September 13, 2011

# O Wad Some Power the Giftie Gie Us†

## League Structure & Stadium Rent Seeking – the Antitrust Role Reconsidered

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## INTRODUCTION

The median age of a family home in the United States is 37 years[1] but Major League Baseball and National Football League stadiums each average less than 23 years of age.[2] Several times a decade a completely new edifice, often in a city over a thousand miles away, supplants some team's relatively new stadium. Governments at various levels invest heavily in stadiums that wealthy professional franchises then use.

In stark contrast, this season the mean age of playing grounds in England's and arguably the world's top soccer league, the Premier League, exceeds 78 years. The conjunction of Premier League and American ages seems quite odd given the similar configurations and functional interchangeability of soccer and American rules football stadiums.[3] English soccer teams in every competitive tier renovate frequently but rarely build an entirely new stadium. Wealthy upper tier teams typically bear much or all construction and renovation cost. English teams almost never abandon their hometown.

We argue that neither cultural nor political cross-Atlantic differences are responsible for the disparity; instead, a differing organization of sports – the structure of entry control – facilitates rent seeking by U.S. and Canadian teams that is unavailing for their English counterparts.[4]

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† Robert Burns, *To a Louse* (1786)

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[1] U.S. Census Bureau, American Housing Survey National Tables: 2009, Table 1-1. Introductory Characteristics – All Housing Units
http://www.census.gov/hhes/www/housing/ahs/ahs09/ahs09.html

[2] See *infra*, Figure 1.

[3] The 1994 Mens Soccer World Cup, hosted by the United States, used professional and collegiate football stadiums exclusively; American rules football games played in England, including the annual NFL game at London's Wembley Stadium, use soccer stadiums exclusively.

[4] Scotland and Northern Ireland have separate leagues, as does Wales to an incomplete degree, so the reader mustn't think us careless when we speak not of Britain but of England. Similarly, all the major

Top tier American teams use their league as a cartel, impeding entry by potential competitors whether they be teams or entire leagues, collaborating when rent seeking, keeping quantity low and price high. To avoid costly formation of an entire league, an aspirant requires acquiescence by the existing teams acting jointly through their league, an acquiescence that comes rarely and at a very high price. The difficulty an American challenger has entering the industry without entering the incumbent league enables the incumbent to threaten to withhold or withdraw all representation from a city that refuses to absorb much or all of the cost of cutting-edge facilities.

Los Angeles reveals a glaring example – in 1961 the Chargers moved to San Diego, then in 1995 the Rams moved to St Louis and the Raiders to Oakland. Each of those teams relocated to a newer publically financed stadium in a much smaller city. Henceforth the second most populous Standard Metropolitan Statistical Area (SMSA) in the United States has lacked an NFL team. That is sixteen years and counting. It is noteworthy that the Raiders initially arrived in Los Angeles only because Oakland refused to update its stadium as the team demanded, then returned north when LA likewise proved intransigent after Oakland saw the error of its ways. Now, the Chargers, Rams, and Raiders are among five teams thought most likely to relocate to Los Angeles – but only if local government contributes heavily toward a new stadium.[5]

Regardless of the sport – soccer, basketball, ice hockey, or others rarely played in the U.S. – in most of the world entrance into leagues opens annually. A team earns or loses its place based on competitive merit via a system known as promotion-and-relegation. The system demotes the worst performing teams in one competitive tier to the next lower tier at season's end, replacing them with an equivalent number of top teams from the division below. Promotion-and-relegation has been standard practice in upper-tier English soccer since 1892. The system enables a team to improve its position unilaterally based on its playing skill and performance, factors that correlate with host city wealth, population, and preferences – in other words fan base ability to provide adequate revenue. That fluidity severely undermines the credibility of a team's threat to leave town. Promotion-and-relegation creates alternative entry points for teams anxious to represent the locality, thus mitigating pressure to engage in intercity competition over scarce team slots.

The existing literature on stadium rent seeking overwhelmingly concludes that the practice is harmful in numerous ways.[6] Premature replacement of stadiums is expensive, wasteful of scarce public resources – diverting money from alternative infrastructure such as hospitals and roads – and seldom leads to the positive economic and cultural benefits that advocates routinely tout.

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leagues that have teams in the U.S. also have Canadian franchises, so we refer collectively to American teams, leagues, and governments, using U.S. only if the context is inapplicable to Canada.

[5] Arash Markazi, *LA has tentative stadium agreement*, ESPNLOSANGELES.COM July 26, 2011. The other two are Jacksonville and Minnesota, using the exit threat to pry from its host government a third new stadium since the team's formation in 1960.

[6] See *infra*, Part I.

Most writers merely describe the problem or focus on one causal aspect – credible threats to leave – and suggest a single solution, such as legally restricting team movement in one fashion or another. We contend that the problem is broader than simple team movement; the problem is league structure and entry control lying in the hands of incumbents.

We argue that imposition of a promotion-and-relegation system would be the least intrusive means for the U.S. and Canada to limit sporting league cartel behavior to its proper functions, such as arranging schedules and defining homogeneous rules.[7] We support our claim with cross-country time series data contrasting American professional football and baseball stadiums with English soccer grounds, and by contrasting data regarding the stadiums of footloose NFL teams with those of functionally immobile major collegiate football teams.

Promotion-and-relegation is only one potential solution for a broader problem of abuse of market power and its manifestation in stadium rent seeking. Adopting a system of promotion-and-relegation is a particularly elegant solution because it restructures incumbent incentives rather than directly interfering with team management, which requires skilled decision making regarding a plethora of matters having little to do with the undesirable aspects of cartel behavior.

The key to addressing the problem of stadium rent seeking is to identify its causes and consider solutions that address those causes. Part I discusses more fully the nature of the American problem and its contrast with England. Part II considers causes: demand – the public choice problems that exaggerate a city's inelastic demand for local league representation; supply – comparing the closed system of American leagues with the freedom of entry created by a promotion-and-relegation system; and free movement – contrasting both American teams incentive and ability to move with the derived incentive for loyalty in England. Part III compares stadium ages to test the impact of the different industrial organizations of sports in the two countries. Part IV pits antitrust law against a promotion-and-relegation system, and considers how lawfully to impose the latter.

## I. PUBLIC SPENDING FOR PRIVATE BENEFIT

American governments spend astonishing sums constructing new sporting facilities for private professional sports teams. Between 1970 and the end of 1999, the tally in the U.S. was $10.4 billion.[8] Public subsidies for stadium renovation over the same period

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[7] Ross and Szymanski advance a similar proposal, although without our data and mode of analysis, Stephen F. Ross and Stefan Szymanski, *Open Competition in League Sports*, 2002 WISCONSIN LAW REVIEW 625, 628 (2002). Noll also noted that the lack of a promotion-and-relegation system contributes to the stadium rent seeking phenomenon in North America, as have Cain and Haddock. Roger G. Noll, *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football,* 3 JOURNAL OF SPORTS ECONOMICS 169, 176-77 (2002); Louis P. Cain and David D. Haddock, *Similar Economic Histories, Different Industrial Structures: Transatlantic Contrasts in the Evolution of Professional Sports Leagues*, 65 JOURNAL OF ECONOMIC HISTORY 1116, 1127-30 (2005).

[8] John Siegfried and Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14(3) JOURNAL OF ECONOMIC PERSPECTIVES 95–114 (2000) at Table 1 (summarizing data in Raymond J.

amounted to a further $1.4 billion.[9] As the studies discussed below show, despite promoters' rationalizations to the contrary, subsidies are nearly entirely a wealth transfer from the general public – and certainly not merely or even predominantly from sports fans – to a select group of private franchises and their players. A few examples are informative.

Estimates indicate that taxpayers will bear more than half of the cost, $1,186 million, of the *New Yankee Stadium* that opened in the Bronx in 2009.[10] A taxpayer burden of $1,186 million amounts to nearly $200 per family living in the tri-state New York City SMSA, or $500 per family within the city itself. Given the choice, how many of those families would have volunteered such a contribution to the third most valuable sports team in the world?[11] Being evenhanded, taxpayers simultaneously forked over an additional $614 million of the $831 million cost of a new stadium for the cross-town Mets,[12] bringing the ratios to $300 per family in the SMSA and nearly $700 in the city.

The public's largesse is unreciprocated. Yankee fans now pay 39% more, on average, for standard tickets,[13] and fewer of them to boot.[14] By revealed preference, the combination of fewer seats at higher prices must make sense from the teams' perspective, but is incongruous given the projects' massive public subsidies.

A further incongruity is the demolition of so much recently built or refurbished infrastructure. Milwaukee built the first completely new publicly funded stadium intended solely as a professional baseball field, attracting the Braves away from Boston upon completion in 1953.[15] During the first season, the team set a National League

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Keating, *Sports Pork: The Costly Relationship Between Major League Sports and Government*, POL'Y ANALYSIS, APR. 1999) These figures are in 1997 dollars. By decade, the figures break down to $5,102 million, $1,581 million and $3,746 million for in the 1970's, 1980's and 1990's, respectively. *Id.*

[9] *Id.*

[10] The remaining $1,123 million was privately financed. See, Neil Demause, *Private/Public Cost Breakdown For New Yankees/Mets Stadiums*, January 2009 available at *http://www.fieldofschemes.com/documents/Yanks-Mets-costs.pdf* last visited on 4 August 2011.

[11] According to Forbes, Manchester United is the most valuable sporting team in the world, worth $1.835 billion, followed closely by the Dallas Cowboys at $1.65 billion and the New York Yankees at $1.6 billion. See, FORBES, *SportsMoney 50-50*, August 9, 2010.

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[13] Victor Matheson and Brad R. Humphreys, *Pilots And Public Policy: Steering Through The Economic Ramifications*, 16 VILL. SPORTS & ENT. L.J. 273 (2009).

[14] The new stadium's seating capacity is 50,287 whereas at abandonment the old stadium could seat 56,936. Prior to an earlier publically supported renovation, the Yankees had often sold more than 70,000 tickets. See, *http://en.wikipedia.org/wiki/Yankee_Stadium#cite_note-8, and http://en.wikipedia.org/wiki/Yankee_Stadium_%281923%29*.

[15] Baltimore built Venable Stadium at public expense in 1922. Venable sometimes served as a neutral venue for collegiate football games such as Army v Navy. No professional team used it until 1944 when the city's International League baseball Orioles lost its playing field to fire. Renamed Memorial Stadium after WWII, the city rebuilt the stadium during 1949 and 1950 for use by the Colts of the All American Football Conference and by the Orioles. The Colts folded after using the stadium for one season, though an NFL

attendance record. Following the 1966 season, however, the Braves left for a still newer stadium in Atlanta. County Stadium received a reprieve when the expansion franchise in Seattle, dissatisfied with *its* stadium, moved to Milwaukee two years later, but today none of those stadiums remains standing.[16]

Kansas City and Milwaukee had been rivals in the minor American Association. In 1955 Kansas City followed Milwaukee's lead, replacing its minor league stadium in haste, and presumably at substantially enhanced cost, after the Athletics made a firm but contingent commitment to move from Philadelphia.[17] As had happened with the Braves sojourn in Milwaukee, the stay was brief. The team was enticed away thirteen years later by Oakland's new stadium. Following a brief interlude – coupled with a Missouri senator's threat to initiate a Congressional attack on baseball's privileged antitrust status – a new expansion team used KC's Municipal Stadium for an additional four years. But American professional sports teams do not like hand-me-downs, so the city replaced the eighteen-year-old stadium with a new one.

What is so very striking about these examples is not merely the destruction of new stadiums but that teams are often able to convince local politicians that their facility is obsolete before the government has even finished paying for it. New Jersey, for example, still owed about $110 million when they tore down 33-year-old *Giants Stadium* to make way for *New Meadowlands Stadium*.[18] Likewise, taxpayers owe more than $80 million for the Kingdome, which Seattle opened in 1976 but razed in 2000.[19]

Public subsidies come in a complex variety of forms that obscures the true cost: free land, free rent,[20] publicly funded construction and renovation, the assumption of debts,[21] property tax exemptions, and straight cash payments.[22] More subtly, a non-trivial part of the burden of replacing *The House That Ruth Built* and similar structures will be borne by

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expansion team of the same name reoccupied the field in 1953. The St Louis Browns moved to Baltimore in 1954, evicting the minor league baseball team from both its field and its name.

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17 Kansas City managed to complete construction in 90 days by employing workers on three shifts.

18 Ken Belson, N.Y. TIMES, *As Stadiums Vanish, Their Debt Lives On*, September 7, 2010.

19 *Id.*

20 Nathan R. Scott, *Take Us Back To The Ball Game: The Laws And Policy Of Professional Sports Ticket Prices,* 39 U. MICH. J.L. REFORM 37 (2005) (noting that the Baltimore Ravens and the Minnesota Twins play rent-free whereas New York City actually paid the Yankees $10,000 to play in Yankee Stadium in 1977 because the stadium lease allowed the team to deduct maintenance costs from the rent.)

21 For example, state and local governments assumed the Rams's $30 million debt to the City of Anaheim on the team's move to St. Louis.

