

IF YOU CAN'T BEAT 'EM, JOIN 'EM: IMPLICATIONS FOR NEW YORK'S SCALPING LAW IN LIGHT OF RECENT DEVELOPMENTS IN THE TICKET BUSINESS

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“[The scalping law] operates alike upon all ticket brokers, who certainly fall within a reasonably distinguishable class from . . . owners and . . . promoters for purposes of state regulation.”¹

“We’re trying to legally legitimize the secondary ticket market.”²

“If we win, and I expect we will, I think that many more sports teams will be doing this.”³

INTRODUCTION

Many people believe scalpers are the cockroaches of the entertainment industry: They were there at the beginning and they’ll be there at the end, hawking front-row seats to the Apocalypse. Those waiting on long lines to purchase tickets for a popular show are often the most frustrated with the scalping industry’s drive for profits, observing that those who work for scalpers are “not exactly the greatest theater enthusiasts.”⁴ If a local sports team is in the playoffs,

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1. *Gold v. DiCarlo*, 235 F. Supp. 817, 821 (S.D.N.Y. 1964) (Kaufman, J.).

2. Statement of Dave Scarborough, Vice President of Technology, Ticketmaster, in Jennifer Mulrean, *Ticket Scalping Goes Mainstream* (Sept. 16, 2003), at <http://money.msn.com/content/Savinganddebt/Finddealsonline/P58727.asp>. Mr. Scarborough described his company’s latest business plan, which includes both primary market and peer-to-peer auctions, to a financial reporter. *Id.*; see *infra* notes 253-58 and accompanying text.

3. James Klenk, Attorney for the Chicago Cubs and Wrigley Field Premium Ticket Services, in Darren Rovell, *Brokerage Won’t Capitalize on Cubs’ Run* (Oct. 7, 2003), at <http://sports.espn.go.com/mlb/playoffs2003/news/story?id=1632772>. Mr. Klenk, the attorney in a class-action lawsuit filed by the team’s fans, spoke on behalf of the team. *Id.*; see *infra* notes 201-29 and accompanying text.

4. See Jesse McKinley, *For ‘The Producers,’ Another Box Office Bonanza*, N.Y. Times, Nov. 17, 2003, at B1 (describing how the box office for *The Producers* took in

the media blitz over ticket scalping becomes, like the weather report, a standard part of the news.⁵ On any given day, a Google News search⁶ will turn up dozens of articles on scalping, most of which report that a hot event quickly sold out at the box office, many people still want to attend, and buying from scalpers may be the only way to get a seat.⁷ The secondary ticket market is huge—one estimate based on census data pegs revenues between \$20 billion and \$38 billion a year⁸—dwarfing the approximately \$4 billion a year in profits Ticketmaster earns as the world's largest primary ticket seller.⁹

The word “scalper” was first used in the late nineteenth century to refer to those who resold the unused portions of long-distance railroad tickets.¹⁰ Today, scalpers are people who resell tickets outside venues on the day of an event. In contrast to scalpers, “ticket brokers” appeared in the early 1900s as remote sales outlets for theaters and ballparks, providing patrons with a convenient alternative to traveling across town to buy seats in advance.¹¹ Venues and brokers worked together to maximize sales, with brokers returning unsold tickets to the box office and rendering payment for tickets sold.¹² When computers paved the way for corporations such

nearly \$3.5 million the day tickets went on sale for a return engagement of the musical's original stars, a figure aided by the purchases of tickets by scalpers).

5. The 2003 World Series featured the New York Yankees and Florida Marlins. Tickets for these games ranked among the most expensive items in sports history. See Todd Venezia & Lorena Mongelli, *Game 6 Tix: \$4,300*, N.Y. Post, Oct. 24, 2003, at 7.

6. Google News is a website that presents information culled from approximately 4,500 news sources worldwide. The articles are compiled solely by computer algorithm without human intervention. Today's search on ticket scalping is available at <http://news.google.com/news?hl=en&edition=us&q=ticket+scalping>.

7. See, e.g., Gina Goodhill, *Sellout Makes UCLA Ticket Scalping Likely*, Daily Trojan, Nov. 7, 2003, at 1. The article describes how the recent success of the USC and UCLA football teams made the game—one which regularly sells out—more likely to have tickets resold on the secondary market, especially by USC students who value more the potential money from selling their student tickets than they do attending the game. This was one of 56 articles Google News found that day alone.

8. See Elliot Zaret, *Will the Net End Ticket Scalping?* (Sept. 2, 1999), at <http://zdnet.com.com/2100-11-501311.html>. This MSNBC article, which focuses on how the Internet will change, not end, scalping, quotes Arizona State University economist Stephen Happel, whose estimate as to the size of the secondary ticket market considers the combined scalping and brokering industry. *Id.*

9. See Ticketmaster, About Us, at http://www.ticketmaster.com/h/about_us.html?tm_link=tm_home_i_abouttm (last visited Jan. 19, 2004).

10. See 14 Oxford English Dictionary 568 (2d ed. 1989); see also Pascal Courty, *Some Economics of Ticket Resale*, 17 J. Econ. Persps. 85, 88 (2003).

11. See National Association of Ticket Brokers, What is a Ticket Broker?, at <http://www.natb.org/ticketbroker/> (last visited Jan. 25, 2004). The National Association of Ticket Brokers is an industry trade group formed in 1994 as a concerted effort to set rigid ethical standards for the ticket brokerage industry, to educate the public about the business of selling tickets on the secondary market, and to encourage ticket brokers to get bonded to ensure consumer refunds.

12. *Id.*

as Ticketron and Ticketmaster to serve several markets simultaneously, local brokers moved into the secondary market, providing premium tickets to sold-out events and serving as an outlet for ticket holders to sell seats to events they could not or did not want to attend.¹³ Some see the price markups imposed by ticket scalpers¹⁴ as free-market capitalism in action because they facilitate transactions between willing buyers and sellers. Others, however, consider it “un-American” because they believe scalpers steal profits from promoters and force fans to pay unnecessarily high prices for tickets.¹⁵ Regardless of one’s individual viewpoint, however, scalping is against the law in New York.

Scalping is defined by section 25 of the New York Arts and Cultural Affairs Law (“NY ACAL”), which provides in part,

1. No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, or own, conduct or maintain any office, branch office, bureau, agency or sub-agency for such business without having first procured a license . . . granted upon the payment by or on behalf of the applicant of a fee of two hundred dollars . . .
2. This section shall not apply to any person, firm or corporation which purchases any tickets as defined in this section with the intent of using the tickets solely for their own use or the use of their invitees, employees and agents and resells them at a price not in excess of that permitted by section 25.13 of this article should they no longer be able to use them.¹⁶

Ticket resale is thereby regulated in New York, excluding from prosecution those without licenses who need to resell tickets they cannot use, but forbidding resale for prices over the amount set by law.

The stated purpose of New York’s legislature in controlling the sale of tickets to theaters or places of entertainment is to “safeguard[] the public against fraud, extortion, exorbitant rates and similar abuses.”¹⁷

13. *Id.*

14. This Note uses the colloquial “scalpers” to refer to both scalpers and brokers because from an economic perspective, both groups provide similar services. See Pascal Courty, *An Economic Guide to Ticket Pricing in the Entertainment Industry*, 66 *Louvain Econ. Rev.* 167, 174 (2000).

15. See Associated Press, *Is Minnesota’s Scalping Law Out of Date?* (Nov. 2, 2003) (explaining that ticket scalping should not be criminalized because, “in 2003, nationwide ticket buying and selling is as modern as eBay, as easy as the click of your mouse and as secure as Internet banking”), at http://wcco.com/localnews/local_story_306224722.html.

16. N.Y. Arts & Cult. Aff. Law § 25.03 (McKinney 1984 & Supp. 2004).

17. N.Y. Arts & Cult. Aff. Law § 25.01 (McKinney 1984 & Supp. 2004). The full section reads:

To put it plainly, ticket scalping is prohibited because scalpers allegedly gouge helpless consumers by charging several times the face value¹⁸ for tickets that scalpers preemptively remove from the public market or blatantly counterfeit. This Note demonstrates that the premises on which the legislature based the law are flawed because, contrary to popular belief, scalpers do not corner the ticket market for sold out events, nor do they price gouge or engage in extortionate pricing. Moreover, this Note also shows that the court-created justification for the law fails even when taken on its own terms: The rationale cited to uphold the law cannot be sustained in light of recent developments in the sports and entertainment industries, including promoters' appropriation of the supposedly "unethical" business practices of scalpers, which are unquestionably illegal under the current regime when perpetrated by scalpers.

