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SPORTS AND THE CITY: HOW TO CURB PROFESSIONAL SPORTS TEAMS' DEMANDS FOR FREE PUBLIC STADIUMS

Marc Edelman*

On February 21, 2008, the thirteen commissioners of Miami-Dade County approved a plan to spend \$347 million in taxpayer money to build a new 37,000-seat retractable-roof ballpark for the Florida Marlins baseball club.¹ The plan requires the county to contribute roughly two thirds of the cost for the new ballpark, with the city of Miami contributing three percent (\$10 million)

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¹ See Marc Edelman, *Marlins Stadium: Deal Expensive, Maybe Unconstitutional*, MIAMI HERALD, Mar. 4, 2008, at A19; Sarah Talalay, *Play Ball! Marlins Stadium Approved: Commissioners Approve Framework for \$515 Million Deal in Miami*, SOUTH FLA. SUN-SENTINEL, Feb. 22, 2008, at 1A ("Miami and Miami-Dade County commissioners approved a binding agreement that serves as the framework for a \$515 million, 37,000-seat, retractable-roof ballpark and a \$94 million parking garage at the site of the Orange Bowl . . ."). See also Michael Vasquez & Matthew I. Pinzur, *Bases Loaded for Marlins: Miami OK's Stadium*, MIAMI HERALD, Feb. 21, 2008; *Braman v. Miami-Dade County*, No. 08-03787-CA-15 1, 5 (Fla. Cir. Ct. Sept. 9, 2008). The stadium building plan was approved as part of a larger Global Interlocal Agreement that also included building a port access tunnel, museum park, streetcar project, and major league soccer stadium. See *Braman*, No. 08-03787-CA-15 at 3.

and the team owner, Jeffrey Loria, contributing the remaining thirty percent (\$155 million).² Loria would then defray most, if not all, of his costs by selling stadium naming rights to a third party.³

Many Miami-Dade County residents have objected to this plan.⁴ Their biggest complaint is that it allows the Marlins' owner to pay just thirty percent of stadium construction costs, yet entitles him to one hundred percent of stadium revenues.⁵ That arrangement hardly seems like an equitable "partnership."⁶

² Edelman, *Marlins Stadium*, *supra* note 1. See also Talalay, *supra* note 1. The Marlins' \$155 million contribution would include \$120 million in upfront spending and another \$35 million in annual rent payments of \$2.3 million a year. *Id.*

³ See Edelman, *Marlins Stadium*, *supra* note 1 (noting that providing Loria with the full revenue stream from selling naming rights to the new Marlins ballpark "is essentially free money for Loria, given that the New York Mets recently sold their stadium naming rights to a third party, Citigroup, for \$400 million"). See also Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 914 (2008) [hereinafter Edelman, "*Single Entity" Defense*] (noting the value of stadium naming rights). But see DENNIS R. HOWARD & JOHN L. CROMPTON, FINANCING SPORT 272-86 (2d ed. 2005) (same); *Braman*, No. 08-03787-CA-15 at 9 (finding the value of naming rights, for some bizarre reason, to be as little as "\$2 million per year").

⁴ See, e.g., *Braman*, No. 08-03787-CA-15. *Braman* involved a lawsuit seeking to enjoin the public funding of a new Marlins stadium. *Id.* The court noted "a poll show[ing] that 56% of a segment of the population (super voters) are opposed to the building of the stadium with hotel tax dollars." *Id.* at 18.

⁵ See Linda Robertson, *Stadium Plan is Bad for City*, MIAMI HERALD, July 19, 2008, at D1 ("It's a \$515 million gamble, of which the Marlins are paying one-fifth the cost and reaping 100% of the profits in a sweet deal for Loria, a wealthy art dealer."); Evan S. Benn, Charles Rabin & Michael Vasquez, *Miami Megaplan: Megaplan Trial Likely with Talks Going Nowhere - About 70 People Joined Plaintiff Norman Braman on Watson Island to Protest Miami and the County's \$3 Billion Megaplan as Pretrial Settlement Talks Fizzled*, MIAMI HERALD, July 13, 2008, at B1 (explaining that under the plan, even "money made from concerts or other sporting events that take place in the park would go directly to the Marlins").

⁶ See Robertson, *supra* note 5. The argument that Miami-Dade County's "partnership" with the Marlins is unequal is bolstered by the fact that Marlins ownership has never invested much of its own money into the ballclub. See Larry Larue, *Florida Marlins: Good Team, Built Dirt Cheap: Marlins Contend with a Payroll Three-Fourths of A-Rod's Salary*, MORNING NEWS TRIBUNE

Nevertheless, many local communities continue to engage in these inequitable “partnerships” because professional sports leagues have monopoly power over the number of franchises in their sport.⁷ This monopoly power gives teams the control to switch host communities almost at will, as well as the clout to credibly threaten to switch host communities if a current host fails to meet that team’s subsidy demand.⁸ Pennsylvania

(Tacoma, Wash.), Aug. 17, 2008, at C3 (“At \$21 million on opening day, their payroll is about \$22 million lower than the 29th team on that list, the Tampa Bay Devil Rays.”); Arthur Staple, *Marlins Show They’re Not Just Spoilers*, NEWSDAY, May 28, 2008, at A46 (comparing the Marlins’ \$21,811,500 opening day payroll for the 2008 season with their rival New York Mets’ \$137,793,376 payroll); Dave George, *Trade Could Add Fun to Marlins’ Run*, PALM BEACH POST (Fla.), Jul. 31, 2008, at 1C (“Loria certainly isn’t shy, not about perturbing fans with a bargain-basement payroll for a constantly rebuilding team . . .”); Carlos Frias, *Marlins Pump Up Volume, Not Payroll*, PALM BEACH POST (Fla.), Mar. 31, 2008, at 1A (“[Until the Marlins’ new publicly funded ballpark opens], owner Jeffrey Loria has said, there are no plans to start pumping up the lowest payroll in Major League Baseball.”); Tom D’Angelo, *Loria: Payroll Increase Will Wait*, PALM BEACH POST (Fla.), Mar. 2, 2008, at 1B (“Jeffrey Loria said Saturday he will boost the salaries, but not until the stadium opens in 2011.”).

⁷ See MICHAEL LEEDS & PETER VON ALLMEN, *THE ECONOMICS OF SPORTS* 111-12, 154-55 (2d ed. 2005); Rodney Fort, *Direct Democracy and the Stadium Mess*, in *SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS* 149-50 (Roger G. Noll & Andrew Zimbalist eds., 1997) [hereinafter Fort, *Direct Democracy*]; RODNEY FORT, *SPORTS ECONOMICS* 140 (2d ed. 2006) [hereinafter FORT, *SPORTS ECONOMICS*]; *Stadium Financing and Franchise Relocation Act of 1999: Hearing on S.952 Before the Sen. Comm. on the Judiciary*, 106th Cong. 38 (1999) [hereinafter *Hearings*] (statement of Andrew Zimbalist) (“An economist has no difficulty in identifying monopoly as the root of the problem.”); ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* 123-24 (2003) [hereinafter ZIMBALIST, *MAY THE BEST TEAM WIN*]; see generally Marc Edelman & C. Keith Harrison, *Analyzing the WNBA’s Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL’Y 1, 23, 77 (2008) (indicating that even certain other sports leagues such as the WNBA may at times act as monopolists).

⁸ See Marc Edelman, *How to Curb Professional Sports’ Bargaining Power Vis-à-Vis the American City*, [hereinafter Edelman, *Bargaining Power*] 2 VA. SPORTS & ENT. L. J. 280, 284 (2003); Fort, *Direct Democracy*, *supra* note 7, at 149-50; see also *Braman*, No. 08-03787-CA-15 at 6 (“According to [Marlins President David] Samson, the team has publicly stated its intention to relocate if a new baseball stadium is not acquired in the near future.”); *id.* (stating that former President of Major League Baseball Bob DuPuy warned Miami-Dade county commissioners that failure to build the Marlins a new subsidized ballpark would be “a death knell for baseball” in Miami); ZIMBALIST, *MAY THE*

Senator Arlen Specter describes this practice as “legalized extortion.”⁹

This article argues that America needs to better protect its local communities against monopolist sports leagues’ demands for publicly funded stadiums. Part I of this article discusses the evolution of sports stadium subsidies. Part II discusses why American communities continue to provide subsidies to professional sports teams. Part III explains why providing stadium subsidies is a bad idea for most local communities. Part IV discusses four types of proposals intended to reduce sports teams’ power to demand stadium subsidies. Part V proposes a federal bill that would better protect the interests of American communities by ensuring that any community which builds a professional sports facility is able to keep the pro rata share of that facility’s revenue stream.

I. THE HISTORY OF PROFESSIONAL SPORTS SUBSIDIES

American communities have not always subsidized the professional sports industry.¹⁰ To the contrary, for the first seventy-five years of professional sports, most team owners built their own facilities and covered their own costs.¹¹ By the end of

BEST TEAM WIN, *supra* note 7, at 124 (citing a 2001 letter from Major League Baseball Commissioner, Bud Selig, to former Florida Senator, Alex Villalobos, threatening that, if denied public financing, the Marlins would be relocated).

⁹ *Hearings*, *supra* note 7, at 11 (testimony of Sen. Arlen Specter of Pennsylvania); *see also id.* at 53; *id.* at 31 (testimony of Jean B. Cryor, former Member, Maryland House of Delegates) (“Today team owners are holding the baby captive and waiting for ransom. They are using the fear of losing everything to force the ransom payment.”).

¹⁰ *See* Edelman, *Bargaining Power*, *supra* note 8, at 284 (describing the “glory era” of professional sports).

¹¹ *See id.* at 284 (citing Lee Geige, *Cheering for the Home Team: An Analysis of Public Funding of Professional Sports Stadia in Cincinnati, Ohio*, 30 U. TOL. L. REV. 459, 461 (1999)); FORT, *SPORTS ECONOMICS*, *supra* note 7, at 338. Indeed, until 1950, there were just three publicly funded stadiums used by professional sports teams: the Los Angeles Coliseum (built in 1923), Chicago’s Soldier Field (built in 1929) and Cleveland’s Municipal Stadium (built in 1931). Edelman, *Bargaining Power*, *supra* note 8, at 285; *see also* John Siegfried &

World War II, however, changing demographics led to the start of communities subsidizing professional sports teams.¹²

A. The Emergence of Public Subsidies

The era of publicly funded sports facilities that continues into today began in 1950 when the city of Milwaukee, unable to secure a Major League Baseball (“Baseball”) expansion franchise, decided to lure an existing team by building a public stadium.¹³

Enticed by the offer to play in a new, publicly funded stadium, on March 18, 1953 Lou Perini, then the owner of MLB’s Boston Braves, decided to move his team to Milwaukee.¹⁴ This move marked the first time since the signing of Baseball’s Major League Agreement in 1903 that a MLB team switched host cities.¹⁵

Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 95-96 (2000).

¹² See Edelman, *Bargaining Power*, *supra* note 8, at 285 (“With new metropolitan markets in the western United States opened by jet travel, the growth of in-home television, and the baby boomers coming of age, professional sports leagues for the first time encountered significant growth opportunities. Major League Baseball (‘MLB’), however, chose not to expand to meet these opportunities.”).

¹³ See Siegfried & Zimbalist, *supra* note 11, at 96; JAMES QUIRK & RODNEY FORT, *HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS* 15 (1999) [hereinafter QUIRK & FORT, *HARD BALL*].

¹⁴ See Siegfried & Zimbalist, *supra* note 11, at 96; QUIRK & FORT, *HARD BALL*, *supra* note 13, at 15; A Fan Site Dedicated to Preserving The Memory of Wisconsin’s Lost Treasure, <http://www.milwaukeebraves.info> (last visited Nov. 12, 2008).

