

STEALING HOME IN HOLLYWOOD: WHY THE TAKEOVER  
OF THE LOS ANGELES DODGERS ILLUSTRATES THE  
UNJUST NATURE OF MAJOR LEAGUE BASEBALL'S  
ANTITRUST EXEMPTION

*“To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves everyone to keep it there.”<sup>1</sup>*

I. INTRODUCTION

Nobody likes Frank McCourt.<sup>2</sup> Los Angeles Dodgers fans want him gone, his wife divorced him, and Major League Baseball (“MLB”) has seemingly tried everything to replace him as the owner of the Dodgers.<sup>3</sup> On April 20, 2011, MLB Commissioner Bud Selig seized control of the Dodgers and appointed Tom Schiefel to monitor the day-to-day operations of the franchise.<sup>4</sup> This

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1. Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970) (placing importance of baseball above any one person, group, or organization).

2. See Doug Mead, *Los Angeles Dodgers: 5 Reasons for Owner Frank McCourt to Walk Away Quietly*, BLEACHER REPORT (Apr. 21, 2011), <http://bleacherreport.com/articles/672922-los-angeles-dodgers-5-reasons-for-owner-frank-mccourt-to-quietly-walk-away> (mentioning why MLB, fans, and owners want Los Angeles Dodger’s owner Frank McCourt gone from baseball).

3. See *id.* (discussing why MLB dislikes McCourt due to his publicizing money-driven aspect of baseball, contrary to popular image that baseball is purely for sport). One commentator hypothesized that MLB hates McCourt because he revealed “the ordinariness of baseball as a business – one where people are in it for, well – the money.” See Tom Gallagher, *Why Does Baseball Hate Dodger Owner Frank McCourt?*, COMMON DREAMS (July 5, 2011), <http://www.commondreams.org/view/2011/07/05-2> (arguing that MLB does not want to broadcast that business of baseball revolves around money); see also Bill Shaikin, *Frank and Jamie McCourt Reach Settlement Involving Dodgers*, L.A. TIMES (Oct. 17, 2011), <http://www.latimes.com/sports/la-sp-1017-mccourt-divorce-settlement-20111017,0,2826184.story> (reporting on McCourt’s finalized divorce where Frank retains sole ownership of Dodgers, but must give Jamie \$130 million in return for her giving up ownership interest). Frank McCourt is required to pay his wife “\$225,000 in temporary spousal support until the lump-sum payment is made.” See *Frank McCourt to Pay Ex-Wife \$131M*, ESPN (Nov. 4, 2011, 3:10 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7187451/frank-mccourt-pay-131m-divorce-settlement](http://espn.go.com/los-angeles/mlb/story/_/id/7187451/frank-mccourt-pay-131m-divorce-settlement) (discussing McCourt’s divorce settlement with his wife).

4. See PRESS RELEASE, MLB, *MLB Statement Regarding the Dodgers*, MLB.COM (Apr. 20, 2011, 5:04 PM), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110420&content\\_id=18038724&vkey=pr\\_mlb&fext=jsp&c\\_id=](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20110420&content_id=18038724&vkey=pr_mlb&fext=jsp&c_id=)

Hollywood drama intensified on June 17, 2011, when Frank and Jamie McCourt agreed to a divorce settlement contingent on MLB approving a proposed \$2.7 billion, 17-year television deal with Fox Sports.<sup>5</sup> Bud Selig rejected the deal, however, with the support of other baseball owners, “citing the ‘best interests of baseball’ clause in the MLB Constitution.”<sup>6</sup> These unprecedented legal maneuvers by Bud Selig reveal the absolute and unchecked power wielded by the commissioner of MLB.<sup>7</sup>

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mlb (describing why MLB is assuming control of Dodgers’ day-to-day operations); *see also*, Eric Morath, *Dodgers: Selig Targets L.A. Team as Fans Die Elsewhere*, WALL ST. J. (July 18, 2011, 5:19 PM), <http://blogs.wsj.com/bankruptcy/2011/07/18/dodgers-selig-targets-l-a-team-as-fans-die-elsewhere/> (commenting on beating of San Francisco Giant’s fan, Bryan Stow, at Chavez Ravine and how Selig treated this situation much more aggressively than incidents at other parks that were arguably worse); *see also* Marie-Andrée Weiss, *Take Me Out to the Courts: the Los Angeles Dodgers File for Bankruptcy*, ENT., ARTS, AND SPORTS L. BLOG (July 1, 2011, 8:24 AM), [http://nysbar.com/blogs/EASL/2011/07/take\\_me\\_out\\_to\\_the\\_courts\\_the.html](http://nysbar.com/blogs/EASL/2011/07/take_me_out_to_the_courts_the.html) (discussing Bud Selig’s opinion that Dodger takeover was in “best interest” of baseball).

5. *See* Weiss, *supra* note 4 (noting lucrative television offer from Fox in connection with background drama of divorce proceedings). The McCourts eventually finalized their divorce in October 2011. *See* Steve Dilbeck, *Judge to Frank and Jamie McCourt: ‘Good Luck to You’*, L.A. TIMES (Jan. 19, 2012, 11:50 AM), <http://latimesblogs.latimes.com/dodgers/2012/01/judge-to-frank-and-jamie-mccourt-good-luck.html> (discussing how McCourt divorce finally settled after over \$20 million spent, perhaps most expensive divorce in California history). Frank will reportedly have to pay Jamie \$130 million, but will receive her promise to withdraw any opposition to the sale of the Dodger’s media rights. *See* Greg Risling, *McCourts Reach Settlement in Divorce Battle*, BUS. WK. (Oct. 18, 2011, 8:28 AM), <http://www.businessweek.com/ap/financialnews/D9QEN1R83.htm> (detailing McCourt divorce settlement).

6. *See* MLB Const. art. II, § 2, cl. b., *available at* <http://www.bizoffbaseball.com/docs/MLConstitutionJune2005Update.pdf> (quoting language which gives Commissioner absolute power over baseball so long as actions are within “best interests of . . . baseball”); *see also* Tim Brown, *Selig vs. Dodgers’ McCourt is 29 Against One*, YAHOO! SPORTS (Apr. 22, 2011), [http://sports.yahoo.com/mlb/news?slug=ti-brown\\_mccourt\\_selig\\_dodgers\\_fox\\_television\\_soboroff\\_owners\\_042111](http://sports.yahoo.com/mlb/news?slug=ti-brown_mccourt_selig_dodgers_fox_television_soboroff_owners_042111) (citing “rival team executive” who warns McCourt that Selig has support of other baseball owners); *see generally* Weiss, *supra* note 4 (detailing Selig’s decision to solely veto deal and prevent McCourt from receiving financing based upon MLB Constitutional authority). Bud Selig argued that McCourt was planning to use a portion of the money from the television deal to pay off his divorce. *See* David Wharton, *Denial of TV Deal Further Chokes Dodgers’ Cash Flow; Team Is Closer Than Ever to a Change in Ownership After Commissioner’s Action*, L.A. TIMES, June 21, 2011, at 1 (alleging financial mismanagement as reason for rejecting Fox contract with McCourt).

7. *See* Mead, *supra* note 2 (noting that no other commissioner has taken over baseball franchise for complete financial mismanagement); *see* Lester Munson, *The ‘Death Penalty’ and the Dodgers*, ESPN (Sept. 30, 2011), [http://espn.go.com/espn/commentary/story/\\_/page/munson-110930/mlb-shows-powerful-hand-dodgers-dispute](http://espn.go.com/espn/commentary/story/_/page/munson-110930/mlb-shows-powerful-hand-dodgers-dispute) (explaining how Selig threatened to use death penalty provision against McCourt for first time in MLB history). Frank McCourt defended his ownership rights after the takeover and vetoed television deal by stating:

I’m here to continue to run this club . . . and I think it is wrong — fundamentally wrong — for any one person to stand in the way of a sound business transaction, which I and my organization have every right to

Without money from the proposed Fox Sports television deal, McCourt filed for Chapter 11 bankruptcy protection on June 27, 2011.<sup>8</sup> The judge ordered McCourt to accept a loan from MLB instead of contracting with Highbridge Principal Strategic, a third party hedge fund.<sup>9</sup> After using the loan to pay creditors and establish cash reserves, McCourt requested to auction the team's television rights even though Fox Sports maintained it was granted an exclusivity agreement with the Dodgers for the rights through November 2012.<sup>10</sup> In response, MLB and Bud Selig made their unwillingness to approve any sale of television rights that would help McCourt retain ownership of the team vividly clear.<sup>11</sup> Once it re-

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enter into . . . . [It is] not appropriate for one person's property to be seized by someone else just because he got divorced or for some arbitrary reason.

Richard Sandomir, *McCourt Criticizes Takeover of Dodgers*, N.Y. TIMES, Apr. 27, 2011, at B14 (criticizing arbitrariness of MLB decision to take over Dodgers and veto Fox deal).

8. See Petition for Chapter 11 Bankruptcy at 1, In re Los Angeles Dodgers LLC, available at <http://online.wsj.com/public/resources/documents/dodgers.pdf> (filing for chapter 11 bankruptcy protection); see also Press Release, MLB, *MLB Statement Regarding Dodgers Chapter 11 Filing*, MLB (Jun. 27, 2011, 4:59 PM), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20110627&content\\_id=21076822&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20110627&content_id=21076822&vkey=pr_mlb&fext=.jsp&c_id=mlb) (quoting Allan H. Selig disapproving of McCourt's actions and expressing concern for future of Dodger's franchise). Frank McCourt argues that Selig's veto of the Fox television contract and rejection of loans forced him to seek bankruptcy protection. See Richard Sandomir, *Terms of Loan from Baseball Ease Dodgers' Fear of Seizure*, N.Y. TIMES, Aug. 5, 2011, at D2 (describing how Judge Gross forced Dodgers to agree to loan with MLB and why McCourt blames Selig for getting him in this position).

9. See In re L.A. Dodgers LLC, No. 11-12010(KG), 2011 Bankr. LEXIS 2781, at \*10-11 (Bankr. Del. July 22, 2011) (holding that Dodgers must negotiate with MLB "in good faith" and that MLB loan must "not be vehicle to control [Dodgers]"); see Steve Dilbeck, *Frank McCourt v. MLB: Stamina and Patience of Job Required*, L.A. TIMES (Sept. 27, 2011, 12:30 PM), <http://latimesblogs.latimes.com/dodgers/2011/09/frank-mccourt-vs-mlb-stamina-and-patience-of-job-required.html> (noting that \$150 million loan MLB gave McCourt is now being used to fund McCourt's legal battle against MLB).

10. See *Dodgers Ask Court for Rules for TV Rights Auction*, CBS SPORTS (Sept. 16, 2011), <http://www.cbssports.com/mlb/story/15591040/dodgers-ask-court-for-rules-for-tv-rights-auction> (describing McCourt's attempts to auction TV rights of Dodgers to receive \$175 million "cash cushion"); see also Richard Sandomir, *TV's Supporting Role in Dodgers' Drama*, N.Y. TIMES, July 4, 2011, at D2 (highlighting pivotal and predominant role TV industry plays in financing MLB).

11. See Bill Shaikin, *Baseball: MLB Asks for Sale of Dodgers*, L.A. TIMES, Sept. 24, 2011, at 1 (detailing MLB's efforts to run McCourt out of league and its refusal to grant any television deals for McCourt); see also *MLB Goes for the KO against McCourt*, ALLOFBASEBALL (Sept. 23, 2011), <http://allofbaseball.wordpress.com/2011/09/23/mlb-goes-for-the-ko-against-mccourt/> (discussing MLB's intention not to approve any television contracts for McCourt); see Brief for MLB at 35, In re L.A. Dodgers LLC, No. 11-12010(KG), 2011 Bankr. LEXIS 2781, at \*1 (Bankr. Del. July 22, 2011), available at <http://www.scribd.com/doc/66102703/MLB-Motion-to-Terminate> (stating that MLB will not approve any television contract because it would "not be in the best interests of [d]ebtors, [MLB], or . . . other MLB clubs.").

ceived word McCourt was attempting to auction the television rights to a third party, Fox Sports sued the Dodgers for breach of contract.<sup>12</sup> Frank McCourt found himself in a precarious position; fighting two powerful opponents with deep pockets and crafty lawyers.<sup>13</sup>

As a victim of his own creation, McCourt will garner little, if any, sympathy from the public or the press.<sup>14</sup> Regardless, his self-created battle highlights not only MLB's overly-aggressive efforts to dethrone him, but most notably, Bud Selig's absolute power and authority over all dealings pertaining to the "business of baseball."<sup>15</sup> Selig's statement that he plans to veto any television contract illustrates the arbitrary and totalitarian control he exerts over the sport.<sup>16</sup> As one sports attorney stated, "by [MLB] announcing its

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12. See Tom Hals, *Fox Sues Dodgers to Stop Possible TV Rights Sale*, REUTERS (Sept. 28, 2011, 11:38 AM), <http://www.reuters.com/article/2011/09/28/us-dodgers-fox-idUSTRE78R1XY20110928> (describing Fox's lawsuit against McCourt for breach of contract, alleging any attempt by him to sell TV Rights of Dodgers is in violation of their exclusivity agreement); see Edvard Pettersson & Steven Church, *Fox Sports Sues Dodgers to Block Possible Media-Rights Sale*, BUS. WK. (Sept. 28, 2011, 12:52 PM), <http://www.businessweek.com/news/2011-09-28/fox-sports-sues-dodgers-to-block-possible-media-rights-sale.html> (indicating Fox's intention to prevent potential sale of Dodger's future television rights to third party).

13. See Hals, *supra* note 12 (noting that McCourt is battling MLB to maintain control of Dodgers as he starts this fight with Fox over television rights); see Sandomir, *supra* note 10 (acknowledging Fox's dependency on Dodgers for lucrative investment opportunity and inclination to team up with MLB against McCourt).

14. See *Debt was Burying Dodgers' Owner before Takeover*, SFGATE (Apr. 22, 2011), [http://articles.sfgate.com/2011-04-22/sports/29593494\\_1\\_vice-chairman-steve-soboroff-major-league-constitution-selig](http://articles.sfgate.com/2011-04-22/sports/29593494_1_vice-chairman-steve-soboroff-major-league-constitution-selig) (noting financial turmoil McCourt found himself in prior to Dodger takeover by MLB). McCourt had difficulty procuring loans for the Dodgers' operating expenses and owed around \$457 million. See *id.* (giving overview of McCourt's finances).

15. See Richard Sandomir, *Slow Creep of the 'Best Interests' Clause*, N.Y. TIMES, May 15, 2010, at D6 (describing ever-expanding scope of "best interests" clause and "business of baseball" under reign of Bud Selig); see also Bill Rochelle, *Dodgers, Solyndra, Viceroy, Innkeepers, Lehman: Bankruptcy*, BUS. WK. (Oct. 3, 2011, 9:33 AM), <http://www.businessweek.com/news/2011-10-03/dodgers-solyndra-viceroy-innkeepers-lehman-bankruptcy.html> (stating bankruptcy judge's opinion on Bud Selig's actions in this case). Kevin Gross, the bankruptcy judge, characterized Selig's assertion of power over the Los Angeles Dodgers as "nearly unparalleled in the business world." See *id.* (quoting Kevin Gross).

