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COMMENTS

COMMUNITY-BASED OWNERSHIP OF A NATIONAL FOOTBALL LEAGUE FRANCHISE: THE ANSWER TO RELOCATION AND TAXPAYER FINANCING OF NFL TEAMS

When Art Modell announced that he was moving the Cleveland Browns to Baltimore he sent a message to sports fans everywhere . . . that fan loyalty doesn't matter . . . that today's fan shouldn't get too attached–because it's all about money . . . [I]t's not just about the Browns. It's about the game. . . . Your city could be next.[1]

I. INTRODUCTION

Take notice, because your city could be next in line to confront the loss of a hometown favorite. Your National Football League ("NFL" or "League") team could be the next to pack up and relocate.[2] The Browns' 1996 move from their home in Cleveland, Ohio, is one of the latest in a recent trend of completed, impending, or threatened franchise relocations in the NFL.[3] Franchise relocation has escalated to an unprecedented level since the 1984 decision by the Court of Appeals for the Ninth Circuit in *Los Angeles Memorial Coliseum Commission v. NFL.*[4] In that case, the Ninth

1. *Browns Supporters*, USA TODAY, Jan. 12, 1996, at C3.

2. *See If This Is Allowed to Happen to Cleveland, It Can Happen to Your City Too!*, USA TODAY, Jan. 12, 1996, at C4.

3. Katherine C. Leone, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 476 (1997). For example, the Los Angeles area lost two teams in 1995. The Rams moved to St. Louis to fill the vacancy left by the Cardinals' move to Phoenix in 1988, and the Raiders returned to Oakland after playing for 13 years in Los Angeles. *Id.* Bud Adams moved his Oilers from Houston to Nashville to begin play in Nashville in 1996. *Id.* Since 1995, the Seattle Seahawks, Chicago Bears, Cincinnati Bengals, Tampa Bay Buccaneers, and the Arizona Cardinals all intimated their intention to move if they did not receive better stadium deals. *Id.*

4. 726 F.2d 1381 (9th Cir. 1984), *cert. denied sub nom.*, Oakland-Alameda County

Circuit held that the NFL's policy restricting franchise relocation violated section 1 of the Sherman Antitrust Act.[5] In the ensuing years, many owners of NFL franchises have exploited the holding in *Raiders* by instigating a "relocation frenzy," considered by many to be driven by the owners' desire for money.[6]

Many NFL franchise owners, hoping to relocate their teams to tap into more profitable markets, now seek new stadiums complete with luxury suites from which they can derive millions in unshared revenue.[7] Ambitious NFL owners have been known to move to the city offering the best deal,[8] regardless of the degree of local support and fan loyalty they leave behind.[9]

Once a team leaves a city, it is no easy task to fill the void by enticing an existing team to relocate. For example, Baltimore enjoyed and supported the Colts from 1953 to 1984, but went without an NFL team until 1996 when the Browns left Cleveland and became the Baltimore Ravens.[10] Also, following the departure of the Rams and the Raiders in 1995,[11] Los Angeles, the second largest television market in the country,[12] has been without a

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Coliseum, Inc. v. Oakland Raiders, Ltd., 469 U.S. 990 (1984) [hereinafter *Raiders*].

5. *Id.*; *see* Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1982) (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").

6. *See* Sanjay José Mullick, *Browns To Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 15 (1996); Kevin Starr, *A Covenant Broken: The Bonds Linking City and Professional Football Team and Fan Are Being Increasingly Sundered by Owners Whose Only Loyalty Is to the Dollar*, L.A. TIMES, Nov. 26, 1995, at 61.

7. Alan J. Ostfield, *Seat License Revenue in the National Football League: Shareable or Not?*, 5 SETON HALL J. OF SPORTS L. 599, 604 (1995). The NFL is largely a revenue-sharing league, all network television income is shared equally among the 30 teams. *Id.* Additionally, revenues from game ticket sales are split 60/40 between home and visiting teams, respectively. *Id.* Non-ticket, luxury-box stadium revenue is the principal exception carved out of the revenue-sharing system. Mullick, *supra* note 6, at 16.

8. Leone, *supra* note 3, at 484–92. Cities want NFL teams because of the publicity, major-league image, civic pride, and tax revenues that accompany the presence of an NFL team. *Id.* In order to obtain teams of their own, cities will often assume enormous long-term financial obligations. *Id.* Twenty-seven of the NFL's 30 teams currently play in publicly owned stadiums. *Id.*

9. *See* Adam Teicher, *NFL Teams Walk When Money Talks Cleveland Browns' Plan to Move Makes Fans Worry About Own Teams*, KAN. CITY STAR, Nov. 12, 1995, at A1. For example, before the Browns moved to Baltimore, they regularly attracted home crowds in excess of 70,000 (fourth largest in the League). *Id.* Their "Dawg Pound" boasted some of the most rabid of NFL fans, and their telecasts were one of the most watched in the country. *Id.* Further, in the wake of the announced move, Cleveland voters approved a $175 million plan to renovate Cleveland Stadium in an effort to keep the team. Leone, *supra* note 3, at 475.

10. THE OFFICIAL NATIONAL FOOTBALL LEAGUE 1996 RECORD & FACT BOOK 269, 273, 276 (Chris McCloskey & Chuck Garity, Jr. eds. 1996) [hereinafter 1996 RECORD & FACT BOOK].

11. *Id.* at 276.

12. Tony Grossi, *After Cleveland, Owners Will Focus on L.A.*, PLAIN DEALER (Cleveland), Mar. 22, 1998, at 9C.

team for three years. The difficulty cities have in luring NFL franchises is primarily due to the pressures the NFL team owners place on local governments to build and pay for a new stadium.[13]

The necessity for cities to provide state-of-the-art stadiums to lure NFL teams has reached a critical level.[14] Having awarded Cleveland an expansion team for the 1999 season,[15] the NFL is now looking for a city to accommodate a thirty-second team, considering both Los Angeles[16] and the pre-1997 home of the Oilers franchise, Houston.[17] It will be quite difficult for a city to acquire a new franchise. Any new franshise deal requires initial capital of an estimated $700 million: about $500 million on fees paid to the NFL,[18] and about $200 million to build a state-of-the-art stadium.[19] Consequently, no city is likely to be granted a team until it hurdles the

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13. *See* Richard Alm, *NFL's Suite Life: Moves by LA Teams Show Importance of Stadium Deals*, DALLAS MORNING NEWS, Sept. 11, 1995, at D1. For example, Los Angeles has not been able to maintain a team without a profit-maximizing, state-of-the-art stadium. *Id.* The former Los Angeles Rams played in the Los Angeles Coliseum from 1946 to 1979, and then in Anaheim Stadium, now known as Edison International Field of Anaheim, from 1980 to 1994. *Id.* The aging Coliseum erected in 1923, contains no luxury boxes, while Anaheim Stadium's 113 luxury suites derived a maximum of $4.3 million annually. *Id.* By moving to a newly built stadium in St. Louis, the Rams had the opportunity to make $20 million annually in stadium revenues. *Id.*

14. T.J. Simers, *NFL Appears to Love L.A.*, L.A. TIMES, Mar. 25, 1998, at C1.

15. T.J. Simers, *Lerner-Policy Group Wins Browns: NFL Approves Record $530-million Purchase, Then Turns Attention to Los Angeles and Houston*, L.A. TIMES, Sept. 9, 1998, at C3. On Sept. 8, 1998, the NFL owners selected Alfred Lerner and Carmen Policy as the new owners of the Cleveland Browns franchise. *Id.* The Lerner-Policy group paid the NFL $530 million to buy the Cleveland Browns. *Id.*

16. *Id.*; *see also* Rick Orlov, *City to Play Tough with NFL: Officials to Tout Report Citing Decrease in Television Viewership*, L.A. DAILY NEWS, Sept. 17, 1997, (News), at 4 (reporting that the NFL wants to return a team to Los Angeles, the second largest television market, because since Los Angeles lost a team, the NFL has lost $5–6 million a year due to the drop in television viewing in the Los Angeles area). If an expansion team were to return to Los Angeles, there is a potential for approximately $19 million in additional revenue. *Id.*

17. Simers, *supra* note 15, at C3 (reporting that on Oct. 27-28, 1998 both Houston and Los Angeles will be invited to make presentations to all 31 NFL owners in their bid for the thirty-second team).

18. Owners of an expansion team are required to pay the NFL a certain amount of money to join the League. Simers, *supra* note 14, at C1; *see also* Dick Patrick, *Dollars Expand with Each New Team: Franchise Moves Might Be the Next Agent of Change*, USA TODAY, Oct. 21, 1994, at 10C (reporting that to begin play in 1995 both the Jacksonville Jaguars and the Carolina Panthers paid the NFL $140 million in expansion fees); Simers, *supra* note 15, at C3 (reporting that the winner of the match race between Houston and Los Angeles undoubtedly will have to start at Clevelands $530 million expansion tariff). Lerner and Policy were willing to pay almost three times what Carolina and Jacksonville paid only three years ago, because they are expected to collect $30 million a year in stadium revenues and an average of $73.3 million in TV money for the next eight years. *Id.*

19. *See* Leone, *supra* note 3, at 485–92.

obstacle of providing viable financing plans for building a new stadium and finding an individual or group with enough money to purchase a franchise.[20]

This Comment proposes community-based public ownership of NFL franchises as a mechanism for generating the necessary funding to obtain an NFL team and prevent it from relocating in the future. The rising popularity of this concept is enhanced by a bill that was introduced in Congress in February 1997 by Congressman Earl Blumenauer from Portland.[21] The bill, entitled the "Give Fans a Chance Act," would prohibit any professional sports franchise from banning public ownership.[22]

Part II contains a blue-print for a publicly owned NFL franchise using the Green Bay Packers as a working model.[23] Part III discusses why community-based ownership is more desirable for cities, taxpayers, fans, and the NFL than having privately owned NFL teams. This Part explains how a community-based entity could reduce the occurrence of franchise relocation by shifting much of the financial burden of acquiring and maintaining NFL teams from small groups of owners, who hold cities hostage with their demands, to larger groups of individual fans eager to own an interest in an NFL team.

Part IV reveals that as currently enforced, the NFL's Constitution and Bylaws effectively prohibit community-based corporations from owning an NFL franchise. Part IV also explains the "rule of reason" test under section 1 of the Sherman Act. This Comment contends that the NFL's prohibition on public ownership of NFL teams establishes a prima facie case for an antitrust injury under section 1 of the Sherman Act. This Part also argues that the NFL's policy on public ownership fails the rule of reason test because the harms of such a policy outweigh its benefits. This Part discusses alternative ways that the NFL can achieve the benefits it deems necessary to its survival as an organization, and suggests that community-

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20. *Id.*; *see also* Jim Newton, *NFL Stadium Proposals Far from the Goal Line*, L.A. TIMES, Apr. 5, 1998, at A1 (containing an extensive discussion of the proposed funding and sites for a new stadium in Los Angeles).

21. Art Thiel, *Public Sharing of NFL Teams Due for Look*, SEATTLE POST-INTELLIGENCER, Feb. 5, 1997 (Sports), at D1.

22. *Id.*; *see also* Don Esmonde, *Threats Disappear When Communities Own Pro Teams*, BUFFALO NEWS, Dec. 12, 1997 (Local), at C1; Daniel Kraker and David Morris, *The Ticket to Community Pride, Prosperity: Let the Public Own the Pro Teams*, BUFFALO NEWS, Nov. 16, 1997 (Viewpoints), at H5; *Editorials*, THE TAMPA TRIBUNE, Apr. 6, 1997 (Commentary), at 2; Rice Elliott Almond, *Stock in M's, Hawks? It's a Thought; Public Stake in Teams 'Worth Pursuing,'* THE SEATTLE TIMES, Jan. 28, 1997 (News), at A1.