¹⁵ See JAMES EDWARD MILLER, *THE BASEBALL BUSINESS: PURSUING PENNANTS AND PROFITS IN BALTIMORE* 31-32 (1990); JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST* 5, 8 (1999); see generally Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig’s Contraction Plan was Never a Sure Deal*, 10 *SPORTS L.J.* 45, 47 (2003) (discussing the merger of the National and American leagues under the Major League Agreement).

As it turned out, the Braves' move to Milwaukee greatly improved Perini's bottom line.¹⁶ In addition to a new stadium, Perini inherited a larger fan base that purchased 1.8 million tickets in 1953 - more than six times as many tickets as Braves fans bought during the team's final season in Boston.¹⁷

Over the next two years, two other MLB teams, the St. Louis Browns and Philadelphia Athletics, decided to similarly leave shared markets and private stadiums in favor of solo markets and public stadiums.¹⁸ The Browns left St. Louis, a market they shared with the Cardinals, in favor of Baltimore's Memorial Stadium, where they became known as the Baltimore Orioles.¹⁹ Meanwhile, the Athletics, a team which shared the Philadelphia market, moved to Kansas City to play in Municipal Stadium.²⁰

In 1958, Brooklyn Dodgers owner Walter O'Malley continued this trend - moving his beloved Dodgers out of Brooklyn and to Los Angeles, another city that had been long trying to land a MLB franchise.²¹ Unlike the earlier teams that had moved - the Braves, Athletics, and Browns - the Dodgers had regularly drawn large crowds and maintained a loyal fan base while playing in Brooklyn.²² However, by moving the Dodgers to Los

¹⁶ See MILLER, *supra* note 15, at 31; JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 480 (1992) [hereinafter QUIRK & FORT: PAY DIRT] (Table: Attendance Records: Baseball, National League).

¹⁷ See MILLER, *supra* note 15, at 31; QUIRK & FORT, PAY DIRT, *supra* note 16, at 480 (compiling attendance records for Major League Baseball's National League).

¹⁸ See MILLER, *supra* note 15, at 79 and accompanying text; QUIRK & FORT, HARD BALL, *supra* note 13, at 15.

¹⁹ See MILLER, *supra* note 15, at 79; QUIRK & FORT, HARD BALL, *supra* note 13, at 15.

²⁰ *Id.*

²¹ See JOANNA CAGAN & NEIL DEMAUSE, FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT 186 (1998); QUIRK & FORT, HARD BALL, *supra* note 13, at 16.

²² *Hearings*, *supra* note 9, at 55 (testimony of Sen. Charles E. Schumer of New York) ("I am one who believes in what Pete Hamill has written[,] that the three most evil men of the 20th century were Hitler, Stalin and Walter O'Malley, Sr.").

Angeles, O'Malley became the beneficiary of a prime chunk of real estate.²³

B. The 1960s: A Rollercoaster Ride for Stadium Subsidies

Once O'Malley moved the Dodgers to Los Angeles, MLB owners became cognizant of a basic tenet in economics: the law of supply and demand.²⁴ As long as there were more cities that wanted to capture the essence of professional sports than there were MLB teams available, existing team owners could levy heavy stadium demands on cities, which would often pay the price.²⁵ By keeping a limited supply of professional baseball teams, the public share of new stadium financing by the end of the 1950s reached close to 100%.²⁶

Shortly thereafter, MLB club owners learned the flip side of this rule, when, in November 1958, New York lawyer William Shea and former Dodgers general manager Branch Rickey announced plans to launch a rival professional baseball league, the Continental League.²⁷ In fear that the planned rival league would begin to gain a presence for itself in untapped MLB markets, MLB owners quickly announced that they would

²³ See CAGAN & DEMAUSE, *supra* note 21, at 186; QUIRK & FORT, *HARD BALL*, *supra* note 13, at 16. Shortly after O'Malley moved the Dodgers to Los Angeles, New York Giants owner Horace Stoneham followed by moving his Giants from Manhattan to San Francisco. The Giants' move, however, was different from the one made by the Dodgers in that the Giants were struggling with attendance before heading to California. See MILLER, *supra* note 15, at 79-80; QUIRK & FORT, *PAY DIRT*, *supra* note 16, at 480.

²⁴ See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 12-22 (3d ed. 1998) (discussing the law of supply and demand).

²⁵ See FORT, *SPORTS ECONOMICS*, *supra* note 7, at 140. At the same time, the law of supply and demand has allowed existing team owners to charge huge entry fees to prospective new entrants. See Fort, *Direct Democracy*, *supra* note 7, at 7 tbl.1.3 (showing rapidly increasing expansion franchise rights fees).

²⁶ See Siegfried & Zimbalist, *supra* note 11, at 96; QUIRK & FORT, *HARD BALL*, *supra* note 13, at 19-20.

²⁷ DUQUETTE, *supra* note 15, at 52-53; see also FORT, *SPORTS ECONOMICS*, *supra* note 7, at 134.

expand into most of the territories that the Continental League sought to enter.²⁸ From 1962 through 1969, MLB expanded from sixteen to twenty-four teams, temporarily returning the supply of baseball teams back into equilibrium with demand.²⁹ As a result, the rate of stadium subsidies fell during the early part of the 1960s from nearly 100% to just above 60%.³⁰

This counterbalance, however, was short-lived. On August 2, 1960, the Continental League ceased its plans to launch a rival league, and thereafter no other investor group seriously proposed doing the same.³¹ As a result, once the next wave of communities interested in investing in professional sports emerged, MLB clubs again had an opportunity to increase their subsidy demands.³²

C. Stadium Subsidies Today

Since the 1970s, most local communities have paid between seventy percent and eighty percent of new stadium building costs.³³ Today, these subsidies are paid to MLB teams, as well as

²⁸ See DUQUETTE, *supra* note 15, at 53-54; QUIRK & FORT, PAY DIRT, *supra* note 16, at 479-87 (Major League Baseball added eight new teams in the years from 1962-69, with new teams beginning play in New York City, Houston, San Diego, Montreal, Los Angeles, Washington, Seattle and Kansas City); FORT, SPORTS ECONOMICS, *supra* note 7, at 134, 141 (“[E]xpansion and relocation also protect existing owners from outside competition.”); *id.* at 148 (discussing how leaving viable locations without teams increases the risk of new leagues forming).

²⁹ See generally DUQUETTE, *supra* note 15.

³⁰ Siegfried & Zimbalist, *supra* note 11, at 96.

³¹ See FORT, SPORTS ECONOMICS, *supra* note 7, at 134; see also Wikipedia, Continental League, http://en.wikipedia.org/wiki/Continental_League (last visited Nov. 12, 2008).

³² See generally CAGAN & DEMAUSE, *supra* note 21, at 28-29 (“North America is in the midst of a remarkable stadium and sports arena building boom unlike any other in its history Between 1980 and 1990, U.S. cities spent some \$750 million on building or renovating sports arenas and stadiums. The bill for the ’90s is expected to total anywhere between \$8 billion and \$11 billion, the bulk of it paid by taxpayers – and hidden subsidies could amount to billions more.”).

³³ See, e.g., Michael Cunningham, *Stadium Deal Just Doesn’t Make Sense: Money Could Be Used on Much More Important Priorities*, SOUTH FLA. SUN-

to teams in the National Football League (“NFL”), National Basketball Association (“NBA”) and National Hockey League (“NHL”).³⁴ Although the modern subsidy rate remains below that of the late 1950s, most teams exert more power over local communities today than ever before.³⁵ This is seen in three ways.

First, local communities today are paying more than ever before to build sports facilities.³⁶ For instance, the Astrodome, which was the most expensive sports facility built or refurbished prior to 1968, cost \$38,000 (or \$175,000 in 1989 dollars).³⁷ By contrast, the Skydome, which opened in Toronto, Ontario in 1989, cost \$532 million.³⁸ In addition, the new publicly funded baseball stadium in Washington, D.C., which opened in April 2008, cost \$611 million,³⁹ and Indianapolis’s new football and NCAA basketball stadium, which opened in August 2008, cost

SENTINEL, Feb. 22, 2008, at 1C (evaluating stadium subsidy percentages since 1992). Cunningham notes that:

There are 20 baseball parks built or that are currently under construction since 1992, when Baltimore’s Oriole Park at Camden Yards sparked a building boom. The median public contribution for those parks was 73 percent of costs, according to information compiled by the National Sports Law Institute of Marquette University Law School.

Id.; see also Siegfried & Zimbalist, *supra* note 11, at 96 tbl.1 (detailing Expenditures on New Sports Facilities for Professional Teams by Decade); FORT, SPORTS ECONOMICS, *supra* note 7, at 338 (finding, from the period of 2000-06, the median public contribution was just sixty-three percent. Yet, this figure is skewed downward because it includes the San Francisco Giants’ entirely privately financed stadium, built in the year 2000).

³⁴ See Edelman, *Bargaining Power*, *supra* note 8, at 288.

³⁵ See *infra* notes 36-49 and accompanying text.

³⁶ See *infra* notes 37-41 and accompanying text.

³⁷ See QUIRK & FORT, PAY DIRT, *supra* note 16, at 161-63.

³⁸ See QUIRK & FORT, PAY DIRT, *supra* note 16, at 161-63.

³⁹ See Eric Fisher, *In D.C., Baseball Hits a Crossroads at New Park*, STREET & SMITH’S SPORTS BUS. J., Mar. 10, 2008, at 18.

\$720 million.⁴⁰ According to *Street & Smith's Sports Business Journal*, at the time of publishing this article, the city of Minneapolis is considering building a retractable-roof football stadium that is estimated to cost close to \$1 billion.⁴¹

In addition, the number of new facilities that sports teams are demanding is also rising.⁴² From 1950 to 1959, sports teams moved into only seven new sports facilities, as compared to twenty-one from 1960 to 1969, twenty-five from 1970 to 1979, fourteen from 1980 to 1989, thirty-two from 1990 to 1998, and already more than forty since 1999.⁴³ A significant percentage of the increase in new stadiums built over the past decade is attributable to baseball and football teams, which once shared community stadiums, beginning to demand their own separate facilities.⁴⁴ Another component of the increase is based on teams with greater frequency declaring their facilities obsolete.⁴⁵

⁴⁰ See Don Muret, *Opening in 2008*, STREET AND SMITH'S SPORTS BUS. J. (Jan. 21, 2008), at 15; Don Muret, *Indy's Showplace is also a Showroom*, STREET AND SMITH'S SPORTS BUS. J. (Sept. 15, 2008), at 1 [hereinafter Muret, *Indy's Showplace*].

⁴¹ Don Muret, *Extra 30 Days in Minnesota will Allow for Tour of NFL Stadiums*, STREET AND SMITH'S SPORTS BUS. J. (Sept. 1, 2008), at 24 (estimating the Minnesota stadium potential building cost at \$954 million).

⁴² See *infra* note 43 and accompanying text.

⁴³ See Siegfried & Zimbalist, *supra* note 11, at 96; see also FORT, SPORTS ECONOMICS, *supra* note 7, at 340 tbl.10.1 (describing Recent and Upcoming Stadium and Arena Openings as of 2004).