16. See Shaikin, *supra* note 11 (discussing Selig's plans to veto any television contract for McCourt's Dodgers); see Craig Calcaterra, *MLB's Takeover of the Dodgers Could Imperil Baseball's Antitrust Exemption*, NBC SPORTS (Apr. 22, 2011, 9:11 AM), <http://hardballtalk.nbcsports.com/2011/04/22/one-silver-lining-about-the-mlb-takeover-of-the-dodgers-it-could-imperil-baseballs-antitrust-exemption> (describing anticompetitive club ownership rules that would not likely survive legal challenge).

rejection of any television deal before an auction could take place . . . the league could be seen as not acting in good faith.”<sup>17</sup>

On November 1, 2011, McCourt finally succumbed to MLB’s pressures and agreed to sell the Los Angeles Dodgers.<sup>18</sup> The agreement called for both the sale of the team and its media rights by April 30, 2012.<sup>19</sup> The Dodgers and MLB resolved the media rights issue on January 11, 2012 when a Delaware Bankruptcy judge approved settlement terms between the Dodgers and Fox Sports, requiring the Dodgers to abide by the terms of their existing contract with Fox.<sup>20</sup> The existing contract prevents the Dodgers’ ownership from talking to other potential buyers until its exclusive negotiating period with Fox ends on November 30, 2012.<sup>21</sup> This exclusive ne-

17. See Shaikin, *supra* note 11 (quoting lawyer Thomas Salerno and considering whether Selig is acting unreasonably by refusing to approve any television contract for Dodgers). Bud Selig’s totalitarian power and ability to use aggressive attempts to run McCourt out of the league stem from his “wide, virtually non-reviewable latitude to regulate any aspect of the game, including ownership interests.” See Michael McCann, *Options Vary for McCourt, Selig*, SPORTS ILLUSTRATED (Apr. 25, 2011, 6:08 PM), [http://sportsillustrated.cnn.com/2011/writers/michael\\_mccann/04/21/mccourt.selig/index.html](http://sportsillustrated.cnn.com/2011/writers/michael_mccann/04/21/mccourt.selig/index.html) (referring to “best interests of baseball” clause and how it allows Selig to act with essentially unchecked power).

18. See Bill Shaikin, *MLB Agreement says Frank McCourt Must Sell Dodgers by End of April*, L.A. TIMES (Dec. 7, 2011), <http://articles.latimes.com/2011/dec/07/sports/la-sp-1208-dodgers-mlb-20111208-9> [hereinafter Shaikin I] (detailing outline of agreement McCourt made with MLB on November 1, 2011). Frank McCourt still has authority to decide what to do with the parking lots surrounding Dodger Stadium since he subdivided the real estate and the property is not connected to his ownership of the team. See *id.* (discussing McCourt’s options with parking lots and how he could make \$10 million in annual profits by retaining them); see also Bill Shaikin, *Frank McCourt Might Be Able to Claim Stadium and Land Even If He Loses Dodgers*, L.A. TIMES (May 7, 2011), <http://articles.latimes.com/2011/may/07/sports/la-sp-0508-dodgers-mccourt-sale-20110508> (describing how McCourt subdivided Dodger assets into separate companies, making him new owner’s potential landlord).

19. See Shaikin I, *supra* note 18. (noting deadline McCourt must meet for selling Dodgers). Although it is not entirely clear what made Frank McCourt concede defeat in his legal battle with Bud Selig, the Dodgers’ attorneys contend that “Selig deliberately starved the club of cash and destroyed its reputation in a bid to seize control of the team and force its sale.” See Tony Jackson, *Frank McCourt to Sell Dodgers*, ESPN (Nov. 2, 2011, 2:05 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7180599/frank-mccourt-agrees-sell-los-angeles-dodgers](http://espn.go.com/los-angeles/mlb/story/_/id/7180599/frank-mccourt-agrees-sell-los-angeles-dodgers) (analyzing reasons for McCourt’s settlement with MLB).

20. See Ken Gurnick, *Judge Approves Dodgers, FOX Agreement*, MLB (Jan. 11, 2012, 11:30 AM), [http://losangeles.dodgers.mlb.com/news/article.jsp?ymd=20120111&content\\_id=26310154&vkey=news\\_la&c\\_id=la](http://losangeles.dodgers.mlb.com/news/article.jsp?ymd=20120111&content_id=26310154&vkey=news_la&c_id=la) (describing Bankruptcy Judge Kevin Gross’ decision to approve settlement, allowing any new owner opportunity to “auction the future broadcasting rights after the 2013 season or develop a regional channel to televise games.”).

21. See Randall Chase, *Judge OKs Settlement between Dodgers, Fox Sports*, BOSTON.COM (Jan. 11, 2012), [http://www.boston.com/sports/baseball/articles/2012/01/11/dodgers\\_settle\\_with\\_fox\\_abandon\\_media\\_rights\\_sale/](http://www.boston.com/sports/baseball/articles/2012/01/11/dodgers_settle_with_fox_abandon_media_rights_sale/) (noting exclusive negotiation clause in contract between Fox and Dodgers). Although the exclusive ne-

gotiating period runs for 45 days beginning in October 2012, providing Fox with the opportunity to negotiate a media rights contract extension with the Dodgers before any competitors have the chance to submit offers.<sup>22</sup> Moreover, this settlement paved the way for McCourt to sell the franchise by the April 30 deadline he agreed to with MLB.<sup>23</sup> Previously, McCourt insisted that the Dodgers' media rights needed to be bundled with the sale of the team to maximize the value of the sale, but he reversed this course after District Court Judge Leonard Stark held that the prior approval for marketing the media rights process would not stand on appeal.<sup>24</sup> Therefore, in an attempt to meet the deadline and to maximize the value of the Dodgers' franchise, Frank McCourt agreed to settle for the original terms of the agreement with Fox and not shop the media rights to other potential buyers.<sup>25</sup> McCourt's settlement with Fox did not detrimentally affect the sale of the Dodgers to say the least, as a group led by Magic Johnson bought the franchise for a record shattering \$2.15 billion on March 27, 2012.<sup>26</sup> This astronomical sale price, inflated from the skyrocketing price of television contracts in the lucrative Los Angeles media market, nets McCourt an \$860 million profit after paying off various expenses, debts, and divorce payments to his wife.<sup>27</sup>

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gotiating period ends in November 2012, the existing broadcasting agreement with Fox runs through the 2013 season. *See* Gurnick, *supra* note 20 (explaining broadcast agreement between Dodgers and Fox).

22. *See* Chase, *supra* note 21 (noting length of Fox's exclusive negotiating period).

23. *See id.* (describing how stay on Fox's appeal threatened plans to sell Dodgers by April 30, but settlement provided viable solution for McCourt). Even with a new media contract prior to the sale of the team "[a] new owner will need to invest \$250 million to \$400 million in the outdated Dodgers Stadium, making it hard . . . to attract upward of \$1.1 billion. *See* Josh Kosman, *Foul Call on Dodgers*, N.Y. POST, Dec. 24, 2012, at 25 (discussing how "[w]ithout new media contract, the Dodgers are potentially less valuable" and it will be harder for McCourt to collect money he needs to pay off debts).

24. *See* Chase, *supra* note 21 (explaining why McCourt changed his litigation strategy and agreed to settle). Bankruptcy Judge Kevin Gross had previously ruled that the "no shop" exclusivity provisions were unenforceable in bankruptcy, and consequently, he moved the exclusive negotiating period forward by about ten months. *See id.* (reporting on judge's holding).

25. *See id.* (noting Dodgers' reasons for settling with Fox).

26. *See* Matthew Futterman, *\$2 Billion Dodgers Price Tag Shatters Records*, WALL ST. J., Mar. 29, 2012, at B1, available at [http://online.wsj.com/article/SB10001424052702303404704577308483250633906.html?mod=WSJ\\_hp\\_LEFTWhatsNewsCollection](http://online.wsj.com/article/SB10001424052702303404704577308483250633906.html?mod=WSJ_hp_LEFTWhatsNewsCollection) (detailing "100% cash offer" made by Magic Johnson led group to buy Dodgers' franchise from Frank McCourt).

27. *See* Brian Solomon, *Baseball Bandit: Frank McCourt Escapes Dodgers with \$860 Million Profit*, FORBES, (Mar. 28, 2012, 10:29 AM), <http://www.forbes.com/sites/briansolomon/2012/03/28/baseball-bandit-frank-mccourt-escapes-dodgers-with-860-million-profit/> (calculating McCourt's net profit on sale of Dodgers). "From

While many people despise Frank McCourt for his financial mismanagement of the franchise and the unnecessary drama he brought to the city of Los Angeles with his high-profile divorce, the negative public opinion against McCourt does not excuse Bud Selig's actions.<sup>28</sup> No other Commissioner, in any sports league, has acted in such a totalitarian fashion.<sup>29</sup> The strong-armed tactics, aggressive litigation strategies, and arbitrary decisions used by Selig in the "best interests of baseball" all occurred in the foreground of a judicially-created antitrust exemption that has existed in baseball for almost 90 years.<sup>30</sup> This exemption keeps MLB almost completely judgment proof under antitrust laws.<sup>31</sup> Only one other owner in the history of baseball attempted to challenge the commissioner under antitrust laws, and he lost in favor of the commissioner's "broad authority" to determine what is in the "best

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bankruptcy to near-billionaire, it will only take a few good investments to bump this baseball bandit onto our Forbes 400 Richest Americans list." *Id.* The high price for the Dodgers comes with the unique opportunity to start a regional sports network in the second-largest media market in the country. See Matthew Futterman, *Behind Dodgers Deal: TV Riches*, WALL ST. J., Mar. 29, 2012, at A1, available at [http://online.wsj.com/article/SB10001424052702304177104577309860750637758.html?mod=WSJ\\_hp\\_LEFTTopStories](http://online.wsj.com/article/SB10001424052702304177104577309860750637758.html?mod=WSJ_hp_LEFTTopStories) (describing reasons for high-priced sale of Dodgers).

28. See Dan Weikel, *McCourt Uphill Fight to Win Back the Dodgers*, L.A. TIMES Apr. 22, 2011, at 1 (reporting on public scorn of McCourt, and on possibility that McCourt could argue that Selig's actions were "arbitrary and capricious.").

29. See David Wharton, *Commissioners Walk a Fine Line*, L.A. TIMES, May 15, 2011, at 1 (recounting history of commissioners in sports leagues and their relationships with owners). Horace Fogel, owner of the Philadelphia Phillies in 1912, is the only owner ever to be forced out of an ownership position in any sports league. See *id.* (noting ousting of Phillies owner, Horace Fogel). He was banned for his repeated criticisms of umpires in MLB. See *id.* (explaining reason why Horace Fogel was forced out as owner of the Phillies). Bud Selig has been notorious for expanding the scope of the commissioner's power ever since becoming commissioner in 1992. See Jacob F. Lamme, Comment, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 179-80 (2004) (listing expanding power of commissioner's office under Selig and radical changes he has made).

30. See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (excluding baseball from force and effect of federal antitrust laws); see also McCann, *supra* note 17 (noting strength of MLB's antitrust exemption and its effect on discouraging owners from suing MLB and commissioner).

31. See Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265, 269-70 (2011) (presenting history of baseball's antitrust exemption and how it prevents baseball from being subjected to federal antitrust laws). While some judges even referred to previous cases that carved out the exemption as "anomalies" only "confined to baseball," . . . "the Court has never definitively removed the exemption." See *id.* (explaining persistence of MLB's antitrust exemption).

interests” of baseball.<sup>32</sup> Aside from Bud Selig, no other commissioner in any sports league has ever threatened to remove an owner who is arguably in compliance with league rules.<sup>33</sup>

The following comment suggests: (1) Bud Selig can act in an unreasonable, arbitrary, and overly aggressive manner against people he wants out of MLB because of the unchecked freedom the antitrust exemption gives him; (2) if McCourt chose to challenge Selig’s authority instead of agreeing to sell the team, then he probably could prevail in an antitrust suit against MLB and Selig; and (3) MLB’s problems could be judicially or congressionally solved by abolishing the exemption in favor of the rule of law, economic efficiency, and greater uniformity.<sup>34</sup>

Part II of this comment will detail the history of the antitrust exemption in baseball, the power it provides for commissioners like Bud Selig, and the elements Frank McCourt would need to prove to establish a viable antitrust suit against MLB if he chose to challenge the league’s attempts to revoke his ownership rights.<sup>35</sup> Part III will analyze whether Frank McCourt would have a viable antitrust claim against MLB and Bud Selig.<sup>36</sup> Part IV will advocate for abolishing the antitrust exemption in baseball to force MLB to adhere to the rule of law, to make the league more economically efficient, and to provide greater uniformity and accountability to prevent another quarrel between an owner and the commissioner.<sup>37</sup> Finally, Part V will provide concluding remarks, advocating a uniform and fair application of antitrust laws to all industries, including MLB, and why

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32. See *Charles O. Finley & Co. v. Kuhn, Inc.*, 569 F.2d 527, 539 (7th Cir. 1978) (upholding commissioner’s power to rule in “best interests of baseball” and that it is not up to courts to decide whether commissioner is right or wrong); see also McCann, *supra* note 17 (noting Oakland Athletics owner’s attempt to sell the contracts of his star players and why commissioner thought it would “harm the competitive balance of league . . .”).

33. See *Charles O. Finley*, 569 F.2d at 539 (challenging commissioner’s restraint on trade, but was never forced out of MLB by commissioner); see also Wharton, *supra* note 29 (discussing unprecedented nature of completely removing owner’s rights to own professional franchise).

34. For general discussion of content and argument, see *infra* notes 39-236.

35. For a history of the Sherman Antitrust Act, how it applies to MLB, and what is required for a viable antitrust claim, see *infra* notes 39-132 and accompanying text.

36. For an analysis of a potential antitrust suit Frank McCourt could bring against MLB if he chose to challenge his removal from ownership of the Dodgers, see *infra* notes 133-197 and accompanying text.

37. For an examination of the potential benefits that could derive from abolishing baseball’s antitrust exemption, see *infra* notes 198-228 and accompanying text. This section will also take into account counterarguments in favor of the exemption.

this is in the best interests of baseball, the owners, players, and most importantly, the fans.<sup>38</sup>

## II. A BRIEF HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

### A. Historical Background

The business of baseball dates back to 1903.<sup>39</sup> After the “Black Sox” scandal broke in 1919, baseball owners agreed to create the Office of the Commissioner of Baseball and vest in the Commissioner the “broad power” to act in the “best interests” of baseball.<sup>40</sup> One year after the agreement in 1922, the Supreme Court held in a landmark case, *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,<sup>41</sup> that MLB has an exemption from federal antitrust regulation.<sup>42</sup> The case involved a baseball club, who along with seven other teams, was a member of the Federal League that attempted to compete with the combined defendants that made up MLB at the time.<sup>43</sup> The plaintiff claimed that the

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38. For concluding remarks and reasons why abolishing the exemption is in the “best interests” of all parties, see *infra* notes 229-236 and accompanying text.

39. See Lamme, *supra* note 29, at 159-60 (describing 1903 National Agreement’s unprecedented nature, how it started MLB, and created business of baseball). Some baseball historians place the origins of modern baseball in 1842, beginning with the New York Knickerbocker Base Ball Club. See Michael J. Hauptert, *The Economic History of Major League Baseball*, EH.NET (Feb. 2, 2010, 5:21 PM), <http://eh.net/encyclopedia/article/hauptert.mlb> (declaring game of baseball originated and evolved from 1842 onwards). See also *World Series History*, BASEBALL ALMANAC (last visited Jan. 30, 2011), <http://www.baseball-almanac.com/ws/wsmenu.shtml> (recognizing that 1903 agreement produced “business blueprint for [MLB] result[ing] in . . . merger that has lasted to this day.”).

