The Secondary Market for Tickets: A Look at Ticket Scalping Through an Economic, Property Law, and Constitutional Framework

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THE SECONDARY MARKET FOR TICKETS:
A LOOK AT TICKET SCALPING THROUGH AN
ECONOMIC, PROPERTY LAW, AND
CONSTITUTIONAL FRAMEWORK

Caleb Halberg*

I. INTRODUCTION

The word “scalper”\(^1\) tends to conjure up negative connotations. Average sporting event patrons are likely to be suspicious of the seemingly shady figures lurking around the stadiums and arenas of their favorite teams. Despite society’s general scornful attitude towards the activity and legislative attempts at prohibition, the practice of ticket scalping continues to thrive. This is evidenced by the fact that those seemingly shady figures, just as always, are still engaging in the activity.

A plausible explanation for the continued existence of this secondary market might be found by reasoning that the scalper has something that the public wants, and the public likewise has something that the scalper wants. This mutually beneficial exchange between two entities demonstrates the prototypical market situation. By pursuing their own self-interest, both sides of the exchange advance not only their own welfare, but the welfare of society as well. Under this reasoning, the continued existence of the practice of ticket scalping seems to validate the classic economic theory of the invisible hand.\(^2\)

That being said, the secondary market for tickets also presents many controversial issues. The aforementioned mutually beneficial exchange brings along with it several questions of economic fairness, property law, and constitutional interpretation. Part II of this article

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1. “Scalpers” resell tickets to sporting and entertainment events at a price that is above face value in order to make a profit.

2. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 351-2 (J.C. Bullock ed., P.F. Collier & Son 1909) (1776) (arguing that “[b]y preferring the support of domestic to that of foreign industry, [the individual] intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an Invisible Hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.”).
will explore the positive and negative economic effects of the secondary market. Part III will attempt to illustrate how ticket scalping falls into the principles of property law. Part IV will examine judicial review of legislatures’ anti-scalping laws through a constitutional lens. Finally, Part V will examine several regulatory approaches through the economic, property, and constitutional framework in an attempt to find which approach is the most satisfactory.

II. Economic Issues

In the Western world, it is for the most part undisputed that any sound economic policy should attempt to allocate resources in a way that will maximize social utility. Therefore, from an economic perspective the best policy regarding ticket scalping should maximize societal welfare.\(^3\) When dealing with any policy, it is important to examine it from an economic perspective in order to promote efficiency.\(^4\) This section will explain the structure of the secondary market for tickets and show both its positive and its negative economic effects.

A. Structure of the Ticket Market

Tickets to sporting and entertainment events are consumer goods. Forces of supply and demand interact through a price mechanism in order to influence producers and consumers. In a competitive industry in which the goods are homogenous, firms will compete by lowering the price until it is at the social utility-maximizing equilibrium so that quantity supplied equals quantity demanded. However, in an industry in which the goods are differentiable, each firm will theoretically be able to exercise some monopoly power.

Tickets to major sporting events more closely resemble an industry with differentiable goods. Attending a game or event gives the con-

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4. Here we are concerned for the most part with Pareto efficiency. Pareto efficiency is a useful criterion for comparing the outcomes of different economic institutions, and it is defined by the following:

[[If we can find a way to make some people better off without making anybody else worse off, we have a Pareto improvement. If an allocation allows for a Pareto improvement, it is called Pareto inefficient. If an allocation is such that no Pareto improvements are possible, it is called Pareto efficient. A Pareto inefficient allocation has the undesirable feature that there is some way to make somebody better off without hurting anyone else. There may be other positive things about the allocation, but the fact that it is Pareto inefficient is certainly one strike against it. If there is a way to make someone better off without hurting anyone else, why not do it?\]

Id. at 15-7.
sumer a unique experience, especially since consumers will usually be fans of a particular team and desire to see a particular event. Although most major events will be televised, watching a game on television does not give the consumer the same experience as actually being there among the crowds and excitement. This differentiability means that consumer demand should be particularized so that the ticket supplier faces little direct competition.

Due to space constraints, there is a limited supply of tickets that may be sold to a given sporting event. The supplier of tickets may only sell as many tickets as he may fit within the arena, stadium, or other venue in which the event takes place. In a perfect market situation, the revenue-maximizing ticket supplier would charge the highest possible price for the tickets so that there would be exactly as many people willing and able to buy the tickets as the supplier could fit within the venue.

Taken together, the limited supply and the differentiability of the market should give ticket suppliers monopoly power. With no competitive pressure to lower prices, the profit-maximizing ticket supplier should theoretically sell tickets at the highest price that the market can stand. This would create a situation in which there would be no excess demand, even for a popular event, because the venue would be entirely filled by those consumers who would be willing to pay the high price of admission. Supply would exactly equal demand, creating a situation economists refer to as "market-clearing."

In the real world, however, ticket suppliers regularly sell tickets at a price lower than that which would clear the market. Although it is possible that the explanation for charging this low price could be nothing more than poor market analysis on the part of the ticket suppliers, a more likely explanation is that consistent sellouts are desirable enough to prevent ticket suppliers from charging a market-clearing price. Moreover, keeping the prices low so that “blue collar fans” can afford to purchase tickets will help the organizations satisfy their long-term agenda of maintaining a sustainable fan-base. Regardless

8. Id. at 7-8.
of why ticket suppliers behave this way, the low prices create a situation in which there are more people willing and able to purchase tickets than there are available seats. This situation is called excess demand.