⁴⁴ See Editorial, *Take Us Out*, RICHMOND TIMES DISPATCH, Apr. 29, 2008, at A10 ("Orioles Park at Camden Yards started the trend away from multipurpose stadiums shaped like doughnuts and toward baseball-only stadiums with so-called throwback designs."); see also David Armstrong, *49ers on the Move? Economics, Football-Only Stadiums Rarely Pay Off for Cities, Experts Say*, SAN FRANCISCO CHRONICLE, Nov. 10, 2006, at B4; *Bengals have Sold 20 Percent of Seat Licenses in Three Weeks*, COLUMBUS DISPATCH (Ohio), Jan. 9, 1997, at 4D (discussing the city of Cincinnati's building of separate ballparks for the Reds and Bengals); *Hearings*, *supra* note 9, at 14 (testimony of Sen. Arlen Specter of Pennsylvania) ("[Pennsylvania is] looking at four new [publicly funded] stadiums. Two are under construction now in western Pennsylvania for the Steelers and the Pirates, and two are in the immediate offering for the Phillies and the Eagles.").

⁴⁵ See, e.g., Siegfried & Zimbalist, *supra* note 11, at 96; David McLemore, *Functioning in a New Arena; San Antonio's Alamodome Alive despite SBC Center*, DALLAS MORNING NEWS, Dec. 1, 2002, at 43A.

For example, in 2002, owners of the Spurs basketball team demanded that the city of San Antonio build them a new public arena, even though their current arena was just ten years old.⁴⁶

Finally, in recent years, teams have even begun to negotiate the right to keep sports facilities' non-sports related revenues.⁴⁷ For instance, when the State of Maryland in 1998 built its new state-of-the art football stadium for the Baltimore Ravens, Maryland agreed to provide the Ravens' ownership with rights to all of the stadium's revenues, including those derived from rock concerts held during the NFL off-season.⁴⁸ Similarly, in Miami-Dade County's recent stadium agreement with Marlins ownership, the county agreed to provide the Marlins owners with 100% of all non-baseball related revenues, including revenues from rock concerts, other sporting events, and even the sale of the stadium's naming rights.⁴⁹

In sum, these three trends have created "such a confusion of interests [that] ordinary tax payers are now expected to subsidize the already immense wealth of . . . an indescribably small number of owners."⁵⁰ In other words, subsidized sports stadiums have gone from being an exception in the world of professional sports to something far closer to the rule.⁵¹

D. Today's Sports Teams Do Not Need Subsidies to Turn a Profit

Despite the trend toward subsidizing professional sports stadiums, most professional team owners do not need government aid to profit.⁵² This is because, in addition to

⁴⁶ See McLemore, *supra* note 45.

⁴⁷ See *infra* notes 48-49 and accompanying text.

⁴⁸ *Hearings, supra* note 9, at 31 (testimony of Jean B. Cryor, former Member, Maryland House of Delegates).

⁴⁹ See Benn, Rabin & Vasquez, *supra* note 5.

⁵⁰ *Hearings, supra* note 9, at 13 (testimony of Thomas Finneran, former Speaker of the Massachusetts House of Representatives).

⁵¹ See *supra* notes 11 - 34 and accompanying text.

⁵² This argument is supported by building a mathematical model for sports-team profitability, which estimates net operating income and annual expected

earning a high rate of return on the team's resale,⁵³ most team owners have recently learned to capitalize on two important stadium-related revenue streams: stadium naming rights and personal seat licenses.⁵⁴

Stadium naming rights are the rights of corporations to place their name on major sports stadiums.⁵⁵ Although the first reputed naming-rights agreement goes back to 1971, when Schaefer Brewing Company paid \$150,000 to name the Patriots' stadium Schaefer Field, sports teams did not begin to recognize the full power of selling naming rights until recently.⁵⁶ In recent years, teams in large markets such as the New York Mets have sold stadium naming rights for as much as \$400 million (20 year rights at \$20 million per year).⁵⁷ Meanwhile, teams that play in less traditional sports markets such as the Houston Texans have sold their stadium naming rights for as much as \$300 million (30 year rights at \$10 million per year).⁵⁸

return on investment by team. *See generally* QUIRK & FORT, *HARD BALL*, *supra* note 13, at 206, 212. The model considers the additional costs of constructing a new stadium and factors in revenue streams that are created by building a new stadium. *See generally id.*

⁵³ *See, e.g.*, FORT, *SPORTS ECONOMICS*, *supra* note 7, at 1-2 (showing that, since 1915, ownership of a sports team such as the New York Yankees has provided twice as large a rate of return as owning a diversified investment portfolio); *id.* at 9 ("Professional team sports generated revenues of about \$13.9 billion in 2002-03.").

⁵⁴ *See* Zimmerman, *infra* note 79, and accompanying text.

⁵⁵ *See* HOWARD & CROMPTON, *supra* note 3, at 272.

⁵⁶ *See id.*

⁵⁷ *See* Edelman, "Single Entity" Defense, *supra* note 3, at 914; *see also* Terry Lefton, *CAA Hired to Land Sponsors for the Yankees*, STREET & SMITH'S SPORTS BUS. J., Oct. 1, 2007, at 1; John Lombardo, *Barclays-Nets: A Brand Grows in Brooklyn*, STREET & SMITH'S SPORTS BUS. J., Jan. 22, 2007, at 1.

⁵⁸ *See* HOWARD & CROMPTON, *supra* note 3, at 275 tbl.7-5 (compiling the largest sports venue naming rights agreements); *see also* FORT, *SPORTS ECONOMICS*, *supra* note 7, at 79 tbl. 3.8 (noting recent naming rights agreements). Among the newest stadium naming rights agreements, the Indiana Stadium and Convention Building Authority recently sold naming rights to their luxurious, new \$720 million facility to Lucas Oil for \$120 million over a 22 year period. *See* Muret, *Indy's Showplace*, *supra* note 40, at 1. The Dallas Mavericks sold their naming rights for \$195 million (30 years at \$6.5 million per year), and the Atlanta Hawks and Thrashers sold naming rights for a

Although many teams that have obtained lucrative naming rights agreements have chosen to build expensive sports facilities, these kind of naming rights agreements could conceivably cover the entire cost of building a more affordable stadium or arena.⁵⁹

Personal seat licenses (“PSLs”), meanwhile, are advance payments to purchase the right to secure a particular seat in a given venue.⁶⁰ Although the Dallas Cowboys football team sold a limited number of “seat options” back in 1968,⁶¹ the NFL’s Carolina Panthers in 1993 became the first team to extensively use the concept of PSLs when they privately financed their new facility, Bank of America Stadium (formerly known as Ericsson Stadium).⁶² By selling PSLs before beginning stadium construction, Carolina Panthers ownership raised \$180 million in upfront capital.⁶³ Since then, several other sports teams including the Baltimore Ravens, St. Louis Rams, and Chicago

combined \$185 million (20 years at \$9.3 million per year). See HOWARD & CROMPTON, *supra* note 3, at 275 tbl.7-5.

⁵⁹ For one example of a more affordably built professional sports stadium, Miller Field in Milwaukee, Wisconsin was constructed in time for opening day of the 2001 season at a cost of just \$313 million. See Edelman, *Bargaining Power*, *supra* note 8, at 288 (citing Don Walker, *Auditors Blame ‘Enron-Style Accounting’ for Ballpark Cost Dispute; Stadium District Relied on Future Revenue*, *Memo Says*, MILWAUKEE J. SENTINEL, May 22, 2002, at 1A). As another example, the San Francisco Giants privately financed their ballpark, which opened in 2000, for the total cost of \$319 million. *Id.* at 289 (citing Richard Alm, *Nosebleed Prices: Cost of a Day of Baseball Has Soared at New Arenas*, DALLAS MORNING NEWS, Jul. 11, 2000, at 1D). Meanwhile, the Cincinnati Reds new ballpark, which opened in 2003, cost just \$288 million to build. FORT, SPORTS ECONOMICS, *supra* note 7, at 340.

⁶⁰ See *Hearings*, *supra* note 9, at 63 (statement of Jerry Richardson, Owner and Founder, Carolina Panthers); see also *Hearings*, *supra* note 9, at 104 (testimony of Paul Tagliabue, former Commissioner, National Football League); FORT, SPORTS ECONOMICS, *supra* note 7, at 42 (discussing the economics behind PSLs).

⁶¹ See HOWARD & CROMPTON, *supra* note 3, at 288.

⁶² *Hearings*, *supra* note 9, at 63 (statement of Jerry Richardson, Owner and Founder, Carolina Panthers); see also HOWARD & CROMPTON, *supra* note 3, at 288.

⁶³ See *Hearings*, *supra* note 9, at 63 (statement of Jerry Richardson, Owner and Founder, Carolina Panthers).

Bears have copied this strategy, similarly raising substantial amounts of money.⁶⁴

II. WHY AMERICAN COMMUNITIES SUBSIDIZE PROFESSIONAL SPORTS

Although professional sports teams rarely need subsidies to profit, most American communities continue to subsidize their professional sports teams because they fear their teams would otherwise move to other communities.⁶⁵ As explained by sports economist Rodney Fort, “[l]eaving some viable locations without teams enhances the bargaining power of existing owners with their current host cities.”⁶⁶ Some examples of viable locations without teams in each of the four premier sports leagues include: Los Angeles (no NFL team), Houston (no NHL team), Seattle (no NBA or NHL team), Cleveland (no NHL team), San Diego (no NBA or NHL team), St. Louis (no NBA team), Pittsburgh (no NBA team) and Baltimore (no NBA or NHL team).⁶⁷

In a perfectly competitive market, new premier leagues such as Shea and Rickey’s Continental League would periodically emerge to meet communities’ demand for sports teams, and existing leagues would in turn have an incentive to expand into on-hold cities.⁶⁸ However, in practice, the four premier sports

⁶⁴ See HOWARD & CROMPTON, *supra* note 3, at 288 tbl. 7-7 (compiling statistics on the size, price, and economic magnitude of current PSL programs).

⁶⁵ See Fort, *Direct Democracy*, *supra* note 7, at 149-50; FORT, SPORTS ECONOMICS, *supra* note 7, at 140 (“Owners acting through their leagues limit the number of teams in their league by choice rather than through the forces of competition. There are two important indicators that the number of teams is smaller than a more economically competitive sports world would give to fans. First, rival leagues do form occasionally Second, every time a league announces that it plans to expand, a long line of candidate-owners forms in hope of becoming the newest addition to the league.”).

⁶⁶ FORT, SPORTS ECONOMICS, *supra* note 7, at 141.

⁶⁷ See LEEDS & VON ALLMEN, *supra* note 7, at 100 tbl.3.7 (listing the fifteen most populous metropolitan areas and their respective sports teams).

⁶⁸ See generally DUQUETTE, *supra* note 15, at 52-53; FORT, SPORTS ECONOMICS, *supra* note 7, at 140.

leagues rarely face competition from any new league because sports markets have high barriers to entry.⁶⁹ Indeed, competitor leagues are rarely able to compete against MLB or the NBA, NFL and NHL because these leagues enjoy an almost insurmountable lead in building a fan base, signing superstar players, acquiring television broadcast contracts,⁷⁰ and obtaining playing facilities.⁷¹ For this reason, some liken a sports league's tight control on its number of franchises to a form of blackmail or extortion.⁷²

According to former Washington, D.C. mayor Sharon Pratt Kelly, the limited number of franchises in professional sports forces American communities to deal with "a prisoner's dilemma of sorts."⁷³ The dilemma is that "if no mayor succumbs to the demands of a franchise shopping for a new home, then the team will stay where they are."⁷⁴ However, this outcome is unlikely because "if Mayor A is not willing to pay the price,

⁶⁹ See Edelman, *Bargaining Power*, *supra* note 8, at 291. Almost all attempts to form rival, premier professional sports leagues in the four major sports over the past forty years have failed. For example, in football, the World Football League emerged in the 1960s and almost from its first games exhibited dire financial trouble; missed payrolls were common and the league folded during its second season. See ROBERT BERRY ET AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* 93 (1986). The United States Football League then emerged in 1983 with a differentiated strategy of playing football during the spring; the USFL quickly found itself in a bidding war for players with the NFL, and in November of 1984, it too filed for bankruptcy. See *id.* at 95-96. In basketball, Harlem Globetrotters owner Abe Saperstein launched the American Basketball League in 1961, but the league folded in its second season. See *id.* at 155. Its successor, the American Basketball Association, which started in 1967-68, performed slightly better; however, it too was heading toward bankruptcy in 1976 when the league disbanded and four existing teams joined the NBA. *Id.* at 156-57. In hockey, the World Hockey Association was founded by entrepreneurs Gary Davidson and Dennis Murphy in 1972, but by 1979, most of its teams were bankrupt; the four remaining franchises were acquired by the NHL. *Id.* at 213-14.

