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League Structure & Stadium Rent Seeking —the Antitrust Role Reconsidered

Haddock David

Jacobi Tonja

Matthew Sag

Loyola University Chicago, School of Law, msag@luc.edu

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LEAGUE STRUCTURE & STADIUM RENT-SEEKING—THE ROLE OF ANTITRUST REVISITED

*David Haddock, Tonja Jacobi & Matthew Sag**

“O wad some Power the giftie gie us”†

Abstract

Professional North American sporting teams receive enormous public funding for new and renovated stadiums after threatening to depart their hometowns, or by actually moving elsewhere. In contrast, English sporting teams neither receive much public money for such projects, nor move towns. This Article argues that no inherent cultural or political transatlantic variations cause the differences; rather, it is the industrial organization of sports in the two countries—the structure of league control—that enables rent-seeking by American teams but not by their English counterparts. Cross-country time series data contrasting American professional football and baseball stadiums with English soccer grounds support our claim, as does data contrasting the stadiums of geographically flexible National Football League teams with those of functionally immobile major collegiate football teams.

North American sports leagues are cartels: they control entry of teams, then collaborate to maximize effective rent-seeking, stave off competition, and keep prices high. In most of the world, competitive merit determines entrance into leagues via a system known as promotion and relegation, which demotes the worst performing teams in one competitive tier to the next lower tier at season’s end, simultaneously promoting an equivalent number of top teams from the division below. The fluidity created by promotion and relegation severely undermines the credibility of a team’s threat to leave town by creating alternative, less costly entry points into the league. Open entry

* Professor, Northwestern University School of Law & Department of Economics; Professor, Northwestern University School of Law; Associate Professor, Loyola University Chicago and Visiting Fellow at Northwestern’s Searle Center on Law, Regulation, and Economic Growth. Versions of this article were presented at the Searle Center’s Fourth Annual Conference on Antitrust Economics and Competition Policy (2011), the Midwest Political Science Association Annual Conference (2012), the Marquette University School of Law Intellectual Property Colloquium (2012), the Benjamin N. Cardozo School of Law IP Speaker Series (2012), the Robert A. Levy Workshop at George Mason University (2012), and the European Association for Law & Economics (2012). Thanks to Charlotte Crane, Laura E. Evans, Jerry Hausmann, Matthew Mitten, John McGinnis, Ryan Sachs, Spencer Waller, the faculty of Northwestern Law School for comments, and to Kelli Rucker for research. The authors gratefully acknowledge a generous grant from the Searle Center on Law, Regulation, and Economic Growth.

† Robert Burns, *To a Louse* (1786).

mitigates pressure to engage in intercity competition over scarce team slots, and thus relieves the pressure to transfer wealth from public taxpayers to private team owners through stadium funding.

Stadium rent-seeking illustrates a weakness of antitrust law in remedying problems at the intersection of market and political organization. The anticompetitive structure of American leagues provides the platform for stadium rent-seeking, but the resulting harm is arguably a political injury rather than an antitrust offense. Nonetheless, this Article argues that finding a way to impose a promotion and relegation system would be the least intrusive means for the United States and Canada to limit sporting league cartel behavior to its proper functions, such as arranging schedules and defining uniform rules. The unpromising solution under antitrust law makes it all the more imperative for Congress to address this costly injury.

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INTRODUCTION

The median family home in the United States is about thirty-seven years old¹ but Major League Baseball (MLB) and National Football League (NFL) stadiums average less than twenty-three 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 for wealthy professional franchises.

In stark contrast, this season the mean age of playing grounds in arguably the world's top soccer league, the English Premier League, exceeds seventy-eight years. The contrast between Premier League and American stadium ages seems quite odd given the similar configurations and functional interchangeability of soccer and American football fields.³ Stadium age is not the only transatlantic difference: 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, and English teams almost never abandon their hometowns.

This Article argues that neither cultural nor political transatlantic differences are responsible for this disparity; instead, a difference in the organization of sports—the structure of entry control—facilitates rent-seeking by North American teams that is unavailing for their English counterparts.⁴

Top tier American teams use their respective leagues as cartels: impeding entry by potential competitors (whether the competitors be teams or entire leagues), collaborating when seeking government handouts, and keeping quantity low and prices high. To avoid costly formation of an entire league, a would-be sporting franchise must obtain the approval of the existing teams acting jointly through their league;

1. See U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009 1 tbl.1-1 (2011), available at <http://www.census.gov/prod/2011pubs/h150-09.pdf>.

2. See *infra* Figure 1.

3. The 1994 Men's Soccer World Cup, hosted by the United States, used professional and collegiate football stadiums exclusively. See *1994 FIFA World Cup*, U.S. SOCCER, <http://www.ussoccer.com/About/History/US-Soccer-as-Host/1994-FIFA-World-Cup.aspx> (last visited Sept. 15, 2012). American rules football games played in England, including an annual NFL game at London's Wembley Stadium, use soccer stadiums exclusively. See, e.g., *NFL in the UK*, NFL LONDON, <http://www.nflondon.net/history.html> (last visited Sep. 31, 2012).

4. Scotland and Northern Ireland have separate leagues, as does Wales to some degree, so the reader must not think us careless when we speak not of Britain but of England. Similarly, though Canada has a separate professional football league, with the exception of the NFL all the major leagues with U.S. teams also have Canadian teams, so we refer collectively to (North) American teams, leagues, and governments, using *U.S.* only if the context is inapplicable to Canada.

such acquiescence comes rarely and at a very high price. The difficulty an American challenger has entering the industry without entering the incumbent league gives incumbents a credible threat to withhold or withdraw all representation from cities that refuse to absorb much or all of the cost of cutting-edge facilities. Not only can a franchise leave, but it can also be confident that no new team will soon replace it; therein lies the heart of its negotiating power.⁵

Los Angeles reveals a glaring example of stadium rent-seeking. 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.⁶ Henceforth, the second most populous Standard Metropolitan Statistical Area (SMSA) in the United States⁷ has lacked an NFL team. That is seventeen 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 L.A. likewise proved intransigent and Oakland saw the error of its ways. Now, the Chargers, Rams, and Raiders are among teams thought most likely to relocate to Los Angeles—but only if local government contributes heavily toward a new stadium.⁸

Regardless of the sport—soccer, basketball, ice hockey, or others rarely played in America—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

5. Departing teams have been replaced, but, as exemplified by the Cleveland Browns, only after the losing city agreed to substantial new subsidies. See Aaron Kuriloff & Darrell Preston, *In Stadium Building Spree, U.S. Taxpayers Lose \$4 Billion*, BLOOMBERG, (Sept. 5, 2012, 1:03 PM), <http://www.bloomberg.com/news/2012-09-05/in-stadium-building-spree-u-s-taxpayers-lose-4-billion.html> (“To land an expansion team in 1998, Cleveland provided a \$315 million publicly financed building.”).

6. Taxpayers assumed liability in one way or another for \$60 million and \$26 million dollars of renovations at Qualcomm Stadium for the Chargers and the Oakland Arena for the Raiders, respectively. The taxpayer bill for the Rams’ new stadium in St. Louis was \$290 million. See Raymond J. Keating, *Sports Pork: The Costly Relationship Between Major League Sports and Government*, 339 POL’Y ANALYSIS 1, 14–15 tbl.1 (1999).

7. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF INCORPORATED PLACES: APRIL 1, 2010 TO JULY 1, 2011 (2011), available at <http://www.census.gov/popest/data/cities/totals/2011/files/SUB-EST2011-IP.csv><http://www.census.gov/popest/data/cities/totals/2011/files/SUB-EST2011-IP.csv>.

8. See Arash Markazi, *LA has tentative stadium agreement*, ESPN.COM (Jul. 26, 2011, 3:23 AM), http://espn.go.com/los-angeles/nfl/story/_id/6801664/city-reveals-tentative-agreement-la-stadium. Jacksonville is another potential mover, but Minnesota lost interest recently after recently successfully using the threat to pressure its host government for a third new stadium since the team’s formation in 1960. See *id.*

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 in upper tier English soccer since 1898, right after the merger of the Football League with the Football Alliance.⁹ The system enables a team to improve its position unilaterally through skillful performance, which correlates with host city wealth, population, and preferences—in other words, the team's ability to generate adequate revenue. Promotion and relegation's fluidity creates alternative entry points for teams anxious to represent the locality, thus undermining the credibility of a team's threat to leave and mitigating pressure for intercity competition.

The literature on stadium rent-seeking overwhelmingly concludes that the practice is harmful in numerous ways.¹⁰ 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.

Some commentators focus on the fact that American leagues permit teams to move as the root cause of stadium rent-seeking, but that analysis confuses cause and effect; the ready availability of rent-seeking gains incentivizes leagues to permit team movement. Others see the problem as rooted in avid public interest in sport or the failings of the political system. This Article contends that the problem is broader than simple team movement, enthusiasm for sports, or the weaknesses of politicians; the problem is that league structure vests entry control in the hands of incumbents. This Article supports that claim with cross-country data contrasting American professional football and baseball stadiums with English soccer grounds, and also by comparing stadiums of footloose NFL teams with those of functionally immobile major collegiate football teams.

Given the evidence that stadium rent-seeking is a product of closed league structures, the corresponding solution would seem to be some kind of structural remedy. This Article argues that imposition of promotion and relegation would be the least intrusive means for the U.S. and Canadian national governments to shield local governments from league abuses, thus limiting cartel behavior to legitimate functions, such as arranging schedules and defining uniform rules.¹¹ For over a

9. See *History of the Football League*, THE FOOTBALL LEAGUE (Sept. 22, 2010), <http://www.football-league.co.uk/page/History/HistoryDetail/0,,10794~1357277,00.html>.

10. See *infra* Part I.

11. Ross and Szymanski, Noll, and Cain and Haddock have also discussed how the lack of a promotion and relegation system contributes to the stadium rent seeking phenomenon in North America, although without our data and mode of analysis. See Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 627 (2002) (arguing

century, aggrieved plaintiffs and government enforcement agencies have looked to antitrust law (competition law in the rest of the world) to right anticompetitive wrongs such as price fixing and cartelization. However, it is unclear whether current antitrust law can provide any remedy to the American stadium rent-seeking problem—but not for the reasons conventionally assumed. The decision to operate as a closed league presents an obvious structural impediment to competition. League cartels make new entry all but impossible and thus provide franchises with extraordinary leverage over cities to negotiate for ever greater subsidies. This closed structure hides in plain sight, obscured by the belief that there is no workable way to have a sporting league without it. Although producing a sporting competition does require cooperation with respect to certain features—such as rules, uniforms, equipment, league size, and competition schedule—the promotion and relegation system common throughout most of the world shows that the essentials of cooperation are compatible with freedom of entry. Obviously, once a schedule of matches is determined for a season, the league must exclude outsiders temporarily—but this is no justification for a cartel structure that endures across seasons.

Running a permanently closed shop is an optional feature designed to benefit incumbents and not in any way essential to maintaining a sporting league. Thus, aspects of league behavior toward their host cities that depend on a permanently closed shop may violate the first mandate of antitrust law, § 1 of the Sherman Act, which prohibits unreasonable agreements between competitors to restrain trade.¹² Because existing teams determine whether new entry will be allowed, a threat by an individual team to relocate may comprise an implicit threat of a concerted boycott. However, courts have proven reluctant to use antitrust law to address competition problems at the intersection of political and market structures. They may take the view that, although stadium rent-seeking results from the closed market structure of sporting leagues, the matter nonetheless concerns a political rather than a market injury. Likewise, we also anticipate that at the remedy stage

promotion and relegation would “raise consumer welfare by increasing effective competition among the teams in [the] league” and undermine the existing potential for abuse of market power); Roger G. Noll, *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football*, 3 J. SPORTS ECON. 169, 175–77 (2002) (noting that the lack of promotion and relegation contributes to rent seeking in North America); Louis P. Cain & David D. Haddock, *Similar Economic Histories, Different Industrial Structures: Transatlantic Contrasts in the Evolution of Professional Sports Leagues*, 65 J. ECON. HIST. 1116, 1127–30 (2005) (describing the divergence in power between English and American leagues arising due to the open entrance created by a promotion and relegation system in the former and not the latter).

12. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

courts would be reluctant to try to determine the best way to transition from current league cartels to a system of open competition through promotion and relegation.

This Article argues, however, that the same factors that make judicial intervention unlikely make it apparent that Congress should take steps to correct a distorted market structure. Although it is not the only potential solution, adopting a system of open competition through promotion and relegation would address the problem and leave sports otherwise free from unnecessary government interference, restructuring incumbent incentives rather than directly interfering with team and league management.

The key to addressing stadium rent-seeking is to identify its causes and consider solutions that address those causes. Accordingly, this Article proceeds as follows. Part I discusses more fully the nature of the American problem and its contrast with England. Part II considers the 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 team incentive and ability to move in America with the derived incentive for loyalty in England. Part III examines the role that antitrust law could play in addressing the anticompetitive organization of sporting leagues. It explains why current antitrust law may not offer a complete solution to the problem and why the legislative imposition of a system of promotion and relegation may be preferable to court ordered remedies.

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 United States was \$10.4 billion.¹³ Public subsidies for stadium renovation over the same period amounted to a further \$1.4 billion.¹⁴ The NFL alone has commanded public stadium subsidies of at least \$2.4 billion since 2001.¹⁵ 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

13. See John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 96 tbl.1 (2000) (summarizing data in Keating, *supra* note 6, at 11–15.). These figures are in 1997 dollars. By decade, the figures break down to \$5.10 million, \$1.58 million and \$3.75 million for in the 1970s, 1980s, and 1990s, respectively. See *id.*

14. See *id.*

15. See *infra* note 120 and accompanying text.

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, \$1.19 billion, of the New Yankee Stadium that opened in the Bronx in 2009.¹⁶ A taxpayer burden of \$1.19 billion amounts to nearly \$200 per family living in the tristate 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?¹⁷ Being evenhanded, taxpayers simultaneously forked over an additional \$614 million of the \$831 million cost of a new stadium for the crosstown Mets,¹⁸ 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,¹⁹ and there are fewer of them available to boot.²⁰ By revealed preference, the combination of fewer seats at higher prices must make sense from the teams' perspectives, 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 1953.²¹

16. The remaining \$1.123 million was privately financed. See Neil Demause, *Private/Public Cost Breakdown For New Yankees/Mets Stadiums*, FIELDOFSCHEMES.COM (Jan. 2009), <http://www.fieldofschemes.com/documents/Yanks-Mets-costs.pdf>.

17. Manchester United is the world's most valuable team, worth \$1.835 billion, followed closely by the Dallas Cowboys at \$1.65 billion and the New York Yankees at \$1.6 billion. See Michael K. Ozanian & Kurt Badenhausen, *SportsMoney 50-50: The World's Most Powerful Teams and Athletes*, FORBES.COM (Jul. 22, 2010, 6:40 AM), http://www.forbes.com/forbes/2010/0809/sports-tiger-woods-kobe-bryant-floyd-mayweather-50-50_2.html.

18. Raymond J. Keating, *The Sporting Fellow: Old-Time Brooklyn in Queens*, LONG ISLAND SENTINEL (Jul. 13, 2009), <http://longislandsentinel.sports.blogspot.com/2009/07/sporting-fellow-old-time-brooklyn-in.html>.

19. See Victor Matheson & Brad R. Humphreys, *PILOTs and Public Policy: Steering Through the Economic Ramifications*, 16 VILL. SPORTS & ENT. L.J. 273, 280 (2009).

20. The new stadium's seating capacity is 50,287, whereas at abandonment the old stadium could seat 56,936. The Yankees had sold more than 70,000 tickets for some games prior to an earlier publically supported renovation. See *Stadium Comparison*, NEW YORK YANKEES, http://newyork.yankees.mlb.com/nyy/ballpark/new_stadium_comparison.jsphhttp://newyork.yankees.mlb.com/nyy/ballpark/new_stadium_comparison.jsp (last visited Sept. 15, 2012); *Yankee Stadium*, BALLPARKS.COM, <http://www.ballparks.com/baseball/american/yankee.htm> (last visited Sept. 15, 2008).

21. Baltimore built Venable Stadium at public expense in 1922. Venable sometimes served as a neutral venue for collegiate football games such as Army–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 World War II, the stadium was rebuilt during

During the first season, the team set a National League attendance record. Following the 1966 season, however, the Braves left for a still newer stadium in Atlanta. County Stadium was nearly abandoned then, but 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.²²

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 at substantially enhanced cost after the Athletics made a firm but contingent commitment to move from Philadelphia.²³ 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 status²⁴—a new expansion team used K.C.'s Municipal Stadium for an additional four years.²⁵ American professional sports teams do not like hand-me-downs, however, so the city replaced the eighteen-year-old stadium with a new one.²⁶

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 thirty-three-year-old Giants Stadium to make way for New Meadowlands Stadium.²⁷ Likewise, in 2010, taxpayers still owed more than \$80 million for the Kingdome that

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 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.

22. See Andrew Clem, (*Milwaukee*) *County Stadium*, CLEM'S BASEBALL BLOG, <http://www.andrewclem.com/Baseball/MilwaukeeCountyStadium.html> (last updated Feb. 28, 2011, 10:45 PM).

23. Round the clock construction took only ninety days. See John Peterson, *History of the A's*, KANSAS CITY BASEBALL HISTORICAL SOCIETY, <http://kansascitybaseballhistoricalsociety.com/jan%20article.pdf> (last visited Sept. 3, 2012).