Excess demand helps create the secondary market of ticket scalping. Ticket scalping is a consumer service that exists in order to clear the secondary market that is created by the excess demand. When a promoter charges less than the market clearing price for tickets, demand for those tickets will exceed their supply, and some mechanism other than price must determine which consumers get to purchase the tickets. One of these mechanisms is a queue. Queuing substantially transforms the cost of a ticket. The true cost becomes the money price plus the time price of waiting in line. Therefore, for people who do not have time or are simply unwilling to stand in line to purchase tickets, the cost of buying a ticket from the queue is very high. These people might be more willing to buy tickets from the secondary market at an increased price in order to avoid the lines. The true price of a ticket is not only the cost of the ticket itself, but also the opportunity cost of attaining it; therefore, scalpers hire people to stand in line and purchase tickets which are turned over and resold by the scalper at a higher price.

B. Positive Economic Effects

Despite the negative stigma of scalping, the positive economic effects of the secondary market are at least one partial explanation for its continued existence. Several of these positive economic effects are the possibility of a lower price in the secondary market, the ability of the market to clear, and the increased convenience that comes along with the coexistence of technology and the secondary market.

1. The Possibility of a Lower Price in the Secondary Market

Allowing the secondary market to thrive allows for situations in which a patron could purchase tickets at prices that are lower than face value. Although scalping is defined as the business of obtaining tickets to sporting events, amusements or exhibitions then reselling them at a higher price, consumers will benefit when the price of tick-

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11. Tishler, supra note 5, at 103.
12. Queue is the British word for a waiting line.
13. Tishler, supra note 5, at 103
14. Tishler, supra note 5, at 103
15. Id. at 105
ets in the secondary market is lower than face value. Reselling tickets at a lower price is not banned by most anti-scalping ordinances, but this type of activity is only likely to arise in an environment where a secondary market exists in the first place. A resale price below face value usually results when the scalper overestimates the demand for the event. Consequently, he must resell at a lower price to recoup his loss. This produces a positive result because the consumers are able to attend the event at a low price. Furthermore, scalpers are encouraged to thoroughly analyze market demand in order to set efficient prices and avoid losses, thereby maximizing societal benefits from market conduct.

2. Market Clearing

As mentioned above, economists generally look at queues negatively because they indicate that the market is not clearing due to excess demand. The existence of a secondary market allows the market to clear when the ticket suppliers in the primary market set prices artificially low.

Market clearing also allows tickets to be distributed in a way that maximizes society's well-being. In the absence of transaction costs, ticket-holders could trade until the tickets would be allocated in the hands of the people who would value them the most. However, many mutually beneficial exchanges would fail to occur if each willing buyer had to find a willing seller. The ticket scalper facilitates the transfer from the low-valuing consumer to the high-valuing consumer and takes as payment a portion of the surplus created.

3. Technology

The development of technology has made ticket sales in the secondary market much safer and more convenient. Scalping used to be a shady activity that took place in back alleys, but technology has legitimized it to the point where it is a fairly safe industry. Today the

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18. See Tishler, supra note 5, at 96.
20. See Eric Baker, Ticket Resale Ban Would Hurt Fans, Lincoln Journal Star, Feb. 20, 2008 at B5 (arguing against legislation banning ticket resale because the migration of the secondary market to the internet provides fans with an opportunity to purchase tickets from a more reliable source).
21. Id.
Internet enables an open, transparent and secure marketplace for tickets, where consumers don’t have to risk showing up to the event and being unable to find tickets to purchase. With the advent of Internet auctions, various online secondary marketplaces, sports teams, and concert promoters are eager to provide websites to let fans sell tickets they have purchased but are unable to use.

C. Negative Economic Effects

Although the positive economic effects of the secondary market are legitimate, scalping also has several negative economic effects that fuel anti-scalping sentiments. Negative economic effects include fairness concerns, fraud and corruption, and loss of tax revenues.

1. Fairness Concerns

One of the most prominent arguments made against ticket scalping is that scalpers charge exorbitant prices that are unfair to true fans and poor people who want to see an event. Ticket suppliers attempt to keep prices low to retain goodwill with customers, but scalpers charge prices significantly above face value and make tickets unaffordable to average fans. Politicians support anti-scalping ordinances because they are hesitant to open the floodgates and allow anyone to sell tickets without any limitation on costs.

Moreover, teams view scalping as unfair because scalpers make excessive profits of which the teams do not get a cut. The teams are “on the sidelines” because for years they have watched ticket brokers earn hundreds of thousands of dollars from an entertainment product that the teams—not the brokers—create and develop.

2. Fraud and Corruption

It has been claimed that fraud and corruption run rampant in the secondary market. One corrupt practice includes ticket brokers paying illegal and substantial bribes to various persons who have control

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22. Id.
23. Glantz, supra note 19, at 262-3.
25. Id.
27. Dreyer & Schwartz, supra note 17, at 755.
over tickets at the original point of sale. Some people who have control over tickets at the original point of sale are venue operators, agents, or employees. Pay-offs made to these persons are known as "ice."