22 See generally, Judith Grant Long, *Full Count: The Real Cost of Public Funding of Major League Sports Facilities*, 6 JOURNAL OF SPORTS ECONOMICS 119-42 (2005); Ross D. Weiner, *Financing Techniques and Stadium Subsidies in the United States*, 11 JOURNAL OF URBAN TECHNOLOGY 41-59 (2004). See also, Scott, *supra* note 20 (noting that the Rams were given $15 million to cover relocation expenses in their move to St. Louis. In 1990, Montreal and the Province of Quebec gave the Expos' new owners $33 million to help them buy a team that moved to Washington fifteen years later.)

people who live thousands of miles away. A 1996 Congressional Research Service (CRS) report shows that even those stadiums ostensibly built with private funds receive substantial aid from their tax-exempt bond status.[23] Holding the overall size of government constant, other taxes have to be higher in compensation because interest earned by holders of municipal and state bonds is taxed less. The CRS estimated that a $225 million stadium built in 1996 and financed entirely with tax-exempt bonds would receive a federal subsidy as great as $75 million over its life.[24] According to the CRS, the federal tax subsidy for sports stadiums was $146 million in 1989 alone.[25]

Most stadium construction or refurbishment confers real benefits. What is needed when evaluating projects is not benefit analysis, however, but cost-benefit analysis. The willingness of English soccer teams to undertake such projects without public aid evidences those stadiums pass the test, but the analysis is faulty if, as in America, the decision maker reaps the bulk of the benefits while bearing a greatly reduced or nonexistent share of the cost.

Though the benefits typically include positive spillovers, the same is true when a family replaces an eyesore or weed-infested lot with a nice new home. In both instances, the bulk of the benefit accrues to the occupant, and ordinarily the family must bear its own construction cost. As we elaborate below however, the stadium projects also create subtle negative spillovers beyond the neighborhood. A coherent argument that either the home or the stadium merits a subsidy requires evidence both that positive spillovers outweigh negative and that the net is what Buchanan and Stubblebine have branded a "relevant externality."[26] A party that satisfies an especially avid private demand often inadvertently satiates weaker demands for spillovers. If so, an externality that might demonstrably be positive in total is nonexistent at the margin.[27]

The empirical literature overwhelmingly concludes that the long-term public cost of stadium construction overshadows the public benefits.[28] Public funds ploughed into new

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[23] When a state sells stadium bonds they pay below-market interest rates because the interest earnings are exempt from federal tax. In most states bonds issued by a city are exempt from state taxes as well. The CRS Report "found that the federal government loses millions of dollars in tax revenues without generating any net economic benefits to the nation as a whole. Moreover, federal taxpayers' revenue loss usually exceeds the value of stadium bond interest savings to state or local taxpayers." Matthew J. Mitten and 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, 145-46 (1997).

[24] DENNIS ZIMMERMAN, TAX-EXEMPT BONDS AND THE ECONOMICS OF PROFESSIONAL SPORTS STADIUMS 9 (1996) (Congressional Research Service); Adam Safir, *If You Build It, They Will Come: The Politics of Financing Sports Stadium Construction*, 13 J. L. & POLITICS 937 (1997)

[25] Zimmerman *supra* note 24. The public choice implications of the complexity of stadium financing are considered in Part II-A, *infra*.

[26] James M. Buchanan and William Craig Stubblebine, *Externality*, 29 ECONOMICA 371-84 (1962).

[27] David D. Haddock, *Irrelevant Externality Angst*, 19 JOURNAL OF INTERDISCIPLINARY ECONOMICS 3-18 (2007).

[28] See generally, ROGER G. NOLL AND ANDREW S. ZIMBALIST (EDS), SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (1997).

and rejuvenated stadiums typically are justified as conferring gains to city reputation, prestige, employment, and tax revenue.[29] Promoters assert that the franchise will enhance "the cultural fabric" of a city in ways that defy empirical assessment.[30] The evidence, however, suggests that publicly subsidized stadiums are not cost effective job creation tools, nor are they particularly beneficial in urban redevelopment.[31] Further, even assuming one credits the claims, if a new stadium attracts one of an arbitrarily limited number of teams, one city's gain is another city's loss. Proponents' assertions also run aground on a fact that is little known in American – while foregoing the magnitude of stadium finance that plagues American governments, during a typical season a high caliber city in England nonetheless has high caliber teams, *and usually more of them* as we show below.[32] If one stadium confers the benefits alleged, one would think multiple stadiums would confer more.

Examining new construction that occurred in ten cites between 1958 and 1993, Robert Baade and Allen Sanderson estimated that a new stadium had either no effect or a negative effect on the city's share of amusement and recreation income.[33] New stadiums draw scant business from outside local communities.[34] Household entertainment demand is inelastic, so a new stadium mainly displaces local competitors such as movie theaters and amusement parks. Like an individual, a government has a budget constraint. Consequently, government money spent on stadiums diverts economic development from other forms of infrastructure toward labor-intensive, low-wage, part-time jobs such as staffing the parking lot or concession stand on game days.[35] Money spent on stadiums is diverted from education, public health, public safety and infrastructure with undeniable positive spillovers.[36] Thus stadium building simply transfers wealth from a plethora of politically less-favored industries whose aggregate loss exceeds the gain realized by the single favored one.

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[29] Benjamin A. Okner, *Subsidies of Stadiums and Arenas, in Government and the Sports Business* 325, 327-29 (Roger G. Noll ed., 1974).

[30] Dean V. Baim, *The Rational Behavior Behind NFL Relocations*, 30 U. TOL. L. REV. 443 (1999)

[31] See generally, Noll and Zimbalist *supra* note 28.

[32] See *infra* Part II-B.

[33] Robert A. Baade & Allen R. Sanderson, *Employment Effect of Teams and Sports Facilities,* in SPORTS, JOBS AND TAXES 92 (ROGER G. NOLL & ANDREW ZIMBALIST EDS.) (1997). See also Robert A. Baade, *Is There an Economic Rationale for Subsidizing Sports Stadiums* (HEARTLAND INST. POL'Y STUDY NO. 13, 1987) (concluding that stadiums do not create jobs, instead, jobs are "diverted from the manufacturing economy to the service economy, or from higher-skilled to lower-skilled (and lower-paid) occupations.")

[34] See Siegfried & Zimbalist, *supra* note *8* (discussing 'substitution in public spending'); See also Safir, *supra* note 24 (noting that in St. Louis, San Francisco, and Washington, D.C., stadiums probably had a negative effect on per-capita income.)

[35] Safir, *supra* note 24. See also, Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173 (2002) ("Opportunity costs associated with a community's decision to build a stadium arise as scarce tax dollars, earmarked for stadium financing, are precluded from funding other public programs.")

[36] Brad R. Humphreys, *The Economic Impact of Sporting Facilities*, in HANDBOOK ON THE ECONOMICS OF SPORT, (WLADIMIR ANDREFF & STEFAN SZYMANSKI EDS) 218 (2006).

Apart from opportunity cost, public underwriting of sporting facilities is demonstrably a very expensive tool of job creation. The new stadium used to draw the original Browns from Cleveland to become the Baltimore Ravens cost Maryland taxpayers $200 million in 1998.[37] Supporters claimed that 1,394 full-time jobs would materialize.[38] That comes to a cost of $127,000 per job, but it takes a good while for most employees to aggregate that sum in their paychecks. Moreover, even when the initial figures can be formulated in a way that make them look positive, new stadiums are without exception plagued by construction problems and cost over-runs.[39]

Teams often argue that they cannot attract playing talent that is able to compete in the league without taxpayer support, given the astronomical salaries today's players demand. The argument may sometimes have merit vis-à-vis a single team, but that is because it describes a prisoner's dilemma. If all other teams are able to pay astronomical salaries because they receive taxpayer support, one team will have tremendous difficulty securing comparable talent unless it follows suit. If none of the teams received taxpayer support, however, the salaries would not be so astronomical.

The vast bulk of the paycheck of virtually every top tier professional athlete represents economic rent. The average annual salary of a player in the NBA exceeds $5 million; in MLB last season it was more than $3 million; in the NHL it is $2.4 million; in the NFL, $1.9 million. Those amounts do not include income from endorsments, public appearances, and the like that for star athletes usually exceed the salary component itself.

Imagine what would happen if every player salary was cut in half. How many of those athletes would quit playing and seek alternative employment? Some marginal players who earn well below the average would decide they had superior alternatives, as would some older players who had stashed away substantial investments. Some immature players of questionable talent would decide not to make an investment trying to become a major league talent. The number exiting would be modest however, and more to the point those are supporting players, the ones most easily replaced. Fans hardly recognize the names of "near greats" who grease the skids for the stars; the stars' exploits are the ones most fans follow. Moreover, an increase in the number of professional teams that might result from promotion-and-relegation would mitigate or even reverse the impact on player salaries.

In any event, though car buyers care about the absolute ability of an automaker to build a good vehicle, the relative ability of competing teams is the matter of interest. If one team

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[37] Keating, *supra* note 8.

[38] Goodman, *supra* note 35.

[39] Prospective assessments of the economic contribution of new stadiums by consultants employed by the teams and leagues are invariably positive: "Every proposed facility will pump millions of new dollars of spending into the local economy during the construction period, and when built will continue to create thousands of new jobs, raise incomes significantly, and enrich local government coffers with millions of dollars of new tax revenues." Humphreys, *supra* note 36 at 215. These prospective studies rely on unrealistic mulitpliers and overly optimistic cost predictions that are literally never borne out in retrospect. *Id.*

became 10% less skillful while the others in the league remained unchanged, we have identified the cellar dweller. If all the teams became 10% less skillful because taxpayers won't pony up, few fans would be able to tell the difference.

Public financing is so entrenched in America that the reader must imagine that no other way exists to finance modern high-caliber stadiums. England reveals a different model. Arsenal's recent move from their home of 93 years to a new facility stands in marked contrast to the American experience. The new *Emirates Stadium* has a capacity of 60,355, offering many more fans the chance to see their team in action than did the 38,419 seats in *Highbury Stadium*.[40] The *Emirates* stadium has much in common with the *New Yankee Stadium*: the latter broke ground less than a month after the former was officially opened, [41] Arsenal FC and the Yankees are both wealthy privately owned franchises based in world-class cities,[42] and the two stadiums were designed by the same leading architectural firm.[43] However, in stark contrast to its American equivalent, the *Emirates* was completed ahead of schedule and on budget, was built without public financing, and included other facilities for public use.[44]

## II. CAUSES

The extraordinary leverage that teams hold over American cities is a product of strong demand, limited supply, closed entry and the ability to make credible threats to move to obtain better terms from rival cities. As we explain in the Part, the strong demand driven by intense public interest in sports and the fallibility of local political systems are necessary pre-conditions. However, as those are common factors in England and America, they cannot provide an explanation of the prevalence of the form of rent seeking in America while it remains muted across the pond. Some commentators focus on "franchise free-agency" or team freedom of movement as the root cause of stadium rent seeking, but that analysis confuses cause and effect. English soccer teams are as free to move as are their American counterparts, but as their host city would lose relatively little if the team left, little would be gained by threatening. The foundation of the problem is the cartelization of American leagues.

### A. Demand

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[41] *Emirates* opened on 22 July 2006, the New Yankee Stadium broke ground on August 19, 2006.

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[44] See, ESPNSOCCERNET, *"Arsenal sell £260 million bond to help finance stadium",* 13 July 2006. Available at (http://soccernet.espn.go.com/news/story?id=373845&cc=5901) last visited __. Arsenal used the odd corners of its new property to construct housing for sale. Rather than remaining empty except on game days, Brighton and Hove Albion's new stadium includes bars, clubs, convention facilities, a daycare center, and instructional space for the University of Brighton. In instances when the U.K. provides public financing, typically for smaller and less profitable teams, a widened public access is a common condition. The national government dispenses most public stadium construction funds, such as they are, bypassing intercity competition for team representation.

Although the literature overwhelming concludes that public funding of professional stadiums is costly rent seeking, when discussing causes many scholars posit either irrational public demand or a dysfunctional political system.[45] The former suggests excessive attachment to sports, leading taxpayers to tolerate large transfers to maintain or gain local league representation. The demand for local representation in top tier leagues appears to be quite inelastic, however that is also true in the U.K. and cannot account for a difference. The political explanation for stadium rent seeking takes two forms: either shortsighted municipal leadership – i.e. incompetence – or else standard public choice theory – groups that have a focused interest exploiting a skewed political system against a general public that has diffused interests.

For a local politician, facilitating publicly financed stadium renovation or construction offers immediate and extraordinary benefits. Strong civic interest in retaining or obtaining a team means the politician's effort (or lack of effort) will be extraordinarily well-reported by the press. Political elites ability to dispense construction contracts selectively provides them with an additional and less well-reported benefit. Much of the cost of renovation or new construction, in contrast, falls well into the future on people who are in a poor position to predict their individual burdens.

In effect, a team's ability offer to move to some city or cities, a simultaneous threat to leave their present host, benefits not just the team but also city officials. By being offered or "threatened" politicians gain a derived offer to make to their voters or a derived threat to turn against them.[46]

The opacity of infrastructure financing also contributes to the public choice dynamic. We in Chicago know that the Bears and White Sox play in subsidized stadiums,[47] but few of us realize that we also support facilities across the nation for both major and minor league teams. The new facilities certainly are a bargain for the teams and their players. They may be a bargain for some Chicago sports fans as well, considering that part of the tab is borne by taxpayers elsewhere. At the same time, taxpayers outside Chicago cannot spare the time to pay much attention to Chicago, so few of them even recognize the load they

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[46] McChesney discusses the benefits accruing to politicians from their ability to threaten to withhold or withdraw benefits from small and coalesced interest groups. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987). The threats regarding public stadium finance are aimed at a broad general public, and doubtless would incite retribution at the polls if issuing directly from city officials. Without risking adverse political outcomes, city officials turn threats from unelected team management to their benefit in a way similar to the one McChesney discusses..

