THE LAW AND ECONOMICS OF TICKET SCALPING

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I. INTRODUCTION

It is a supply and demand tale as old as time: There are a limited number of tickets for a live sporting event, and after the primary ticket seller exhausts its supply of tickets, a secondary market forms to sell tickets for more than the original ticket price to help meet the demand to attend the event. Within this secondary environment—starting hundreds of years ago—ticket scalping was born.[1] Ticket scalping is defined as "the sale of a ticket to. . . [a] sporting event for an amount above the face value" of—or original asking price for—the event.[2] However, despite the commonly-held perception that the secondary ticket market imposes an increased cost to the consumer, the term scalping encompasses tickets being sold for less than their original cost as well.[3] Therefore, a broader

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1. *See* Pascal Courty, *Some Economics of Ticket Resale*, 17 J. ECON. PERSP. 85, 90 (2003) (suggesting that ticket scalping may trace back to as early as the Sixteenth Century when playwrights introduced for-profit theaters in England).

2. *See* Jon Michael Gibbs, Comment, *Cyberscalping: On-Line Ticket Sales*, 31 U. TOL. L. REV. 471, 474 (2000).

3. *See* Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-Scalping Laws*, 15 CATO J. 65, 71 (1995) (hereinafter "Happel & Jennings, *The Folly*") (defining ticket scalping as the purchase of a commodity by a willing buyer from a willing seller); *See also* Andrew T. Williams, *Do Anti-Ticket Scalping Laws Make a Difference?*, 15 J.

and more accurate definition for ticket scalping might be "the reselling of tickets to . . . sporting events at some price dictated by the [secondary] marketplace."[4] Scalpers thus emerged to facilitate the intermediary need for ticket reallocation.[5]

However, the term "ticket scalping" evokes negative images for many sports fans: specifically, fake tickets and the nuisance scalpers harassing fans as they walk to the stadium or arena.[6] Moreover, because the secondary market often marks up ticket prices from the original cost, fans negatively perceive ticket scalping.[7] Unsurprisingly, many states and localities adopted anti-scalping laws to attempt to target at least some of these sports ticket ills.[8] While variations exist depending on the jurisdiction, these laws seek to protect the consumer from fraudulent tickets and excess prices,[9] protect the teams or venue from the adverse reputational effects of counterfeit tickets,[10] and control nuisance around the stadium or arena.[11] On their face, these legislative remedies appear relatively responsive to the concerns expressed by fans, teams, venues, and municipalities—at least in a pre-Internet era.[12]

However, a deeper dive into the business of sports ticketing—and how it has transformed over time—raises important questions regarding the legitimacy and efficacy of these underlying justifications. In fact, compelling evidence calls into question the effectiveness of many of these

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MANAGERIAL & DECISION ECON. 503, 504 (1994) (providing that NFL teams will charge "at what [price] the market will bear").

4. Jonathon Bell, Student Article, *Ticket Scalping: Same Old Problem with a Brand New Twist*, 18 LOY. CONSUMER L. REV. 435, 440 (2006).

5. *See* Happel & Jennings, *The Folly*, *supra* note 3.

6. *See* Sheree Rabe, Note, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 59–61 (1991) (listing problems that ticket scalpers bring, including ticket fraud and the harassment of fans en route to the event location).

7. *See* Jonathan C. Benitah, *Anti-Scalping Laws: Should They Be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 60 (2005) (noting that resale ticket prices are often well above face value for the ticket and thus too expensive for many fans).

8. *See* Danielle Moore, Note, *The Times They Are a Changing: Secondary Ticket Market Moves from Taboo to Mainstream*, 11 TEX. REV. ENT. & SPORTS L. 295, 297–99 (2010).

9. *See* Caleb Halberg, *The Secondary Market for Tickets: A Look at Ticket Scalping Through an Economic, Property Law, and Constitutional Framework*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 173, 178 (2010).

10. *See* Benitah, *supra* note 7, at 58.

11. *See* Paul J. Criscuolo, Comment, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 SETON HALL J. SPORTS L. 189, 198–99 (1995).

12. *See generally* Daniel J. Glantz, Note, *For*-Bid *Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261 (2005).

ticket scalping laws.[13] The proliferation and maturation of the online ticket market has created greater efficiencies and lessened the occurrences of fraudulent ticket sales.[14] Indeed, the sophistication of the online ticket market may have actually created a persuasive argument that scalpers in front of a sporting venue are more needed now than in pre-Internet times.

But even if that is not the case, another increasing—and perhaps now dominant—trend should concern scholars and observers of the sports business: sports leagues and teams partnering with others in the secondary ticket market. This development calls into question some of the animating motivations for anti-scalping laws. Moreover, the more widespread presence of professional sports leagues and teams in the secondary ticket market also raises concerns about potential price fixing and true competition in the marketplace. Understanding these concerns through the context of public choice theory and law and economic theory only exacerbates them.

With this backdrop, this Article aims to assess the current state of the sports ticketing market and the laws that govern the secondary market. In particular, it seeks to provide a deeper understanding of the contextual landscape described above, as well as evaluate the efficacy of—and continued need for—ticket scalping laws. Part II provides an overview of how the sports ticketing market operates. Part III describes the different types of anti-scalping laws and the judicial responses to them. Finally, Part IV explores the policy justifications for these laws. Part V delves into law and economics, public choice theory, and general critiques of these laws. Part VI concludes with some reflections on how the current regulatory framework for sports tickets might be rethought based on these critiques and the realities of the market as they exist today.

II. THE SPORTS TICKET MARKETPLACE

A. Primary Ticket Market

For many people, there is nothing quite like a sporting event. Fans love the competition, food, ambience, and the various other things that make an in-person experience so exhilarating. Indeed, each game is unique, even if one can watch it live on television.[15] Fans relish the ability to witness and experience the singularity of a game's highlights and to do so in the company of thousands of other fans.[16] Unsurprisingly, tickets for sporting

13. *Id.* at 286.
14. *See* Halberg, *supra* note 9, at 177–78.
15. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 66–67.
16. *Id*. at 67.

events are thus in great demand, and fans seek them out in either the primary or secondary ticket markets.[17] The primary market for tickets derives from the professional sports team hosting the game.[18] The team sells tickets directly to the public at its box office or on its website[19]—which usually uses a third-party platform, like Ticketmaster, to complete the sale of tickets.[20] There are several benefits for consumers buying directly from the team: confidence in the authenticity and legitimacy of the tickets purchased, lower ticket prices (in most cases), and fewer to no fees charged when purchasing tickets compared to fees charged on the secondary market.[21] Teams sell tickets in advance—oftentimes months before a game is played—and price them at "face value."[22]

However, the sports ticketing market is rather unique and performs differently than many other business markets.[23] One of the main reasons for this reality—and a definitive reason why the secondary market exists[24]—is that professional sports teams, despite otherwise being profit maximizers, sell their tickets at a face value that is less than what the market would bear.[25] There are several reasons why teams, as the sole purveyors in the primary ticket market, might do so. To begin, demand for sporting events—especially those that are part of a months-long season—is often uncertain at the time of initial sale.[26] Another reason is

17. *See id.* at 66–74.

18. See *id*. at 66–67.

19. *Id*.

20. *See* Dylan C. Porcello, Note, *A Fixed Game: The Frustrations of Ticket Scalping and the Realities of Its Solution*, 84 BROOK. L. REV. 259, 263 (2018).