Part I of this Note provides background about the secondary ticket market by presenting an economic analysis of ticket scalping, examining the reasons the resale business thrives despite the legislature's finding that scalping is dangerous and harmful to the public.

Part II outlines developments in the sports and entertainment industries that evince the paradigm shift in the ticket business that this Note argues necessitates revision of existing laws. Part II.A.

It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the appropriate political subdivisions of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

Id.

18. New York law requires prices to be printed on all tickets and defines the maximum price resellers may obtain:

Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation. Such person, firm or corporation shall likewise be required to print or endorse thereon the maximum premium (not to exceed two dollars, plus lawful taxes), at which such ticket or other evidence of the right of entry may be resold or offered for resale. It shall be unlawful for any person, firm or corporation to resell or offer to resell such ticket or other evidence of the right of entry at any premium or price in excess of such maximum premium printed or endorsed thereon, plus lawful taxes, or so that the ultimate price to the purchaser of such ticket shall exceed a sum in excess of two dollars over and above the original price charged for admission as printed on the face of each such ticket or other evidence of the right of entry, plus lawful taxes.

N.Y. Arts & Cult. Aff. Law § 25.13.

chronicles the history of scalping cases in New York by focusing on five prominent cases, from the first review of the law in 1924, which struck it down, to more recent failed constitutional challenges to New York's scalping law.¹⁹ Part II.B. describes promoters' efforts to make as much money selling tickets as possible by entering into territory previously inhabited only by scalpers. These tactics include holding back tickets until the day of the event, operating on the secondary market, and outright price discrimination.

Part III explains how the constitutional basis for upholding the New York law has significantly eroded such that courts should strike down the scalping prohibition. This Note argues that, far from posing a threat to society, the existence of the secondary ticket market benefits consumers and does not harm promoters. The due process argument for sustaining the law employed by New York courts, analyzed in Part III.A., does not withstand a microeconomic study of the secondary ticket market. Because consumers are not being defrauded or extorted into paying exorbitant rates, the disconnect between the facts and the legislature's rationale points to a failure of the rational relationship test and a lack of due process under the Fourteenth Amendment. Courts addressing the issue have deferred to the judgment of New York's legislature, which identified scalping as a problem and enacted a law to eliminate it. This Note argues that it is not New York's remedy that curtails due process, but the legislature's unreasonable finding that scalping is a harm to consumers in the first place that makes the law unconstitutional.

An even stronger argument is made in Part III.B. that New York's scalping law fails an equal protection analysis. Courts' distinction between resellers and original sellers is breaking down because promoters are charging market rates for their best tickets—prices that when obtained by brokers are condemned as extortionate. Promoters are also reselling tickets on the secondary market, mimicking the business practices of scalpers. Additionally, promoters are implementing auction systems by which the best seats will first be sold at the price the highest bidder is willing to pay. The consequences of this type of price discrimination—namely that individuals who pay the most are the ones who end up with tickets—is most often the focal point of anti-scalping campaigns. Because courts consider these business methods legitimate when practiced by original sellers but illegal when practiced by scalpers, the law is discriminatory and therefore unconstitutional.

19. *People v. Rosenblatt*, 717 N.Y.S.2d 9 (App. Div. 2000), which challenged the constitutionality of New York's scalping law, is not included in this analysis. In that case, the court held, without elucidation, that "[t]he maximum ticket price restrictions . . . are not unconstitutional," citing the 1964 and 1995 cases this Note describes in detail *infra* Part II.A. *Id.* at 10.

Part III.C. concludes with a look at the consequences of accepting this Note's proposal of striking down section 25 of the NY ACAL: Promoters will be forced to confront a free ticket market and the New York legislature may pass a new law addressing those harms that may arise from legalized scalping.

I. ECONOMICS OF THE SECONDARY TICKET MARKET

This section reviews the extensive literature on how the illegal activity of scalping persists despite fifty years of legislative effort to eradicate it, examining the uniqueness of the ticket industry, promoters' pricing structure, and ticket distribution practices. The work of researchers John Tishler²⁰ and Pascal Courty,²¹ among others, has clearly framed the issue.

A. *Opportunity for Scalping*

Traditionally, the entertainment and sports industries have set their ticket prices far below market value.²² Basic microeconomic theory posits that when sellers offer goods at lower prices, demand will be higher and more goods will be sold.²³ For many consumers, the admission price they would be willing to pay is much greater than that charged by the box office, resulting in a shortage of tickets, more commonly referred to as an event being sold out. Those who are able to buy from the box office²⁴ receive consumer surplus, the positive difference between what they would have paid for the ticket and the price that the box office charged.²⁵ When the ticket is worth less to its owner than to some other consumer, reselling will benefit both parties because sellers have received more consideration than they would have accepted and buyers have received tickets that they value more than the consideration paid.²⁶ Without obstacles to this process, a series of bargains will be struck until all tickets are in the hands of the

20. See John D. Tishler, *Ticket Scalping: An Economic Analysis and Proposed Solution*, 33 Santa Clara L. Rev. 91 (1993). The structure of Part I is drawn from Tishler's excellent article.

21. See Courty, *supra* note 10, at 85; *supra* note 14, at 174.

22. See, e.g., 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, 144-47 (1992) (criticizing per se regulation of scalping because consumers are both victims and beneficiaries of the practice).

23. See Robert Cooter & Thomas Ulen, *Law & Economics* 31 (3d ed. 2000).

24. Consumers' ability to purchase tickets at box office prices is discussed *infra* Part I.D.

25. See Tishler, *supra* note 20, at 95. Although not a tangible commodity, consumer surplus is the reason the resale market exists. Both promoters and scalpers constantly strive to capture this surplus for themselves, while consumers themselves intrinsically feel entitled to it.

26. See Courty, *supra* note 14, at 185.

highest-valuing users.²⁷ Historically, however, the costs inherent in these transactions stem from the difficulty buyers and sellers have finding each other.²⁸ Scalpers enter the market as middlemen between the low-valuing ticket holder²⁹ and the high-valuing buyer, taking as profit a part of the consumer surplus created.³⁰

B. *Uniqueness of the Ticket Market*

Entertainment tickets do not conform to economists' generic "wider" model of goods manufactured for sale, placed on retail shelves, and sold at uniform prices.³¹ This dissimilarity is because tickets, unlike #2 Kansas Red Wheat, are heterogeneous commodities that generate diverse levels of demand based on different events' popularity, date, seat location, and myriad other factors. Also, unlike thickly traded goods, tickets ordinarily represent a tiny part of a promoter's cost equation because the only expenses associated with filling an otherwise empty seat are the security and clean-up costs that are not dependent on the attendance of one additional fan.³² Once a venue sells out, however, a promoter's costs associated with adding one additional seat are impracticably high, as that addition would require moving the event to a larger venue or scheduling an extra show.³³ As most ticketed events are scheduled and sold well in advance of their performance date, switching venues would inconvenience fans as well as promoters. Sports events are even more rarely moved because teams have fields at which all their home games are played and because one team's schedule is dependent on that of all other teams in the same league. The supply of tickets to any given event, therefore, is limited by the size of the facility.³⁴ For example,

27. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Coase won the Nobel Prize for Economics in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." See Nobel e-Museum, at <http://www.nobel.se/economics/laureates/1991/index.html> (last visited Jan. 25, 2004).

28. Transaction costs have recently declined for computer users with the ascension of eBay, an online marketplace where sellers advertise the availability of tickets and potential buyers bid on them, auction-style. See Jon Michael Gibbs, *Cyberscalping: On-Line Ticket Sales*, 31 U. Tol. L. Rev. 471, 485 (2000). Although eBay may facilitate more transactions, the limited supply of tickets to any given event will keep prices and transaction costs high.