23. The Green Bay Packers are the only publicly owned team in the League, and this ownership structure is possible because the Packers' community ownership predates NFL rules prohibiting public ownership. David Nielsen, *Packer Envy: Green Bay Fans Don't Have to Worry About Their Team Moving—They Own It*, WASH. TIMES, Dec. 20, 1995, at B1.

based ownership would actually strengthen the NFL. Part V concludes that community-based ownership of NFL franchises is an ideal way for the NFL to regain stability and return professional football to its place in the center of popular culture in the United States.

II. BLUEPRINT FOR A COMMUNITY-OWNED NFL FRANCHISE

A. The Green Bay Packers Model

With the sole exception of the publicly held non-profit Green Bay Packers, Inc.,[24] the NFL consists of thirty-one privately owned teams.[25] NFL teams are predominantly owned by closely held corporations, though some are owned by partnerships and a few by individuals.[26] While many cities have been exploited by their own team or other potential teams in the form of lucrative subsidy packages, the city of Green Bay has never faced the threat of the Packers relocating.[27]

The Packers have played in Green Bay since 1919, two years before joining the fledgling NFL, when the club was formed by Curly Lambeau.[28] In 1923, a group of local Green Bay businessmen organized the club as a Wiconsin nonprofit corporation.[29] When the club was financially struggling in 1935, it was reorganized as a Wisconsin nonprofit stock corporation.[30] The Green Bay Packers Corporation was at this time authorized to issue 300 shares of common stock.[31] In 1950, when the Green Bay Corporation desired to ensure its ability to remain a long-term competitor in the NFL, the Green Bay Corporation's stockholders authorized the Corporation to issue up to 10,000 shares of common stock to raise funds for the Corporation.[32] The shares were offered at $25 per share.[33]

24. *Id.*

25. Simers, *supra* note 15, at C3.

26. *See Raiders*, 726 F.2d at 1390.

27. Mike Ivey, *Packers Offer Example for Corporate America*, CAP. TIMES (Madison, Wis.), Jan. 13, 1996, at B1.

28. Green Bay Packers, Inc. Common Stock Offering Document, Nov. 14, 1997 (on file with *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter Green Bay Packers Offering Document].

29. *Id.*

30. *Id.* at 2.

31. *Id.*

32. *Id.* Although the original stockholders receive no financial return, they insist that money and profits are not their primary concern; rather, they claim that the status they enjoy as Packers' stockholders is enough. *Id.*

33. Nielsen, *supra* note 23, at B1.

The Corporation's restated articles of incorporation provided that no stockholder could own more than 200 shares, and the stock would pay no dividends.[34] From 1950 to November 1997, the Packers had approximately 1900 shareholders who owned 4627 shares.[35]

In November 1997, the Packers' shareholders approved the issuance of new stock involving a 1000-for-1 stock split.[36] In response to the new stock offering, 106,000 Packers' fans bought stock at $200 per share, generating $24 million for the Corporation.[37] The new stock is largely ceremonial because the new shareholders have diluted voting rights, no possibility of profits, and may receive no other special benefits.[38]

The Packers are managed by a seven-member executive committee, elected from a forty-five-person board of directors.[39] The board must approve all substantive changes, such as upgrading the scoreboards at Lambeau Field, adding luxury boxes to the stadium, or building a new indoor practice facility.[40] President Bob Harlan and executive vice-president/general manager John Fabry have authority to make all football operations decisions.[41]

One of the most important features of the Packers' bylaws is that a majority vote of the shareholders is necessary to relocate the team.[42] With over ninety percent of the shareholders residing in Green Bay, all presumably rabid Packers fans, it is highly unlikely that any shareholder would ever vote to relocate the team.[43] Furthermore, if a shareholder ever desires to sell his or her stock, the Packers' bylaws state that the shares must

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34. *Id.*

35. Green Bay Packers Offering Document, *supra* note 28, at 8.

36. Kent Youngblood, *Shareholders Set to Approve Additional Shares of Stock*, WIS. ST. J. (Madison, Wis.), Nov. 13, 1997, at B3.

37. Green Bay Packers Offering Document, *supra* note 28, at 2; *see also Packers to Report Record Profits*, WIS. ST. J. (Madison, Wis.), Apr. 10, 1998, at C2. The Packers must use this $24 million for capital improvements rather than on salaries for players and coaches. *Id.* However, this additional revenue essentially allows the Packers to spend more on players and coaches because future capital expenditures will not drain their cash flow. *Id.*

38. Youngblood, *supra* note 36, at B3; *see also* Green Bay Packers Offering Document, *supra* note 28, at 5.

39. Nielsen, *supra* note 23, at B1.

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.*

be offered back to the franchise first.[44] As a result of this corporate structure, the publicly owned Packers have become the most stable team in the NFL.[45]

With the smallest market (population 96,466),[46] and one of the smallest stadiums (seating 60,790),[47] the Packers' annual income is one of the smallest in the League.[48] The Packers' financial success and viability is primarily due to the NFL's revenue-sharing system.[49] The Packers' success is also contingent on the effectiveness of the NFL salary cap, instituted in 1993 to equalize the competitive balance between the League's large and small market teams.[50] The Packers' tremendous recent on-field success is demonstrated by their winning Super Bowl XXXI[51] and appearing in Super Bowl XXXII.[52] Their great off-field success is demonstrated by their local popularity and the $166 million value of their franchise.[53] Hence, the Green Bay Packers provide an example of the potential economic success and popularity of a community-owned team.

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44. Green Bay Packers Offering Document, *supra* note 28, at 4. The only limited exception to this rule is that the stock shares may be transferred to the holder's immediate family.

45. Nielsen, *supra* note 23, at B1.

46. *Id.*

47. Bill Plaschke, *Packers Super, Fans Are Better*, CAP. TIMES (Madison, Wis.), Jan. 11, 1997, at B3.

48. Tom Mulhern, *Wolf Tells Shareholders: Put Focus on Football*, CAP. TIMES (Madison, Wis.), May 29, 1997, at C4. The Packers record income for 1997 was nearly $5.9 million. *Id.* The Dallas Cowboys' annual profit for 1996 was over $25 million. Ivey, *supra* note 27, at B1; *see also* Tom Pedulla, *Loyalty Never out of Stock: Shareholder Reap Dividend of Pride in Pack*, USA TODAY, Jan. 14, 1997, at 5C (containing the Packers' 1996 income statement). Interestingly, because the Packers are the only publicly owned team in the League, it is the only team subject to disclose it finances. The Packers' income statement for fiscal year ending March 31, 1996, revealed the following: *Operating Income*: Television and Radio: $38,962,954; Home Games: $9,116,329; Road Games: $6,955,224; Private boxes: $3,775,000; NFL properties: $3,152,329; Expansion fees: $2,279,351; Other: $6,053,078; Total operating income: $70,294,265; *Operating Expenses*: Player Costs: $41,453,668; General/administrative: $19,494,478; Game Expenses $1,782,233; Total Operating Expenses: $62,730,379; *Profit From Operations*: Interest expense: $403,210; Interest/dividend income: $1,689,784; Sale of assets: $1,090,168; Income before taxes: $9,940,628; Allowance for income taxes: $4,500,000; *Net Income*: $5,440,628. *Id.*

49. Mark Kreidler, *Rozelle's Vision Changed Football*, SACRAMENTO BEE, Dec. 7, 1996, at E1.

50. Nielson, *supra* note 23, at B1; *see discussion infra* Part IV.D.3.b.

51. Bob Oates, *Super Bowl: Green Bay Packers 35, New England 21*, L.A. TIMES, Jan. 27, 1997, at S3.

52. Bob Oates, *Super Bowl XXXII: Denver Broncos vs. Green Bay Packers Analysis: Broncos' Best Shot Is to Make Packers Play Catch-Up*, L.A. TIMES, Jan. 18, 1998, at C12.

53. *See* Pedulla, *supra* note 48, at 5C. The Packers value is due in part to the Packers' assets and stockholders' equity totaling $68.785 million, and recording a 1996 profit of almost $5.5 million. *Id.*

B. *The Modern Community-Owned Corporate Entity*

1. Formation of the Entity

Under the NFL's Constitution and Bylaws, a community-owned corporation, similar to the Green Bay Packers Corporation, could be formed specifically for the purpose of owning and operating an NFL franchise in a particular city.[54] The incorporator of the community-owned team should be a high-profile, public-spirited individual or a leadership group, ideally with some NFL or other major league sports experience. The incorporators would prepare and file[55] a certificate of incorporation[56] and bylaws.[57]

In addition, the incorporators would take all other steps necessary to form the ownership entity.[58] For instance, the incorporators would negotiate with the NFL for an expansion franchise for the designated city. The incorporators would also negotiate with the city and other governmental entities for a stadium and related facilities.[59] The deals negotiated with the NFL and the city would be contingent upon a successful public offering of stock in the ownership entity and receipt of any other required financing and governmental approvals, such as zoning and environmental impact clearance for building the new stadium. To this extent, the incorporator should be prepared to advance the costs associated with securing the necessary entitlements, as well as the costs associated with incorporating and organizing the new entity.

The corporation would then make an initial public offering ("IPO") of stock in the ownership entity. The IPO would be arranged by a group of attorneys, accountants, bankers, underwriters, and other professionals so as to assure compliance with all applicable state and federal laws. These professionals should all be dedicated to the purpose of creating a permanent football entity within a particular city.

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54. 1988 NFL CONSTITUTION AND BYLAWS art. III, § 3.2 (allowing any entity operated for the purpose of owning a football team to be eligible for membership) [hereinafter NFL CONST.]; *see* discussion *infra* Part IV.A.

55. This Comment references the requirements of the Delaware Code because it is often the preferred state of incorporation due to its flexible rules. *See* DEL. CODE ANN. tit. 8, § 101(a).

56. *See id.* §§ 102–05 (1991).

57. *See id.* § 109.

58. *See id.* §§ 106, 107.

59. *See* Stuart Silverstein & Jim Newton, *Financing Remains the Unknown Factor*, L.A. TIMES, Apr. 5, 1998, at A19. It has recently been proposed that a real estate investment trust ("REIT") could be established, enabling fans to purchase shares to help finance a stadium. *See id.* While this idea is less likely to attract investors than the proposal to actually buy stock in the team itself, it may be a viable way to acquire additional funds. *Id.*

Limiting the purpose of the corporation to the operation of an NFL franchise within a specific geographic area would be the primary means of generating widespread community support for the ownership entity and the IPO.[60] Such a geographic-specific provision should be stated in the certificate of incorporation and supported by other provisions in the certificate and bylaws,[61] such as a requirement that the team could not be relocated or sold without the approval of a super-majority of the shareholders.[62]

The IPO should be structured in a manner that would encourage widespread ownership by persons living in the designated geographic area and having an interest in NFL football. Thus, a large number of shares of stock should be offered for sale at a price an average football fan in the community could afford.[63] In addition, a limitation on the number of shares that any one person or group could purchase should be imposed to ensure a broad ownership base, rather than allowing a few wealthy individuals or companies to buy all the stock.[64]

2. A Hypothetical IPO

The board of directors would determine the appropriate share price and number of shares to issue in order to generate the capital necessary to pay for the stadium and expansion fees.[65] This Comment provides an example of how the shares could be issued. For example, two classes of stock could be offered, essentially setting up an investment tier as well as a fan-based tier. Under this model, a total of thirteen million total shares should be offered.