40. See Lamme, *supra* note 29, at 163 (explaining how owners disregarded democratic structure in favor of possibility of despotism by implementing “best interests” clause into 1921 Major League Agreement). Mr. Lamme describes the “best interests” clause as giving the Commissioner “sole authority to regulate and punish any act that he deemed ‘detrimental to the best interests of the national game of baseball.’” *Id.* (quoting 1921 Major League Agreement, art.I, § 2(a), 3 available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=58:1921-major-league-agreemen&catid=37:1900-1960&Itemid=47](http://bizofbaseball.com/index.php?option=com_content&view=article&id=58:1921-major-league-agreemen&catid=37:1900-1960&Itemid=47) (last visited Sept. 11, 2011)); see also Matthew J. Parlow, *Professional Sports League Commissioners’ Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 183-84 (2010) (describing how baseball owners consolidated power in one commissioner after reality of Black Sox scandal ruined public confidence of game). The Black Sox scandal involved eight members of the Chicago White Sox franchise who were found to have conspired with gamblers to intentionally lose games in the 1919 World Series against the Cincinnati Reds. See *Black Sox Scandal*, BASEBALL-REFERENCE (last visited Mar. 5, 2012), [http://www.baseball-reference.com/bullpen/Black\\_Sox\\_Scandal](http://www.baseball-reference.com/bullpen/Black_Sox_Scandal) (detailing history of Black Sox scandal).

41. 259 U.S. 200 (1922).

42. See *id.* at 209 (holding that “personal effort, not related to production, is not a subject of commerce,” thus baseball is not subject to federal regulation).

43. See *id.* at 207 (explaining attempted competition between Federal League and MLB).

“defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League.”<sup>44</sup> Instead of discussing the antitrust implications of these actions, Justice Oliver Wendell Holmes held that the business of “giving exhibitions of base ball . . . are purely state affairs.”<sup>45</sup> He reasoned that paying baseball players to cross state lines to engage in these exhibitions amounted to “personal effort, not related to production” and consequently, baseball was not interstate commerce subject to federal regulation under the Sherman Antitrust Act (“Sherman Act”).<sup>46</sup> This landmark decision was only the beginning of a tumultuous history of uncertain precedents, contradicting opinions, and inconsistent analyses regarding baseball’s antitrust exemption.<sup>47</sup>

Approximately thirty years after the Court’s decision in *Federal Baseball*, the Court revisited baseball’s antitrust exemption in *Toolson v. New York Yankees*.<sup>48</sup> Emphasizing the fact that Congress had abstained from acting on the judicially-created exemption, the Court concluded that any change in regulation must come from Congress instead of the judiciary.<sup>49</sup> Consequently, the Court upheld baseball’s sweeping antitrust exemption, finding it to encompass the entire “business of baseball.”<sup>50</sup>

The next and final time the Supreme Court ruled on baseball’s antitrust exemption came almost twenty years later in *Flood v.*

44. *See id.* at 207 (detailing plaintiff’s claim that defendants were engaged in conspiracy to destroy Federal League).

45. *Id.* at 208 (quoting Holmes, J.).

46. *See id.* at 208-09 (discussing why baseball does not violate Sherman Act).

47. For a discussion of the history of baseball’s antitrust exemption, see Jonathan D. Gillerman, Comment, *Calling Their Shots: Miffed Minor Leaguers, the Steroid Scandal, and Examining the Use of Section 1 of the Sherman Act to Hold MLB Accountable*, 73 ALB. L. REV. 541, 565-70 (2010) (detailing historical background of baseball’s antitrust exemption and inconsistency with current state of antitrust exemption); *see also* Thomas J. Ostertag, *Baseball’s Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 54-66 (2004) (giving historical accounts of baseball’s antitrust exemption and arguing for its broad scope in application to federal antitrust laws). For a discussion of recent effects on the exemption from the evolution of case law, see Mozes & Glicksman, *supra* note 31, at 288-90 (discussing impact *American Needle* has on antitrust jurisprudence as applied to professional sports).

48. 346 U.S. 356, 357 (1953) (finding that any change in MLB’s antitrust exemption status must first come from Congress, not courts).

49. *See id.* at 357 (“The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.”).

50. *See id.* at 357; *see also* Ostertag, *supra* note 47, at 58 (noting that *Toolson* Court defined scope of antitrust exemption as encompassing entire “business of baseball”).

*Kuhn*.<sup>51</sup> Curt Flood, a major league baseball player, filed an anti-trust lawsuit challenging the existence of MLB's reserve system, which allowed Flood's team, the St. Louis Cardinals, to trade him to the Philadelphia Phillies without his consent.<sup>52</sup> The Court, however, found Mr. Flood's antitrust claim unpersuasive, especially when considering the significant passage of time without congressional action since the original precedent set in *Federal Baseball*.<sup>53</sup>

While the Court upheld baseball's antitrust exemption, much confusion followed this case primarily because many argued that the Court limited the scope of *Federal Baseball* and *Toolson* when stating, "[w]ith its *reserve system* enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."<sup>54</sup> Subsequent courts and scholars widely disagreed on the scope and meaning of *Flood* and whether it narrowed the exemption solely to MLB's reserve clause.<sup>55</sup>

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51. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding that any change in baseball's antitrust exemption is for Congress and that state antitrust laws do not apply to baseball). In the last paragraph of the opinion, Justice Blackmun stated, "And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action." *Id.* at 285 (reaffirming judgments of *Federal Baseball* and *Toolson*).

52. See *id.* at 264-65 (noting that Flood asked Commissioner to bargain with other major league teams, but his request was denied); see also Ostertag, *supra* note 47, at 60 (recognizing that existence of antitrust exemption and MLB "reserve system permitted . . . [Cardinals to trade Flood] without his consent").

53. See *Flood*, 407 U.S. at 282 (stating that aberration of baseball's antitrust exemption has lasted for half century and is fully entitled to *stare decisis*). The court's *stare decisis* justification "rests on a recognition and an acceptance of baseball's unique characteristics and needs." See *id.* at 282 (justifying why baseball is exempt from antitrust laws while other professional sports are not).

54. See *id.* at 282 (emphasis added) (specifying that reserve system of MLB enjoys exemption from federal antitrust laws as opposed to entire "business of baseball"); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 184 (1994) (discussing consequences of interpreting *Flood v. Kuhn* with limiting scope solely to MLB's reserve clause).

55. See Gillerman, *supra* note 47, at 568 ("Without any direction from the Supreme Court as to how broadly or narrowly the 'unique characteristics and needs' language should be construed, this inquiry has been left to the unfettered discretion of the lower courts."). For cases and commentary that interpret the exemption as limited to the reserve clause or nonexistent altogether, see *Piazza v. Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993) (holding that exemption created by *Federal Baseball* is inapplicable because it is limited to baseball's 'reserve system'); see Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 270 (S.D. Tex. 1982) (finding that broadcasting rights are not subject to baseball's antitrust exemption because broadcasting is not central to baseball in "the way in which players, umpires, the league structure, and the reserve system are"); *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994) (holding that MLB's antitrust exemption extends only to reserve system); Charles Matthew Burns, *The Scope of Major League Baseball's Antitrust Exemption*, 24 STETSON L. REV. 495, 532-34 (1995) (advocating that *Piazza* correctly interpreted *Flood* in its

Congress finally spoke on the issue in 1998 with the passage of the Curt Flood Act (“Flood Act”), but neglected to state what activities were still subject to the antitrust exemption.<sup>56</sup> Instead, the Flood Act only eliminated a narrow category of exempted issues “directly relating to or affecting employment of major league baseball players to play baseball at the major league level.”<sup>57</sup> Therefore, what falls under the umbrella of MLB’s antitrust exemption remains open to judicial interpretation.<sup>58</sup>

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use of *stare decisis* to limit exemption to reserve clause); Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 5-6 (2005) (discussing *Toolson* and *Flood*’s focus solely on reserve clause, and uncertainty in precedent because of no analysis regarding scope of exemption); Martin M. Tomlinson, *The Commissioner’s New Clothes: The Myth of Major League Baseball’s Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 309 (2008) (arguing that revocation of reserve clause exemption from Flood Act completely demolished existence of MLB antitrust exemption). For cases and commentary that interpreted *Flood* broadly, see *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) (holding that baseball’s antitrust exemption applies broadly to “business of baseball”). The Court attempted to clarify the scope of MLB’s antitrust exemption when stating:

Despite the two references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.

*Id.* at 541 (trying to dispel notion that antitrust exemption only applies to reserve system); see also *Major League Baseball v. Crist*, 331 F.3d 1177, 1189 (11th Cir. 2003) (holding that decisions to contract teams falls squarely within “business of baseball” and is protected under antitrust exemption); Gary Roberts, *On the Scope and Effect of Baseball’s Antitrust Exemption*, 4 SETON HALL J. SPORT L. 321, 325 (1994) (arguing that baseball’s antitrust exemption extends to structuring of professional baseball and production of baseball entertainment, but not to contracts between professional baseball entities and third parties); Ross, *supra* note 54, at 205 (finding that Flood set baseball’s antitrust exemption to encompass baseball’s “unique characteristics and needs”).

56. See 15 U.S.C. § 26 (2006) (eliminating antitrust exemption for issues concerning major league baseball players and reserve clause). Additionally, through the Flood Act, Congress instructs courts not to “rely on the enactment” to grant standing for lawsuits against MLB on other antitrust grounds. See *id.* § 26(b) (explaining enactment); see also Gillerman, *supra* note 47, at 570 (noting that Congress’s silence on exemption’s relationship to other antitrust issues suggests that “the exemption encompasses other forms of concerted action”).

57. See 15 U.S.C. § 26 (2006) (highlighting narrow category of exempted issues); see also Gillerman, *supra* note 47, at 570 (stating that what remains subject to antitrust exemption is widely open to judicial interpretation).

58. See Nathaniel Grow, *Defining the Business of “Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 562 (2010) (discussing variance of opinion amongst courts and scholars regarding scope of baseball’s antitrust exemption); Peter M. Macaluso, *Bang the Gavel Slowly: A Call for Judicial Activism Following the Curt Flood Act*, 9 B.U. PUB. INT. L.J. 463, 471 (2000) (expressing how lack of unity amongst precedent makes it unlikely to determine how Supreme Court would rule on antitrust exemption); Tomlinson, *supra* note 55, at 309 (describing extremes of interpretation and how

## B. An Exempted Commissioner: All Roads Lead to Despotism

With the luxury of an exemption from antitrust laws since 1922, MLB commissioners have enjoyed unbridled reign over an industry and have wielded absolute power in legislating, executing, and adjudicating the private laws of baseball.<sup>59</sup> Bud Selig entered the commissioner's office in 1992, a little over a decade after being sued for orchestrating owner collusion in the 1980s.<sup>60</sup> His family continued to own the Milwaukee Brewers baseball team even while he started his official tenure as the commissioner of MLB in 1998.<sup>61</sup> Finding no problem or conflict of interest with this situation, Selig continued the unethical practices in the commissioner's office that had made him notorious as an owner.<sup>62</sup>

As Commissioner, Bud Selig unilaterally eliminated the Presidents of the American and National Leagues while consolidating all

some interpret exemption to encompass "business of baseball," while others interpret it as limited to reserve clause or to longer exist).

59. See Lamme, *supra* note 29, at 163 (establishing office of commissioner as law unto himself starting with Commissioner Kenesaw Mountain Landis); see Parlow, *supra* note 40, at 184 (describing how first commissioner would accept position only if he received unbridled reign over game); see also Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 304 (2005) (discussing how first commissioner demanded commissioner receive unchecked investigative and judicial powers).

60. See Lamme, *supra* note 29, at 176 (describing how commissioner's office witnessed worst scandals and most unethical practices game had ever seen under Bud Selig's regime). Prior to Selig entering the commissioner's office, baseball owners, including Selig, had settled with the players for their part in the owner collusion that had kept player salaries at abnormally low levels in the 1980s. See *id.* (noting pattern of low salaries); see also Hauptert, *supra* note 39 (detailing owner collusion of 1980s where owners agreed not to bid on one another's free agents to keep player salaries low). As commissioner, Bud Selig pawned off the \$280 million settlement on expansion teams, charging unprecedented prices of \$490 million to join MLB for the four new baseball cities: Tampa Bay, Phoenix, Denver, and Miami. See Lamme, *supra* note 29, at 177 (arguing that "new owners . . . paid for old owners' sins").

61. See John Helyar & Scott Soshnick, *Selig Bends Rules to Fit in Effort to Oust McCourt from Dodgers*, BLOOMBERG (Oct. 24, 2011), <http://www.bloomberg.com/news/2011-10-24/selig-bends-rules-to-fit-as-baseball-attempts-to-oust-mccourt-from-dodgers.html> (indicating that Selig's daughter took control of Milwaukee Brewers when Selig was confirmed as commissioner in 1998).

62. See Lamme, *supra* note 29, at 177-81 (explaining how Selig used contraction to help pay off settlement damages); Sandomir, *supra* note 15 (arguing that Selig has widened commissioner's "best interest" powers since becoming commissioner). Reports also indicate that Selig, who helped implement a rule requiring teams to maintain a ratio of at least 60% equity and 40% debt, suspended enforcement of the rule as commissioner from 1994-1998 when the Milwaukee Brewers were conveniently in violation of the rule. See Helyar & Soshnick, *supra* note 61, at 2 (noting that Brewers were in violation of rule for seven of ten years they were audited, but never had rule enforced against them by Selig).

power in the Office of the Commissioner.<sup>63</sup> Additionally, he increased the commissioner's salary from \$650,000 to an astronomical \$18.4 million today.<sup>64</sup> Furthermore, Selig has overseen and permitted a myriad of anticompetitive actions that have occurred under his watch.<sup>65</sup> In 2002, he threatened to contract MLB; a move that would have eliminated the Minnesota Twins and the Montreal Expos had it not been for public outcry.<sup>66</sup> In 2005, Selig approved a monopolistic deal granting Baltimore Orioles owner, Peter Angelos, a ninety percent share of the Washington Nationals' television rights.<sup>67</sup> And although Bud Selig refused to help the Dodgers with a new television contract, he bailed out New York Mets owner Fred Wilpon when he was sued in March of 2011 by Bernie Madoff victims.<sup>68</sup> Apparently, criminal fraud was not as egregious of a con-

63. See *Commissioners of Major League Baseball, American League Presidents and National League Presidents*, BASEBALL ALMANAC (2011), <http://www.baseball-almanac.com/recbooks/officials.shtml> (indicating that Selig discontinued president positions for both leagues to centralize power in one commissioner to "unify the leagues."); Lamme, *supra* note 29, at 180 (recounting Selig's unilateral decision to eliminate American and National League presidents and to consolidate power in commissioner's office).

64. See Lamme, *supra* note 29, at 180 (noting that Selig's starting salary was \$650,000); Cork Gaines, *Bud Selig Makes Almost Twice as Much as Roger Goodell*, BUS. INSIDER (July 26, 2011), [http://articles.businessinsider.com/2011-07-26/sports/30008559\\_1\\_bud-selig-gary-bettman-nhl-commissioner](http://articles.businessinsider.com/2011-07-26/sports/30008559_1_bud-selig-gary-bettman-nhl-commissioner) (revealing astronomical nature of Selig's salary in comparison to commissioners in other sports leagues).

65. For a discussion of Bud Selig's anticompetitive practices, see Lamme, *supra* note 29, at 176-81 (arguing that Selig's regime is corrupt with retribution and despotism).