29. See Tishler, *supra* note 20, at 96. Tishler believes that scalpers obtain most of their inventory from the box office. Why box office prices for tickets are set far below the market clearing price is discussed *infra* Part I.C.

30. See Tishler, *supra* note 20, at 96.

31. See Courty, *supra* note 14, at 167 (discussing the ticket market as "a unique laboratory experiment").

32. See Tishler, *supra* note 20, at 96.

33. *Id.* at 96-97. Tishler notes that this is "generally impossible for sporting events and often impracticable for other performances." *Id.* at 97 n.45.

34. See *id.* at 97.

Madison Square Garden has a fixed capacity of 19,763.³⁵ Economists call this a perfectly inelastic supply.³⁶ When supply is inelastic, demand sets the price.³⁷ Consumers perceive price increases based on promoters' increases in cost as fair, but consider those based on demand unfair.³⁸ Thus high-valuing consumers, who readily pay the market price of a ticket (which depends on demand), may consider themselves victims rather than equal participants in a market transaction even though they received the full benefit of the bargain.

A second unique characteristic of the entertainment ticket market is that promoters are not depending solely on single-event ticket sales for their profit. They are promoting more than just a solitary concert or sporting event—they want fans to become regulars at their concerts or games to ensure recurring profits.³⁹ Furthermore, promoters' ancillary revenue streams, such as souvenirs, concessions, broadcast rights and parking should also be considered part of the ticket-pricing equation.⁴⁰ For instance, promoters earn more from expensive soda, hot dogs, and beer than they do from tickets.⁴¹ Because entertainment tickets are not the same as standard retail goods, promoters are likely to price and sell them differently as well.

C. *The Underpricing of Tickets*

Demand exceeds supply for tickets to certain events because of the pricing policies implemented by promoters of events for which tickets are scalped.⁴² Two theories of underpricing in the entertainment industry, as well as the case of the movie theater industry, are examined below. Tishler provided the "textbook analysis"⁴³ of this

35. See The Official Website of the New York Knicks: Arena and Tickets, at <http://www.nba.com/knicks/tickets/arena.html> (last visited Jan. 28, 2004).

36. See Cooter & Ulen, *supra* note 23, at 25-26.

37. See *id.*

38. See Brian M. Pukier, *Exiled on Main Street: A Ticket Scalper's Dilemma*, 50 U. Toronto Fac. L. Rev. 280, 292 (1992) (citing D. Kahneman, J. Knetsch & R. Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 Am. Econ. Rev. 728 (1986)). Pukier's study of the Canadian ticket market demonstrates that scalping is an international phenomenon. He concludes that Canada's scalping legislation is "invariably overbroad" such that the government should be "getting out of the ticket game." *Id.* at 300.

39. See Tishler, *supra* note 20, at 97.

40. See *id.*

41. See Team Marketing Report, Fan Cost Index: Major League Baseball, at http://www.teammarketing.com/fci.cfm?page=fci_mlb2003.cfm (last visited Jan. 25, 2004). The Fan Cost Index tracks the cost of attendance for a family of four, including tickets, parking, souvenirs, and concessions. In 2003, the average cost of concessions and parking at a Major League Baseball game, as researched by Team Marketing Report, was more than double the cost of an average ticket. *Id.*

42. See Tishler, *supra* note 20, at 98.

43. See Courty, *Economics*, *supra* note 10, at 85. "The textbook analysis of resale typically takes for granted that promoters deliberately choose to underprice and that

phenomenon, describing several reasons promoters underprice tickets and declaring that promoters keep ticket prices low to engender goodwill with patrons.⁴⁴ Courty contrasted the entertainment business with that of airlines, concluding that scalping of sports and concert tickets is inevitable given promoters' difficulty with preventing resale and their inability to price tickets for buyers in both the early and late markets.⁴⁵ Einav and Orbach assessed movie theaters' pricing schemes and presented motives similar to those proposed by Tishler but were not convinced by any of them, leaving open the question of why rational theater owners would abandon easily attainable profits.⁴⁶ This part addresses each of these models in turn.

1. Tishler's Textbook Analysis of Promoter Underpricing

It may come as a surprise that the business decisions of promoters create the scalping market.⁴⁷ Promoters' pricing motives include, but are not limited to, any one of the following explanations.⁴⁸ First, because tickets are sold weeks or months in advance of an event, setting prices lower than market clearing levels may be due to promoters' mistaken belief as to the ultimate demand for a specific event.⁴⁹ Promoters who believe that an event will be unpopular will set prices low so as to stimulate demand. However, if the promoter is proven wrong and the event turns out to be very popular, as with a new band with a hit single or a sports team that is unexpectedly in first place, consumers will buy tickets at the low price even though they would have been willing to pay more.

Tickets may also be underpriced because promoters are unable to perfectly price differentiate:⁵⁰ Even though front row tickets often cost several times as much as "nosebleed seats," promoters may not set any price difference between front row center and the very last row of floor seating even though those tickets have vastly different values to consumers. Seats within the same section could have higher values than others because they are closer to the field or the stage. Some seats could be valued lower than others because the view is

this opens the door for arbitrages." *Id.*

44. See Tishler, *supra* note 20, at 102.

45. See Courty, *supra* note 10, at 92-94.

46. See Liran Einav & Barak Y. Orbach, *Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry* (Oct. 2001), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/337.pdf.

47. See Stephen K. Happel & Marianne M. Jennings, *Assessing the Economic Rationale and Legal Remedies for Ticket Scalping*, 16 J. Legis. 1, 7 (1989).

48. See Tishler, *supra* note 20, at 98.

49. *Id.*

50. *Id.* at 99. Courty calls this process "scaling the house." See Courty, *supra* note 14, at 171.

obstructed or behind the stage. Tishler wrote that it is impossible for promoters to determine the market clearing price for each individual ticket because they have insufficient information about consumer demand. However, even if promoters had that information, they would choose not to incur the cost of marketing and distributing thousands of tickets, each with a different face value, because the complex process of individually pricing and selling 45,000 different tickets costs more than promoters could expect to gain from it.⁵¹

A third reason promoters may underprice tickets is to enable promoter insider-trading,⁵² the practice of intentionally withholding the best tickets from public sale so that the promoters themselves can sell tickets to scalpers at prices above face value⁵³ or give them away to favored parties.⁵⁴ The first practice, known as "ice," is "money paid, in the form of a gratuity, premium or bribe, in excess of the printed box office price of a ticket, to an operator of any 'place of entertainment' or their agent, representative or employee."⁵⁵ Box office employees of promoters or Ticketmaster have an opportunity to take bribes because promoters set ticket prices so far below what the public is willing to pay. Kandel and Block argue that tickets on the secondary market are so expensive in large part because scalpers must cover the increased cost of acquiring tickets by means of "ice." The second practice, that of denying the public the ability to buy tickets in favor of giving them away to VIPs, is much more widespread than the public realizes.⁵⁶ In fact, the New York Yankees were investigated by a New York State lobbying commission for distributing free tickets to public officials without disclosing the nature and amount of the gifts,⁵⁷ and later paid a fine of \$75,000.⁵⁸ Further, when promoters object to scalpers "monopolizing" ticket purchases, they are certainly not complaining about their own ability

51. See Tishler, *supra* note 20, at 99.

52. *Id.* at 100.

53. See generally 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 (1997). The authors describe "ice" as commercial bribery and recommend that New York State classify the payment and receipt of "ice" as a felony under the ACAL. *Id.* at 505-06.

54. See Pukier, *supra* note 38, at 284. "[W]ell-connected scalpers can obtain tickets from promoters, artists, and other favoured individuals who have received tickets that never went on sale to the general public." *Id.*

55. See Kandel & Block, *supra* note 53, at 489-90.

56. See, e.g., *Cavoto v. Chi. Nat'l League Baseball Club, Inc.*, No. 02 CH 18372, slip op. at 8 (Ill. Ch. Nov. 24, 2003) (describing the regular process of sports teams holding back tickets for VIPs).

57. See Associated Press, *Steinbrenner, Yankees Issued Subpoenas* (Dec. 24, 2003), at <http://sports.espn.go.com/mlb/news/story?id=1693880>.