[47] The Illinois legislature approved a $432 million contribution to rebuild Soldier Field for Chicago Bears. Area taxpayers will be paying off the debt for more than thirty years, at a total cost of $1.3 billion. See Nathan R. Scott, *Take Us Back To The Ball Game: The Laws And Policy Of Professional Sports Ticket Prices,* 39 U. MICH. J.L. REFORM 37 (2005). See also, Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-a-Vis the American City*, 2 VA. SPORTS & ENT. L.J. 280 (2003). In the face of the team's threat to relocate to the Tampa SMSA, Illinois voters authorized a $60 million stadium subsidy to the Chicago White Sox. Under the final bonding provision, however, the team actually received $150 million. See, Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo,* 67 IND. L.J. 25 (1991).

are bearing. Even the knowledgeable few can ill afford to do anything about it. In other words, much of the weight falls on rationally ignorant and rationally apathetic taxpayers because individually their contributions are small, though multiplied by the more than 300 million of them living across the U.S. the aggregate is sizable.

Even fully informed Chicago sports fans might be happy to have the new stadiums considering that foregoing the local construction would have led to no reciprocation. We also bear the burden in reflection – we bear only part of the cost of local stadium construction, but simultaneously bear part of the burden for a plethora of publically financed stadiums across the nation, the vast majority of which we will never enter. What could seem a bargain under a local focus morphs into a bald-faced swindle under a national focus. Another prisoner's dilemma, the one facing voters.

Though public choice theory is useful for understanding the problem, it is incomplete for two reasons. First, it explains too little: many rent-seekers have the ear of politicians, combining the clout of wealth with the political advantage of broadly dispersed costs and concentrated benefits; yet local governments are particularly responsive to the demands of professional sports teams. Consider Cincinnati's Hamilton County, Ohio, which assumed more than $1 billion in debt to pay for one stadium for baseball and another for football, and in consequence was forced to roll back a property-tax break when the two projects soared over their initial budgets.[48] Second, the public choice story explains too much: the political advantages that it describes apply equally to British politicians, yet there the practice is nearly unknown.[49] An explanation for the divergence is required. Pointing simply to "cultural differences" is unsatisfactory given apparent cultural similarities across much of the English-speaking world.

The organization of American leagues is the culprit. American teams have more success limiting entry by teams into the league and sabotaging new leagues. That control over entry arms them with a credible threat to leave a given locality with no league representation and thus makes cities eager to retain the teams they have and willing to pay a high price to attract teams from elsewhere.

### B. Supply

#### *1. The Closed American Sports System*

Because a team cannot join the National Football League, Major League Baseball, the National Basketball Association, the National Hockey League, nor even the perversely named Major League Soccer without permission of the existing members, incumbent franchises determine their own competition. They have an obvious interest in restricting entry. If the initial teams in a league were sited in the best locales, being selected sequentially from the most attractive option on down, increasing league size should

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[48] Reed Albertgotti and Cameron McWhirter, *A Stadium's Costly Legacy Throws Taxpayers for a Loss*, the Wall Street Journal (July 12, 2011)

[49] Calvin Jones, A Level Playing Field? Sports Stadium Infrastructure and Urban Development in the United Kingdom, 33 ENVIRONMENT AND PLANNING A 845-61 (2001).

increase total revenue but reduce average revenue.[50] That makes incumbents hostile toward new contestants unless and until the aspirant demonstrates an ability to enter the industry without permission.

New teams refused entry into the incumbent league could form their own league, but that poses a less serious challenge than in other industries. An investor can risk his capital founding a new bakery without any agreement with other bakeries, existing or potential, but an investor cannot form a successful insurgent sports team unless a number of other investors take the same risk at the same time. Consider the difficulty Volkswagen would have had entering the U.S. market in competition with the domestic incumbents had it been necessary to persuade Toyota, Honda, Nissan, Fiat, and Volvo to take the leap that same year. Volkswagen did not have to play against another entrant to be successful, but a new team unwelcomed by the incumbents will fail if the owner cannot persuade other investors to form its playing competition. A single enterprise acting alone cannot produce the sports product; there have to be other teams to compete against.

Many rival leagues entered professional sports in America during the Twentieth Century, but only the American Baseball League and American Football League saw their entire collection of teams survive. To be sure, the incumbents occasionally take in a few strong teams from still other insurgent leagues (e.g., the original Cleveland Browns, Indiana Pacers, and Edmonton Oilers), but a good part of the attraction is to precipitate or hasten the insurgent's demise.

The survival of the American Football League was especially noteworthy considering the measures the NFL took to impede it. During the 1950s the NFL had two teams in Chicago, though the Bears overshadowed the Cardinals. Dallas businessman Lamar Hunt attempted unsuccessfully to buy the Cardinals and move the team to his hometown.[51] The NFL then rebuffed Hunt when he asked for a Dallas expansion franchise. As a third attempt, during 1959 Hunt joined with other investors to form the AFL, with the Dallas Texans to be his franchise. The new league announced a 1960 inaugural season.

Before the AFL could even get off the ground, the NFL authorized the Cardinals to move to St. Louis for the 1959 season. St. Louis had lacked a professional football team and thus had been an attractive target for the new league. The AFL forged ahead nonetheless, but before it could commence its inaugural season, the NFL lured its Minnesota franchise away as an NFL expansion team. The defection of Minnesota required the upstart league to put together another group of investors in short order or begin play with only seven teams, which would have forced one team each week to be idle throughout the season. The NFL also had a sudden change of heart regarding Dallas. Rather than awarding an expansion team to Hunt, however, the league inserted a competitor into the city. Both teams, the Texans and the Cowboys, began play in 1960, but after three seasons the

[50] Noll, *supra* note 7 at 176-77.

[51] Ed Gruver, *The American Football League* 9 (1997).

Texans moved to Kansas City and became the Chiefs. The AFL filed an antitrust suit against their rival, but it was unsuccessful.[52]

### *2. Freedom of Entry Through Promotion-and-Relegation*

Although deeply rooted in America, the closed nature of sporting leagues is not normal by international standards. As in most of the world, in England teams do not play year in year out against the same opponents, but instead rely on promotion-and-relegation to homogenize skill levels within seasons. The English football structure is distinguishable from the American in all the ways discussed above, but importantly it is also distinguishable from the structure across the world in promoting and relegating teams across an incredible 23 tiers. Not every country has such a deep system of promotion-and-relegation, thus the English and American leagues are best viewed as opposite ends of a continuum of openness rather than a binary choice between open and closed. The lower tiers of the so-called English pyramid are mainly recreational, company, social club, pub, and church teams, but promotion-and-relegation links them automatically step by step to the elite tiers.[53] Rare as it is, each team in the lower tiers is endowed with the potential to improve and progress, perhaps even to the Premier League (e.g., Wigan Athletic) without requesting permission from the teams at the top.

That English leagues do not control entry into the pyramid is crucial; that function lies in the hands of an older and more comprehensive organization known as the Football Association. The FA governs all the teams in the pyramid, semi-professional and amateur teams as well as the professional clubs, and is older, distinct from, and independent of any league. Upon formal application, the Football Association will assign any individual or group who can finance the formation of a team of any skill level to the tier the FA judges appropriate. Following its assignment by the FA, a team finds its appropriate level through promotion-and-relegation. That aspect of the system is crucial to its success because no permanent harm occurs if the FA's initial assignment is wrong – a team

[52] American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), aff'd, 323 F.2d 124 (4th Cir. 1963). For similar instances regarding baseball, consider the Pacific Coast League's mid-1950s major league aspirations and the aborted formation of the Continental League. Six of the eight PCL teams played in SMSAs that today host an identical number of major league teams, but the originals were displaced either by existing teams that moved to the Coast (Dodgers, Giants, and Athletics) or by expansion teams that bought their way into MLB (Angels, Padres, and Seattle Pilots). The two remaining PCL teams played in Sacramento and Portland, large cities that today host major league basketball teams, and no doubt would host baseball teams with serious major league ambitions if promotion-and-relegation were an American practice. All of the displaced PCL teams moved to smaller markets. Because New York City had lost two of its three teams to California, William Shea, thinking to fill that void, convened other entrepreneurs with an intention to form the Continental League. Unfortunately for Shea and his colleagues, at that time baseball's reserve clause gave indefinite title to a player's baseball playing services to whichever team owned his contract. The new league could not acquire enough top tier players even to begin play.

[53] The structure is not a true pyramid, although it converges to a single point – the Premier League – that convergence is not linear.

placed too high will fall, a team placed too low will rise. Consequently, the long run pay-off for influencing the FA's initial allocation decision is very small.[54]

The entry opportunity allowed by promotion-and-relegation in English football is more than theoretical: there is significant movement of teams among the tiers, including teams moving in just a few years from the Premier League all the way down to competition with semi-professional teams.

Every large or moderate size city in England supports multiple full time professional soccer teams – teams playing in the first four tiers of the pyramid in addition to a majority of the teams playing in the fifth tier and a handful in even lower tiers.[55] To take just a few examples, this season sixteen professional soccer teams play inside London's ring road, five in the Premier League, with an additional eight part time or semi-professional teams playing in the sixth tier. Being so numerous, most teams bear neighborhood names such as Chelsea, Fulham, Leyton, Tottenham, or West Ham, and none calls itself London. Greater Manchester, a governmental unit with a border roughly encircling the city center about 15 miles out and a population comparable to the Tampa SMSA, hosts four Premier League teams and an additional eight that play in the lower tiers through 6. Even relatively small Blackpool finds five professional teams playing in various tiers within twenty miles of its city center. Additional semi-professional and amateur teams play in even lower tiers, and new promotable teams can and do materialize when promoters believe conditions are auspicious. These teams are all potential substitutes for any local team that threatens to leave.

Normalized either by area or population, English teams are much denser than their American counterparts. In the age of rail transportation, lower English transportation cost, both the explicit price and the implicit opportunity cost of travel time, accounted for the dissimilar densities.[56] That a similar team density per unit population has not arisen in America in the age of air travel is attributable to the absence of promotion-and-relegation. Revenue coverage is broader in England professional sports. A small market English team can survive by achieving occasional promotions into higher and more lucrative tiers. Even the most successful minor league team in America will never share the major league rewards that the handful of major league teams hold firmly. A minor league team must survive year-in and year-out on minor league attendances, minor league broadcast revenues (if any), and handouts from major league teams who park young players for experience (then withdraw as soon as they mature). In brief, the very best minor league team will never seem good enough to its host if that city believes itself to be major league. Thus, unlike England, American teams outside the top tier are not potential substitutes for top tier franchises.

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[54] The absence of attempts to capture the FA is analogous to the dog that did not bark. ARTHUR CONAN DOYLE, *Silver Blaze* in THE MEMOIRS OF SHERLOCK HOLMES (1892).

[55] In distinction to American practice, nothing bars professional teams from playing against semi-professional or amateur teams performances in past seasons leads to such a configuration.

[56] Cain and Haddock, *supra* note 7 at 1127-30.

Some observers claim that year-to-year volatility within American major leagues swamps that in the Premier League, being reflected not only in a small number of semi-permanent elite teams but in illusory movement between tiers as well.[57] The teams in the upper part of the top tier seem to be the same this season as last. Teams just promoted were relegated a year or two earlier – poppers, they are called – pop up a tier one season, pop down a tier the next, pop up a tier soon after, and so on. Indeed, there do seem to be a few teams that rarely play out of the top tier, and a few poppers. Even if the assertion adequately characterized, say, three-quarters of the teams, it would not alter our argument – economics works at the margin. There is potential competition if there is room for even a few invaders of the top table.

The extent to which American leagues display greater volatility is a product of three practices that are absent abroad – a draft of players from lower to higher tiers, a salary cap, and a limited roster. Putting aside player transitions from collegiate to professional that is important in the NFL and NBA, it is not immediately apparent how a lower tier to higher tier draft of professional baseball and ice hockey players could be made compatible with a potential-entry-preserving promotion-and-relegation system – which hardly means an imaginative innovator could not design one. American leagues could retain the other two rules seamlessly, however, even after implementing promotion-and-relegation.

In most of the world, including England, only a team's bank account limits its wage bill and roster. Though rules define the number of players on the field during any one game, the group of players under contract from which to select that limited number is undefined. In consequence, a wealthy few teams have such large rosters that an elite world-class player such as David Beckham might spend a season sitting on the bench (as he did, albeit in Spain). Not only are those rules independent of the promotion-and-relegation system, they lie beyond the topic here.

Even with the caveat of the previous paragraph, the impression of Premier League year-to-year inertia proceeds from a faulty frame of reference. A good deal of season-to-season stability is inevitable given the mechanism employed, which relegates only three teams each year. This year's Premier League must look very much like last year's regardless of long-run entry potential. Even if no relegated team subsequently regained Premier League status and each promoted team remained there, it would take seven years for the league to turn over completely. Inevitably, season-to-season comparisons are misleading.

Table 1 shows the most recent year in which the teams in the Premier League of the 2011-12 season last played in the second tier. Seven teams have remained continuously in the top tier during the present century, Arsenal since World War I. However, nearly twice that number – thirteen – spent time in lower tiers during the past decade. Consider Blackburn, promoted from the second tier in 1992, Premier League champion in 1995, relegated in 1999, promoted again in 2001 – apparently a popper, but also a champion.

[57] Kuper and Szymanski argue that the volatility is actually more similar that perceived. Simon Kuper and Stefan Szymanski, Soccernomics 157-78 (2009).