⁷⁰ See LEEDS & VON ALLMEN, *supra* note 7, at 124-25.

⁷¹ See QUIRK & FORT, *HARD BALL*, *supra* note 13, at 135.

⁷² See, e.g., *id.* at 6; *Hearings*, *supra* note 9, at 11 (testimony of Sen. Arlen Specter of Pennsylvania).

⁷³ Fort, *Direct Democracy*, *supra* note 7, at 150.

⁷⁴ *Id.*

Mayor B may think it is advantageous to open up the city's wallet. Then to protect his or her interest, Mayor A often ends up paying the demanded price.⁷⁵

III. WHY STADIUM SUBSIDIES ARE A BAD IDEA FOR LOCAL COMMUNITIES

Absent the monopoly power of America's professional sports leagues, few communities would likely subsidize the professional sports industry.⁷⁶ Although rooting for professional sports teams is often a source of personal enjoyment, stadium funding rarely adds economic value to a local community.⁷⁷ In addition, the social benefits of new public stadiums are often misaligned in favor of the already wealthy.⁷⁸

A. Sports Stadiums Add No Economic Value to The Local Community

It is often claimed by both sports owners and local government officials that public stadiums add great financial value to local communities.⁷⁹ For instance, Carolina Panthers

⁷⁵ *Id.*

⁷⁶ As empirical support for this statement, one needs to look no further than professional soccer in Europe, where the Associations Europeennes de Football imposes no restrictions on league entry, and as a result, teams regularly privately finance their own stadiums, or else relinquish significant rights over team assets to the public bodies that assist them. See STEFAN SZYMANSKI & ANDREW ZIMBALIST, NATIONAL PASTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER 130-31 (2005); see also Michael Smith, *IMG Venture to Offer Private Financing for College Facilities*, STREET & SMITH'S SPORTS BUS. J., Aug. 25, 2008, at 3 ("ISG, a London-based joint venture between IMG and Bastion Stadiums LLP, has used the private-financing model to pay for construction of Wembley Stadium [in England] as well as projects in Brazil and India.").

⁷⁷ See *infra* notes 79-94 and accompanying text.

⁷⁸ See *infra* notes 101-11 and accompanying text.

⁷⁹ See Dennis Zimmerman, *Subsidizing Stadiums: Who Benefits, Who Pays?*, in SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 120-25 (1997); see also John L. Crompton, *Economic Impact Analysis of Sports Facilities and Events: Eleven Sources of Misapplication*, 9 J. SPORT MGMT. 14, 15 (1995); *CLEAN v. State*, 928 P.2d 1054, 1057 (Wash. 1996)

owner Jerry Richardson once stated that “[c]ities use stadiums to facilitate and accomplish a wide variety of purposes [including serving] as the centerpiece of a broader urban renovation plan, and . . . enhancing local communities and their economies.”⁸⁰ Similarly, former Houston Mayor Lee Brown has claimed that building a football stadium and bringing professional football to Houston would “generate millions of dollars for our city.”⁸¹ Meanwhile, according to the Miami commissioners that approved publicly subsidizing a new Marlins ballpark, the new ballpark will soon help to economically revitalize Little Havana, an area surrounded by working class and low income housing.⁸²

Independent, empirical research, however, consistently has rebutted these claims, finding no positive correlation between facility construction and economic development.⁸³ One prominent research study, conducted by the Congressional Research Service, analyzed 30 different stadium projects and found that none of them positively impacted the local community.⁸⁴ Another study, conducted by economists Robert Baade and Allen Sanderson, found that subsidized sports facilities also do not improve local employment.⁸⁵ Meanwhile, a

(“Robbie Stern, Special Assistant to the President of the Washington State Labor Council, expanded on the view of the business persons, stressing the broader impact of the Mariners on the state’s economy, saying, ‘Here is an opportunity to use tax money to create family wage jobs’”).

⁸⁰ *Hearings, supra* note 9, at 61 (testimony of Jerry Richardson, Owner and Founder, Carolina Panthers).

⁸¹ FORT, SPORTS ECONOMICS, *supra* note 7, at 338, 339.

⁸² *Braman v. Miami-Dade County*, No. 08-03787-CA-15 1, 12-13 (Fla. Cir. Ct. Sept. 9, 2008).

⁸³ *See generally* Siegfried & Zimbalist, *supra* note 11, at 103.

⁸⁴ *See generally* Todd Senkiewicz, *Stadium and Arena Financing: Who Should Pay?*, 8 SETON HALL J. SPORT L. 575, 589 (1998) (citing William J. Donovan, *Stadiums: Winners or Losers*, PROVIDENCE JOURNAL-BULLETIN, Feb. 26, 1997, at A1).

⁸⁵ *See* Robert A. Baade & Allen R. Sanderson, *The Employment Effect of Teams and Sports Facilities*, in SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 93 (Roger G. Noll & Andrew Zimbalist eds., 1997) (describing how spending on spectator sports “is largely offset by reductions in other forms of leisure spending by consumers and other fiscal

third study, prepared by the Maryland Department of Business and Economic Development,⁸⁶ found that the Baltimore Ravens' new stadium cost more money and created fewer jobs than the best alternative public tax investment, and the stadium did not even lead to much in-state tourist spending.⁸⁷

A simple visit to some of the communities that have recently invested in new sports stadiums seems to buttress these conclusions.⁸⁸ For example, according to Jean Cryor, a former member of the Maryland House of Delegates, although the State of Maryland was promised by Ravens officials that building a new stadium would provide Baltimore with “a wave of tourism money,” in reality, most fans that travel to Baltimore to watch a Ravens game then drive directly home afterwards.⁸⁹ Similarly, according to Dr. Phillip Porter, an expert in sports economics from the University of South Florida, money spent at the ballpark generally does not spread to local businesses because “stadiums . . . are self-contained.”⁹⁰ In reaching this conclusion, Dr. Porter relied on a study he undertook of Tropicana Field, which was built in Tampa for the Rays baseball team.⁹¹

commitments by government entities”); *see also* Mark S. Rosentraub, *Stadiums and Urban Space*, in *SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS* 186 (Roger G. Noll & Andrew Zimbalist eds., 1997) (stating that even some paid consulting studies concede that the substitution effect does exist). Although there are studies available by paid consulting firms that claim new ballparks create thousands of jobs annually, those studies, which are self-serving, generally involve “an inappropriate methodology, based on antiquated input-output models and unrealistic assumptions.” ZIMBALIST, *MAY THE BEST TEAM WIN*, *supra* note 7, at 125.

⁸⁶ The Maryland Department of Business and Economic Development is part of the state's executive branch. This study was afterward reviewed by the Maryland Department of Fiscal Services – part of the state's legislative branch. *See Zimmerman, supra* note 79, at 122-23.

⁸⁷ *See Zimmerman, supra* note 79, at 122-23.

⁸⁸ *See infra* notes 89-92 and accompanying text.

⁸⁹ *Hearings, supra* note 9, at 31 (testimony of Jean B. Cryor, former Member, Maryland House of Delegates).

⁹⁰ *Braman v. Miami-Dade County*, No. 08-03787-CA-15 1, 13 (Fla. Cir. Ct. Sept. 9, 2008).

⁹¹ *Id.*

According to Porter, even fifteen years after the stadium was constructed, there is still little neighborhood development, and the surrounding area remains mostly abandoned.⁹²

In summary, as testified before Congress by sports economist Andrew Zimbalist, who now consults for MLB,⁹³ “most of the money that gets spent [on sports facilities] is [simply] re-circulated money within the town. It does not generate new value added.”⁹⁴

B. Social Benefits of Stadium Subsidies are Misaligned

Other supporters of stadium subsidies concede that building sports facilities do not in themselves revitalize the economy; yet, they still support stadium subsidies as way to provide social value.⁹⁵ Some argue that professional sports teams provide communities with a public good, the ability to “root for the home team,” and with a level of community spirit that would not exist in the absence of sports.⁹⁶ As explained by Seattle radio

⁹² *Id.* at 13; *see also id.* at 15 (“Dr. Porter has studied 13 stadiums nationwide and concluded that only four garnered a positive impact for the local community, while the remaining nine actually had a negative impact according to the sales tax data.”).

⁹³ *See* Nathan Vardi, *A Royal Mess (Professional Baseball, Kansas City Royals)*, FORBES, May 7, 2007, at 40; Jeff Nash, *Turnaround Job: Making Tigers’ Overnight Success Last*, CRAIN’S, DET. BUS. Oct. 16, 2006, at 1; Jeff Passan, *Slice of Strife – Royals say they need their \$55 million to compete*, KANSAS CITY STAR, Jan. 27, 2006, at D1.

⁹⁴ *Hearings, supra* note 9, at 37 (testimony of Andrew Zimbalist).

⁹⁵ *See* Martin Greenberg, *Sports Facilities and Development: Stadium Financing and Franchise Relocation Act of 1999*, 10 MARQ. SPORTS L.J. 383, 387 (2000); *CLEAN v. State*, 928 P.2d 1054, 1067 (Wash. 1996) (accepting the state’s argument that loss of the Seattle Mariners baseball club from Seattle would “diminish[] the quality of life for a substantial number of [the] state’s citizens”); *Hearings, supra* note 9, at 66 (testimony of Benjamin Klein, Professor of Economics, University of California, Los Angeles) (“One must take into account what economist call the public good consumption benefits of these projects.”); *Braman*, No. 08-03787-CA-15 at 17 (restating the contention of Miami-Dade County Mayor Carlos Alvarez that: “For children, for tourists, professional sports brings people of all walks of life together”).

⁹⁶ *See* Zimmerman, *supra* note 79, at 121.

talk show host Vincent Richini, the Mariners playing in Seattle provides “something that’s intangible . . . it’s a way of life.”⁹⁷

Another form of this same argument claims that professional sports teams help communities to develop national identities, increasing the morale of communities that host sports teams.⁹⁸ Mayors of what have traditionally been defined as second-tier cities such as Charlotte, Nashville and Oklahoma City have defended paying subsidies as a way to solve their cities’ long-term identity crises.⁹⁹ For example, on the day after Oklahoma City residents voted in favor of creating a 15-month, one-cent sales tax to fund renovating the city’s basketball arena and lure away the Seattle Supersonics, Oklahoma City Mayor Mick Cornett declared “the arena vote would help put Oklahoma City on a world stage.”¹⁰⁰

The problem with both of these policy arguments, however, is that the social benefits of building public stadiums skew in favor of the wealthy, whereas the costs skew in favor of the middle- and lower-class.¹⁰¹ In other words, government spending on sports facilities fails to follow the benefits principle of taxation - the principle that each taxpayer’s contribution to provide for a public service should remain in proportion to the benefits received from that service.¹⁰²

⁹⁷ *CLEAN*, 928 P.2d at 1054.

⁹⁸ See Senkiewicz, *supra* note 84, at 593 (citing MARK S. ROSENTRUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO’S PAYING FOR IT 19 (1997)).