58. See Associated Press, *Yankees, Lobbying Commission Settle Case* (Dec. 31, 2003), at <http://sportsillustrated.cnn.com/2003/baseball/mlb/12/31/bc.bba.yankees.subpoenas.ap>.

to hold back tickets, which the scalping law does not even address.⁵⁹ For example, the National Football League holds back 25.2% of tickets to the Super Bowl,⁶⁰ giving these “house seats” away to people like politicians, sponsors, and media personalities. Promoters who provide free seats to VIPs think that making these few people happy outweighs the small profit gained from selling tickets to fans.

Tishler ultimately argues that promoters underprice tickets to maximize long-term revenues.⁶¹ Their strategy is based on their belief that consumers see price increases based on boosts in demand as unfair.⁶² Kahneman, Knetsch and Thaler, in oft-repeated behavioral economics studies, found that 82% of survey respondents believed it “unfair” or “extremely unfair” for a hardware store to raise snow shovel prices by \$5 the morning after a snowstorm.⁶³ The authors’ conclusion, that consumers are more likely to accept price increases based on recovering economic cost than those based on a free market, is quite relevant to a discussion of ticket scalping because it implies that consumers will choose not to transact with promoters who “take advantage” of them.⁶⁴ Tishler suggested that consumers mistakenly view the face value of a ticket as representative of promoters’ costs,⁶⁵ an error implicitly endorsed by state statutes that require prices to be printed on tickets.⁶⁶ Therefore, Tishler argues, promoters intentionally keep prices low, creating consumer goodwill that increases loyalty, resulting in higher attendance and purchases of the promoters’ related products.⁶⁷

2. Comparison to Airline Industry Ticketing Practices

In 2000, Courty reviewed much of the economic and legal research on pricing policies in the ticket business, in part collecting arguments

59. “Payments of premiums to individuals other than agents of the venue (such as promoters and house seat holders) are not specifically covered by ACAL, but can be covered by other provisions of the criminal law, such as commercial bribery.” See Bureau of Investor Protection and Securities, *Why Can’t I Get Tickets? Report on Ticket Distribution Practices* (May 27, 1999), at http://www.oag.state.ny.us/press/reports/scalping/full_text.html. The report recommends that the secrecy surrounding current ticket distribution practices be lifted by legislating increased disclosure as to the availability of tickets to consumers. *Id.*

60. See [Superbowl.com Special Events Information](http://www.superbowl.com/Special_Events_Information), at http://www.superbowl.com/features/general_info (last visited Jan. 28, 2004).

61. See Tishler, *supra* note 20, at 101-02.

62. See Pukier, *supra* note 38, at 292.

63. *Id.*

64. See Tishler, *supra* note 20, at 102.

65. *Id.* at n.81.

66. See, e.g., N.Y. Arts & Cult. Aff. Law § 25.13 (McKinney 1984 & Supp. 2004).

67. See Tishler, *supra* note 20, at 102.

on why promoters would intentionally underprice tickets.⁶⁸ He cited the popular assumption that promoters, by setting low prices, guarantee a sellout and a feeling of prestige and validation for those in attendance.⁶⁹ Promoters also underprice because they know that tickets withheld from public sale can be used to grant favors to selected individuals.⁷⁰ More insidiously, promoters underprice to evade taxes: They declare that all tickets were sold to the public at face value and pay taxes on that revenue, while withholding some tickets for sale at the higher market price.⁷¹

Three years later Courty appeared to reject the theories of other researchers when he presented his own hypothesis on scalping. Like models of airline ticket pricing, Courty's theory of entertainment ticket resale was based on the premise that "consumers learn new information about their demands over time."⁷² He broke down the hypothetical market into "diehard fans,"⁷³ who value the knowledge that they definitely will attend, and "busy professionals,"⁷⁴ who only find out if their schedule is open close to the event date, but who place a high value on tickets.⁷⁵ This state of affairs opens up an opportunity where scalpers can buy early tickets—priced low enough for diehard fans—that they resell later to those consumers who eventually find out that they are eager to attend the event.⁷⁶ In other words, Courty believes promoters have to sell tickets in the early market at low prices to ensure that diehard fans can afford to go. Scalpers then buy some of the tickets meant for diehard fans and sell them in the late market to busy professionals, who are willing to pay any price. The result is that promoters cannot sell high-priced tickets early or they will dissuade fans from buying, and they cannot beat scalpers' high prices in the late game because scalpers who bought at the same time

68. See Courty, *supra* note 14, at 167.

69. *Id.* at 173. Courty also mentions that consumers are influenced by box office figures: Broadway shows inflate their attendance numbers as a marketing tool. *Id.*

70. *Id.* People who receive tickets from promoters can choose between selling the tickets or attending the event. Presumably this explanation includes the payment of "ice."

71. See *id.*

72. See Courty, *supra* note 10, at 86. He recognizes that the model is limited in that airlines have control over the transferability of tickets whereas a supposed lack of feasibility precludes entertainment promoters from checking the identification of thousands of ticket holders the day of the event. *Id.* at 89.

73. *Id.* at 92.

74. *Id.*

75. *Id.* Compare this situation to the airline industry, in which consumers who purchase in advance receive the least expensive fare while those who purchase the day of the flight are charged significantly more for the same class of seat. Although this pricing model ignores the recent introduction of airline ticket brokers such as Priceline and Hotwire, it describes the airline ticket-buying process for the vast majority of passengers.

76. *Id.* at 92-94.

as diehard fans will simply undercut whatever price the promoter sets while still making a profit for themselves.⁷⁷ In this way scalping is an unavoidable consequence of the ticket business.

3. Ticketing Practices of the Movie Theater Industry

“Inferior,” “inefficient,” and “unexplained”⁷⁸ describe the movie industry’s practice of uniform pricing for all films despite significant variation in their popularity, the day of the week, and the time of the year.⁷⁹ Einav and Orbach did not attempt to solve this puzzle;⁸⁰ rather they laid out several possible reasons theater owners engage in this behavior and refute them all.

The first possible reason movie tickets are underpriced is that theater owners need regular customers, so it is against owners’ best interest to antagonize consumers with pricing schemes the latter perceive as unfair.⁸¹ Owners believe that variable prices will affect consumers’ loyalty, that the long history of fixed prices is ingrained into consumers’ minds such that this regularity is the fairness standard. Under this theory, consumers have always paid the same price for every movie in a theater so a change from that pricing model would infuriate them. Theater owners are afraid that moviegoers who believe they have been treated unfairly by a theater that institutes a variable pricing scheme will substitute the similar experience of watching a DVD.⁸² This is because consumers would prefer renting a movie for viewing on their home theater system to submitting to the “unfair” practice of variable pricing.

Einav and Orbach respond, however, that the fairness of price fluctuations in the eyes of consumers depends on how owners frame them.⁸³ Rather than increasing admission prices for blockbusters, theater owners could institute a “B-movie” or a “Tuesday” discount that consumers would embrace. In other words, theaters could set the “normal” price of a ticket at \$15.00 but, like a commuter train’s off-peak fares, could charge \$6.50 for unpopular screening times or films. Furthermore, the authors, citing Kahneman et al.,⁸⁴ argue that consumers—who often equate fair prices with production costs—

77. *Id.* at 93.

78. *See* Einav & Orbach, *supra* note 46, at Abstract, 2.

79. *Id.* at 3.

80. *Id.* at 3-4. The authors focus on why extremely popular films like the *Lord of the Rings* trilogy are priced the same as much less popular ones like *Stuck On You*, but do not focus on variations in price across theater chains or on discounts for students and seniors. *Id.*

81. *Id.* at 20; *see also supra* notes 62-63 and accompanying text.

82. *See* Einav & Orbach, *supra* note 46, at 22.

83. *Id.* at 23.

84. *See id.* at 23 n.19; *see also* Pukier, *supra* note 38, at 292 n.38.

would probably accept premiums charged for \$100 million blockbusters.⁸⁵ This would simply be another public-relations battle for promoters. If they announced that their screening costs for a star-studded extravaganza necessitated a one-dollar surcharge for the opening weekend, consumers might very well accept it.