Another corrupt practice includes fraud. Tickets purchased from scalpers are often suspected to be fraudulent. This argument is supported by the fact that some sellers in the secondary market have been caught selling fake tickets. These concerns cause anxiety in potential consumers over the secondary market.

3. **Loss of Tax Revenues**

When tickets are resold at shockingly high prices as part of an "underground economy", politicians are outraged at the lost tax revenue. The problem here is that, like any underground economy, if the government does not know about the activity it cannot be taxed. Undeclared taxable income received by box office employees and brokers because of the secondary market is a matter requiring increased attention.

III. **Property Law Issues**

This section will analyze the primary and secondary market for tickets in the context of property law. A thorough examination of the ticket market must include a property law perspective because this area of law contains the bulk of the legal analysis, as opposed to economic analysis, concerning the legality of the secondary market. Relevant property law topics include the question of licenses or leases and also concepts of nuisance.

A. **Structure of the Ticket Market**

The ticket market revolves around a license contract between teams and patrons. Although these licenses fall within the scope of property law, the property interest that comes with the ticket is extremely limited; it only grants the holder the limited right to use and enjoy the object or land. A license grants the licensee a right to enter upon

29. *Id.* at 4.
30. *Id.*
32. *See* Spitzer Report, *supra* note 28, at 10
33. Spitzer Report, *supra* note 28, at 10
the licensor’s land and use it for a specific purpose, without giving up
the licensor’s legal possession and control over the property.\textsuperscript{35}

In its precise legal sense, property is nothing more than a collection
of rights.\textsuperscript{36} Property as to a thing “does not consist merely in its own-
nership or possession, but also in the lawful, unrestricted right of its
use, enjoyment, and disposal.”\textsuperscript{37} Licenses only pass a limited right of
possession, as opposed to all of these rights. Tickets being mere li-
censes, the team still retains legal possession and control over the seat.
Furthermore, a license is revocable at any time at the will of the licen-
sor, and mere possession to use the land does not ripen into a pre-
scriptive right regardless of the length of time that such enjoyment is
permitted.\textsuperscript{38}

Besides the limited interests a ticket license, a property law analysis
is also important to the secondary ticket market because anti-scalping
sentiments are furthered by principles of nuisance. Governments es-
pecially oppose scalping practices on nuisance grounds.\textsuperscript{39}

**B. Traditional Property Law**

According to traditional property law, licenses are non-assignable.
The right of possession is limited to the particular licensee, and the
right to alienate is simply not part of a license. The following deci-
sions enforce this traditional doctrine of property law.

1. **Soderholm v. Chicago Nat’l League Baseball Club**

In **Soderholm**, the plaintiff purchased season tickets for five years in
a row, but upon hearing that the plaintiff was re-selling tickets at
above face value, the defendant baseball team refused to sell him sea-
son tickets again.\textsuperscript{40} The plaintiff argued that he had a property inter-
est in the ability to continue to purchase the season tickets.\textsuperscript{41}
However, the court found a more limited interest; specifically, “[e]ach
individual ticket permits the holder to enter the ball park on the date
and at the time stated on the ticket for the specific purpose of attend-
ing the identified game and sitting in the specified seat, subject to all
terms, conditions, and policies established by the baseball club.” The

\textsuperscript{36} Id.
\textsuperscript{37} 63C AM. JUR. 2D Property § 1.
\textsuperscript{38} Soderholm, 587 N.E.2d at 520.
\textsuperscript{39} See Spitzer Report, supra note 28.
\textsuperscript{40} Soderholm, 587 N.E.2d at 518.
\textsuperscript{41} Id. at 519.
court held that the season tickets were merely licenses and were therefore revocable at will of the licensor.42

2. *In re Liebman*

In *In re Liebman*, a bankruptcy court refused to acknowledge a property interest in the right to renew season tickets to a basketball club’s games.43 The court viewed the season tickets as a series of licenses that were nontransferable and revocable.44 Relying upon *Soderholm*, as well as other cases refusing to acknowledge a right to renewing the season tickets,45 the court held that the expectation of the ability to renew is not an interest in property under Illinois law.46

C. The Argument for Finding Property Interests in Licenses

While the commonly recognized rule regarding tickets leans toward classifying the tickets as a revocable license, some courts find a more substantial property interest in season tickets.47 This occurs particularly when the seller posts vague season ticket policies and the seller fails to enforce its policies consistently.48

1. Property Interests in Bankruptcy Proceedings

In *In re I.D. Craig Service Corp.*, Pittsburgh Steelers Sports, Inc. objected to the sale of the renewal rights by a trustee during bankruptcy proceedings on grounds that the sale violated the state’s anti-scalping laws.49 The court held that the sale of the rights was a property interest because there was an expectation of renewal, which had sufficient value to warrant a sale.50 Similarly, in *In re Platt*, a trustee in a bankruptcy proceeding wanted to sell the rights to season tickets to Boston Red Sox games at an auction.51 The court agreed with the trustee that the season tickets were property because the baseball club automatically renewed the season tickets and also allowed transfers