With thirteen million total shares, the investment tier would consist of three million shares of non-voting cumulative preferred stock. This investment tier Class A preferred stock would be offered at $100 a share and would carry approximately a ten percent dividend yield. There would be no limitation on how many shares anyone could buy of Class A stock. With three million shares at $100 dollars per share, the offering of Class A stock could generate $300 million. While it is conceivable that one wealthy person or company could buy all of this Class A stock, the community-owned

60. *See* DEL. CODE ANN. tit. 8, §§ 102(a)(3), 102(b)(1).

61. *See id.* § 242 (b)(1) (describing how to amend the certificate of incorporation); *id.* § 109 (describing how to amend the bylaws).

62. *See id.* § 102 (b)(4).

63. The certificate of incorporation would list the number of authorized shares of stock to be sold. *See id.* § 102 (a)(4).

64. *See id.* §§ 102 (b)(1), 109(b), 151(a).

65. *See id.* § 152.

nature of the corporation would not be diminished if the Class A shares do not carry voting rights. Class A shares would be attractive to investors nonetheless because it is anticipated that virtually all the operating profit of the franchise, if any, would be used to pay dividends to the Class A preferred shareholders.

The second tier would consist of the Class B voting common stock, presumably sold to NFL fans. Ten million shares of Class B stock could be offered at $40 per share.[66] This stock offering would generate $400 million of equity capital. To encourage widespread ownership, each individual, family group, or company would be restricted to purchasing only two hundred shares of Class B stock. Further, the Class B shareholders would be required to offer the shares back to the franchise at the original IPO price when a shareholder wished to sell. No dividends would be paid on Class B stock. Nonetheless, many residents would likely be interested in such stock as a way of participating in ownership of an NFL team and bringing a team to their city.[67]

Because Class B stock does not pay dividends, it is recommended that a provision be made in the certificate of incorporation entitling a fan who purchases two hundred shares to a personal seat license ("PSL").[68] With 10,000,000 shares offered, subject to a limitation of two hundred shares per shareholder, 50,000 shareholder-owned PSLs would be issued. Thus, with the shareholder essentially receiving a PSL as the sole material benefit from buying stock in the franchise, rather than receiving dividends, shareholder-fans would be highly motivated to keep the team in the particular city in which it was formed.

66. Compare this price to the $25 price for original shares in the Green Bay Packers. *See* Nielsen, *supra* note 23, at B1.

67. For instance, shareholders purchased stock in the Green Bay Packers even though the stock paid no dividends. *See* Pedulla, *supra* note 48, at 5C. Instead, community members purchased stock as a gesture of hometown pride and loyalty and received the advantage of being a season-ticket holder. *Id.* "A shareholder is someone of distinction in Green Bay . . . . Stock certificates are framed and proudly displayed in living rooms. . . . Home games have been sold out since 1966. The season-ticket waiting list counts more than 28,000 names and frequently includes newborns." *Id.*

68. A PSL is a right to purchase a season ticket, but is not itself a season ticket. *See discussion* Part III.B. If offering PSLs is not desirable, an alternative inducement for stock ownership is to provide ticket price discounts, club house privileges, autographed memorabilia, or other incidental benefits. Perhaps offering the right to attend a gala annual shareholders meeting in the team's new stadium combined, for example, with the annual awards dinner for the team, would be an attractive inducement to stock ownership.

Under the conditions described above, if the IPO was fully subscribed[69] the offering would result in a total of $700 million in equity capital for the ownership entity. With this amount of money, any additional funding necessary to acquire the franchise, stadium, and other facilities, as well as initial operating capital, could be provided from other sources such as bank financing or private donations.

3. Compliance with NFL Membership Requirements

The NFL Bylaws require a financial statement from every officer, director, and shareholder of an entity applying for membership.[70] After considering the financial statements, the NFL has the ultimate authority to approve the applicants.[71] To comply with this requirement, the certificate of incorporation must state that the directors and officers of such corporation will be subject to the ultimate approval of the NFL.[72] Ostensibly, giving other owners and the League authority over the decision to admit new members gives them a way to ensure that the NFL is represented by persons who will promote the NFL. Such an addition to the certificate of incorporation would also be advisable, given that the board of directors and officers will need to work with the NFL in various ways to control the conduct of the corporation.[73]

Obtaining NFL approval of all shareholders, on the other hand, may prove impracticable.[74] However, with the effective limitation on the number of shares any one individual can own, it would be unnecessary for the NFL to approve each individual shareholder as no individual shareholder could control the company or even elect a single director. If the limitation on the number of shares any one individual or company could own was not effectively imposed, the certificate of incorporation could grant the NFL the

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69. If the IPO was over-subscribed, shares should be allocated to the subscribers by random selection, such as a lottery, which would also impose the stated limitation on the maximum number of shares any one individual, or family group, could purchase. If the IPO was under-subscribed, the proposed transaction with the NFL or city in question could be re-negotiated in order to arrive at a workable deal.

70. NFL CONST., *supra* note 54, art. III, § 3.3.

71. *Id.*

72. While this may sound tedious, the NFL currently approves the officers and directors of the other private corporations of the NFL. This might encourage a small board of directors.

73. For example, the vice president/general manager, along with such duties as hiring a coach, drafting players, and negotiating player contracts, would have the responsibility to attend the NFL annual meetings. Thus, the officer and directors of the corporation should be persons the of whom the NFL approves and believes will act in the best interest of the NFL.

74. *See* discussion in Part IV.D.3.a. (discussing why NFL membership rules pertaining to all shareholders would not only be impracticable, but would also be an antitrust violation for a publicly owned team).

right to approve any shareholder owning more than five percent of the total outstanding shares.[75] In all other respects, the community-owned entity in question would be formed, managed, and operated like any other general commercial corporation.

III. THE BENEFITS OF COMMUNITY-BASED PUBLIC OWNERSHIP

A. Ability to Transform the NFL from the "National Floating League" Back to the National Football League

Properly formed community-owned franchises could help reverse the recent trend of franchise relocation that undermines the stability of the NFL.[76] The unchecked mobility of NFL teams disappoints football fans everywhere and host cities alike.[77] Frequent franchise relocation undermines the NFL's fan base, destroys team loyalties, eliminates team rivalries, and increases the public sentiment that team owners are greedy and self-motivated.[78]

As discussed in Part II, the certificate of incorporation and bylaws of a community-owned corporate franchise could specifically state the conditions under which the team would be allowed to move or be sold. As

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75. This percentage was chosen because it serves the same goals as the requirement imposed by the Securities Exchange Act of 1934 and the rules promulgated thereunder by the Securities and Exchange Commission ("SEC"). *See* Securities Exchange Act of 1934, § 13(d), 15 U.S.C. § 78m(d) (1994). Section 13(d) of the 1934 Act regulates tender offers and requires the release of information about the bidder to shareholders of target companies, but its application has been broadened to require purchasers of substantial amounts of stock to provide information about their intentions. *See* Ellen Taylor, *Teaching an Old Law New Tricks: Rethinking Section 16*, 39 ARIZ. L. REV. 1315, 1334–35 (1997). Specifically, section 13(d) requires any person or group acquiring more than 5% of a class of equity securities registered under section 12 to report the acquisition to the SEC, the issuer, and the exchanges on which the security trades. *See* Securities Exchange Act of 1934 § 13(d)(1). The Schedule 13(d) report must disclose information about the acquiring person or group, the funds used to make the acquisitions, and the acquirer's purpose in acquiring the securities. *See id.* § 13(d)(1)(A)–(E).

Although the Securities Exchange Act does not empower the target corporation to veto any stock purchases, the required information statement is extremely valuable. A reporting requirement placed on purchasers of large blocks of stock in publicly owned NFL teams would give the League and other team owners notice of consolidated ownership, and the power to veto such purchases would allow the NFL to ensure that these persons would be suitable League representatives in much the same way the current membership approval mechanism operate.

76. Richard Sandomir, *Owners' New Strategy: Take the Team and Run*, N.Y. TIMES, Jan. 14, 1996, § 8, at 1. In response to this trend of franchise relocation, former NFL Commissioner Pete Rozelle declared, "This may be the biggest problem the league has ever faced. . . . The integrity of the league and its stability is [sic] hinged on local support." *Id.*

77. Leone, *supra* note 3, at 491.

78. *Id.*

demonstrated by the history of the Green Bay Packers, teams owned by residents of the community are unlikely to move away from that community.

B. Reducing the Need for Publicly Financed "Suite" Deals

Community-based ownership of NFL teams is desirable for cities, taxpayers, and fans alike because this corporate entity, being largely self-funded, would not be dependent on cities for huge subsidies. Recent football history is replete with examples of extravagant public financing to lure NFL teams. The deal that induced Art Modell to move the Cleveland Browns to Baltimore offered a $200 million, 70,000-seat, rent-free stadium with 108 luxury boxes and 7500 club seats.[79] Baltimore also promised Modell a $15 million training facility, 100% of the revenues from ticket sales, luxury suites, club seats, concessions, stadium-naming rights, parking, and half of all revenues from non-football events held in the stadium.[80] Similarly, the Los Angeles Rams were lured to St. Louis by an offer of a new $260 million stadium, a guarantee that tickets for at least 55,000 of the 70,000 stadium seats would be purchased for every game, $15 million towards their relocation costs, another $15 million for a practice facility, and retirement of the $30 million debt that the Rams owed the city of Anaheim at the time of the move.[81]

Currently, cities use a variety of public financing mechanisms to fund the construction of new stadiums or renovations of existing facilities.[82] Cities utilize low interest municipal bonds, lotteries, sales taxes, and levies on parking, hotels, alcohol, car rentals, and cigarettes to finance subsidies to team owners.[83] Cities may also offer tax abatements on land, broadcast arrangements, and assumption of past debts.[84] Cities essentially fund these initiatives by passing new taxes, extending old ones, and reallocating money from one pocket to another.[85] Ultimately, the taxpayers bear the burden of all these subsidies.

Cities and owners also rely heavily on revenue from Personal Seat Licenses ("PSLs") to raise money for new franchises and stadiums.[86] PSLs

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79. *See* Leone, *supra* note 3, at 486.

80. *Id.*

81. Alm, *supra* note 13, at D1.

82. *See* Leone, *supra* note 3, at 485.

83. *Id.* at 486.

84. *Id.*

85. *Id.*

86. In Charlotte, the home of the new Carolina Panthers, the team raised $150 million to build Ericsson Stadium through PSLs. Ray Waddell, *Oilers' Move to Nashville: Heading Toward Reality*, AMUSEMENT BUS., Nov. 6, 1995, at 16. Fans in St. Louis bid on 46,000 PSLs at

essentially offer fans the chance to become charter member ticketholders by paying a fee to reserve a seat for a certain number of seasons.[87] PSLs range in cost from $250 to $5400, yet the PSL holder still needs to purchase a ticket for each game.[88] Thus, in order to be a season-ticket holder, a fan must first pay increased taxes, buy a PSL, and then buy a game ticket.