Theater owners most often cite the unpredictability of a new film's demand⁸⁶ as the reason they refrain from price differentiation.⁸⁷ Einav and Orbach, however, contend that theater owners, by looking only to the demand for each film, ignored the predictable and regular patterns of demand for watching movies in the theater, which could be exploited for profit.⁸⁸ Since the highest demand occurs during the weekend and during the summer and holidays,⁸⁹ theater owners should adjust their pricing patterns to earn more money from consumers who insist on attending during those times. Last, the authors look at how an agency problem might lead to uniform ticket pricing practices. Owners receive more of each dollar spent on concessions than they do on admissions,⁹⁰ so exhibitors may not have an interest in maximizing ticket prices.⁹¹ In response, Einav and Orbach assert that consumers have seemingly always complained that movie ticket prices are too high.⁹² This observation is relevant because if theater owners were really interested in getting consumers in the door to buy snacks, they would lower ticket prices to the point where movies were universally considered a bargain. Furthermore, box office revenue remains theaters' major source of income, so it is in the owners' best interest to "maximize the pie of box-office revenues as it will allow bigger slices to all" involved.⁹³

4. Critique of Promoter Underpricing Theories

As profit-seekers, promoters should be expected to set ticket prices at a level that maximizes their revenues. The research reviewed above explains why promoters ignore the law of supply and demand to underprice tickets. The remainder of this part critiques those analyses to provide a framework for use in Parts II and III.

The textbook analysis of ticket underpricing proposed first that promoters mistakenly underestimate consumer demand, resulting in

85. See Einav & Orbach, *supra* note 46, at 23-24.

86. *Id.* at 24-25. Owners would likely be unable to adjust prices once demand was established due to a movie's short screen life and the above discussion on fairness. *Id.*

87. *Id.* at 24.

88. *Id.* at 25.

89. *Id.* at 15.

90. *Id.* at 26. The markup on refreshments is "more than 80%." *Id.*

91. *Id.*

92. *Id.* at 27.

93. *Id.*

low prices.⁹⁴ This underestimation is unlikely because music promoters are industry insiders who know that, for example, the Simon and Garfunkel reunion tour will be one of the most popular concert series of the year and one that would likely sell out at any price point. Sports promoters similarly know the drawing power of the teams in their league and that demand increases significantly for all teams during the playoffs. Thus the “mistake” rationale for underpricing is unconvincing.

The next reason provided by the textbook analysis is that promoters are unable to scale the house such that the price of each seat reflects its value on the market.⁹⁵ Promoters may have historically faced technological limitations to marketing and selling tickets in this fashion,⁹⁶ but this does not explain why tickets at all price levels are resold on the secondary market. Consumers who are willing to pay scalpers a significant premium over box office prices usually value admission to an event over seat location. These consumers are unconcerned where they sit as long as they can say “I was there.” Promoters’ failure to price differentiate each seat is therefore not the cause of underpriced tickets.

The practice of holding back tickets to profit from “ice” or to give tickets away to preferred individuals⁹⁷ results in a benefit to promoters, and withholding tickets to avoid taxes⁹⁸ could be doubly profitable, if doubly illegal.⁹⁹ Still, this custom begs the question: Why do promoters underprice, holding back certain tickets for sale on the open market, when they could price all tickets at market clearing levels and receive market profits on all of them? In other words, promoters who recognize that there is money to be made by selling tickets at whatever price the market sets will also recognize that they should do that for all tickets, not just some of them. It follows that this irrational behavior could not be the reason promoters underprice tickets.

The textbook analyst’s answer to that question—and to the other questions dealing with mistake and inability to price differentiate—lies in promoter goodwill: Promoters intentionally keep prices low to keep fans coming back.¹⁰⁰ This theory, however, has a fatal flaw. Promoters contend that consumers view pricing based on demand as

94. *See supra* text accompanying note 49.

95. *See supra* notes 50-51 and accompanying text.

96. *See infra* Part III.B.2.-5. for a discussion on why this situation is no longer the case.

97. *See supra* notes 52-55, 70 and accompanying text.

98. *See supra* note 71 and accompanying text.

99. Tax avoidance is illegal and, in New York, so is the practice of promoters selling their own tickets for more than face value. *See, e.g.*, N.Y. Arts & Cult. Aff. Law § 25.13 (McKinney 1991) (amend. 2001).

100. *See supra* text accompanying note 67.

unfair and would be unwilling to buy from promoters who “take advantage” of them by charging market rates for admission.¹⁰¹ However, consumers are willing to do just that when they deal with scalpers. Because reselling underpriced tickets is a successful industry, goodwill is both an insignificant part of consumers’ ticket purchasing decisions and an insufficient explanation for promoter underpricing.

Courty wrote that ticket resale is a natural and unavoidable consequence of market timing; he assumed that promoters must sell to “diehard fans” who buy tickets early and to “busy professionals” who buy tickets late because the latter only realize they can attend an event close to its date.¹⁰² Scalpers buy tickets at the same time as diehard fans and resell to busy professionals at prices that professionals are willing to pay but are lower than whatever the promoter would choose to charge in the late market.¹⁰³ In theory, this model is appealing, but when compared to the real world it is counterintuitive. A key observation is that for any sold-out event, there are enough diehard fans to purchase every ticket the promoter makes available to the public.¹⁰⁴ As the “diehard” label should make clear, these fans value attendance even more than they do planning and are willing to pay market clearing prices if necessary. True diehard fans commit in advance to buying a ticket and attending whether or not they can get tickets from the box office. Thus Courty’s theory is unpersuasive.

Einav and Orbach searched but could not find a reason the movie theater industry abandoned readily available profits by underpricing tickets: Consumers’ irrational views of fairness could be tempered by framing variable prices as discounts rather than increases; the unpredictability of a specific film’s popularity was inconsequential given broader demand patterns; and what seemed like an owner incentive to maximize concession revenue at the expense of ticket prices was shown to be a fallacy because tickets are the industry’s primary revenue source.¹⁰⁵

These findings also apply to the broader ticket business. Sports promoters could discount ticket prices to reflect the quality of a weaker opposing team. Music promoters could predict demand based on factors like radio play and CD sales, with ticket premiums that “fairly” reflect the artist’s popularity and thus the promoter’s costs. Also like the movie industry, tickets are the primary source of

101. See Pukier, *supra* note 38, at 292.

102. See *supra* notes 72-77 and accompanying text.

103. See *supra* notes 76-77 and accompanying text.

104. Engaging in “ice,” holding back tickets for VIPs, and season ticket plans all reduce the box office supply.

105. See *supra* notes 78-93 and accompanying text.

revenue, so it makes no sense to underprice tickets to benefit concessions when promoters could charge high ticket prices and still sell concessions.

Einav and Orbach, by leaving open the question of why promoters underprice tickets, avoided foreclosing the possibility that promoters underprice because of poor business decisions. As Part III shows, theirs was the correct analysis because promoters are wising up so that a discussion of promoter underpricing will soon be moot.

D. *Alternative Distribution Schemes and the Function of the Scalper*

Because of promoter underpricing, demand for tickets will outstrip supply, so the initial distribution must depend on a means other than price.¹⁰⁶ Tishler identified three of the most common mechanisms.

1. Queue

Queuing, the British term for waiting in line,¹⁰⁷ is the traditional distribution method for concerts and single-game sporting events.¹⁰⁸ This method involves little cost to promoters, is seen as the most “fair” method by consumers¹⁰⁹ because social and economic status plays no part in determining one’s place in line, and queuing transforms the price of the ticket from box office price to face value plus the cost of waiting in line.¹¹⁰ As to this third feature, a queue method of distribution favors the less wealthy who place more value on money than time, as opposed to the more wealthy, who deem time as more valuable.¹¹¹ When tickets are allocated by queue, the scalper serves as a middleman in a transaction where wealthy individuals pay less wealthy individuals to wait on line,¹¹² thus “partially restor[ing] price allocation to a non-price distribution system.”¹¹³

106. See Tishler, *supra* note 20, at 103.

107. *Id.* at 103 n.88.

108. *Id.* at 103. Aside from the box office at the venue itself, Ticketmaster operates many remote box offices at locations such as record stores and supermarkets, where individuals can wait on line. In addition, Ticketmaster has modernized queue distribution mechanisms by allowing consumers to purchase from Ticketmaster over the phone or Internet. At the prescribed date and time at which tickets for a given event go on sale, consumers attempt to “get through” to Ticketmaster by calling a phone number or visiting the company’s website. Due to the limited number of phone operators and concurrent users supported by Ticketmaster’s servers, consumers often experience delays in connecting—to an operator or to a server—similar to physically waiting in line and may end up similarly situated to those at the end of the line: without tickets.