24. http://en.wikipedia.org/wiki/Stuart_Symington under "Other Issues"

25. *Kansas City Sports Stadiums, Arenas and Ballparks History*, ALL STARR SPORTS ZONE (Feb. 18, 2012, 4:54 PM), <http://www.allstarrsports.com/index.php/kansas-city-sports/95-kansas-city-sports-stadiums>.

26. See *Kauffman Stadium: The History of Kauffman Stadium*, KANSAS CITY ROYALS, <http://kansascity.royals.mlb.com/kc/ballpark/history.jsp> (last visited Aug. 30, 2012).

27. Ken Belson, *As Stadiums Vanish, Their Debt Lives On*, N.Y. TIMES, Sept. 7, 2010, available at <http://www.nytimes.com/2010/09/08/sports/08stadium.html?pagewanted=allhttp://www.nytimes.com/2010/09/08/sports/08stadium.html?pagewanted=all>.

Seattle opened in 1976 but razed in 2000.²⁸

While discussing an early draft of this article, a professor living in Boston pointed to the Patriots, Celtics, and Bruins as constituting exceptions in the U.S. system, claiming that they had paid for their own stadiums.²⁹ Exceptions to the rule of stadium rent-seeking do not disprove the phenomenon—there is always going to be a distribution of success in teams' rent-seeking abilities. Moreover, the so-called exceptions are in fact quite misleading. Many forms of public stadium subsidization are not immediately apparent to casual observers, so the actual magnitude of subsidy is opaque. As such, it often appears that teams have paid their own way though they have not.

Public subsidies come in a complex variety of forms that obscures their true cost: free land, free rent, publicly funded construction, renovation, and infrastructure, the assumption of debts, tax exemptions for creditors receiving interest on bonds, and property and sales tax exemptions are common features, whereas straight cash payments are rare.³⁰ The complexity of stadium financing is an important ingredient of the public choice dynamic that allows for such massive wealth transfers from taxpayers to private for-profit franchises for four reasons.

First, wealth transfers in the form of publicly financed stadiums are advantageous because, while cash is obviously a gift, a new or renovated stadium can be labeled as an infrastructure investment. The notion that building a public stadium for a primarily private use is an investment is assisted by the fact that stadiums are one of the few forms of infrastructure that actually produce revenue streams. As such, they can be made to appear on paper as if they are investments rather than transfers of wealth, even if the city is investing far more money than it ever expects to receive in revenue from concession stands, license fees, and other sources.

28. *Id.*

29. Discussant comment at the Searle Center's Fourth Annual Conference on Antitrust Economics and Competition Policy (2011).

30. See generally Judith Grant Long, *Full Count: The Real Cost of Public Funding for Major League Sports Facilities*, 6 J. SPORTS ECON. 119 (2005); Ross D. Weiner, *Financing Techniques and Stadium Subsidies in the United States*, 11 J. URB. TECH. 41 (2004). For example, the State of Missouri and the City of St. Louis assumed the Rams' \$30 million debt to the City of Anaheim to secure the team's move to St. Louis. The Rams were also given \$15 million to cover relocation expenses. Likewise Montreal and the Province of Quebec gave the Expos' new owners \$33 million in 1990 to help them buy a team that moved to Washington fifteen years later. Remarkably, 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. 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, 46–48 & nn.61–62 (2005).

Second, cities are not required to account for public construction spending and tax exemptions in the same way as cash. Notably, the commonly used Tax Increment Financing (TIF) makes large sums of money available to mayors as an economic development tool that would allow spending on stadium development, but not allow simple cash transfers. TIFs allow governments to spend future gains in taxes to finance current improvements, which will, theoretically, create those future gains. Note, however, that when these gains fail to materialize, TIFs are no more than a public to private transfer of wealth.³¹ For example, critics charge that \$700 million of the \$1.7 billion dollars spent through TIFs in Chicago in the last eight years went to private developers, and amounted to “little more than a slush fund for [the mayor] to subsidize corporate Chicago at the public’s expense.”³²

Third, many stadium construction projects are financed with tax exempt municipal bonds. This effectively allows local decision makers to spend federal money on infrastructure such as stadium building. Thus subtly, a nontrivial part of the burden of replacing “The House That Ruth Built” and similar structures will be borne by 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.³³ Holding the overall size of government constant, other taxes have to be higher in compensation because interest payments to holders of municipal and state bonds are 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.³⁴ According to the CRS, the federal tax subsidy for sports

31. Note that increases in tax revenues attributable to inflation and demographic shifts can be used to make TIFs appear more effective than they are in reality.

32. Juan-Pablo Velez, *TIF Aided Public and Private Projects Almost Evenly, Analysis Shows*, N.Y. TIMES, Aug. 6, 2011, available at http://www.nytimes.com/2011/08/07/us/07cncitif.html?_r=1&pagewanted=allhttp://www.nytimes.com/2011/08/07/us/07cncitif.html?_r=1&pagewanted=all.

33. 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. Matthew J. Mitten and Bruce W. Burton summarize the findings of the CRS Report as follows: “[T]he 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 & 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, 144–45 (1997).

34. See DENNIS ZIMMERMAN, CONGRESSIONAL RESEARCH SERVICE, TAX-EXEMPT BONDS AND THE ECONOMICS OF PROFESSIONAL SPORTS STADIUMS 9–13 & tbl.2 (1996); Adam Safir,

stadiums was \$146 million in 1989 alone.³⁵ Moreover, local taxpayers are left with the responsibility to repay the bonds if (inevitably when) the stadium fails to generate the expected revenues.

Finally, in the rent-seeking game, complexity is a virtue in itself—the complexity of stadium financing enables the public choice dynamic by obscuring the true net cost. The ambiguous cost of subsidies, loan guarantees, tax breaks, and free infrastructure can be difficult to calculate, as are the offsetting gains. Thus, byzantine mechanisms of stadium funding are far less accountable than cash—and far more attractive to politicians.

The problem with the subsidies is not that stadiums confer no benefit on the community; the problem is that benefits are apparent whereas many costs are hidden. What is needed when evaluating infrastructure projects is not “benefit analysis,” however, but “cost–benefit analysis.” It is not enough to point out that a new stadium will have some positive spillovers; a coherent argument that a stadium merits subsidy requires evidence both that the positive spillovers outweigh negative ones and that the net is what James Buchanan and William Craig Stubblebine have branded a “relevant externality.”³⁶ The willingness of English soccer teams to finance their own stadium construction and renovation demonstrates that such projects create substantial private benefits and thus do not require public aid. If the private benefits of a new stadium exceed the private cost, then no public subsidy is required regardless of any positive spillovers that might accrue. To illustrate, a home owner who plants a garden for her own enjoyment may confer benefits upon those who look at it, she may even increase the value of surrounding property, but if her private incentives were sufficient to plant the garden without public subsidy, the externality is positive in total but nonexistent at the margin.³⁷

The empirical literature overwhelmingly concludes that the long-term public cost of stadium construction overshadows the public benefits.³⁸ Public funds ploughed into new and rejuvenated stadiums typically are justified as conferring gains to city reputation, prestige,

Note, *If You Build It, They Will Come: The Politics of Financing Sports Stadium Construction*, 13 J.L. & POL. 937, 941 (1997).

35. ZIMMERMAN, *supra* note 34, at 7. For the public choice implications of the complexity of stadium financing, see *infra* Section II.A and accompanying text.

36. See James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371, 373–84 (1962).

37. See David D. Haddock, *Irrelevant Externality Angst*, 19 *J. INTERDISC. ECON.* 3, 8–11 (2007).

38. See generally SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (Roger G. Noll & Andrew Zimbalist eds., 1997).

employment, and tax revenue.³⁹ Promoters assert that the franchise will enhance “the cultural fabric” of a city in ways that defy empirical assessment.⁴⁰ The evidence, however, suggests that publicly subsidized stadiums are not cost-effective job creation tools, nor are they particularly beneficial in urban redevelopment.⁴¹ Further, even assuming one credits those claims, if a new stadium attracts one of an arbitrarily limited number of teams, one city’s gain is another city’s loss.

Examining new construction that occurred in ten cities 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.⁴² New stadiums draw scant business from outside local communities.⁴³ 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 stands on game days.⁴⁴ Money spent on stadiums with dubious spillovers is diverted from education, public health, public safety, and infrastructure with undeniable positive spillovers.⁴⁵ 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.

39. See Benjamin A. Okner, *Subsidies of Stadiums and Arenas*, in GOVERNMENT AND THE SPORTS BUSINESS 325, 327–29 (Roger G. Noll ed., 1974).

40. Dean V. Baim, *The Rational Behavior Behind NFL Relocations*, 30 U. TOL. L. REV. 443, 450–51 (1999).

41. See generally Noll & Zimbalist eds., *supra* note 38.

42. See Robert A. Baade & Allen R. Sanderson, *The Employment Effect of Teams and Sports Facilities*, in SPORTS, JOBS, AND TAXES, *supra* note 38, at 92; ROBERT A. BAADE, HEARTLAND INST. POL’Y STUDY NO. 13, IS THERE AN ECONOMIC RATIONALE FOR SUBSIDIZING SPORTS STADIUMS? 18–19 (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”)

43. See Siegfried & Zimbalist, *supra* note 13, at 105–06 (discussing substitution in public spending); see also Safir, *supra* note 34, at 953 (noting that in St. Louis, San Francisco, and Washington, D.C., stadiums probably had a negative effect on per-capita income).

44. See Safir, *supra* note 34, at 953; see also, Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 201 (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.”).

45. See Brad R. Humphreys, *The Economic Impact of Sporting Facilities*, in HANDBOOK ON THE ECONOMICS OF SPORT 214, 217–18 (Wladimir Andreff & Stefan Szymanski eds., 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 1998.⁴⁶ Supporters claimed that 1,394 full-time jobs would materialize.⁴⁷ That comes to a cost of \$127,000 per job,⁴⁸ 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 overruns.⁴⁹

Public subsidies do not just enrich wealthy sporting franchises, they also inure to the benefit of wealthy athletes. Teams often argue that they cannot attract the talent they need 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 an individual small-market 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—a payment for services over and above the incentive required for its production.⁵⁰ The average annual salary of a player in the NBA exceeds \$5 million; in the MLB last season it was more than \$3 million; in the NHL it is \$2.4 million; in the NFL, \$1.9 million.⁵¹ Those amounts do not include income from endorsements, public appearances, and the like, which for star athletes

46. Keating, *supra* note 13, at 15 tbl.1.

47. Goodman, *supra* note 44, at 205–06.

48. *Id.* at 206.

49. 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 in new tax revenues.” Humphreys, *supra* note 45, at 215 (disparaging, not endorsing such claims). These prospective studies rely on unrealistic multipliers and overly optimistic cost predictions that are literally never borne out in retrospect. *See id.*

50. *See Economic Rent Definition*, THE OXFORD DICTIONARY OF ECONOMICS, available at <http://oxforddictionaries.com/definition/economic+rent?region=us> (last visited Sept. 15, 2012).

51. Joe Dorish, *Average Salaries in the NBA, NFL, MLB and NHL*, YAHOO SPORTS (Nov. 12, 2011), <http://sports.yahoo.com/nba/news?slug=ycn-10423863>. It is true that athletes in English soccer are also very well paid, but for reasons that are independent of promotion and relegation.

usually exceeds the salary component itself. At least as late as the 1970s, less skilled major league baseball players held off-season jobs such as gas station attendants.⁵² As a young prospect, Hall of Famer Nolan Ryan spent a winter installing air conditioning.⁵³ Adjusted for inflation, the minimum major league baseball salary at the time was \$72,000 and the average was \$175,000, which is to say substantially less than a fair number of upper end professorial salaries.⁵⁴ Yet Ryan was unlikely to become a college professor and he and others toiled on in their dual baseball player–gas station attendant profession.

Imagine what would happen if every player's 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 star. The number exiting would be modest however, and more to the point they would be 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. The point is not that top tier athletes may be overpaid in some absolute sense. Rather, the point is that public funding of stadium construction and renovation inflates athletes' salaries without any corresponding benefit to the public.

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 ninety-three years to a new facility stands in marked contrast to the American experience. The new Emirates Stadium has a capacity of 60,361,⁵⁵ offering many more fans the chance to see their team in action than did the 38,500 seats in Highbury Stadium.⁵⁶ The Emirates has much in common with New Yankee Stadium: the latter broke ground less than a month after the former officially opened,⁵⁷

52. See Jim Caple, *Take Me Out to the Gas Station*, ESPN.COM (Jan. 26, 2011), http://sports.espn.go.com/espn/page2/story?page=caple/110126_MLB_second_jobs&sportCat=mlb.

53. *Id.*

54. *See id.*

55. *Emirates Stadium*, THESTADIUMGUIDE, <http://www.stadiumguide.com/emirates> (last visited Sept. 15, 2012).

56. *Highbury (Arsenal Stadium)*, THESTADIUMGUIDE, <http://www.stadiumguide.com/highbury> (last visited Sept. 15, 2012).

57. Emirates Stadium opened on July 23, 2006, *Emirates Stadium*, *supra* note 55, while New Yankee Stadium broke ground on August 16, 2006, *New Yankee Stadium*, BALLPARKS.COM, <http://www.ballparks.com/baseball/american/nyybpk.htm> (last visited Sept. 15, 2012).

Arsenal and the Yankees are both wealthy, privately owned franchises based in world-class cities,⁵⁸ and the two stadiums were designed by the same leading architectural firm.⁵⁹ In stark contrast to its American counterpart, however, the Emirates was completed ahead of schedule and on budget, was built without public financing, and included other facilities for public use.⁶⁰

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 English soccer 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 square foot retail park built as part of the project.⁶¹ 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.⁶²

15, 2012).

58. Andrew Allen, *Forbes Rate Arsenal as 7th Most Valuable Sports Franchise in World*, ARSEBLOG (Jul. 14, 2011, 11:21 AM), <http://news.arseblog.com/2011/07/forbes-rate-arsenal-as-7th-most-valuable-sports-franchise-in-world>.

59. Both were designed by Populous, formerly known as HOK Sport Venue Event. See *A Modern Classic: Yankee Stadium*, POPULOUS, <http://portfolio.populous.com/showcase/yankeestadium.html> (last visited Aug. 30, 2012); *Europe's Most Successful Football Stadium: Emirates Stadium*, POPULOUS, <http://portfolio.populous.com/projects/emirates.html> (last visited Aug. 30, 2012).

60. See *Emirates Stadium Completed Early*, SIR-ROBERT-MCALPINE.COM (Jul. 24, 2006), <http://www.sir-robert-mcalpine.com/news/?page=4&id=1606>. Arsenal used the odd corners of its new property to construct housing for sale. Rather than remaining empty except on game days, as most areas surrounding American stadiums do, Brighton and Hove Albion's new stadium includes bars, clubs, convention facilities, a daycare center, and instructional space for the University of Brighton. See *Hire Emirates Stadium*, ARSENAL.COM (Aug. 4, 2007), <http://www.arsenal.com/membership/special-offers/hire-emirates-stadium>. In instances when the United Kingdom 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.

61. RobertT, *Swansea's Development*, forum post at <http://thetownend.com/index.php?topic=8036.0;wap2> (last visited Sept. 15, 2012).

62. For commercial and legal reasons, it is currently unclear whether West Ham will actually move to the Olympic Stadium. See David Gold, *West Ham United Refusing to Commit Themselves to Olympic Stadium Move*, INSIDE THE GAMES (Jan. 16, 2012), <http://www.insidethe>

Subtly, however, the stadiums of Manchester City and West Ham as well as the temporary home of fourth tier Rotherham United support this Article's argument. All three structures resulted from competition among nations for international athletic events—the 2002 Commonwealth Games (Manchester City), the 2012 Olympics (West Ham), and the 1991 World Student Games (Rotherham United). Organizers of these 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, lavish facilities were required. Even the most ardent critic of government stadium funding would agree that after an event like the Olympics has concluded, the facilities should be used for some compatible purpose.

In addition to those three examples, over the past fifteen years the British government has allocated significant funds to renovate stadiums not just in England but throughout Great Britain.⁶³ 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 farther down. Terraces still provide the majority of capacity in lower tier stadiums.

During the early minutes of a 1989 cup semifinal 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.⁶⁴

The British government responded by banning terraces in the pyramid's upper tiers, a time-consuming conversion that is still ongoing as additional teams are promoted.⁶⁵ A standing fan occupies less space than a seated one, however, so banning terraces has diminished the number of tickets for sale. All-seater stadiums also deprive fans of a sense of camaraderie that many had enjoyed.⁶⁶ These renovations were

games.biz/olympics/summer-olympics/2012/15521-west-ham-united-refusing-to-commit-themselves-to-olympic-stadium-move.

63. Kevin Hollett, *Raising the Roof, Raising Questions: BC Place Stadium renovations and the cost to taxpayers*, MEGAPHONE (Sept. 30, 10:27 AM) <http://megaphonemagazine.com/magazine/310/raising-the-roof-raising-questions-bc-place-stadium-renovations-and-the-cost-to-taxpayers> (last visited Dec. 1, 2011).

64. LORD JUSTICE TAYLOR, *THE HILLSBOROUGH STADIUM DISASTER: INQUIRY BY THE RT HON LORD JUSTICE TAYLOR, FINAL REPORT* 12, paras. 61–64 (1989).

65. See ANTHONY KING, *THE END OF THE TERRACES: THE TRANSFORMATION OF ENGLISH FOOTBALL IN THE 1990s* 100–03 (Leicester University Press 2002) (1998).

66. See e.g., MICHAEL CRICK, *THE BOSS: THE MANY SIDES OF ALEX FERGUSON* 360

compelled by the state and only reluctantly accepted by most clubs.