21. *See* Seth E. Miller, Comment, *Seeing Over the Brick Wall: Limiting the* Illinois Brick *Indirect Purchaser Rule and Looking at Antitrust Standing in* Campos v. Ticketmaster Corp. *Through a New Lens*, 32 FLA. ST. U. L. REV. 197, 224 n.200 (2004).

22. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 66. *See also* Glantz, *supra* note 12, at 262 n.3 (defining face value as the price that will be refunded to the ticketholder if a game is cancelled).

23. *See* Sammi Elefant, *Beyond the Bots: Ticked-Off Over Ticket Prices or the Eternal Scamnation?*, 25 UCLA ENT. L. REV. 1, 12 (2018).

24. Indeed, if professional sports teams priced their tickets at closer to market value when they sold them, it would dramatically diminish the need for—and proliferation of—the secondary ticket market. *See* Gregory M. Stein, *Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets*, 42 PEPP. L. REV. 1, 11 (2014).

25. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 67.

26. *See* Stephen Happel & Marianne M. Jennings, *The Eight Principles of the Microeconomic and Regulatory Future of Ticket Scalping, Ticket Brokers, and Secondary Ticket Markets*, 28 J.L. & COM. 115, 121 (2010) (hereinafter, "Happel & Jennings, *The Eight Principles*"). In an earlier article, Happel and Jennings also identify "poor market analysis" as another possible explanation for professional sports teams to underprice their

the team's interest in building a relationship between the fans, the team, and the arena or stadium in which they play.[27] Unlike other industries, professional sports do not seek to capture consumer demand for a single event; rather, leagues and teams seek to build a regular fan base that will repeatedly return to their venue.[28] By pricing tickets below their true value, teams are better able to accomplish this goal.[29]

Teams also do not want to alienate their season ticketholders—who commit to buying an entire set of tickets even before individual game tickets go on sale to the general public—by reducing prices if there is lower demand for games.[30] Due to these market and consumer dynamics, teams find it difficult to subsequently discount tickets and thus price the face value of their tickets below market rate.[31] Similarly, teams look to cultivate a diverse fan base that spans socio-economic spheres.[32] To ensure that younger fans and those with less means are able to attend games, professional sports teams may intentionally price tickets below market rate[33] and, in some instances, set aside particular tickets at a dramatically reduced cost to ensure access to a wider set of the community.[34] By expanding opportunities to purchase sports tickets beyond just the wealthy, teams help imbue positive morale within a team's fan base—thus growing and sustaining deep community support.[35] Of course, teams cannot always ensure that these specially-priced tickets are purchased and used by the fans they seek to target.[36]

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tickets. *See* Stephen K. Happel & Marianne M. Jennings, *Assessing the Economic Rationale and Legal Remedies for Ticket Scalping*, 16 J. LEGIS. 1, 7 (1990) (hereinafter "Happel & Jennings, *Assessing*").

27. *See* Porcello, *supra* note 20, at 280.

28. *See id*. at 280–81.

29. *See id*. at 281.

30. *See* Eric Schroeder et al., *A Brief Overview on Ticket Scalping Law, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS LAW. 1, 32 (2012).

31. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 122.

32. *See* Elefant, *supra* note 23, at 13.

33. *See id*.

34. *See, e.g.,* Andrew Greif, *Clippers Offering $10 Tickets to Fans Wearing Red and Blue*, L.A. TIMES (Oct. 17, 2019, 1:10 PM), https://www.latimes.com/sports/clippers/story/2019-10-17/clippers-offering-10-tickets-to-fans-wearing-red-and-blue [https://perma.cc/ZC65-N2Y5] (describing the Los Angeles Clippers selling $10 tickets to games); *see also* Jon Becker, *Warriors Unveil Plan to Sell $25 Tickets for Home Games This Season*, MERCURY NEWS (Oct. 26, 2020, 4:07 PM), https://www.mercurynews.com/2019/10/09/warriors-offering-some-insanely-cheap-tickets-to-chase-center-games/ [https://perma.cc/E65N-9TC3] (noting the Golden State Warriors selling $25 tickets to games).

35. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 70.

36. *See* Elefant, *supra* note 23, at 13. In fact, many tickets on sale to the public are purchased in bulk by ticket brokers who use software—called ticket bots—to buy tickets and then sell them for a profit on the secondary market. *See id*.

Perhaps just as importantly, teams underprice the face value of their tickets to maximize attendance.[37] A variety of motivations animate this strategy. Part of what draws fans to stadiums and arenas is a shared experience with other fans watching the live sporting event.[38] With stadiums and arenas having attendance capacities, supply is limited for access to games.[39] Moreover, teams frequently do not release all available seats to the public at once, thereby further limiting availability.[40] By spurring demand with lower ticket prices, teams help build that ambience that fans seek—thus driving demand even further.[41] In addition, sports teams are willing to forgo potential profits off of ticket sales in favor of larger crowds because of the ancillary goods and services consumed by those in attendance: parking, concessions, and souvenirs.[42] This non-ticket revenue represents a robust source of money for professional sports teams. Finally, sold out games—or higher attendance figures than in past years—help teams create a perception of demand for their product, which they hope will be self-perpetuating and self-fulfilling for future games.[43] For these reasons, sports teams intentionally price the face value of their tickets below fair market value.

B. Secondary Ticket Market

The approach by primary market ticket sellers—professional sports teams—creates excess demand for tickets to sporting events and thus generates the need for a secondary ticket market.[44] When sports teams price their tickets in the primary market below their true value, they drive up demand for tickets in a manner that usually exceeds the supply of tickets.[45] Moreover, because tickets for games are sold well in advance, circumstances that can alter supply and demand for tickets—such as a team being a championship contender or, conversely, having a terrible season—also create the conditions for a secondary ticket market and ticket

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37. *See id*. at 12. In selling tickets at a below-market price, professional sports teams also minimize—or shift—the risks inherent in any market. By taking less money upfront, teams shift the potential for a devaluation of the tickets—or an inability to sell tickets to an undesirable game in the future—onto the consumer/fan. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 129.

38. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 66.

39. *See* Halberg, *supra* note 9, at 175.

40. *See* Elefant, *supra* note 23, at 12.

41. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 67, 70.

42. *Id*.

43. *See* Porcello, *supra* note 20, at 281.

44. *See* Halberg, *supra* note 9, at 176.

45. *See id*.

scalping.[46] The secondary ticket market consists of ticket brokers, ticket agents, individual sellers, and third-party websites that host ticket resales and auctions.[47] These various actors in the secondary market seek to make a profit (what the market will actually bear)—or in some cases avoid losing money—from selling tickets after the initial primary market sale.[48] Unsurprisingly, to maximize profits, many secondary ticket market participants seek to procure as many tickets as possible from the primary ticket selling sports team.[49] Such market clearing can occur in physical stores set up by ticket brokers, on the street in front of a stadium or arena, on secondary ticket market websites, or in other informal manners through private transactions.[50]

In pre-Internet times, brick-and-mortar ticket broker locations made up the vast majority of the secondary ticket market—often close to sports stadiums and arenas—and ticket scalpers sold tickets right before games on the streets outside the venue.[51] Ticket brokers sold tickets they purchased on the primary ticket market or that they had on consignment from others who purchased them that way.[52] Ticket scalpers sold remaining available tickets on the streets in front of stadiums and arenas to fans who did not have tickets or those wanting to upgrade their seats.[53] These methods for securing tickets on the secondary ticket market still exist, but the predominant manner in which that market now operates is through online websites.[54] Indeed, the Internet has transformed the secondary ticket market—more so than many other industries.[55] Online resale websites have made the secondary ticket market more efficient,

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46. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 70–71.