109. There is an equal opportunity for the public to stand in line, yet consumers still complain when resellers or their agents are waiting alongside them.

110. *Id.* The transformation does not necessarily result in an increase in ticket prices, as certain individuals incur no cost from waiting in a line.

111. *Id.* at 104.

112. The people who wait in line to purchase tickets on behalf of scalpers are called

2. Lottery

Another standard mechanism for distributing underpriced tickets is a lottery.¹¹⁴ The Super Bowl, the NCAA basketball tournaments, and many music artists' fan clubs use lotteries. These involve low administrative costs for promoters, are not tied to wealth, and do not cost consumers the time value of waiting in line.¹¹⁵ Again, scalpers who obtain tickets, whether by paying lottery winners¹¹⁶ or by hiring "lottery diggers"¹¹⁷—those who enter the lottery for the sole purpose of selling their tickets to scalpers—will "restor[e] price allocation amongst consumers."¹¹⁸

3. Merit

Promoters sometimes distribute tickets based on their own specialized criteria.¹¹⁹ The most familiar of these are season tickets.¹²⁰ Season tickets are an agreement between a promoter and a consumer whereby the promoter reserves certain seats for the consumer for an entire season, conditioned on the consumer's willingness to prepay for the entire season's worth of games. Season ticket holders rarely receive a volume discount for purchasing what can amount to multiple tickets for over 80 games each year. This becomes a merit method of distributing tickets because consumers who have purchased season tickets one season are permitted to renew those tickets before they are released to the general public.¹²¹ Season tickets, especially for football teams, can only be obtained by placing one's name at the bottom of a long waiting list.¹²² Long-time season ticket holders will periodically be able to renew for better seats when others fail to renew. Further, season ticket holders for a season in which a team

"diggers." See Lawrence Bershak & Richard J. Ensor, *Ticket Scalping Legislation—A New Jersey Case Study*, 9 Seton Hall Legis. J. 81, 82-83 (1985) (describing the effects of state anti-scalping legislation where previously none existed, and concluding that New Jersey's law is not sufficiently effective at curtailing the problems associated with scalping). "Diggers" use Ticketmaster's phone and Internet ordering system as well.

113. See Tishler, *supra* note 20, at 105.

114. *Id.*

115. *Id.* at 106 n.110. In fact, because the cost of entering a lottery is small compared to that of waiting in line, in theory every eligible person would enter a lottery for underpriced goods solely for the purpose of resale. *Id.*

116. The endowment effect, by which people sometimes demand more to sell something that they possess than they would be willing to pay to buy it, dictates that scalpers who try to purchase tickets from lottery winners will have to pay a premium. See Cooter & Ulen, *supra* note 23, at 87; see also Tishler, *supra* note 20, at 106.

117. See Tishler, *supra* note 20, at 106.

118. See *id.*

119. *Id.* at 106-07.

120. *Id.* at 107.

121. See *id.*

122. *Id.*

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makes the playoffs are granted the opportunity to purchase playoff tickets before the general public. Scalpers may be season ticket holders themselves. But, much more often, scalpers develop "an intricate network of season ticket holders who pass tickets which they cannot use onto the ticket scalper. The season ticket holder usually receives the face value of the ticket from the scalper, who in turn resells it for a profit."¹²³ Thus scalpers' main source of supply for sports tickets are season ticket holders, not the box office.

II. THE CONFLICT OVER SCALPING IN NEW YORK STATE

A. *Judicial Response to Scalping Legislation*

Part I discussed the New York ticket scalping law as well as the economics of secondary ticket markets. This part describes courts' interpretation of section 25 of NY ACAL and its predecessors.

1. *Weller*: The Supreme Court's First Look at Scalping

The validity of the New York scalping law¹²⁴ was first brought before the United States Supreme Court in *Weller v. New York*,¹²⁵ where a broker convicted of reselling tickets without a license challenged that provision of the law.¹²⁶ The New York Court of Appeals held below that "[s]uch restrictions interfere with the liberty of those desiring to engage in that business and are lawful only if imposed by the legislature in the exercise of what has come to be described as the 'police power.'"¹²⁷ In its determination of whether ticket resale was subject to State regulation, the Court of Appeals found that the legislature's goal to protect the public from extortion and similar abuses was open to interpretation:

The declaration of the legislature that the price or charge for admission is a matter affected with the public interest is not conclusive upon the courts; for the courts must in each case decide whether in fact the public interest justifies an attempted restriction by the state upon the liberty of its citizens. Not the assertion of the legislature but only the actual existence of conditions which would justify the exercise of legislative control, must be the basis of a valid exercise of the police power.¹²⁸

The Court of Appeals examined the legislature's assertions and

123. See Pukier, *supra* note 38, at 281.

124. See N.Y. Gen. Bus. Law §§ 167-69k (McKinney 1922) (repealed 1983).

125. 268 U.S. 319 (1925).

126. *People v. Weller*, 143 N.E. 205, 206 (N.Y. 1924).

127. *Id.*

128. *Id.* at 207.

held that the legislature could “remedy the abuse of ‘extortion’ by price regulation”:¹²⁹ Promoters had the right to forbid resale as part of their contract of sale, but, because promoters could not control scalping behavior by contract or condition,¹³⁰ the legislature was justified in enacting the law. Although the Court of Appeals left open the question of whether the legislature could validly restrain prices, the court upheld the petitioner’s conviction for selling without a license.¹³¹

When the case reached the Supreme Court, the broker argued that the provisions requiring a license and creating a maximum resale price were inseparable; that those which limit resale were invalid; and therefore the whole law should fail.¹³² Justice McReynolds in response cited section 174 of the law, which stated that if any part of the law were judicially determined unconstitutional, the remaining provisions of the law would remain valid and in effect.¹³³ Because eliminating the provision restricting resale prices could be removed without creating an unworkable plan, the section requiring a license was severable and valid, and the judgment of the Court of Appeals was affirmed.¹³⁴

2. *Tyson*.¹³⁵ The Supreme Court Holds Maximum Resale Price Provisions Unconstitutional

Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton, which reached the Supreme Court three years after *Weller*, was brought against the New York District Attorney by a ticket broker who sold approximately 300,000 tickets annually. The broker sought a judicial declaration that the provision of the scalping law regulating prices was unconstitutional.¹³⁶ The broker had obtained a license under *Weller* and had provided a bond of \$1,000 as required by law to ensure that he would not engage in fraud or extortion.¹³⁷ Because he had acquired a license and posted a bond, the broker argued, any further regulation was an invalid restriction of individuals’ right to contract.¹³⁸ The case had been heard below, where the broker’s plea for a temporary injunction had been denied.¹³⁹

129. *Id.* at 208.

130. *Id.* at 209.

131. *Id.* at 209-10.

132. *See* *Weller v. New York*, 268 U.S. 319, 325 (1925).

133. *Id.*

134. *Id.*

135. *Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927).

136. *See id.* at 426-27

137. *See id.*

138. *Id.* at 428.

139. *Id.*

The Supreme Court, in a 5-4 decision, held that the state's police power to regulate the conduct of a business or to restrict dealings in private property existed "only where the business or the property involved has become 'affected with a public interest.'"¹⁴⁰ Businesses clothed with a public interest, the Court wrote, fall into one of three classes: those which expressly or impliedly have a duty to render public service (railroads and public utilities); those "exceptional" occupations that have always served the public (innkeepers and cab drivers); and "businesses which though not public at their inception . . . have risen to be such" by devoting the business to the public use.¹⁴¹ The resale of tickets, if it could be characterized as affected with a public interest, must be the third type.¹⁴² Businesses found to be of this third type included insurance companies, telegraph companies, and the operators of a major cross-country grain transfer station, all of which should be distinguished from ordinary private business.¹⁴³ The phrase "affected with a public interest," the Court wrote, was not intended to include private undertakings like those now under consideration.¹⁴⁴

Distinguishing private ticket resale from the other businesses held to be affected with a public interest was not difficult for the Supreme Court. First, a theater's relation to the public differs "obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll."¹⁴⁵ Second, the importance of theater tickets as amusement falls far below that of food and shelter, yet the legislature did not have the power to fix the prices for food or clothing, nor the rental prices for houses or apartments.¹⁴⁶ Finally, the Court held that theater tickets may be made revocable or nontransferable by the promoter, obviating the need for State legislation.¹⁴⁷ If people did not want to adhere to such contracts, they could simply "stay away."¹⁴⁸

Despite the District Attorney's argument that the law was designed to prevent fraud, extortion, and the like, the Supreme Court held that the law unjustly encroached on private activity and thus was a "serious invasion of the rights of property and the freedom of contract."¹⁴⁹ As an example of effective legislation, the Court cited an Illinois statute, which required that a price be printed on each ticket

140. *Id.* at 430 (quoting *Munn v. Illinois*, 94 U.S. 113, 126 (1876)).