66. See *Twins, Expos Look to Future Without Contraction*, SPORTS ILLUSTRATED (Aug. 30, 2002, 7:56 PM), [http://sportsillustrated.cnn.com/baseball/news/2002/08/30/contraction\\_labor\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2002/08/30/contraction_labor_ap/) (commenting on new labor agreement and how it prevents Selig from eliminating any teams from MLB); David Schoenfield, *Still 30 Teams: Contraction Timeline*, ESPN (Feb. 5, 2002), <http://static.espn.go.com/mlb/s/2002/0205/1323230.html> (describing Bud Selig's efforts for contraction of MLB, and subsequent public outcry against his actions).

67. See Bruce Fein, *Baseball's Privileged Antitrust Exemption*, DCBAR (Oct. 2005), [http://www.dcbbar.org/for\\_lawyers/resources/publications/washington\\_lawyer/october\\_2005/stand.cfm](http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/october_2005/stand.cfm) (detailing Angelos's efforts to prevent Washington from getting team, and his subsequent pact with Selig so Nationals could play in Washington market). Peter Angelos eventually lost the battle against the arrival of a new team, but won the war by obtaining monopolistic control from Selig over the Washington Nationals television rights with a 90 – 10% ownership split in his favor. See *id.* (explaining Nationals' television rights).

68. See Brian Ross, *Mets Money Mishap May Make MLB a Monopoly After All*, HUFFINGTON POST (Mar. 1, 2011, 11:48 AM), [http://www.huffingtonpost.com/brian-ross/mets-money-mishap-revives\\_b\\_828745.html](http://www.huffingtonpost.com/brian-ross/mets-money-mishap-revives_b_828745.html) (discrediting Selig's discretionary allotment of loan money to Mets owner who was allegedly involved in Madoff ponzi scheme); *Bud Selig: Lord of the Realm*, IT'S ALL ABOUT THE MONEY (Feb. 26, 2011), <http://itsaboutthemoney.net/archives/2011/02/26/bud-selig-lord-of-the-realm/> (comparing McCourt and Mets situation and pointing out how Selig is helping one owner who was possibility involved in one of history's biggest criminal frauds, while attempting to oust McCourt from MLB for financial mismanage-

cern as the financial mismanagement in McCourt's case.<sup>69</sup> Additionally, Bud Selig also helped Tom Hicks, owner of the Texas Rangers, without threatening to kick him out of MLB.<sup>70</sup> It was with this broad, sweeping, and arbitrary power that Bud Selig acted in the "best interests of baseball" by taking over the day-to-day operations of the Los Angeles Dodgers, vetoing a television deal which forced them into bankruptcy, and demanding that MLB be permitted to sell the team.<sup>71</sup>

The strong-armed tactics of Commissioner Bud Selig has successfully forced McCourt into a settlement agreement that will expel him from the league and from his ownership of the Dodgers.<sup>72</sup> Even if McCourt decided not to settle, but instead chose to challenge Selig's attempts to run him out of MLB, baseball's antitrust exemption probably would have stood between him and a successful antitrust lawsuit against Selig and the league.<sup>73</sup> If there was ever a better time, however, for the judiciary to overturn an archaic and

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ment). "[T]his shows just how much arbitrary and capricious power the commissioner of baseball can exercise from time to time." *Id.*

69. See Ian O'Connor, *Hey, Bud Selig: Take Our Mets, Please!*, ESPN NEW YORK (May 25, 2011, 7:56 AM), [http://sports.espn.go.com/new-york/mlb/columns/story?columnist=connor\\_ian&id=6584339](http://sports.espn.go.com/new-york/mlb/columns/story?columnist=connor_ian&id=6584339) (asserting that until Selig treats Wilpon in similar manner to McCourt, then it looks like he's unjustly favoring his good friend, Wilpon).

70. See Mike Ozanian, *Frank McCourt is Right But Will Still Lose Dodgers to Bud Selig*, FORBES (Apr. 21, 2011, 10:03 AM), <http://www.forbes.com/sites/mikeozanian/2011/04/21/frank-mccourt-is-right-but-will-still-lose-dodgers-to-bud-selig/> (examining differences in Selig's treatment of Dodgers versus Rangers, noting that Selig never took over operations of Rangers or threatened to oust owner from baseball).

71. See Weiss, *supra* note 4 (declaring that Bud Selig took over Dodgers in what he viewed as "best interests" of baseball); Shaikin and Wharton, *supra* note 6 (detailing Bud Selig's rejection of McCourt's television deal with Fox Sports); Shaikin, *supra* note 11 (discussing Bud Selig's efforts to remove McCourt from his ownership of Dodgers and to run him out of MLB).

72. See Ozanian, *supra* note 70 (citing commissioner's broad "best interest" clause as reason for likelihood that McCourt will lose Dodgers to Bud Selig and MLB); Helyar & Soshnick, *supra* note 61 (noting vast power of Bud Selig and his goal to remove McCourt from ownership of Los Angeles Dodgers); see also Mike Ozanian, *Selig Wants Judge to Force Sale of Dodgers*, FORBES (Sep. 24, 2011, 8:37 AM), <http://www.forbes.com/sites/mikeozanian/2011/09/24/selig-wants-judge-to-force-sale-of-dodgers/> (describing Selig's request to bankruptcy judge asking for order requiring McCourt to sell Dodgers). The protracted litigation from MLB's efforts to dethrone McCourt has starved the Dodgers financially. See Jackson, *supra* note 19 (discussing reasons for McCourt's settlement with MLB).

73. See McCann, *supra* note 17 (recognizing strength of baseball's antitrust exemption in areas not involving players or franchise relocation). "[T]here are at least two issues that are likely presently included within the scope of baseball's antitrust exemption, the minor league system and franchise relocation . . ." See Mozes & Glicksman, *supra* note 31, at 275 (asserting what is still included within confines of baseball's antitrust exemption).

outdated precedent, the time is now.<sup>74</sup> Baseball's antitrust exemption stands in McCourt's way, but if the exemption were judicially overturned or congressionally abolished, then he could probably bring a viable claim against MLB under section 1 of the Sherman Act.<sup>75</sup>

### C. The Sherman Antitrust Act: A Brief History and its Requisite Elements

The Sherman Act has its roots in the Industrial Revolution when robber barons like Rockefeller and Carnegie accumulated massive fortunes and undercut competition by creating agreements that would help enhance their wealth.<sup>76</sup> The purpose behind the Sherman Act rests in the fear the Federal Government had that a small group of individuals would stifle competition through monopolies and cartelization.<sup>77</sup> Its philosophy centers on the premise that free competition among business entities will produce the best price levels.<sup>78</sup> Thus, to promote free competition and to protect

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74. See Morgen A. Sullivan, "A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption, 48 DUKE L.J. 1265, 1267 (1999) (advocating for court to abolish baseball's antitrust exemption because of eroded foundation of "positive inaction" doctrine, obsolete factual conditions, and scholarly criticism). The positive inaction doctrine advocated by courts in many cases dealing with baseball's antitrust exemption is further weakened by the Court's action in overturning a ninety-six year old antitrust precedent. See Ariana E. Gillies, *Not With a Bang, but a Whimper: Congress's Proposal to Overturn the Supreme Court's Leegin Decision with the Discount Pricing Consumer Protection Act of 2009*, 18 VILL. SPORTS & ENT. L.J. 645, 645 (2011) (noting Supreme Court's willingness to overturn a ninety-six year old precedent in antitrust law).

75. See McCann, *supra* note 17 (discussing possibilities of McCourt bringing antitrust claim against MLB under Section 1 of Sherman Act); Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (citing antitrust claim).

76. See Gillies, *supra* note 74, at 651-52 (citing origins of Sherman Act); *Antitrust: An Overview*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/wex/antitrust> (providing introduction to antitrust law under Sherman Act); T.J. Stiles, *Robber Barons or Captains of Industry?*, GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY (June 2010), [http://www.gilderlehrman.org/historynow/06\\_2010/historian4.php](http://www.gilderlehrman.org/historynow/06_2010/historian4.php) (commenting on rise of regulation due to price fixing and monopolization activities of robber barons like Rockefeller and Carnegie).

77. See Joshua Hamilton, *Congress in Relief: The Economic Importance of Revoking Baseball's Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1225 (1998) (describing purpose and goal behind passage of Sherman Act on July 2, 1890).

Economists believe that [monopolies and cartelization] injures both individuals and the public because [they] lead[ ] to anticompetitive practices in an effort to obtain or maintain total control. Anticompetitive practices then lead to price controls and diminished individual initiative. These results in turn cause markets to stagnate and depress economic growth. *Antitrust: An Overview*, *supra* note 76 (presenting reasons for Sherman Act's purpose of prohibiting monopolies and cartels in American economy).

78. See Hamilton, *supra* note 77, at 1225 (explaining basic premise of Sherman Act). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26

the American consumer, Congress passed the Sherman Act in July 1890.<sup>79</sup>

Section 1 of the Sherman Act prohibits “[e]very contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states.”<sup>80</sup> Although it appears that any restraint on trade will be illegal, only unreasonable restraints will violate the Sherman Act.<sup>81</sup> When deciding what constitutes an unreasonable restraint, courts do not have to resort to the plain meaning of the statute, but may freely interpret the Sherman Act in light of the economic concerns of the time.<sup>82</sup> Broken down into its component parts, a colorable section 1 claim requires three elements: (1) the existence of a contract between two or more separate entities; (2) an unreasonable restraint on trade; (3) which affects interstate commerce.<sup>83</sup> Anyone found to have violated the Sherman Act will face penalties requiring the individual to pay plaintiffs “threefold the damages . . . sustained, and the cost of the suit, including a reasonable attorney’s fee.”<sup>84</sup>

There are two tests a court may apply when deciding whether a violation of the Sherman Act has occurred: the Per Se Test or the

(1940) (proposing that collusion among competitors may produce prices which harm consumers)

79. See Gillies, *supra* note 74, at 652 (stating Congress’s fear that small number of individuals will accumulate massive wealth and create agreements that hurt competition and stifle economic growth).

80. Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

81. See Hamilton, *supra* note 77, at 1226 (explaining that restraint on trade must be found unreasonable by court); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (recognizing that courts only prohibit “unreasonable” restraints on trade). Additionally, a plaintiff in a civil antitrust action “must demonstrate a causal connection among the following: (1) injury suffered, (2) to business or property, by (3) the violation of an antitrust law.” See Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball’s Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.F. 213, 251 (1995) (quoting E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY, AND PROCEDURE* 33 (3d ed. 1994)) (explaining necessity of connecting various elements for successful prima facie case).

82. See Gillies, *supra* note 74, at 652 (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978)) (recognizing that legislative purpose behind Sherman Act was to keep it flexible and focused on restraint’s impact on competitive conditions). For a discussion of the substantial transformation this flexible practice of interpretation has had on Supreme Court antitrust jurisprudence, see *id.* at 653-54 (detailing how effect of common law has transformed Sherman Act from influence of Chicago school to modern day economics).

83. See 15 U.S.C. § 1 (2004) (citing section 1 elements); Gillerman, *supra* note 47, at 551-52 (quoting *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d 1027, 1033 (9th Cir. 2005)) (providing requisite elements for successful Sherman Act section 1 lawsuit).

84. Sherman Antitrust Act, at § 15 (2004).

Rule of Reason Test.<sup>85</sup> The Per Se Test is reserved for contracts, agreements, and restraints that are “plainly anticompetitive” and are “conclusively presumed illegal without further examination.”<sup>86</sup> Conversely, the Rule of Reason test is used in situations “where the economic impact of the challenged practice is not obvious.”<sup>87</sup> Under the Rule of Reason, a court will consider factors that include “specific information about the relevant business, its condition before and after the restraint was imposed, and the restraints history, nature, and effect.”<sup>88</sup> The following analysis will utilize the Rule of Reason Test because of the disagreement surrounding the economic impact of the Sherman Act as applied to MLB.<sup>89</sup>

### 1. *Existence of a Contract Among Two or More Separate Entities*

To establish a viable section 1 claim under the Sherman Act, plaintiffs must first prove the existence of a contract among two or more separate entities.<sup>90</sup> The alleged “contract, combination . . . or

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85. See Gillerman, *supra* note 47, at 551-52 (noting two tests courts use to determine occurrences of antitrust violations); Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.J. 213, 251 (1995) (referencing three requirements for prima facie antitrust suit).

86. See *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1, 8 (1979) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)) (describing certain agreements which have pernicious effects on competition and lack any redeeming value “are conclusively presumed to be unreasonable and therefore illegal.”). “*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.” *Nat'l Coll. Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16, n.25 (1984)) (asserting what is needed for a per se violation of section 1 under Sherman Act).

87. See Gillerman, *supra* note 47, at 552 (quoting *Jack Russell Terrier Network*, 407 F.3d 1027, 1033 (2005)). “[T]he Court considers ‘whether the restraint imposed . . . merely regulates and perhaps . . . promotes competition or whether . . . it may suppress or even destroy competition.’ If it is the latter, then the restraint will likely be found unreasonable.” See Hamilton, *supra* note 77, at 1226 (quoting *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)) (noting type of restraint).

88. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). However, this is not an exhaustive list; a company’s market power is also given significant consideration. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (examining market power and structure to assess combination’s actual effect).

89. For a discussion of some of the disagreements over competitive economic effects and the antitrust exemption in the context of franchise relocation, see *Mozes & Glicksman*, *supra* note 31, at 275-83 (discussing disagreement that persists over economic effects that may result from lifting exemption). For a discussion of the economic disagreements over the exemption, see generally Hamilton, *supra* note 77, at 1253-54.

90. See 15 U.S.C. § 1 (2004) (citing elements to prove claim); see *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2212 (2010) (citing section 1 of Sherman Act and highlighting requirements for element one). The Court in *Amer-*

conspiracy” must be concerted action which joins together separate decision-makers.<sup>91</sup> In some cases, however, the court has recognized that collaboration is needed in order for a league like MLB to operate effectively.<sup>92</sup> Thus, it must be determined “whether the restraint of trade is outweighed by the benefit that the agreement provides to consumers.”<sup>93</sup> Even if there is a history of concerted activity, that does not immunize anticompetitive conduct from section 1 scrutiny under the Sherman Act.<sup>94</sup> The Court in *American Needle* helped illustrate what needs to be considered by way of an analogy:

[A] nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to [section] 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.<sup>95</sup>

Thus, on its face, *American Needle* broadly ruled out “single entity” status for sports leagues.<sup>96</sup> As one scholar noted when commenting on *American Needle*, “where a venture is controlled by independent entities with potentially distinct interests, any agreement among them represents the joining together of potentially independent economic forces and, therefore, constitutes concerted

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*ican Needle* held that NFL teams are not single entities for purposes of section 1 when it comes to marketing teams’ individually owned intellectual property. *See id.* (describing holding of *American Needle*).

91. *See Am. Needle, Inc.*, 130 S. Ct. at 2212 (stating further requirements for single entity status).

92. *See id.* at 2216-17 (distinguishing collaborative restraints with anticompetitive effects harmful to consumers and collaborative restraints that are in consumer’s best interest); Gillerman, *supra* note 47, at 559 (recognizing that MLB clubs sometimes need to cooperate “on matters intimately affecting their economic interests”).

93. *See* Hamilton, *supra* note 77, at 1227 (citing *Broad. Music v. Columbia Broad. Sys.*, 441 U.S. 1 (1979)) (asserting that collaboration is sometimes necessary in order to offer goods to public).