Distinguishing most British government stadium investments from the result of coercive rent-seeking by American teams is uncomplicated: first, improving fan safety rather than improving club profitability is the British motive; second, many government investments result in renovations that British clubs oppose due to lost seating and diminished fan enthusiasm. Moreover, well-heeled clubs bear the expense themselves, though clubs in financial distress often receive aid when undertaking mandated renovations. National funding characterizes most British government support, and that level of government lacks the incentive of cities to encourage teams to move.

In sum, while the billions of dollars spent by American taxpayers on sporting stadiums are not entirely wasted, they are predominantly a transfer of wealth from the public at large, not just sports fans, to private commercial interests. The empirical literature overwhelmingly concludes that the long-term public cost of stadium construction outweighs the public benefits. Politicians and stadium boosters are able to gloss over economic reality because the complexity of stadium financing obscures the true cost to the public. Even though stadium construction may have public benefits, the English experience shows that private incentives get new stadiums built when the benefit exceeds the cost. The next Part examines the underlying causes of the stadium rent-seeking phenomenon and highlight the consequences of divergence between the closed system of American leagues with the freedom of entry created by a promotion and relegation system.

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. As this Part explains, the strong demand driven by intense public interest in sports and the fallibility of local political systems are necessary preconditions. However, as those are common factors in England and America, they cannot provide an explanation of the prevalence of a form of rent-seeking in America that 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 also free to move but, as their host city stands to lose relatively little, little can be gained by threatening. The foundation of the problem is the cartelization of American leagues.

(Pocket Books) (2003).

A. Demand

The root cause of unproductive stadium rent-seeking is usually ascribed to an irrational public demand or a dysfunctional political system, or some combination of the two.⁶⁷ Both are accurate, but incomplete.

The former suggests excessive attachment to sports, leading taxpayers to tolerate large transfers to maintain or gain local league representation. Though the demand for local representation in top tier leagues appears to be quite inelastic, that is also true in the United Kingdom and cannot account for the difference. The latter argument takes two forms: either shortsighted municipal leadership—that is, incompetence—or else standard public choice theory—groups that have a focused interest exploiting a skewed political system against a public that has diffused interests. Like the irrational demand argument, the political explanation certainly captures some aspects of stadium rent-seeking, but it also fails to explain English and American differences.

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 that press reports on a politician's effort (or lack of effort) will be extensive and exhaustive. Political elites' ability to dispense construction contracts selectively provides them with an additional and less well-reported benefit.⁶⁸ 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 to offer a move to a new city, and a simultaneous threat to leave their host, benefits not just the team but also city officials. By receiving an offer or threat, politicians gain a derived offer or threat to forward to their electorate.⁶⁹ 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, politically skillful city officials turn threats from unelected team

67. See SARAH WILHELM, CTR. FOR PUB. POL'Y & ADMIN., THE UNIV. OF UTAH, PUBLIC FUNDING OF SPORTS STADIUMS 2, 8–9 (2008), available at http://cppa.utah.edu/_documents/publications/finance-tax/sports-stadiums.pdf.

68. See David R. Herwitz, *Accounting for Long-Term Construction Contracts: A Lawyer's Approach*, 70 HARV. L. REV. 449, 455–56 & nn.20–21 (1957) (explaining how the clever timing of contracts can be used to shift or eliminate tax burdens).

69. See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 117 (1987) (discussing the benefits accruing to politicians from their ability to threaten to withhold or withdraw benefits from small and coalesced interest groups).

management to their benefit by adopting the role of savior.

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,⁷⁰ 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 (surprise!) the two projects soared way over their initial budgets.⁷¹

Second, the public choice story explains too much: the political advantage described applies also to British politicians, who are also elected under a single-member district plurality electoral system, yet there the practice is rare.⁷² An explanation for the divergence is required. Pointing simply to "cultural differences" seems unsatisfactory given apparent cultural similarities across much of the English-speaking world. At any rate, as our comparison below between professional and collegiate football stadiums within the United States shows, the "cultural differences" thesis is unsupported by the evidence.⁷³

The previously mentioned opacity of infrastructure financing also contributes to the public choice dynamic.⁷⁴ Residents of Chicago know that the Bears and White Sox play in subsidized stadiums,⁷⁵ but few of

70. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 98–102 (1981) (providing a taxonomy of demand and supply for legislation based on the extent to which both costs and benefits are distributed or concentrated); JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 333–34 (1973) (examining the extent of interest group activity based on the distribution of costs and benefits).

71. Reed Albertgotti & Cameron McWhirter, *A Stadium's Costly Legacy Throws Taxpayers for a Loss*, WALL ST. J., Jul. 12, 2011, available at <http://online.wsj.com/article/SB10001424052748704461304576216330349497852.html>.

72. See generally Calvin Jones, *A Level Playing Field? Sports Stadium Infrastructure and Urban Development in the United Kingdom*, 33 ENV'T & PLAN. 845 (2001).

73. See *infra* Section II.D.

74. See *supra* notes 33–35 and accompanying text.

75. The Illinois legislature approved a \$432 million contribution to rebuild Soldier Field for the Chicago Bears. "Chicago-area taxpayers will be paying off the debt for more than thirty years, at a total cost of \$1.3 billion." Scott, *supra* note 30, at 46; Marc Edelman, *How to Curb Professional Sports' Bargaining Power vis-à-vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 281 (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. Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 25 & n.3 (1991).

us realize that we also support facilities across the nation for both major and minor league teams. Our stadiums certainly are a bargain for the teams and players, while taxpayers outside Chicago cannot spare the time to pay much attention to Chicago, so few of them even recognize the load they are bearing. Even the knowledgeable few can ill afford to do anything about it. In other words, much of the weight falls on taxpayers who are rationally ignorant and rationally apathetic because individually their contributions are small (though sizable when aggregated across them).

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 reciprocity elsewhere in the nation, but we bear the burden in reflection. We pay 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, now facing the voters.

The U.S. federated structure may exacerbate rent-seeking behavior, but it does not cause it; without the cartelizing effects created by closed entry and franchise free agency discussed below, the stadium rent-seeking we observe in the United States is unlikely to occur in the United Kingdom. As such, the fact that U.S. political structure encourages rent-seeking behavior is a reason to be more attentive to the possibility of promotion and relegation as a solution.

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 American franchises determine their own competition, while English teams do not. Teams have an obvious interest in restricting entry if they can. If the initial teams in a league were placed in the best locales, being selected sequentially from the most attractive option on down, once a minimum threshold is reached, increasing league size should increase total revenue but reduce average revenue.⁷⁶ That makes incumbents hostile toward new contestants unless and until an aspirant demonstrates an ability to enter the industry without permission.

76. See Noll, *supra* note 11, at 176–77.

New teams refused entry into the existing league could form their own league, but that poses a much less serious challenge in sports 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 the exact 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 tried to enter American professional major league sports during the twentieth century, but only the American Baseball League and American Football League (AFL) saw their entire collection of teams survive. To be sure, the incumbents occasionally take in a few strong teams from insurgent leagues (for example, the original Cleveland Browns, Indiana Pacers, and Edmonton Oilers), but a good part of the attraction of admitting those teams into the existing league was to precipitate or hasten the insurgent league's demise.⁷⁷

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.⁷⁸ The NFL then rebuffed Hunt when he asked for a Dallas expansion franchise.⁷⁹ As a third attempt, during 1959, Hunt joined with other investors to form the AFL, with the Dallas Texans to be his franchise.⁸⁰ 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

77. The NHL expansion in the late 1960s and early 1970s was driven, at least in part, by the desire to prevent rival leagues forming or transitioning from minor league status. *See Seattle Totems Hockey Club, Inc. v. NHL*, 783 F.2d 1347, 1350 (9th Cir. 1986).

78. ED GRUVER, *THE AMERICAN FOOTBALL LEAGUE: A YEAR-BY-YEAR HISTORY, 1960-1969* 13 (1997).

79. *See id.*

80. *Id.* at 14.

Minnesota franchise away as an NFL expansion team. The defection of Minnesota forced the upstart league to put together another group of investors in short order or begin play with only seven teams, which would have left one team idle each week throughout the season.⁸¹ The NFL also had a sudden change of heart regarding expansion. Rather than awarding an expansion team to Hunt, however, the league inserted a competitor into Dallas.⁸² The Texans and the Cowboys both began play in 1960, but after three seasons the Texans moved to Kansas City and became the Chiefs. The AFL filed an antitrust suit against their rival, but it was unsuccessful.⁸³

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 and year-out against the

81. *The Kansas Vikings*, MINNESOTA VIKINGS TEAM HISTORY, <http://www.kansasvikings.com/history.html> (last updated Jan. 3, 2012). The Oakland Raiders, who actually played in San Francisco their first two seasons, were that hastily organized franchise. The Raiders won only nine of their first forty-two games, the poorest performance by any of the AFL's founding teams. Assuming one is not asking for a reference to the necessity of one idle team in an odd-number league, check http://en.wikipedia.org/wiki/American_Football_League and http://en.wikipedia.org/wiki/Oakland_raiders.

82. Joe McGruff, *KC Sports Institution Started After NFL Snubbed Hunt*, KAN. CITY STAR, Aug. 8, 1982. The NFL also announced plans for an expansion franchise in Houston but never followed through with the threat. *Id.*

83. *Am. Football League v. NFL*, 205 F. Supp. 60, 80 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). The NFL reaction to the AFL resembled its earlier and successful effort to thwart the All American Football Conference, from which it extracted the original Cleveland Browns, the San Francisco 49ers, and a Baltimore team that promptly failed. For similar instances regarding baseball, consider the Pacific Coast League's (PCL) 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. The PCL teams were not promoted, however, but 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). Two separate teams bought their way into the Seattle market—after local government ignored their stadium complaints, the Pilots moved to become the Milwaukee Brewers two years after the Braves had moved to Atlanta; eight years later, another expansion team, the Mariners, formed to occupy the Kingdome after a repentant local government built it. 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, displacing lower tier minor league teams in the process. 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.

same opponents, but instead rely on promotion and relegation to ensure parity within a season. 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 because it promotes and relegates teams across an incredible twenty-three tiers. No other country has such a deep system of promotion and relegation. Scotland, for instance, practices promotion and relegation across only four tiers, admitting additional teams only when an incumbent becomes insolvent (for example, Gretna in 2008), while Italy and Spain each maintain the practice across ten tiers.

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 competition. The lower tiers of the 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. Each team in the lower tiers is endowed with the potential to improve and progress, perhaps even to the Premier League (for example, Wigan Athletic FC⁸⁴) 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 (FA). The FA governs all the teams in the pyramid, amateur and part-time semiprofessional teams as well as the full-time professional clubs, and is older, distinct from, and independent of any league. Upon formal application, the Football Association will assign any individual or group that 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 suitable 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 placed too high will fall, a team placed too low will rise. Consequently, the payoff for influencing the FA's allocation decision is small, and in the long run irrelevant.⁸⁵

Would the adoption of promotion and relegation work in North America? One objection to this proposal is that it would decrease variety in the American leagues. This objection rests on two

84. Wigan bounced around in the lower tiers for many decades before entering the English League in the fourth tier in 1978. They ultimately rose to the Premier League in 2005, where they have remained since (despite some very close calls). See *Latics League Finishing Positions*, WIGAN ATHLETICS (Feb. 15, 2012, 12:32 PM), <http://www.wiganlatics.co.uk/club/history/history-finishingpositions.aspx>.

85. The absence of serious attempts to influence initial FA assignments is analogous to the dog that did not bark.

misconceptions. First, promotion and relegation is not incompatible with the features of American sports that improve variety, such as salary caps, the draft of players from lower to higher tiers, and a limited roster.⁸⁶ Putting aside player transition 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.

Most importantly, American league salary caps are compatible with promotion and relegation. Thus salary caps, particularly the extent to which they prevent a semi-permanent dominance by a few top teams, are tangential. Despite salary caps, notable dominance of a few teams is also observed in many American competitions. To educate an ignorant American for example, a European sports fan may liken a team such as Manchester United, Bayern Munich, or Juventus to “the New York Yankees of [its league].”

In much of the world, 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 has historically been undefined. In consequence, a few wealthy teams have such large rosters that an elite world-class player such as David Beckham might spend a season as a substitute (as he did, albeit on Real Madrid’s bench in Spain).⁸⁷ Not only are those rules independent of the promotion and relegation system, they lie beyond the topic here.

The second misconception is that year-to-year volatility within American major leagues swamps that of the Premier League. Unlimited player rosters, the absence of a salary cap, and the additional financial rewards of playing in Europe confer significant advantages on the top

86. Nor are these features uniformly implemented in American sports. Major League Baseball, for example, has a luxury tax instead of a salary cap. See *Baseball Luxury Tax*, STEVE THE UMP, http://www.stevetheump.com/luxury_tax.htm (last visited Aug. 29, 2012). The NHL now has a salary floor as well as a cap. See Greg Wyshynski, *The war over the NHL’s salary cap floor*, YAHOO! SPORTS (Sept. 6, 2010, 10:50 AM), http://sports.yahoo.com/nhl/blog/puck_daddy/post/the-war-over-the-nhls-salary-cap-floor?urn=nhl,wp11924.

87. English Premier League teams are now subject to a roster restriction of sorts: at the end of each semi-annual transfer window, each club is limited to twenty-five players over the age of twenty-one, at least eight of whom must be “home-grown” as defined by the rules. Jeff Rusnak, *New Roster Rules to Test Premier League Market*, SUNSENTINEL.COM (Aug. 14, 2010), http://articles.sun-sentinel.com/2010-08-14/sports/fl-soccer-rusnak-0815-20100814_1_manche-ster-city-richard-scudamore-brazil-striker-robinho.

English teams.⁸⁸ However, these advantages are not intrinsic to promotion and relegation. Moreover, a more careful analysis shows that 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 semiprofessional teams, with other teams replacing them from below.

Some observers claim that year-to-year volatility within American major leagues swamps that in England, reflected not only in a small number of semipermanent elite Premier League teams but in illusory movement between tiers as well.⁸⁹ The teams in the upper part of the top tier seem to be the same this season as last. Promoted teams often were relegated just a year or two earlier—they are called “poppers”: they 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 as well.⁹⁰ 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.

As a matter of fact and as we show below, the prior paragraph’s claim is untrue, at least for England. For example, Leeds United won the Premier League in 1991–1992, having regained Premier League status only two years earlier.⁹¹ Leeds were then relegated in 2004, and subsequently relegated again from the second to the third tier in 2007.⁹² At the other end of the scale, the richest team in the League, Manchester United, who many Americans imagine to be perennial favorites, were relegated in 1974, and were in danger of relegation again in 1986 until

88. UEFA recently adopted a European wide policy of “financial fair play” that operates, broadly speaking, like a salary cap. The policy will take effect in 2013. See UEFA, UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS (2010), available at http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/50/09/12/1500912_DOWNLOAD.pdf.

89. See SIMON KUPER & STEFAN SZYMANSKI, *SOCCERONOMICS: WHY ENGLAND LOSES, WHY GERMANY AND BRAZIL WIN, AND WHY THE US, JAPAN, TURKEY—AND EVEN IRAQ—ARE DESTINED TO BECOME THE KINGS OF THE WORLD’S MOST POPULAR SPORT* 167–69 (2009) (arguing that the volatility is actually more similar than perceived).

90. All three teams promoted to the top tier for the 2011–12 season – Swansea, Norwich, and Queens Park – avoided relegation after finishing 11th, 12th, and 17th in the twenty-team Premier League. Of the three teams relegated that season, only West Ham popped immediately back up, and that by winning a four-team playoff for the final of the three promotion spots.

91. Matthew Balmforth, *‘Whatever Happened’ to the Leeds United Title Winners of 1992?*, FOOTBALLFANCAST, (Sept. 12, 2010, 1:26 PM), <http://www.footballfancast.com/2010/09/football-blogs/whatever-happened-to-the-leeds-united-title-winners-of-1992>.

92. Jim Howlett, *Leeds United—From Milan to Yeovil*, SOCCERLENS (Nov. 10, 2008), <http://soccerlens.com/leeds-united-from-milan-to-yeovil/15752>.

Sir Alex Ferguson was appointed manager.⁹³

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, it would take at least 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 each team from the recently completed Premier League 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, second in the Premier League in 1994 and then champion in 1995,⁹⁴ relegated in 1999, promoted again in 2001, (and now relegated still again for the 2012-13 season)—apparently a popper, but also a champion. Wigan had never played in the top tier at all before 2005, indeed, had never even played in the Football League until 1976, but has now retained its spot in the Premier League for an eighth consecutive season. Two other teams, Reading and Hull City, reached the top for the first time even more recently, in 2007 and 2008, respectively. Manchester United, Tottenham Hotspur, Chelsea, and Newcastle, all world-renowned teams that have won multiple top tier championships, played in the second tier as recently as 1975, 1978, 1989, and 2010 respectively.⁹⁵

93. Rob Smyth, *A Brief History of Manchester United*, ESPN.COM (Jul. 1, 2012), http://soccernet.espn.go.com/feature/_/id/841082?cc=5901.

94. Blackburn were runners up the previous year. Matthew Adams, *The History of Blackburn Rovers FC*, HELIUM (Oct. 5, 2011), <http://www.helium.com/items/2238385-the-history-of-blackburn-rovers-fc>.