Wigan had never played in the top tier at all before 2005. Two other now relegated teams, Reading and Hull, reached the top for the first time even more recently. Manchester United, Tottenham Hotspur, Chelsea, Sunderland, Wolves, and Newcastle, all world-renowned teams that have won multiple top tier championships, played in the second tier as recently as 1975, 1978, 1989, 2007, 2009, and 2010 respectively.

**Table 1 – Most Recent Year Out of the Top Tier**

| Team | Year |
|---|---|
| Arsenal | 1915 |
| Everton | 1954 |
| Liverpool | 1962 |
| Manchester United | 1975 |
| Tottenham | 1978 |
| Aston Villa | 1988 |
| Chelsea | 1989 |
| Fulham | 2001 |
| Blackburn | 2001 |
| Bolton | 2001 |
| Manchester City | 2002 |
| Wigan | 2005 |
| Sunderland | 2007 |
| Stoke | 2008 |
| Wolves | 2009 |
| Newcastle | 2010 |
| West Bromwich | 2010 |
| Queens Park | 2011 |
| Norwich | 2011 |
| Swansea | 2011 |

Table 1 is perhaps a bit crude.  A more useful way to investigate entry potential is to compare the top tier's composition over a longer span. For instance, one might contrast the teams that twenty years ago were in the top tier – then called the First Division – with the Premier League this season, as shown in Table 2.

During the 1991-92 season Leeds was the champion; Leeds has spent the past eight seasons out of the Premier League, three of them in the third tier. Five other teams from the 1991-92 First Division now compete with Leeds in the second tier, while an additional five compete in the third tier.[58] Poor Luton has fallen all the way to the fifth tier. Fewer than half of the top tier teams of 1991-92 are in the top tier in 2011-12, and most teams in this season's Premier League have spent intervening seasons relegated to lower tiers. Just promoted Norwich and Queens Park each spent fifteen of the intervening twenty years in the second and third tiers.

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[58] The statement takes Milton Keynes to be the continuation of the original Wimbledon – see *infra* note 66 and accompanying text. If AFC Wimbledon, the team that replaced the original Wimbledon, is taken as the continuation, Wimbledon would count as a 4th tier team rather than a 3rd.

**Table 2 – The Fate of Top-Tier Teams Across Two Decades**

| | 1991-92 First Division | 2011-12 Premier League |
|---|---|---|
| | Arsenal (London) | Arsenal (London) |
| | Aston Villa (Birmingham) | Aston Villa (Birmingham) |
| | Chelsea (London) | Chelsea (London) |
| | Everton (Liverpool) | Everton (Liverpool) |
| | Liverpool | Liverpool |
| | Manchester City | Manchester City |
| | Manchester United | Manchester United |
| | Norwich | Norwich |
| | Queens Park (London) | Queens Park (London) |
| | Tottenham (London) | Tottenham (London) |
| | Coventry | 2nd Tier |
| | Crystal Palace (London) | 2nd Tier |
| **Champion** | Leeds | 2nd Tier |
| | Nottingham Forest | 2nd Tier |
| | Southampton | 2nd Tier |
| | West Ham (London) | 2nd Tier |
| | Notts County (Nottingham) | 3rd Tier |
| | Oldham (Greater Manchester) | 3rd Tier |
| | Sheffield United | 3rd Tier |
| | Sheffield Wednesday | 3rd Tier |
| | Wimbledon (London) | 3rd Tier |
| | Luton Town | 5th Tier |
| | 2nd Tier | Blackburn |
| | 2nd Tier | Newcastle |
| | 2nd Tier | Sunderland |
| | 2nd Tier | Wolves (Wolverhampton) |
| | 3rd Tier | Bolton (Greater Manchester) |
| | 3rd Tier | Fulham (London) |
| | 3rd Tier | Stoke City |
| | 3rd Tier | Swansea |
| | 3rd Tier | West Bromwich (Birmingham) |
| | 3rd Tier | Wigan (Greater Manchester) |

The analysis can be more comprehensive still. Including the present season, the twenty-two First Division teams from the 1991-92 season will have played 220 seasons in aggregate over the past decade.[59] Table 3 shows how those seasons are distributed.

[59] For the reasons discussed above, the computation excludes the first decade following the 1991-92 season to control against the inevitable strong serial correlation imparted by the three-team-per-year mechanism of promotion-and-relegation.

**Table 3**

| | | |
|---|---|---|
| Tier 1 | 97 seasons | 44.10% |
| Tier 2 | 71 seasons | 32.30% |
| Tier 3 | 40 seasons | 18.20% |
| Tier 4 | 9 seasons | 4.10% |
| Tier 5 | 3 seasons | 1.40% |

The teams experienced no random draw (that would indeed have been surprising) but neither in aggregate did they spend even half the recent decade in the top tier. In general, the table reveals considerable entry potential.

### *3. The Contrast Between the English and American Leagues*

The structure of American sports severely restricts potential supply for a city that fails to attract or retain one the incumbent franchises, a vital component of league leverage for public subsidies.[60] In contrast, systems with promotion-and-relegation limit monopoly power, allowing individual teams to enter or exit according to team quality and market demand. That dilutes threats to relocate because cities have alternatives.

## C. Freedom of Movement

### *1. Franchise Relocation in North America*

The term "franchise free agency" became popular in the late 1990s after both the Rams and Raiders left Los Angeles for better stadium deals in St. Louis and Oakland.[61] As the term suggests, the major sports leagues rarely resist intercity team movement in pursuit of an improved handout from politicians. Sometimes a league will even broker such a move.

Franchise relocation is a complicated issue for sports leagues. Individual franchises have a strong interest in either relocating or threatening to relocate as a tool to secure support from local and city governments. NFL teams are particularly mobile because league members share broadcast revenues equally while each team bears its own field expenses if it cannot obtain public defrayment.[62] Thus, the key to improving franchise value is not winning championships but obtaining a favorable deal regarding rent and items that are

[60] Ross and Szymanski, *supra* note 7.

[61] Legislative and Oversight Hearings on Professional Sports Franchise Relocation Antitrust Implications Before the House Comm. on the Judiciary, 104th Cong., 2d Sess. 16 (1996) (statement of NFL Commissioner Paul Tagliabue)).

[62] The $3 billion received by the NFL for its current television contracts are split equally by the 32 teams over the life of the contract.

unshared with other teams such as concessions, parking, luxury boxes, and personal seat licenses.[63]

Although teams often have strong incentives to move, their colleagues occasionally have an interest in preventing relocation. Relocation that reduces the national television audience may be profit maximizing for the team but reduces shared revenue from the television contract. All the elite American sporting leagues retain some discretion over franchise relocation.[64] However, for reasons which are elaborated in Part III-D, the leagues either cannot, or are unlikely to, stand in the way of opportunistic relocation threats.[65]

### *3. Franchise Continuity in England*

The replacability of English teams allowed by promotion-and-relegation fundamentally alters their incentives to move to a new location. Attracting public stadium financing is a key business driver for American franchises. In England, however, it is primarily the local environment – population, wealth, sporting interest, and such – that dictates whether there will be a soccer team at a particular level (on average) or whether the top local team will be promoted to a higher level or relegated to a lower one. Consequently, if a team were to move elsewhere in search of a more favorable stadium arrangement, over time a lower ranking local team or a new one will rise to occupy the environmental niche. The abandoned locale, therefore, need not mortgage itself for fear of losing representation at a level its environment can support. As evidence, only a single team, Wimbledon, has actually moved to a new stadium at any substantial distance removed from its original home. Even then, the distance – 56 miles to Milton Keynes – was trivial in comparison with the moves American teams undertake.[66] A new team AFC (Association Football

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[63] Don Nottingham, *Keeping The Home Team At Home: Antitrust And Trademark Law As Weapons In The Fight Against Professional Sports Franchise Relocation*, 75 U. COLO. L. REV. 1065. ("Unquestionably, it is vital to the economic health of an NFL franchise - the viability of the franchise as a business, not the quality of the team on the field - to have a state of the art facility.")

[64]

[65] Se *infra*, Part III-D.

[66] Wimbledon's 56-mile move would raise hardly an eyebrow in America.

For just a subset of examples from baseball, the Pilots moved nearly 2,000 miles to become the Milwaukee Brewers two years after Milwaukee lost the Braves to Atlanta, that a move of more than 800 miles. The Braves of course were the team had moved nearly 1,100 miles to get to Milwaukee from Boston in the first place. The Giants moved over 2,900 miles from Manhattan to San Francisco; the Dodgers moved nearly 2,800 miles from Brooklyn to Los Angeles; the Expos moved nearly 600 miles from Montreal to become the Washington Nationals. The Athletics moved over 1,100 miles to their stopover in Kansas City on the way to Oakland, an additional trek of 1,800 miles.

In football, Kansas City was the receiver (pun intended) as the Texans arrived from Dallas, only 500 miles away, to become the Chiefs. The Rams moved over 1,800 miles from Los Angeles to St Louis, which had earlier lost the Cardinals to Phoenix, a move of nearly 1,500 miles. That team had arrived in St Louis from Chicago, a mere 300 miles away. The Rams are having second thoughts about leaving Los Angeles, but they could be beaten to the prize if the Jaguars make a 2,400 mile move from Jacksonville before the Rams get packed. Of course nobody is moving to Los Angeles unless the city puts a proper stadium in place – screw you, 100,000 seat Rose Bowl with your lack of corporate suites.

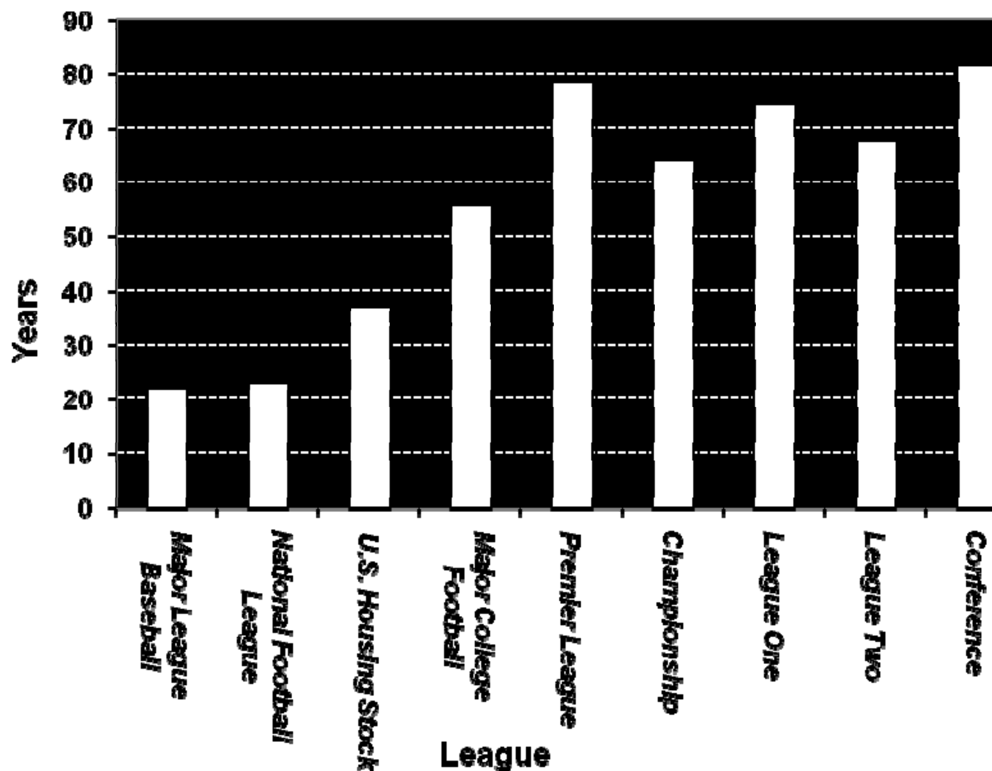
Club) Wimbledon formed in 2002 within weeks of the announcement of the impending but unconsummated move, with both clubs playing in Wimbledon for one season.

AFC Wimbledon began play in the eighth tier but has achieved frequent promotions and now plays in the fourth, while Milton Keynes has fluctuated between the third and fourth tiers. Clearly, if those trends continue the new team will soon pass the old one in the pyramid, as predicted if the locale's environment rather than the team's franchise is the limiting variable.

**D. The Leverage of American Sporting Franchises Reconsidered**

We have argued that the closed cartel structure of American professional sports enables franchises to coerce frequent and sizable stadium investments from government, whereas the open structure of English professional soccer, coupled with the autonomous governing authority of the Football Association, goes far to obviate a similar pressure. Figure 1 shows that stadium ages are consistent with that hypothesis, dramatically so.

**Figure 1**




On average National Football League stadiums are nearly 23 years old. Major League Baseball stadiums are nearly 22 years old. The present season's Premier League stadiums average more than 78 years of age. It is not that English soccer teams are unresponsive to local changes in population and wealth; they have responded the way homeowners most often do when family size grows – they have put up with a bit of inconvenience until

matters have become untenable, then they have renovated. At zero cost all teams prefer new structures with a bias toward lucrative corporate hospitality suites, but it is very often substantially cheaper to renovate the old than to demolish it and start anew. Because English teams, especially the upper tier teams, usually must pay the bill, they often forego the attractive alternative because it is not worth the difference in cost.

Teams in America followed the same practice until enticements from cities without teams, such as Milwaukee and Kansas City, revealed the other side of the coin. They inferred that they did not have to wait for a city to identify itself by making the first move; a threat to move often induces the local government to contribute a substantial part or all of the cost of a new stadium.[67] Even if the ploy fails, the team has placed itself in play, almost invariably attracting offers from elsewhere. There is nothing lamentable if natural scarcity leads to competition among alternative claimants, but as the English experience reveals, a scarcity of potentially high caliber teams is unnatural.