47. *See* Porcello, *supra* note 20, at 263.

48. *See* Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. MIAMI L. REV. 71, 72–73 (1982).

49. *See* Gibbs, *supra* note 2, at 474–75. Indeed, some ticket brokers illegally bribe primary ticket sellers to secure tickets at below-market prices so they can make healthy profits. *See* Zachary H. Klein, Note, *Who's the Boss? The Need for Regulation of the Ticketing Industry*, 5 BROOK. J. CORP. FIN. & COM. L. 185, 200 (2010).

50. *See* Halberg, *supra* note 9, at 176–78, 185.

51. *See* Danette R. Davis, Comment, *The Myth & Mystery of Personal Seat Licenses and Season Tickets: Licenses or More?*, 51 ST. LOUIS U. L.J. 241, 259–60 (2006).

52. *See* Scott D. Simon, Note, *If You Can't Beat 'Em, Join 'Em: Implications for New York's Scalping Law in Light of Recent Developments in the Ticket Business*, 72 FORDHAM L. REV. 1171, 1211 (2004).

53. *See* Andrew Kandel & Elizabeth Block, *The "De-Icing" of Ticket Prices: A Proposal Addressing the Problem of Commercial Bribery in the New York Ticket Industry*, 5 J.L. & POL'Y 489, 494 (1997).

54. *See generally* Clark P. Kirkman, Note, *Who Needs Tickets? Examining Problems in the Growing Online Ticket Resale Industry*, 61 FED. COMM. L.J. 739 (2009).

55. *Id.* at 741.

easier to navigate, and less susceptible to fraud.[56] In addition, ticket resellers have enhanced profitability by not only selling tickets above face value but also by collecting fees for online purchases—usually in the form of a percentage of the sale or a flat fee.[57] In fact, the secondary ticket market was recently estimated—pre-COVID-19—as an approximately $15.2 billion industry.[58]

Many of the brick-and-mortar ticket brokers described above set up websites in the late 1990s and started selling tickets online as well.[59] States in which ticket brokers conduct business generally require them to be licensed and registered.[60] Ticket brokers secure tickets for resale by buying season tickets or by purchasing individual tickets directly from teams or through other secondary ticket market sellers.[61] Some ticket brokers use ticket bots, which are advanced software tools that enable brokers to buy large quantities of tickets within seconds of release for purchase on a team's website or the third party-website that administers its ticket sales.[62] In fact, ticket bots are so effective that legislation has been passed on the federal and state levels to attempt to address the issue, particularly because they can so dominate ticket sales that ordinary consumers cannot obtain tickets through the primary market and must thus pay inflated prices for tickets on the secondary market.[63] Regardless of how they obtained tickets

56. *See* Klein, *supra* note 49, at 192–93.

57. *See* Porcello, *supra* note 20, at 263.

58. Oisin Lunny, *Battle for $15.19 Billion Secondary Ticket Market Heats Up with First Europe-Wide Anti Touting Law*, FORBES (June 24, 2019, 9:53 AM), https://www.forbes.com/sites/oisinlunny/2019/06/24/the-battle-for-15-19b-secondary-ticket-market-heats-up-with-first-europe-wide-anti-touting-law/#218fb96f2e02 [https://perma.cc/PEK6-D27X].

59. This segment of the secondary ticket market industry has worked hard to gain legitimacy as reputable businesses in what many perceive as a field filled with fraud and corruption. *See* Kirkman, *supra* note 54, at 747. For example, for more than twenty-five years, the National Association of Ticket Brokers has sought to establish industry-wide standards related to professional ethics, protecting consumers, and fostering a positive perception of the ticket broker community. *See generally Why NATB*, NATB, https://www.natb.org/why-natb/ [https://perma.cc/Z325-2ZK3] (last visited May 27, 2021).

60. *See* Gibbs, *supra* note 2, at 478–79.

61. *See id*. Some ticket brokers also sell other people's tickets on their websites on consignment.

62. *See* Elefant, *supra* note 23, at 5. This result occurs even with combative security technology such as CAPTCHA, which attempts to confirm that the purchaser is a living human and not a bot. The ticket bot technology's sophistication has figured out how to bypass those built-in software protections in many cases. *See id*.

63. *See id*.

for resale, ticket brokers charge prices in excess of face value or the price they paid for the tickets.[64]

Ticket agents also fill much of the secondary ticket market.[65] These companies have contractual agreements with professional sports leagues and teams which authorize them as the official resale website for their tickets.[66] With this contractual relationship, ticket agents differ from ticket brokers, who are not affiliated with the team or league.[67] Prominent ticket agent companies are StubHub—the official resale partner for the National Football League ("NFL")[68] and Major League Baseball ("MLB")[69]—and Ticketmaster, which runs Ticket Exchange resale websites for the National Basketball Association ("NBA")[70] and National Hockey League ("NHL").[71] In addition to acting as ticket agents, both StubHub and Ticketmaster—and similar companies—function as ticket brokers, allowing others to resell tickets on their websites.[72] Whether functioning as ticket agent or broker, these websites make money by charging a fee equivalent to a percentage of the final ticket sales price and a consumer service charge as a fixed fee for the transaction.[73] When acting as the ticket agent for a professional sports league or team, companies like StubHub and Ticketmaster receive a portion of all ticket sales as well as data regarding ticket sales.[74]

Online ticket auction websites—like eBay—provide another avenue for fans to secure tickets on the secondary market.[75] With this type of platform, ticket brokers and individual ticket purchasers alike can post

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64. *See* Gibbs, *supra* note 2, at 479.

65. *See id.*

66. *See id*.

67. *See* Glantz, *supra* note 12, at 264 n.12.

68. *See* StubHub News Team, *StubHub Becomes Designated NFL Ticker Resale Marketplace*, EBAY (Oct. 23, 2017), https://www.ebayinc.com/stories/news/stubhub-becomes-designated-nfl-ticket-resale-marketplace/ [https://perma.cc/5RLP-QUCB] (announcing the StubHub and NFL agreement).

69. *See StubHub,* MLB, https://web.archive.org/web/20210607003443/https://www.mlb.com/tickets/stubhub (last visited May 27, 2021) (explaining the MLB and StubHub arrangement).

70. *See Ticketmaster Debuts Resale Ticket Service on NHL.com*, NHL (Nov. 14, 2008), https://www.nhl.com/news/ticketmaster-debuts-resale-ticket-service-on-nhl-com/c-392386 [https://perma.cc/G6HV-KY9F] (announcing the NHL and Ticketmaster deal).

71. *See FAQ,* NBATICKETS.COM, https://nbatickets.nba.com/faq/ [https://perma.cc/5CMG-MHYH] (last visited May 27, 2021) (detailing the NBA and Ticketmaster agreement).

72. *See* Alexander P. Frawley, Comment, *Revoking the Revocable License Rule: A New Look at Resale Restrictions on Sports Tickets*, 165 U. PA. L. REV. 433, 436 (2017).

73. *See* Steven C. Highfield, *How Modern Trends and Market Economics Have Rendered Anti-Ticket Scalping Legislation Obsolete*, 59 DEPAUL L. REV. 697, 709 (2010).

74. *See id*. at 708–09.