95. The same applies to the once formidable Sunderland who played in the second tier in 2007.

Table 1—Most Recent Year Out of the Top Tier

Arsenal (London)	1915
Everton (Liverpool)	1954
Liverpool	1962
Manchester United	1975
Tottenham (London)	1978
Aston Villa (Birmingham)	1988
Chelsea (London)	1989
Fulham (London)	2001
Blackburn	2001
Bolton (Greater Manchester)	2001
Manchester City	2002
Wigan (Greater Manchester)	2005
Sunderland (Tyne and Wear)	2007
Stoke	2008
Wolves (Wolverhampton)	2009
Newcastle (Tyne and Wear)	2010
West Bromwich (Birmingham)	2010
Queens Park (London)	2011
Norwich	2011
Swansea	2011

Table 2 compares the top tier's composition over a longer span, contrasting top tier teams of 2011–12—the most recent complete season—with top tier teams twenty years earlier.⁹⁶

96. At the opening of the 1991–1992 season, the top tier was the Football League First Division. All First Division teams withdrew in February to form the Premier League, an independent organization that continues promotion and relegation with the second tier now known as the Football League Championship. *See infra* Table 2A.

Table 2A—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 (Tyne and Wear)
	2nd Tier	Sunderland (Tyne and Wear)
	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)

When a new locale gains entry into the Premier League the enterprise is a new entrant. A comparison with the NFL over a similar timespan is instructive. Other than the Jacksonville Jaguars, Carolina Panthers, Houston Texans, and the new Cleveland Browns—all of them

expansion teams admitted after hefty side payments to the incumbent cartel—the enterprises are precisely the same, though several have moved to new cities in order to reap rent seeking profits.

Table 2B—The Fate of NFL Teams Across Two Decades

1991 NFL Teams	2011 NFL Teams
Chicago Bears	Chicago Bears
Arizona Cardinals	Arizona Cardinals
Green Bay Packers	Green Bay Packers
New York Giants	New York Giants
Detroit Lions	Detroit Lions
Washington Redskins	Washington Redskins
Pittsburgh Steelers	Pittsburgh Steelers
Philadelphia Eagles	Philadelphia Eagles
Los Angeles Rams*	St. Louis Rams
Cleveland Browns	Baltimore Ravens
San Francisco 49ers	San Francisco 49ers
Indianapolis Colts	Indianapolis Colts
Dallas Cowboys	Dallas Cowboys
Minnesota Vikings	Minnesota Vikings
Atlanta Falcons	Atlanta Falcons
New Orleans Saints	New Orleans Saints
Buffalo Bills	Buffalo Bills
Miami Dolphins	Miami Dolphins
New England Patriots	New England Patriots
New York Jets	New York Jets
Cincinnati Bengals	Cincinnati Bengals
Houston Oilers*	Tennessee Titans
Denver Broncos	Denver Broncos
Kansas City Chiefs	Kansas City Chiefs
Los Angeles Raiders*	Oakland Raiders
San Diego Chargers	San Diego Chargers
Tampa Bay Buccaneers	Tampa Bay Buccaneers
Seattle Seahawks	Seattle Seahawks
	Jacksonville Jaguars
	Carolina Panthers
	Cleveland Browns [#]
	Houston Texans

* The Houston Oilers became the Tennessee Titans in 1999; the Rams moved to St. Louis in 1995; and the Raiders returned to Oakland in 1995.

[#] The pre-1996 Cleveland Browns became the Baltimore Ravens. Although the NFL records indicate otherwise, the current Cleveland Browns are a new NFL franchise established in 1999.

Leeds won the 1991–1992 championship, but has spent the past eight seasons out of the Premier League, three of them in the third tier. Five other top tier teams from 1991–1992 now compete with Leeds in the second tier, while an additional five compete in the third tier.⁹⁷ Poor Luton has fallen all the way to the fifth tier. Thus twelve of the top tier teams of 1991–1992—more than half—are in lower tiers in 2011–2012, and most teams in this season’s Premier League have spent intervening seasons relegated to lower tiers. Recently promoted Norwich and Queens Park each spent fifteen of the intervening twenty years in the second and third tiers.

The analysis can be more comprehensive still. Including the 2011–2012 season, the twenty-two First Division teams from 1991–1992 will have played 220 seasons in aggregate over the past decade.⁹⁸ Table 3 shows the distribution of the top 1991–1992 teams across all tiers.

Table 3

Tier 1	97 seasons	44.1 %
Tier 2	71 seasons	32.3 %
Tier 3	40 seasons	18.2 %
Tier 4	9 seasons	4.1 %
Tier 5	3 seasons	1.4 %

The English Premier League 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.

A second objection to the adoption of promotion and relegation in North America is that no minor league teams exist that could constitute meaningful competitors for major league rivals. This is no reason why promotion and relegation could not work here—rather, it is an

97. The statement takes Milton Keynes to be the continuation of the original Wimbledon. See *infra* notes 109–111 and accompanying text. If AFC Wimbledon, the team that replaced the original Wimbledon, is taken as the continuation, Wimbledon would count as a fourth tier team rather than a third.

98. For the reasons discussed above, the computation excludes the first decade following the 1991–1992 season to control against the inevitable strong serial correlation imparted by the three-team-per-year mechanism of promotion and relegation.

endogenous artifact of the system itself, a product of the impossibility of entry. If entry into the top tier were a meaningful prospect, there would be an incentive to develop stronger teams in the tiers below—if you build it they will come. In promotion and relegation systems, there always exists at least one other competitive tier of competition, and usually more.

Although promotion and relegation is alien to the American context, it is easy to imagine how it could be introduced. Take the NFL, for example. At season's end the 32 teams could be divided into top and bottom halves according to won/lost records, creating two 16-team divisions—a number with which the NFL is very experienced from its final years of pre-merger competition with the AFL. Because the number of teams in American leagues is driven not by considerations of optimal league size for competitive purposes but rather to keep the number of large but unserved cities too few to permit a competing league to intrude, the closeness of competition at each level would actually improve the following season. A third division of 16 expansion teams could initiate play in a third division with automatic promotion the incentive for performance. Surely a new Los Angeles based team would soon be taking turns in the top tier. In time, other tiers that met the ambitions of entrepreneurs in still smaller cities could be added, accompanied no doubt by additional teams in cities already represented in the league.

Promotion and relegation can cause instability because the decline in revenue associated with relegation can be too steep to support expenses such as player contracts that were appropriate to the higher tier. The English Premier League addresses this concern by giving exiting teams a “parachute payment” over three years while they make necessary adjustments.⁹⁹ It is common for player and staff contracts to include an automatic salary reduction in the event of relegation.¹⁰⁰ The transition to promotion and relegation might work differently in sports such as hockey and baseball which already have strong minor leagues.¹⁰¹

99. *Parachute Payments and Their Use by the FA Premier League*, IN BRIEF, <http://www.inbrief.co.uk/football-law/premier-league-parachute-payment.htm> (last visited Sept. 28, 2012).

100. *See id.* These contractual provisions can also serve the interests of players. When West Ham was demoted at the end of the 2010–2011 season, Senegalese striker Demba Ba invoked a release clause in his contract allowing him to leave as a free agent. Jamie Jackson, *Demba Ba Leaves West Ham and Looks to the Premier League*, THE GUARDIAN (Jun. 15, 2011, 3:41 AM), <http://www.guardian.co.uk/football/2011/jun/15/demba-ba-west-ham-everton>.

101. The American Hockey League's Chicago Wolves, for example, carry enough local support to have a full television package. *See Wolves Add 15 Games on My50 Chicago To Broadcast Slate*, CHICAGOWOLVES.COM, <http://www.chicagowolves.com/releases/1398-wolves-add-15-games-on-my50-chicago-to-broadcast-slate> (last visited Sept. 28, 2012).

Interest in minor leagues has a ceiling at the moment precisely because so little is at stake, but if the winners of the top minor league in each sport were promoted to the majors at the end of the season it would be, as they say, a whole different ballgame.

In sum, the structure of American sports severely restricts potential supply for a city that fails to attract or retain one of the incumbent franchises, a vital component of league leverage for public subsidies.¹⁰² 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 the power of 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.¹⁰³ 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.¹⁰⁴

Many people doubt that franchise free agency could be responsible for stadium subsidies for teams like the New York Yankees and the Chicago Bears. They believe that it is not credible that teams so closely associated with their city could ever leave.¹⁰⁵ The claim that the Yankees will never leave New York is persuasive only *ex ante*, and only if little thought is given to history. Similar claims were made about baseball’s Brooklyn Dodgers and New York Giants until they simultaneously moved to California, whereupon everyone expressed great shock.¹⁰⁶ Or, like the football Giants and Jets, a Yankee exit from

102. See Ross & Szymanski, *supra* note 11, at 626–27.

103. See *Professional Sports Franchise Relocation: Antitrust Implications: Hearing Before the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. 16 82–112 (1996) (statement of former NFL Comm’r Paul Tagliabue).

104. Andrew Zimbalist & Roger G. Noll, *Sports, Jobs, and Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (1997), <http://www.brookings.edu/research/articles/1997/06/summer-taxes-noll>.

105. This objection has been raised on every occasion that the authors have presented this Article.

106. The 1957 shift of the New York Giants and Brooklyn Dodgers to California provoked a bitter and long-lasting reaction that could have threatened the future of the major leagues. Even though the Dodgers had long threatened to move, the transfer came as a great shock. When the Dodgers moved west, one fan remembers, “[I]f you were in Behan’s Bar and Grill, you’d have thought it was a wake. This was like seceding from the [U]nion.” CHARLES C. EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM* 17 (1993).

New York City might merely be across the Hudson River to reap largess from New Jersey. If the Yankees left New York, it would be shocking—not because it would be breaking with their traditional home, as many teams have done this, but because it would be surprising if New York City broke the trend of governments willing to pay for public stadiums as a result of such threats. *Ex post*, the Yankees would be added to the long list of movers that no longer shocked people.

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 government. 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.¹⁰⁷ Thus, the key to improving franchise value is not winning championships but obtaining a favorable deal regarding rent and items such as concessions, parking, luxury boxes, and personal seat licenses that are unshared with other teams.¹⁰⁸

107. The \$3 billion received by the NFL for its current television contracts are split equally by the thirty-two teams over the life of the contract. The credibility of the threat arguably depends on the nature of revenue-sharing arrangements in each league, which does vary. Teams in the NFL share between 75% and 85% of total league revenues. Until recently, MLB had almost the opposite balance, with local revenue contributing between 70% and 80% to a typical team's total revenue. See VINCE GENNARO, *DIAMOND DOLLARS: THE ECONOMICS OF WINNING IN BASEBALL* 4 (2007). However, under the relatively recent MLB revenue-sharing scheme, all thirty teams pay 31% of their local revenues into a common pool to be divided evenly among them. David Jacobson, *MLB's Revenue-Sharing Formula*, CBSMONEYWATCH (Jul. 14, 2008, 3:00 AM), http://www.cbsnews.com/8301-505125_162-51210897/mlbs-revenue-sharing-formula. The NHL has a complex revenue-sharing formula that provides for transfers from the top ten teams to the bottom fifteen. The NHL implemented the revenue-sharing system after the lockout that led to the cancellation of the 2004–2005 season. The NBA franchises are apparently considering dramatically increasing the amount high-revenue teams share with low-revenue teams from roughly \$60 million to about \$150 million per season. Henry Abbott, *Sources: Owners Talk Revenue Sharing*, ESPN.COM (Oct. 25, 2011, 9:36 PM), http://espn.go.com/nba/story/_/id/7147909/nba-lockout-owners-discussing-revenue-sharing-sources-say. MLS operates under a hybrid single-entity structure. See *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 58 (1st Cir. 2002). Technically, MLS owns all teams and other assets; however, the operations of each team are managed by a specific owner–investor. Team “operators” retain 50% of local ticket sales and concessions, the first \$1.25 million of local broadcast revenues, 100% of overseas tour revenues, and 50% of net revenues from the MLS championship game. *Id.* at 54.

108. Except, of course, the Green Bay Packers. 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, 1069 (2004) (“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.”).

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 profitable for the team but reduces shared revenue from the television contract. All of the elite American sporting leagues retain some discretion over franchise relocation. However, for reasons which are elaborated in Part III, the leagues either cannot or are unlikely to stand in the way of opportunistic relocation threats. In fact, one plausible explanation for the length of time that the NFL has abandoned the valuable L.A. market is that the “city’s main value to the league is as a threat to hold over cities whose existing teams want new stadiums with public subsidies.”¹⁰⁹

2. Franchise Continuity in England

Promotion and relegation fundamentally alters team incentives to relocate due to a team’s substitutability from the perspective of its hometown. Attracting public stadium financing is a key business driver for American franchises. In England, however, the local environment—population, wealth, sporting interest, and the like—primarily determines 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.

Every large or moderately sized 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.¹¹⁰ To take just a few examples, this season sixteen professional soccer teams play inside London’s ring road, five in the Premier League, and an additional eight semiprofessional 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 fifteen miles out and a population comparable to the Tampa SMSA, hosts four Premier League teams and an additional eight teams that play in the lower tiers through the sixth tier. Even relatively small Blackpool finds five professional teams playing in various tiers within twenty miles of its city center. Additional semiprofessional and

109. Tim Rutten, Op-Ed., *Protecting L.A.’s Pocket*, L.A. TIMES, Jan. 22, 2011, available at <http://articles.latimes.com/2011/jan/22/opinion/la-oe-rutten-column-football-20110122>.

110. In distinction to American practice, nothing bars professional English teams from playing against semiprofessional or amateur opposition if past performance leads to such a configuration. Indeed, that sort of intermixed competition occurs many times each season during tournaments that run simultaneously with league play.

amateur teams play in even lower tiers, and new promotable teams can and do materialize when promoters believe conditions are favorable. Importantly, all are potential substitutes for any local team that threatens to leave.

Normalized by area or by population, English teams are much denser than their American counterparts. In the age of rail transportation, lower English transportation cost, both the explicit ticket price and the implicit opportunity cost of travel time, accounted for the dissimilar densities.¹¹¹ 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. Lower tier teams are also a more effective substitute in England because revenue coverage is broader there. 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 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 and then withdraw them as soon as they mature. In brief, in the eyes of a host city with aspirations to “major league” status, the very best minor league team will never seem good enough. Thus, unlike England, American teams outside the top tier are not potential substitutes for top tier franchises.

In England, substitutes abound. Over time, a lower ranking local team or a new one will rise to occupy the abandoned niche if a team were to move elsewhere. No locale needs to mortgage itself for fear of losing league 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—fifty-six miles, to Milton Keynes—was trivial in comparison with the moves American teams undertake.¹¹² A new

111. See Cain & Haddock, *supra* note 11, at 1127–30 & fig.1.

112. 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, a move of more than 800 miles. See *Milwaukee Brewers and Seattle Pilots*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/teams/brewers.shtml> (last visited Sept. 28, 2012); *The Story of the Braves*, ATLANTA BRAVES, http://atlanta.braves.mlb.com/at/history/story_of_the_braves.jsp (last visited Sept. 28, 2012). The Braves of course 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. See *Timeline*, SAN FRANCISCO GIANTS, <http://mlb.mlb.com/sf/history/timeline.jsp> (last visited Sept. 28, 2012); *Timeline*, LOS ANGELES DODGERS, <http://losangeles.dodgers.mlb.com/la/history/timeline.jsp> (last visited Sept. 28, 2012); *Franchise Timeline*, WASHINGTON

team, AFC Wimbledon, formed in 2002 within weeks of the announcement of the impending move. The replacement became operational so promptly that both clubs claimed to represent Wimbledon for a season. The eighth tier newcomer attracted larger crowds than the second tier incumbent, which was forced to rely mainly on travelling fans supporting the opponent. AFC Wimbledon has achieved frequent promotions and now plays in the fourth tier, from where at the conclusion of the present season it could conceivably swap places with the now third tier Milton Keynes. That result might be unsurprising given that in England the locale's environment rather than the team's franchise is the limiting variable. Although English teams sometimes seek public subsidies, they take no retaliatory action when, as commonly happens, those requests are rejected. There is no credible threat with which to extort stadium subsidies in a system with promotion and relegation.

D. *The Leverage of American Sporting Franchises Reconsidered*

This Article has argued that the closed cartel structure of American professional sports enables franchises to coerce frequent and sizable stadium investments from local 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. Some recent examples of North American stadium subsidies are illustrative. Since 2001, in the NFL alone, taxpayers have provided \$193 million for Reliant Stadium (Houston Texans),¹¹³ \$251 million for CenturyLink Field (Seattle Seahawks),¹¹⁴ \$219 million for Ford Field (Detroit Lions),¹¹⁵ \$188 million for Lincoln Financial Field

NATIONALS, <http://washington.nationals.mlb.com/was/history/timeline.jsp> (last visited Sept. 28, 2012). 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. *Chief's History—1960s*, KANSAS CITY CHIEFS, <http://www.kcchiefs.com/team/chiefs-history/1960s.html> (last visited Sept. 28, 2012). 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 1500 miles. T.J. Simers, *NFL Owners OK Rams' Move to St. Louis*, L.A. TIMES, Apr. 13, 1995, available at http://articles.latimes.com/1995-04-13/news/mn-54268_1_rams-owner. However, the Cardinals 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 or county puts a proper stadium in place.

113. See *Reliant Stadium*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/afc/ReliantStadium.htm> (last visited Sept. 28, 2012).

114. See *CenturyLink Field*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/CenturyLinkField.htm> (last visited Sept. 28, 2012).