42. *Id.* at 520.
43. *Id.* at 520.
44. *Id.* at 41.
45. *See In re Harrell*, 73 F.3d 218, 220 (holding that “although season ticket holders are generally awarded the opportunity to renew, there is no guarantee that the Suns will extend the offer. Season ticket holders are powerless to stop the Suns from declining to do so.”).
46. *Id.* at 41.
47. *Davis*, *supra* note 34, at 248.
48. *Id.*
49. *Id.* at 502.
50. *Id.* at 502.
51. *Id.*
regularly, which gives a reasonable expectation that the previous year's holders could renew the tickets.\textsuperscript{52}

These cases demonstrate a legal trend in bankruptcy courts favoring the ability of season ticket holders to prevail in establishing property rights.\textsuperscript{53} While the team structures the contract as a license, courts have begun to look beyond the contract terms to the policies of the teams to find these property rights.\textsuperscript{54}

2. \textit{An Economic Approach to Alienability}

From an economic perspective, but still within the context of property law, property must be freely alienable in order to promote the efficient use and allocation of resources. According to the Coase Theorem,\textsuperscript{55} if there are gains from trade rational parties will trade, and if not, not.\textsuperscript{56} From an economic perspective, people who will not make exchanges that improve their net welfare are irrational.\textsuperscript{57} Under this framework, free alienability should promote efficiency because rational actors should trade until the gains from trade no longer outweigh the costs of making the transaction.\textsuperscript{58} This scenario is much more efficient than a situation in which actors do not trade and are stuck with whichever resources they are initially assigned.

In applying these concepts to the ticket market, a strong argument may be made for recognizing a property interest in ticket licenses. These licenses would allow consumers to assign their tickets to other consumers and maximize the efficiency of resource allocation.

\textbf{D. Nuisance}

Much public opposition to the practice of ticket scalping is grounded upon principles of nuisance law.\textsuperscript{59} Although nuisance is actually a tort, for the purposes of this discussion it suffices to say that it also falls within the realm of property law. Politicians and other individuals that are hostile to the secondary market for tickets often rouse anti-scalping sentiments by declaring that the practice is a public nuisance.\textsuperscript{60} However, given that the secondary market also has positive

\textsuperscript{52} Id. at 17.
\textsuperscript{53} Davis, \textit{supra} note 34, at 248.
\textsuperscript{54} Id.
\textsuperscript{55} The Coase Theorem is a fundamental principle of law and economics.
\textsuperscript{56} \textit{Richard A. Posner, Economic Analysis of Law} 52 (7th ed. 2007).
\textsuperscript{57} Id.
\textsuperscript{58} See Id.
\textsuperscript{59} See generally Spitzer Report, \textit{supra} note 28.
\textsuperscript{60} Id.
effects on the public, it becomes necessary to our analysis to determine whether it legally constitutes a public nuisance in the first place.

1. Public Nuisance

A public nuisance is an unreasonable interference with a right common to the general public, including activities injurious to the health, safety, morals or comfort of the public. In other words, labeling an activity a public nuisance requires two elements: (1) that there be a "right common to the general public," and (2) that there be an "unreasonable interference" with that right.

With respect to the first prong, if a scalper is aggressive, he could clearly have an annoying effect on those around him. Furthermore, scalpers might take up space in an already crowded area. In an attempt to sell their tickets, they block pathways and inconvenience patrons of the event, and others who merely want to go about their business. If scalpers obstruct the use of public roads or sidewalks, it could negatively affect the interests of the community at large from exercising the right to use them, and therefore fall under public nuisance. The right of the general public to be comfortable, although its expectation may be diminished in an already-crowded area surrounding a sporting event, seems to be a legitimate interest of the public.

The question then hinges upon the second prong—whether the scalpers' interference with that right is unreasonable. Circumstances that may sustain a holding that an interference with a public right is unreasonable include (1) whether the conduct involves a significant interference with the public comfort or the public convenience; (2) whether the conduct is proscribed by a statute, ordinance or administrative regulation; or (3) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. Scalpers might cause public inconvenience but that inconvenience is hardly significant. Absent aggressive conduct on the part of the scalper, they do not take up any more space than anyone else. However, the unreasonableness of the conduct is established in many cases by its disturbance to the public.

[Note: Footnotes are not included in the natural text provided.]
places by statute, thereby bringing the pro-scalping argument to an abrupt halt.\textsuperscript{64} Moreover, scalpers tend to regularly engage in the conduct and so it is probable that they know of the illegality of their actions.

Scalping interferes with a right of the general public, and that interference is unreasonable. Therefore, scalping presents a genuine legal issue of public nuisance.

2. \textit{Statutory Aim}

Anti-scalping statutes and ordinances present further evidence that the issue of nuisance is a legitimate concern of society and is one of the main policy considerations.\textsuperscript{65} Some statutes do nothing more than restrict the locations where tickets are allowed to be resold.\textsuperscript{66} Legislatures passing statutes like this are indicating that they are willing to acquiesce to the aforementioned negative economic effects of the secondary ticket market, but unwilling to acquiesce to the real problem, which comes from the unreasonable interferences with the general right of the public to convenience.\textsuperscript{67} Other statutes decline from indicating any intention to giving the ban on the resale of tickets extraterritorial effect,\textsuperscript{68} which could bolster the argument that the public nuisance is the true evil that the statutes intend to prohibit.