75. *See id.* at 697.

their tickets for sale to the highest bidder at the end of the auction.[76] These websites do not procure tickets and then sell them but rather serve as an intermediary between a seller and buyer.[77] However, like other resale websites, they make money by charging fees for the listing and selling of tickets.[78] The final component of the secondary ticket market is individual sellers—not corporate entities—who sell tickets for games they cannot attend to others using websites such as Craigslist, social media websites, and other informal methods.[79] These websites do not charge any fees and thus do not make any money off such transactions, but similarly there are no protections from ticket fraud the way the websites described above tend to have.

III. TYPES OF ANTI-SCALPING LAWS

By setting the face value prices for their tickets below market rate—creating excess demand and thus a need for alternative avenues to secure tickets—sports teams inherently cede part of the market away with their primary market approach. Teams are comfortable with some forms of ticket reallocation, such as consumers giving their tickets to friends, business acquaintances, or relatives or reselling tickets they cannot use at face value to others.[80] However, professional sports teams object to the robust profits earned in the secondary ticket market.[81] They also identify various concerns related to fraud, nuisance, and other potential problems that can accompany the methods of reselling tickets described above.[82] In response to these concerns—as well as for other policy reasons—many states and municipalities have implemented anti-scalping laws to address these issues.[83]

Some cities and states adopted ticket scalping laws that target sellers in the secondary market by mandating licensure or other requirements to

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76. *See* Glantz, *supra* note 12, at 267–68. Some ticket auction sites like eBay also offer a "Buy It Now" price to secure tickets without completing the normal auction cycle.

77. *See id.* at 268.

78. *See id.* at 267–68.

79. *See* Frawley, *supra* note 72, at 460.

80. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 71.

81. *See id.*

82. *See id.* at 71–72.

83. *See* Criscuolo, *supra* note 11, at 192–93. Even in states that do not prohibit ticket scalping, state law permits cities to impose their own anti-scalping laws. *See* Glantz, *supra* note 12, at 265. *See also* OHIO REV. CODE ANN. § 715.48 (2020) (permitting cities to adopt ticket scalping laws); VA. CODE ANN. § 15.2-969 (2020) (same). *But see* MO. REV. STAT. § 67.306 (2020) (barring local governments from adopting anti-scalping laws).

engage in ticket resale.[84] Such laws may either require a seller to register as a ticket broker or to obtain permission from the sports team or venue to sell tickets at prices above face value.[85] These requirements validate the traditional brick-and-mortar ticket broker, while the traditional ticket scalper on the street would otherwise be provided from reselling tickets unless they obtained a license or otherwise received permission from the team or venue.[86] However, teams and venues almost always reserve permission for authorized ticket agents who enter into contracts with the team or venue to officially resell tickets.[87] Under such arrangements, the authorized ticket agent may sell tickets on the secondary market for above face value and pay the team or venue a portion of the profit.[88] In short, these laws primarily target the on-the-street ticket scalper rather than other participants in the secondary ticket market.

Other laws focus on the location of the ticket resale, as opposed to regulating the individuals engaging in ticket resale. With these statutes the distance of the reselling of tickets in proximity to the sporting venue triggers the application of the ticket scalping law.[89] Distance restrictions ranging from 200 to 1,500 feet from a venue limit a scalper's ability to sell tickets close to where the game is being played.[90] Notably, these laws rarely distinguish between selling a ticket at face value versus a price greater than that.[91] Rather, they impose somewhat of a strict liability approach on anyone selling tickets at any price within a defined distance from the stadium or arena.[92] This family of ticket scalping laws thus does not discriminate between certain preferred ticket resellers and others but instead attempts to create a buffer around the stadium or arena from ticket reselling.

Perhaps the most common form of anti-scalping laws are those that restrict the price of the resale ticket.[93] These price restrictions vary by state.

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84. *See* Highfield, *supra* note 73, at 700. One obvious advantage for local or state governments adopting such laws is that they ensure sellers pay taxes and follow various business regulations imposed by the jurisdiction. *See* Gibbs, *supra* note 2, at 475–76.

85. *See* Highfield, *supra* note 73, at 700. *See also* N.J. STAT. ANN. § 56:8-27 (2020) (requiring ticket resellers to register as ticket brokers, including maintaining a permanent office in the state) and GA. CODE ANN. § 43-4B-25 (2020) (prohibiting anyone other than licensed ticket brokers from selling tickets on the secondary market).

86. *See* Criscuolo, *supra* note 11, at 194–95.

87. *See* Gibbs, *supra* note 2, at 477.

88. *See id*.

89. *See* Highfield, *supra* note 73, at 701.

90. *See id*.

91. *See id*. at 405.

92. *See id*. at 406.

93. *See* Joris Drayer, *Examining the Effectiveness of Anti-Scalping Laws in a United States Market*, 14 SPORT MGMT. REV. 226, 227 (2011).

Some states make it illegal—without exceptions for authorized ticket agents or licensed ticket brokers—to resell tickets at an amount above face value.[94] Some of these statutes provide limited exceptions for above-face-value pricing for authorized ticket agents with contractual approval from the sports team or venue.[95] Other states and municipalities allow for resale prices above face value but set a maximum amount that the ticket reseller can charge.[96] Some states even impose a license tax for reselling tickets at prices above face value.[97] These ticket scalping laws target the in-person, physical resale of tickets to sporting events—the sole form of reselling before the Internet (and still a significant portion of the secondary ticket market).[98]

The advent and proliferation of the online secondary ticket market spurred many states to pass additional laws to regulate online sales because their existing laws did not prove applicable or effective. For example, some states require online resellers to formally register to conduct sales while also providing a method to consumers to pursue claims if something went wrong with the transaction.[99] At the same time, some states seem to favor online ticket reselling with their approaches. For example, some states draw preferential distinctions for those online resellers that register with the state by allowing them to sell tickets for above face value.[100] Virginia allows municipalities to prohibit ticket scalping except for tickets sold online.[101] Georgia restricts the ability for ticket resellers to impose a service fee only to those sold online.[102] However, a unique and important

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94. *See* Criscuolo, *supra* note 11, at 193. *See, e.g.*, ARK. CODE ANN. § 5-63-201 (2020) (prohibiting reselling tickets at above face value but permitting a reasonable service charge for processing). These laws almost always allow for a sale below the face value of a ticket. *See* Drayer, *supra* note 93, at 227.

95. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 73. *See also* CAL. PENAL CODE § 346 (2020) (prohibiting the sale of tickets for more than face value without the venue's permission) and MICH. COMP. LAWS § 750.465 (2020) (same).

96. *See* Drayer, *supra* note 93, at 227 (discussing New York's adoption of permissible percentages above a ticket's face value that those in the secondary ticket market could charge). *See also* Milica Bosnjak, Note, *"Get Your Tickets!" From a Legitimate Source: Primary and Secondary Ticketing Markets in Nevada*, 11 UNLV GAMING L.J. 341, 348–49 (2021) (detailing different state laws restricting the resale of tickets at above face value).

97. *See, e.g.*, ALA. CODE § 40-12-167 (2020).

98. *See* Gibbs, *supra* note 2, at 475.

99. *See* Highfield, *supra* note 73, at 703–04. *See also* 815 ILL. COMP. STATE. ANN. 414/1.5 (2020) (requiring registration with the state and imposing an annual fee on online ticket resellers).

100. *See* Highfield, *supra* note 73, at 703. *See also* 4 PA. STAT. AND CONST. STAT. ANN. § 202 (2020) (permitting tickets to be sold online for an amount greater than face value if the ticket reseller has a license and meets other business-related criteria).

101. *See* VA. CODE ANN. § 15.2-969 (2020).

