in Randall's defense.).

States v. Randall, a Washington D.C. speechwriter was charged with marijuana possession.[113] In this situation, a medical necessity existed because no less harmful alternative was practically available.[114] The judge determined no other reasonable alternatives to medical marijuana existed because other drugs had been ineffective and surgery would not guarantee success.[115] The judge weighed the medical benefits against medical marijuana's claimed, indemonstrable harm. The court held Mr. Randall had a medical necessity to use marijuana and granted his continued use.[116]

Although this case is limited to Mr. Randall, the same principles can and should be applied to citizens who are prescribed medical marijuana in states where it is legal. If the federal government is willing to make the exception once, under the reasoning that no equal alternatives exist, this same situation could apply to other individuals and their ailments.

2. *DUE PROCESS*

The United States Constitution protects its citizens' freedoms with the right to due process. Due process, as provided for in the Fifth and Fourteenth Amendments to the Constitution, requires citizens be protected from arbitrary denial of life, liberty, or property.[117] It ensures judges define and guarantee justice and liberty.

NCAA student-athletes are denied due process rights in fighting against the arbitrary ban on medical marijuana. Students are limited to working with the NCAA on the issue, a process

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See also* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation* . . . ."

through which they are unlikely to prevail. State governments and judicial officers need to recognize a private organization is unnecessarily restricting their citizens from using their liberty, privacy, and right to choose.[118]

The concern surrounding the restriction on liberty is akin to private companies attempting to deny patronage to certain classes, such as same-sex couples. In 2018, the Supreme Court ruled it was legal to refuse to serve a gay couple because the owners' religious beliefs.[119] A major basis for the Court's decision was protecting a citizen's right to religious freedom. Further, in Arizona, an owner declined to create wedding invitations for a gay couple.[120] The Arizona Supreme Court ruled similarly to the United States Supreme Court, reasoning freedom of speech, free exercise, and religious freedom were fundamental rights. These decisions, while grounded in law and supported by the Constitution, unfortunately allow for private entities to deny other citizens the right to use something available to the public, similar to the NCAA's medical marijuana ban.

The United States Supreme Court and Arizona Supreme Court's cases can be differentiated from the NCAA medical marijuana ban because the NCAA is not implementing their ban based on a fundamental right, such as freedom of religion or freedom of speech. The NCAA decided to ban medical marijuana as a response to negative public stigma, influenced by Nixon's "War on Drugs" announcement.[121] When *Randall*'s reasoning is combined with the due process clause's protections and the fundamental right to control one's body, a strong case can be made against the over-reaching NCAA regulations.

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[118] *See generally* D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

[119] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[120] Lynn Trimble, *Court: Phoenix Business Can Refuse to Make Invitations for Same-Sex Couples*, PHOENIX NEW TIMES (Sept. 16, 2019, 11:03 AM), https://www.phoenixnewtimes.com/news/arizona-court-allows-business-to-refuse-lgbt-customers-11359414; *see also Brush & Nib Studios, LC v. City of Phoenix.*, 448 P.3d 890 (Ariz. 2019).

[121] *A Brief History of the Drug War*, *supra* note 5.

III. PUBLIC POLICY CONCERNS: HASHING IT OUT

A private association should not have the right to dictate how a citizen can receive a doctor's prescribed medical treatment. A private entity should not be able to infringe upon certain personal liberty with arbitrary or capricious intent.

A. PUBLIC INTEREST VS. PRIVATE INTEREST

1. *PUBLIC INTEREST*

Citizens should have the ability to receive medical advice without seeking approval from a private organization. As a public policy, citizens should be able to rely on state law and medical professionals' advice to dictate treatment for a particular medical condition.

Current NCAA regulations limit the medical resources available to student-athletes.[122] By participating in an NCAA sport, students must waive their legal right to use medical marijuana.[123] This waiver unfairly limits NCAA student-athletes with scholarships who would likely not otherwise have the opportunity to receive a college education.[124] Students are forced to choose between receiving a bachelor's degree or treating a medical condition using a legally authorized medical remedy. With undergraduate degrees' increasing cost, this choice is an unfair and intrusive decision forced on the United States' youth.

If marijuana is illegal federally, some citizens will remain cautious regarding its sale and usage.[125] A negative public stigma has plagued the United States since the cry for unity against drugs was made in the late 1900s. However, the federal government originally criminalized marijuana to penalize minority groups.

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[122] NCAA MANUAL, *supra* note 61, at 332.