141. *Id.* at 431-32.

142. *Id.* at 432.

143. *Id.* at 432-37.

144. *Id.* at 438.

145. *Id.* at 439.

146. *Id.* at 440.

147. *Id.* at 440-41.

148. *Id.* at 442.

149. *Id.* at 431.

and that promoters not charge more than that face value for the ticket, but did not forbid the resale of the ticket by its purchaser for any price, nor did it forbid the promoter from setting the face value at any price.¹⁵⁰ The Court concluded that legislatures should “define and penalize in specific terms” those fraudulent practices by which promoters and scalpers compel a portion of the public to pay a different price from others.¹⁵¹

Tyson represented the *Lochner*-era¹⁵² Supreme Court’s practice of laissez-faire constitutionalism, of overturning progressive legislation when it interfered with the natural laws of economics.¹⁵³ Here the legislation in question violated the broadly interpreted right to contract and was hence struck down as invalid.¹⁵⁴

Despite the *Tyson* majority’s accurate understanding of the economics of the secondary ticket market, the dissenting opinions had more influence on future ticket scalping cases. Justice Holmes wrote that a state legislature should be permitted to do “whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution,” when it has sufficient force of public opinion behind it.¹⁵⁵ Although Holmes wrote that “I am far from saying that I think this particular law a wise and rational provision,” he believed that if the people of New York, speaking through their legislature, said they wanted the law, the Supreme Court should not act to stop them.¹⁵⁶ In another dissent, Justice Stone wrote that the law was constitutional because it was, like the grain elevator analogy used by the Court,¹⁵⁷ designed to protect consumers from extortionate prices made possible by the strategic position of middlemen intervening between producer

150. *Id.* at 443-44.

151. *Id.* at 445.

152. *Lochner v. New York*, 198 U.S. 45 (1905).

153. See generally Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *Yale L.J.* 2331 (2003).

154. Note, however, that from a purely economic perspective the *Tyson* decision was correct. In dicta, Justice Sutherland wrote:

It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. . . . [The statute] applies wholly irrespective of the existence of fraud, collusion or extortion (*if that word can have any legal significance as applied to transactions of the kind here dealt with . . .*).

Tyson, 273 U.S. at 442-43 (emphasis added) (citation omitted). Thus, the Supreme Court recognized that consumers who buy from scalpers receive exactly what they bargain for, so there is no sound economic reason to enact a law that forbids the practice.

155. *Id.* at 446 (Holmes, J., dissenting).

156. *Id.* at 447.

157. See *supra* text accompanying note 143.

and consumer.¹⁵⁸ According to Stone, because promoters and scalpers worked together to create a monopoly in scalpers of the best tickets, scalpers made exorbitant profits beyond reasonable prices that could be regulated by the legislature.¹⁵⁹

3. *Kelly-Sullivan*:¹⁶⁰ The Supreme Court Defers to State Legislators, Upholding Scalping Laws

The procedural posture of *Kelly-Sullivan v. Moss* mirrored that of *Tyson*, as a group of ticket brokers filed for injunctive relief and a declaratory judgment that the portion of New York's General Business Law that limited the maximum premium for resale of tickets to seventy-five cents was "unreasonable, confiscatory and discriminatory."¹⁶¹ The petitioners argued that an equal protection violation existed because the law failed to distinguish between high- and low-priced tickets, as well as between theater tickets and sports tickets.¹⁶²

In the sixteen years between *Tyson* and *Kelly-Sullivan*, the Supreme Court had formally adopted the view toward state power espoused by the *Tyson* dissents in *Nebbia v. New York*.¹⁶³ That case, in which a retailer was convicted of violating an order of the New York Milk Control Board fixing the selling price of milk, rejected the "affected with a public interest" test once and for all. *Nebbia* symbolized a new era for state legislatures, holding that the Constitution does not guarantee the unrestricted privilege to engage in business as one pleases, and permitting states to prescribe the terms upon which certain businesses may contract.¹⁶⁴ Further, with *Nebbia*, the Supreme Court would take a hands-off approach to state legislation, holding that the need, appropriateness or wisdom of a measure is a matter purely of legislative concern. Courts' subsequent deference to legislatures has resulted in few successful due process challenges to existing laws.

Given the Supreme Court's new attitude toward state legislation, the *Kelly-Sullivan* court turned to the test established in *Nebbia*, that the Fourteenth Amendment requires that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained,"¹⁶⁵ otherwise known as the rational basis or rational

158. *Tyson*, 273 U.S. at 449-50.

159. *Id.* at 450-52.

160. 39 N.Y.S.2d 797 (App. Div. 1943).

161. *Id.* at 800.

162. *Id.*

163. 291 U.S. 502 (1934).

164. *Id.* at 527-28.

165. *Id.* at 525.

relationship test. The court found that the New York legislature had sound reasons for distinguishing between scalpers and promoters, including “the hazards of highly competitive enterprise and the need for large capital investment.”¹⁶⁶ Furthermore, in response to the broker’s argument that tickets are a luxury for which interested parties willingly pay, the court held that because the legislature deemed the law compatible with the public welfare, courts should not intervene.¹⁶⁷

4. *Gold*:¹⁶⁸ A New York Court Holds Scalping Laws Constitutional Under the Rational Relation Test

More than twenty years after *Kelly-Sullivan*, New York had revised the scalping statute so as to prohibit ticket resale for more than two dollars over face value.¹⁶⁹ In *Gold v. DiCarlo*, a class of licensed ticket brokers again brought suit challenging the law on due process and equal protection grounds. The petitioners, despite the ruling in *Kelly-Sullivan*, were counting on the fact that *Tyson* had never been explicitly overruled.¹⁷⁰ The District Court held, however, that *Tyson* was no longer controlling and should be regarded as “a relic for the constitutional historians,”¹⁷¹ going so far as to call it an “antiquated, legally unsound decision.”¹⁷² The court cited Stone’s *Tyson* dissent for the premise that the “affected with a public interest” test was illusory,¹⁷³ as well as Holmes’s dissent for the argument that the legislature may regulate any business when sufficient public opinion stood behind it.¹⁷⁴

The Court then analyzed whether the law was constitutional, examining whether the method of regulation bore a rational relation to a constitutionally permissible objective or whether it was arbitrary and discriminatory.¹⁷⁵ The court thus denied the due process challenge, holding that the law reflected the legitimate concern of the legislature with prices the public should pay for theater tickets, absent fraudulent manipulations.¹⁷⁶ Therefore, even though the legislative solution to ticket scalping, “may not entirely eliminate the grave

166. *Kelly-Sullivan, Inc. v. Moss*, 39 N.Y.S.2d 797, 801 (App. Div. 1943).

167. *Id.*

168. 235 F. Supp. 817 (S.D.N.Y. 1964).

169. The statute has since been amended, setting the maximum premium price at twenty percent over face value. See N.Y. Arts & Cult. Aff. Law § 25.13 (McKinney 1984 & Supp. 2004)

170. See *Gold*, 235 F. Supp. at 819.

171. *Id.*

172. *Id.* at 820.

173. *Id.* at 819.

174. *Id.*

175. *Id.* at 820.