It is of interest that lower tier English teams similarly rarely resort to tear downs, playing in old but renovated structures instead. The average age of this season's second tier stadiums is 64 years, the third tier 74 years, the fourth 68 years, and the fifth 82 years. Those ages are similar to, and overlap the ages of Premier League stadiums.

Another way to test the hypothesis is to contrast professional and collegiate stadium decisions within the U.S. That approach does more than just provide additional data. If we only contrast English with American leagues, we cannot be confident that differences are not a product of omitted variables arising from innate international differences. The collegiate data allows us to challenge our theory that the relatively closed industrial organization of American professional sporting teams – specifically, control over entry and placement of teams – enables the lucrative stadium rent-seeking that leagues exercise over political units. Colleges own the teams they host, and in any event the fan base consists in important part of alumni who would jump ship if the team dared leave the university. Consequently, being functionally immobile, collegiate teams lack an important threat that professional teams possess.

The average stadium age of all major collegiate teams – those teams that will be eligible to play in the Bowl Championship Series during the 2012 season – is 56 years, to wit, about two-and-one-half times the average age of NFL and MLB stadiums (and significantly older than the 37-year median age of a U.S. home). Six college teams that share the relatively new stadium of an NFL neighbor impart a slight downward bias in the average.[68] As in England, colleges renovate their stadiums much more often than they tear them down, as evidenced by Ohio State's recent closure of its famous horseshoe with additional seating.

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[67] For example, the Chicago White Sox secured a $60 million stadium subsidy by threatening to move to the Tampa SMSA in 1988. Michael Martinez, *White Sox Are Safe at Home*, NEW YORK TIMES, July 02, 1988.

[68] The six college teams (with the NFL team and stadium age) are Temple (Eagles, 8), UMass (Patriots, 9), Pitt (Steelers, 10), South Florida (Buccaneers, 13), Miami (Dolphins, 24), and Tulane (Saints, 36).

Nearly one in every five top tier collegiate teams play in a stadium that is older than Chicago's Soldier Field, the NFL's oldest.[69] Illinois taxpayers view Soldier Field as a new stadium, however, given the "renovation" we paid for resulted in a new structure within an old façade.[70] Given that recalculation, 40% of major collegiate teams, including a number of perennial powerhouses, play in stadiums older than any in the NFL.[71] Clearly, as with English soccer, there is nothing intrinsic in American rules football that spoils the usefulness of a stadium after a mere quarter of a century.

## III. ANTITRUST IMPLICATIONS

### A. Antitrust and the Industrial Organization of Sporting Leagues

Federal antitrust law prohibits contracts, combinations and conspiracies that *unreasonably* restrain trade.[72] It also prohibits monopolization and attempted monopolization.[73] Though leagues are classic cartels in many senses, they have rarely suffered adverse antitrust decisions. The deferential treatment of sports under U.S. antitrust laws has been justified by the supposed limits of the Commerce Clause in relation to sport, and the assertion that the leagues lack market power in the context of the

[69] See *infra*, Appendix.

[70] Lavishly praised by television sportscasters admiring it from the inside, various observers viewing it from the outside have called the structure *A Flying Saucer Atop a Greek Temple*, *The Eyesore on the Lake Shore*, and several names that ought not be repeated in polite company.

The renovated Soldier Field's 61,500 seats make it the smallest stadium in the NFL, which doubtless soon will become a major complaint lodged by the Bears in their next stadium demand. Immediately prior to renovation Soldier Field could seat eight percent more Bears fans, 66,944.

[71] A few examples – Southern Cal, Nebraska, Notre Dame, Clemson, Auburn, Texas, Louisiana State, Oklahoma, Alabama, UCLA, Arkansas, Ohio State, Tennessee, Georgia Tech, Wisconsin, and most notably (in the opinion of the authors) Northwestern.

[72] 15 U.S.C. 1. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (indicating that as early as 1898 the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every"); National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (restraint is the essence of every contract and if read literally, Section 1 of the Sherman Act would outlaw the entire body of contract law); Board of Trade of the City of Chicago (Chicago Board of Trade) v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

[73] Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

broader entertainment market. As we elaborate shortly, neither is a compelling explanation. More specifically, the closed nature of American sporting leagues is not generally perceived to be an antitrust problem because it is seen to be inescapable both as a matter of history and present day practicality. Many commentators implicitly assume that there is no way to have a single top tier league without having a cartel.[74] But English soccer shows that leagues need not be closed to new entry – promotion-and-relegation provides a superior organizational structure. The section explains why promotion-and-relegation arose in England but not in the U.S., but why that no longer justifies closed American leagues. It explains why the necessity of some cooperation among rival teams is no justification for anything more than a transitory episodic cartel structure. Finally, it explores how the faulty assumption that closed entry is either desirable or necessary has skewed antitrust analysis.

### 1. Commerce Clause Limitations

In *Federal Baseball Club of Baltimore, Inc. v. National League (1922)* the Supreme Court unanimously held that baseball was not the subject of interstate commerce and that the Sherman Act thus had no application to "the business is giving exhibitions of base ball."[75] Even if the statement was accurate in 1922 (a dubious proposition even then) it is erroneous today given the significant interstate revenues attributable to licensing fees and television, and the frequency with which fans now travel with their team. Nonetheless, in *Toolson v. New York Yankees*,[76] and *Flood v. Kuhn*, the Supreme Court reaffirmed that baseball remains exempt from antitrust liability.[77] In *Flood*, the Court recognized that baseball like other sports is engaged in interstate commerce, but it refused to withdraw baseball's exemption, relying upon *stare decisis*.[78] Thus, for reasons that are entirely anomalous, professional baseball has enjoyed virtually a complete exemption from antitrust challenges.[79]

### 2. Market Power

League representatives argue that they are merely small players in the general entertainment market.[80] Each league dominates its respective market segment, however,

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[74] See e.g. Mitten and Burton, *supra* note 23 at 128. ("The unfortunate reality is that the marketplace, if left entirely alone, will not equalize the supply of, and demand for, professional sports franchises in order to eliminate the significant disparity of bargaining power between a city and team owner, nor will the current marketplace effectively require a sports franchise to bear the public costs that its relocation creates.")

[75] 259 U.S. 200 (1922)

[76] 346 U.S. 356 (1953)

[77] 407 U.S. 258 (1972)

[78] *Id.*

[79] 10-74 FEDERAL ANTITRUST LAW § 74.1

[80] See e.g., United States Football League v. National Football League, 644 F. Supp. 1040, 1056 (S.D.N.Y. 1986) (declining to accept the NFL's argument that there is no product market of professional football).

and has a price seeker's ability increase prices by restricting output.[81] And numerous courts have found that sports leagues are sufficiently different from other forms of entertainment and that the dominant league exercises market power.[82]

### 3. Historical Divergence

There is a historical and geographical explanation for the English-American divergence.[83] The National Baseball League and the English Football League developed almost simultaneously in the late 19th Century. In England, the density of highly populated towns and cities enabled closely contested games that required little travel.[84]

The number and density of established English teams made a closed system untenable. The advantages of coordinated league play over arranging contests team-to-team were immediately obvious once the Football League began play, and a competing league, the Football Alliance, formed within a year, and mainly in the same cities. A number of other leagues followed suit. The Football League could not monopolize contests between highly skilled teams, but a multi-league structure made ascertaining the nation's best team contentious. Stratified amalgamation was the result, with promotion-and-relegation sorting differing quality teams into divisions of similar skill, thus maintaining the excitement of close games,[85] as well as a balance between variety and rivalry.[86] In contrast, the large distances required of American teams to compete with teams of a similar quality in the vastly larger and more sparsely populated U.S. facilitated territorial monopolies.[87] The geographic differences explain the past, but they do not justify the present. The relatively dispersed nature of the U.S. population is no longer a germane in an era blessed with commercial aviation.

### 4. The Necessity of Cooperation and the Antirust Analysis of Sports Leagues

Sporting competitions are adversarial on the playing field but cooperative in the boardroom. A well-functioning league requires agreement on fundamentals such as the rules of the game, uniforms and equipment, dates and locations of contests, and the size and structure of the competition. It is especially relevant that successful leagues cannot be open to all applicants. Nevertheless, commentators unfamiliar with foreign leagues

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[81] United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377, 391 (*year*). ("Monopoly power is the power to control prices or exclude competition.")

[82] *Id.* See also Mid-South Grizzlies v. NFL, 550 F.Supp 558, 571 (E.D. Pa 1983) ("There is no doubt that the NFL currently has a monopoly in the United States for major league football."); Fishman v. Wirtz, 807 F.2d 520, 531 (7th Cir. 1986) (NBA); L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1393 (9th Cir. 1984); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 500-02 (E.D. Pa. 1972) (NHL).

[83] Cain and Haddock, *supra* note 7.

[84] Today England has roughly 1/6th the population of the U.S. in an area similar to that of Michigan.

[85] Cain and Haddock, *supra* note 7 at 1127.

[86] *Id.* at 1131.

[87] *Id.* at 1129.

assume that allowing leagues to determine the things they must goes hand in hand with allowing them to determine league composition and entry.

The four major leagues are cartels, each league coordinates the actions of a individual firms that are ostensible competitors in order to promote their common interests at the expense of non-league rivals, suppliers, and customers.[88] It is to the point that the American cartel Major League Soccer (can one put those three words together without smiling?) consciously rejected promotion-and-relegation despite its worldwide use in soccer, even as nearby as Mexico. Electing promotion-and-relegation, they undoubtedly realized, might have condemned league teams to paying for their own playing fields.

Courts generally are suspicious of competitors' agreements to raise prices or exclude competition, frequently deeming them *per se* illegal.[89] However, courts have acknowledged that it would be impossible to organize a league without extensive coordination.[90] Thus, as in other areas where the economic impact of the restraints is obscure,[91] courts typically evaluate the league activities under a "Rule of Reason."[92] In *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*,[93] the Supreme Court explained that the rule of reason is the more appropriate

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[88] Roger G. Noll & Andrew Zimbalist, "*Build the Stadium - Create the Jobs*!", in SPORTS, JOBS, AND TAXES 2 (ROGER G. NOLL & ANDREW ZIMBALIST eds., 1997).

[89] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (stating that vertical agreements hold the promise of increasing competitive effectiveness and, therefore, are judged under the rule of reason, while certain agreements such as horizontal price fixing and market allocation are thought to be so inherently anticompetitive that they are illegal per se); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (indicating that vertical restrictions reduce intrabrand competition but promote interbrand competition thereby allowing manufacturers to compete more effectively against each other); United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

[90] See ROBERT BORK, THE ANTITRUST PARADOX 332 (1978) ("All league sports ... rest entirely upon the right to boycott."); Gary R. Roberts, The Evolving Confusion of Professional Sports, The Rule of Reason, and the Doctrine of Ancillary Restraints, 61 S CAL L REV 943, 946-7 (1988) ("Because organizationally a sports league is not entirely analogous to any other type of enterprise, legal doctrines created and developed in more traditional business contexts do not easily or always correctly apply to league rules and conduct."). See also American Needle 130 S. Ct. at 2216-17. See also, JAMES QUIRK & RODNEY FORT, HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS (1999).

[91] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986); National Collegiate Athletic Ass'n v. Board of Regents of The University of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

[92] See e.g. Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied* 469 U.S. 990 (1984); Smith v Pro Football, Inc, 593 F2d 1173, 1179-82 (DC Cir 1978); Mackey v National Football League, 543 F2d 606, 618-20 (8th Cir 1976). See generally Note, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U CHI LEGAL F 245 ("The rule of reason has emerged as the proper test for evaluating sports leagues under section 1.")

[93] 468 US 85, 101 (1984).

approach to "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[94]

The interdependence of franchises has led some courts to view leagues as "single entities" and thus incapable of entering into a contract, combination, or conspiracy in violation of Section 1 of the Sherman Act.[95] The Supreme Court firmly rejected that defense in the recent *American Needle* decision.[96] That "NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."[97] Such justifications for concerted activity, however, were simply reasons to find no violation of the antitrust law in that instance, not that it is inapplicable.[98]

Of course, whether the demise of the single entity defense is consequential depends on whether sports franchises would otherwise be liable for antitrust violations. Michael Jacobs argues that single-entity treatment for sporting leagues is unnecessary to save them from antitrust condemnation because the governing rules and business decisions of professional sports leagues pass muster under the 'rule of reason' standard.[99]

The essence of the rule of reason is that the legality of a business practice depends on whether the practice promotes or suppresses competition.[100] In the Ninth Circuit, a rule of reason inquiry requires courts to consider the harms and benefits to competition resulting from a particular restraint and to determine whether less restrictive means could achieve the purported benefits.[101] In the District of Columbia Circuit Court of Appeals, the rule requires evaluation of a restraint to determine whether it is significantly anticompetitive

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[94] *Id.* The rule of reason is also the correct standard to apply if the concerted action complained of is characterized as an 'ancillary restraint'. The doctrine of ancillary restraints has been applied by various courts to assess the validity of restrictions imposed by legitimate business collaborations, such as a business association or joint venture on nonventure activities. Ancillary restraints will be upheld under a rule of reason analysis if they are reasonably related to the lawful purpose of the main contract and are of a scope and duration that is not greater than necessary to achieve the main purpose of the agreement. Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied* 469 U.S. 990 (1984).