⁹⁹ See *id.* at 593 (referencing Charlotte and Nashville as second-tier cities); see also *Oklahoma City Passes Arena Tax to Lure Sonics*, SEATTLE TIMES, Mar. 5, 2008, at A1 (referencing Oklahoma City).

¹⁰⁰ *Oklahoma City Passes Arena Tax to Lure Sonics*, *supra* note 99, at A1.

¹⁰¹ See Zimmerman, *supra* note 79, at 122.

¹⁰² See Zimmerman, *supra* note 79, at 120-21 (stating that “to implement the benefit principle of taxation, revenue must be raised or spending on other programs decreased in such a manner that the distribution of stadium costs matches the distribution of stadium benefits”).

1. Social Benefits of Stadium Subsidies

The main social benefit of stadium subsidies - the opportunity to attend games in the new stadium - skews in favor the wealthy because the current cost of attending a professional sports events precludes the lower- and middle-income segment of the population.¹⁰³ For example, in 2008, the average price for a family of four to attend a New England Patriots football game was nearly \$600.¹⁰⁴ Meanwhile, the average price for the same family to attend a Chicago Bears game was close to \$500.¹⁰⁵ For the common American, this means that taking his family to either one of these events would cost roughly one percent of that family's pre-tax income.¹⁰⁶

Recent stadium-design trends have only further priced the typical American out of the professional sports game market. For example, new seating innovations such as luxury boxes and premium seating have led to building new stadiums that contain a greater number of seats targeted for the ultra-wealthy.¹⁰⁷ In turn, many new stadiums have reduced their number of traditional seats.

2. Costs of Stadium Subsidies

By contrast, the tax burden of building new sports facilities often falls predominantly on the lower and middle classes.¹⁰⁸ From 1990 until 2003, sales taxes, which are regressive in

¹⁰³ *Id.* at 121.

¹⁰⁴ See Scott Van Voorhis & Greg Turner, *Pats Passes Priciest: Team Tops NFL with \$118 Average Ticket Price*, BOSTON HERALD, Sept. 6, 2008, at 18 (the exact projected price is \$596; this price includes four median price tickets (\$471); two small beers (\$15); four small soft drinks (\$16); four hot dogs (\$14); two game programs (\$10); two caps (\$30) and parking (\$40)).

¹⁰⁵ *Id.*

¹⁰⁶ See Roger Lehecka & Andrew Delblanco, *Ivy-League Letdown*, N.Y. TIMES, Jan. 22, 2008, at A21 (noting "the median family income in the United States is around \$50,000").

¹⁰⁷ See Zimmerman, *supra* note 79, at 121; ZIMBALIST, MAY THE BEST TEAM WIN, *supra* note 7, at 130.

¹⁰⁸ See generally Zimmerman, *supra* note 79, at 121.

nature, accounted for 29 percent of the public funds going to new stadium construction.¹⁰⁹ Meanwhile, in the most recent stadium building cycle, sales tax increases were used to fund new stadiums in Arlington, Cincinnati, Denver, Indianapolis, Oklahoma City and Tampa.¹¹⁰ In addition, local lotteries, which are also regressive in impact, were used in Seattle and in the State of Maryland to subsidize their new sports facilities.¹¹¹

Some of the more recent stadium construction plans, such as the one recently approved by Miami-Dade County, have attempted to address this concern by raising funds for new sports stadiums exclusively from tourist taxes. However, even where stadium funding comes entirely from tourist taxes, there is still an opportunity cost in the loss of the opportunity to raise funding for an alternative project that may help the community at large, rather than a project that primarily advantages already wealthy team owners and upper-class fans.

IV. RECENT PROPOSALS TO CURB STADIUM SUBSIDIES

Over the past several years, politicians and academics have proposed many solutions to help curb sports teams' excessive bargaining power in demanding stadium subsidies.¹¹² These proposals generally fall into four broad categories: enforcing state lending of credit and public purpose doctrines; ordering league expansion; requiring breakup of the big leagues (divestitures); and implementing congressional statutes.¹¹³

¹⁰⁹ ZIMBALIST, *MAY THE BEST TEAM WIN*, *supra* note 7, at 130.

¹¹⁰ See Senkiewicz, *supra* note 84, at 585-86; see also *8 Projects to Watch in 2008*, STREET & SMITH'S SPORTS BUS. J., Jan. 16, 2008, at 16 (explaining Indianapolis's use of various sales taxes including a food and beverage tax and a restaurant tax); *Oklahoma City Passes Arena Tax to Lure Sonics*, *supra* note 99, at A1 (referencing the use of a sales tax in Oklahoma City).

¹¹¹ See Zimmerman, *supra* note 79, at 126 (citing CHARLES T. CLOTFELTER & PHILLIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* (1989)); see also Senkiewicz, *supra* note 84, at 586.

¹¹² See *infra* notes 114-227 and accompanying text.

¹¹³ *Id.*

A. Enforcing State Lending-of-Credit and Public Purpose Doctrines

State lending-of-credit and public purpose doctrines are the oldest and generally most conservative way to address the problem of business demands for public spending.¹¹⁴ These doctrines arose alongside the growth of big business in the mid-1800s, as citizens became enraged at state and local governments for subsidizing powerful business interests such as the railroad industry.¹¹⁵

Since the mid-1800s, forty-six states have applied these doctrines to prohibit the use of public money to aid private enterprise.¹¹⁶ Courts, however, have rarely applied these doctrines against the building of public sports facilities.¹¹⁷

1. Lending-of-Credit Doctrines

Lending-of-credit doctrines arise from state enactments that prohibit state and local governments from lending credit to private enterprises.¹¹⁸ For example, Article III, Section 34 of the Maryland Constitution states, in pertinent part, that “[t]he credit of the State shall not in any manner be given, or loaned to, or in aid of any individual association or corporation.”¹¹⁹ Similarly, Article VIII, Sections 5 and 7 of the Washington Constitution provide that the state and its political subdivisions may not give or loan credit to any private individual or

¹¹⁴ See Edelman, *Bargaining Power*, *supra* note 8, at 297. Generally, advocates of state autonomy support curbing professional sports’ bargaining power via state statutes because it allows each state to independently determine whether to subsidize sports facilities. *Id.* at n.151.

¹¹⁵ *Id.*

¹¹⁶ Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace: The Battle to Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 412 (1999).

¹¹⁷ See *infra* notes 122-27 and accompanying text, and notes 132-48 and accompanying text.

¹¹⁸ See generally Rubin, *supra* note 116, at 397-99.

¹¹⁹ MD. CONST. art. III, § 34.

corporation.¹²⁰ Meanwhile, Article VII, Section 10 of the Florida Constitution states that “[n]either the state nor any county . . . shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person”¹²¹

Although the language of lending-of-credit doctrines seems on its face to prohibit publicly subsidizing professional sports facilities,¹²² courts have repeatedly found ways to avoid applying these doctrines in that context.¹²³ For example, the Washington Supreme Court, in the case *CLEAN v. State*,¹²⁴ found that Article VIII, Sections 5 and 7 of the Washington Constitution actually permitted the public funding of a new stadium for the Seattle Mariners because the stadium was to be owned and managed by public government, and the Mariners were required to pay “reasonable rent.”¹²⁵ The court in *CLEAN* did not even inquire into how to determine if a particular rent is “reasonable.”¹²⁶ It simply deferred to the judgment of those same executives who had decided in the first instance to build a new ballpark.¹²⁷

2. Public Purpose Doctrines

Public purpose doctrines, meanwhile, arise from state enactments that require governments to use public money only for public purposes.¹²⁸ For example, Article VII, Section 1 of the

¹²⁰ WASH. CONST. art. VIII, §§ 5, 7. See also *CLEAN v. State*, 928 P.2d 1054, 1061 (Wash. 1996).

¹²¹ FLA. CONST. art. VII, § 10.

¹²² See Rubin, *supra* note 116, at 413.

¹²³ See *infra* notes 124-27 and accompanying text; see also *CLEAN*, 928 P.2d at 1062; *Libertarian Party of Wis. v. State*, 546 N.W.2d 424 (Wis. 1996); Rubin, *supra* note 116, at 412-16.

¹²⁴ *CLEAN*, 928 P.2d at 1061.

¹²⁵ *Id.* at 1062.

¹²⁶ See *id.*

¹²⁷ *Id.* (“In our judgment, a plain reading of the Stadium Act reveals no intent by the Legislature to donate public funds to the Seattle Mariners.”).

¹²⁸ Rubin, *supra* note 116, at 417.

Washington Constitution states that taxes “shall be levied and collected for public purposes only.”¹²⁹ Similarly, Article VII, Section 9 of the Florida Constitution prevents counties from levying taxes for anything other than “municipal purposes.”¹³⁰

Much like with enforcing lending-of-credit doctrines, state courts have been hesitant to apply public purpose doctrines against stadium subsidies.¹³¹ For instance, in *CLEAN*, the Supreme Court of Washington rejected the argument that spending tax dollars on the public development of a baseball stadium as a home field for the Seattle Mariners violates Article VII, Section 1 of the Washington Constitution.¹³² The Washington Supreme Court instead found that the “construction of a publicly owned stadium to be leased to professional sports teams serves a public purpose” as long as it “confer[s] a benefit of reasonably general character to a significant part of the public.”¹³³ While the court noted that it is “not unmindful of the fact that the Seattle Mariners may also reap benefits as the principal tenant of the publicly owned stadium [t]he fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose.”¹³⁴

¹²⁹ WASH. CONST. art. VII, § 1.

¹³⁰ FLA. CONST. art. VII, § 9.

¹³¹ See *infra* notes 132-53 and accompanying text.

¹³² *CLEAN v. State*, 928 P.2d 1054, 1059, 1061 (Wash. 1996).

¹³³ *Id.* at 1059-60.

¹³⁴ *Id.* at 1061 (citing *United States v. Town of N. Bonneville*, 621 P.2d 127 (1980)). The court further went on to state — in direct opposition to almost all independent academic analyses of the issue — that “public provision of a venue for professional sports franchises serves a public purpose in that the presence in a community of a professional sports franchise provides jobs, recreation for citizens, and promotes economic development and tourism.” *Id.* Although the plaintiffs submitted several articles explaining that the economic benefits to a community of building a sports stadium are negligible, the court found that determining whether sports stadiums provide economic benefits is an issue that “is better left to the Legislature, which can assess the relative merits of the arguments for and against a proposition.” *Id.* at 1066. Based on the discussion in Part III of this paper, it is difficult to fathom how the court could have earnestly reached that conclusion. See *supra* notes 76-111 and accompanying text.

Until recently, it seemed that, unlike Washington, the State of Florida was one state that still was willing to apply its “public purpose” doctrine against funding the construction of sports stadiums. Specifically, in the 1966 case, *Brandes v. City of Deerfield Beach*,¹³⁵ the Florida Supreme Court found that the City of Deerfield Beach’s proposal to build a spring training facility for the Pittsburgh Pirates baseball team violated Florida’s public purpose doctrine.¹³⁶ According to the court in *Brandes*,

[t]he mere incidental advantage to the public resulting from a public aid in the promotion of [a professional sports team] is not a public or municipal purpose; and the incidental benefits or advantages gained by private enterprise from expenditures made for a public purpose do not vitiate or diminish the public purpose.¹³⁷

Nevertheless, two of the more recent Florida “public purpose” cases, *Poe v. Hillsborough County*,¹³⁸ and *Braman v. Miami-Dade County*,¹³⁹ have all but stripped away the holding in *Brandes*.¹⁴⁰ First, in *Poe*, the Florida Supreme Court upheld public funding of a football stadium for shared use by the Tampa Bay Buccaneers and various public high school teams.¹⁴¹ At the time, it seemed the decision in *Poe* may have implicitly differentiated *Brandes* on two factual grounds: (1) the publicly financed stadium in *Poe* was to be used for certain public events, including high school and college football games, and (2) the stadium built in *Poe* was intended to attract additional revenue

¹³⁵ *Brandes v. City of Deerfield Beach*, 186 So. 2d 6 (Fla. 1966).