102. *See* GA. CODE ANN. § 43-4b-25 (2020).

type of ticket scalping law arose in response to automated ticket purchasing software that allowed business or individuals to buy large quantities of tickets quickly online.[103] This software—often referred to as "bots"—has been a large source of consternation for professional sports leagues, fans, and governments in trying to ensure fair primary and secondary ticket marketplaces.[104] In response, the federal government adopted the Better Online Ticket Sales Act (BOTS Act)[105] and more than a dozen states have adopted similar laws to target this market-manipulating software that takes primary ticket-buying opportunities out of the hands of ordinary consumers and consolidates large groups of tickets in the hands of ticket brokers in the secondary market.[106] These laws prohibit the use of bots to aggregate tickets in excess of a sporting event's purchasing limits and circumvent security measures.[107] Nevertheless, despite the adoption of these laws, the use of ticket bots on the primary and secondary market remains a challenge in attempting to regulate this aspect of sports tickets.[108]

While ticket scalping laws initially received a very negative judicial response,[109] courts have since generally upheld such laws against due process, equal protection, and other legal challenges.[110] In particular,

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103. *See* Porcello, *supra* note 20, at 260–61.

104. *See* Elefant, *supra* note 23, at 5–6. *But see* Zachary S. Sturman, Note, *Where's the Consumer Harm? The BOTS Act: A Fruitless Boogeyman Hunt*, 22 VAND. J. ENT. & TECH. L. 951, 960–75 (2020) (arguing that ticket bots do not cause harm to consumers).

105. *See* 15 U.S.C. § 45c (2020).

106. *See, e.g.*, N.Y. ARTS & CULT. AFF. LAW § 25.24 (2020); OR. REV. STAT. ANN. § 646A.115(2) (2020); 4 PA. STAT. AND CONST. STAT. ANN. § 212.1 (2020); TENN. CODE ANN. § 39-17-1104 (2020); and VT. STAT. ANN. tit. 9 § 4190 (2020). *See also* Robert J. McFadden, Note, *The BOTS Act: A Small Step for Fankind When a Giant Leap is Needed*, 55 WASHBURN L.J. 427, 428–29 (2016) (noting states that have adopted laws aimed at ticket bots).

107. *See* Elefant, *supra* note 23, at 6.

108. *See* Kieren McCarthy, *It's Not Your Imagination: Ticket Scalper Bots Are Flooding the Internet According to This 'Ere Study*, REGISTER (Mar. 1, 2019, 22:49 UTC), https://www.theregister.com/2019/03/01/ticket_scalper_bots/ [https://perma.cc/VUJ5-JX38]; *see also* Debra Parma, Note, *At Ticketmaster, Scalpers Score and Fans Come Last*, 38. J.L. & COM. 463, 463–64 (2020).

109. *See* Phyllis L. Zankel, Comment, *Wanted: Tickets—A Reassessment of Current Ticket Scalping Legislation and the Controversy Surrounding Its Enforcement*, 2 SETON HALL J. SPORT L. 129, 129–41 (1992). Indeed, early case law invalidated or curbed anti-scalping laws based on property rights, liberty interests, and a general sense by courts that such laws went beyond the permissible state police powers. *See* Bell, *supra* note 4, at 443–44. Some courts struck such statutes down as unconstitutional violations of the Due Process Clause of both the Fifth and Fourteenth Amendments. *See id.* at 444.

110. *See* Highfield, *supra* note 73, at 698. Interestingly, the proliferation of these anti-scalping laws occurred after World War II when the economy began to improve and the general public began to spend money again on sports and entertainment. At the time, many

courts have long upheld challenges to anti-scalping laws by recognizing the legislature's authority to attempt to curb some of the attendant societal issues caused by ticket scalping—such as some of the nuisance effects from those selling tickets on the street by the arena or stadium.[111] Accordingly, courts have upheld these statutes as being within the general police powers of the state and legitimate policy bases for public concern.[112]

IV. Policy Justifications for Anti-Scalping Laws

While courts have upheld ticket scalping laws on the basis of their targeting nuisance effects of the secondary ticket market industry, there are a number of animating reasons why states and local governments have adopted such laws. These laws sought to protect consumers, the sports team or venue, the public (in controlling and abating the nuisance of street scalpers), and the governments themselves (for example, in ensuring business taxes were properly paid).[113] In crafting such laws, states and municipalities attempt to strike a balance between acknowledging the need for a secondary ticket market—for people who were unable to obtain tickets initially at face value—and some of the problems created by this somewhat loosely regulated industry.[114]

Many ticket scalping laws prioritize the interests of the consumer. There is a general sense emanating from these statutes that they seek to provide access to sporting events to the greatest number of people.[115] Indeed, there is a unique public sentiment surrounding tickets to sporting events—a fairness norm that tickets should be available to more than just those who are rich and influential.[116] To further this goal, anti-scalping laws implement restrictions to address unfair pricing[117] and ensure—as best as possible—a fair distribution of tickets among the public.[118]

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box office employees bought tickets and then resold them for their own personal profit—thus spurring a need, in the eyes of elected officials, for such ticket scalping laws. *See id*.

111. *See* Benitah, *supra* note 7, at 58–60.

112. *See* Gibbs, *supra* note 2, at 476.

113. *See* Halberg, *supra* note 9, at 178.

114. *See* Highfield, *supra* note 73, at 703.

115. *See* Rabe, *supra* note 6, at 62.

116. Happel & Jennings, *The Eight Principles*, *supra* note 26, at 126.

117. *See* Halberg, *supra* note 9, at 178.

118. *See* Lynden Griggs, *Ticket Scalping: Its Legal and Economic Effects on the Illusion of Perfect Innocence*, 15 GRIFFITH L. REV. 287, 294–95 (2006). Interestingly, many scholars have conflated the fairness norm related to price gouging and the equity principle regarding ticket distribution. *See* John D. Tishler, *Ticket Scalping: An Economic Analysis and Proposed Solution*, 33 SANTA CLARA L. REV. 91, 100–01 (1993). While there is certainly overlap between the two concerns, they actually have distinct features. *See id*.

Consumers naturally express concern regarding ticket scalpers charging exorbitant prices for tickets on the secondary market sufficient to price out all but the wealthiest of fans.[119] As mentioned above, professional sports teams intentionally price tickets below their true market value, in part to allow access to a wider socio-economic fan base.[120] However, if ticket bots purchase all of these tickets priced below market and then resell them at a substantially higher price, fans understandably see the ticketing markets as illegitimate—or at least not optimal based on the teams' reason for pricing in the primary market.[121] A related and equally concerning problem is that there has been corruption within the sports ticketing industry where those working in the primary ticket market withhold blocks of tickets to sell to ticket brokers and ticket scalpers on the secondary market to profit themselves.[122] This kind of backroom dealing prevents fans from accessing those affordable tickets on the primary market, thus driving prices up for them in the secondary market. For these reasons, anti-scalping laws seek to avoid price gouging (with price limitations), address the problem with bots, and prohibit the manipulation of the primary ticket market to ensure that everyday fans have fair access to tickets at face value.