[95] See generally, Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 Ind. L.J. 25 (1991) (summarizing arguments and concluding that the nature of sports leagues does not justify a fundamental departure from the antitrust rules applicable to other joint ventures.)

[96] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216 (U.S. 2010).

[97] *Id.*

[98] *Id.*

[99] Jacobs, *supra* note 95.

[100] National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); Board of Trade of the City of Chicago (Chicago Board of Trade) v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

[101] Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied* 469 U.S. 990 (1984).

in purpose or effect, and the court has indicated that a restraint is unreasonable if it has a net effect of substantially impeding competition.[102]

The rule of reason enables courts to balance pro-competitive effects, such as economies of scale, technology development and product integration, against aspects of collaboration that appear to foreclose competition. Whereas courts and antitrust enforcement agencies once treated partnerships and joint-ventures with suspicion, there is now a clear recognition that both vertical and horizontal alliances can enhance consumer welfare.[103] The importance of giving due weight to these effects is illustrated by the Supreme Court's *Broadcast Music* decision.[104] BMI is a performing rights society for musical works, the society offers blanket licenses for a large catalog of material, an activity the necessarily involved fixing prices. Although price fixing is usually treated as a per se violation, the Supreme Court applied a rule of reason analysis and held that BMI's integration of functions created significant efficiencies and allowed the copyright owners to offer, in effect, a different product.[105]

The potential benefit of integration entailed in some partnerships and joint ventures justifies a full comparison with the cost of such an arrangement, and differentiates leagues from 'naked cartels'. However, the mere assertion of such benefits does not shield a combination from antitrust scrutiny. In *NCAA v. Board of Regents* the Supreme Court summarized the law as follows: "[w]hile joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may make possible a new product by reaping otherwise unattainable efficiencies."[106] In that case, the National College Athletic Association characterized its television plan as a cooperative joint venture in a similar vein to *Broadcast Music*. The NCAA argued its price-fixing plan assisted individual colleges in marketing broadcast rights and was thus pro-competitive. The Supreme Court disagreed, "unlike *Broadcast Music*'s blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market."[107] As *NCAA v. Board of Regents* indicates, a restraint that is reasonably necessary to achieve the welfare enhancing ends of collaborative effort will not constitute an antitrust violation, but the mere invocation of partnership or joint venture is insufficient to establish that.[108]

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[102] Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

[103] Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors 3.36(b) (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

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[105] Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979)

[106] 468 U.S. at 102 (citations and quotations omitted).

[107] *Id.*

[108] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. Tenn. 1898). See also, Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors 3.36(b) (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

As evidenced by English soccer, the proper working of sports leagues does not require endowing incumbents with permanent entry control, so court deference to that structure in America is inappropriate. As Ross and Syzmanski and others have argued, American's closed system has enabled teams to leverage credible threats to relocate into extraordinary stadium subsidies.[109] Our empirical evidence confirms as much. In effect, the decision to operate as a closed league constitutes an agreement to foreclose competition by new entrants, and that in turn gives franchises extraordinary leverage to negotiate for ever greater subsidies.[110]

## B. Closed Entry as an Antitrust Violation

Once it is apparent that closed entry is neither necessary nor desirable organization for sport, the appropriate antitrust analysis becomes clear. Although the European Union recognizes abuse of a dominant market position as violation of competition law, courts and agencies in the U.S. generally see a monopolist charging unreasonably high prices as an invitation to competition and nothing that, by itself, justifies antitrust intervention.[111] Consequently, it is probably insufficient that American leagues have market power and use that power to demand extravagant subsidies from local governments; a viable antitrust cause of action must identify a particular instance of horizontal restraint (a Section 1 violation) or an attempt to create monopoly power (a Section 2 violation).[112]

### *1. Threats to Relocate As Implicit/Explicit Group Boycotts*

An obvious way to frame the antitrust violation here might be as a group boycott. In the *Raiders* antitrust case the Ninth Circuit indicated that the NFL actively assists teams in making credible threats to leave their host cities in order to extract more favorable stadium finance terms. In that case, the court dismissed the NFL's claim that it would exercise its approval power in the public interest, noting "the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations."[113] Prior to the dispute with the Raiders, the NFL had remained expressly noncommittal regarding team movement to give owners a bargaining edge when they were renegotiating leases with their respective stadiums.[114]

Several statements by NFL Commissioner Paul Tagliabue provide additional evidence that leagues actively assist teams in making credible exit threats. When the Houston

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[109] Ross and Szymanski, *supra* note 7; See also Noll, *supra* note 7 and Cain & Haddock *supra* note 7.

[110] Ross and Szymanski, *supra* note 7 at 642.

[111] See e.g., Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 65 F.3d 1406, 1412-13 (7th Cir. 1995) ("A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act ... and can therefore charge any price that it wants") (citations omitted)

[112] 15 U.S.C. 1, 2.

[113] Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1396 (9th Cir. Cal. 1984).

[114] *Id.*

Oilers threatened to move to Jacksonville, Florida in 1987 Harris County, Texas, responded with $67 million in improvements to the funded by property tax increases, doubling the county's hotel tax, and underwriting bonds to be paid over the next 30 years.[115] Within six years the Oilers began lobbying for a new stadium with club seating. Rather than opposing the Oilers rent seeking, NFL Commissioner Paul Tagliabue warned Houston that "If the Oilers' situation doesn't work down there, I don't see any circumstances in which we're going to guarantee a team, especially when one team's already found it unsatisfactory."[116] The message was clear, if Houston lost the Oilers because it refused to accede to the team's demands, it was unlikely to receive a prompt replacement.[117] At the end of the 1996 season the Oilers left Houston for Nashville where city officials had promised to contribute $144 million toward a new stadium.[118]

The thrashing of stubborn Los Angeles continues today, but contrite Houston repented of its sin, built a nice new stadium, genuflected before Tagliabue, and gratefully accepted an expansion franchise in 2002. Wimbledon was without a team for nary a day when its incumbent leapt across London; Houston was without a team for five years.

Given the artificial scarcity of teams and the effective impossibility of new entry, threats to relocate, such as those made by the Oilers, are more than the action of an individual economic entity; rather every threat to relocate is also an implicit (and in the Houston case, explicit) threat of a concerted boycott. A group boycott exists when a group of companies agrees to refrain from dealing with other entities in order to gain some competitive advantage.

Although the classic group boycott involves a group of competitors agreeing to exclude other competitors from the market, a boycott can also be aimed at customers and suppliers. The Supreme Court case of *FTC v. Superior Court Trial Lawyers Association* is a close parallel to the situation faced by Houston.[119] In *Superior Court Trial Lawyers Association*, a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation. The FTC characterized the trial lawyers conduct as "a conspiracy to fix prices and to conduct a boycott" in violation of Section 5 of the Federal Trade Commission Act. The FTC found that a "coercive, concerted refusal to deal" had the "purpose and effect of raising prices" and was illegal *per se.* The Supreme Court agreed that the trial lawyers concerted action was a plain violation of the antitrust laws and should be condemned on a *per se* analysis.[120]

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116 Mitten and Burton, *supra* note 23 citing John McClain, *Tagliabue: City Won't Get Guarantee*, HOUS. CHRON. Jan. 17, 1996, at C1, available in 1996 WL 5577348.

117 *Id.*

118 The Oilers are now the Tennessee Titans.

119 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

120 *Id.* Although the classic group boycott is considered to be a *per se* violation of the antitrust laws, see NYNEX Corp. v. Discon, Inc., 525 US 128 (1998), the *per se* approach is generally limited to cases in

### 2. *The Inapplicability of the* **Noerr-Pennington** *Doctrine*

While some might characterize lobbying state and local governments to build and renovate public infrastructure as immune from scrutiny under the *Noerr-Pennington* doctrine, the is unlikely. In recognition of the First Amendment right of political speech, Noerr-Pennington allows competitors jointly to petition legislative bodies for laws that are anticompetitive in either design or effect without fear of antitrust liability.[121] However, as *FTC v. Superior Court Trial Lawyers Association* illustrates, an agreement to boycott in order to force governmental acquiescence is not immune simply because its objective is the enactment of favorable legislation.[122] Noerr-Pennington protects individual or concerted activity that aims at procuring anticompetitive *ends*, the doctrine does not shelter anticompetitive *means* of influencing government action.[123]

In *Hecht v. Pro-Football, Inc.,* would-be competitors to the Washington Redskins sought the use of the Robert F. Kennedy Stadium, administered by the District of Columbia Armory Board. The new entrants sought to use the stadium at times that would not conflict with the Redskins, and the stadium was the only suitable place for professional football in the District of Columbia. The Amory Board refused because it had entered into a thirty-year lease prohibiting use of the stadium by any professional football team other than the Washington Redskins. The trial court rejected the plaintiff's antitrust claims in summary judgment on the *Noerr-Pennington* doctrine. The D.C. Court of Appeals reversed, rejecting "the facile conclusion that action by any public official automatically confers exemption." The court held that absent clear statutory guidance to the contrary, federal antitrust laws were applicable to the Amory Board as the custodian of the stadium.[124]

## C. How Promotion-and-Relegation Diffuses Leverage

League size and league entry are separate considerations. In England, competitive success on the field directly determines composition of the tiers. In America xyz by contrast, leagues are fixed cartels that only adjust their membership (nearly always upward) according to threats from the occasional unwelcome entrant who survives a prolonged counterattack.

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which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor, see FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986). See also, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (addressing the question of when *per se* antitrust analysis is appropriately applied to joint activity susceptible of being characterized as a concerted refusal to deal).

[121] *Id;* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961) ("joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition"); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

[122] FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).

[123] *Id.* at 428. ("The exceptions derived from Noerr and Claiborne Hardware have no application to respondents' boycott.")

[124] Hecht v. Pro-Football, Inc., 444 F.2d 931, 947 (D.C. 1971).

American adoption of promotion-and-relegation would destroy extraordinary leverage franchises possess against their host cities. Unlike many other proposed solutions, promotion-and-relegation would leave all other decisions relating to playing competition and club management in the hands of the teams. Although exposing the franchises to competition through may seem like a significant change to the American landscape, in fact it seems to be the least interventionist remedy available.

*League size:* Sport is worth watching precisely because outcomes are the result of skill differentials, but nonetheless the outcome remains uncertain *a priori*. Uncertainty produces excitement. More precisely, the excitement level of games is a function of two components of league size, parity and variety.[125] Parity is important because games are not exciting if teams are mismatched and it is obvious who will win. However, excessive parity can lead to a perception of mediocrity and a longing for the good old days of super-star players and dynasty teams.[126] Likewise, it is generally more interesting to watch team A play team C than it would be to see them play team B a second time. Moreover, if A plays B too often latent differences in parity will become more obvious. Thus, the size of any sporting league is constrained, in part, by considerations of parity and variety.

*Determining League Size*: One solution to the problem of restricted entry would simply be to force the leagues to expand.[127] However, as sports economists understand, determining optimal league size is a complex undertaking and there are reasons to restrict the number of teams in the leagues to their present levels (or even fewer). Antitrust suits aimed at simply compelling a particular league to admit a particular team are bound to fail.[128] As the plaintiffs in *Mid-South Grizzlies* and *Seattle Totems Hockey* discovered, it very difficult for any individual would-be entrant to establish that their application was rejected for anticompetitive reasons and not in the interests of maintaining optimal league size, parity or other structural considerations.[129] The incumbent franchises will argue, quite credibly, that they understand the nature of their sport and the optimal league size better than a court could hope to. However, the does not mean that incumbents actually set the league size according to socially optimal considerations.

In the absence of a system of promotion-and-relegation, self-regulation of size by leagues will be far from optimal. At first blush, a reader might assume that as monopolists, the

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[125] Cain and Haddock, *supra* note 7 at 1130. Other structural factors influence parity as well, most obviously revenue sharing, salary caps, and inter-team wealth transfers.

[126] See Daniel Mizak, Anthony Stair and Armond Rossi, *Assessing Alternative Competitive Balance Measures For Sports Leagues: A Theoretical Examination Of Standard Deviations, Gini Coefficients, The Index of Dissimilarity*, 12(5) ECONOMICS BULLETIN 1, 2 (2005). http://www.economicsbulletin.com/2005/volume12/EB−04L80002A.pdf.

[127] See e.g. Thomas A. Piraino, *The Antitrust Rationale for the Expansion of Sports Leagues* 57 OHIO ST L J 1677 (1996) (arguing that that leagues could be required to undergo "reasonable expansion" under either the essential facilities doctrine or the ancillary restraints doctrine.)

[128] See e.g. Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983); Seattle Totems Hockey Club v. NHL, 783 F.2d 1347 (9th Cir. 1986)

[129] *Id.*

leagues will control entry to engineer revenue-maximizing scarcity, and the is certainly one important consideration. For example, Major League Baseball would rather shrink the league than allow a city to not pay for a new stadium, as evidenced by its threat to cut the Twins if Minnesota did not agree to pay for a new stadium.[130] However, the leagues also make tactical use their power to expand to prevent a rival league from forming.