¹³⁶ *Id.* at 7, 12.

¹³⁷ *Id.* at 12.

¹³⁸ *Poe v. Hillsborough County*, 695 So. 2d 672 (Fla. 1997).

¹³⁹ *Braman v. Miami-Dade County*, No. 08-03787-CA-15 1, 5 (Fla. Cir. Ct. Sept. 9, 2008).

¹⁴⁰ See *infra* notes 141-151 and accompanying text.

¹⁴¹ *Poe*, 695 So. 2d at 679.

by hosting the Super Bowl, a major tourist attraction.¹⁴² The Florida Supreme Court, however, never explained these differentiations in its opinion.

Then, in *Braman* (decided on Sept. 9, 2008), a Florida lower court upheld Miami-Dade County's decision to build a baseball stadium for the Florida Marlins, even though the stadium agreement only entitled Miami-Dade County to use of the stadium for sixteen days per year.¹⁴³ The *Braman* court reached this ruling based on a broad application of *Poe* and, essentially, the rejection of *Brandes*.¹⁴⁴

According to *Braman*, under Florida law "the burden is on the Plaintiff to prove that [a stadium] project . . . fails to serve a paramount public purpose."¹⁴⁵ Based on this standard, a court "must give deference to the Commission as long as it has competent substantial evidence for its decision"¹⁴⁶ The *Braman* court ultimately found "ample legislative findings in the evidence . . . for a finding that . . . the building of a [Marlins] stadium constitutes a paramount public purpose."¹⁴⁷ Nevertheless, the court conceded that "*the Marlins are getting what amounts to a sweet deal.*"¹⁴⁸

¹⁴² See *id.* at 678.

¹⁴³ According to the lease, the Marlins have full stadium rights for 349 days per year, while "[t]he County and City will have the right to use the stadium for 16 days each year for community events." *Braman*, No. 08-03787-CA-15 at 9. The Marlins have first choice on selecting days. See *id.*

¹⁴⁴ See *id.* at 15. The Florida lower court refers to the facts surrounding the Marlins subsidy, and perhaps all other modern subsidies for Florida sports teams, as "strikingly similar" to *Poe*, and different from *Brandes*. *Id.* at 27, 34. The *Braman* court first distinguished *Brandes* because that case was decided in 1966, "when there were no legislative declarations by the state that the construction of a sports facility served a public purpose." *Id.* at 34. In addition, the court found it relevant that "the sports facility in *Brandes* served an out-of-state sports team providing them with a spring training facility for exhibition games." *Id.*

¹⁴⁵ *Id.* at 20.

¹⁴⁶ *Id.* at 23.

¹⁴⁷ *Id.* at 34.

¹⁴⁸ *Id.* (emphasis added).

As a practical matter, the *Braman* holding helps to show just how unlikely it is today that any court would strictly interpret its state's "public purpose" doctrine against the building of a sports stadium.¹⁴⁹ Indeed, the opinion in *Braman* spends more than a full page citing to cases in which courts from other states have upheld building sports stadiums under their state's public purpose doctrine, a matter seemingly of great implicit importance.¹⁵⁰ According to the court in *Braman*, "[w]hile the holdings of courts from other jurisdictions are not determinative of the issue . . . these cases are certainly instructive . . . in deciding [the] issue"¹⁵¹

Based on the Florida state court's ruling in *Braman*, as well as similar rulings reached by many other state courts, it seems futile to continue attempting to regulate professional sports subsidies through state law, as this approach only shifts the "prisoner's dilemma" discussed above by former Washington, D.C. mayor Sharon Kelly from state executives to state judges.¹⁵² A federal-backed solution, applying to all fifty states, therefore seems like a far better approach.¹⁵³

B. Court-ordered Expansion of Professional Sports Leagues

A second potential way to curb professional sports teams' bargaining power involves using federal antitrust law to order the four premier sports leagues to expand their total number of

¹⁴⁹ See generally QUIRK & FORT, *HARD BALL*, *supra* note 13 (discussing the prisoner's dilemma).

¹⁵⁰ *Braman v. Miami-Dade County*, No. 08-03787-CA-15 1, 32-34 (Fla. Cir. Ct. Sept. 9, 2008).

¹⁵¹ *Id.* at 35-36.

¹⁵² See Edelman, *Bargaining Power*, *supra* note 8, at 299 ("This argument fails to consider that part of the reason why states are so unwilling to strictly interpret their constitutions is because individual states fear that in doing so they would lose professional sports teams to more leniently-interpreting states.").

¹⁵³ See *id.*

teams.¹⁵⁴ This approach would lead to an increased supply of sports teams per league, thus better balancing team supply with community demand.¹⁵⁵ As a result, it would remove from team owners the ability to credibly threaten to relocate to a different market if their host community denies subsidies.¹⁵⁶

Thus far, only two plaintiffs have attempted to obtain court-ordered entry into an existing professional sports league. Both plaintiffs, however, have failed on their claims.¹⁵⁷

1. *Mid-South Grizzlies v. National Football League*

In the first case, *Mid-South Grizzlies v. National Football League*, the plaintiff, Mid-South Grizzlies Limited Partnership, brought an antitrust suit in the Eastern District of Pennsylvania against each of the individual NFL teams, arguing that the teams' refusal to accept the Grizzlies' membership into the league illegally restrained trade.¹⁵⁸ The reviewing court in that case ultimately ruled in favor of the NFL teams, holding that "a professional sport league's refusal to accept for membership a qualified applicant for a franchise in an area where no current league team is located" does not violate either Section 1 or Section 2 of the Sherman Act.¹⁵⁹

More specifically in *Mid-South Grizzlies*, the Grizzlies ownership group filed three separate antitrust claims. The first claim contended that the NFL teams' collective decision to deny them entry into the NFL amounted to an illegal group boycott

¹⁵⁴ Section 1 of the Sherman Act reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (2004). Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (2004).

¹⁵⁵ See generally FORT, SPORTS ECONOMICS, *supra* note 7, at 141.

¹⁵⁶ *Id.*

¹⁵⁷ See *infra* notes 158-78 and accompanying text.

¹⁵⁸ *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 560-61, 562 (E.D. Pa. 1982), *aff'd* 720 F.2d 772 (3d Cir. 1983).

¹⁵⁹ *Id.* at 560.

under Section 1 of the Sherman Act.¹⁶⁰ With respect to that claim, the district court ruled in favor of the NFL based on the Rule of Reason.¹⁶¹ The court explained that the NFL's decision to limit its number of teams gave the Grizzlies and other rejected franchise applicants the "motivation to form a rival league" that could compete against the NFL teams.¹⁶² Thus, the court found the restraint pro-competitive.¹⁶³ The Third Circuit thereafter affirmed.¹⁶⁴

The Grizzlies' second claim contended that the NFL clubs again violated Section 1 of the Sherman Act by conspiring to deny the Grizzlies access to an essential facility in the form of league membership.¹⁶⁵ Here, the district court again found in favor of the NFL clubs, concluding that the Grizzlies' "reliance on [the essential facilities doctrine was] misplaced" because the essential facilities doctrine "is applicable only where a party is being denied access to something necessary for that party to

¹⁶⁰ See *id.* at 565-66.

¹⁶¹ *Id.* In assessing whether the allegedly anticompetitive conduct violates Section 1 of the Sherman Act, a court will begin with a *prima facie* review of the conduct by applying one of the Supreme Court's three sanctioned tests. Edelman & Harrison, *supra* note 7, at 38. If the allegedly anticompetitive conduct seems to yield an ambiguous effect, a court will apply Rule of Reason analysis, under which a court conducts a full economic investigation. *Id.* at 39. Applying the Rule of Reason, a court will determine whether a plaintiff can make a *prima facie* showing of a violation based on the presence of the following three factors: (1) market power, (2) anticompetitive effects that exceed any procompetitive justifications, and (3) harm. *Id.*

¹⁶² *Mid-South Grizzlies*, 550 F. Supp. at 568.

¹⁶³ *Id.*

¹⁶⁴ See *Mid-South Grizzlies*, 720 F.2d 772, 786-87 (noting, however, that the court of appeals did not accept the NFL's position that there is no intra-league competition).

¹⁶⁵ See *Mid-South Grizzlies*, 550 F. Supp. at 569. The "essential facilities doctrine" is applicable where a party is denied access to something necessary to engage in business which is controlled by his competitors. *Id.* at 569-70. Under this doctrine, courts have required certain joint ventures to adopt objective membership rules, giving all parties equal opportunity to participate in the venture. Edelman, *Bargaining Power*, *supra* note 8, at 303. Courts have held essential facilities to include railroad hubs, bridges and ferries, access to news stories, local telephone lines, and, even in certain circumstances, stadium usage. *Id.* at 303-04 (citing several cases).

engage in business which is controlled by his competitors.”¹⁶⁶ According to the court, the Mid-South Grizzlies were not competitors to the other NFL clubs in the market for football clubs because “plaintiffs wish to join with defendants, not to compete with them.”¹⁶⁷ On this issue, the Third Circuit Court of Appeals again affirmed.¹⁶⁸

Finally, the Grizzlies’ third antitrust claim contended that the NFL clubs unlawfully monopolized the professional football market in violation of Section 2 of the Sherman Act.¹⁶⁹ Here, the district court similarly found no violation because it found no abuse by the NFL. The district court concluded that “[p]laintiffs simply are not rivals or potential rivals of defendants except on the playing field,” and that the Grizzlies are “still free to promote a rival league,” as well as that the NFL clubs’ actions “have done nothing to prevent the formation of a rival league or the fielding of a team in Memphis, Tennessee.”¹⁷⁰ Thereafter, the Third Circuit Court of Appeals affirmed, noting that “the Memphis home team market has been left by the NFL for potential competitors. Thus on this record summary judgment on the section 2 Sherman Act claim was also proper.”¹⁷¹

2. *Seattle Totems Hockey Club, Inc. v. National Hockey League*

In the second case, *Seattle Totems Hockey Club, Inc. v. National Hockey League*, a Seattle hockey club, which had been a member of the defunct World Hockey League and was thereafter denied entry into the NHL, brought a Section 2 claim in the Ninth Circuit against the NHL teams.¹⁷² Much like the Third Circuit’s findings in *Mid-South Grizzlies*, the Ninth Circuit

¹⁶⁶ *Mid-South Grizzlies*, 550 F. Supp. at 569 (emphasis removed).

¹⁶⁷ *Id.* at 570.

¹⁶⁸ *Mid-South Grizzlies*, 720 F.2d at 786-87.

¹⁶⁹ *See Mid-South Grizzlies*, 550 F. Supp. at 571.

¹⁷⁰ *Id.*

¹⁷¹ *Mid-South Grizzlies*, 720 F.2d at 788.