Cities continually bear the financial burden because no entrepreneur is willing to take the economic risk of financing both a new team and a stadium.[89] In regard to subsidizing the acquisition of a new NFL franchise, Peter O'Malley, who recently sold the Los Angeles Dodgers for $311 million,[90] stated, "I don't believe any individual or company, can, should, or will try to do this alone."[91] Moreover, the NFL does not want to promote non-subsidized privately funded stadiums because it would set a precedent for shifting the economic risk from cities back to the individual owners.[92]

Thus, NFL host cities bear the huge subsidy risk and often are not rewarded for their tremendous economic investment when teams leave for a better deal offered by another city.[93] Community-owned franchises would effectively shift the burden from taxpayers to individuals interested in owning a piece of an NFL team in a particular community. This shift in NFL financing increases the likelihood of an NFL franchise staying in one city as the shareholders of the team are highly motivated to keep the team as a permanent fixture in their city.

C. Offering Cities an Alternative Mechanism for Acquiring an NFL Franchise

Community-owned franchises would provide a way for cities that have a large potential pool of fan support to overcome "general" opposition to whatever amount of public funding may be necessary to acquire a team. Currently, some cities that would otherwise be appropriate markets for an NFL team are not willing to bear the financial burdens associated with

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$250–$4000 each, raising $75 million to finance the Rams' move. *Id.*

87. Randall Lane, *Bread and Circuses*, FORBES, June 6, 1994, at 62. A PSL is not a ticket itself; it is merely the right to purchase a ticket. *Id.*

88. Peter Fimrite, *Why Raiders Are a Bargain for Oakland: Other Cities Spending Far More to Lure Teams*, S.F. CHRON., Sept. 5, 1995, at A1.

89. T.J. Simers, *L.A. Goes Fourth and Looooooong: Every Answer to Every Question About the Future of Pro Football in L.A.*, L.A. TIMES, Jan. 28, 1996, at C8.

90. Jim Murray, *O'Malley Moved—Rest Is History*, L.A. TIMES, Mar. 20, 1998, at W1.

91. Simers, *supra* note 89, at C8. For example, the only stadium that has been privately built for football in the last 50 years was Joe Robbie Stadium in Miami. *Id.*

92. *Id.*

93. *See* Leone, *supra* note 3, at 491–92.

subsidizing the acquisition of an NFL franchise.[94] Los Angeles is a prominent example of a major city reluctant to approve public subsidies for an NFL team.[95] Currently, projects such as sports stadiums need only be approved by the City Council.[96] However, the City Council's reluctance to grant public funding is evidenced by the tremendous struggle certain developers experienced in persuading the City Council to subsidize the construction of a new sports arena in downtown Los Angeles.[97] Strong opposition came from Council members who believed that voters did not want their hard-earned tax dollars spent to subsidize wealthy sports team owners.[98] The downtown arena developers finally gained approval for their project only after reaching an extensive agreement with city officials assuring the city would incur no financial risk.[99]

Although acquiring public funding for sports projects in Los Angeles is difficult, it soon could become nearly impossible. The downtown arena battle prompted Los Angeles City Councilman Joel Wachs to initiate a ballot measure for the November 1998 election that would require city-wide voter approval of publicly subsidized sports stadiums.[100] If the Wachs initiative

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94. *Id.* at 487. There are risks involved for the city subsidizing the sports franchise. *Id.* For example, a 1991 study by Pepperdine University economist Dean Baim showed that "[g]overnment-subsidized sports stadiums are chronic money losers . . . . The ultimate beneficiaries of tax-supported subsidies are the team owners, not the fans; and [g]overnment-subsidized sports stadiums are unlikely to return enough money to the municipal treasury to pay their combined operating and fixed costs." *Id.*; *see also* Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1701 (1996). City-subsidized sports teams may cause a reduction in the ability of such cities to meet the traditional municipal responsibilities, such as improving public schools, health care, or housing. *Id.*

95. Alm, *supra* note 13, at D1.

96. Ted Rohrlich, *Arena Developers Adopt a Strategy of Disclosure*, L.A. TIMES, Aug. 28, 1997, at A1.

97. *Id.* The Arena is being built for the NHL's Los Angeles Kings and the NBA's Los Angeles Lakers and Clippers. *See* Rick Orlov, *Big Money, Plans Orbit New Arena*, L.A. DAILY NEWS, Apr. 18, 1998, (News), at 7.

98. Rick Orlov, *Drive Launched on Sports Funding*, L.A. DAILY NEWS, Aug. 27, 1997, (News), at 4.

99. Beth Shuster, *Wachs Approves Altered Deal on Sports Arena*, L.A. TIMES, Oct. 9, 1997, at A1. The conditions of the agreement were that the developers: (1) must give the city an "ironclad" guarantee that they will repay the $58 million in municipal bonds that are to be used for the project; (2) ensure that the $58 million will not come from sales, property, or utility taxes generated by the arena; (3) pay approximately $1.6 million for a two-acre piece of property that the city had tentatively agreed to give to the developers; and (4) pay approximately $3.2 million for use of the arena site for 55 years. The previous deal called for a $1-a-year lease. The only public money involved in the arena would be $12 million given to the developers by the Community Redevelopment Agency, which can control its own spending to help with projects located in the central business districts. *Id.*

100. *Id.* The Wachs initiative is entitled "City of Los Angeles Taxpayers Right to Vote Act."

passes, it will be even more difficult for Los Angeles to issue municipal bonds or to provide other taxpayer-based financing for sports facilities. The community-owned franchise, with its inherent high degree of fan support and largely self-funded nature, would relieve the problem cities have in providing the appropriate level of subsidies necessary to attract an NFL team.

IV. THE RULE OF REASON TEST AS APPLIED TO THE NFL RULES PROHIBITING PUBLIC OWNERSHIP

This Comment contends that the NFL Bylaws, which effectively prohibit public ownership of an NFL franchise, violate section 1 of the Sherman Act. This Part demonstrates that a prima facie case for an antitrust injury can be established for the public ownership prohibition.

A. NFL Bylaws Prohibiting Public Ownership

Article III of the NFL Bylaws contains the provisions governing who may become a member of the League, that is, who may own an NFL franchise.[101] The requirements for admissions of new members do not contain any express provisions prohibiting a public corporation from owning a franchise.[102] In fact, rule 3.2 allows any individual or entity organized for the purpose of operating a professional football club to be eligible for membership, as long as such organization is operated for profit.[103] Thus, the community-owned entity that this Comment proposes would be eligible for membership.

However, the membership provisions for *new* members, when taken together, have the effect of being so burdensome that it is a practical impossibility for a public corporation to own a franchise. For example, rule 3.3(A)(1) requires "[t]he names and addresses of all persons who do or shall own any interest or stock in the applicant, together with a statement that such persons will not own or hold such interest or stock *for the benefit of any undisclosed person or organization.*[104] Rule 3.3(A)(2) states that a written financial statement is required from the applicant, including stockholders.[105] Perhaps the most difficult rule to comply with is rule 3.3(C). That rule states, in relevant part, that "[e]ach proposed owner or holder of any interest in a membership, including stockholders in any

Id.

101. NFL CONST., *supra* note 54, art. III.

102. *Id.*

103. *Id.* § 3.2 (a).

104. *Id.* § 3.3 (A)(1) (emphasis added).

105. *Id.* § 3.3 (A)(2).

corporation, . . . and all other persons holding any interest in the applicant must be *individually approved* by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League."[106] With a community-owned NFL franchise anticipated to offer millions of shares of stock and potentially having over 50,000 shareholders, gaining League approval of each shareholder would be practically impossible.

Rule 3.5 of the Bylaws discusses transfer of ownership of an NFL franchise.[107] This rule contains the uncodified, but well known, prohibition against transfer of any interest of a member franchise to the public.[108] This rule effectively precludes any kind of public ownership, including the community-owned corporation proposed by this Comment.

The NFL's uncodified policy prohibiting the sale of any interest of an existing member to the public was challenged in *Sullivan v. NFL*.[109] In that case, William H. Sullivan, the then owner of the New England Patriots, brought an action against the NFL alleging that the NFL violated antitrust laws by restricting owners of NFL franchises from selling shares in their team to the public.[110] Sullivan, who was faced with financial difficulties and increasing debt burdens, desired to offer forty-nine percent of the team to the public in the form of publicly traded stock.[111] Sullivan requested that the NFL either waive its public ownership prohibition or modify the prohibition to allow for certain controlled sales to the public of minority interests in

106. *Id.* § 3.3 (C) (emphasis added).

107. NFL CONST., *supra* note 54, art. III., § 3.5.

108. *See* Sullivan v. NFL, 34 F.3d 1091, 1095 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1994). NFL officials have also recognized the existence of this anti-corporate ownership policy. Former NFL commissioner Pete Rozelle stated that public ownership of teams "would make it impossible for [the NFL] to control ownership of [the] league." *Corporately Yours*, SPORTS ILLUSTRATED, June 3, 1991, at 15. Cincinnati Bengals assistant general manager Mike Brown stated, "We have always opposed corporate involvement in NFL teams for the obvious reason that corporations can fund the operation of teams far beyond anything we could do." *Id.*

109. *Sullivan*, 34 F.3d at 1095. *Sullivan* is a case closely analogous and highly applicable to the concepts and issues presented in this Comment. It will be discussed extensively throughout Part IV as the primary authority for the NFL's prohibition of public ownership violating antitrust law. *See also* Drew D. Krause, Comment, *The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership--Implications Arising From William H. Sullivan's Antitrust Suit*, 2 SETON HALL J. SPORT L. 175 (1992).

110. *Id.* at 1095.

111. *Id.* Sullivan had owned the Patriots from their inception in 1959 when they belonged to the American Football League ("AFL"). *Id.* In 1960, Sullivan and his partner sold non-voting shares of the team to the public, as the former AFL had no prohibition against public ownership. *Id.* When the AFL merged with the NFL in 1966, the new NFL was required to adopt the old NFL's policy against public ownership. *Id.* However, the Patriots were allowed to retain their level of public ownership as a special exception. *Id.* In 1976, Sullivan acquired all the publicly held shares, making the Patriots a fully privately owned club. *Id.*

NFL clubs.[112] After the NFL failed to act on the request, Sullivan brought his lawsuit.[113]

The U.S. District Court for the District of Massachusetts entered judgment for Sullivan, ruling that this NFL prohibition violated the Sherman Act.[114] The Court of Appeals for the First Circuit held that Sullivan had presented sufficient evidence of harm to competition in sale of ownership interests in NFL clubs.[115] However, due to several prejudicial trial errors, the First Circuit vacated and remanded the judgment of the District Court.[116] No other court has decided the issue of whether the NFL policy prohibiting public ownership interests of NFL franchises violates section 1 of the Sherman Act. Therefore, the First Circuit's antitrust analysis of the NFL's prohibition of public ownership for *existing* NFL franchises is the primary authority by which to challenge the NFL's effective prohibition of public ownership for *new* NFL franchises.[117]

B. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits every agreement, conspiracy, or other concerted activity in restraint of trade.[118] This section was enacted to prevent agreements that "restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services."[119] However, the Supreme Court, recognizing that virtually every business agreement restrains trade to some degree, has held that Congress did not intend for "every" agreement restraining trade be invalidated.[120] The Court has developed two tests to determine if the Act has been violated: the "per se" test and the "rule of reason" test.[121]

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112. *Id.* at 1095–96.

113. *Id.* at 1096.

114. *Sullivan*, 34 F.3d at 1091.