94. *American Needle*, 130 S. Ct. 2201, 2214 (2010) (announcing there is no blanket immunity under section 1 of Sherman Act).

95. *See id.* at 2214 (concluding that some collaboration, or history of collaboration does not provide immunity from section 1 scrutiny under Sherman Act).

96. *See* Meir Feder, *Is There Life After Death For Sports League Immunity? American Needle and Beyond*, 18 VILL. SPORTS & ENT. L.J. 407, 420 (2011) (citing *Am. Needle v. Nat’l Football League*, 130 S. Ct. 2201, 2212 (2010)) (asserting that *American Needle* ruled out “single entity” defense not only for sports leagues, but other joint ventures of substantial and independently managed and owned businesses).

action subject to section 1.”<sup>97</sup> Another group of scholars, recognizing the impact of *American Needle*, argued that the Court and Congress are whittling down antitrust exemptions to a few select functions and therefore, baseball may stand to lose its exemption entirely.<sup>98</sup>

## 2. *Unreasonable Restraint on Trade*

Once the court determines that a contract or agreement exists amongst two or more separate entities, the court must then decide whether the contract creates an unreasonable restraint on trade.<sup>99</sup> An unreasonable restraint involves contracts or agreements that either “had, or [are] likely to have, an adverse effect on [interstate] competition.”<sup>100</sup> Under the Rule of Reason, a court will evaluate whether the challenged conduct “has an unlawful purpose or anticompetitive effect.”<sup>101</sup>

There has only been one instance of a MLB owner suing the commissioner for unreasonably restraining trade.<sup>102</sup> In that case,

97. *Id.* at 420 (describing what counts as concerted action under section 1 when a venture is controlled by independent entities with distinct interests).

98. *See Mozes and Glicksman, supra* note 31, at 283 (projecting what might come for MLB in wake of *American Needle* striking down likelihood of success for sports league using “single entity” defense).

99. *See Gillerman, supra* note 47, at 560 (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-60 (1911)) (stating that determination of unreasonable restraint is second inquiry under section 1 claim).

100. Gillerman, *supra* note 47, at 560.

101. McMahon and Rossi, *supra* note 81, at 251 (quoting E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY, AND PROCEDURE* 33, 80 (3d ed. 1994)). To determine whether challenged conduct has an unlawful purpose or anticompetitive effect:

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.*; *see also Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (listing relevant factors for determining anticompetitive behavior); *see Gillies, supra* note 74, at 654 (describing how initial burden is placed on plaintiff to prove activity unreasonably restrains trade); *see Gillerman, supra* note 82, at 560 (“It is this requirement – that plaintiffs be able to demonstrate the actual, tangible anticompetitive effects of the restraint – wherein the first major obstacle in proving this claim lies.”).

102. *See Bud Selig Says MLB Will Run Dodgers*, ESPN LA (Apr. 21, 2011, 5:03 PM), <http://sports.espn.go.com/los-angeles/mlb/news/story?id=6397488> (detailing other attempt by MLB owner to sue commissioner).

*Finley & Co. v. Kuhn*,<sup>103</sup> Oakland Athletics owner Charles Finley sued MLB Commissioner Bowie Kuhn for preventing Finley from selling the contracts of star players to the Red Sox and Yankees.<sup>104</sup> The Seventh Circuit held that Kuhn exercised his power appropriately in the “best interests” of baseball and did not arbitrarily, capriciously, or unreasonably restrict trade.<sup>105</sup> No commissioner, however, has ever taken the drastic step of restraining an owner from the game by kicking him out of MLB for financial mismanagement.<sup>106</sup> An owner found in this situation may be able to prove an unreasonable restraint on trade through a variety of arguments revealing the anticompetitive nature of the commissioner’s actions.

#### a. Ancillary Restraints

One way of proving anticompetitive behavior is through the “ancillary restraints doctrine,” which requires that rules be tailored to complete league objectives.<sup>107</sup> Under the ancillary restraints doctrine, courts must evaluate (1) whether a challenged agreement is ancillary to an efficiency-enhancing collaboration, and (2) whether the restraints are reasonably necessary to achieve the efficiency benefits produced by collaboration.<sup>108</sup> It originated from

103. 569 F.2d 527 (7th Cir.), *cert denied*, 439 U.S. 876 (1978).

104. *See id.* at 531 (holding MLB Commissioner’s decision to disapprove of player trades under authority of “best interests” did not constitute unreasonable restraint on trade in violation of section 1 of Sherman Act). When Commissioner Kuhn voided the trades made by Finley, the Oakland owner said, “Kuhn ‘sounds more like a village idiot than a commissioner of baseball’ and [he subsequently] sued to have the deals go through, charging restraint of trade.” *See Bud Selig Says MLB Will Run Dodgers*, *supra* note 102 (detailing Finley’s claim against commissioner); *see McMahon & Rossi*, *supra* note 85, at 253 (noting that Finley case may indicate that “decisions made by the Commissioner regarding player trades under the Commissioner’s ‘best interests of baseball’ authority are exempt from antitrust scrutiny.”).

105. *See Finley & Co.*, 569 F.2d 527, 531 (finding that commissioner has broad authority to act in best interests of baseball, regardless of moral turpitude or whether transaction or practice complies with MLB rules).

106. *See Mead*, *supra* note 2 (noting previous takeovers by MLB commissioners, but none have ever occurred for complete mismanagement). In the past, most disputes have ended with owners walking away from the game because of the disincentive to challenge MLB’s overarching and seemingly impenetrable antitrust exemption. *See McCann*, *supra* note 17 (commenting on rare instances where owners challenge each other or MLB under antitrust laws).

107. *See Thomas A. Piraino, Jr., A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U.L. REV. 889, 930 (1999) (explaining that under ancillary restraints doctrine, restraints unrelated to league’s efficiency objectives would be deemed void).

108. *See Stephen F. Ross and Stefan Szymanski, Open Competition in League Sports*, 2002 WIS. L. REV. 625, 640 (2002) (describing requisite elements for violation of section 1 under ancillary restraints doctrine).

William Howard Taft's holding in *United States v. Addyston Pipe & Steel Co.*<sup>109</sup>

The ancillary restraints doctrine was first applied to sports leagues in *NCAA v. Board of Regents*.<sup>110</sup> In the *NCAA* case, the Court held that the television plan in question did not produce any pro-competitive effects because it reduced the volume of television rights sold and did not reduce the price of televised games.<sup>111</sup> Only restraints that bear a reasonable relationship to the league's efficiency objectives are ancillary, and thus subject to a balancing test of their efficiency objectives against any potential anticompetitive effects.<sup>112</sup> Legitimate league objectives that are ancillary restraints include competitive balance, fan interest, and scheduling efficiency.<sup>113</sup> However, leagues are not allowed to enforce restraints, even in these areas, if they can accomplish the same objectives through less restrictive means.<sup>114</sup> Courts place the burden on leagues to prove their efficiency objectives and membership rules are ancillary, and therefore reasonable and not anti-competitive.<sup>115</sup>

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109. 175 U.S. 211 (1899) (holding that naked restraints unrelated to joint venture's procompetitive purpose should be void). A restraint of trade should only be permissible when it is "ancillary to the main purpose of a contract reasonably adapted and limited to the necessary protection of a party in carrying out of such a purpose." *Id.* at 283. See Ross and Szymanski, *supra* note 108, at 639-40 (citing *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899)) (marking beginning of ancillary restraints application).

110. 468 U.S. 85 (1984). See Ross and Szymanski, *supra* note 108, at 640 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 115-16 (1984)) (noting that court's decision to restrain output of televised games had adverse effects on price, output, and responsiveness of output to consumer demand). The recent adoption and revival of the ancillary restraints doctrine "leaves little doubt that the approach should be used to analyze the membership rules of sports leagues." See Thomas A. Piraino, *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1709 (1996) (advocating for adoption of ancillary restraints doctrine by federal courts to consider relationship between league's efficiency objectives and membership requirements).

111. See *NCAA*, 468 U.S. 85, 115 (noting uniqueness of college football and how there's no need for product to compete against nonexistent competitors, especially when *NCAA* television plan reduces volume of television rights sold). These types of restraints in closed leagues "[bear] [the] hallmarks of an unreasonable restraint on trade." See Piraino, *supra* note 107, at 940 (arguing that closed league structure allows league to restrict number of franchises below efficient level).

112. See Piraino, *supra* note 107, at 930-31 (noting this inquiry should be able to confirm a restraint's net competitive effect without conducting complicated economic analysis).

113. See Piraino, *supra* note 110, at 1709 (providing a non-exhaustive list of what qualifies as a legitimate league objective).

114. See *id.* (noting restrictions on league objectives).

115. See *id.* (advocating fairness of shifting burden to leagues because they are in best position which membership rules are necessary to accomplish their efficiency objectives).

b. Essential Facilities

Another way of proving anticompetitive behavior is through the “essential facilities doctrine.”<sup>116</sup> Courts have characterized essential facilities as “any joint ventures which control a non-duplicable resource to which access is necessary in order to compete effectively in a relevant market.”<sup>117</sup> The doctrine dates back to 1912 from the Supreme Court case, *United States v. Terminal Railroad Association*.<sup>118</sup> This case concerned fourteen railroads owned by the Terminal Railroad Association.<sup>119</sup> In *Terminal Railroad*, no competing railroad could access St. Louis from the east without first using the Association’s facilities.<sup>120</sup> The Court held that the Association must permit other railroads to use their facilities “upon such just and reasonable terms as shall place such railroads upon a plane of equality in respect of benefits and burdens with the [current owners].”<sup>121</sup> A multitude of other Supreme Court cases followed *Terminal Railroad’s* precedent.<sup>122</sup>

As applied to sports leagues, the “essential facilities doctrine” does not allow leagues like MLB to arbitrarily refuse to admit qualified applicants because the leagues control all means of entry into

116. *See id.* at 1689 (asserting that sports leagues are essential facilities).

117. *Id.* (quoting LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST 131 (1977)). “If a group of competitors, acting in concert, operate a common facility and if due to a natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate a facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.” LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST 131 (1977).

118. 224 U.S. 383 (1912). *See Piraino, supra* note 110, at 1690 (citing *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912)) (marking beginning of essential facilities doctrine).

119. *See Terminal R.R. Ass’n*, 224 U.S. 383, 395-96. The Association controlled the only means for railroads to access St. Louis from the east over two bridges crossing the Mississippi River. *See id.* (laying out facts for why bridges constituted “essential facilities”).

120. *See id.* at 395-96 (explaining why none of twenty-four rail lines connecting to St. Louis could pass through city without first using Association’s bridge).

121. Piraino, *supra* note 110, at 1690 (quoting *Terminal R.R.*, 224 U.S. 383, 411) (asserting that all other railroads must be permitted to use bridges and ferry).

122. *See Associated Press v. United States*, 326 U.S. 1, 12-14 (1945) (holding that members of Associated Press cannot exclude competitors from membership with news service); *see also Radiant Burners v. People Gas Light & Coke Co.*, 364 U.S. 656, 658-60 (1961) (holding industry-wide standards-setting organization unreasonably restrained trade because discretionary seal of approval was required for participation in relevant market); *see also Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 344-45 (1963) (holding that denial of access to private wire system, section 1 violated because of inability to compete in over counter market for sale of securities).

the relevant market.<sup>123</sup> The primary reasoning behind this logic is the fact that sports are not interchangeable.<sup>124</sup> This lack of interchangeability imposes a duty of essential facility operators to deal fairly with members or applicants, or to continue an already existing relationship.<sup>125</sup> Some circuits use a four-part test when assessing an essential facilities claim that includes: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to the competitor; and (4) the feasibility of providing the facility.<sup>126</sup> Given these considerations, scholars argue the burden should be placed on leagues like MLB "to demonstrate a valid efficiency justification for any of their restrictions on membership."<sup>127</sup>

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123. See Piraino, *supra* note 110, at 1693 (describing application of "essential facilities" doctrine to sports leagues and league membership); see also A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 46 (2003) (noting criticism essential facilities doctrine has received, but how some scholars still approve of its application).

124. Courts have recognized, from a consumer perspective, that sports are not interchangeable with other sports or forms of entertainment. See *NCAA*, 468 U.S. 85, 111-12 (1984) (holding that college football broadcasts constituted a separate market because they are watched by a unique audience); see also Piraino, *supra* note 110, at 1694 (noting that fans have not switched allegiance from their preferred sport to others because of increased ticket prices, strikes, or other economic difficulties). Additionally, evidence suggests that consumers are not likely to consider competing baseball leagues comparable to MLB's American or National Leagues. See also Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 948 (1999) (describing how leagues cannot reject qualified members or applicants to leagues because resources cannot be reasonably duplicated given sheer impossibility for prospective owners to form rival leagues).

125. See Daryl Lim, *Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*, 17 ALB. L.J. SCI. & TECH. 481, 488 (2007) (asserting how access to essential facilities must be given on reasonable and non-discriminatory terms).

126. See Froomkin & Lemley, *supra* note 123, at 46 (citing *MCI Commc'n Corp. v. AT&T*, 708 F.2d 1081, 1097 (7th Cir. 1983)) (stating test used in some jurisdictions for determining what constitutes essential facilities). Recent case law suggests that the essential facilities doctrine has been limited to specific circumstances "where foreclosure of competition in the downstream market would occur or where the refusal of the [essential facilities doctrine] would help the owner to acquire or maintain a monopoly in that market." See Lim, *supra* note 125, at 489 (citing Froomkin & Mark Lemley, *supra* note 123, at 46) (declaring there must be foreclosure in downstream market or monopolistic effect for use of essential facilities doctrine).

127. See Piraino, *supra* note 110, at 1705 (recognizing that membership is sine qua non for participation and therefore any restriction on membership must have efficiency justifications).

### 3. *Affects Interstate Commerce*

After finding that a contract or agreement has an unreasonable restraint on trade, a court must determine if this restraint affects interstate commerce.<sup>128</sup> The issue of baseball and its effect on interstate commerce was first discussed in *Federal Baseball*.<sup>129</sup> In a rare judicial aberration from Justice Oliver Wendell Holmes, the Supreme Court held that baseball did not have an effect on interstate commerce.<sup>130</sup> Some fifty years later in *Flood v. Kuhn*, the Supreme Court overturned this portion of *Federal Baseball* by explicitly stating that “[p]rofessional baseball is a business and it is engaged in interstate commerce.”<sup>131</sup> Therefore, the Supreme Court eradicated any previous ambiguity with the issue of baseball and its effects on commerce.<sup>132</sup>

### III. MCCOURT V. SELIG: A BATTLE OF LEGAL HEAVYWEIGHTS

In October 2011, it appeared that Frank McCourt would not surrender his ownership of the Los Angeles Dodgers, but on November 1, 2011, McCourt finally decided to settle with Selig and MLB.<sup>133</sup> Without the luxury of an antitrust exemption, however, McCourt’s settlement with MLB may have had an entirely different outcome.<sup>134</sup> In fact, without this luxury, Bud Selig’s arbitrary decision not to accept any new television deal allowing McCourt to

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128. See Gillerman, *supra* note 47, at 564 (indicating third and final prima facie element needed for successful section 1 suit under Sherman Act).

129. See *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 209 (1922) (finding that “personal effort, not related to production, is not a subject of commerce.”)

130. See *id.* at 209 (holding that business of baseball did not have effect on interstate commerce and was therefore not subject to federal antitrust regulation).

131. See *Flood*, 407 U.S. 258, 282 (1972) (reversing at least some of *Federal Baseball* holding when concluding that baseball is engaged in interstate commerce).