The issues of fraud and corruption also arise in the concern about counterfeit tickets. While fraudulent tickets can be sold in most parts of the secondary ticket market, the prominent concerns come from tickets sold by ticket scalpers on the street in front of sports stadiums and arenas.[123] In particular, unlike licensed ticket brokers—whether online or in a brick and mortar storefront—ticket scalpers on the street are harder to locate and seek refunds from if tickets were counterfeit.[124] Given this concern, it is unsurprising that many ticket scalping statutes limit or prohibit ticket scalping within a certain distance of the stadium or arena. These laws further address ticket scalpers on the street because they may also pose a danger or nuisance to fans attending a game.[125] Fans sometimes experience harassment, safety concerns, and traffic problems because of these ticket scalpers.[126] Indeed, local ticket scalping laws are careful to distinguish between behavior by ticket scalpers that is annoying but

119. *See* Highfield, *supra* note 73, at 704.
120. *See supra* text accompanying notes 20–40.
121. *See* Halberg, *supra* note 9, at 178.
122. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 160.
123. *See* Halberg, *supra* note 9, at 178–79.
124. *See* Highfield, *supra* note 73, at 704. *See also* Schroeder et al., *supra* note 30, at 32 ("[F]ans do not have the same authenticity concerns with an established broker as they might with someone hawking tickets outside a stadium.").
125. *See* Tishler, *supra* note 118, at 114.
126. *See* Criscuolo, *supra* note 11, at 198–99.

permissible and behavior that is unreasonable and thus prohibited.[127] While each of these issues may also be of concern to others—like the promoter, local governments, and other surrounding businesses—there is a clear consumer-centric approach to many of these ticket scalping statutes.

There is no doubt, however, that these anti-scalping laws also further the interests of the professional sports teams and even the government entities themselves. In fact, these statutes attempt to regulate the secondary market to help professional sports teams "control [to a degree] the distribution of tickets" for a game.[128] As explained above, teams price their tickets below market value for a variety of reasons, including ensuring access for a broader fan base.[129] When those on the secondary ticket market manipulate the primary ticket market, teams understandably bristle at these ticket resellers making hefty profits.[130] In addition to objecting to missing out on these profits, teams also express concern that fans will pay so much for the tickets that they will not spend as much money on concessions, parking, and souvenirs—thus further cutting into their revenues and business.[131] These ticket scalping laws also recognize that price gouging in the secondary market can jeopardize teams' goodwill with their fans.[132] When fans purchase tickets to a game from those in the secondary ticket market for prices far above face value, they often blame the team—not the ticket broker or other reseller—for the lack of affordability.[133] This negative fan perception—somewhat misplaced though it may be—can hurt future ticket sales and profits for a team.[134] For these reasons, states and local governments attempt to address price gouging and primary ticket market manipulation with their ticket scalping statutes.

Finally, states and municipalities have their own vested interest in regulating the secondary ticket market—beyond addressing the harms to the fans and sports teams: tax revenue. For many ticket resales, the profit earned from the sale is rarely reported.[135] By requiring ticket resellers to

127. *See* Halberg, *supra* note 9, at 183–84.
128. *See* Benitah, *supra* note 7, at 58.
129. *See id*.
130. *See id*.
131. *See* Tishler, *supra* note 118, at 120 (noting the difference in face value versus secondary ticket market sale as lost profit for the team); Highfield, *supra* note 73, at 705 (noting the potential for lost revenues on ancillary gameday expenses because of resale ticket prices).
132. *See* Criscuolo, *supra* note 11, at 198–99.
133. *See* Highfield, *supra* note 73, at 705.
134. *See* Criscuolo, *supra* note 11, at 198.
135. *See* Halberg, *supra* note 9, at 179.

register for a business license, many anti-scalping statutes enable state and local governments to derive income from licensing fees and applicable taxes.[136] While many legitimate public policy reasons justify such laws—especially those aimed at protecting the public and the sports teams—scholars have noted the inherent benefit that governments derive from these statutes.

V. QUESTIONING THE WISDOM OF TICKET SCALPING LAWS

A. General Effectiveness Concerns

While well-intended to address the various maladies of the secondary ticket market described above, anti-scalping statutes have had little effect in addressing these problem areas. To begin, these laws are difficult to enforce.[137] For in-person resales—particularly for ticket scalpers on the street in front of a stadium or arena—enforcement requires a significant police presence that has proven economically unsustainable.[138] Online enforcement poses similar challenges. States and local governments face significant jurisdictional issues when enforcing their ticket scalping laws given the differing locations of the buyer, seller, processor of the financial transaction, and the online website's server.[139] Most states and municipalities lack the financial resources, technological tools, and experience to pursue online ticket sellers who violate their anti-scalping statutes.[140] Another challenging dynamic that undercuts the efficacy of ticket scalping laws is that many primary ticket sellers often have close relationships—legal or otherwise—with secondary ticket resellers that distort the sports ticketing marketplace.[141] Whether through contractual agreements or clandestine arrangements, some sports teams withhold a certain portion of tickets and redirect them to ticket brokers or other ticket scalpers in a manner that drives up prices for fans seeking to purchase

136. *See id.*

137. *See* Highfield, *supra* note 73, at 707–08. (noting how there are also a variety of loopholes in many of these anti-scalping statutes that allow secondary ticket resellers to avoid falling within the prohibitions or prescriptions).

138. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 73. Similarly, while some states allow the stadium or arena to employ private security to enforce these laws, these measures also prove not to be financially viable. *See* Criscuolo, *supra* note 11, at 214–15.

139. *See* Glantz, *supra* note 12, at 269.

140. *See* Avi Lowenstein, Note, *Ticket Sniping*, 8 J. ON TELECOMM. & HIGH TECH. L. 243, 271 (2010). Even if states or local governments chose to pursue online violators occasionally—despite the financial impracticality of doing so—they would risk a potential claim of selective enforcement against them. *See* Glantz, *supra* note 12, at 287.

141. *See* Klein, *supra* note 49, at 194.

tickets to games.[142] In this regard, one of the two constituencies that these laws seek to protect—here, the sports team—contributes to undermining one of the intended purposes of anti-scalping statutes: avoiding unnecessary inflation in sports tickets.[143]

B. Law and Economics Critique

The general concerns above focus largely on the logistics of enforcing anti-scalping laws and whether they are effective in achieving the goals they seek to accomplish. However, a law and economics critique of anti-scalping law provides a compelling analysis of the questionable theoretical underpinnings of the current statutory approach to the secondary ticket market. Law and economics theory is based on the general economic and free market principle that economic policy should seek to allocate resources in a manner that maximizes social utility.[144] It also focuses on the efficiency of government statutes in attempting to discern the optimal approach to particular problems.[145] Through these lenses, anti-scalping laws interfere with the free market for tickets, negatively impact ticket prices, and are inefficient.

Some commentators have argued that ticket scalping is not a societal ill but merely a simple exercise of participating in the free market.[146] In fact, some scholars have gone so far as to condone ticket scalpers on the street because they facilitate transactions in the secondary market that efficiently allocate the high demand for the low supply of sports tickets.[147] In this regard, ticket scalping appears consistent with the goals of a free market system, and anti-scalping laws thus seem to constrain transactions in the secondary ticket marketplace.[148] In particular, in most cases, both the buyer and seller enter the transaction voluntarily with the benefits clear for each side—access to a game and profit, respectively.[149] Moreover, economists argue that buyers act rationally when they pay prices greater

142. *See id*. at 195.

143. *See* Benitah, *supra* note 7, at 56.

144. *See* Robin Feldman & Charles Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 YALE J.L. & TECH. 61, 120 (2020).

145. *See* Craig A. Depken, II, *Another Look at Anti-Scalping Laws: Theory and Evidence*, 130 PUB. CHOICE 55 (2006).

146. *See* John Tierney, *Tickets? Supply Meets Demand on Sidewalk*, N.Y. TIMES (Dec. 26, 1992), https://web.archive.org/web/20220402104736/https://www.nytimes.com/1992/12/26/nyregion/tickets-supply-meets-demand-on-sidewalk.html.

147. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 76.

148. *See* Williams, *supra* note 3, at 503.

149. *See* Alan B. Krueger, *Supply and Demand: An Economist Goes to the Super Bowl*, MILKEN INST. REV. 22, 24 (2001), http://assets1c.milkeninstitute.org/assets/Publication/MIReview/PDF/22-29.pdf.

than face value on the secondary market because they desire the in-person experience sufficiently enough to pay those prices.[150] Fans purchasing from scalpers also promotes efficiency because it avoids queueing, which occurs because sports teams underpricing their tickets creates higher demand.[151] Part of the higher cost on the secondary ticket market is attributable, in part, to the opportunity cost to the fan of purchasing a ticket on the primary market—whether it is waiting in line, navigating overwhelmed websites, or taking time away from other interests or responsibilities to beat the rush for tickets sold directly from the team.[152] Anti-scalping laws that prohibit resale of tickets at above face value threaten to disrupt the rational fan from purchasing tickets as they are forced to choose between queueing or forgoing the game entirely.[153] In addition, when ticket scalping statutes impose such price caps, they interfere with the market sorting out pricing more efficiently based on supply and demand.[154] By creating an artificial market with such price caps, these laws prevent a sorting in the market where the more zealous fans wind up with tickets—even if above-face-value prices—rather than "fair weather" fans who may hold on to underpriced tickets they obtained directly from the team because they are not allowed to sell them for fair market value.[155] In fact, from a free market perspective, the greatest need for scalpers is right before a game because that is when price fluctuates the most, and there is a need for market sorting whereby those who want to attend the game the most—and thus pay the most for the tickets—have access to tickets on the secondary market.[156] In these regards, some anti-scalping laws can preclude many fruitful transactions between willing buyers and sellers, which hinders the maximization of social welfare.[157]

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150. *See id*.

151. *See* Stein, *supra* note 24, at 18. Queueing "impose[s] significant opportunity costs on those with a high value of time"—thus causing inefficiency. Happel & Jennings, *The Eight Principles*, *supra* note 26, at 120. While primary market ticket sellers—like teams—do not factor in the cost of time to the ticket price, those in the secondary ticket market do. *Id*. at 133.

152. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 133–35.

153. *See id*. at 134.

154. *See* Griggs, *supra* note 118, at 290–91.

155. *See* Highfield, *supra* note 73, at 719. Such market clearing achieves the maximum utility of the tickets. *See* Halberg, *supra* note 9, at 176.

156. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 74. That most online ticket sales close an hour or more before the game starts—to maintain ticket integrity—makes this need for scalpers even greater.

157. *See* Halberg, *supra* note 9, at 176–77. Proponents of anti-scalping statutes point to fairness in resale transactions as the justification for adopting these laws. *See* Griggs, *supra* note 118, at 294–95. Law and economics theorists reject fairness as a part of economics as

Moreover, while one of the professed intents of anti-scalping laws is to keep prices low for the consumer, it is far from clear that they actually do so.[158] One study found that these laws protected consumers from exorbitant pricing.[159] The study concluded that anti-scalping laws aligned with lower NFL ticket prices and that "[w]hen [anti-scalping laws] are absent and fans can freely and easily resell tickets, NFL teams charge higher ticket prices."[160] A law and economics analysis using free market principles may help explain this result. In the absence of anti-scalping laws, an active, legal "scalping market provides a team with better information about the true market-clearing price" for tickets.[161] Therefore, even though a team may desire to maintain customer goodwill and thus may underprice their tickets, the team also has a valid reason for raising its prices, even if they keep such pricing under the true market-clearing price.[162] In this regard, the study illustrates the law and economics critique of anti-scalping laws as it shows that such laws deflate prices by imposing the constraints described above.[163] Teams are unable to use this type of pricing information that they would otherwise have available to them from free market transaction on a normally-functioning secondary ticket market.[164] Given the lack of this information, teams keep their prices low to maintain and ensure consumer goodwill rather than increasing ticket prices more efficiently as they might within a data-informed market.[165]

Other studies cast greater doubt on the efficacy of anti-scalping laws and price controls.[166] One study "predict[ed] that anti-scalping laws . . . have no effect on ticket prices in the primary market" because "[b]anning scalping does not change the uncertainty of the . . . fan's demand" if the fan waits until the last minute to buy tickets.[167] In fact, one study posits that these laws might actually raise ticket prices on the primary market because teams may have difficulty distinguishing between scalpers and actual fans at the point of purchase.[168] By making scalping illegal, the law

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it "is antithetical to efficiency-oriented economists[.]" Happel & Jennings, *The Eight Principles*, *supra* note 26, at 137.

158. *See* Drayer, *supra* note 93, at 228.

159. *See* Williams, *supra* note 3, at 507.

160. *See id*.

161. Griggs, *supra* note 118, at 297.

162. *See* Williams, *supra* note 3, at 507.

163. *See id*.

164. *See* Griggs, *supra* note 118, at 297.

165. *See id*.

166. *See* Courty, *supra* note 1, 96 ("The upshot of the Courty model is that the common expectation that anti-scalping laws will make tickets 'more affordable' may be misplaced").

167. Depken, II, *supra* note 145, at 57.

168. *See id*.

cuts through this ambiguity but, in the process, may lead to teams increasing their ticket prices.[169] Indeed, this hypothesis seems to be borne out in ticket prices in both baseball and football markets.[170] As the authors of the study wrote, "if speculators are not in the market it is possible that [teams] will actually increase price[s] because the only individuals at the ticket window are true fans"—those who place the highest value on tickets and have the highest demand for them, without running afoul of the law as a scalper would.[171] In these regards, anti-scalping laws may not keep prices low, they may actually exacerbate pricing on the primary ticket market.

Finally, a law and economics analysis exposes that anti-scalping laws are inefficient because of the lack of enforcement. In fact, these laws are rarely enforced.[172] This may be due to at least two identifiable factors. First, because it is difficult for law enforcement to catch each instance of scalping, any enforcement of the law could beget a claim of arbitrary or selective enforcement from the scalper.[173] To enforce anti-scalping laws effectively and properly, law enforcement must increase its presence at the arena or stadium—something most cities or venues cannot afford.[174] In addition, scalpers can use jurisdictional loopholes—such as selling online or from a location without an anti-scalping law—to circumvent existing laws.[175] When anti-scalping laws are enforced, "judges tend to reduce those [already low] penalties . . . or dismiss the charges altogether."[176] One scholar offers a succinct potential explanation for this trend: "scalping is a victimless crime."[177] In all events, anti-scalping laws are largely unenforced, thus creating even greater inefficiencies in the market.