\textsuperscript{64} Statutes such as 720 \textsc{ill. comp. stat.} § 375/1(a) (2005) proscribe scalping activities and therefore scalping would qualify as “unreasonable” under Restatement 2d of Torts, § 821B(2)(a)-(c).

\textsuperscript{65} See Arlotta v. Bradley Center, 349 F.3d 517, 520 (7th Cir. 2003) (arguing that local governments perceive that the presence of scalpers surrounding the site of an event is an annoyance and can be, in some instances, even dangerous).

\textsuperscript{66} See Dreyer & Schwartz, supra note 17 (certain states restrict where the tickets may be resold).

\textsuperscript{67} See People v. Shepherd, 74 Cal. App. 3d 334, 383 (Cal. App. 2d 1977) (noting that the subject and purpose of \textsc{cal. penal code} 346, which prohibits ticket scalping, is not to regulate ticket sales as such, but to limit business activities on public property dedicated to recreational use. Furthermore, the unregulated use of that area by peddlers of tickets or other property would add to congestion, annoyance, and inconvenience in areas where crowds must be moved rapidly and safely).

\textsuperscript{68} See Connecticut v. Cardwell, 718 A.2d 954, 963 (Conn. 1998) (holding that the statute banning ticket resale to an event in Connecticut was not applicable to a resale occurring in another state).
3. **Technology**

Technology has decreased the nuisance effect of the secondary market for tickets.\textsuperscript{69} Indeed, such "street scalpers" are now the smallest part of an immense ticket resale industry.\textsuperscript{70} This is because much of the reselling that used to be done on sidewalks and street corners now goes on over the Internet.\textsuperscript{71} Thus, much of the secondary market exists in cyberspace rather than in the physical realm around the venue.

IV. **Constitutional Issues**

If "the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."\textsuperscript{72} If a statute or an ordinance is contrary to the constitution, courts have the ability to void the unconstitutional statutes or ordinances through the process of judicial review.\textsuperscript{73} Historically, challenges to the constitutionality of anti-scalping statutes have been rejected by a majority of courts. This section will explore possible constitutional challenges to anti-scalping statutes on First Amendment and substantive due process grounds.

A. **First Amendment**

A relatively new approach to challenging the constitutionality of anti-scalping ordinances lies in First Amendment jurisprudence. Laws that illegalize the solicitation of ticket sales may unconstitutionally restrict commercial speech. The Supreme Court has held that "even speech that does no more than propose a commercial transaction is protected by the First Amendment."\textsuperscript{74} Notably, the Court has reasoned that "commercial speech serves to inform the public of the availability, nature, and prices of products and services. Thus, commercial speech performs an indispensable role in the allocation of resources in a free enterprise system."\textsuperscript{75} However, laws restricting

\textsuperscript{69} See Glantz, supra note 19, at 262 ("Associating the term "ticket scalping" with the traditional sidewalk scalper is becoming less obvious as it meets its "digital future," i.e., the Internet.")

\textsuperscript{70} See Id.

\textsuperscript{71} See Id.

\textsuperscript{72} Marbury v. Madison, 5 U.S. 137, 178 (1803).

\textsuperscript{73} See Id.

\textsuperscript{74} City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421 (1993); See also Edenfield v. Fane, 507 U.S. 761, 765-66 (1993) ("[I]t is clear that . . . personal solicitation is commercial expression to which the protections of the First Amendment apply.").

\textsuperscript{75} Discovery Network, 507 U.S. at 421 (1993).
commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.  

For commercial speech to come within the First Amendment it must meet the requirements set out in Central Hudson Gas & Electric Corp. v. Public Service Commissioner of New York: it must (1) concern lawful activity and not be misleading; and (2) the asserted governmental interest must be substantial. If both inquiries yield positive answers, we must determine whether the regulation itself directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

1. *Carroll v. City of Detroit*

In *Carroll v. City of Detroit*, plaintiff ticket sellers brought a class action suit against the City of Detroit under § 1983, challenging the constitutionality of an anti-scalping ordinance. Although Michigan generally prohibited the sale of tickets at a price above face value, the sale of tickets at face value or below was legal as a matter of state law. The ordinance prohibited sales of and offers to sell tickets, regardless of price. Accordingly, the court held that the ordinance restricted speech that concerned lawful activity; and the first element of the Central Hudson test was met.