132. See Burns, *supra* note 55, at 496 (noting that *Flood* recognized baseball is engaged in interstate commerce, but that Court refused to overrule entire exemption out of concern for its retroactive effect on years of precedent); see also Ross, *supra* note 54, at 192 (asserting *Federal Baseball* conception of commerce was clearly overruled even prior to *Flood* by post-New Deal Court).

133. See Shaikin, *supra* note 18 (detailing agreement McCourt made with MLB on November 1, 2011 to sell Dodgers).

134. See Michael McCann, *Dodgers Deal is a Victory for Selig, and a Warning for Other Teams*, SPORTS ILLUSTRATED (Nov. 2, 2011), [http://sportsillustrated.cnn.com/2011/writers/michael\\_mccann/11/02/dodgers.sale/index.html](http://sportsillustrated.cnn.com/2011/writers/michael_mccann/11/02/dodgers.sale/index.html) (noting how settlement with MLB signifies major victory for inherent power of Commissioner’s Office). The settlement with MLB reveals that Bud Selig has the power and authority to take control of teams and force out owners he finds unacceptable. See *id.* (arguing that settlement is warning to league that Bud Selig has power to expel owners he dislikes).

maintain ownership of the team would probably have been viewed as an unreasonable restraint on trade.<sup>135</sup>

Although there is a strong case against McCourt for his financial mismanagement of the team and use of Dodger money to finance his lavish lifestyle, Bud Selig has revealed his totalitarian tendencies and the extent of his unchecked power throughout the entire legal debacle with McCourt.<sup>136</sup> If Selig did force McCourt out against his will, then it would be the first time a commissioner has forced an owner to sell his team since 1912 when Philadelphia Phillies' Horace Fogel was banished from MLB.<sup>137</sup> Unlike Fogel, however, McCourt may be successful in fighting back against the commissioner.<sup>138</sup> By filing an antitrust suit against Selig and MLB, McCourt may be able to successfully challenge the veracity of MLB's antitrust exemption and Bud Selig's totalitarian regime.<sup>139</sup>

## A. Bottom of the Ninth for McCourt - Sherman Up to Bat

### 1. *Existence of a Contract*

In his antitrust suit against MLB and Selig, Frank McCourt will first need to prove the existence of a contract that represented concerted action of separate entities against his ownership of the team.<sup>140</sup> Although no court has determined whether MLB falls within the single entity scope, MLB's constitution contains provi-

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135. *See id.* (illustrating Selig's perhaps unjust power over MLB). Baseball's antitrust exemption as it currently stands may prevent McCourt from challenging Bud Selig's authority as commissioner, but a lawsuit may be possible if MLB had to adhere to antitrust laws. *See id.* (arguing that this is a foreboding incident for other MLB owners because it indicates that Selig has power to remove owners at will and is not afraid to use it).

136. *See Bud Selig: Lord of the Realm, supra* note 68 (reporting Selig's tendency to selectively enforce his powers to help his friends, but not his foes like McCourt); *see also* McCann, *supra* note 17 (discussing Selig's ever-expanding power in legal battle versus McCourt).

137. *See* Bill Shaikin, *Selig Weighs His Dodgers Options*, L.A. TIMES, Sept. 15, 2010, at 1 (stating last time owner removed from MLB). The MLB Commissioner who preceded Bud Selig, Fay Vincent, expressed his concerns about a forced sale of the Dodgers by Selig when saying, "[n]obody will want to buy into baseball if the commissioner can get upset and move to take away a franchise." *Id.* *See* Lalli, *Horace Fogel: The Strangest Owner in Phillies History*, PHILLY SPORTS HISTORY (July 6, 2011), <http://phillysportshistory.com/2011/07/06/horace-fogel-the-strangest-owner-in-phillies-history/> (discussing MLB's ousting of Fogel for his numerous accusations against league).

138. *See* McCann, *supra* note 17 (indicating McCourt may have legal options, including antitrust claims, against Selig and MLB).

139. *See* Calcaterra, *supra* note 16 (stating that Selig's takeover of Dodgers could imperil baseball's antitrust exemption).

140. *See* 15 U.S.C. § 1 (2004) (declaring contracts that restrain trade or commerce among states illegal); *see also* Am. Needle v. Nat'l Football League, 130 S. Ct. 2201, 2212 (2010) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467

sions similar to those relied upon by the Supreme Court when rejecting the NFL's single entity defense.<sup>141</sup> Therefore, courts are likely to interpret MLB clubs as independent organizations operating in a unified league for the purposes of the first element under section 1 of the Sherman Act.<sup>142</sup>

McCourt will need to prove that these independent organizations, specifically the twenty-nine other MLB owners, conspired with Bud Selig to terminate his ownership interest in MLB.<sup>143</sup> Many owners expressed their private concerns and frustrations to Bud Selig, worried about the devaluation of their franchises because of McCourt's financial and operational ineptness.<sup>144</sup> Enough owners reportedly shared Selig's "deep concerns" for the financial state of the Dodgers to encourage Selig to take over the day-to-day operations of the team in April 2011.<sup>145</sup> Undoubtedly, the drama that has ensued since – allegedly undervalued television deals, bankruptcy, ongoing divorce proceedings, and numerous public criticisms of the league – has inspired at least some owners to back Selig in his expulsion of Frank McCourt from MLB.<sup>146</sup> In fact, one

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U.S. 752, 769 (1984)) (requiring that concerted action be joining together of separate economic decisionmakers).

141. See Gillerman, *supra* note 47, at 558 (citing L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (1984)) (advocating that similarities between MLB and NFL allow for conclusion that like NFL, MLB should not be considered single entity). While MLB clubs cooperate on matters intimately affecting their economic interests, they are constantly competing against one another for broadcast revenue, free agent players, ticket sales, and merchandise. See Feder, *supra* note 96, at 420 (arguing that *American Needle* ruled out single entity defense for sports leagues).

142. See Gillerman, *supra* note 47, at 559 (citing Major League Const. art. I, II, § 1) (asserting that MLB Constitution should be analyzed in same light as NFL's Constitution and therefore should not afford MLB single entity status under section 1 of Sherman Act); see Mozes & Glicksman, *supra* note 31, at 283 (arguing single entity defense likely to be unsuccessful in wake of *American Needle*).

143. See Feder, *supra* note 96, at 420 (discussing concerted action under section 1 and how independent entities must be acting together).

144. See Brown, *supra* note 6 (noting that Selig is not acting alone and has support of much of baseball). In recent court filings, Selig and MLB argued that McCourt's attempts to sell television rights "is not in the best interest of the Debtors, Major League Baseball, or the 29 other MLB Clubs." See Maury Brown, *In Bold Move, MLB Files to Force Frank McCourt to Sell Dodgers*, BIZ OF BASEBALL (Sep. 24, 2011, 10:16 AM), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=5435:in-bold-move-mlb-files-to-force-frank-mccourt-to-sell-dodgers&catid=70:mlb-club-sales&Itemid=157](http://bizofbaseball.com/index.php?option=com_content&view=article&id=5435:in-bold-move-mlb-files-to-force-frank-mccourt-to-sell-dodgers&catid=70:mlb-club-sales&Itemid=157) (acknowledging concerted action in attempts to force sale of Dodgers).

145. See Brown, *supra* note 6 (suggesting Selig had support of other team owners to take over Dodgers and remove McCourt from running day-to-day operations of team).

146. See Ozanian, *supra* note 70 (describing Selig's request for sale of Dodgers due to McCourt's extracting too much equity from Dodgers and bringing unnecessary drama to sport). It is likely that other owners will support Selig out of con-

team executive stated “McCourt should know that Selig has the support of much of baseball, and that Selig probably won’t stop until he’s forced McCourt to sell.”<sup>147</sup> Furthermore, MLB owners know they only stand to benefit from the Dodgers’ sale as they lick their lips at the thought of splitting \$2.15 billion in revenue sharing.<sup>148</sup> Therefore, with evidence of a “contract, combination . . . or conspiracy” and concerted action of separate decision-makers, Frank McCourt can probably meet the first element for a section 1 claim under the Sherman Act.<sup>149</sup>

## 2. *Unreasonable Restraint*

The hardest element for McCourt to prove is that the agreement and conspiracy to remove him from MLB constitutes an unreasonable restraint on trade.<sup>150</sup> McCourt’s golden tickets for proving that an unreasonable restraint occurred are the “ancillary restraints” and “essential facilities” doctrines.<sup>151</sup> If Selig chose to expel McCourt from MLB against his will, then McCourt could argue: (1) Selig is in violation of the ancillary restraints doctrine because McCourt is in compliance with MLB rules, and therefore any membership rules would not be reasonably tailored to league objectives, and (2) that MLB is an essential facility, and therefore cannot restrain McCourt from participating, especially considering his compliance with MLB rules.<sup>152</sup> Given these two arguments, Bud Se-

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cerns for franchise devaluation. See Brown, *supra* note 6 (considering Selig’s argument that McCourt’s attempts to auction off television rights are not in “best interests of baseball”).

147. Brown, *supra* note 6 (noting Selig’s vendetta against McCourt and his persistence to oust McCourt from ownership of Dodgers).

148. See Steve Dilbeck, *Dodgers’ Frank McCourt: MLB Owners’ New Inspiration*, L.A. TIMES (Feb. 1, 2012, 1:59 PM), <http://latimesblogs.latimes.com/dodgers/2012/02/dodgers-frank-mccourt-mlb-owners-new-inspiration.html> (recognizing how trickle-down effect of revenue sharing in MLB will make every owner richer from Dodgers’ sale); see also Futterman, *supra* note 26 (noting high sale price of Dodgers’ deal with Magic Johnson’s ownership group).

149. See Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (stating contracts, combinations, or conspiracies in restraint of trade are per se illegal under Act).

150. See *id.* (outlining elements); see also Gillerman, *supra* note 47, at 560 (defining “unreasonable restraints”). “Unreasonable restraints are those agreements and combinations that either ‘had, or [are] likely to have, an adverse effect on [interstate] competition.’” *Id.*

151. See Piraino, *supra* note 107, at 930 (arguing that ancillary restraints must be related to league’s efficiency objectives); see also Piraino, *supra* note 110, at 1689 (explaining why sports leagues fall under essential facilities doctrine).

152. For a discussion of what constitutes a violation of the ancillary restraint doctrine, see Ross & Szymanski, *supra* note 108, at 640 (stating elements for viable challenge to ancillary restraints doctrine). For a discussion of what constitutes a violation of the essential facilities doctrine see Piraino, *supra* note 110, at 1709

lig is probably imposing an unreasonable restraint on McCourt if he forces him out of baseball.<sup>153</sup>

a. Ancillary Restraints: MLB's Poorly Tailored Membership Rules

Under the ancillary restraints doctrine, MLB membership rules will first need to be evaluated to determine if they are overly broad and not tailored to completing league objectives.<sup>154</sup> The membership rules in question here are financial requirements that Bud Selig and MLB charge McCourt with failing to meet.<sup>155</sup> MLB's allegation that McCourt failed to meet these requirements led to Selig's takeover of the Dodgers in April 2011.<sup>156</sup>

The only financial requirement that teams must follow is the debt limit rule, requiring franchises not to have debt exceed ten times their operating income.<sup>157</sup> Prior to filing for bankruptcy protection and receiving a loan from MLB, McCourt received two separate loans from Fox, and he also leveraged assets to finance the purchase and operation of the Dodgers.<sup>158</sup> Not only did Selig and the other owners know about the loans McCourt used to purchase the team, they welcomed him and his unstable financial situation into the league with open arms.<sup>159</sup> Nevertheless, McCourt does not appear to have broken MLB's financial requirement because he maintained \$33 million of operating income and had less than

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(describing what plaintiff needs to prove for viable claim under essential facilities doctrine).

153. Both of these restraints may be proven to have an adverse or anticompetitive effect on interstate competition, and therefore may be deemed to be unreasonable. See McMahon & Rossi, *supra* note 81, at 251 (stating that "unlawful purpose or anticompetitive effect[s]" are necessary for proving unreasonable restraints).

154. See Piraino, *supra* note 110, at 1707 (asserting that restraints unrelated to league's efficiency objectives are deemed to be void).

155. See Bill Shaikin, *Frank McCourt Goes on a Fishing Expedition*, L.A. TIMES (Sept. 26, 2011), <http://articles.latimes.com/2011/sep/26/sports/la-sp-0927-mlb-dodgers-20110927> (reporting that Selig charges McCourt with using Dodgers as his own personal "cash cow"). MLB claims it has grounds to kick McCourt out of the league because "[a] Club owner must be well-capitalized and cannot use the team as a personal 'cash cow.'" *Id.*

156. See PRESS RELEASE, *supra* note 4 (declaring takeover of Dodgers due to "deep concerns regarding the finances and operations of the Dodgers . . .").

157. See Ozanian, *supra* note 70 (describing how debt cannot exceed ten times operating income, which includes earnings before interest, taxes, depreciation, and amortization).

158. See *id.* (noting multiple loans McCourt took out to purchase and finance Dodgers).

159. See Shaikin, *supra* note 155 (stating that MLB and other owners knew of loans from Fox and Bank of America, yet still approved his purchase of Dodgers).

\$300 million in debt.<sup>160</sup> While MLB undoubtedly has a legitimate efficiency objective to minimize franchise debt, if McCourt is in compliance with financial rules, then it does not seem equitable for MLB to expand the scope of the rule solely on his account.<sup>161</sup> Subjective and arbitrary enforcement of this membership rule is overly broad, unpredictable, and not tailored to the league's efficiency objective for limiting franchise debt.<sup>162</sup>

Even if McCourt is in violation of the debt limit rule, he is not alone.<sup>163</sup> At least nine teams in MLB, which may include the Dodgers, are in violation of MLB's debt limit rule.<sup>164</sup> Thus, it may be difficult for Bud Selig to enforce the membership rule that owners give the commissioner the power to act in the "best interests of baseball" to limit debt, enhance profitability, and maintain a competitive balance.<sup>165</sup> If Selig attempts to oust McCourt from the league for spending team finances on personal matters, such as his divorce settlement, then McCourt could reveal Selig's selective enforcement of the "best interests" clause.<sup>166</sup>

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160. See Ozanian, *supra* note 70 (noting that remaining debt, primarily on stadium and other real estate, does not exceed ten times operating income and therefore does not violate MLB's debt limit rule); see also #3 *Los Angeles Dodgers*, FORBES (2011), [http://www.forbes.com/lists/2011/33/baseball-valuations-11\\_Los-Angeles-Dodgers\\_338671.html](http://www.forbes.com/lists/2011/33/baseball-valuations-11_Los-Angeles-Dodgers_338671.html) (indicating debt/value percentage and amount of revenue).

161. See *id.* (illustrating that McCourt is in compliance with MLB financial guidelines); see also Piraino, *supra* note 107, at 930-31 (asserting that restraints on membership must be tailored and accomplished through least restrictive means possible).

162. See Piraino, *supra* note 107, at 930-31 (noting how restrictions must be narrowly tailored).

163. See Bill Shaikin, *Debt Is Not So Unique in MLB Nine of 30 Teams Are Said to Be Over Limit, but McCourt's Use of Funds Makes Dodger's Situation Complicated*, L.A. TIMES, June 3, 2011, at 1 (noting debt troubles for nine MLB teams).

164. See *id.* (including successful teams such as Philadelphia Phillies, Detroit Tigers, and Texas Rangers).

165. See Ozanian, *supra* note 70 (predicting that Selig could use "best interests" clause to say that McCourt violated his fiduciary duty as owner of Dodgers).