115. See *Ford Field*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/>

(Philadelphia Eagles),¹¹⁶ \$395 million for Soldier Field (Chicago Bears),¹¹⁷ \$285 million for University of Phoenix Stadium (Arizona Cardinals),¹¹⁸ \$612 million for Lucas Oil Stadium (Indianapolis Colts),¹¹⁹ and \$325 million for Cowboys Stadium (Dallas Cowboys).¹²⁰ This publically reported total, in excess of \$2.4 billion, is a significant understatement because, as discussed above, much stadium subsidization comes in opaque forms that are difficult to assess accurately.¹²¹

To appreciate the scope of the phenomenon, it is instructive to compare the effects of stadium rent-seeking as manifested in stadium age. Using stadium age allows us to compare any team in any league. Figure 1 shows that stadium ages are consistent with our hypothesis, dramatically so.¹²²

nfc/FordField.htm (last visited Sept. 28, 2012).

116. See *Lincoln Financial Field*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/LincolnFinancialField.htm> (last visited Sept. 28, 2012).

117. See *Soldier Field*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/SoldierField.htm> (last visited Sept. 28, 2012).

118. See *University of Phoenix Stadium*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/UniversityofPhoenixStadium.htm> (last visited Sept. 28, 2012).

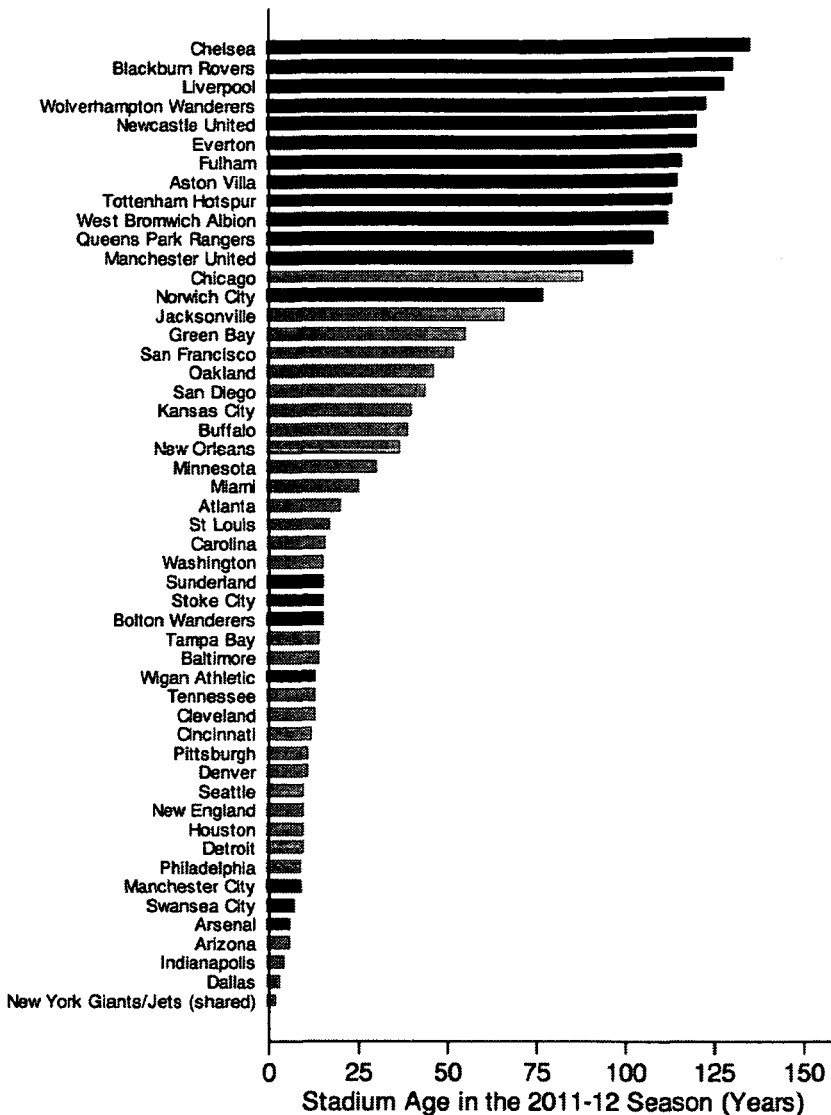
119. See *Lucas Oil Stadium*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/afc/LucasOilStadium.htm> (last visited Sept. 28, 2012).

120. See *Cowboys Stadium*, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/CowboysStadium.htm> (last visited Sept. 28, 2012).

121. See *supra* note 30 and accompanying text.

122. The figures summarized by STADIUMS OF PRO FOOTBALL, *supra* notes 113–120, do not appear to incorporate the loss of federal tax dollars due to the tax-exempt status of municipal bonds. Other sources indicate larger taxpayer expenditures.

Figure 1 English Premier League and National Football League Stadiums by Age



On average, NFL stadiums are nearly twenty-three years old. MLB stadiums are nearly twenty-two years old. The 2011-12 season's Premier League stadiums averaged more than seventy-eight years of age. It is not that English soccer teams are unresponsive to local changes in population and wealth; rather, 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 would prefer brand-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 or postpone 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. Moreover, teams quickly realized 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.¹²³ 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 in America is a product of an artificial cartel, not market forces. It is notable that lower tier English teams rarely resort to tear-downs, playing in old but renovated structures instead. The average age of the 2011–2012 season's second tier stadiums was sixty-four years; the third tier, seventy-five years; the fourth, sixty-eight years; and the fifth, eighty-three years. Those ages are similar to, and overlap, the ages of Premier League stadiums.

Another test contrasts professional and collegiate stadium ages within the United States, an approach that goes beyond providing additional data. If we only contrast English with American leagues, the differences could merely be a product of omitted variables arising from innate geographical, political, or cultural differences. The collegiate data allow 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 the team's fan base consists in important part of alumni who would jump ship if the team dared leave the university. Being functionally immobile, collegiate teams lack an important tool that professional teams possess; they can plead with alumni to finance stadium improvements, but they cannot threaten to leave, and thus lack a professional team's leverage over their host.

123. 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*, N.Y. TIMES, Jul. 2, 1988, at 45.

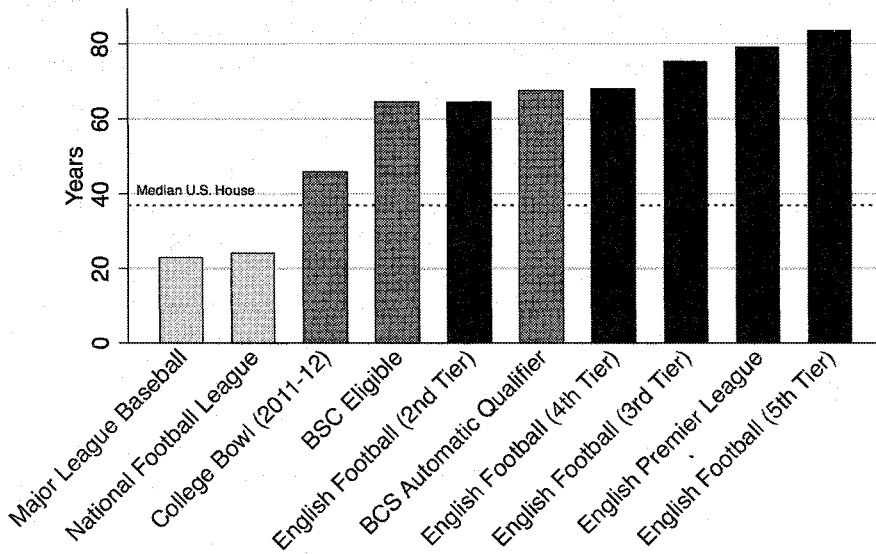
Figure 2 Stadium Age by Competition

Figure 2 summarizes much of the foregoing discussion. It shows the average age of sports stadiums in English football and a variety of American sports. The contrast between the various tiers of English football on the one hand (black bars) and MLB and NFL on the other (light gray bars) is striking. The average age of MLB and NFL stadiums in 2012 was twenty-two and twenty-three years, respectively, well below the median age of U.S. housing stock, college football stadiums (gray bars), or English football stadiums. Figure 3 illustrates the same data in more detail.

At more than sixty-seven years, average stadium age in the major collegiate conferences—those whose champion qualifies automatically for the Bowl Championship Series (BCS)—intermingle with the various tiers of English soccer.¹²⁴ In college football, three independent teams and the members of five other conferences compete for a chance to play in the BCS by meeting specified criteria, though none qualifies automatically.¹²⁵ A number of the latter teams have only recently begun

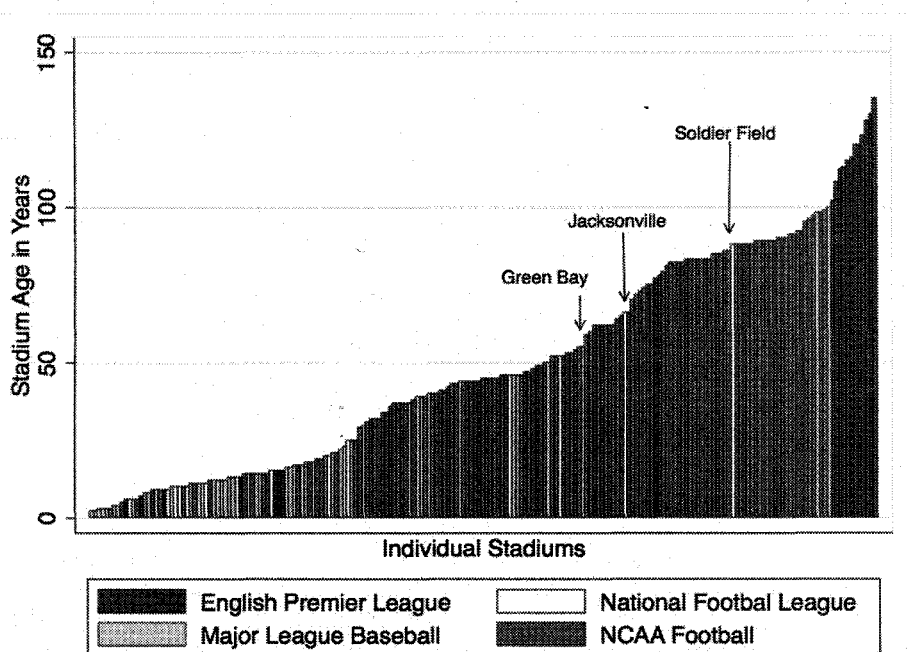
124. The automatic BCS qualifying conferences are the Atlantic Coast, Big East, Big Ten, Big 12, Southeastern, and Pac-12. Independent Notre Dame automatically qualifies by meeting defined criteria. See *BCS Automatic Qualification, At-Large Eligibility and Selection Procedures, 2011–2014 Games*, COLLEGEFOOTBALLPOLL, http://www.collegefootballpoll.com/bcs_selection_procedures.html (last updated Nov. 25, 2011).

125. They are Conference USA, Mid-American, Mountain West, Sun Belt, and

playing intercollegiate football or have moved up from lower tiers; consequently, their stadiums are relatively new. Even with those stadiums included, the overall average age of top tier collegiate stadiums is about two-and-one-half times the average age of NFL stadiums.¹²⁶ A number of teams that share the relatively new stadium of an NFL neighbor or a bowl impart a slight downward bias to the collegiate averages.

Figure 3 shows, in order, the age of every stadium in the Premier League, National Collegiate Athletic Association (NCAA) Football, MLB, and NFL.

Figure 3 Age Distribution of Individual Stadiums



As seen in Figure 3, a third of major collegiate teams play in stadiums older than Chicago's Soldier Field, by far the NFL's oldest stadium at eighty-seven years. However, Illinois taxpayers view Soldier Field as a new structure—we paid extra in order to retain the old façade while building a completely new stadium within (or, depending on one's perspective, above).¹²⁷ For all practical purposes, the true age of

Western Athletic, as well as independents Army, Brigham Young, and Navy. *Id.*

126. On average, collegiate football stadiums are about two-and-one-half times as old as MLB stadiums as well, and are half again as old as the median U.S. home.

127. Lavishly praised by admiring television sportscasters on the inside, various observers

Soldier Field is eight years. If we count Jacksonville's sixty-five-year-old field as truly the oldest in the NFL,¹²⁸ then 60% of major collegiate teams, including a number of perennial powerhouses,¹²⁹ play in stadiums older than any in the NFL.¹³⁰ Clearly, as with English soccer, there is nothing intrinsic to American football that spoils the usefulness of a stadium after a mere quarter of a century—sports stadiums easily outlast residential housing when permitted to do so.

As in England, colleges renovate their stadiums much more often than they tear them down, as evidenced by (among many potential examples) Ohio State's recent closure of the open end of its famous horseshoe with additional seating and Cal's present renovation project. The same is true for the University of Michigan's "Big House", with capacity repeatedly expanded from 72,000 in 1927 to 109,901 in 2010.¹³¹

viewing Soldier Field from the outside have called it "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 new (renovated) Soldier Field's 61,500 seats make it the smallest in the NFL, which doubtless will be a complaint when the Bears launch their next stadium demand, though what ultimately materializes may well seat even fewer. *Soldier Field*, ESPN.COM, http://espn.go.com/travel/stadium/_s/nfl/id/3/soldier-field (last visited Sept. 28, 2012). Immediately prior to reconstruction, Soldier Field could seat 8% more Bears fans, 66,946. *Historical Timeline of Soldier Field*, CHICAGO BEARS, http://assets.chicagobears.com/tradition/sf_timeline.asp? (last visited Sept. 28, 2012).

128. Some would argue that Jacksonville's stadium scarcely counts either, given that it was so extensively renovated in 1995 at a taxpayer cost of \$136 million. See Keating, *supra* note 6, at 14.

129. A few examples of those powerhouses—Southern Cal, Nebraska, Notre Dame, Clemson, Auburn, Texas, Louisiana State, Oklahoma, Alabama, UCLA, Arkansas, Ohio State, Tennessee, Georgia Tech, Wisconsin, and most notably (in our view) Northwestern.

130. This would make the average age of an NFL stadium just over twenty-one years. Making a similar adjustment for the remade Jacksonville stadium, the average NFL stadium is slightly less than twenty years old.

131. *Stadium History*, UNIV. OF MICH., <http://www.umich.edu/stadium/history> (last visited Sept. 28, 2012); *Big House Again! Michigan Stadium Capacity Announced at 109,901*, MGOBLUE.COM (Jul. 14, 2010), <http://www.mgoblue.com/sports/m-footbl/spec->

Though a university's campus anchors the football team's stadium, end-of-season bowl game locations are in the main decision variables for the NCAA. Like professional leagues, the NCAA can act as a cartel for its member institutions when entertaining bids to host bowls, pitting city against city. The NCAA's demands are stringent, including substantial financial side payments from the host, and the organization is sensitive to stadium attributes. As Appendix 2 shows, at thirty-nine years old on average, bowl stadiums are nearly twenty-six years younger than the home fields of the major conferences.¹³²

The third oldest NFL stadium at fifty-four is Green Bay's, unique among major professional North American teams in any sport in being a non-profit corporation owned by the community, a community thus immune to team exit threats. In that regard at least, community ownership is a substitute for promotion and relegation. It is notable as well that Green Bay, roughly the size of the Premier League's Blackburn, is by far the smallest American city with a major league team. But Green Bay is substantially larger than Burnley, which was relegated from the Premier League in 2010. It appears that in addition to providing a defense against a team's extortionate exit threats, promotion and relegation shields against loss of a team merely because the host city is small. Just as many major collegiate football teams such as Clemson, Penn State, or Texas A&M are found in small, out-of-the-way towns, so teams from places like Carlisle, Ipswich, and Oxford sometimes play in the top tier of English soccer.

Whether examining professional English soccer versus major league North American stadium age or else internal U.S. data comparing collegiate and professional leagues, the data strongly confirm the hypothesis that control over league size combined with control over entry and exit creates the credible threat that enables stadium rent-seeking. As the English-American comparison shows, league structure can solve that competition problem: promotion and relegation would be a solution to stadium rent-seeking. We now examine the feasibility of this and other solutions under American antitrust law.

rel/071410aad.html.

132. The Rose, Orange, Sugar, and Fiesta Bowls alternate as the site of the BCS national championship game. The average age of those four stadiums is virtually identical to the overall average. Three stadiums host two bowl games apiece; the overall average falls by one year if their ages enter the calculation only once.

III. ANTITRUST IMPLICATIONS

A. Antitrust and the Industrial Organization of Sporting Leagues

Federal antitrust law prohibits contracts, combinations, and conspiracies that *unreasonably* restrain trade.¹³³ Though leagues are classic cartels in many senses, they have suffered few adverse antitrust decisions of any sort, and no one has even attempted seriously to apply antitrust law to restrict stadium rent-seeking.¹³⁴ That antitrust law fails to curb stadium rent-seeking is not because antitrust is inapplicable to sport,¹³⁵ nor because sporting leagues lack market power.¹³⁶ Antitrust

133. Sherman Antitrust Act, 15 U.S.C. § 1 (2006); *see also* *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 342–43 (1982) (citing *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898) (indicating that as early as 1898, the Supreme Court recognized that Congress could not have intended a literal interpretation of the word “every”)); *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 687–88 (1978) (“[R]estraint is the very essence of every contract [and if] read literally, § 1 [of the Sherman Act] would outlaw the entire body of private contract law.”); *Bd. of Trade of the City of Chi. v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911).

134. *See infra* Subsection III.B.3 (explaining how the decision in *Los Angeles Memorial Coliseum* may exacerbate the stadium rent seeking problem).