Although the City argued that the ordinance was “necessary for the preservation of the public peace, health, safety, and welfare of the people of the City of Detroit,” the court was unconvinced that this broad, generic statement of purpose assisted in determining the City’s

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78. Id.
79. Id.
80. See City of Detroit Ordinance § 5-1-3 (The constitutionality of an original version of the ordinance and its amended version were both challenged. The amended version provided as follows: “(a) No person shall stand, or remain, on private property without written permission from the owner, or his or her designee, for the purpose of selling, or offering for sale, any ticket of admission to an athletic event, a concert, a public entertainment, a show, or a theater. (b) No person shall sell, or offer for sale, any ticket of admission to an athletic event, a concert, a public entertainment, a show, or a theater on any public street, alley, sidewalk or other public place that is within 500 feet of the structure which houses the athletic facility, the concert hall, the public entertainment facility, or the theater where the ticket will be used, including the civic center facilities which consist of Cobo Arena, Cobo Center, and the Joe Louis Arena.” City of Detroit Ordinance § 5-1-3).
true purpose in enacting the ordinance. The City further argued that the governmental interests of alleviating traffic congestion and in safety were “self-evident.” However, the City failed to provide evidence that it enacted the ordinance to address traffic or safety concerns. Thus, the second element of the Central Hudson test was met, and was therefore unconstitutional.

The court went on to say that even “assuming that the City enacted the . . . ordinance in an attempt to address traffic or safety concerns, the City cannot meet the next essential element of the Central Hudson test, that the . . . ordinance ‘directly advance the state interest involved.’” The court further reasoned that the ordinance would have unreasonable implications, such as that it would prohibit a person from offering to sell his extra Lions ticket to a friend at a restaurant in the City, without written permission from the owner. The court held that “[t]he City offers no explanation how the . . . ordinance, with its broad reach, directly advances its alleged interest in traffic safety and security. . . Moreover . . . the City has provided no evidence that persons attempting to sell tickets in a manner prohibited by the . . . ordinance genuinely cause traffic congestion or security problems.”

B. Substantive Due Process

Anti-scalping ordinances have been attacked on substantive due process grounds, with mixed results. Although opponents of anti-scalping ordinances have maintained that ticket scalping is an exercise of free enterprise, the Federal Constitution does not guarantee the unqualified right to free enterprise. An early Supreme Court, in contrast, held that a state is empowered to fix prices only where the business or the property involved had become “affected with a public interest.” Unable to find that the resale of amusement tickets was

82. Id.
83. Id.
84. Id.
85. See id. at 625.
86. Id.
87. Id.
88. Id.
90. See Ex parte Quarg, 84 P.766 (Cal. 1906) (arguing that the business of reselling tickets at a profit is no more immoral, or injurious to the public welfare or convenience, than is the sale of any ordinary article or merchandise at a profit).
such a business, the Court concluded that the state's regulation was in violation of the Due Process Clause. The Supreme Court began to erode the “affected with public interest” standard throughout the twentieth century. It is now apparent, and the Supreme Court has recognized, that the regulation of the resale price of sports and entertainment admission tickets is a legitimate state interest.

Due process is satisfied if the anti-ticket-scalping statute or ordinance is reasonably related to a proper legislative purpose and promotes the public welfare without discrimination or arbitrariness. Although the United States Supreme Court has recognized a proper legislative purpose and a promotion of public welfare from anti-scalping statutes, states are theoretically allowed to apply a higher standard. Unfortunately for advocates of the secondary market, state courts have also been hesitant to reject anti-scalping statutes since the days of Lochner.

V. Analysis

The secondary market for tickets has both positive and negative effects. However, in order to determine how to maximize the positive effects and minimize the negative ones, it is necessary to look at several actual policy approaches to this issue and then determine which is best. This section will compare several different policy approaches to the secondary market, and run them through the economic, property law, and constitutional law frameworks that were established in sections II-IV. The policies and approaches to be considered are (A) designated areas and only licensed sellers; (B) an official secondary market operated by the team itself; (C) barring sales at above face value, subject to certain exceptions; (D) an aggressive anti-scalping ordinance; and (E) paperless tickets. In the end, it is my position that an official secondary market operated by the team itself is the best approach.

93. In Tyson, a New York statute prohibited the resale of tickets at a price in excess of fifty cents above the price printed on the face of the ticket. Id.
94. For example, in Nebbia the Court stated that “so far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”
97. In Lochner v. New York, the Court struck down a maximum hour law for New York bakers on due process grounds holding that the state’s regulation impermissibly interfered with the bakers’ fundamental liberty to contract. 198 U.S. 45 (1905).
A. Designated Areas and Only Licensed Sellers

The first policy examined allows for a secondary market, but designates certain areas and only licensed sellers may legally engage in the conduct of buying and reselling tickets to sporting and entertainment events. California\(^98\) has an anti-scalping statute that could fall under this category. New York also had a statute in place recently that could have fallen under this category.\(^99\)

1. Economics

By allowing the primary and secondary markets to coexist, the market is able to clear when the original ticket suppliers sell at a price below that which the market demands. However, none of the negative economic concerns from the framework above are resolved. For example, the fairness concerns are just as prevalent under this scheme. Moreover, while certain economic benefits are realized, other economic costs are realized. In particular, by only allowing licensed sellers to resell tickets the government will limit supply, thereby keeping prices artificially high.\(^100\) The resulting monopoly effect could hinder the ability of the market to effectively allocate tickets in a beneficial manner.

One positive economic effect of this type of policy would be the minimization of search costs.\(^101\) In an entirely laissez-faire market, potential buyers and potential sellers would need to physically find each other before they could make the transaction, thereby reducing some of the consumer surplus that could be gained from avoiding the queues.\(^102\) It is questionable whether the economic benefits of the "designated areas and licensed-only sellers" approach are significant enough to outweigh its economic costs.