115. *Id.*

116. *Id.*

117. While section 3.5, dealing with transfer of NFL membership, is the basis for the uncodified prohibition on public ownership recognized in *Sullivan*, it is likely that the uncodified policy pertains equally to new member franchises. Regardless of whether the uncodified policy prohibits public ownership of new franchises, the requirement that all new owners be approved by three-fourths of the team owners practically prohibits public ownership by itself.

118. Sherman Antitrust Act, 15 U.S.C. § 1 (1982) (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").

119. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

120. *See* United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); *see also* NCAA v. Board of Regents, 468 U.S. 85, 98 (1984); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

121. *Board of Regents*, 468 U.S. at 85.

Under the per se test, a court will hold a business practice "per se" unlawful only when the court can predict with certainty that the restraint violates the basic purposes of the Sherman Act.[122] Courts have reserved per se invalidity for blatant restraints of trade that further no purpose other than the impairment of competition.[123] With respect to such business practices, the court will not inquire into the possible business justification for the restraint in question.[124] Such unlawful trade practices include: group boycotts,[125] price fixing,[126] horizontal market division,[127] tying arrangements,[128] and concerted refusals to deal.[129]

Restraints that do not fall into the per se category are analyzed under the "rule of reason" test.[130] The rule of reason is particularly appropriate when a court is confronted with an industry that requires cooperation among its members in order to compete in the marketplace.[131] Considering the unique character of professional sports,[132] courts have generally rejected the application of the per se test and have applied the rule of reason test in deciding antitrust suits concerning League practices.[133]

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122. *Raiders*, 726 F.2d at 1387 (citing United States v. Topco Assoc., Inc., 405 U.S. 596 (1972)).

123. *Id.*

124. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

125. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963).

126. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

127. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972).

128. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947).

129. *See, e.g.*, Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

130. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

131. Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984), *cert. denied sub nom.* Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd., 469 U.S. 990 (1984) [hereinafter *Raiders*].

132. *See* Lewis S. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Law: Los Angeles Memorial Coliseum Comm'n v. National Football League*, 15 CONN. L. REV. 183 (1983). Discussing the impact of the *Raiders* case, Professor Kurlantzick notes:

> Professional sports teams do not fit neatly into traditional models of industrial structure . . . . NFL teams are a hybrid form of economic animal—both business rivals and partners. Unlike other industries, the success of each member of the professional football industry depends, to a considerable extent, upon the success of all other members.

Id. at 189.

133. *See, e.g.*, *Raiders*, 726 F.2d at 1381; North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978), *cert. denied*, 434 U.S. 801 (1977); Mid-South Grizzlies v. NFL 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); San Francisco Seals, Ltd. v. NH, 379 F. Supp. 966 (C.D. Cal. 1974).

The rule of reason test is a balancing test that requires the fact-finder to decide whether, under all the circumstances of the case, the agreement imposes an unreasonable restraint on competition.[134] An activity restrains trade if the anti-competitive effects of such activity outweigh its legitimate business justifications.[135] However, before balancing the positive and negative effects on competition of the activity in question,[136] the plaintiff must show that the challenged conduct restrains competition.[137]

To establish a cause of action, the plaintiff must prove three elements:[138] (1) an agreement among two or more persons or distinct business entities;[139] (2) the agreement is intended to harm or unreasonably restrain competition;[140] and (3) the agreement actually causes injury to competition.[141]

C. Application of the Rule of Reason Test to the NFL's Public Ownership Policy: The Prima Facie Case

1. Element One: Whether an Agreement Exists Among Two or More Persons or Distinct Business Entities: Applicability of the Single Entity Defense

As discussed above, the NFL Bylaws, the conduct of the NFL in the *Sullivan* case, and the candid discussions about the League's uncodified policy against corporate ownership by NFL and team officials are evidence that an agreement exists among the NFL owners to prohibit public

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134. *Raiders*, 726 F.2d at 1391; *see also* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). Justice Brandeis, who articulated the test that has been uniformly adopted in evaluating a restraint under the rule of reason, stated "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*

135. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

136. *See infra* Part IV.D.

137. *Raiders*, 726 F.2d at 1391.

138. *Id.*

139. *See also* National Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 690 (1978).

140. *See also* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 883 (1953) (stating that a plaintiff need not allege an intent on the part of the co-conspirators to restrain trade if the purported conspiracy has an anti-competitive effect).

141. *See also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 21–22 (1st Cir. 1990) (stating that an agreement injures competition when it obstructs the achievement of one or more basic goals of competition, namely, lower prices, increased output, and preventing more efficient production methods in the relevant market).

ownership.[142] The next question, therefore, is whether this agreement can be said to exist among two or more entities.

To establish a violation of section 1 of the Sherman Act, an antitrust plaintiff must first establish that the NFL Bylaws are an "agreement" among two or more entities. In defending against antitrust suits attacking numerous NFL agreements and activities, the NFL has consistently argued that its policies are not agreements between two or more business entities because the NFL is a single entity incapable of conspiring with itself.[143] Because section 1 requires a "contract, combination . . . or conspiracy, in restraint of trade" *among two or more parties*, the single entity approach, if adopted by a court, would effectively exempt the NFL from all antitrust liability.[144] However, it is now well established that the NFL is not a single entity, but rather a joint venture of separate entities which *are capable* of conspiring with each other under section 1 of the Sherman Act.[145]

In *Los Angeles Memorial Coliseum Commission v. NFL* (the "*Raiders*" case),[146] the Ninth Circuit stated three reasons for its renunciation of the NFL's single entity theory.[147] The court found that the logical extension of the single entity argument would be to make the League incapable of ever violating section 1 of the Sherman Act.[148] Such antitrust immunity would contradict the extensive precedent set for holding the NFL subject to the Sherman Act.[149] The court also stated that other organizations

142. *See supra* note 108 and accompanying text.

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

144. 15 U.S.C. § 1 (1994); *see also Raiders*, 726 F.2d at 1387–88.

145. *Raiders*, 726 F.2d 1381; *see also* North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982). An in-depth discussion of the single entity theory is beyond the scope of this Comment. For extensive discussion of the single entity theory, see Lazaroff, *supra* note 143 (arguing that the NFL is not a single entity). *But see* Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1987); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); John C. Weistat, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, DUKE L.J. 1013 (1984).

146. 726 F.2d 1381 (9th Cir. 1984).

147. *Id.* at 1388 (holding section 4.3 of the NFL Constitution, which required a three-quarters affirmative vote from existing NFL owners when a team sought to relocate, violated section 1 of the Sherman Act).

148. *Id.* at 1388.

149. *See id.*; *see also* Radovich v. NFL, 352 U.S. 445 (1957); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); North Am. Soccer League v. NFL, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part, rev'd in part*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907; United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

have been found to violate section 1 even though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members [as does the NFL]."[150]

Finally, the court stated that the NFL is an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under section 1 of the Sherman Act.[151] The court found that NFL teams possess all the indicia of independent competitors: they are independently owned, thus separately accountable for their own profits and losses, and they compete with each other to acquire the best players, coaches, and management personnel.[152] Also, in areas where two teams operate in close proximity, there is competition for fan support, local television and radio revenues, and media access.[153] Consequently, the court held that the necessity for cooperation through joint venture did not preclude the teams from competing with each other.[154]

Shortly after *Raiders*, the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.*[155] that a corporation and its wholly owned subsidiary was a single enterprise for purposes of section 1.[156] The NFL has since attempted to argue that *Copperweld* overturned prior caselaw, including *Raiders*, that held that the NFL and its member clubs do not constitute a single enterprise.[157] However, the NFL's *Copperweld* argument was rejected by the First Circuit in *Sullivan*.[158]

The First Circuit stated that the parent-subsidiary form of ownership that was involved in *Copperweld* was distinguishable from the NFL joint venture type of organization.[159] The *Sullivan* court noted that the subsidiary in *Copperweld*, although legally distinct from its parent, pursued the common interests of the whole rather than interests separate from those of the parent corporation.[160] In contrast, the court found that NFL member

150. *Raiders*, 726 F.2d at 1388 (quoting Los Angeles Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 583 (C.D. Cal. 1981)); *see also* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141–42 (1968).

151. *Raiders*, 726 F.2d at 1389.

152. *Id.* at 1389–90.

153. *Id.*

154. *Id.*

155. 467 U.S. 752 (1984).

156. *Id.*

157. *See* Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir. 1994); McNeil v. NFL, 790 F. Supp. 871, 879–80 (D. Minn. 1992) (holding that *Copperweld* did not apply to the NFL and its member clubs and finding the clubs to be separate entities capable of conspiring together under section 1).

158. *Sullivan*, 34 F.3d at 1099.

159. *Id.* at 1099.

160. *Id.*

clubs compete in several ways both on and off the field.[161] Having such diverse interests, the court held that the NFL could not properly be considered a single entity under section 1.[162]

Finally, as further evidence that the NFL is not a single entity, Congress has twice granted the NFL specific limited exemptions from antitrust regulation. The first exemption concerned antitrust immunity for the NFL's 1961 pooled television rights agreement.[163] The second exemption concerned the merger agreement between the NFL and the American Football League ("AFL").[164] Such specific legislative exemptions from antitrust regulation would not be necessary if the NFL were a "single entity" within the meaning of cases interpreting section 1 of the Sherman Act.

2. Element Two: Whether the NFL's Prohibition on Public Ownership Is Intended to Harm or Unreasonably Restrain Competition

The NFL has suggested several reasons for banning corporate ownership.[165] Former NFL Commissioner Pete Rozelle stated that public corporate ownership would make it impossible for the NFL to maintain control of the League.[166] Rozelle was concerned that public ownership would splinter control of a team among thousands of individuals making it difficult, if not impossible, for the NFL to control who owned the team.[167] Furthermore, Rozelle claimed that public ownership could make the effective

161. *Id.*

162. *Id.*; *see also McNeil*, 790 F. Supp. at 879–90.

163. *See* Sports Broadcasting Act of 1961, Pub. L. 87-331, 75 Stat. 732 (1961) (codified as amended at 15 U.S.C. §§ 1291–95 (1994)) (permitting organized sports franchises to combine to negotiate television broadcasting rights).

164. Act of Nov. 8, 1966, Pub. L. No. 89-900, U.S.C.C.A.N. (80 Stat.) 1515, § 6(b)(1). The 1996 amendment extended the exemption from antitrust laws to include a joint agreement by which the member clubs of two or more professional football leagues combine their operations in an expanded single league (the NFL-AFL merger). *Id.* After the 1966 amendment, section 1291 provided as follows:

> [S]uch laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under [the Internal Revenue Code] . . . combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

15 U.S.C. § 1291.

165. *Corporately Yours*, *supra* note 108, at 15.

166. *Id.*

167. *Id.*

management of a team difficult, and could create a conflict between the interests of the shareholders and the interests of the NFL.[168]

Second, the NFL has expressed concern that publicly owned corporations would be able to provide more funding than any current owner.[169] The availability of greater funds would give publicly owned teams an "unfair competitive advantage."[170] The NFL fears that if a few teams dominate the League, coupled with a lack of interesting rivalries, fan support would decline, eventually resulting in the NFL's demise.[171]

Third, the NFL is concerned that public ownership will result in undue commercialization of the NFL.[172] The fear is that certain corporations would view professional football as a means of promoting their other businesses.[173] For instance, if Disney were to buy a football franchise, the focus of this franchise, the NFL fears, would shift from promoting football to advertising for Disney and its products.