135. Baseball has long enjoyed an unusual exemption from antitrust laws. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the U.S. Supreme Court unanimously held that baseball was not the subject of interstate commerce because “[t]he business is giving exhibitions of base ball” and thus the Sherman Act does not apply. *Id.* at 208–09. 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. The editors of *Baseball and the American Legal Mind* regard *Federal Baseball* as “one of [Justice Holmes’] most heavily criticized decisions and a source of embarrassment,” which is a generous understatement. SPENCER WEBER WALLER ET AL., *BASEBALL AND THE AMERICAN LEGAL MIND* 76 (1995). Nonetheless, in *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, 407 U.S. 258 (1972), the Supreme Court reaffirmed that baseball remains exempt from antitrust liability. 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*. *See Flood*, 407 U.S. at 282–85. Thus, for reasons that are entirely anomalous, professional baseball has enjoyed virtually a complete exemption from antitrust challenges. *See* EARL W. KINTNER, 1 *FEDERAL ANTITRUST LAW* § 6.2 (1980).

136. League representatives argue that they are merely small players in the general entertainment market. *See, e.g., U.S. Football League v. NFL*, 644 F. Supp. 1040, 1057 (S.D.N.Y. 1986) (declining to accept the NFL’s argument that there is no product market for professional football). Each league dominates its respective market segment, however, and has a price seeker’s ability to increase prices by restricting output. *Cf. United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (“Monopoly power is the power to control prices or exclude competition.”). And numerous courts have found that sports leagues are sufficiently different from other forms of entertainment and that the dominant league exercises market power. *U.S. Football League*, 644 F. Supp. at 1056; *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 571 (E.D. Pa. 1982) (“There is no doubt that the NFL currently has a monopoly in the United States in major league football.”); *see also Fishman v. Wirtz*, 807 F.2d 520, 531 (7th Cir.

law's failure is grounded in the necessity of some forms of cooperation in a sports league, obscuring the boundary between legitimate and illegitimate collusion among franchises,¹³⁷ and the difficulty of fitting rent-seeking into a recognizable antitrust cause of action.¹³⁸

Sporting competitions are adversarial on the playing field but, of necessity, cooperative in the boardroom because a well-functioning league requires agreement on fundamentals: the rules of the game, uniforms, equipment, dates and locations of contests, and the size and structure of the competition. In any given year, a fixed game schedule necessitates a closed league. Accordingly, most North Americans assume that there is no way to have a single top tier league without having a cartel. To the contrary, sports leagues throughout most of the world demonstrate that a closed league during a competitive season is consistent with an open league across a longer period. No justification exists for anything beyond a transitory, episodic cartel structure.

How, then, should courts assess concerted action by individual franchises given that it would be impossible to organize a league without extensive coordination?¹³⁹ The interdependence of franchises has led some courts to view leagues as "single entities" incapable of entering into a contract, combination, or conspiracy in violation of § 1 of the Sherman Act.¹⁴⁰ However, the Supreme Court rejected that defense in the recent *American Needle* decision.¹⁴¹ The Court noted that "[t]he fact 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

1986); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1394 (9th Cir. 1984); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 502 (E.D. Pa. 1972).

137. See *infra* Section III.A.

138. See *infra* Section III.B.

139. See Paul H. Brietzke, *Robert H. Bork's The Antitrust Paradox: A Policy at War with Itself*, 13 VAL. U. L. REV. 403 (1979) (book review) ("All league sports . . . rest entirely upon the right to boycott."); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 946-47 (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 *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010) (analyzing concerted action by individual franchise within the NFL); JAMES QUIRK & RODNEY FORT, *HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS* 117-37 (1999).

140. 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).

141. *Am. Needle*, 130 S. Ct. at 2213.

making a host of collective decisions.”¹⁴² Nevertheless, the Court saw these justifications for concerted activity as mitigating factors in particular instances; such justifications did not forge separate economic actors into a single entity to which § 1 of the Sherman Act could never be applied.¹⁴³

Courts generally are suspicious of competitors’ agreements to raise prices or exclude competition, frequently deeming them *per se* illegal regardless of any procompetitive impact.¹⁴⁴ But courts are not blind to the potential benefits of coordinated activity in appropriate cases,¹⁴⁵ so league activities should be scrutinized under a “Rule of Reason” standard.¹⁴⁶ In *NCAA v. Board of Regents*,¹⁴⁷ the Supreme Court explained that the rule of reason is the more appropriate approach to “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”¹⁴⁸

The essence of the rule of reason is that the legality of a business practice depends on whether the practice promotes or suppresses competition.¹⁴⁹ The rule of reason enables courts to balance pro-competitive effects, such as economies of scale, technological 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

142. *Id.* at 2216.

143. *Id.*

144. *See, e.g.,* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (stating that vertical agreements increase competitive effectiveness and, therefore, are judged under the rule of reason, while “[c]ertain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se*”); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–52 (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 Assocs., Inc.*, 405 U.S. 596, 611 (1972) (allocating territories to minimize competition is a horizontal restraint which constitutes a *per se* violation of the Sherman Act).

145. *See, e.g.,* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458–59 (1986); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–01 (1984).

146. *See, e.g.,* *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1386–87 (9th Cir. 1984); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606, 620 (8th Cir. 1976); *see generally* Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 249 n.16 (2000) (“The rule of reason has emerged as the proper test for evaluating sports leagues under § 1.”).

147. 468 U.S. 85 (1984).

148. *Id.* at 101.

149. *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 691 (1978); *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

horizontal alliances can enhance consumer welfare.¹⁵⁰ The importance of giving due weight to these effects is illustrated by the Supreme Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*¹⁵¹ Broadcast Music (BMI) is a performing-rights society for musical works; the society offers blanket licenses for a large catalog of material, an activity that necessarily involves 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.¹⁵²

The obvious potential benefits of integration entailed in some partnerships and joint ventures justifies a full comparison with the costs of such an arrangement, and differentiates sporting 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 balance of the law as follows: "While 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."¹⁵³ The NCAA characterized its television plan as a cooperative joint venture in a similar vein to BMI. 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."¹⁵⁴ As *NCAA v. Board of Regents* indicates, a restraint that is reasonably necessary to achieve the welfare-enhancing ends of a collaborative effort will not constitute an antitrust violation, but the mere invocation of partnership or joint venture is insufficient to establish that claim.¹⁵⁵

In other words, *NCAA v. Board of Regents* suggests that it is open to a defendant to argue that the closed and anticompetitive structure of American sporting is justified by offsetting pro-competitive effects, but that such a conclusion is by no means guaranteed. As Parts I and II

150. See FED. TRADE COMM'N & U.S. DEPT. OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 23-25 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter ANTITRUST GUIDELINES].

151. 441 U.S. 1 (1979).

152. *Id.* at 22-24.

153. *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984) (internal citations and quotations omitted).

154. *Id.* at 113-14.

155. ANTITRUST GUIDELINES, *supra* note 150, at 8-9; see also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 290-91 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1898).

established, a smoothly functioning sports league does not require endowing incumbents with permanent entry control. The decision to operate as a closed league constitutes an agreement to foreclose competition by new entrants,¹⁵⁶ and that in turn gives franchises extraordinary leverage to negotiate for ever-greater subsidies. The current closed system has enabled teams to leverage credible threats to relocate into extraordinary stadium subsidies.¹⁵⁷ Our empirical evidence confirms that the lack of a promotion and relegation system, while not the only cause, is a sufficient cause of this dire public choice problem. But no matter how direct the line from league structure to stadium rent-seeking might be, the question still remains whether there is cognizable antitrust claim under existing law.

B. *A Competition Problem Without an Antitrust Solution*

Although it is clear that the closed and anticompetitive structure of American sporting leagues enables extraordinary rent-seeking in the form of stadium subsidies, it is far from clear that current antitrust law provides any remedy. The reason for this disconnect is that antitrust law is designed to cure problems in the marketplace but it does not address political problems, even those with anticompetitive implications. The stadium rent-seeking problem sits oddly at the intersection of political and market structures. This Section reviews the three most promising antitrust law solutions to stadium rent-seeking and address their limitations.

1. Collective Boycott

The closed entry system in American sporting leagues creates artificial scarcity of the most extreme kind: it is, for example, literally impossible for a city to procure an NFL team to play in its stadium without the permission of the majority of existing NFL teams.¹⁵⁸ This absolute scarcity puts the incumbent franchises in a position to make credible threats to leave a city in order to extract favorable terms, usually in the form of stadium construction or renovation subsidies. When such threats are made by a single economic entity, they do not constitute an antitrust violation. Although the European Union recognizes abuse of a dominant market position as violation of competition law, courts and agencies in the United States generally see a monopolist charging unreasonably high prices as an invitation to

156. Ross & Szymanski, *supra* note 11, at 642.

157. *Id.*; see also Noll, *supra* note 11; Cain & Haddock *supra* note 11.

158. The same holds true for MLB. See MAJOR LEAGUE BASEBALL CONST., art. V, § 2(b).

competition and nothing that, by itself, justifies antitrust intervention.¹⁵⁹ However, when several economic actors agree between themselves to shut out rivals or to refuse to deal with customers or suppliers, except on agreed terms, such concerted action generally constitutes an unlawful horizontal restraint, specifically a collective boycott.

The collective boycott argument is as follows: given the artificial scarcity of teams and the difficulty of new entry, threats to relocate are more than the action of an individual economic entity; rather, every threat to relocate is also an implicit threat of a concerted boycott. A group boycott exists when individual economic actors agree to refrain from dealing with another entity in order to gain some competitive advantage, in this case the advantage of favorable subsidies to build or renovate new stadiums.

Although the classic group boycott involves excluding competitors from a market, a boycott can also be aimed at customers, suppliers, or both. The case of *FTC v. Superior Court Trial Lawyers Association*¹⁶⁰ is a close parallel to the situation faced by American cities in their dealings with sports franchises.¹⁶¹ In that case, a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District raised the lawyers' pay.¹⁶² The FTC portrayed the lawyers' conduct as "a conspiracy to fix prices and to conduct a boycott" in violation of § 5 of the Federal Trade Commission Act.¹⁶³ The FTC found that a "coercive, concerted refusal to deal had the purpose and effect of raising prices and was illegal *per se*."¹⁶⁴ The Supreme Court agreed that the concerted action was a plain violation of the antitrust laws and should be condemned on a *per se* analysis.¹⁶⁵

159. See, e.g., *Blue Cross & Blue Shield United of Wis., v. Marshfield Clinic*, 65 F.3d 1406, 1413 (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.") (internal citation omitted).

160. 493 U.S. 411 (1990).

161. See *id.* at 414.

162. *Id.*

163. *Id.* at 418 (internal quotation omitted).

164. *Id.* at 419 (internal quotation omitted).

165. *Id.* at 436. Although the classic group boycott is considered to be a *per se* violation of the antitrust laws, see *NYNEX Corp. v. Discon Inc.*, 525 U.S. 128, 136–37 (1998), the "per se approach is generally limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor," *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986). See also *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293–98 (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).

There is some evidence to bolster the collective boycott theory, at least with respect to the NFL. The Ninth Circuit Court of Appeals concluded almost as much in the *Raiders* decision when it noted that “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.”¹⁶⁶ The court found that prior to its dispute with the Raiders, the NFL had remained expressly noncommittal when owners were renegotiating leases with their respective stadiums.¹⁶⁷ In addition, a statement attributed to NFL Commissioner Paul Tagliabue also could be taken as evidence of an express collective boycott threat. When the Houston Oilers threatened to move to Jacksonville, Florida, in 1987, Harris County, Texas, responded with \$67.5 million in improvements to be funded by property tax increases, doubling the county’s hotel tax, and underwriting bonds to be paid over the next thirty years.¹⁶⁸ Within six years, the Oilers began lobbying for a new stadium with club seating. Commissioner Tagliabue reportedly warned: “If the Oilers’ situation doesn’t work down there, I don’t see any circumstances in which we’re going to guarantee [Houston] a team, especially when one team’s already found it unsatisfactory.”¹⁶⁹ Translation: If Houston does not pay the price demanded by the Oilers, no other NFL team will deal with the city. At the end of the 1996 season, the Oilers moved to Nashville, where city officials had promised to contribute \$144 million toward a new stadium.¹⁷⁰

More recently, the NFL’s insistence that L.A. will not be allowed an NFL team until it foots the bill for a new stadium could be taken to indicate that a concerted boycott of that city is ongoing. It is noteworthy that Houston repented of its sin, built a nice new stadium, genuflected before the league, and contritely accepted an expansion franchise in 2002. In contrast, thanks to promotion and relegation, Wimbledon was without a team for nary a day when its incumbent leapt across London to a suburb on the far side; Houston was without a team for five years after its incumbent leapt across Louisiana and Mississippi to Tennessee.

If proved, such boycotts, and the closed league structure that enables them, cannot be justified under a rule of reason standard. There is no

166. L.A. Mem’l Coliseum Comm’n. v. NFL, 726 F.2d 1381, 1397 (9th Cir. 1984).

167. *Id.*

168. *Sports Law—Come Back, Shane: The Movement of Professional Sports Teams*, <http://law.jrank.org/pages/10434/Sports-Law-COME-BACK-SHANE-MOVEMENT-PROFESSIONAL-SPORTS-TEAMS.html> (last visited Sept. 28, 2012).

169. Mitten & Burton, *supra* note 33, at 104 n.255 (citing John McClain, *Tagliabue: City Won’t Get Guarantee*, HOUS. CHRON., Jan. 17, 1996, at C1).

170. Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 10 U. DENV. SPORTS & ENT. L.J. 1, 31 (2011). The Oilers are now the Tennessee Titans. *See id.* at 29.

pro-competitive justification for collective negotiation with cities qua stadium suppliers. However, the viability of the collective boycott cause of action is far from certain. Even assuming that an allegation of a concerted boycott was backed up by sufficient evidence to survive the post-*Twombly* pleading standard under Federal Rule of Civil Procedure 8(a)(2),¹⁷¹ it faces the argument that there is no antitrust injury upon which to base a claim. The core of this objection is that the stadium rent-seeking that results from the closed market structure of sporting leagues is a political problem, not a market injury.

Although antitrust law has a broad remit to prevent and remedy harms to consumers, it has no role in preventing harm to voters. The antitrust laws do not—and because of the First Amendment probably could not—take aim at failures of the political process. This objection can be framed narrowly along the lines of the *Noerr-Pennington* doctrine which shields certain activity from the scrutiny of antitrust law, or more broadly as a fundamental objection that rent-seeking, in spite of its obvious harms to the body politic, does not occasion any market harms within the remit of antitrust law.

The *Noerr-Pennington* doctrine provides that there is no violation when competitors jointly petition legislative bodies for laws that are anticompetitive.¹⁷² However, the *Noerr-Pennington* doctrine is limited by its underlying rationale; although it protects businesses as they lobby for anticompetitive *ends*—such as licensing laws and state-sanctioned monopolies—the doctrine does not shield anticompetitive *means* of influencing governmental action where the government is acting as a market participant. Accordingly, in *Trial Lawyers*,¹⁷³ a concerted boycott aimed at forcing the government of the District of Columbia to pay more for legal services was not protected under *Noerr-Pennington*.¹⁷⁴ The doctrine was also found to be inapplicable in *Hecht v. Pro-Football, Inc.*¹⁷⁵ In that case, would-be competitors to the

171. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court held that a well-pleaded claim must contain sufficient factual matter “to state a claim to relief that is plausible on its face.” *Id.* at 570. The Court held that threadbare recitals of a cause of action’s elements, supported by mere conclusory statements, would be insufficient to meet this standard, but cautioned that determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *See id.* at 556–57.

172. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”).

173. 493 U.S. 411 (1990).

174. *Id.* at 428 (“The exceptions derived from *Noerr* and *Claiborne Hardware* have no application to respondents’ boycott.”).

175. 444 F.2d 931, 934 (D.C. Cir. 1971).

Washington Redskins sought the use of the Robert F. Kennedy Stadium, the only suitable venue for professional football in the District of Columbia.¹⁷⁶ The entrants sought to use the stadium at times that would not conflict with the Redskins, but the District of Columbia Armory 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.¹⁷⁷ The trial court rejected the plaintiff's antitrust claims in summary judgment on the *Noerr–Pennington* doctrine.¹⁷⁸ The U.S. Court of Appeals for the D.C. Circuit reversed, rejecting “the facile conclusion that action by any public official automatically confers exemption.”¹⁷⁹ 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.¹⁸⁰

Arguably, even if a plaintiff could demonstrate that the favorable terms upon which cities deal with sports franchises were the result of a concerted boycott, the harm which results is an injury to taxpayers—an injury which does not constitute an antitrust injury because citizens qua taxpayers are not consumers. The coordinated rent extraction that is facilitated by anticompetitive league structure is not completely analogous to the conduct of the trial lawyers in *FTC v. Superior Court Trial Lawyers Association*.¹⁸¹ In that case, the District of Columbia was the customer, it paid the lawyers' fees, and the lawyers were attempting coordinated price-fixing in order to extract higher fees.¹⁸² In the context of stadium rent-seeking, any given government entity may not be the direct supplier of stadium infrastructure. The complex and opaque nature of stadium financing makes this more likely than one might presume. Many cities pay for stadiums that they do not technically own. For example, Soldier Field in Chicago is owned by the Chicago Park District; the Park District is an independent statutory authority and is not directly controlled by the City of Chicago.¹⁸³ In 2000, the Illinois legislature enacted legislation authorizing a \$432 million bond issue for the effective demolition and rebuilding of Soldier Field; the bond issue was paid for, in part, by a 2% tax on Chicago hotel rooms.¹⁸⁴ The court in the *Raiders* antitrust litigation drew a distinction between the direct

176. *Id.* at 933.

177. *Id.* at 932.

178. *Id.*

179. *Id.* at 934 (quoting *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* 424 F.2d 25, 80 (1st Cir. 1970)).

180. *Id.* at 947.