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98. CAL. PENAL CODE §346 (West 1999). California prohibits the selling of tickets in excess of the face-value (plus lawful taxes) "on the grounds of or in the stadium, arena, theater, or other place where an event for which admission tickets are sold is to be held or is being held," unless the seller obtains written permission from the owner of the property. Dreyer & Schwartz, supra note 17, at 757.


100. A general principle of economics is that license requirements limit supply, thereby keeping prices higher than they would be in an unrestricted competitive market. In effect, licensing provides the holders of the licenses with what economists call a monopoly rent.

101. Search costs are similar in theory to the additional costs of waiting in queues. In other words, the total cost of the ticket will be the monetary price of the ticket plus the cost of actually attaining it. For a more complete discussion of time component costs, see Gary Becker, A Theory of the Allocation of Time, 75 ECON J. 493-517 (1965).

102. The patron would need to spend significantly less time searching for a seller on the secondary market than he would have spent waiting in the queue in order to make the premium above face value of the ticket worthwhile.
2. Property Law

With respect to property law, a policy of designating areas in which the secondary market is legal could curb the nuisance effects of scalping. If scalpers are forced to stay within the confines of a specific area the interference with the public's right of convenience becomes much less unreasonable. The mitigation of nuisance effects makes this policy attractive from a property law perspective.

3. Constitutional Law

Under a policy that delegates specific areas where the secondary market could operate, an anti-scalping statute could be reasonably related to a proper legislative interest. The legislative interest would be traffic and congestion problems associated with the nuisance concerns of a hands-off approach, as well as the consumer protection motives of the government. Furthermore, the policy would not be arbitrary or discriminatory and would therefore survive a due process challenge.

B. An Official Secondary Market Operated By the Team Itself

The second policy considered is an official secondary market operated by the team itself, or its subsidiary. Many professional sports teams use the "if you can't beat'em, join'em" model in order to try to capitalize on the secondary market themselves.\(^{103}\) However, members of the general public have viewed teams using this policy as scandalous,\(^ {104}\) and it has spawned litigation on grounds that the teams are themselves breaking the anti-scalping laws.\(^ {105}\)

1. Economics

The secondary market operated by the team itself would allow the market to clear, thereby bringing all of the aforementioned positive economic effects. In addition, this is a very attractive approach because many of the negative economic effects are curbed by this policy. Teams would have the ability to take a cut from the transactions on the secondary market, which they would appreciate since they are the

\(^ {103}\) John Seabrook said, "Well, it does seem that sports teams are kind of leading the way. They really have gone from, you know, if you can't beat [them], join [them]. The Yankees used to do the same thing. They used to confiscate peoples seasons tickets if they found they have been resold. And now the Yankees actually have a StubHub window at the new stadium. They, you know, assist you in reselling tickets. But, you know, most of the sports teams have now, you know, realized it's, you know, it's let's get a piece of this, let's become part of the secondary market." The Economics Of Live Music (National Public Radio broadcast Aug. 3, 2009).

\(^ {104}\) See Siporin, supra note 89.

\(^ {105}\) Cavoto v. Chicago Nat'l League Ball Club, Inc., 2006 WL 2291181 (Ill. App. 1 Dist.).
ones actually producing the “product.” Furthermore, teams operating official secondary markets would eliminate the fraud and corruption problems because the team would be able to guarantee that the tickets were legitimate.\textsuperscript{106}

2. Property Law

Although the tickets themselves would still not be freely alienable under the official secondary market approach, they would be alienable in the sense that ticket holders could sell to at least one buyer—the team itself. This approach would still allow for increased efficiency in the allocation of resources, similar to the aforementioned increase that Richard Posner argued would come with free alienability.\textsuperscript{107} The negligible difference would be that the team or its subsidiary would act as a broker. Furthermore, with the official secondary market, nuisance problems could be minimized.

3. Constitutional Law

This policy would not bring up constitutional issues because the team would not be a state actor. The team should be able to operate an official secondary market, assuming they could avoid antitrust issues.\textsuperscript{108}

C. Barring Sales Above Face Value, With Exceptions

A third policy examined is the government barring sales above face value, subject to several broad exceptions. Illinois follows this approach.\textsuperscript{109} The first exception is that the registered ticket brokers may sell tickets above face-value provided they engage in the resale of tickets on a regular and ongoing basis from one or more permanent or fixed locations within the state.\textsuperscript{110} Furthermore, they must maintain consumer protection measures such as a toll free number specifically dedicated for consumer complaints and participate in a refund policy, and they must not engage in selling or attempting to sell tickets while near the venue unless they own, lease, or have permission to occupy that property.\textsuperscript{111} Second, tickets may be resold above face value

\textsuperscript{106} See Siporin \textit{supra} note 89, at 740 (saying “The Cubs claim their rationale was to provide consumers a service and protect fans from purchasing illegitimate tickets.”).

\textsuperscript{107} See Posner \textit{supra} note 56.

\textsuperscript{108} This article does not discuss antitrust issues. See Siporin, \textit{supra} note 89, for more legal issues with this type of policy.