[123] NCAA SUBSTANCE ABUSE PREVENTION, *supra* note 88.

[124] *Athletic Scholarships: Legal Issues to Know*, FINDLAW, https://education.findlaw.com/higher-education/athletic-scholarships-legal-issues-to-know.html (last visited Nov. 14, 2019).

[125] *Federal Marijuana Laws*, FINDLAW, https://criminal.findlaw.com/criminal-charges/federal-marijuana-laws.html (last visited Nov. 14, 2019).

These NCAA regulations may similarly be racist. Over one-third of NCAA student-athletes are minorities.[126] By allowing this ban, states are allowing racial discrimination to continue to affect minorities. The public must consider this bans' true intent and effects, and seek to fix government overreach by protecting individuals' rights to legal medical treatments.

2. *PRIVATE INTEREST*

As non-State actors, businesses and private entities may generally establish their own rules and operate how they deem best, so long as they do not interfere with fundamental rights.[127] As previously discussed in the cases involving private entities denying services to certain people, federal and state governments have sided with businesses based on other fundamental rights. However, the NCAA has no fundamental right backing their bylaws. Nonetheless, this private entity has been allowed to run their businesses how they see fit.

Collegiate institutions and student-athletes willingly elect to participate in the NCAA. By doing so, both the institutions and student-athletes submit to adhere to the regulations enacted by the association.[128] Thus, the NCAA is free to establish bylaws as it deems necessary. Should a school disagree with the organization's bylaws, it has the right to not participate. However, the NCAA has gained such notoriety and the institutions receive great benefits from participating in the NCAA conferences. The NCAA, as a private entity, has the right to unilaterally create limitations on entry and participation.

Although participation is voluntary, if a collegiate institution wants to compete athletically in the largest, most popular arena, it must agree to the NCAA's intrusive bylaws.[129] The NCAA's monetary benefits are the guiding consideration for schools entering the NCAA.[130] Schools do not have much

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[126] *NCAA Demographics Database*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Mar. 2021), http://www.ncaa.org/about/resources/research/ncaa-demographics-database.

[127] *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719.

[128] NCAA MANUAL, *supra* note 61, at 7.

[129] *Id.*

[130] Cork Gaines, *The Difference in How Much Money Schools Make Off of College Sports is Jarring, and it is the Biggest Obstacle to Paying Athletes*, BUSINESS INSIDER (Oct. 14 2016, 9:00 AM),

bargaining power in their decision. Additionally, once schools have established a presence in the NCAA, leaving the league is an expensive and risky move. Accordingly, the NCAA can continue to modify its bylaws, without allowing participating institutions to influence the rules even though the institution is perpetually bound to the regulations.

B. MEDICAL PRIVACY

United States citizens have the right to keep their medical diagnoses and treatments private.[131] Congress passed the Health Insurance Portability and Accountability Act ("HIPAA"), to protect citizens' rights to keep medical information private from third parties and prohibit medical personnel from sharing medical information without permission.[132] Congress believed this right to medical privacy was so necessary that it codified it into legislation.[133] If Congress felt strongly enough to codify these protections, a private association should not have the right to obtain medical information without a legitimate and compelling need. A student's medical diagnoses, prescriptions, and treatments should not concern the NCAA, as an athletic organization, unless the diagnoses affect fellow student-athletes or puts the student's life at risk.

Generally, a collegiate institution must avoid disclosing a student's medical history to any person or entity without the student's consent.[134] Passing the Family Educational Rights and Privacy Act (FERPA) further restrained state sponsored colleges and universities from sharing a student's medical information. One caveat in the legislation permits schools to disclose medical information, without student or parent consent, to third parties

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https://www.businessinsider.com/ncaa-schools-college-sports-revenue-2016-10.

[131] Eric K. Gerard & Brandt A. Leibe, *Supreme Dilemma: Handling Conflicts Between State Medical Privacy Laws and Federal Investigative Subpoenas*, AMERICAN BAR ASSOCIATION: THE HEALTH LAWYER, Issue 6, Aug. 2019, at 24.

[132] *Id.*

[133] *Id.* at 26.

[134] *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEPT. OF EDUCATION (Dec. 15, 2020), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

connected with the student's financial aid.[135] Accordingly, because the NCAA is a party connected to an student-athlete's financial aid, NCAA state sponsored schools are likely permitted to share a student's medical marijuana prescription and use with the NCAA, without the student's consent. Nonetheless, a private association should not be privy to medical diagnosis and treatment information; most assuredly, the NCAA should not be able to dictate medical treatment actions.