A fourth reason the NFL disfavors public ownership is that some owners fear that it would eliminate the public's perception of NFL franchises as individually or family owned "mom-and-pop operations."[174] The NFL would like the public to believe that it is essentially a "club of cigar-puffing old men sitting in leather chairs sipping scotch," looking out for the welfare of the players and fans.[175]

These four reasons evidence an intent to restrain competition. By prohibiting public ownership, the NFL is limiting who may compete for ownership of an NFL franchise.[176] The *Sullivan* court stated that by restricting all sales of a particular type of ownership interest, the broad-based policy potentially compromises the entire competitive process for the buying and selling of a club ownership.[177] While the intent to harm competition is blatant, the *Sullivan* court stated that whether the NFL's public ownership policy actually injures competition is ultimately a question of fact.[178]

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168. *Id.*
169. *Sullivan*, 34 F.3d at 1100.
170. *Corporately Yours*, *supra* note 108, at 15.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Sullivan*, 34 F.3d at 1100.
177. *Id.*
178. *Id.* at 1098. *See* discussion *infra* Part IV.D (discussing how none of these four concerns justify the harm to competition by the blanket anti-public ownership policy of the NFL since all the stated concerns can be addressed by less restrictive means).

3. Element Three: Whether the Public Ownership Policy Causes Injury to Competition

There are three factors to consider in determining whether an agreement actually causes injury to competition. First, the relevant market in which the competition occurs must be defined. Second, the existence of competition in that market must be demonstrated. Finally, injury to that competition must be shown.

a. Market Analysis

The Supreme Court has stated that an antitrust analysis void of market considerations would lack any objective benchmarks.[179] The concept of a "relevant market" provides the context in which to examine any alleged injury to competition.[180] In the antitrust context, the relevant market has two components: (1) the product market; and (2) the geographic market.[181]

The relevant product market has been defined as commodities reasonably interchangeable by consumers for the same purpose.[182] All commodities must be considered, including actual rivals or potential rivals to the market.[183] The relevant geographic market has been defined as the "area in which a potential buyer may rationally look for the goods or services he or she seeks."[184]

In determining the relevant market in antitrust cases involving the NFL, the NFL has often argued that the product market consists of all forms of entertainment, and the geographic market is the United States.[185] While the unique nature of NFL football makes the market definition especially difficult,[186] courts have declined to define the product market in the NFL

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179. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1988).

180. Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

181. *Raiders*, 726 F.2d at 1392; *see also Kaplan*, 611 F.2d at 291; Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1143 (9th Cir. 1974).

182. SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1062–63 (3d Cir. 1978).

183. *Id.* at 1063.

184. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

185. *See, e.g.*, *Raiders*, 726 F.2d at 1393; *Sullivan*, 34 F.3d at 1112.

186. *See Raiders*, 726 F.2d at 1391–92 (stating that market definition is difficult due to the NFL's structure containing both horizontal and vertical attributes). For example, the League can be viewed as an organization of 30 competitors, an example of horizontal arrangement. *Id.* On the other hand, with the owners having a legitimate interest in protecting the integrity of the League itself and collective action being necessary in some areas, the NFL resembles a vertical arrangement. *Id.*

context as a general entertainment market.[187] Rather, in *Sullivan*, the jury, in defining the relevant market for the NFL's prohibition on public ownership, found that the relevant market was a nationwide market (the geographic market) for the sale and purchase of ownership interests in member clubs in general and in the New England Patriots in particular (the product market).[188] Thus, it appears that the relevant market for the NFL's prohibition on public ownership, including the prohibition on community-owned public franchises proposed by this Comment, should be considered the nationwide market for the sale and purchase of ownership interests in member clubs.

b. The Existence of Competition

In order for a public corporation to establish a claim for antitrust injury against the NFL, it must prove that there is harm to the competition. In *Sullivan*, the NFL attempted to argue that no competition existed between NFL clubs for the sale of ownership interests.[189] The First Circuit disagreed, holding that sufficient evidence was presented to allow a jury to reasonably believe that competition existed between teams for the sale of ownership interests.[190] Competition was inherently proved by the NFL's admission that the purpose of the public ownership policy was to enable the current owners to compete with other teams in the market for investment capital and the sale of ownership interests in NFL teams.[191]

Furthermore, the court stated that "evidence of actual, present competition is not necessary as long as the evidence shows that the potential for competition exists."[192] Indeed, it would be difficult to provide direct evidence of competition when the NFL effectively prohibits it. Thus, relying on *Sullivan*, it appears that a publicly owned entity would be able to prove that competition exists between NFL clubs for the sale of ownership interests.

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187. *See id.* at 1394 (stating that NFL football has limited substitutes from a consumer standpoint); *Sullivan*, 34 F.3d at 1097.

188. *Sullivan*, 34 F.3d at 1097.

189. *Id.* at 1099.

190. *Id.*

191. *Id.* at 1100.

192. *Id.* (citing *Raiders*, 726 F.2d at 1394).

c. Actual Harm to Competition

Restricting competition has been held to be a sufficient antitrust injury.[193] On the other hand, sports leagues are generally allowed to impose conditions and requirements on who, if anyone, may join as a franchise member or acquire an existing team.[194] The prohibition on public ownership, however, is distinguishable from this well-established rule.

In *Sullivan*, the NFL unsuccessfully argued that the two situations are indistinguishable.[195] The NFL cited such cases as *Mid-South Grizzlies v. NFL*,[196] *Seattle Totems Hockey Club, Inc. v. NHL*,[197] and *Levine v. NBA*[198] as support for its argument. These cases all involved a professional sports league's refusal to approve individual transfers of team ownership or of the creation of new teams.[199] In these cases, no antitrust injury was found to exist.

The *Sullivan* court distinguished these cases, refusing to accept the NFL's argument that its ownership policy does not injure competition.[200] The court found that these cases did not involve injury to competition because the plaintiffs were not *competing with* the defendant sports leagues.[201] Instead, plaintiffs were seeking to *join* those leagues.[202] The court found that refusing to approve a given sale transaction or a new team merely prevents particular outsiders from joining the league, but does not limit competition between the teams themselves.[203]

On the other hand, the NFL's policy against public ownership generally restricts competition between clubs for the sale of their ownership interests.[204] Such a prohibition eliminates an entire class of entities from competing for an NFL franchise. The First Circuit relied on *North American Soccer League v. NFL* ("NASL"),[205] which held that the NFL's policy against cross-ownership of NFL teams and franchises in competing

193. *See generally id.*
194. *Sullivan*, 34 F.3d at 1098.
195. *Id.* at 1098.
196. 720 F.2d 772 (3rd Cir. 1983).
197. 783 F.2d 1347 (9th Cir. 1986).
198. 385 F. Supp. 149 (S.D.N.Y. 1974).
199. *Sullivan*, 34 F.3d at 1098.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. 670 F.2d 1249 (2d Cir. 1982).

sports leagues injured competition between the leagues, thereby violating section 1 of the Sherman Act.[206]

The restriction at issue in *NASL* is analogous to the NFL's ban on public ownership. Similar to the prohibition in the NFL's Bylaws, the policy at issue in *NASL* effectively barred a class of owners, namely those who owned other franchises, from purchasing NFL teams.[207] Accordingly, it is evident that a restriction on who may own an NFL team, specifically a prohibition on public ownership, injures competition.

In support of a community-owned entity claim that the NFL Bylaws restricts competition and produces injury thereto, it can point to the standard indicators of the existence of injury. The normal incidents of injury to competition are (1) reduced output; (2) increased price; and (3) reduced efficiency.[208] It is likely that a publicly owned franchise will be able to establish sufficient evidence of these injuries.

First, the *Sullivan* court noted that the NFL's public ownership policy completely eliminates a certain type of ownership interest—public ownership of stock.[209] By restricting output in one form of ownership, the NFL is thereby reducing the output of ownership interests overall.[210] In *Sullivan*, the NFL attempted to argue that output was not affected because its ownership policy did not limit the number of games or teams, did not raise ticket prices, and did not affect the normal consumer of the NFL's product in any way.[211] In rejecting this argument, the First Circuit stated that it is irrelevant that consumers of "NFL football" are not affected by output.[212] Rather, the focus is on whether consumers of the NFL in the relevant market are affected.[213]

The court found that the public ownership prohibition potentially harms two types of consumers: (1) those who want to buy stock in an NFL franchise; and (2) team owners, such as Sullivan, wishing to "purchase" investment capital in the market for public financing.[214] Thus, the public ownership policy literally restricts the output of a product—a share in an NFL franchise.[215]

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206. *Id.*
207. *Sullivan*, 34 F.3d at 1098.
208. Town of Concord v. Boston Edison Co., 915 F.2d 17, 21–22 (1st Cir. 1990).
209. *Sullivan*, 34 F.3d at 1101.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Sullivan*, 34 F.3d at 1101.

With respect to the policy's effect on prices, the NFL has correctly argued that the alleged effect of prohibiting public ownership is to reduce prices of NFL team ownership interests, rather than to raise them.[216] The reduced price occurs because NFL franchises would likely command a premium on the public market relative to their value in the private market.[217]

The Supreme Court addressed this issue in *NCAA v. Board of Regents*.[218] The Court found that in determining whether there has been an injury to competition, the overall effect on consumer preference is more important than the effect on price.[219] The public ownership policy is clearly unresponsive to consumer demand for ownership interests in NFL teams. Experts in the *Sullivan* case testified that fans are extremely interested in purchasing shares in NFL teams, and that the NFL's policy deprives fans of this product.[220] Furthermore, the successful public offerings of the National Basketball Association's ("NBA") Boston Celtics in 1986 and the National Hockey League's ("NHL") Florida Panthers in 1996, as well as the impending offering of Major League Baseball's ("MLB") Cleveland Indians demonstrates the high level of fan interest in buying ownership in professional sports teams.[221] Thus, the NFL's policy injures competition in the relevant market not by raising prices, but by causing the market to be "unresponsive to consumer preference."[222]

It is also likely that a jury could find that the public ownership policy hinders efficiency in the relevant market.[223] First, the policy hinders efficiency by preventing certain highly skilled and experienced individuals from owning teams.[224] These individuals may be unable to buy a team privately because of scarce resources. Second, the NFL policy prohibits certain types of management structures that may be more efficient and produce higher quality teams than the current teams.[225] Finally, it is acknowledged that an increased access to capital can improve a team's

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216. *Id.*

217. *Id.* Fan loyalty is a prominent factor in elevating the ownership price if public offerings were made.

218. 468 U.S. 85 (1984).

219. *Id.* (citing *Board of Regents*, 468 U.S. at 107).

220. *Id.*

221. *See* Sandra Livingston & Zach Schiller, *National Stock Plan Is Jacobs' Double Play: Indians Owner Gets Millions with No Loss of Control*, PLAIN DEALER (Cleveland), Apr. 20, 1998, at 1A.

222. *Board of Regents*, 468 U.S. at 87.

223. *Id.* at 85.

224. *Sullivan*, 34 F.3d at 1101–02.

225. *Id.* at 1102.

operations and performance.[226] The public ownership policy restricts access to capital, thereby, limiting all NFL teams' ability to be strong and competitive.[227] Thus, the policy clearly affects the overall efficiency in the NFL.