181. 493 U.S. 411 (1990).

182. *Id.* at 414.

183. See Chicago Park District Act, 70 ILL. COMP. STAT. 1505/0.01 (1981).

184. *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 164 (Ill. 2003).

loss suffered by the L.A. Coliseum and the indirect effects on local businesses, finding that the former conferred antitrust standing but the latter did not.¹⁸⁵ In cities where the legal entity controlling the stadium and the taxpayers who pay for it are linked only indirectly, an antitrust injury may be hard to establish.¹⁸⁶

Looking beyond technicalities, a court might reasonably conclude that even if the paying political entity happens to be the owner of the sports facility (or the land for a new facility), that relationship is merely serendipitous. When teams leverage credible threats of relocation in order to extract government subsidies, they do not care which taxpayers ultimately foot the bill. Thus, even if the leveraged municipality owns the relevant stadium, a court may well find that the municipality is injured (if at all) as a political entity, not as a supplier of sports facilities. In short, courts may well resist attempts to shoehorn a public choice injury into the antitrust market regulation framework.

The significant question here is whether an injury that can be fairly characterized as both a market injury and a political injury should be automatically removed from the ambit of antitrust law. One could take the view that injuries to competition that arise through market manipulation should be addressed through the antitrust system regardless of their intersection with politics. However, courts anxious to avoid controversy are more likely to insist that rent-seeking is an essentially political problem that should be resolved through political mechanisms.

2. League Expansion: Antitrust Claims by Excluded Teams

If deserted cities are unable (or unwilling) to pursue a collective boycott claim against an anticompetitive league, there is little prospect that a would-be new entrant would succeed either. Under a system of promotion and relegation, a city can replace a top tier team with a lower division team or even a new team. With sufficient financial backing to obtain quality players and coaching staff, the new team will ascend to top tier in a matter of a few years.¹⁸⁷ Under the American system, a city can only replace a lost team if the league decides to allow it. One solution to the problem of restricted entry would simply be to force the leagues to expand and admit new teams.¹⁸⁸ Whatever the merits of this

185. See *L.A. Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir. 1986).

186. *Id.*

187. With a high enough win rate, it would take only one season to take a team from the Championship Division to the Premier League; two from League One; and so on.

188. See, e.g., Thomas A. Piraino, *The Antitrust Rationale for the Expansion of Sports Leagues*, 57 OHIO ST. L.J. 1677, 1679 (1996) (arguing that leagues could be required to undergo "reasonable expansion" under either the essential facilities doctrine or the ancillary restraints

proposal might be as a matter of social policy, it seems far-fetched as an antitrust case. For a court to order league expansion as a remedy, there would have to be an underlying violation. If the claimed violation is simply that the decision by the league not to admit a given team was unjustified, leagues have very little cause for concern.

Two cases, *Mid-South Grizzlies v. National Football League*¹⁸⁹ and *Seattle Totems Hockey Club, Inc. v. National Hockey League*,¹⁹⁰ are illustrative. The Memphis Southmen were a member of the ill-fated World Football League in 1974 and 1975.¹⁹¹ When the World Football League disbanded halfway through the 1975 season, the Southmen rebranded as the Memphis Grizzlies and sought admission to the NFL.¹⁹² At the time, the NFL had no franchise at Memphis, and a home team designation for that location would not infringe upon the home territory of any NFL member.¹⁹³ When the Grizzlies's application was rejected by the NFL, the team's owners sued, alleging that the rejection was made pursuant to a conspiracy and that it amounted to an unreasonable restraint of trade, or a group boycott.¹⁹⁴

Seattle Totems Hockey Club is more convoluted, as it involves the interactions of three separate hockey leagues: the dominant National Hockey League (NHL) and two would-be competitors, the Western Hockey League (WHL)—a minor league based in Canada—and the World Hockey Association (WHA), based in New York.¹⁹⁵ The NHL doubled in size for the 1967–1968 season¹⁹⁶ and then added teams in Vancouver and Buffalo in 1970. This expansion was driven by the league's desire to expand its television audience, but also to suppress the WHL's threat to turn itself into a major league. In 1972, the NHL added teams in New York and Atlanta to stave off the threat of competition from the newly formed WHA. In June 1974, the NHL voted to award a conditional Seattle franchise to the owners of the Seattle Totems, a team that was then part of the minor league WHL.¹⁹⁷ The Totems did not seek or receive a WHA franchise.¹⁹⁸ The Totems had been slated to play in the NHL in the 1976–1977 season; however,

doctrine).

189. 720 F.2d 772 (3d Cir. 1983).

190. 783 F.2d 1347 (9th Cir. 1986).

191. *Mid-South Grizzlies*, 720 F.2d at 776.

192. *Id.*

193. *Id.*

194. *Id.* at 776–77. The Grizzlies' complaint was filed on December 3, 1979.

195. *Seattle Totems Hockey Club*, 783 F.2d at 1349.

196. Adding teams in Los Angeles, Minnesota, Philadelphia, Pittsburgh, Oakland, and St. Louis.

197. *Seattle Totems Hockey Club*, 783 F.2d at 1349.

198. *Id.*

the conditional franchise for Seattle expired because the owners of the team did not fulfill the NHL's conditions.¹⁹⁹ The Totems claimed that their failure to receive an NHL franchise amounted to a violation of § 2 of the Sherman Act.²⁰⁰ They alleged "a grand scheme on the part of the NHL to destroy the WHA by promising franchises to WHL teams so that those teams would not join the WHA."²⁰¹

Mid-South Grizzlies and *Seattle Totems Hockey Club* illustrate the quixotic nature of antitrust suits aimed at compelling a particular league to admit a particular team. Such lawsuits are bound to fail because of the complexity of determining optimal league size and composition.²⁰² Sport is worth watching precisely because outcomes are the result of skill differentials, but nonetheless the outcome remains uncertain beforehand. Uncertainty produces excitement. More precisely, the excitement level of games is a function of two components of league size: parity and variety.²⁰³ 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 superstar players and dynastic teams.²⁰⁴ 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. In theory, there will be an optimal league size for any given sport, and, if a league should expand, there will be an expansion team that is preferable to all others. However, in practice, as the plaintiffs in *Mid-South Grizzlies* and *Seattle Totems Hockey Club* discovered, it is 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 some other structural considerations.²⁰⁵ The incumbent franchises will argue, quite

199. *Id.*

200. *Id.* at 1350. Section 2 of the Sherman Antitrust Act prohibits monopolizing or combining and conspiring to monopolize any part of trade or commerce. Sherman Antitrust Act, 15 U.S.C. § 2 (1890).

201. *Id.* at 1350.

202. *See, e.g.,* *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 786 (3d Cir. 1983); *Seattle Totems Hockey Club*, 783 F.2d at 1350.

203. Cain & Haddock, *supra* note 11, at 1130–31. Other structural factors influence parity as well, most obviously revenue sharing, salary caps, and inter-team wealth transfers.

204. *See* Daniel Mizak et al., *Assessing Alternative Competitive Balance Measures for Sports Leagues: A Theoretical Examination of Standard Deviations, Gini Coefficients, the Index of Dissimilarity*, 12 ECON. BULL. 1, 1 (2005), available at <http://www.accessecon.com/pubs/eb/2005/volume12/EB-04L80002A.pdf>.

205. *See Mid-South Grizzlies*, 720 F.2d at 786; *Seattle Totems Hockey Club*, 783 F.2d at 1351.

credibly, that they understand the nature of their sport and the optimal league size better than a court could hope to.²⁰⁶

3. Reverse *Los Angeles Memorial Coliseum Commission v. NFL*²⁰⁷

A 1984 Ninth Circuit Court of Appeals decision 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 for a better deal in suburban Anaheim.²⁰⁸ The Coliseum attempted to lure the Oakland Raiders as replacement tenants.²⁰⁹ However, because of the proximity of Anaheim to Los Angeles, the city was still designated as part of the Rams' territory.²¹⁰ Without the permission of the Rams, the addition of a new league member within their territory required three-quarters approval of all twenty-eight teams under the NFL rules.²¹¹ The other teams voted twenty-two to zero to oppose the move.²¹² Following the vote, the Raiders joined the Coliseum in an antitrust complaint against the other members of the NFL.²¹³

In *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders)*,²¹⁴ the Ninth Circuit upheld a jury verdict that the NFL's relocation restriction violated § 1 of the Sherman Act.²¹⁵

206. This does not mean that incumbents actually set the league size according to socially optimal considerations, merely that the complexity of these considerations provides cover for whatever their true motives may be.

207. 726 F.2d 1381 (9th Cir. 1984).

208. *Id.* at 1384.

209. *Id.* at 1385.

210. *Id.*

211. At the time, Rule 4.3 of Article IV of the NFL Constitution demanded "unanimous approval of all 28 teams of the League" before a team could relocate into a rival's territory. *Id.* at 1384.

212. *Id.* at 1385. There were five abstentions and the Raiders did not get to vote. SEAN LAHMAN, *THE PRO FOOTBALL HISTORICAL ABSTRACT: A HARDCORE FAN'S GUIDE TO ALL-TIME PLAYER RANKINGS* 44 (2008).

213. The City of Oakland also attempted unsuccessfully to use its power of eminent domain to retain the Raiders. *See City of Oakland v. Oakland Raiders*, 646 P.2d 835, 845 (Cal. 1982).

214. 726 F.2d 1381 (9th Cir. 1984) [hereinafter *Raiders*].

215. It is unclear whether a decision by the 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. MLB*, 831 F.Supp. 420, 421 (E.D. Pa. 1993) (alleging that the MLB frustrated their efforts to purchase the San Francisco Giants and relocate the team to the Tampa SMSA); *see also Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994). *But see McCoy v. MLB*, 911 F.Supp. 454, 456-58 (W.D. Wash. 1995); *New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc.*, 1994 WL 631144, at *8-9 (E.D.

The appellate court agreed that the restraint caused significant harm to competition and that less restrictive means could have achieved any benefits.²¹⁶ Subsequently, the NFL has been reluctant to block relocation, even when detriment to the league is apparent.²¹⁷ Franchise relocation restrictions are not invalid per se under the decision, but are subject to a “rule of reason” balancing test.²¹⁸ 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.²¹⁹ The owners had initially voted against the move, but relented to avoid the risk of treble antitrust damages.²²⁰ 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.²²¹

It is unlikely that merely giving the leagues an antitrust free pass in this 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.²²² The individual franchises

La. 1994). 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. § 26b. 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. *Id.* § 26b(b)(3). 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. See J. Philip Calabrese, *Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531, 538 (1999).

216. *Raiders*, 726 F.2d at 1395 (“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 stadia 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 ensue to the benefit of all who consume the NFL product in the Los Angeles area.”).

217. See Nottingham, *supra* note 108, at 1076.

218. See *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 567–68 (9th Cir. 1987).

219. Nottingham, *supra* note 108, at 1075.

220. *Id.* at 1076. On the impact of the decision, see Travis T. Tygart, *Antitrust's Impact on the National Football League and Team Relocation*, 7 SPORTS LAW. J. 29, 31–34 (2000); see also John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues and Congress*, 5 MARQ. SPORTS L.J. 83 (1994).

221. See, e.g., Mitten & Burton, *supra* note 33, at 138–39.

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

will oppose relocation only if that will diminish their own revenues. Though that will be clear with some opportunistic moves, it will not be in others. Furthermore, although some franchise relocations may be narrowly detrimental, they are nonetheless useful examples of the wages of host resistance. Other teams have some incentive to stand aside and allow a move because it strengthens their own future threats.²²³ Finally, a relocation fee paid to the league can overcome resistance by other league members.²²⁴ As such, it is unsafe to assume that giving greater antitrust immunity to leagues will result in less rather than more harm to consumers and taxpayers.

4. The Question of Remedies

For the reasons we have already discussed, there is every reason to believe that a system of promotion and relegation would produce superior sporting competitions and substantially reduce, if not eliminate, the stadium rent-seeking problem to which this article is addressed. However, as reviewed in this Part, the problems caused by the anticompetitive structure of American sporting leagues do not necessarily lend themselves to solutions based in antitrust law. Even if they did, one must address the question of whether the court ordered imposition of a system of promotion and relegation is a viable remedy.

As a remedy, promotion and relegation is similar to, but distinct from, the more drastic step of breaking up sporting leagues. A number of commentators have advocated breaking professional sports leagues into multiple independent entities.²²⁵ Professor Stephen Ross argues that judicially ordered divestiture would be an appropriate remedy for correcting unlawful monopolization by a professional sports league.²²⁶ However, a simple breakup ignores the natural desire of sports fans to compare the best against the best. As such, the proposal runs counter to the history of professional sports, which has been one of increasing

223. Mitten & Burton, *supra* note 33, at 104 (“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.”) (quoting Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 654 (1989)).

224. See *Leveling the Playing Field*, *supra* note 146, at 246 n.6 (“Some commentators have suggested that the real reason the [NFL] approved the Rams’ move to St. Louis was because the Rams agreed to pay the NFL a \$71 million ‘relocation fee.’”) (citing Sanjay José Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 11 & n.55 (1996) (noting that the owners originally voted twenty-one to three (with five abstentions) against the Rams move, but then voted twenty-three to six in favor, after being offered the relocation fee)).

225. See, e.g., PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 333 (2000); Ross, *supra* note 223, at 715–33.

226. Ross, *supra* note 223, at 646.

consolidation.²²⁷ History shows that the sports market is unlikely long to sustain multiple top tier leagues within a given sport.²²⁸ It is also hard to see how depriving the sporting public of the pinnacle of competition would be consistent with promoting consumer welfare.

In contrast to simply breaking up monopolistic sporting leagues, imposing a system of promotion and relegation would address the credible threat problem we have identified but leave all other aspects of decision making to the teams themselves. Courts favoring structural remedies seek to address the fundamental causes of illegal conduct in a way that does not require ongoing court supervision: they seek, in other words, to “pry open to competition a market that has been closed by defendants’ illegal restraints.”²²⁹ However, although structural remedies may appear to be preferable to behavioral ones—given the difficulty of adapting injunctions to changing market conditions²³⁰—the recent trend in antitrust law has been away from structural remedies. At least since *United States v. Microsoft Corp.*,²³¹ structural remedies have fallen out of favor with courts, commentators, and government agencies because structural remedies may be just as likely to create inefficiencies that harm consumers as was the antitrust violation complained of.²³² In particular, even if a court were convinced of the benefits of promotion and relegation (which it should be) it may nevertheless be wary of the transitional costs of moving from the current system.

To summarize, it is far from clear that antitrust law offers good solutions to the problems caused by the closed and anticompetitive structure of American sporting leagues. As set forth above, a court could quite reasonably (although not inevitably) take the view that the stadium rent-seeking resulting from the closed market structure of sporting leagues is essentially a political problem and not a market injury. Likewise, at the remedy stage, a court might be reluctant to take on the task of determining the best way to transition from current league cartels to a system of open competition through promotion and relegation. The ambiguity as to whether this is a market problem or a political problem combined with the uncertainty as to the appropriate

227. See Jeffrey H. Kahn, 41 SANTA CLARA L. REV. 921, 935 (2001) (reviewing PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* (2000)).

228. See Edelman, *supra* note 75, at 301.

229. *Ford Motor Co. v. United States*, 405 U.S. 562, 577–78 (1972) (quoting *Int’l Salt Co. v. United States*, 332 U.S. 392, 401 (1947)) (internal quotation omitted).

230. Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 88 (2009); see also U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 n.12 (2011), <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

231. 253 F.3d 34 (D.C. Cir. 2001) (en banc).

232. *Id.* at 49.

remedy given potential transition costs may well counsel abstention in favor of a political solution. Obviously, however, neither of those reasons should deter Congress from taking steps to address the distorted market structure that enables franchises to hold American cities hostage to extravagant demands for subsidies.

A system of promotion and relegation is just one solution Congress should consider, but it would be less radical than simply breaking up existing leagues.²³³ Imposing a system of promotion and relegation on American sporting leagues would have significant benefits beyond addressing the public choice problem of stadium rent-seeking.

CONCLUSION

The end of the season is a dreary affair for the teams at the bottom of the NFL and NBL ladders. By contrast, the end of the season in a promotion and relegation system sets hearts racing at both ends of the table.

Roy Hodgson took over as the coach of struggling Fulham FC on December 30, 2008, halfway through the 2008–2009 English Premier League Season.²³⁴ The team improved under Hodgson, but still looked bound to be relegated with three games to go. To avoid relegation, Fulham had to win all three games and hope for favorable results in other matches. In that third to last game, with twenty minutes remaining, the team was down 0–2 away against this year’s current leaders, Manchester City.²³⁵ At this point, due to results in other matches, Fulham were mathematically relegated—if results stayed the same, it was out of the top competition. Hodgson substituted the much maligned Diomansy Kamara at halftime; the two goals he went on to score in the second half were instrumental in Fulham’s astonishing 3–2 comeback. Fulham then won their next match against another struggling team, Birmingham City, putting it in relegation danger. On the final day of the season Fulham faced off against Portsmouth. But it would not be enough to avoid relegation for Fulham to beat Portsmouth—their fate also depended on what happened in other games being played simultaneously on the final day of the season.

Joining Fulham at the bottom of the table were four teams facing potential relegation that happened to be playing one another in the final round: Derby versus Reading, and Birmingham versus Blackburn. At

233. Changes to the tax code and the laws relating to municipal bonds may also alleviate the public choice problems we have identified in this Article; they are, however, beyond its scope. For a discussion of tax related issues, see, for example, Mitten & Burton, *supra* note 33, at 144–48.