166. See McCann, *supra* note 17 (noting other owners have many personal and professional failings, but none have been taken over or ousted from ownership). McCourt's goal here is not to slander other owners, but to give perspective to the problem by characterizing his financial and personal situation as far from extreme. See *id.* (identifying McCourt's motives). See also Eric Morath, *Dodgers: Selig Targets L.A. Team as Fans Die Elsewhere*, WALL ST. J. (July 18, 2011, 5:19 PM), <http://blogs.wsj.com/bankruptcy/2011/07/18/dodgers-selig-targets-la-team-as-fans-die-elsewhere/> (discussing discriminatory treatment of Dodgers while teams with arguably worse problems receive preferential treatment from Selig). One fan died in 2009 at the home of the Los Angeles Angels after getting attacked in the bleachers, yet Selig did not take over the Angels. See *id.* (noting Angels' troubles in 2009). Additionally, three men faced murder charges in connection with the beating death of a man outside the Philadelphia Phillies' ballpark in 2009, but Selig did not take over the Phillies. See *id.* (discussing Phillies' incident in 2009). However,

One example of Selig's selective enforcement is Florida Marlins owner, Jeffrey Loria.<sup>167</sup> Loria reportedly took \$198 million from revenue sharing and placed some of the money into a company owned by himself and the club president.<sup>168</sup> Perhaps the most glowing example, however, of selective enforcement is Selig's treatment of the New York Mets owner, Fred Wilpon, who was potentially involved in the biggest Ponzi scheme in world history.<sup>169</sup> The Mets are in violation of the league's debt rule, but Wilpon's friendship with Selig has helped prevent the commissioner from seizing control of his franchise.<sup>170</sup> In fact, Selig approved a \$40 million loan from Bank of America to Wilpon on top of the \$25 million loan Wilpon still owes to MLB.<sup>171</sup> Selig made this loan with knowledge that \$303 million is at stake in the lawsuit against Wilpon, where Irving Picard, the trustee in the case, is seeking to prove that the Mets owner was "willfully blind to Madoff's scheme while investing with him."<sup>172</sup> The Mets must pay \$83 million to Picard regardless of the result in the case because of the fictitious profits

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when Bryan Stow, a San Francisco Giants fan, was beaten in the Dodgers parking lot in 2011 and survived, Selig cited this as a primary reason for taking control of the team. *See id.* (contrasting Selig's reaction to Dodgers' incident with his reaction to incidents at other ballparks).

167. *See* Jeff Passan, *Marlins Exes Funneled Cash to Themselves*, YAHOO! SPORTS (Aug. 27, 2010), <http://sports.yahoo.com/mlb/news?slug=jp-marlinsfinancials082810> (explaining how Marlins executives set up corporation to funnel team revenue to themselves).

168. *See id.* (detailing Loria's personal business transactions with MLB money); *see also* Bill Shaikin, *supra* note 155 (reporting how Loria allegedly took same amount of funds from revenue sharing for personal use that McCourt is accused of taking from Dodgers).

169. *See Bud Selig: Lord of the Realm*, *supra* note 68 (explaining how Wilpon was engaged in one of biggest criminal frauds in American history, yet Selig allowed him to maintain ownership). Aside from the \$550 million the Mets lost when Bernie Madoff's Ponzi scheme unraveled in 2009, Wilpon faces a possible trial in 2012 over claims by the trustees of Madoff's victims that Wilpon turned a blind eye to signs that Madoff was up to no good. *See* Richard Sandomir, *For Mets, Vast Debt and Not a Lot of Time*, N.Y. TIMES, Dec. 25, 2011, at 6 (describing allegations against Wilpon by trustees of Madoff victims).

170. *See* O'Connor, *supra* note 69 (reporting that Selig is favoring his good friend Wilpon over McCourt, even though they are in similar situations).

171. *See* Sandomir, *supra* note 169 (noting preferential treatment Wilpon receives from Selig as opposed to Selig's treatment of McCourt under same private laws of MLB). The Mets are drowning in debt with a \$450 million loan for their broadcasting network, SNY, and bonds payments for Citi Field that rose from \$19 million to \$43.7 million this past year. *See id.* As the article author reported, "That is a lot of borrowing for a team that lost \$70 million last season and had faltering attendance." *Id.*

172. *See* Anthony DiComo, *Wilpon, Katz Must Go to Trial in Madoff Case*, MLB (Mar. 5, 2012), [http://mlb.mlb.com/news/article.jsp?ymd=20120305&content\\_id=27017478&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20120305&content_id=27017478&vkey=news_mlb&c_id=mlb) (stating claim and damages sought against Mets owner in Madoff case).

reported by Wilpon and his ownership partner, Saul Katz.<sup>173</sup> Furthermore, another example of Selig's selective enforcement is his handling of the Texas Rangers who were in violation of the debt limit rule dating back to 2008, but were not taken over by MLB.<sup>174</sup> Thus, Bud Selig's argument that McCourt is not acting in the "best interest of baseball" blatantly reveals the arbitrary and discretionary nature of this membership rule.<sup>175</sup>

The arbitrary and vast powers of the Commissioner's Office under Bud Selig are overly broad and not reasonably necessary to achieve the efficiency benefits gained from collaboration with MLB.<sup>176</sup> Without uniform application of membership rules like the debt limit rule or the "best interests" clause, members of the league may be unjustly expelled, and therefore unreasonably restrained from participating.<sup>177</sup> The stated efficiency benefits of vesting the Commissioner with this authority is for him to provide a centralized authority to protect the integrity and best interests of the league.<sup>178</sup> However, this broad, sweeping, and arbitrary power is unreasonably restrictive when it is used to take over and expel some owners with financial problems, but not others.<sup>179</sup> This membership rule most likely violates the ancillary restraints doctrine be-

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173. *See id.* (recognizing large sum of required payment to trustee aside from potential damages in lawsuit).

174. *See Ozanian, supra* note 70 (noting that Rangers had negative operating income in 2008, but Selig and MLB did not take over team).

175. *See Sandomir, supra* note 15 (describing ever-expanding scope of best interests clause under Selig's reign).

176. *See Ross & Szymanski, supra* note 108, at 640 (asserting requirements for ancillary restraints). For a prime example of Selig's vast and arbitrary powers, see e.g. *Bud Selig: Lord of the Realm, supra* note 68 (describing Selig's arbitrary treatment of Mets and Dodgers' cases).

177. *See Piraino, supra* note 107, at 930 (requiring that rules must be tailored to complete league objectives). This may create an anticompetitive effect of lowering franchise values, especially if owners fear they may be ousted when falling into financial difficulties. *See id.* at 930-31 (noting that inquiry of restraint's net competitive effect can be conducted without complicated economic analysis).

178. *See* Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1648 (1999) (stating efficiency justifications for vesting all power in one commissioner); *see also*, Sigman, *supra* note 59, at 304 (discussing how first commissioner demanded broad and vast powers for commissioner's office).

179. This membership rule, the "best interests" clause, is overly broad, and therefore not ancillary to the league objective of an efficient and centralized governing authority to protect the integrity and best interests of the game. *See* Pollack, *supra* note 178, at 1648 (asserting central reason for having commissioner is to protect integrity and best interests of league). It is arguable that it is not in the "best interests" of sports leagues for so many teams to be in debt, yet only one team is penalized for it. *See* Shaikin, *supra* note 163 (noting nine teams are in violation of debt limit rule).

cause it is not tailored to league objectives, given its discretionary enforcement.<sup>180</sup> Therefore, if Bud Selig prevents McCourt from participating as an owner in MLB, he is probably unreasonably restraining trade.<sup>181</sup>

b. Essential Facilities: MLB's Qualifications

Despite an argument that McCourt violated certain provisions in the Baseball Agreement and the MLB Constitution, McCourt can argue that preventing him from maintaining ownership of the Dodgers is an unreasonable restraint on trade because MLB is an "essential facility."<sup>182</sup> MLB qualifies as an essential facility because the league is a non-duplicable resource.<sup>183</sup> Thus, assuming McCourt is in compliance with MLB membership rules, Selig cannot exclude him from participating in the league because the league is the only means for accessing the relevant market.<sup>184</sup> No comparable league has survived in competition with MLB for more than a few years since the Federal League in 1915.<sup>185</sup> Moreover, McCourt cannot be forced to invest in another sports franchise because sports are not interchangeable.<sup>186</sup> Each sport has its own unique and distinctive fan base.<sup>187</sup>

Absent a valid efficiency justification for this membership restriction, McCourt will likely be granted access to the league given

180. See Piraino, *supra* note 110, at 1709 (claiming that any restraints not narrowly tailored to league objectives will be void).

181. The burden will be on Bud Selig and MLB to prove that the "best interests" clause and the debt limit membership rules are not unreasonable restraints on trade. See *id.* at 1709 (indicating burden shifts to leagues to prove membership rules are tailored to efficiency objectives).

182. See *id.*, at 1689 (arguing that sports leagues should be classified as essential facilities).

183. See *id.*, at 1692-93 (stating how MLB cannot arbitrarily refuse to admit qualified applicants because it controls all means of entry to relevant market).

184. See LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 131 (1977) (arguing that when competitor controls all means for entry to relevant market, that competitor must give access to excluded competitors on reasonable, non-discretionary terms)

185. See *American and National League Encyclopedia*, BASEBALL-REFERENCE (2011), <http://www.baseball-reference.com/leagues/> (noting that last defunct league was Federal League in 1915).

186. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 111-12 (1984) (finding that college football is watched by unique audience, so sport cannot be interchangeable with others); see also Piraino, *supra* note 110, at 1694 (noting that fans will not switch allegiance between sports even in face of increased ticket prices).

187. See *NCAA*, 468 U.S. at 111-12 (recognizing targeted audiences for marketing purposes in college football).

the aforementioned considerations.<sup>188</sup> MLB and Bud Selig might be able to argue, however, that the business of baseball will benefit from restricting McCourt from participating in the league.<sup>189</sup> In response, McCourt can argue that although attendance may have dropped in the past season, the Dodgers still maintained the 12th highest payroll and an overall winning record under his ownership.<sup>190</sup> Additionally, in his first years as an owner, MLB commended McCourt for cutting the inefficiencies of the Dodger's business model used by the previous Fox ownership group.<sup>191</sup> Therefore, with an opportunity to reorganize, it is reasonable to believe McCourt would be capable of returning the Dodgers to their successful and profitable past.<sup>192</sup> While he had numerous financial transgressions, this is not a valid efficiency justification when considering the widespread financial difficulties across the league.<sup>193</sup> Penalizing McCourt and not others would be an arbitrary refusal for entry to an otherwise qualified applicant, which is a

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188. See Piraino, *supra* note 110, at 1705 (asserting necessary connection between membership and participation that requires restraints to be tailored to league's efficiency justifications).

189. See Shaikin, *supra* note 155 (stating that Selig wants "well-capitalized" owner in exchange for McCourt). Under McCourt, the past season saw a drop in attendance, finishing the season with 18% decrease. See Evan Brunell, *MLB Says McCourt 'Looted' \$190M From Dodgers*, CBSSPORTS.COM (Oct. 25, 2011, 11:58 AM), <http://eye-on-baseball.blogs.cbssports.com/mcc/blogs/entry/22297882/32937221> (discussing McCourt's financial troubles and how Dodgers have been losing money).

190. See *Dodgers Total Payroll Ranks 12th in MLB*, CBS LOS ANGELES (Apr. 4, 2011, 4:15 PM), <http://losangeles.cbslocal.com/2011/04/04/dodgers-total-payroll-ranks-12th-in-mlb/> (noting that Dodger payroll for 2011 topped \$104 million); see also Gene Maddaus, *Frank McCourt Fact Check: Dodgers' Record Was Better Under Fox Ownership*, L.A. WEEKLY BLOGS (May 4, 2011, 11:36 AM), [http://blogs.laweekly.com/informer/2011/05/mccourt\\_fact\\_check\\_dodgers\\_rec.php](http://blogs.laweekly.com/informer/2011/05/mccourt_fact_check_dodgers_rec.php) (recognizing McCourt's winning record with four playoff appearances in six years). However, McCourt only has a .523 winning percentage whereas Fox, the previous owner, had a slightly better winning percentage at .524. See *id.* (distinguishing winning percentages).

191. See Ramona Shelburne, *Dodgers Situation a Comedy, Drama*, ESPN (Jan. 19, 2012, 10:26 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7475039/los-angeles-dodgers-situation-comedy-drama](http://espn.go.com/los-angeles/mlb/story/_/id/7475039/los-angeles-dodgers-situation-comedy-drama) (noting that "MCCourt initially did a good job of getting the Dodgers' financial house in order after Fox ran the team at a substantial loss.").

192. See Frank H. McCourt, Jr. *Owner and Chairman*, MLB.COM (2011), <http://mlb.mlb.com/la/community/executives/fmccourt.html> (noting McCourt's accomplishments as owner of Dodgers). Under his reign the Dodgers reached back-to-back National League Championship Series ("NLCS") for the first time in thirty-one years (1977-78), and prior to his purchase of the team the Dodgers had not reached the NLCS or won a postseason game in fifteen years. See *id.* (listing McCourt's accomplishments).

193. See Shaikin, *supra* note 163 (examining widespread debt problems in MLB, with at least nine teams in violation of debt limit rule).

direct violation of the essential facilities doctrine.<sup>194</sup> Therefore, assuming that a judge finds that McCourt did not violate the Baseball Agreement with MLB, it is likely that McCourt could prove that preventing his membership from MLB would unreasonably restrain his access to an essential facility.<sup>195</sup>

### 3. *Affects Interstate Commerce*

The last element McCourt must prove under a section 1 claim is that this unreasonable restraint affects interstate commerce.<sup>196</sup> Given the Court's recent history of interpreting the effects baseball has on interstate commerce, it can almost be guaranteed that any court would find that McCourt's removal from ownership affects interstate commerce.<sup>197</sup>

## IV. BASEBALL IS NOT AN ANOMALY: WHY ABOLISHING THE EXEMPTION IS IN EVERYONE'S 'BEST INTERESTS'

### A. Rule of Law

Much of the conflict between Frank McCourt and Bud Selig stems from MLB being almost completely exempted from the rule of law.<sup>198</sup> Thus, Bud Selig is able to legislate, execute, and adjudicate the private rules of baseball without concern for any anticompetitive effects that might stem from his actions.<sup>199</sup> While some owners and other baseball insiders argue profusely for the exemption's existence, more often than not the exemption hinders owners on an individual basis.<sup>200</sup> Applying the rule of law (*i.e.* the Sherman Act) to MLB owners would not only give owners an incentive to offer more competitive and reasonable employment terms to

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194. See Piraino, *supra* note 110, at 1689 (characterizing essential facilities as "any joint ventures which control a non-duplicable resource to which access is necessary in order to compete effectively in a relevant market.").

195. See *id.*, at 1689 n.49 (asserting that exclusion from essential facilities can only be made on reasonable and non-discriminatory terms).

196. See Gillerman, *supra* note 47, at 564 (noting third prima facie element that must be proven under Rule of Reason analysis).

197. See Macaluso, *supra* note 58, at 467 (commenting on Court's expansion of commerce clause jurisprudence since *Federal Baseball*).

198. See Nathanson, *supra* note 55, at 5-6 (discussing uncertainty in scope of exemption and its application to antitrust laws). *But see* Macaluso, *supra* note 58, at 481 (reasoning since Flood Act only focused on reserve clause, all other parts of MLB are still subject to exemption).