D. The Balancing Test

After establishing that a publicly owned corporation can make a prima facie antitrust case under the rule of reason, a court will determine whether the anti-competitive effects of the policy outweigh the NFL's public ownership policy's legitimate business justifications.[228]

1. Ancillary Restraints Doctrine

The NFL has repeatedly raised the ancillary restraints doctrine as a defense to antitrust challenges.[229] When a restraint is "ancillary" to the functioning of a joint activity, that is, the restraint is required to make the joint activity more efficient, then the injury to competition caused by this restraint does not necessarily violate antitrust law.[230] Courts have agreed that it is possible that League rules restricting competition may be ancillary to a legitimate joint activity.[231]

However, ancillary restraints alone are not per se justifications for NFL policies that otherwise constitute unreasonable restraints of trade under the Sherman Act.[232] The *Sullivan* court, for example, stressed that the holdings in the cases discussing ancillary restraints did not ignore the rule of reason once a restraint was found to be ancillary to legitimate and efficient activity.[233] Rather, the injury to competition must still be weighed against

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226. Dave Anderson, *Jones Successfully Buys NFL Crown*, DALLAS MORNING NEWS, Jan. 29, 1996, at B4. For example, Dallas Cowboys owner Jerry Jones, one of the richest owners in the League, spent more than $40 million in signing bonuses during the 1995–96 NFL season. *Id.* The Cowboys were able to lure Deion Sanders away from the 49ers with a $35 million contract and offered other large signing bonuses to secure other top talent. *Id.* The following year the talent-packed Cowboys were Super Bowl Champions. *Id.*

227. *Sullivan*, 34 F.3d. at 1102.

228. *Id.* at 1096 (citing Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

229. *See, e.g.*, *Sullivan*, 34 F.3d at 1102; *Raiders*, 726 F.2d at 1381.

230. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293–98 (1985); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 23–25 (1971); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) (discussing the ancillary restraint doctrine).

231. *Sullivan*, 34 F.3d at 1102.

232. *Id.*

233. *Id.* (citing *Broadcast Music*, 441 U.S. at 25; *Northwest Wholesale Stationers*, 472 U.S.

the purported benefits.[234] The fact that the injury to competition may be ancillary merely means that the scale may tip in the favor of the restraint.[235]

2. Balancing the Harms and Benefits of the NFL's Prohibition on Public Ownership

In *Sullivan*, errors in determining how to balance the harms and benefits in the appropriate market led in part to the case being remanded.[236] In *Sullivan*, the District Court instructed the jury to balance the *injury* to competition in the nationwide market for the sale and purchase of ownership interests in NFL member clubs with the *benefits* to competition in that same relevant market.[237] The NFL protested, arguing that the pro-competitive effects of the NFL's policy in the broader entertainment market should have been weighed against the anti-competitive effects of the prohibition in the market the jury found.[238] The NFL contended that the beneficial effects of its prohibition on public ownership policy were not readily apparent in the market that the jury found, but it had a beneficial effect for the NFL as a whole by enhancing its ability to effectively produce and present a popular entertainment product.[239]

The *Sullivan* court, agreeing with the NFL, stated that several courts had found it appropriate to balance the anti-competitive effects on competition in one market with certain pro-competitive benefits in another market.[240] While it appears to be a balancing of apples and oranges, the court stated that this kind of balancing was not impossible.[241] In making this determination, the *Sullivan* court discussed how the Supreme Court arguably endorsed this kind of balancing test in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[242] In *Continental*, the Court recognized that positive effects on *interbrand* competition could justify anti-competitive effects on *intrabrand* competition.[243] The *Sullivan* court thus determined that because the entertainment market was closely related to the nationwide market for the

at 293–98).

234. *Id.*

235. *Sullivan*, 34 F.3d at 1103.

236. *Id.* at 1113.

237. *Id.* at 1111.

238. *Id.* at 1112.

239. *Id.* at 1113.

240. *Id.* at 1112 (citing *Board of Regents*, 468 U.S. at 115–20; Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 799 (1st Cir. 1988); M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 986 (1st Cir. 1984); *Raiders*, 726 F.2d at 1381, 1392, 1397, 1399).

241. *Sullivan*, 34 F.3d at 1112.

242. 433 U.S. 36 (1977).

243. *Id.*

sale and purchase of NFL teams, the jury could weigh the benefits of the NFL's prohibition on public ownership in the entertainment market against the harms of the prohibition in the nationwide market for the sale and purchase of ownership interests in NFL clubs.[244] This conclusion makes the critical inquiry whether the benefits to the NFL as a whole resulting from the prohibition on public ownership outweigh the injury caused by this prohibition.[245]

3. Less Restrictive Means

The *Sullivan* court held that if there is a reasonable, less restrictive alternative that would provide the same benefits as the current restraint, the benefits of the restriction cannot outweigh its harm to competition.[246] The NFL claims that its policy against public ownership of teams is intended to ensure the following four benefits: (1) controlling ownership of League teams; (2) sustaining a competitive balance between the teams; (3) preventing commercialization of the League; and (4) maintaining the NFL's image as an individual or family-run operation.[247] However, there are less restrictive alternatives to the NFL's public ownership policy that would yield the same benefits.[248]

a. Maintaining Ownership Control

The NFL need not completely ban public ownership in order to retain a reasonable degree of control over the management of League teams. Rather, in each particular instance the NFL need only require the officers and directors of a publicly owned corporation to abide by applicable NFL guidelines for "new members."[249]

Such requirements for new members, however, should be amended to exempt *all stockholders*—except possibly shareholders holding five percent or more of the voting power of the corporation—from having to comply with these requirements. As currently written, it would be impossible for a publicly held corporation to comply with such requirements. For example, section 3.3(A)(2) states in part that a written financial statement shall be

244. *Sullivan*, 34 F.3d at 1112.

245. *Id.* at 1113; *see also Raiders*, 726 F.2d at 1394 (stating that the critical inquiry was whether the benefits to the League as a whole were outweighed by the harm caused by rule 4.3).

246. *Sullivan*, 34 F.3d at 1103 (citing *Raiders*, 726 F.2d at 1396).

247. *See* discussion *supra* Part IV.C.2.

248. *See Sullivan*, 34 F.3d at 1103.

249. NFL CONST., *supra* note 54, art. III, § 3.1(a).

required from any applicant, including all stockholders.[250] Section 3.3(C) states that each holder of any interest in a membership, including stockholders, must be *individually approved* by the affirmative three-quarters vote of the NFL owners.[251] Obviously, it would be impossible to apply this type of individual approval to the hundreds or thousands of possible shareholders in a public offering. A less restrictive way to avoid hidden shareholder control would be to place a limitation on the size of the holding by any one individual or family, resulting in no majority shareholders.[252]

NFL team owners also have expressed concern that NFL operations would be impaired by publicly owned teams because the short-term profit motive of a club's shareholders might conflict with the long-term interests of the League as a whole.[253] If the board of directors and officers exercising authority over team operations of the publicly owned entity were approved by the NFL, it is likely that they would be persons who would keep the long-term interests of the League in mind. If necessary, the NFL also could create guidelines as to the timing and amount of dividends to be paid out to shareholders. In any event, there is no inherent likelihood that the current private owners put the long-term interests of the League above their own desire for quick profit.[254] In fact, the exact opposite is true for potential fan-shareholders, each holding too little stock to pursue personal interests over maintaining the viability of the team and League.

Article IX of the NFL Bylaws describes prohibited conduct of its member clubs.[255] As currently drafted, prohibited conduct applies to shareholders, officers, directors, managers, and other related persons. If strictly enforced, these rules would make public ownership of an NFL team a practical impossibility. For example, section 9.1(C) states that no stockholder shall bet on any game in which a member club participates.[256] While it is true that allowing anyone owning a membership interest to bet on League games would undermine the credibility of the League,[257] such a

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250. *Id.* § 3.3(A)(2).

251. *Id.* § 3.3(C).

252. *See Sullivan*, 34 F.3d at 1103.

253. *Id.*

254. *See, e.g.*, Leone, *supra* note 3, at 493. The NFL's argument is belied by the frequent relocation of teams in the past decade, believed by many to be the result of the desire to maximize profits at the expense of fan loyalty and League stability. *See* Mullick, *supra* note 6, at 15; Starr, *supra* note 6, at M1.

255. NFL CONST., *supra* note 54, art. IX.

256. *Id.* § 9.1(C).

257. *See* Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961) (recognizing that because of the importance of fan confidence, player gambling rules were "necessary for the survival of the

restriction is overbroad as applied to all shareholders of a publicly owned franchise. For example, a person holding 200 shares of an NFL team having 10,000,000 shares of outstanding voting stock, has no more influence on the outcome of games than any other fan and should be allowed to bet on NFL games to the same extent as any member of the public. This restriction could easily be amended to apply only to those shareholders holding five percent or more of the voting power of the company, and officers, directors, and managers who actually have some control over the team.

By amending the NFL Bylaws to apply only to those shareholders with substantial voting power or otherwise involved directly in the management of an NFL franchise, the NFL could maintain control of each team in a less restrictive manner than a total prohibition on publicly owned teams.

b. Retaining Competitive Balance

The benefit of preserving competitive balance within the NFL could also be controlled with less than an outright ban on public ownership. Competitive balance means that all NFL teams are of sufficiently comparable playing strength to provide competitive and high quality games that are close, exciting, and well-played.[258] The basic assumption is that publicly owned corporations have a greater access to capital than private owners, giving corporate teams a competitive advantage.[259]

There are several reasons why allowing public ownership may not necessarily result in a competitive imbalance. First, publicly held corporate-owned teams may not always have greater access to capital, and even if they do, there is not always a direct correlation between the amount a team spends on player salaries and on-field performance. For example, the privately owned Dallas Cowboys annually record a profit of five times greater than the Green Bay Packers, the only corporately owned team in the League.[260] Although certain corporations such as mega-giants like Disney and Rupert Murdoch's News Corp. would have greater access to capital than most privately owned teams, a publicly owned team formed for the sole purpose of operating a football team, such as this Comment proposes, may have funds similar to the Packers.

In any event, the amount a team spends on player salaries is not always determinative of on-field performance. For example, the Los

League").

258. *See* McNeil v. NFL, 2 Trade Cas. (CCH) ¶ 69,982 (D. Minn. Sept. 10, 1992).

259. *See Sullivan*, 34 F.3d at 1100.

260. Ivey, *supra* note 27, at B1. Compare the Dallas Cowboys average annual profit of over $25 million with the Green Bay Packers average annual profit of just $5 million. *See id.*; Mulhern, *supra* note 48, at C4.

Angeles/Oakland Raiders, the Miami Dolphins, and the Cleveland Browns/Baltimore Ravens have spent liberally on players, but have had little on-field success to show for it.[261]

It is also useful to compare the effect that publicly owned franchises have had on the competitive balance in the other major sports leagues. The NBA, NHL, and MLB all have at least one publicly owned franchise each.[262] The Boston Celtics franchise is forty percent publicly owned.[263] The Toronto Blue Jays, New York Knicks, and Boston Bruins are publicly owned in whole or in part.[264] The Florida Panthers are 58% owned by investors who paid $10 a share.[265] Permitting public ownership of at least a minority interest in a professional team's stock has not harmed the operation of these franchises or the respective sports league.[266]

Second, corporate teams may simply operate without the help of government subsidies that non-corporate-owned teams receive. Public ownership may merely help shift the burden of financing a team from the general tax-paying public, which currently subsidizes many private NFL owners, to the shareholders of the team.[267] Ideally, the raising of capital by sale of stock to the public would enable publicly owned teams to assume the responsibility of paying NFL fees, building stadiums and practice facilities, and financing all other team operating expenses. Thus, corporate access to capital primarily would be used to replace some, if not all, public subsidies, instead of being spent on player salaries.