234. The team was then ranked nineteenth out of twenty.

235. The team which is leading the EPL as this paragraph is being written.

3:15 p.m., James Harper scored a goal against Derby, lifting Reading out of the relegation zone. Birmingham fans listening on their radios while watching their own game became feverish with anxiety; but seventeen minutes later, David Murphy scored for Birmingham, placing them 1–0 ahead of Blackburn. Even then, to avoid relegation, Birmingham needed Derby to defeat Reading. At 4:09 p.m., Blackburn drew level with Birmingham at 1–1, thanks to a goal from Morten Gamst Pedersen. At this stage, Fulham and Birmingham were set for relegation along with Derby. This standing was made all the more likely when Dave Kitson scored a second goal for Reading at 4:19 p.m. Then Cameron Jerome scored for Birmingham at 4:33 p.m., making the score 2–1, but the insufficiency of this result was confirmed when Kevin Doyle put Reading 3–0 ahead moments later. Then, at 4:35 p.m., with less than fifteen minutes of regular time remaining, Fulham’s Danny Murphy scored a fantastic header inside the penalty box and the score remained 1–0 at full time. Fulham had survived the season, beating out Reading on goal difference, despite its sensational 4–0 victory.²³⁶

Back home, in contrast, the end of the season is at best irrelevant for most American teams who are out of contention; at worst, there are actually perverse incentives at the bottom of the table—the worse that a team performs, the better its pick in the draft for next year.²³⁷ In 2011, multiple teams had been counseled to perform as badly as possible, to “suck for Luck”—that is, to aim to be the bottom team so as to have the first pick of the draw and thus a chance to draft Andrew Luck, Stanford’s exceptional quarterback.²³⁸ The draft system is not simply a form of salary capping—it is a necessary device given that there is no promotion and relegation. Without relegation, there is no way to get rid of poorly performing teams. Short of allowing some teams to simply get worse and worse but nonetheless stay in league, it is necessary to have this artificial system of equalization. But there exists an alternative system for managing team quality that simultaneously avoids the costly rents of multimillion or even billion-dollar taxpayer funded sporting stadiums: promotion and relegation.

The economic and legal literature thoroughly documents the consequence and extent of public spending by American cities for the

236. *How the Battle to Avoid relegation Unfolded*, THE GUARDIAN, May 11, 2008, at 9.

237. In the NFL, the worst team gets the best draft pick. Poor performance is rewarded in a more indirect fashion in other leagues. In MLB the top three draft picks are randomly allocated among the fourteen teams that did not make the playoffs the year before.

238. See Steve Politi, ‘Suck for Luck’ Could Be Best Hope for NFL’s Worst, CNN.COM (Oct. 21, 2011, 4:13 PM), <http://www.cnn.com/2011/10/21/us/suck-for-luck-could-be-best-hope-for-nfls-worst/index.html>.

private benefit of professional sporting franchises.²³⁹ 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. That is a consequence of the extraordinary leverage that American leagues hold over cities, a fact that many commentators have understood without properly diagnosing the source.

The frequency of team movements and magnitude of public handouts in America in comparison with England cannot arise solely from passionate public interest in sports or the frailty of the political process. Nor is the ability of teams to move the culprit. Avid sporting interest, imperfect political systems, and team mobility characterize both America and England. The characteristics manifest themselves in extraordinary ways in America because of the exceptional organizational structure of American leagues: closed entry severely restricts 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 a different local team, and by so doing 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 credible threats, not merely of departure but of long-term deprivation, as the NFL has pointedly taught Los Angeles residents for the past sixteen years.

This Article has 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 major sports leagues do not require absolute control over league composition. The closed cartel system is a poor option in comparison to an automatic, episodically open, promotion and relegation system.

Professional American sporting leagues have been cartels for so long that this artificial structure has taken on the appearance of normality, a false premise that distorts antitrust analysis. A comparison with English soccer demonstrates that cooperation on some aspects of competition does not necessitate cooperation on all aspects. With that evident, the illegitimacy of cartels threatening collective boycotts against cities unless they play the subsidy game becomes transparent. However, even though the closed structure of the American leagues is

239. *See supra* Part I.

clearly, in the normal sense of the word, a competition problem, it may not be amenable to an antitrust law solution.

Stadium rent-seeking occurs at the intersection of flawed political and market structures. Courts may well take the view that although franchise leverage is an artifact of a distorted market, the injury in the form of public subsidies is political in nature and not within the scope of antitrust law. Given the logistical issues to be resolved in transitioning from the existing cartel to open competition through promotion and relegation, it would be best if Congress rather than the courts tackled the issue. 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.

Imagine an American team earning its place at the top table through sporting achievement while its fans and sponsors 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 1
NFL & Bowl Championship Series College Football Team
Stadiums—2012 Season

Legend	Updated 19 Sept. 2011
Stadium of National Football League Team	
Stadium of NCAA Football Team from Automatically Qualifying BCS Conference	
<i>Stadium of NCAA Football Team From Non-Automatically Qualifying BCS Eligible Conference</i>	

Team	Year Opened	Age		Notes
New York Giants	2010	1	NFL	shared w. Jets
New York Jets	2010	1	NFL	shared w. Giants
Dallas Cowboys	2009	2	NFL	shared w. Cotton Bowl
U of Minnesota	2009	2	Big 10	
Indianapolis Colts	2008	3	NFL	
<i>Central Florida</i>	<i>2007</i>	<i>4</i>	<i>C USA</i>	
Arizona Cardinals	2006	5	NFL	shared w. Fiesta Bowl
Stanford	2006	5	PAC 12	
Philadelphia Eagles	2003	8	NFL	shared w. Temple
<i>Temple</i>	<i>2003</i>	<i>8</i>	<i>MAC</i>	shared w. Eagles
U Conn	2003	8	Big East	
Detroit Lions	2002	9	NFL	
Houston Texans	2002	9	NFL	shared w. Texas Bowl
New England Patriots	2002	9	NFL	shared w. U Mass at Amherst
<i>U Mass at Amherst</i>	<i>2002</i>	<i>9</i>	<i>MAC</i>	shared w. Patriots
Seattle Seahawks	2002	9	NFL	
Denver Broncos	2001	10	NFL	

Pittsburgh Steelers	2001	10	NFL	shared w. Pitt
Pitt	2001	10	Big East*	shared w. Steelers *Impending move to ACC
Cincinnati Bengals	2000	11	NFL	
<i>Southern Methodist</i>	<i>2000</i>	<i>11</i>	<i>C USA</i>	shared w. Armed Forces Bowl
Cleveland Browns	1999	12	NFL	
Tennessee Titans	1999	12	NFL	shared w. Music City Bowl
Baltimore Ravens	1998	13	NFL	
Tampa Bay Buccaneers	1998	13	NFL	shared w. South Florida & Outback Bowl
South Florida	1998	13	Big East	Shared w. Buccaneers & Outback Bowl
<i>Middle Tennessee</i>	<i>1998</i>	<i>13</i>	<i>Sun Belt</i>	
Louisville	1998	13	Big East	
Utah	1998	13	PAC 12	
Washington Redskins	1997	14	NFL	
Carolina Panthers	1996	15	NFL	
St. Louis Rams	1995	16	NFL	
<i>Florida International</i>	<i>1995</i>	<i>16</i>	<i>Sun Belt</i>	
Rutgers	1994	17	Big East	
<i>Suny at Buffalo</i>	<i>1993</i>	<i>18</i>	<i>MAC</i>	
<i>UT San Antonio</i>	<i>1993</i>	<i>18</i>	<i>WAC</i>	shared w. Alamo Bowl
Atlanta Falcons	1992	19	NFL	
<i>Marshall</i>	<i>1991</i>	<i>20</i>	<i>C USA</i>	
Miami Dolphins	1987	24	NFL	shared w. U of Miami (Florida) & Orange Bowl
U of Miami	1987	24	ACC	shared w. Dolphins & Orange

(Florida)				Bowl
<i>Miami University (Ohio)</i>	1983	28	MAC	
Minnesota Vikings	1982	29	NFL	
<i>Texas State</i>	1981	30	WAC	
<i>Fresno State</i>	1980	31	Mtn W	
Syracuse	1980	31	Big East*	*Impending move to ACC
West Virginia	1980	31	Big East	
<i>Louisiana at Monroe</i>	1978	33	Sun Belt	
<i>New Mexico State</i>	1978	33	WAC	
<i>Southern Mississippi</i>	1976	35	C USA	
New Orleans Saints	1975	36	NFL	shared w. Tulane & Sugar & New Orleans Bowls
<i>Tulane</i>	1975	36	C USA	shared w. Saints & Sugar & New Orleans Bowls
<i>Idaho</i>	1975	36	WAC	
<i>Hawaii</i>	1975	36	Mtn W	shared w. Hawai'i & NFL Pro Bowls
Iowa State	1975	36	Big XII	
<i>Arkansas State</i>	1974	37	Sun Belt	
Buffalo Bills	1973	38	NFL	
Kentucky	1973	38	SEC	
Kansas City Chiefs	1972	39	NFL	
<i>Central Michigan</i>	1972	39	MAC	
Washington State	1972	39	PAC 12	
<i>UNLV</i>	1971	40	Mtn W	shared w. Las Vegas Bowl
<i>Louisiana at Lafayette</i>	1971	40	Sun Belt	
<i>Boise State</i>	1970	41	Mtn W	shared w. Famous Idaho Potato Bowl
<i>Eastern Michigan</i>	1969	42	MAC	

<i>Kent State</i>	1969	42	<i>MAC</i>	
<i>Louisiana Tech</i>	1968	43	<i>WAC</i>	
<i>Utah State</i>	1968	43	<i>WAC</i>	
<i>Western Kentucky</i>	1968	43	<i>Sun Belt</i>	
<i>Kansas State</i>	1968	43	<i>Big XII</i>	
<i>Wake Forest</i>	1968	43	<i>ACC</i>	
<i>Ball State</i>	1967	44	<i>MAC</i>	
<i>Memphis</i>	1967	44	<i>C USA</i>	shared w. Liberty Bowl
<i>Colorado State</i>	1967	44	<i>Mtn W</i>	
<i>Oregon</i>	1967	44	<i>PAC 12</i>	
San Diego Chargers	1968	43	<i>NFL</i>	shared w. San Diego St & Holiday & Poinsettia Bowls
<i>San Diego State</i>	1967	44	<i>Mtn W</i>	shared w. Chargers & Holiday & Poinsettia Bowls
Oakland Raiders	1966	45	<i>NFL</i>	
<i>Bowling Green</i>	1966	45	<i>MAC</i>	
<i>Nevada</i>	1966	45	<i>Mtn W</i>	
<i>North Carolina State</i>	1966	45	<i>ACC</i>	
<i>Northern Illinois</i>	1965	46	<i>MAC</i>	
<i>Virginia Tech</i>	1965	46	<i>ACC</i>	
<i>BYU</i>	1964	47	<i>IND</i>	
<i>East Carolina</i>	1963	48	<i>C USA</i>	
<i>UTEP</i>	1963	48	<i>C USA</i>	shared w. Sun Bowl
<i>Air Force</i>	1962	49	<i>Mtn W</i>	
San Francisco 49ers	1960	51	<i>NFL</i>	
<i>New Mexico</i>	1960	51	<i>Mtn W</i>	shared w. New Mexico Bowl
<i>Indiana</i>	1960	51	<i>Big 10</i>	
<i>Penn State</i>	1960	51	<i>Big 10</i>	
<i>Florida Atlantic</i>	1959	52	<i>Sun Belt</i>	
<i>Navy</i>	1959	52	<i>SEC</i>	
<i>Arizona State</i>	1958	53	<i>PAC 12</i>	shared w. Insight Bowl
Green Bay Packers	1957	54	<i>NFL</i>	

Boston College	1957	54	ACC	
Oregon State	1953	58	PAC 12	
<i>North Texas</i>	1952	59	<i>Sun Belt</i>	
<i>Rice</i>	1950	61	<i>C USA</i>	
<i>Troy State</i>	1950	61	<i>Sun Belt</i>	
<i>Wyoming</i>	1950	61	<i>Mtn W</i>	
Baylor	1950	61	Big XII	
Florida State	1950	61	ACC	
Maryland	1950	61	ACC	
<i>South Alabama</i>	1948	63	<i>Sun Belt</i>	shared w. Senior & GoDaddy Bowls
Texas Tech	1947	64	Big XII	
Jacksonville Jaguars	1946	65	NFL	shared w. Gator Bowl
<i>Houston</i>	1946	65	<i>C USA</i>	
Clemson	1942	69	ACC	
<i>Akron</i>	1940	71	<i>MAC</i>	
Auburn	1939	72	SEC	
Arkansas	1938	73	SEC	
<i>Toledo</i>	1937	74	<i>MAC</i>	
<i>Western Michigan</i>	1937	74	<i>MAC</i>	
South Carolina	1934	77	SEC	
<i>San Jose State</i>	1933	78	<i>WAC</i>	
Virginia	1931	80	ACC	
<i>Tulsa</i>	1930	81	<i>C USA</i>	
Florida	1930	81	SEC	
Notre Dame	1930	81	SEC	
Texas Christian	1930	81	Big East	
<i>Ohio</i>	1929	82	<i>MAC</i>	
Alabama	1929	82	SEC	
Arizona	1929	82	PAC 12	
Duke	1929	82	ACC	
Georgia	1929	82	SEC	
Iowa	1929	82	Big 10	
Texas A&M	1929	82	Big XII	
<i>Alabama at Birmingham</i>	1927	84	<i>C USA</i>	shared w. BBVA Compass Bowl

Michigan	1927	84	Big 10	
North Carolina	1927	84	ACC	
Missouri	1926	85	Big XII	
Northwestern	1926	85	Big 10	
Chicago Bears	1924	87	NFL	
<i>Army</i>	<i>1924</i>	<i>87</i>	<i>IND</i>	
Colorado	1924	87	PAC 12	
Louisiana State	1924	87	SEC	
Purdue	1924	87	Big 10	
Texas	1924	87	Big XII	
California	1923	88	PAC 12	
Illinois	1923	88	Big 10	
Michigan State	1923	88	Big 10	
Nebraska	1923	88	Big XII	
Oklahoma	1923	88	Big XII	
Southern Cal	1923	88	PAC 12	
Ohio State	1922	89	Big 10	
UCLA	1922	89	PAC 12	shared w. Rose Bowl
Vanderbilt	1922	89	SEC	
Kansas	1921	90	Big XII	
Tennessee	1921	90	SEC	
Oklahoma State	1920	91	Big XII	
Washington	1920	91	PAC 12	
Wisconsin	1917	94	Big 10	
Cincinnati	1916	95	Big East	
Mississippi	1915	96	SEC	
Mississippi State	1914	97	SEC	
Georgia Tech	1913	98	ACC	
NFL Average Stadium Age				23
Average Year Opened				1988
Automatic BCS Qualifier Average Stadium Age				65
Average Year Opened				1946
BCS Eligible Collegiate Average Stadium Age				56
Average Year Opened				1955

Appendix 2
Stadium Ages of Collegiate Bowl Games

Collegiate Bowl Game Stadiums			Updated 18 Sept. 2011
	Age	Year Opened	Venue
Cotton Bowl	2	2009	Cowboys Stadium
Pinstripe Bowl	2	2009	Yankee Stadium
Fiesta Bowl	5	2006	Arizona Cardinals home
Texas Bowl	9	2002	Houston Texans home
Little Caesars Pizza Bowl	9	2002	Detroit Lions home
Armed Forces Bowl	11	2000	SMU home, Ft Worth
Kraft Fight Hunger Bowl	11	2000	SF Giants home field
Music City Bowl	12	1999	Tennessee Titans home
Outback Bowl	13	1998	Tampa Bay Buccaneers home
Belk Bowl	15	1996	Carolina Panthers home
Alamo Bowl	18	1993	Alamo Dome, San Antonio
Chick-fil-A Bowl	19	1992	Georgia Dome, Atlanta Falcons home
Beef O'Brady's Bowl	21	1990	Tampa Bay Rays home
Orange Bowl	24	1987	Miami Dolphins & Marlins home
Sugar Bowl	36	1975	New Orleans Saints home
New Orleans Bowl	36	1975	New Orleans Saints home
Hawai'i Bowl	36	1975	Aloha Stadium, Honolulu
Bowl Championship Game	38.5	Average of Rose, Sugar, Orange & Fiesta	
Las Vegas Bowl	40	1971	UNLV Stadium, Las Vegas
Famous Idaho Potato Bowl	41	1970	Bronco Stadium
Holiday Bowl	43	1968	San Diego Chargers home
Poinsettia Bowl	43	1968	San Diego Chargers home
Liberty Bowl	44	1967	Liberty Bowl Memorial, Memphis
Sun Bowl	48	1963	Sun Bowl, El Paso
Military Bowl	50	1961	RFK Stadium, DC
New Mexico Bowl	51	1960	U of New Mexico home, Albuquerque
Insight Bowl	53	1958	Sun Devil Stadium, Tempe
GoDaddy Bowl	63	1948	Ladd Peebles Stadium, Mobile
Gator Bowl	65	1946	Gator Bowl, Jacksonville Jaguars

			home
Capital One Bowl	75	1936	Citrus Bowl, Orlando
Champs Sports Bowl	75	1936	Citrus Bowl, Orlando
Ticket City Bowl	81	1930	Cotton Bowl, Dallas
BBVA Compass Bowl	84	1927	Legion Field, Birmingham
Independence Bowl	86	1925	Independence Bowl, Shreveport
Rose Bowl	89	1922	Rose Bowl, Pasadena

Average Bowl Stadium Age	39
Average Year Opened	1972