\textsuperscript{109} 720 ILL. COMP. STAT. § 375/1(a) (2005).

\textsuperscript{110} Id. § 375/1.5(b).

\textsuperscript{111} Id.
through registered Internet auctions that meet consumer protection standards.\textsuperscript{112} Third, tickets may be sold above their face value by not-for-profit organizations for charitable purposes.\textsuperscript{113} Fourth, tickets may be sold above their face value if resale is made through an Internet website whose operator has a business presence and physical street address in Illinois.\textsuperscript{114}

1. \textit{Economics}

The economic effects of this policy are similar to the “designated areas” approach mentioned above. By restricting the free exchange of tickets, the government might limit supply and therefore keep costs of tickets high. Furthermore, this type of policy does not address the fairness concerns of the secondary market. However, by requiring certain standards for entering the secondary market, the government furthers its goal of consumer protection. Therefore, this approach may be slightly more attractive than the “designated areas” approach from an economic perspective.

2. \textit{Property Law}

By forbidding ticket suppliers from barring resale above face value if it falls within one of the exceptions, this policy erodes traditional property law. Although tickets are traditionally regarded as licenses, which are non-assignable, this policy forces the property owner to recognize assignments when they fall into these categories. Assuming that traditional property law is something that should be preserved, this policy seems unattractive. However, this almost eradicates the public nuisance problem because participants in the secondary market must own, rent, or have permission to use the property from which they operate.\textsuperscript{115}

3. \textit{Constitutional Law}

This would probably pass the \textit{Carroll} test because the law says nothing about the resale of tickets at below face value. Furthermore, this policy would not be arbitrary or discriminatory and would therefore survive a due process challenge.

\textsuperscript{112} Id. § 375/1.5(c).
\textsuperscript{113} Id. § 375/1.5(d).
\textsuperscript{114} Id. § 375/1.5(e).
\textsuperscript{115} Id. § 375/1.5(b)
D. An Aggressive Anti-Scalping Ordinance

The fourth policy considered is an aggressive anti-scalping ordinance that bans all transactions on the secondary market. A policy like this was enacted by the City of Detroit, but was declared unconstitutional in federal court.\textsuperscript{116}

1. Economics

Clearly, anti-scalping ordinances that are this aggressive will not allow the market to clear. However, many of the negative economic effects of scalping could be avoided under a strict policy. Teams could preserve their goodwill, and price tickets in such a way that would allow them to maintain a sustainable fan base. From an economic standpoint, the problem with such a strict policy is that it is difficult to enforce. Scalping is a reality of market forces, and it is likely that a law is not enough to stop the emergence of a secondary market.

2. Property Law

From a property law perspective, a strict policy is the best way to enforce traditional concepts of non-assignability. Nuisance effects would also be minimal, provided that such a strict policy is enforceable.

3. Constitutional Law

In Carroll, a strict anti-scalping law was struck on grounds that it was an unconstitutional restriction of commercial speech. It is likely that other courts would follow similar reasoning and hold aggressive scalping laws unconstitutional. It is not so clear that courts would hold these laws as a violation of due process, as the test for due process involves a lower level of judicial scrutiny.\textsuperscript{117}

E. Paperless Tickets

The final policy examined is the new system of paperless tickets. Some entertainers have utilized new technology to eliminate the need for paper tickets, thereby eliminating the possibility of scalping entirely.\textsuperscript{118}

\begin{itemize}
  \item\textsuperscript{116} Carroll v. City of Detroit, 410 F. Supp.2d 615, 624 (E.D. Michigan, 2006).
  \item\textsuperscript{117} Id.
  \item\textsuperscript{118} Jon Bream & Paul Walsh, \textit{Miley Takes On Scalpers; E-tickets for Minneapolis Gig May Keep Prices Down But Add a Hurdle,} \textit{Star Tribune,} June 4, 2009. Paperless ticket policies require the showing of the credit card that was used to purchase the ticket.
\end{itemize}
1. Economics

When there is no possibility of resale, the market will not clear if the original supplier sets the price either too low or too high. However, this policy could prevent consumers from being charged exorbitant prices; therefore it would probably be seen as being fairer. However, paperless ticket schemes are criticized on grounds that they create difficulties with entering the venue because every credit card must be checked at the door.\footnote{Id.}

2. Property Law

Paperless ticket schemes promote traditional concepts of non-assignability and also minimize nuisance effects of the secondary market. Therefore, the major property law concerns are avoided by a paperless ticket policy.

3. Constitutional Law

Typically a paperless ticket scheme would not come from a law, but from ticket suppliers themselves, and their concerns about scalping. However, even a law requiring paperless ticket schemes might pass constitutional muster. Such a law would likely be insulated from any type of first amendment attack, and could probably pass rational review scrutiny from a due process attack.

VI. Conclusion

A team entering the secondary market themselves is probably the best approach that can satisfy economic, property law, and constitutional concerns. The practice of ticket scalping is virtually impossible to completely prohibit. Furthermore, its economic benefits might suggest that efforts to prohibit the activity would be better-placed elsewhere. The teams themselves are best protected against the negative effects of scalping by entering into the secondary market themselves.