C. HARSH IMPLICATIONS FOR NON-REGULATED MARIJUANA EXTRACTS LIKE CBD

If the NCAA bans cannabidiol ("CBD"), it can ban participants from using CBD even though the federal government does not currently regulate CBD.[136] With the modern trend favoring cannabis-related products, numerous companies have found a loophole around the federal ban on marijuana products. The Agriculture Improvement Act of 2018 removed hemp from the Controlled Substances Act and allowed for its commercial use.[137] The Act's implications spread to CBD products being mass-produced. CBD remains federally illegal if it is placed in food or drinks, as it is not yet approved by the FDA.[138]

CBD can be derived from hemp or cannabis; cultivating hemp is legal, but cultivating cannabis is illegal as it contains THC.[139] CBD products without high THC levels are readily available on the market for student-athletes to use. However, as the extract process has not yet been perfected, small THC amounts

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[135] *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEPT. OF EDUCATION (Dec. 15, 2020), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

[136] Gene Bruno, *Is CBD Legal in All 50 U.S. States?*, NUTRASCIENCE LABS (Apr. 20, 2020), https://www.nutrasciencelabs.com/blog/where-is-cbd-legal-and-illegal-in-the-united-states.

[137] Gene Bruno, *What You Need to Know: Farm Bill 2018 & Hemp Legalization*, NUTRASCIENCE LABS (Jan. 4, 2019), https://www.nutrasciencelabs.com/blog/is-hemp-legal-after-farm-bill-2018.

[138] Laura Reiley, *CBD-Infused Food and Beverages are Still Illegal Under U.S. Law. So Why Are They Everywhere?*, WASH. POST (June 24, 2019, 8:31 AM), https://www.washingtonpost.com/business/2019/06/24/cbd-infused-food-beverages-are-still-illegal-under-us-law-so-why-are-they-everywhere/.

[139] *Id.*

can be found in CBD extracts.[140] Student-athletes using CBD related products, which are legal, risk failing a drug test without intentionally using a banned substance. This allows the NCAA to further punish its athletes for using federally legal CBD-related substances. Thus, an association should not be able to have the power to ban a federally accepted substance.[141]

Student-athletes are punished for partaking in a federally legal substance. Should the federal government determine CBD is illegal, the NCAA's ban would be legitimized. Currently, neither the federal government nor the NCAA bans CBD, but that could change. Regardless, students are currently punished for using federally legal CBD products if it leads to a failed drug test, which is an even broader reach than overstepping a state's medical marijuana law.

IV. PROPOSED ACTIONS TO SHATTER MEDICAL MARIJUANA BAN IN THE NCAA

A. JOINT EFFORT AMONG COLLEGES: PETITION FOR A CHANGE IN NCAA BYLAWS

Students and collegiate institutions can petition the NCAA to amend its regulations.[142] As participating NCAA members, schools have the ability to voice their input on the rules governing the NCAA.[143] The challenge is schools are heavily reliant on the revenues generated through NCAA membership. Therefore, schools are forced to choose between money and student-athletes. Collegiate institutions operate as a business; they use student-athletes to garner significant money, with less consideration for the student's education or well-being.[144] As such, schools are not inclined to criticize the NCAA's marijuana ban because they fear losing revenue. However, as the public stigma regarding marijuana continues to change, schools are more likely to step up and advocate for their student-athletes.

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[140] *Id.*

[141] *Id.*

[142] NCAA MANUAL, *supra* note 61, at 33.

[143] NCAA v. Gov. of N.J., 939 F.3d 597 (3d Cir. 2019).

[144] *See e.g.,* Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992) (denying a student-athlete recourse for his claim of educational malpractice because his college allowed him to graduate with the language skills of a fourth grader and a reading level of a seventh grader).

Even if an institution tried to fight the medical marijuana ban, it would likely fail. The NCAA Board of Governors is charged with determining arguments' validity and will ultimately make the decision. Although institutions can propose changes, the NCAA ultimately has the final decision-making authority to accept or reject such changes. The Board is unlikely to approve these petitions without pressure. If enough schools band together for this cause, change could occur; but again, the schools are not to succeed, as the NCAA currently has no formal pressure to change the bylaw.