C. Public Choice Theory Analysis

Public choice theory provides another lens through which to assess the effectiveness and necessity of anti-scalping laws. A public choice analysis applies economic concepts to political and governmental decision-

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169. *See id*. at 65.
170. *See id*. at 76.
171. *See id*.
172. *See* Drayer, *supra* note 93, at 228 ("[A]rresting scalpers is surprisingly uncommon and rarely makes big news.").
173. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 144. *See also* Drayer, *supra* note 93, at 229–30 (citing the study of an undisclosed NFL market and how selectively anti-scalping laws were enforced there).
174. *See* Criscuolo, *supra* note 11, at 214–15.
175. *See id.* at 216; Benitah, *supra* note 7, at 68.
176. Happel & Jennings, *The Eight Principles*, *supra* note 26, at 144.
177. Benitah, *supra* note 7, at 67.

making.[178] The theory focuses on the interplay between interest groups based on the foundational principles of supply and demand.[179] In the political process, "interest groups [represent] the demand side, and [policy-makers] form the supply side."[180] Public choice theory further posits that both interest groups and government decision-makers will act in their own self-interest in the political arena the way those in the financial marketplace vigorously pursue self-gain.[181] The currency of the political process—the benefits or rents, as public choice theory refers to them—take the form of the results of government decision-making: laws, government subsidies, administrative approvals or denials, and the like.[182] Motivated by their desire to get re-elected or pursue a higher office, government decision-makers provide such benefits to interest groups to garner votes, political contributions, and other support for their goals.[183] Interest groups support these decision-makers with political contributions and endorsements in exchange for the types of rents they seek from the political process: laws, economic benefits, government contracts, and other benefits.[184] In this regard, interest groups capture political decision-making to further their own self-interest with the complicit support of government officials.[185]

Public choice theory thus provides a relatively accurate explanation of the circumstances of anti-scalping laws. Interest groups such as sports teams and arena and stadium operators seek to protect their business interests by seeking the adoption of anti-scalping laws from their municipalities. On the one hand, as noted above, sports teams may have valid business concerns for wanting such regulation: to curb nuisances in front of the arena or stadium and addresses the problem of fraudulent

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178. *See* Michael R. Diamond, *Affordable Housing: Of Inefficiency, Market Distortion, and Government Failure*, 53 U. RICH. L. REV. 979, 993–94 (2019).

179. *See* Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 279, 288 (1990).

180. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988).

181. *See* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 940 (1988).

182. *See* Daniel J. Schwartz, Note, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. Rev. 1845, 1848 (2002).

183. *See* Clayton P. Gillette, Comment, *Interest Groups in the 21st Century City*, 32 URB. LAW. 423, 424 (2000).

184. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373–74 (1998).

185. *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL'Y 49, 99–103 (1998).

tickets.[186] On the other hand, teams may also seek to minimize competition in selling or reselling tickets to their games by pursuing local anti-scalping laws. These laws restrict both who can sell tickets and under what conditions they may be sold in the secondary ticket market, thus depressing the competition to varying degrees based on the jurisdiction. In this regard, local government officials—anxious to be supported for re-election by wealthy and powerful team owners, whose teams are often very popular within the city—adopt anti-scalping laws to further the interests of this influential interest group.

This analysis seems even more applicable in light of sports teams' movement into the secondary ticket market. Sports teams have long taken issue with those on the secondary ticket market profiting off of their games without the team receiving any of the profits.[187] It is thus unsurprising that sports teams have entered the secondary ticket market to reap additional profits.[188] Teams have done this, for example, by forming sponsorship agreements with authorized ticket websites.[189] Under such arrangements, "a [sports] team receives a flat fee from the ticket reseller" in exchange for the authorized ticket agent getting "exclusive access to that team's secondary market."[190] In addition, some sports teams enter into exclusive agreements with ticket resellers in exchange for a percentage of the profits from such sales on the secondary market.[191] One form of these exclusive agreements are the Ticket Exchange platforms where season ticketholders can resell their tickets on the secondary market, and both the sports team and the host website—like Ticketmaster—earn profits from the sale.[192] Finally, some sports teams create a related company that they own to sell tickets to the public at a premium.[193] In this regard, the team circumvents the primary ticket market by selling premium tickets directly through its sister company on the secondary market, thus keeping all of the secondary ticket market profits, rather than receiving a mere portion of them.[194]

Sports teams also gain access to data regarding sales of tickets on the secondary market through such agreements. Perhaps it is unsurprising then that the price of tickets on the primary market has increased as teams have

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186. *See supra* text accompanying notes 115–18.
187. *See* Happel & Jennings, *The Folly*, *supra* note 3, at 71.
188. *See* Happel & Jennings, *The Eight Principles*, *supra* note 26, at 156–57.
189. *See* Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game Is It Anyway: Sports Teams' Right to Restrict (and Control) Ticket Resale*, 17 FORDHAM INTELL. PROP. & ENT. L.J. 753, 781 (2007).
190. Highfield, *supra* note 73, at 709.
191. *See id.* at 709–10.
192. *See* Dreyer & Schwartz, *supra* note 189, at 783–86.
193. *See* Bell, *supra* note 4, at 452.
194. *See id.*

been better able to price their tickets closer to their market value (though still below the secondary market price), thus maintaining the aforementioned good will with their season ticketholders and other fans.[195] This data has also informed the adoption and proliferation of variable pricing on the primary ticket market. Equipped with data on pricing, sports teams charge different prices for tickets to different games depending on what the market bears for them at any given time.[196] While similar to other industries—like the airlines—this change in pricing approach on the primary market represents a stark departure from the historical sports industry practice of fixed pricing for all games.

These developments in the primary and secondary ticket markets raise important questions about anti-scalping laws as such changes seemingly undercut the animating reasons for such regulation. Specifically, as described above, one of the key reasons why municipalities adopt anti-scalping laws is to protect the team from business and reputational harm caused by the secondary ticket market.[197] A sports team is "no longer an innocent bystander nor an unfortunate scapegoat for skyrocketing ticket prices."[198] Instead, not only are sports teams major participants and beneficiaries in the secondary ticket market but they have used the information gathered from these exclusive ticketing agreements in the secondary market to aggressively increase the price of tickets they sell on the primary market.[199] Moreover, the concern of ticket fraud in the secondary ticket market dramatically decreases when sports teams are active participants and partners in the resale market.[200] With these professed policy reasons diminished—if not eliminated—anti-scalping laws seem more suspect as they advantage sports teams that are already reaping significant profits by limiting competition on the secondary market. This kind of scenario raises questions both of price fixing and market manipulation given what seems like an increasingly monopolistic status for sports teams. In all events, sports teams entering the secondary ticket market in this fashion—and the changes that have followed—seem to render anti-scalping laws obsolete or, at a minimum, inefficient.[201]

195. *See* Highfield, *supra* note 73, at 710.
196. *See id.* at 730–31.
197. *See supra* text accompanying notes 104–25.
198. Highfield, *supra* note 73, at 716.
199. *See id.* at 717.
200. *See* Halberg, *supra* note 9, at 191.
201. *See* Highfield, *supra* note 73, at 716–19.

V. CONCLUSION

The online secondary ticket market has transformed sports ticketing by minimizing fraud and limiting queues.[202] Indeed, it is an efficient and effective form of market clearing that has significant economic benefits with fewer potential problems than the pre-Internet ticket market experience.[203] When seen through a law and economics lens, anti-scalping laws are inefficient—creating significant hurdles in the marketplace. From a public choice theory perspective, anti-scalping laws appear suspect because they are seen as special regulations designed to benefit a special interest group—sports teams and venue promoters—with an even greater market advantage. This concern has only grown as sports teams enter the secondary ticket market. Finally, general critiques of these laws demonstrate that they are not particularly effective at rooting out the problems they seek to address. In light of these various critiques, several states have repealed their anti-scalping laws.[204] Given the evolution of the secondary ticket market, a move towards less regulation may make sense to advance consumer interests and to better reflect the realities of sports teams' operations in both the primary and secondary ticket marketplaces.[205]

202. *See* Halberg, *supra* note 9, at 177–78.
203. *See id*.
204. *See* Schroeder et al., *supra* note 30, at 26.
205. *See* Highfield, *supra* note 73, at 728.