¹⁷² *Seattle Totems Hockey Club, Inc. v. NHL*, 783 F.2d 1347 (9th Cir. 1986).

rejected the Totems' monopolization claim, finding that "any denial of an NHL franchise to plaintiffs . . . was procompetitive, rather than anti-competitive in its effect and hence not violative of the anti-trust laws."¹⁷³

According to the Ninth Circuit, for "the plaintiff [to succeed on its Section 2 claim, it] must prove that the defendant's actions caused a decrease in competition in the relevant market."¹⁷⁴ However, according to the court, the Totems "were not competing with the NHL; they were seeking to join it."¹⁷⁵ In addition, the Ninth Circuit found no proof that the Totems were denied membership to protect another major league team because, at the time, the Seattle market had no NHL hockey team.¹⁷⁶

Based on this holding, as well as the similar holding in *Mid-South Grizzlies*, it seems clear that a plaintiff's best chance, if any, to obtain court-ordered expansion into an existing sports league would involve seeking a court order to enter a market that already contains a team in that league.¹⁷⁷ Nonetheless, when reading *Mid-South Grizzlies* and *Seattle Totems* alongside other antitrust cases involving the Rule of Reason, the chances are remote that even under the same-market scenario any court would order a sports league to expand.¹⁷⁸

C. Applying Antitrust Law to Break up Professional Sports Leagues

A third potential way to curb professional sports clubs' bargaining power would be to impose a court-ordered breakup

¹⁷³ *Id.* at 1350 (quoting unpublished district court opinion).

¹⁷⁴ *Id.* (quoting *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983)) (footnote omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* Indeed, this leaves open the possibility that the Ninth Circuit may reach a different ruling if a team seeks to enter a sports league in a market where one of the league's teams already exists. *See id.*

¹⁷⁷ *See supra* notes 169-70 and accompanying text.

¹⁷⁸ *See supra* notes 158-76 and accompanying text.

of the four premier sports leagues.¹⁷⁹ By breaking up the big leagues, economic incentives for teams and leagues would change so that sports leagues would have the enticement to expand as quickly as possible to maximize league revenues, rather than keep potential host cities on hold without a team.¹⁸⁰

Any proposal to break up the four premier sports leagues would require that courts apply similar logic to the professional sports market as was applied to the telecommunication market in the famous breakup of AT&T's long-term monopoly over telephone services.¹⁸¹ It would first require that the Department of Justice bring a monopolization charge against the four premier sports leagues.¹⁸² Then, a federal court would need to hold that the leagues violated antitrust laws, and order the violation remedied by separating MLB, the NBA, NFL and NHL into smaller, competitor leagues.¹⁸³

The argument to break up the professional sports leagues is a favorite amongst academics in both the areas of law and economics.¹⁸⁴ In the famous 1997 article, *Economic Impact of Sports Teams and Facilities*, two distinguished economics

¹⁷⁹ See Rodney Fort, *Employment Effect of Teams and Sports Facilities*, in SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 88 (Roger G. Noll & Andrew Zimbalist eds., 1997); FORT, SPORTS ECONOMICS, *supra* note 7, at 445-49; QUIRK & FORT, HARD BALL, *supra* note 13, at 177; PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 194-95 (2d ed. 1998).

¹⁸⁰ See FORT, SPORTS ECONOMICS, *supra* note 7, at 140.

¹⁸¹ See WEILER & ROBERTS, *supra* note 179, at 643 (citing *United States v. Am. Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982)).

¹⁸² See generally QUIRK & FORT, HARD BALL, *supra* note 13, at 177.

¹⁸³ See Stephen D. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV 643 (1989); WEILER & ROBERTS, *supra* note 179, at 643. Usually, a movement to break up the four premier sports leagues would require courts to consider sports leagues under Section 2 of the Sherman Act; if the court considers this path, there are two kinds of charges available under Section 2 of the Sherman Act. *Id.* at 596. A monopolization charge consists of possession of monopoly power and use of unacceptable means to acquire or maintain that power. *Id.* An "attempt to monopolize" claim requires a showing that the defendant is dangerously close to obtaining market power and is taking steps with the specific attempt to obtain a monopoly. *Id.*

¹⁸⁴ See *infra* notes 185-90 and accompanying text.

professors, Roger Noll and Andrew Zimbalist, concluded that if there were multiple leagues per sport, professional sports' excessive bargaining power would dissipate.¹⁸⁵ According to Noll and Zimbalist, in a multiple league model, each league would expand into as many markets as could support a team, and each league would place more teams into the markets that could support multiple teams.¹⁸⁶ As Zimbalist later testified to Congress, “[i]f you had the AL and NL competing in business terms in baseball [as entirely separate league structures], you wouldn't have had Washington DC, one of the 10 largest media markets in the United States, without a baseball team.”¹⁸⁷

Concurring with Noll and Zimbalist's position are economics professors James Quirk and Rodney Fort, who in their 1999 book *Hard Ball* conclude that there are substantial market benefits to creating competing leagues in each premier, professional sport.¹⁸⁸ In addition, sports law professors Paul Weiler and Gary Roberts, co-authors of the field's leading textbook *Sports and the Law*, also recognize that the economics of the multiple-league model would remove incentives for teams to demand government subsidies.¹⁸⁹ Weiler and Roberts explain that the competitive pressures generated by multiple sports leagues would further lead to innovations that would enhance fans' overall enjoyment of sports, such as those that occurred

¹⁸⁵ Roger Noll & Andrew Zimbalist, *Economic Impact of Sports Teams and Facilities*, in SPORTS, JOBS AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 65, 88 (1997).

¹⁸⁶ NOLL & ZIMBALIST, *supra* note 185, at 88. Since accepting a consulting position with MLB, Zimbalist has seemed to soften on his stance against public funding for sports stadiums. See Andrew Zimbalist, *Rays' Owners Offer Worthy Finance Plan for St. Petersburg*, STREET & SMITH'S SPORTS BUS. J., Dec. 17, 2007, at 46 (supporting a new stadium-building proposal where the Tampa Bay Rays organization contributes “roughly \$150 million, or one-third of the construction costs of the new ballpark”). However, Zimbalist's seemingly softened position goes against the weight of his research conducted throughout his career, as well as positions that he has previously taken while testifying under oath. See, e.g., *Hearings*, *supra* note 9, at 38-40 (testimony of Andrew Zimbalist).

¹⁸⁷ *Hearings*, *supra* note 9, at 38 (testimony of Andrew Zimbalist).

¹⁸⁸ See QUIRK & FORT, *HARD BALL*, *supra* note 13, at 177.

¹⁸⁹ See *id.*; see also WEILER & ROBERTS, *supra* note 179, at 594.

when the American Basketball Association briefly competed against the NBA and introduced the slam dunk and three-point shot.¹⁹⁰

Nevertheless, there are also real problems with breaking up professional sports leagues. The main problem with breaking up the big four professional leagues is that historically the free market has failed to sustain multiple, premier leagues competing against one another in the same sport.¹⁹¹ Although the current sample size is too small to conclude with certainty that a competitive sports league model would never work, any long-term attempts in America at multiple-league competition, thus far, have either led to a merger of the leagues or else failure of at least one of the leagues.¹⁹² Such a result may be inevitable. Historically, in a multi-league model, one league generally gains a comparative advantage and drives the others out of business—even if all of the leagues begin operating at the same time and with similar resources.¹⁹³ Alternatively, both leagues may

¹⁹⁰ WEILER & ROBERTS, *supra* note 179, at 595.

¹⁹¹ See, e.g., *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 563 (E.D. Pa. 1982), *aff'd* 720 F.2d 772 (3d Cir. 1983), (“The NFL has its roots early in this century. Throughout the years several other leagues appeared usually only for a short time without much success.”); DAVID QUENTIN VOIGHT, *THE LEAGUE THAT FAILED* (The Scarecrow Press, Inc. 1998) (discussing the Inter-League Wars in professional baseball during the early 1890s, which eventually led to the survival of just one professional baseball league); Jody Goldstein, *Alive & Kicking in the U.S.A.*, HOUS. CHRON., June 5, 1994, at 21 (discussing how competition between the National Indoor Soccer League and the Major Indoor Soccer League helped drive most teams in both leagues into bankruptcy); Lena Williams, *Former Team Official Recounts the A.B.L.’s Dizzying Descent*, N.Y. TIMES, Apr. 2, 1999, at D5 (discussing how the rivalry between America’s two premier women’s basketball leagues resulted in the Women’s National Basketball Association driving the American Basketball League into bankruptcy).

¹⁹² See FORT, *SPORTS ECONOMICS*, *supra* note 7, at 151 (Table 5.4 Pro Sports League Rivalries) (showing the ultimate fate of rival professional sports leagues in the premier professional sports); *but see* Joe Nocera, *It’s a Bloody Takeover*, N.Y. TIMES, Sept. 12, 2008, at MM-34 (mentioning that the Premier League and the Football League have both survived in England, even after the 20-team Premier League broke away from the 92-team Football League).

¹⁹³ See Edelman, *Bargaining Power*, *supra* note 8, at 302; *see also* FORT, *SPORTS ECONOMICS*, *supra* note 7, at 153-56. Indeed, there are a few exceptions; for example, in the early 1960s, the American Football League seemed to survive as a rival to the NFL, until 1966 when the leagues merged into one. See

simultaneously drive each other out of business by both overpaying for players and advertisements in attempts to become the dominant league.¹⁹⁴

This “survival of the fittest” dynamic in professional sports appeared subsequent to brief eras of competition in 1890s baseball, 1980s men’s soccer, and late 1990s women’s basketball.¹⁹⁵ A likely reason for it is that premier sports leagues are different from other forms of business in that they require the services of elite members of their labor force in order to maintain “major league” status. According to Bill Veeck, arguably the greatest owner and promoter in professional sports history, operating a professional sports team involves marketing dreams —intangible benefits identified with the best players, coaches and managers.¹⁹⁶ These dreams are only obtainable through extraordinarily high labor-market competition.¹⁹⁷

Additional reasons why breaking up the big leagues may fail include the logistical costs involved in the breakup,¹⁹⁸ as well as the high start-up costs of constructing new sports facilities absent strong guarantees of league sustainability, and the fact that sports fans seem to enjoy the tradition that underlies the way leagues currently operate.¹⁹⁹ Unlike consumers of

also Mid-South Grizzlies, 550 F. Supp. at 563; FORT, SPORTS ECONOMICS, *supra* note 7, at 151. In addition, baseball’s National League and American League effectively coexisted until they silently merged together into MLB in 1903. *See id.*

¹⁹⁴ *See* Edelman, *Bargaining Power*, *supra* note 8, at 302; *see also* FORT, SPORTS ECONOMICS, *supra* note 7, at 156.

¹⁹⁵ *See supra* note 191 and accompanying text.

¹⁹⁶ *See generally* QUIRK & FORT, HARD BALL, *supra* note 13, at 4.

¹⁹⁷ *See generally id.* at 135. Indeed, there is probably a sustainable market to create rival sports on the minor league level. *See* Edelman, *Bargaining Power*, *supra* note 8, at 302 (citing ARTHUR T. JOHNSON, MINOR LEAGUE BASEBALL AND LOCAL ECONOMIC DEVELOPMENT 1-35 (Univ. of Ill. Press 1995)). However, in many ways, this market already appears to be highly saturated. *See* Edelman, *Bargaining Power*, *supra* note 8, at 302.

¹⁹⁸ *See generally* Edelman, *Bargaining Power*, *supra* note 8, at 303.