B. FEDERAL INTERVENTION: CURRENT FEDERAL LEGISLATION TAKES A HIT

The federal government can reclassify marijuana and thus change its federal legal standing.[145] If marijuana were no longer federally banned, the NCAA's reasoning in banning medical marijuana would hold much less weight. As most states continue to enact legislation legalizing medical marijuana, the federal government should respond and modify current legislation to mirror public sentiment and modern research.[146] Progress has been slow and is unlikely to come to fruition in the near future, leaving student-athletes in a tough position.

The public is slow to fully accept the modern trend toward legalization because marijuana was viewed negatively for decades.[147] The federal government instituted the original "War on Drugs" to rally the country against drugs. As those growing up then are still alive and voting, their sentiments are hard to change. Additionally, because medical marijuana was not highly researched after being classified as a Schedule I drug, there continues to be insufficient research and data to fully prove its healing properties and capabilities. The federal classification limited researchers' ability to explore marijuana's potential and has left the United States behind in this area.[148] Until more positive, conclusive research can be provided, the federal government is unlikely to change its stance on marijuana.

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[145] Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, 13 ANN. REV. CLIN. PSYCH. 397, 397—399 (2017).

[146] *Id.* at 400.

[147] *Id.*

[148] *Id.*

As stated by the current attorney general, the federal government is not actively prosecuting or prohibiting medical marijuana use in states where it is legal.[149] Determining how to reconcile these conflicting laws has created turmoil and concern across the country. Many people are afraid to invest in or participate in the marijuana industry, even in legalized states, because they fear the federal government can shut them down at any time. The attorney general's statement brings some security to this growing market, but a full reconciliation between federal and state laws is necessary.[150]

Additionally, in June 2019 The House of Representatives approved a measure to prohibit the Department of Justice from interfering with state marijuana laws. Representative Tom McClintock (R-CA) led the conversation asking whether the federal government has the power to dictate the policies dealing with actions taking place within a state's borders.[151] The Constitution established the United States as a federalist society, in which states have the authority to govern within their state. This authority is a huge step on the federal level toward a modern movement and progression in marijuana law. Legalization proponents are in the federal government, and as research progresses, the trend toward legalization will eventually reach the federal level.[152]

In the meantime, student-athletes in states where medical marijuana is legal are forced to choose either (1) receiving the medical treatment they need, or (2) participating in a renowned, notorious association. Therefore, eighteen-year-olds must choose whether fulfilling their dreams of becoming an NCAA athlete is worth foregoing medical marijuana prescribed for epileptic seizures, or other serious illnesses. Further, accepting a scholarship to an NCAA participant college is many athletes' only opportunity to obtain a higher education, which is unfair and unreasonable.

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[149] Glenn Fleishman, *States Hold Breath as Trump's Attorney General Nominee Says He Won't Prosecute Pot in Marijuana-Legal States*, FORTUNE (Jan. 15, 2019, 3:22 PM), https://fortune.com/2019/01/15/barr-marijuana-pot-cole-memo-legal-states/.

[150] *Id.*

[151] *Id.*

[152] *Id.*

C. STATE INTERVENTION: A CHANCE TO PIPE UP AND BLAZE A NEW TRAIL

Several states have intervened as far as they can in countering the federal ban. However, NCAA bylaws should not supersede state legislation, particularly a bylaw removing individuals' right to undergo legal medical treatments to participate in athletic associations. States must act to protect citizens from this overreaching, discriminatory bylaw.

States must institute legislation rendering the NCAA's intrusive medical marijuana ban obsolete. The broad grant of state powers, according to the federalism principle, gives states the ability and duty to implement laws they see fit to protect their citizens.[153] To inadvertently address the NCAA issue, states could enact legislation denying private organizations the ability to create legislation impeding individual rights.[154] The legislation could be geared towards marijuana legislation or could be broader. This legislation would prevent employers from being able to create marijuana policies. It would need to be drafted broadly enough to allow being under the influence at work to be banned. This legislation likely has too many potential negative externalities to be a feasible means to reform overreaching NCAA policies. Narrowly tailored legislation, focusing on the NCAA and medical marijuana could be successful.

Ideally, a large, impactful state, like California, could implement such legislation and force changes in the NCAA. California has twenty-four collegiate institutions participating in NCAA Division I athletics,[155] the most NCAA schools in a single state. As such, California schools participating in the NCAA

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[153] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[154] Alex Johnson, *California's College Sports Pay Law Could Change NCAA as We Know It*, NATIONAL BROADCASTING COMPANY (Oct. 1, 2019, 1:43 AM), https://www.nbcnews.com/news/sports/california-s-college-sports-pay-law-could-change-ncaa-we-n1060591.