Third, the NFL already controls the competitive balance through its 1993 Collective Bargaining Agreement ("CBA") with the NFL Players Association in the form of spending limits on teams—the "salary cap."[268]

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261. *See* Scott McPhee, *First Down, Goal to Go: Enforcing the NFL's Salary Cap Using the Implied Covenant of Good Faith and Fair Dealing*, 17 LOY. L.A. ENT. L.J. 449 (1997). At one point, the Raiders had three Heisman Trophy winners on their roster: Marcus Allen, Bo Jackson, and Tim Brown. *Id.* at 466. Despite exceptional talent, the Raiders have had only four winning seasons in the past 10 years. *Id.* Likewise, the Browns/Ravens had the seventh largest payroll in 1995, paid out the second most in bonuses, yet finished 5-11 and failed to make the playoffs. *Id.* The Dolphins had the sixth largest payroll in 1995, issued more than $20 million in bonuses, and finished 9-7, failing to advance past the first round of the playoffs. *Id.*

262. PAUL C. WEILER & GARY R. ROBERTS, CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW 175 (Supp. 1995).

263. *See Sullivan*, 34 F.3d at 1095.

264. *See* WEILER & ROBERTS, *supra* note 262, at 174.

265. Rice Elliott Almond, *Stock in M's, Hawks? It's a Thought; Public Stake in Teams 'Worth Pursuing,'* THE SEATTLE TIMES, Jan. 28, 1997 (News), at A1.

266. *See* Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57 (1997).

267. *See* discussion *supra* Part III.B-C.

268. NFL COLLECTIVE BARGAINING AGREEMENT 1993–2000 art. XXIV (1993) [hereinafter

The CBA's salary cap clause limits the amount of money each team may spend on salaries and benefits for both veteran and rookie players.[269] The Salary Cap was specifically enacted to prevent teams with greater revenue potential from consistently outbidding less affluent teams for the top talent.[270] The CBA also provides a guaranteed League-wide minimum salary of at least fifty-eight percent of the League's defined gross revenues ("DGR").[271] This requirement forces teams that historically have carried a low player payroll to pay higher individual salaries, and thus, presumably remain more competitive.[272]

While some of the League's more aggressive owners have found ways to circumvent the Salary Cap,[273] it remains a fact that there are NFL provisions in effect designed to maintain a competitive balance among teams.[274] Any new bylaws, or changes to the current bylaws, enacted to better maintain the competitive balance could be applied equally effectively to a publicly owned team.

Finally, the wealth of a corporate team may actually improve the viability of the League as a whole rather than lead to its demise. Wealthy corporately owned teams do not necessarily harm the current balance of the League. If wealthy teams mean successful teams, then having more successful teams in the League should increase the League's overall financial strength. Because the NFL has a comprehensive revenue-sharing

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CBA].

269. *See id.* arts. XXIV, XVII. The Salary Cap creates a League-wide salary system that includes a minimum and maximum amount teams may spend on player salaries and benefits. *See id.* art. XXIV. The CBA determines what percentage of the League's defined gross revenues ("DGR") will be spent on all player costs for that given season. *See id.* The DGR is calculated by adding the revenue generated League-wide from ticket sales and broadcast rights to NFL games. *See id.* Each team's total payroll is then set at a fixed percentage of its equal share of the League's revenues. *See id.* For example, in 1994, the first year of the Salary Cap, the projected DGR was $1.7 billion. *See* MARTIN J. GREENBERG, SPORTS LAW PRACTICE § 1.07(10) (Cumulative Supp. 1995) [hereinafter SPORTS LAW PRACTICE 1995]. The fixed percentage was set at 64% of the DGR. CBA, *supra* note 268, art. XXIV, § 4(a)(1). With 28 NFL teams in 1994, the aggregate amount allocated for player salaries and benefits was just over $1.09 billion, or about $39 million per club. SPORTS LAW PRACTICE, *supra*, § 1.07(10).

270. *See* McPhee, *supra* note 261, at 457.

271. CBA, *supra* note 268, art. XVII, §2.

272. *See* McPhee, *supra* note 261, at 459.

273. Allen Barra, *How the 49ers Beat the Salary Cap*, N.Y. TIMES, Jan. 8, 1995, at 35.

274. Ways to cure the ineffectiveness of the Salary Cap in order to better ensure a competitive balance are beyond the scope of this Comment. For a discussion of the inefficiencies of the NFL's current salary cap system, see McPhee, *supra* note 261.

system, a strong, successful team will actually increase the revenue pie, providing more income for other League members.[275]

Corporate-owned teams could also increase the value of every individual NFL franchise.[276] This notion is supported by the recent sale of the Los Angeles Dodgers to Rupert Murdoch's News Corp. for a reported price of approximately $311 million.[277] Commentators have estimated that this transaction increased the value of all other MLB teams by ten to twenty percent.[278] Thus, strong NFL teams, whether because of corporate ownership or otherwise, should raise the value for every other team in the open market.

c. Preventing Commercialization of the NFL

The fear concerning undue commercialization of the NFL can be resolved in a number of ways without prohibiting all public corporate ownership. For example, as currently required under section 3.2 of the NFL Bylaws, only corporations formed solely for the purpose of operating an NFL franchise are eligible for membership.[279] Also, section 3.11(e) of the NFL Bylaws states that after becoming a member of the League, the primary purpose of the entity must at all times be the operation of a professional football team.[280] Restricting the use of public ownership to corporations formed solely for the purpose of running an NFL franchise would eliminate any concerns that the corporation would use football as a means to promote other products.

An even less restrictive way to limit commercialization would be for the NFL to allow any type of corporation to own an NFL franchise, but to actively enforce its bylaws dealing with advertising of products.[281] Currently, not all the NFL owners abide by these licensing rules, making it

275. Ostfield, *supra* note 7, at 604.

276. The possibility of public ownership increasing the purchase price of NFL franchises to a level that few private owners can afford is not factor under a section 1 analysis because a basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace, rather than private agreement. *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1397 (9th Cir. 1984) (citing United States v. Trenton Potteries, 273 U.S. 392 (1927)).

277. *See* Ross Newhan, *Owners Vote Today on Sale of Dodgers*, L.A. TIMES, Mar. 19, 1998, at C11.

278. *See* Ross Newhan, *These Guys Should Know How to Communicate*, L.A. TIMES, Mar. 20, 1998, at W3.

279. NFL CONST., *supra* note 54, art. III, § 3.2.

280. *Id.* § 3.11(e).

281. *See id.* § 3.11(g) (requiring all members to agree to be bound by all of the terms and provisions of the NFL Constitution and Bylaws).

possible for current private owners of the NFL to unduly commercialize the League.[282]

The NFL could also require any public corporations desiring membership to enter into specific contractual arrangements with the NFL promising to abide by League guidelines. The possibility of preventing commercialization by contractual arrangement is supported by the recent sale of the Los Angeles Dodgers to Rupert Murdoch's News Corp.[283] News Corp. also owns Fox Television, prompting several MLB team owners to express concern about News Corp. abiding by baseball regulations governing international and local telecasts.[284] In negotiating the sale, the chief operating officer of News Corp. entered into a specific agreement with major league baseball assuring that he would protect the Dodger image and abide by all baseball negotiations.[285] While it remains to be seen whether such arrangements will effectively protect MLB's interests, Rupert Murdoch's "side agreements" with that League serve as an example of how specific fears can be alleviated by contractual agreement.

d. The Fallacy of the NFL Being a "Mom-and-Pop" Organization

It may be comforting to envision the NFL being run by a small, close-knit club of individuals who hold football dearest to their hearts. Indeed, it is romantic to think of the teams being owned by noble, idealistic, family people, free of controversy and scandal, serving fans of all generations. While NFL owners are often "super-fans" who originally acquire franchises seeking to maximize their enjoyment of the game, owners also want to maximize their profits once a franchise is acquired.[286] Owning a franchise can be a lucrative investment, with financial benefits including tax advantages, annual direct profits, and, most significantly, profit from the sale of a franchise.[287]

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282. *See* Piraino, *supra* note 94, at 1684. For instance, the Dallas Cowboys have openly defied this policy, entering into independent marketing agreements with Nike, PepsiCo, and American Express. *See* McPhee, *supra* note 261, at 471.

283. *See* Murray, *supra* note 90, at W1.

284. Ross Newhan, *Owners Vote Today*, *supra* note 277, at C11.

285. Ross Newhan, *These Guys Should Know*, *supra* note 278, at W3. Rupert Murdoch is quoted as saying, "As owners of the Dodgers, we will work hand in hand with the other owners to further assure the long-term growth and success of America's pastime." *Id.*

286. GEORGE H. SAGE, POWER AND IDEOLOGY IN AMERICAN SPORT 138–39, 154 (1990).

287. *Id.*; *see also* Piraino, *supra* note 94, at 1703. The Baltimore Orioles sold for $70 million in 1989. *Id.* In 1994, after the State of Maryland built Camden Yard for the Orioles, the team was sold for $173 million, representing an appreciation of 250% in just four years. *Id.* Further, Art Modell paid $4 million for the Cleveland Browns in 1961. *Id.* With the Browns' new stadium in Baltimore, estimates of the team's worth are now close to $200 million. *Id.*

Make no mistake, the NFL is "big business."[288] Indeed, Article II of the NFL Bylaws states that the League is formed for the purpose of promoting the primary business of League members.[289] With this in mind, it is clear that a publicly owned NFL franchise would not change the current "big business" character of the NFL. Furthermore, whether a team is publicly or privately owned, the entertainment value of the League will not be affected. If anything, public ownership will result in improved quality and more exciting League games, especially because potential fan-shareholders will truly be able to cheer for their "own" team.[290] Moreover, public ownership should increase fans' loyalty to the NFL because they can take pride in and achieve personal benefit from their investment.[291]

Thus, viable less restrictive alternatives exist to the NFL's prohibition on public ownership, making it likely that the benefits of such a prohibition cannot outweigh the harms it causes. Unless the NFL takes a hard look at its anti-public ownership policy, it could be in for more antitrust problems.

V. CONCLUSION

With the possibility that the NFL's prohibition on public ownership violates section 1 of the Sherman Antitrust Act, the time has come to challenge this policy. Since the NFL recently granted the Lerner-Policy group ownership of the Cleveland Browns, creating thirty-one NFL teams, the NFL is clamoring to find an appropriate city in which to locate a thirty-second team.[292] With the stark reality that it will take money—lots of money—to win the NFL's affection, a community-owned franchise provides a practical solution to the main obstacle cities confront when trying to entice the League to grant its area a new franchise.

Furthermore, public ownership obviates the need for a city to seduce a franchise from another desirous NFL city. Rather, community-based ownership gives NFL fans the unique opportunity to build a team through their own resources and to become owners of the franchise. With ownership rights come pride, love of the game, and loyalty to the NFL. Moreover, a community-owned team would become a permanent fixture in an area, much like the Green Bay Packers, increasing the stability of the NFL. NFL fans should not passively allow the NFL to destroy itself in its relentless pursuit of the almighty dollar. Rather than watching professional football continue

288. SAGE, *supra* note 286, at 69.

289. NFL CONST., *supra* note 54, art. II.

290. *See Sullivan*, 34 F.3d at 1102.

291. *See* Ivey, *supra* note 27, at 13.

292. *See* Simers, *supra* note 15, at C3.

its play-by-play pageant of opportunism and greed, NFL fans should partake in a plan to return professional football to its civic foundation.

*Lynn Reynolds Hartel**

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