¹⁹⁹ *See, e.g., Play at the Plate: Fans Want ‘Devil Ray’ to Stay*, TAMPA BAY BUS. J. (May 1, 2007), available at 2007 WLNR 8219824 (tradition sensitive fans oppose team’s proposed name change); Ron Chimelis, *Baseball Displays Smarts*, THE REPUBLICAN, Nov. 17, 2005, at C1 (“Baseball fans treat the game’s

telecommunications services, most consumers of professional sports place significant value on maintaining historical consistency and tradition within the game — something they might not want to sacrifice, even if it were to lead to a personal cost savings.²⁰⁰

D. Congressional Statutes

Finally, a fourth potential way to reduce professional sports leagues' bargaining power is through congressional statutes.²⁰¹ Over the past fifteen years, two proposals that were intended to address sports leagues' excessive bargaining power were New York Senator Daniel Patrick Moynihan's 1996 Stop Tax-Exempt Arena Debt Issuance Act ("STADIA"),²⁰² and Pennsylvania Senator Arlen Specter's 1999 Stadium Financing and Franchise Relocation Act ("SFFRA").²⁰³ Neither of these two proposals, however, ever went to a congressional vote.²⁰⁴ In addition, even if passed, neither of these proposals would have fully resolved the problem of sports stadium subsidies.²⁰⁵

The first of these proposals, STADIA, was intended to prevent tax-exempt federal bonds from financing recreational facilities managed by private authorities.²⁰⁶ Ultimately, Congress rejected STADIA for various reasons, including that

traditions and records as sacred"); Thomas J. Fitzgerald & Colleen Mancino, *N.J. Has the Other Sports, So . . . 'Why not Baseball?' Local Fans Speak Out: Bring the Yankees West*, N.J. REC., Aug. 9, 1999, at A3 ("Still, baseball fans worship tradition, and some said safety and convenience couldn't outweigh [that].").

²⁰⁰ Fitzgerald & Mancino, *supra* note 199, at A3.

²⁰¹ See *infra* notes 202-18 and accompanying text.

²⁰² See Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 217-19 (2002); see also WEILER & ROBERTS, *supra* note 179, at 265.

²⁰³ S. 952, 106th Cong. (1999).

²⁰⁴ WEILER & ROBERTS, *supra* note 179, at 630-31.

²⁰⁵ See *infra* notes 208, 216-18 and accompanying text.

²⁰⁶ See Goodman, *supra* note 202, at 217-219; see also WEILER & ROBERTS, *supra* note 179, at 265.

the bill had an adverse effect on zoos and libraries.²⁰⁷ However, even if Congress had enacted STADIA, the bill would have failed to prevent American cities from financing professional sports stadiums via tax-exempt local bonds.²⁰⁸ As a result, STADIA would have done little to cure the actual problem of teams demanding subsidies, as long as other government financing arrangements still remained available.

SFFRA, meanwhile, intended to use antitrust principles, including threats of repealing the Sports Broadcasting Act of 1961,²⁰⁹ to limit the amount of money that local governments could contribute to financing professional baseball and football facilities.²¹⁰ Specifically, SFFRA would have required both MLB and NFL teams, in order to maintain their antitrust exemption for pooling sports broadcasts,²¹¹ to place ten percent of their national broadcasting revenues into a trust fund reserved for stadium financing, and contribute 50 percent of the cost of new stadiums from that fund, with individual team owners paying at

²⁰⁷ Goodman, *supra* note 202, at 218; *see also* WEILER & ROBERTS, *supra* note 179, at 630-61 (noting that Senator Moynihan's retirement and death may have played a role in the abrupt loss of focus on ending tax-exempt bond spending on sports facilities).

²⁰⁸ *See* Goodman, *supra* note 202, at 217-18.

²⁰⁹ The Sports Broadcasting Act of 1961 allows professional sports teams in the four premier professional sports leagues to pool their broadcast rights without risk of violating Section 1 of the Sherman Act.

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports . . . by which any league of clubs sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.

Sports Broadcasting Act, 15 U.S.C. § 1291 (2000); *see also* WEILER & ROBERTS, *supra* note 179, at 641; FORT, SPORTS ECONOMICS, *supra* note 7, at 384 ("Under the Sports Broadcasting Act of 1961, league-wide TV contracts . . . are exempted from antitrust. This exemption continued to the present day, despite the fact that the Supreme Court struck down precisely the same type of behavior by the NCAA."); Edelman, *Single Entity*, *supra* note 3, at 918 n.162.

²¹⁰ *See Hearings*, *supra* note 9, at 1-2.

²¹¹ *See* 15 U.S.C. § 1291.

least 25 percent of the new stadium cost and local taxpayers paying no more than 25 percent.²¹²

According to Specter, SFFRA was a much needed piece of legislation because MLB and NFL teams were demanding publicly financed stadiums from communities “at a time when [these teams] enjoy a [Congressionally created] antitrust exemption [for pooling their sports broadcasts], which has enabled them to have tremendous revenues.”²¹³ Other members of the Judiciary Committee, however, expressed concern about SFFRA. In the opinion of these committee members, SFFRA disparately impacted small market teams that had relied substantially on the league’s broadcast revenues, which SFFRA would have required in part diverted to fund new stadiums.²¹⁴

From an outsider’s perspective, SFFRA would have been a step in the right direction because it would have prevented the kind of one-sided facility “partnerships” that counties like Miami-Dade ultimately felt compelled to make without such a bill.²¹⁵ However, at the same time, the proposed version of SFFRA was insufficient in three respects. First, SFFRA protected communities from MLB and NFL stadium demands, but it did not address arena demands made by NBA and NHL teams.²¹⁶ Second, SFFRA allowed communities to continue to pay up to twenty-five percent of the cost of new stadiums — an arbitrary percentage, which is seemingly more than the amount

²¹² See WEILER & ROBERTS, *supra* note 179, at 275; Greenberg, *supra* note 95, at 394; Marc D. Oram, *The Stadium Financing and Relocation Act of 1999*, 2 VA. J. SPORTS & L. 184, 197-98 (2000).

²¹³ *Hearings*, *supra* note 9, at 11 (testimony of U.S. Senator Arlen Specter of Pennsylvania).

²¹⁴ See *Hearings*, *supra* note 9, at 57 (testimony of U.S. Senator Russell Feingold of Wisconsin) (“I am particularly concerned with how this legislation would impact small media market teams like the Green Bay Packers.”); *id.* at 28 (testimony of U.S. Senator Russell Feingold of Wisconsin) (“[T]he Packers are dependent chiefly on their share of the television revenues from the NFL. In fact, 60 percent of the Packers’ operating revenues are derived from these funds. What this means is that this bill’s trust fund provision will severely hurt the ability of the Packers to survive.”).

²¹⁵ See *supra* note 1 and accompanying text.

²¹⁶ See 15 U.S.C. § 1291 (noting the conspicuous absence of any references about NBA and NHL arenas).

communities would pay if professional sports participated in a truly competitive market.²¹⁷ Lastly, SFFRA did not account for the potential situation where a community is not actually subsidizing a sports team but rather operating as a true partner with that team, such as where the community would keep a pro rata share of all revenues derived from the new facility.²¹⁸

V. DEVELOPING AN APPROPRIATE BILL TO CURB STADIUM SUBSIDIES

Moving forward, it seems the best way for America to protect local communities from sports teams' stadium subsidy demands would be for Congress to pass a bill that removes the Sports Broadcasting Act's limited antitrust exemption from any league in which at least one of its teams accepts facility funding from a local municipality, but does not provide that municipality with a pro rata share of the facility's revenues. A bill of this nature would not outlaw local communities from funding stadium projects; however, it would ensure that no sports team is ever able to "extort" a free ride from its local community.²¹⁹

There are several advantages of this proposed bill. First, this proposed bill would be more effective than relying upon state-based lending of credit and public purpose doctrines because this proposed bill would not lead to a "prisoner's dilemma" with respect to state court enforcement.²²⁰ As history has shown, most state attempts to outlaw stadium subsidies have led to judicially crafted exceptions to keep stadium funding ongoing.²²¹ The judicial history in Florida is a perfect example of how addressing stadium subsidies on a state level has led to state

²¹⁷ Edelman, *Bargaining Power*, *supra* note 8, at 306.

²¹⁸ See Stadium Financing and Franchise Relocation Act of 1999, S. 952, 106th Cong. (1999).

²¹⁹ See *Hearings*, *supra* note 9, at 11 (testimony of U.S. Senator Arlen Specter of Pennsylvania).

²²⁰ See *supra* notes 116-53 and accompanying text.

²²¹ *Id.*

courts eventually loosening their own interpretation of “municipal purpose” to avoid losing a sports team.²²²

Second, this proposed bill is a more practical way to address stadium subsidies than court-ordered expansion. Courts in the Third and Ninth Circuits have already rejected ordering leagues to expand to include teams in new communities.²²³ In addition, even if any court were to compel expansion, doing so would likely create streams of litigation involving the rights of potential new entrants, as well as logistical concerns about how to schedule games in a league with a constantly changing number of teams.²²⁴

Third, this proposed bill is fairer than breaking up the four professional sports leagues because it does not force sports teams into accepting a business model that has strong empirical evidence of failing.²²⁵ Although the Department of Justice regularly takes steps to prevent the forming and maintenance of monopolies, there are major distinctions between the professional sports industry and other more traditional industries, including the presence of intra-league competition.²²⁶ These distinctions favor, in the context of professional sports, pursuing market correction through a less drastic remedy.

Finally, this proposed bill is a more effective attempt at solving the real problem of subsidies than is either STADIA or SFFRA. This is because the proposed bill eliminates all

²²² See *supra* notes 135-53 and accompanying text.

²²³ See *Seattle Totems Hockey Club, Inc. v. NHL*, 783 F.2d 1347 (9th Cir. 1986); *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 560-61, 562 (E.D. Pa. 1982), *aff'd* 720 F.2d 772 (3d Cir. 1983).

²²⁴ See *supra* notes 158-78 and accompanying text.

²²⁵ See *supra* notes 179-200 and accompanying text.

²²⁶ See Edelman, *Single Entity*, *supra* note 3, at 892; see also *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851 (8th Cir. 1998); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *Mid-South Grizzlies*, 720 F.2d 772; *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97 Civ. 5184, 1998 WL 419765 (E.D. Pa. June 23, 1998); *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992); but see *Am. Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008) (finding the NFL is a single-entity in certain licensing markets).

subsidies that do not include a true public partnership.²²⁷ At the same time, the bill allows communities to continue to build sports facilities, as long as they maintain their pro rata share of the facility revenues.

CONCLUSION

The current relationship between professional sports teams and American communities needs to change. The unique structure of professional sports leagues, as well as the American government's historic hands-off approach to regulating the sports industry, has allowed America's four premier professional sports leagues to exploit their monopoly power in the market for sports franchises. As a result, professional sports teams have garnered billions of dollars in local subsidies. Governments would otherwise spend these dollars to improve public welfare.²²⁸ Given the excessive power that the sports industry has come to exert over American communities, new efforts must be made to prevent sports teams from continuing to flex their muscles to the detriment of the common citizen.

A simple bill that prevents professional sports teams from accepting a greater share of facility revenues than they pay in construction costs serves as an important step toward curbing professional sports' excessive bargaining power. Similarly, this bill would influence sports leagues to raise capital more efficiently, and would allow communities to focus their tax spending on true public welfare projects.

Professional sports leagues have enjoyed a long-standing positive relationship with the American community. Sports subsidies, however, are a relatively new phenomenon that is detracting from this relationship. Because subsidized professional sports teams hurt public welfare, as well as encourage the inefficient operation of sports teams, a bill preventing sports teams from accepting public subsidies is an

²²⁷ See *supra* note 219 and accompanying text.

²²⁸ See *Hearings, supra* note 7, at 111 (testimony of Joseph R. Biden, Jr., United States Senator) (explaining that when tax dollars are funneled toward stadium construction, they are moved away from "more important investments like law enforcement, education, and health care.").

important step toward curbing professional sports' bargaining power vis-à-vis the American community.

Placing the professional sports industry back on equal footing with America's local communities would restore an important balance between professional sports and American society. By restoring this balance, American communities would once again become able to enjoy the benefits of professional sports without needing to subsidize the costs of an already profitable industry.