199. See Lamme, *supra* note 29, at 179-81 (listing Selig's attempts to expand power of commissioner's office and his inability to act impartially).

200. See Hamilton, *supra* note 77, at 1246 (expressing benefits of exemption for owners collectively, but how it often hinders owners individually when they are pitted against other owners or against commissioner).

players, but it would protect individual owners who are not members of Selig's inner circle of friends.<sup>201</sup> It would also place a much-needed check on the arbitrary and discretionary power of the commissioner.<sup>202</sup>

One argument often made by owners and the commissioner in favor of the exemption is the protection it provides for the unique and anomalous nature of MLB's minor league system.<sup>203</sup> The exemption currently restricts minor leaguers from negotiating multi-million dollar salaries.<sup>204</sup> Most of the expert opinion on the issue contends that the minor leagues would still survive even without the exemption.<sup>205</sup> However, considering that the minor league system was a driving force behind the narrow and precise language of the Flood Act, it is unlikely the exemption will be lifted for minor league baseball anytime soon.<sup>206</sup>

Many advocates of baseball's antitrust exemption cite the doctrine of *stare decisis* and Congressional action, or positive inaction, when arguing for the continued existence of the exception.<sup>207</sup> Overruling this judicially-created exemption, however, would not be the first time the Supreme Court overruled an archaic antitrust holding.<sup>208</sup> In fact, it was Justice Oliver Wendell Holmes himself –

201. See, e.g., Ken Rosenthal & Jon Paul Morosi, *Selig's Relationship With Mets Owner Key*, FOX SPORTS (Feb. 10, 2011, 5:58 PM), <http://msn.foxsports.com/mlb/story/bud-selig-wont-touch-new-york-mets-mess-021011> (describing Selig's close relationship with Mets owner Frank Wilpon, and favorable treatment he has given him even in light of Wilpon's involvement with Madoff scandal); see Bill Shaikin, *Dodgers Seek MLB Details*, L.A. TIMES, July 6, 2011, at 5 (comparing Selig's "abusive conduct" toward Dodgers and his "velvet glove" treatment toward Mets). For a discussion regarding the exemption and how it creates disincentives for owners from to offer more competitive and reasonable employment terms to players, see Macaluso, *supra* note 58, at 474-75 (noting leverage exemption gives owners at bargaining table and how it discourages them from accepting reasonable terms).

202. See Lamme, *supra* note 29, at 181 (calling for integrity and independence from commissioner's office).

203. See Sullivan, *supra* note 74, at 1300 (discussing debate surrounding future of minor league system and whether antitrust exemption should be abandoned).

204. See Macaluso, *supra* note 58, at 479 (noting this type of control over minor leaguers may be beneficial because it is one less thing MLB clubs have to worry about).

205. See Sullivan, *supra* note 74, at 1300 (arguing that effect on minor league system would be minimal); see Tomlinson, *supra* note 55, at 296-97 (advocating for abolishing exemption and that this would have little to no effect on minor league baseball).

206. See Macaluso, *supra* note 58, at 479 (commenting on congressmen who stressed importance of minor league baseball and having it remain exempted, even though none gave substantial reasons in support).

207. See Sullivan, *supra* note 74, at 1267 (referring to Court's aversion to overturning decision that Congress allowed to exist for many years).

208. See Gillies, *supra* note 74, at 645 (detailing Court's reversal of ninety-six year old precedent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*). For a

the creator of the 90 year old baseball antitrust exemption – who once wrote,

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>209</sup>

Not only is the concept of interstate commerce outdated from the time of *Federal Baseball*, but the game has also evolved into much more of a national, and even international, spectacle since the 1920s.<sup>210</sup> Therefore, rule of law arguments in favor of precedent should yield to antitrust laws that all businesses and industries are required to follow.

### B. Economic Efficiency

Another justification for abolishing baseball's antitrust exemption is economic efficiency. By isolating baseball from market forces, the owners and Commissioner are able to extort large sums of money through collaboration.<sup>211</sup> Similar to the way baseball emphasizes on-field competition, capitalism also requires competition to operate efficiently.<sup>212</sup> If one team on the field gets two extra outs an inning, or only has to throw one strike to get a batter out, fans would be outraged over the unfairness of the game.<sup>213</sup> Likewise, when the commissioner and the owners are not subject to the same

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discussion of other cases that have been overturned after many years of existence, see generally Fein, *supra* note 67 (discussing multitude of cases that were overturned in antitrust law).

209. See Fein, *supra* note 67 (quoting Justice Oliver Wendell Holmes and his book, *The Path of Law*).

210. See Sullivan, *supra* note 74, at 1267 (arguing that obsolete factual conditions and wealth of scholarly criticism should induce Court to overturn antitrust exemption).

211. See Hamilton, *supra* note 77, at 1248 (noting exorbitant amount owners and MLB charge expansion franchises). Tampa Bay and Arizona each had to pay \$130 million to enter the league, when thirty-six years earlier the Mariners and Blue Jays only paid \$5.2 million for an expansion draft. See Jerome Holtzman, *Expansion Draft No Joke Anymore*, CHICAGO TRIBUNE (Nov. 13, 1997), [http://articles.chicagotribune.com/1997-11-13/sports/9711130100\\_1\\_expansion-new-owners-clubs](http://articles.chicagotribune.com/1997-11-13/sports/9711130100_1_expansion-new-owners-clubs) (indicating low value of franchise verses high cost of entrance fee).

212. See Hamilton, *supra* note 77, at 1249 (arguing that off-field competition should coincide with on-field competition).

213. See *id.* (noting how fans would not put up with unfair competition in games, and therefore, they should not have to put up with unfair marketplace competition either).

rules of the marketplace as other businesses, fans pay the price.<sup>214</sup> Whether it is through ticket sales, merchandise, or MLB TV, fans – the American consumers – are the ones who suffer at the end of the day.<sup>215</sup>

While there are strong arguments for repealing baseball's antitrust exemption because of economic competition off the field, some argue that without an exemption, on-field competition will suffer.<sup>216</sup> Proponents of the exemption argue that by receiving leeway from antitrust liability, MLB is able to provide the public with a good product and competitive league.<sup>217</sup> For owners stuck in small market cities who experience financial difficulties, however, it is almost impossible for them to move to other cities and possibly improve financially because other owners can collude to block the moving of a franchise.<sup>218</sup> This is contrary to the National Football League ("NFL"), where teams may relocate to new homes that provide bigger and richer fan bases.<sup>219</sup> The antitrust exemption in baseball discriminates against small market owners, preventing them from relocating to baseball-friendlier cities.<sup>220</sup> By abolishing

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214. See Brittany Van Roo, *One Trilogy that Should Go Without a Sequel: Why the Baseball Antitrust Exemption Should be Repealed*, 21 MARQ. SPORTS. L. REV. 381, 401 (2010) (asserting increased prices fans pay for MLB exclusive agreements with ticket sale organizations like StubHub that would probably violate antitrust laws with exemption). "Professional baseball can no longer be divided into sport and business, and as such, especially with the materialization of MLB's deal with StubHub, a repeal of the antitrust exemption should be considered." *Id.*

215. See *Policy Debate: Should the Antitrust Exemption for Baseball be Eliminated?*, ECONOMICS RESOURCE CENTER (2006), [http://www.swlearning.com/economics/policy\\_debates/baseball.html](http://www.swlearning.com/economics/policy_debates/baseball.html) (commenting on how antitrust exemption increases ticket prices and allows individual teams to extort money for construction or reconstruction of new stadiums); see Fein, *supra* note 67 (detailing astronomical revenues for industry with little to antitrust regulation).

216. See Macaluso, *supra* note 58, at 471-72 (asserting that league where competitiveness is tied to success of all members needs exemptions from antitrust liability to operate well).

217. See *id.* (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 94 (1984)) (arguing that certain degree of cooperation is required to preserve and enhance competition).

218. See Hamilton, *supra* note 77, at 1249-50 (stating that owners who want to move to another city may not be able to do so because of collusion from owners who want to stifle competition for their own best interests).

219. See David Greenberg, *Baseball's Con Game*, SLATE, 2 (July 19, 2002, 10:36 AM), [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2002/07/baseballs\\_con\\_game.2.html](http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.2.html) (noting that before move of Montreal Expos, no baseball team had changed locations in over thirty years).

220. See *id.* (asserting that baseball's antitrust exemption is economically unfair to small market owners). This is arguably worse for the competitive balance of the game because MLB is forcing a franchise to remain in an undesirable situation that is not in the best interests of the team, league, or public. See Mozes and Glicksman, *supra* note 31, at 278 (questioning why MLB is in better position than local franchise to determine what is in its "best interests").

the exemption, cities that place a high value on baseball would be able to attract additional teams in response to consumer demand.<sup>221</sup>

### C. Preventing Another *McCourt v. Selig*

With the abolishment of baseball's antitrust exemption, MLB will be treated as a business that offers one product in a two-sided market.<sup>222</sup> This product, the access to on-field competition, is in the middle of a two-sided market where MLB is the intermediary between the fans and the players and owners.<sup>223</sup> By viewing MLB as a member of a marketplace and not an anomaly of the business world, the rule of law will protect the interests of the people on each side of the marketplace – those of the fans, and those of the players and owners.<sup>224</sup> Thus, there will be an incentive to exclude potential members who initially do not meet requirements, instead of retroactively expelling them from their position in the marketplace as Selig did with McCourt.<sup>225</sup>

Furthermore, once individuals are members of the marketplace, antitrust laws will ensure a fair and uniform application of rules across the board.<sup>226</sup> No longer will there be a wildly subjective “best interests of baseball” rule that changes depending on whether the subject is the commissioner's friend or foe.<sup>227</sup> Bud Selig and any subsequent commissioner would have to abide by antitrust laws and not unreasonably restrain individuals from accessing the

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221. See *Policy Debate: Should the Antitrust Exemption for Baseball be Eliminated?*, *supra* note 215 (advocating for abolishing exemption because it would prevent problem of teams leaving cities if city does not provide a new or rebuilt stadium).

222. See Salil K. Mehra & T. Joel Zuercher, *Striking Out Competitive Balance in Sports, Antitrust, and Intellectual Property*, 21 *BERKELEY TECH. L.J.* 1499, 1541-42 (2006) (arguing there is no reason why sports leagues should be treated differently from other industries that involve organized labor and cooperation between economically competing entities)

223. See *id.* at 1527-29 (describing concept of two-sided market).

224. See *id.* at 1526-27 (stating that market forces and rule of law can place efficient checks on system).

225. See Helyar & Soshnick, *supra* note 61 (noting baseball violated its own financial rules by approving McCourt's \$421 million purchase of Dodgers “entirely with borrowed funds”). When he allowed McCourt to purchase the Dodgers on borrowed money, Selig was reported as saying, “[t]here's no doubt in my mind he will be a good owner of a very storied franchise.” *Id.*

226. See Hamilton, *supra* note 77, at 1252-53 (arguing it's imperative that courts or congress abolish antitrust exemption so MLB can operate under uniform system of laws without having to rely on uncertain precedents).

227. See Morath, *supra* note 166 (commenting on Selig's discretionary use of his powers).

league, moving a franchise, or trading a player.<sup>228</sup> Therefore, a repeat of *McCourt v. Selig* with a different owner and commissioner would be unlikely.

## V. CONCLUDING REMARKS

Frank McCourt will probably go down in sports history as one of the most notorious owners to ever own a professional franchise.<sup>229</sup> He has been vilified by fans, the media, MLB, his former wife, and just about anyone who has any interest in Hollywood or baseball.<sup>230</sup> McCourt probably did not even deserve the opportunity to own the Dodgers in the first place.<sup>231</sup> But unfortunately for MLB, Bud Selig and the other owners allowed him to join their exclusive country club.<sup>232</sup> Moreover, they acquiesced to his membership knowing that his only collateral for the primary loan he used to buy the Dodgers was a twenty-four acre parking lot in Boston.<sup>233</sup> These same people remained silent when he started dividing the Chavez Ravine properties around Dodger Stadium into separate businesses to provide more cash flow and to position himself as the landlord for the next Dodgers owner.<sup>234</sup>

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228. See Gillerman, *supra* note 47, at 560-63 (defining what constitutes unreasonable restraints on trade and how to assess whether restraints fall in this category).

229. See Gallagher, *supra* note 3 (describing why MLB does not like Frank McCourt); see Mead, *supra* note 2 (advocating for McCourt to walk away from game because no fan will ever like him again).

230. See Mead, *supra* note 2 (discussing everyone who does not like Frank McCourt); Kim, Goffard, & Weikel, *supra* note 28 (discussing amount of public scorn McCourt has received and how he is one of the most disliked people in baseball and Hollywood).

231. See Helyar & Soshnick, *supra* note 61 (noting McCourt bought Dodgers with borrowed funds and leveraged pieces of property to get loans approved).

232. See Helyar & Soshnick, *supra* note 61 (stating that Selig knowingly approved of McCourt's purchase of Dodgers); Ozanian, *supra* note 70 (recalling Selig's knowledge that McCourt bought team with leveraged assets and loaned money).

233. See Larry Behrendt, *Frank McCourt Must Go, It's ABOUT THE MONEY* (June 21, 2011), <http://itsaboutthemoney.net/archives/2011/06/21/commissioner-selig-frank-mccourt-must-go-a-petition/> (describing McCourt's purchase of Dodgers).

234. See *If McCourt Can't Play Ball in Chavez Ravine Maybe He Will Build Houses Instead*, EASTSIDER LA (May 10, 2011), <http://www.theeastsiderla.com/2011/05/if-frank-mccourt-cant-play-ball-in-chavez-ravine-maybe-he-will-build-houses-instead/> (noting that McCourt divided team and stadium property into separate companies on MLB's watch). The parking lots generate \$11 million per year. See *id.* (discussing McCourt's landlord income). However, because the finalized sale of the Dodgers includes the land around Dodger Stadium, McCourt will not reap any future profits from the parking lots. See Ramona Shelburne, *McCourt Gets No Parking Lot Money*, ESPN (Mar. 29, 2012, 10:08 PM), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7752934/frank-mccourt-receives-no-parking-revenue-los-angeles-dodg](http://espn.go.com/los-angeles/mlb/story/_/id/7752934/frank-mccourt-receives-no-parking-revenue-los-angeles-dodg)

McCourt has a strong argument that he complied with all MLB rules and regulations, especially considering MLB treatment toward the finances of other teams.<sup>235</sup> With rule of law, economic efficiency, and greater uniformity arguments favoring the abolition of baseball's antitrust exemption, McCourt could have been in a persuasive position to challenge MLB's authority if he had not instead succumbed to a settlement with the league. While McCourt's financial decisions are undoubtedly questionable at best, living on a thin line is different than living in violation of the rules. It goes against the American philosophy of a free market and open competition to permit a captain of industry (*i.e.* Bud Selig), who is exempted from antitrust laws, to threaten to take someone's business when it is not clear that any rules have been broken.<sup>236</sup> Nobody may like Frank McCourt, but nobody likes to be on the receiving end of anticompetitive practices either.

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ers-sources-say (indicating ownership group paid McCourt \$150 million just for land around Dodger Stadium, including parking lots, and rights to control it).

235. See Ozanian, *supra* note 70 (finding that McCourt is not in violation of any MLB financial rules); Shaikin, *supra* note 155 (documenting widespread debt problem in MLB).

236. See Hamilton, *supra* note 77, at 1249-50, 1254 (discussing capitalism underpinnings of economy and why baseball needs to fall in line).

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