As we explained earlier, the leagues' monopoly status is impervious to new entry from individual franchises: individual new entrants are admitted only at the discretion of the incumbents. Otherwise an outsider must engineer additional and simultaneous entry in order to have someone to play against. The difficulty of coordinating a new league from scratch discourages most potential entrants. On the rare occasions that an insurgent league presents even the remote chance of viability, the source of competition can be defeated by cherry-picking the most profitable new teams and inviting them to join the incumbent. On the two occasions when a rival league succeeded, a merger followed.[131]

Adopting a system of promotion-and-relegation would remove those distorting incentives and bring league size closer to a competitive optimum. Decoupling league size from league identity would not only reduce the leverage of the franchises in relation to their hosts, it would also remove the current perverse incentives to govern decisions relating to league size. In fact, these effects are self-reinforcing—promotion-and-relegation reduces the power of teams to make credible threat to abandon a city precisely because it reduces the costs associated with entering the sporting market. As Noll explains "[d]e novo entry can be cheaper under promotion/relegation for two reasons: Expansion fees are avoided and information costs associated with assessing new markets may be lower for residents of an emerging market. Hence, the absence of team relocation is a plausible consequence of a system of promotion-and-relegation."[132] Noll finds that the promotion-and-relegation system acts as a substitute for relocation or expansion.[133]

*Evidence of effect of promotion-and-relegation:* The inability of English teams credibly to threaten relocation translates into diminished capacity to rent seek. Teams in the Premier League spend their own funds on stadiums rather than having them provided by taxpayers, and some such as Arsenal have moved to new stadiums.[134] Teams in lower tiers also invest in stadium capital, with relatively little direct support from local as opposed to national government.

### D. Alternative Solutions to Stadium Rent Seeking

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[130] Ross and Szymanski, *supra* note 7 at 625.

[131] *Id.* 631-632. See also Cain and Haddock, *supra* note 7 at 1135 (when leagues establish monopolies, entrepreneurs face the choice between organizing an entirely new league, with all the costs associated with facing an entrenched competitor, or offering to purchase a franchise from the league).

[132] Noll, *supra* note 7 at 176.

[133] *Id.* at 171.

[134] Ross and Szymanski, *supra* note 7 at 637; Noll, *supra* note 7.

### *1. Antitrust Alternatives*

(a) Reverse *Los Angeles Memorial Coliseum Commission v National Football League*

The Ninth Circuit's 1984 decision in *Los Angeles Memorial Coliseum Commission v National Football League,*[135] considerably weakened the power of the NFL (and possibly other leagues) to prohibit franchise relocations. In 1978 the Rams decided to vacate the Los Angeles Coliseum and move to a better deal being offered by suburban Anaheim. The Coliseum attempted to lure the Oakland Raiders as their new tenants. Because Los Angeles was near enough to Anaheim to be designated Ram's territory, the other teams voted 22 to 0 to oppose the move.[136] The Raiders then joined the Coliseum in an antitrust complaint against the other members of the NFL.[137] In *Los Angeles Memorial Coliseum Commission v National Football League* (Raiders)*,*[138] the Ninth Circuit upheld a jury verdict that, in the circumstances of the case, the NFL's relocation restriction violated the Section 1 of the Sherman Act.[139] The court of appeal agreed that the NFL's relocation restraint caused significant harm to competition and that less restrictive means could have achieved any benefits.[140]

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[135] 726 F2d 1381, 1395 (9th Cir 1984) cert. denied, 469 U.S. 990 (1984).

[136] At the time, Rule 4.3 of Article IV of the NFL Constitution required three-quarters approval of all 28 teams before a team could relocate into a rival's territory. There were five abstentions; the Raiders did not get to vote.

[137] The announcement of the move also led to an attempt by the City of Oakland to use its power of eminent domain to keep the Raiders in Oakland.

[138] 726 F2d 1381, 1395 (9th Cir 1984) cert. denied, 469 U.S. 990 (1984).

[139] It is unclear whether a decision by MLB to block franchise relocation would fall within the scope of baseball's judge-made antitrust exemption. In the only case directly on point, the Eastern District of Pennsylvania refused to dismiss a challenge to baseball's franchise relocation restrictions but held that the scope of the exemption was limited to baseball's reserve system. Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) (Plaintiffs alleged that the MLB frustrated their efforts to purchase the San Francisco Giants and relocate the team to the Tampa SMSA). See also, Butterworth v. National League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1025 (Fla. 1994). But see, New Orleans Pelicans Baseball, Inc. v. National Ass'n of Prof'l Baseball Leagues, 1994 WL 631144, at *8-9 (E.D. La. 1994), McCoy v. Major League Baseball, 911 F. Supp. 454, 456-58 (W.D. Wash. 1995). See generally, Jeffrey Gordon, *Baseball's Antitrust Exemption And Franchise Relocation: Can A Team Move?* 26 FORDHAM URB. L.J. 1201 (1999) (arguing that the baseball exemption extends to the business of baseball, and thus includes franchise relocation rules). In 1998, Congress passed the Curt Flood Act revoking baseball's antitrust exemption with respect to labor relations. 15 U.S.C.A. § 27a. The act does not affect the scope of baseball's antitrust exemption with respect to "franchise expansion, location or relocation", nor does it indicate that those things are within the scope of the exemption. The passage of the Curt Flood Act either eviscerates the baseball exemption, or more likely belies the *Piazza* court's claim that the exemption extends only to the reserve clause. J. Philip Calabrese, *Antitrust And Baseball*, 36 HARV. J. ON LEGIS. 531, 538 (1999).

[140] at 1395-97. ("Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadiums such as the Los Angeles Coliseum that wish to secure NFL tenants. If the transfer is upheld, direct competition between the Rams and Raiders would presumably have ensued to the benefit of all who consume the NFL product in the Los Angeles area.").

In the wake of the *Raiders* antitrust decision the NFL has been reticent to block relocation, even when the detriment to the league as a whole is apparent.[141] Franchise relocation restrictions are not invalid *per se* under the *Raiders* decision; but are subject to a 'rule of reason' balancing test.[142] However, the decision had a substantial impact, as illustrated in 1995 when the NFL owners chose to allow the Rams to move (again) to St. Louis after the Attorney General of Missouri threatened to seek billions of dollars in punitive damages if permission was denied. The owners had initially voted against the move, but relented to avoid the risk of treble antitrust damages.[143] Consequently, many commentators have suggested that the solution is less antitrust regulation. Specifically, they suggest giving leagues antitrust immunity with respect to collective decisions regarding relocation.[144]

It is unlikely that merely giving the leagues an antitrust free pass in the respect would address the problem. Rodney Fort provides the sobering assessment that "leagues carefully husband viable alternative threat locations" to enable teams endowed with market power to offer all-or-nothing propositions to host cities.[145] The individual franchises that vote to allow or disallow relocation will only have an incentive to oppose if the relocation will diminish total league revenues, while the will clearly be the case in some opportunistic moves, it will not be in others. Furthermore, although some franchise relocations may be detrimental to the league as a whole, individual teams have an incentive to stand aside if a fellow team threatens to move because it strengthens their own future threats to move.[146] Finally, a relocation fee paid to the league can overcome resistance by other league members.[147]

*(b) League Break Up*

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142 See National Basketball Association v SDC Basketball Club, Inc, 815 F2d 562, 567-68 (9th Cir 1987).

**143** Don Nottingham, Keeping The Home Team At Home: Antitrust And Trademark Law As Weapons In The Fight Against Professional Sports Franchise Relocation, 75 U. COLO. L. REV. 1065. On the impact of the decision generally, see Travis Tygart, Antitrust's Impact on the National Football League and Team Relocation, 7 SPORTS L.J. 29, 31 (2000); John Wunderli, SQUEEZE PLAY: THE GAME OF OWNERS, CITIES, LEAGUES AND CONGRESS, 5 MARQ. SPORTS L.J. 83 (1994).

144 See e.g., Mitten and Burton, *supra* note 23 ("A league's internal franchise location decisions should not be subject to review under the antitrust laws.")

145 Rodney D. Fort. *Stadium Votes, Market Power And Politics*, 30 U. TOL. L. REV. 419 (1999).

146 Mitten and Burton, *supra* note 23 ("There is no reason to expect that franchise owners routinely will interfere with their joint-venturers' efforts to make more money at the taxpayers' expense.").

147 Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U Chi Legal F 245 [Some commentators have suggested that the real reason the National Football League ("NFL") approved the Rams' move to St. Louis was because the Rams agreed to pay the NFL a $71 million 'relocation fee.' 2000 U Chi Legal F 245 citing Mullick, 7 Marq Sports L J at 7, 11 n 55 (noting that the owners originally voted 21-3 (with five abstentions) against the Rams move, but then voted 23-6 in favor, after securing the relocation fee).

A number of commentators have advocated breaking up professional sports leagues monopolies into multiple independent competing leagues.[148] Stephen Ross argues that judicially ordered divestiture would be an appropriate remedy for correcting unlawful monopolization by a professional sports league; although he does note however that that a court is unlikely to order that kind of relief.[149]

The problem with a simple break up solution is that it ignores the natural desire of sports fans to be able to compare the best against the best. The proposal runs counter to the history of professional sports, which has been one of increasing consolidation.[150] History shows that the sports market is unlikely to sustain multiple, premier leagues within a given sport in the long run.[151] Depriving the sporting public of the pinnacle of competition would hardly be consistent with promoting consumer welfare.

*(c) Conduct Remedies*

Although it is conceivable that a court might issue an injunction or impose fines for individual instances of boycott or threats to exclude, the is unlikely to be a satisfactory remedy. Case-by-case conduct based remedies would require ongoing court supervision and are unlikely to be sought in many cases. As the *Grizzlies* cases illustrates, individual teams seeking entry to a league are not well placed to pursue antitrust actions against the sporting cartels they wish to join because they are placed in the awkward position of arguing that the league should be open to them specifically, but not others.[152] It is also unlikely that cities will bring actions with any regularity because many civic leaders are willing participants in the public choice dynamic described in Part I-A. The most likely candidates to bring an antitrust action are cities that have been shut out of major league representation and those on the verge of losing a team.

Another reason why conduct remedies are unlikely to work in the scenario is that the leagues are unlikely to continue to make explicit boycott threats because they can rely on the well-established implicit threat of boycott. The difference does not change the merits of the underlying cause of action, but it would make proving it more difficult.

Rather than relying on conduct remedies that aim at the point of team departure, a court could entertain structural remedies that seek to "pry open to competition a market that has been closed by defendants' illegal restraints."[153] As we have argued, requiring a league to

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[148] Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 715-33 (1989); PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS (2000)

[149] *Id.*

[150] Jeffrey H. Kahn, "Leveling the Playing Field: How the Law Can Make Sports Better for Fans. By Paul C. Weiler." 41 Santa Clara L. Rev. 921 (2001) (book review).

[151] Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-a-Vis the American City*, 2 VA. SPORTS & ENT. L.J. 280 (2003).

152

[153] Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947) (quoted in Ford Motor Co. v. United States, 405 U.S. 562, 577-78 (1972)).

adopt a system of promotion-and-relegation would be a sufficient and beneficial structural change.

### *2. Legislative Solutions*

According to some, only Congressional can protect taxpayers and fans by leveling the playing field between a team owner and its current or prospective host city.[154] The *Raiders* antitrust decision,[155] the Colt's move from Baltimore to Indianapolis in 1985 and the moves of the Rams, Raiders and Browns in 1995 each spawned a number of legislative proposals to restrict the ability of professional sports franchises to relocate.[156] These bills typically seek to codify league relocation criteria and allowing the NFL, with either judicial or regulatory oversight, to enforce them.[157]

Another approach to the problem is to focus on the adverse outcome, city accession to the unreasonable demands of sporting franchises, and regulate the conduct of cities. Paul Weiler, for example, argues that Congress should prohibit the use of tax funds to build stadiums to either attract or to retain professional sports teams.[158] The obvious objection here is that the federal government has no legitimate role to play in deterring a community from making these kinds of choices.[159]

Some commentators have objected to these solutions on the basis that they interfere with the free market and foreclose competition between cities on their merits as potential hosts.[160] Although it seems absurd to characterize the leveraging of market power and exploitation of rent seeking opportunities as the operation of the 'free market', there are more plausible reasons to be wary of federal intervention in team relocation and local government spending decisions. Federal oversight of franchise relocation or city stadium spending would require administrative agencies to make difficult business decisions

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[154] Mitten and Burton, *supra* note 23.

[155] 726 F.2d 1381 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984).

[156] See 75 U. COLO. L. REV. 1065 (Summarizing the Professional Football Stabilization Act, the Professional Sports Franchise Relocation Act, the Sports Community Protection and Stability Act, the Professional Sports Team Community Protection Act, Fans Rights Act and the Fan Freedom and Community Protection Act.) See also Safir, *supra* note 24.

[157] Safir, *supra* note 24.

[158] PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS (2000). See also, Edelman, *supra* note __ ("the best way to regulate professional sports is to pass a bill that outlaws sports subsidies altogether").

[159] Jeffrey H. Kahn, "Leveling the Playing Field: How the Law Can Make Sports Better for Fans. By Paul C. Weiler." 41 Santa Clara L. Rev. 921 (2001) (book review).

[160] See e.g., Daniel E. Lazaroff, *The Antitrust Implications Of Franchise Relocation Restrictions In Professional Sports*, 53 FORDHAM L. REV. 157; Steven John Kolias, *Offensive Interference: How Communities Have Harnessed Market Forces to Retain NFL Franchises, Eliminating the Need for H.R. 3817's Proposed Antitrust Exemption,* 8 SPORTS LAW. J. 43 (2001) ("when a community does not support a team enough to make it financially viable to remain in that city, the team should have the option to relocate to a community that values the team more.")

while relying on those they regulate for the relevant information. Such oversight may simply shift the rent seeking/public choice phenomenon to a different forum.[161]

## CONCLUSION

Exceptionally knowledgeable readers may think we have overstated our argument, because English taxpayers have demonstrably funded some construction and renovation of professional stadiums. Government ownership is modest by U.S. standards however – the local council has title or leasehold on twenty-one of the 116 stadiums used in the top five tiers of the pyramid, and council ownership becomes more common moving down the tiers. No higher tier has as many of its teams playing in council owned stadiums as the fifth tier Conference's one-quarter. This season only two Premier League teams – Manchester City and Swansea – use government stadiums, and Swansea's was funded by a 355,000 ft retail park built as part of the project. Second tier West Ham is notable as well for the fine government-built stadium it will occupy in 2014, an acquisition that required defeating Tottenham Hotspur in Whitehall rather than on the playing field.