[155] *List of NCAA Division I Schools*, 1KEYDATA, https://state.1keydata.com/ncaa-division-1-schools-by-state.php (last visited Nov. 15, 2019).

generate significant revenue and publicity for the NCAA. California is therefore placed in a power position to bargain with the NCAA. California schools could participate in NCAA alternatives, like the National Association of Intercollegiate Athletics (NAIA), international leagues, and others. [156]

If California exercised its influence, like what it has done with the recent changes in policies regarding paying players and allowing them to use their name, image, and likeness for profit, a similar change could be made regarding medical marijuana.[157] In September 2019, California Governor, Gavin Newsom, signed a bill permitting college athletes in California to be compensated for endorsement deals.[158] This legislation explicitly counteracts the NCAA bylaws regarding amateurism.[159]

While this new legislation makes it legal within California for athletes to receive income, it does not automatically supersede the NCAA bylaws California schools must still abide by if they wish to continue participating in the NCAA. However, California's actions sparked a response from the NCAA. The NCAA released a statement admitting its policies must change, but that California's actions alone are not enough. The NCAA believes the proper procedure is still through the NCAA's rulemaking process.[160] Although the California legislature did not immediately alleviate the injustice created in the NCAA's bylaws, it is hopeful more states will follow suit and enact similar legislation to expedite the changes in NCAA policies.

The same strategy could be used for changing the medical marijuana ban. If California, a state full of NCAA power-house athletic departments, enacted legislation allowing its athletes to use doctor-prescribed medical marijuana it could influence conversation and change in the NCAA bylaws. States have proved their commitment to ensuring their citizens have access to medical

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[156] *NCAA and NAIA Scholarships – Know the Difference!*, EXACT SPORTS, https://exactsports.com/blog/ncaa-and-naia-scholarships-know-the-difference/2011/02/05/ (last visited Nov. 16, 2019).

[157] David K. Li, *Calif. Governor Signs Bill Allowing College Athletes to Sign Endorsements*, NATIONAL BROADCASTING COMPANY (Sept. 30, 2019, 8:18 AM), https://www.nbcnews.com/news/us-news/california-governor-signs-bill-allowing-college-athletes-get-paid-n1060321.

[158] *Id.*

[159] NCAA MANUAL, *supra* note 61, at 60.

[160] *Id.*

marijuana through their continued investment into the cause and furtherance in legislation and legal protections. If California is concerned with a student's right to earn an income, they undoubtedly should be concerned with their inability to receive doctor-prescribed medical treatment. States can no longer sit back and allow the NCAA, a private organization, to dictate which rights it can take away from citizens.

Alternatively, or additionally, a state such as California could bring claims against the NCAA and refuse to participate in the NCAA until the policies are adjusted to accommodate state laws regarding medical marijuana. For example, California could seek an injunction against the NCAA enforcing a rule contrary to state law or through the NCAA processes.[161] If states do not want to enact legislation targeting NCAA, threatening to abstain from participating in the NCAA may be sufficient. However, the seemingly most effective way to elicit a change in the unfair NCAA policies would be through legislation across states to unify a voice against the policy and force the NCAA to modify its policies to reflect current trends in medical marijuana legalization.

CONCLUSION

The NCAA does not have the authority to ban medical marijuana usage in states where it is legal. More specifically, the NCAA should refrain from dictating medical prescriptions for student-athletes. Denying legal medical treatment infringes on citizens' personal privacy rights and oversteps the NCAA's governance. Modern trends in legalizing medical marijuana should be reflected in the NCAA's policies. The policies were created in reaction to the "War on Drugs." Now that the federal government has clarified it will not stand in the states' ways in legalizing marijuana, the NCAA's interest and backing for this arcane ban are de-legitimized.

Because the NCAA's lacks a legitimate basis or constitutional right to support its bylaw policies, a change must be made. States must use their power to protect citizens from the private organizations' overreaching policies. California should continue to be the leader in this arena. California could enact legislation that either explicitly or broadly allows student-athletes to use

[161] *Injunction*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/injunction (last visited Apr. 4, 2021).

medical marijuana while playing in college athletics. California schools may also threaten to abstain from participating in the NCAA until the bylaw is updated. Legislation or abstention will spark a change in other states and ultimately a change in the NCAA bylaws reflecting public policy and respecting its participants' fundamental rights.