Subtly, however, the stadiums of Man City and West Ham as well as the temporary home of fourth tier Rotherham United support our argument. All three structures resulted from competition among nations for international athletic events – the 2002 Commonwealth Games (Man City), the 2012 Olympics (West Ham), and the 1991 World Student Games (Rotherham United). Organizers of such events make the same sort of demands on aspiring nations as American leagues make on cities and states – if Great Britain wanted to be host, it damn well had to provide lavish facilities.

In addition to those three stadiums, over the past decade-and-a-half the British government has allocated significant funds to renovate stadiums, not just in England but throughout Great Britain. To see the compatibility with our argument the reader must understand the Hillsborough tragedy. At one time only a minority of fans at soccer matches had a seat; the majority stood in areas known as terraces that inclined toward the pitch to afford a better view over fans nearer the pitch. Terraces still provide the majority of capacity in lower tier stadiums.

During the early minutes of a 1989 cup semi-final at Sheffield Wednesday's Hillsborough Stadium, overcrowding at the top of a terrace by late arriving fans crushed fans at the bottom against a fence that was intended to prevent field invasions, but inadvertently barred escape. Ninety-six died. That event followed a similar one in 1981 that injured thirty-eight fans. Such human landslides would be unlikely if fans had seats.

The British government responded by banning terraces in the pyramid's upper tiers, a time-consuming conversion that is still ongoing as teams change tiers. A standing fan occupies less space than a seated one however, so banning terraces has diminished the

[161] Broader changes to the tax code and to federal and state infrastructure financing may well have an effect on the stadium rent seeking phenomenon, but are beyond the scope of the Article.

number of tickets an affected club can sell. All-seater stadiums also deprive fans of a sense of camaraderie that many had enjoyed.

The British government investments are easily distinguished from the result of coercive rent seeking by American teams in two important ways: first, improving fan safety rather than improving club profitability is the motive; second, the investments result in renovations that the clubs opposed due to lost seating and diminished fan enthusiasm. Moreover, well-heeled clubs are expected to bear the expense themselves, though the government sometimes helps clubs in financial distress. Limited national funding characterizes most British projects, and that level of government lacks the incentive of American cities to induce teams to move around the country.

The economic and legal literature thoroughly documents the consequence and extent of public spending by American cities for the private benefit of professional sporting franchises.[162] New stadiums arise from the rubble of not-so-old ones, at public expense, often before the public has paid off the debt incurred for the previous model. Commentators rightly understand stadium rent seeking to be a consequence of the extraordinary leverage that teams hold over American cities, but have improperly diagnosed the source.

The frequency of team movements and magnitude of public hand-outs in America in comparison with England cannot arise solely from avid public interest in sports and the frailty of the political process. Nor is the ability of teams to move the culprit. Avid sporting interest, imperfect political systems, and team ability to relocate characterize both America and England. The characteristics manifest themselves in extraordinary ways in America because of the extraordinary organizational structure of American leagues: closed entry limits team supply and enables incumbents to make credible threats to relocate. That stimulates offers of better terms from rival cities that have no team, and a host city wishing to avoid the team's exit must match or exceed the rival offers. An English team could make the same threat, but it would be hollow, as the birth of AFC Wimbledon has demonstrated. The relative openness fostered by promotion-and-relegation shields localities from extortion; local fans have at hand a ready option to shift allegiance to different local team, and by doing so to push it up the ranks. American fans have no assured substitutes if the local team leaves, and thus possess a much weaker weapon against credibly threats, not merely of departure but of long-term deprivation, as the NFL has pointedly taught Angelinos.

We have applied a comparative insight to shed new light on the much-lamented problem of stadium rent seeking. The insight is simple: English football shows that a belief that major sports leagues must have absolute control over league composition – still too often considered axiomatic in blinkered America – is a poor option in comparison to an automatic, episodically open, promotion-and-relegation system. A closed league structure that vests incumbents with all entry decisions is neither historically inevitable, geographically normal, nor a concession to pragmatism.

[162] See supra, Part I.

American sporting leagues have been cartels for so long that the fact almost disappears from view. A false premise hamstrings antitrust analysis of stadium rent seeking. A comparison with English soccer demonstrates that cooperation on some aspects competition does not necessitate cooperation on all aspects. Once that is evident, the illegitimate use of a cartel at the top tier of sports to threaten collectively to boycott cities that will not play the subsidy game becomes apparent. Promotion-and-relegation is not the only conceivable remedy for stadium rent seeking, but it would elegantly restructure incentives of the incumbents without interfering with internal franchise decisions that are not merely benign but beneficial. What is required is a more appropriate set of rules governing the behavior of knowledgeable insiders, not political intervention by the ignorant.

Imagine an American team earning its place at the top table through sporting achievement while its fans pay for the field on which the team plays, sparing other taxpayers who could hardly care less about the team's performance. That sounds almost like English soccer. It would not be such a bad thing.

## APPENDIX

### BOWL CHAMPIONSHIP SERIES COLLEGE FOOTBALL TEAM STADIUMS – 2012 SEASON

| UNIVERSITY OWNER / RENTER | YEAR OPENED | CONFERENCE | AGE | NOTES |
|---|---|---|---|---|
| **Minnesota** | 2009 | Big 10 | **2** | |
| **Central Florida** | 2007 | Conf USA | **4** | |
| **Stanford** | 2006 | PAC 12 | **5** | |
| **Connecticut** | 2003 | Big East | **8** | |
| **Temple** | 2003 | MAC | **8** | shared with Philadelphia Eagles |
| **U Mass** | 2002 | MAC | **9** | shared with New England Patriots |
| **Pitt** | 2001 | Big East | **10** | shared with Pittsburgh Steelers |
| **Southern Methodist** | 2000 | Conf USA | **11** | |
| **Louisville** | 1998 | Big East | **13** | |
| **Middle Tennessee** | 1998 | Sun Belt | **13** | |
| **South Florida** | 1998 | Big East | **13** | shared with Tampa Bay Buccaneers |
| **Utah** | 1998 | PAC 12 | **13** | |
| **Florida International** | 1995 | Sun Belt | **16** | |
| **Rutgers** | 1994 | Big East | **17** | |
| **Buffalo** | 1993 | MAC | **18** | |
| **U Texas at San Antonio** | 1993 | WAC | **18** | shared with Alamo Bowl |
| **Marshall** | 1991 | Conf USA | **20** | |
| **Miami (Florida)** | 1987 | ACC | **24** | shared with Miami Dolphins |
| **Miami (Ohio)** | 1983 | MAC | **28** | |
| **Texas State** | 1981 | WAC | **30** | |
| **Fresno State** | 1980 | Mtn West | **31** | |
| **Syracuse** | 1980 | Big East | **31** | |
| **West Virginia** | 1980 | Big East | **31** | |
| **Lousiana at Monroe** | 1978 | Sun Belt | **33** | |
| **New Mexico State** | 1978 | WAC | **33** | |
| **Southern Mississippi** | 1976 | Conf USA | **35** | |
| **Hawaii** | 1975 | Mtn West | **36** | |
| **Idaho** | 1975 | WAC | **36** | |
| **Iowa State** | 1975 | Big XII | **36** | |
| **Tulane** | 1975 | Conf USA | **36** | shared with New Orleans Saints |
| **Arkansas State** | 1974 | Sun Belt | **37** | |
| **Kentucky** | 1973 | SEC | **38** | |
| **Central Michigan** | 1972 | MAC | **39** | |
| **Washington State** | 1972 | PAC 12 | **39** | |
| **Lousiana at Lafayette** | 1971 | Sun Belt | **40** | |
| **UNLV** | 1971 | Mtn West | **40** | |
| **Boise State** | 1970 | Mtn West | **41** | |
| **Eastern Michigan** | 1969 | MAC | **42** | |
| **Kent State** | 1969 | MAC | **42** | |
| **Kansas State** | 1968 | Big XII | **43** | |
| **Louisiana Tech** | 1968 | WAC | **43** | |
| **Utah State** | 1968 | WAC | **43** | |
| **Wake Forest** | 1968 | ACC | **43** | |
| **Western Kentucky** | 1968 | Sun Belt | **43** | |
| **Ball State** | 1967 | MAC | **44** | |

| | | | | |
|---|---|---|---|---|
| **Colorado State** | 1967 | Mtn West | **44** | |
| **Memphis** | 1967 | Conf USA | **44** | |
| **Oregon** | 1967 | PAC 12 | **44** | |
| **San Diego State** | 1967 | Mtn West | **44** | |
| **Bowling Green** | 1966 | MAC | **45** | |
| **Nevada** | 1966 | Mtn West | **45** | |
| **North Carolina State** | 1966 | ACC | **45** | |
| **Northern Illinois** | 1965 | MAC | **46** | |
| **Virginia Tech** | 1965 | ACC | **46** | |
| **BYU** | 1964 | IND | **47** | |
| **East Carolina** | 1963 | Conf USA | **48** | |
| **UTEP** | 1963 | Conf USA | **48** | |
| **Air Force** | 1962 | Mtn West | **49** | |
| **Indiana** | 1960 | Big 10 | **51** | |
| **New Mexico** | 1960 | Mtn West | **51** | |
| **Penn State** | 1960 | Big 10 | **51** | |
| **Florida Atlantic** | 1959 | Sun Belt | **52** | |
| **Navy** | 1959 | IND | **52** | |
| **Arizona State** | 1958 | PAC 12 | **53** | |
| **Boston College** | 1957 | ACC | **54** | |
| **Oregon State** | 1953 | PAC 12 | **58** | |
| **North Texas** | 1952 | Sun Belt | **59** | |
| **Baylor** | 1950 | Big XII | **61** | |
| **Florida State** | 1950 | ACC | **61** | |
| **Maryland** | 1950 | ACC | **61** | |
| **Rice** | 1950 | Conf USA | **61** | |
| **Troy State** | 1950 | Sun Belt | **61** | |
| **Wyoming** | 1950 | Mtn West | **61** | |
| **South Alabama** | 1948 | Sun Belt | **63** | |
| **Texas Tech** | 1947 | Big XII | **64** | |
| **Houston** | 1946 | Conf USA | **65** | |
| **Clemson** | 1942 | ACC | **69** | |
| **Akron** | 1940 | MAC | **71** | |
| **Auburn** | 1939 | SEC | **72** | |
| **Arkansas** | 1938 | SEC | **73** | |
| **Toledo** | 1937 | MAC | **74** | |
| **Western Michigan** | 1937 | MAC | **74** | |
| **South Carolina** | 1934 | SEC | **77** | |
| **San Jose State** | 1933 | WAC | **78** | |
| **Virginia** | 1931 | ACC | **80** | |
| **Florida** | 1930 | SEC | **81** | |
| **Notre Dame** | 1930 | IND | **81** | |
| **Texas Christian** | 1930 | Big East | **81** | |
| **Tulsa** | 1930 | Conf USA | **81** | |
| **Alabama** | 1929 | SEC | **82** | |
| **Arizona** | 1929 | PAC 12 | **82** | |
| **Duke** | 1929 | ACC | **82** | |
| **Georgia** | 1929 | SEC | **82** | |
| **Iowa** | 1929 | Big 10 | **82** | |
| **Ohio** | 1929 | MAC | **82** | |
| **Texas A&M** | 1929 | Big XII | **82** | |

| **Alabama at Birmingham** | 1927 | Conf USA | **84** | |
|---|---|---|---|---|
| **Michigan** | 1927 | Big 10 | **84** | |
| **North Carolina** | 1927 | ACC | **84** | |
| **Missouri** | 1926 | Big XII | **85** | |
| **Northwestern** | 1926 | Big 10 | **85** | |
| **Army** | 1924 | IND | **87** | |
| **Colorado** | 1924 | PAC 12 | **87** | |
| **Louisiana State** | 1924 | SEC | **87** | |
| **Purdue** | 1924 | Big 10 | **87** | |
| **Texas** | 1924 | Big XII | **87** | |
| **California** | 1923 | PAC 12 | **88** | |
| **Illinois** | 1923 | Big 10 | **88** | |
| **Michigan State** | 1923 | Big 10 | **88** | |
| **Nebraska** | 1923 | Big 10 | **88** | |
| **Oklahoma** | 1923 | Big XII | **88** | |
| **Southern California** | 1923 | PAC 12 | **88** | |
| **Ohio State** | 1922 | Big 10 | **89** | |
| **UCLA** | 1922 | PAC 12 | **89** | shared with Rose Bowl |
| **Vanderbilt** | 1922 | SEC | **89** | |
| **Kansas** | 1921 | Big XII | **90** | |
| **Tennessee** | 1921 | SEC | **90** | |
| **Oklahoma State** | 1920 | Big XII | **91** | |
| **Washington** | 1920 | PAC 12 | **91** | |
| **Wisconsin** | 1917 | Big 10 | **94** | |
| **Cincinnati** | 1916 | Big East | **95** | |
| **Mississippi** | 1915 | SEC | **96** | |
| **Mississippi State** | 1914 | SEC | **97** | |
| **Georgia Tech** | 1913 | ACC | **98** | |