176. *Id.*

abuses and may not be the perfect remedy, [it] cannot be faulted as unreasonable.”¹⁷⁷ The Court also rejected the equal protection challenge.¹⁷⁸ Recall the passage that began this Note: “[The scalping law] operates alike upon all ticket brokers, who certainly fall within a reasonably distinguishable class from theatre owners and boxing promoters for purposes of state regulation.”¹⁷⁹ The Court’s method of distinguishing ticket brokers from promoters hearkened back to *Kelly-Sullivan* and included “the competitive hazards of running a theatre, producing shows, and making large capital investments.”¹⁸⁰ The *Gold* court acknowledged that “brokers play a vital role in the entertainment industry, for they . . . bring to the industry the bulk of its profits,”¹⁸¹ so the scalping law “may not be the perfect remedy” but neither was it unreasonable.¹⁸²

5. *Concert Connection*:¹⁸³ Modern Scalping Jurisprudence Relies on a 1964 Holding

Gold v. DiCarlo represented the last constitutional challenge to the New York scalping law for an entire generation. 1995’s *People v. Concert Connection* was an appeal of a criminal action brought under section 25.01 of NY ACAL against a Connecticut ticket broker doing business in New York State.¹⁸⁴ The judge below found no triable issues of fact and enjoined the broker from further violating the New York ticket scalping law.¹⁸⁵ In addition, *Concert Connection* was ordered to pay restitution to injured consumers—those who had paid more than the legal maximum price of ten percent over face value—after finding that *Concert Connection* had on at least three occasions resold tickets in violation of section 25 of NY ACAL.¹⁸⁶ On appeal, the broker, like the petitioners in *Gold*, challenged the scalping law on due process and equal protection grounds, using the *Tyson* holding that the price at which tickets are resold is not a matter affected with a public interest and therefore is an unauthorized use of the State’s police power under the Fourteenth Amendment.¹⁸⁷

Addressing the due process claim, the Appellate Division cited *Gold* for the premise that under the rational relationship test, which

177. *Id.* at 821.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. 629 N.Y.S.2d 254 (App. Div. 1995).

184. *Id.* at 255-56.

185. *Id.* at 256.

186. *Id.*

187. *Id.* at 258.

carries a strong presumption of constitutionality,¹⁸⁸ the New York statute was valid: “Applying the rational relationship test, the court found that, while the statute ‘may not be the perfect remedy, [it] cannot be faulted as unreasonable.’”¹⁸⁹ The court further held that because other states had upheld scalping laws, the goal of section 25 of the ACAL, to protect the public against fraud, extortion, exorbitant rates and similar abuses, was a legitimate interest of the government that did not violate due process.¹⁹⁰

The ticket broker’s equal protection argument, that the law treated various entities differently, was also rejected.¹⁹¹ Concert Connection argued that because both promoters and brokers sell tickets, limiting the maximum price at which one group can sell is unfairly discriminatory.¹⁹² In response, the court again cited *Gold* for its holding that, although “the statute does distinguish between the resale prices that may be charged by different classes of ticket sellers, it does not distinguish within a given class.”¹⁹³ The court thus asserted that ticket brokers and promoters engage in fundamentally dissimilar businesses such that different laws can be passed to govern each.

The value of *Concert Connection* lies in its reliance on *Gold* in setting the threshold for not striking down section 25 of NY ACAL as unconstitutionally discriminatory: “[A] person seeking to establish discrimination must show that he belongs to the same class as those allegedly receiving preferential treatment.”¹⁹⁴ The defendant in *Concert Connection* attempted to compare himself to promoters who “impose a service charge that reflects ‘special services’ provided to consumers in making tickets available.”¹⁹⁵ Promoters are permitted to charge these fees because, as quoted above in *Gold*, they “face the competitive hazards of running a theatre, producing shows, and making large capital investments.”¹⁹⁶ New York’s scalping law, the court held, made a valid distinction between “those who would lawfully recover their expenses and those who would gain substantial profits from [the] unlawful reselling of tickets.”¹⁹⁷ Essentially, the court found that selling a twenty dollar ticket for one hundred dollars, a fifteen dollar ticket for forty-five dollars, and a twenty-two dollar ticket for sixty-five dollars represented extortionate behavior on the

188. *Id.*

189. *Id.* (citing *Gold v. DiCarlo*, 235 F. Supp. 817, 821 (S.D.N.Y. 1964)).

190. *Id.* at 258-59.

191. *Id.* at 258.

192. *Id.* at 259.

193. *Id.* at 258 (citing *Gold*, 235 F. Supp. at 821).

194. *Id.* (quoting *Gold*, 235 F. Supp. at 821).

195. *Id.* (quoting N.Y. Arts & Cult. Aff. Law § 25.29[1] (1984)).

196. *Id.* at 259 (quoting *Gold*, 235 F. Supp. at 821).

197. *Id.* (quoting N.Y. Arts & Cult. Aff. Law § 25.01 (1984)).

part of Concert Connection, behavior that a reputable promoter would never emulate.¹⁹⁸

But what if promoters did the unthinkable and joined scalpers in bringing in “substantial profits” instead of just “recovering their expenses?” As this Note demonstrates in Part II.B., promoters are now engaging in novel business practices to sell tickets at “substantial profits,” breaking down the fundamental distinction on which courts uphold section 25 of NY ACAL and rendering it unconstitutional. Therefore, Part III argues that because New York law prohibits certain behavior when engaged in by scalpers but ignores the same practices when carried out by promoters, the scalping law fails an equal protection analysis and should be struck down.

B. *Recent Developments in the Ticket Business*

For forty years New York courts have upheld the constitutionality of scalping prohibitions based on *Gold's* 1964 analysis of the differences between promoters and scalpers. However, those distinctions have since broken down. When the *Gold* Court interpreted section 25 of NY ACAL, it differentiated promoters from scalpers by focusing on the intrinsic qualities of promoters: They invest large sums of money to run theaters and produce shows.¹⁹⁹ This distinction made it easy for courts to hold that the law did not unfairly discriminate between two similarly situated groups, as scalpers did not have theaters to run or shows to produce. Today, however, it is essential to look at more than the dictionary definition of promoters²⁰⁰ because their business practices now include intensive efforts to capture consumer surplus for themselves, exactly the type of “extortion” and “exorbitant rates” the scalping law seeks to forbid.

Part II.B. of this Note details how promoters have responded to scalpers—as suggested by the Note’s title—by themselves engaging in scalper-like activities. Then in Part III, this Note explains why these policies have eroded the constitutional rationalization of the New York scalping law and argues that a law which treats similarly situated groups differently is unconstitutional.

1. Chicago Cubs

In June 2002, Tribune Company, owners of the Chicago Cubs, created a subsidiary called Wrigley Field²⁰¹ Premium Ticket Services

198. *Id.* at 256.

199. *See supra* Part II.A.

200. “Promoter” is defined as “One who organizes or actively supports a sporting event, entertainment, etc., esp. for profit.” 12 Oxford English Dictionary 617 (2d ed. 1989).

201. Wrigley Field, the Cubs’ home stadium and one of baseball’s smallest, oldest,

("Premium"), a corporation that holds itself out as a ticket broker unaffiliated with the Cubs.²⁰² The Cubs sold²⁰³ tickets to Premium without ever making them available to the public through the box office.²⁰⁴ Premium then marked those prices up as much as thirty-three times and resold the tickets on the secondary market.²⁰⁵ Premium sold \$45 tickets for some of the team's most popular games, including a rare interleague series between the Cubs and New York Yankees, at \$1,500 a seat.²⁰⁶ However, the Illinois scalping law provides that it is unlawful for a corporation operating a baseball park (or any other place of public entertainment) to sell tickets at any price other than face value.²⁰⁷ Therefore, the fact that Premium's president was a Cubs vice president,²⁰⁸ that its offices—one block away from Wrigley Field—are on land owned by the Cubs' parent company, and that its books kept by the Cubs' accounting department, seemed to put Premium in violation of the law.²⁰⁹

In addition to the operations of Premium raising Tribune Company's revenues, the Cubs have also found a loophole in Major League Baseball's collective bargaining agreement ("CBA").²¹⁰ The CBA mandates that teams share thirty percent of ticket revenue among all clubs. For each ticket the Cubs "sell" to Premium at box office prices (say, \$45), then sold at a markup (say, \$1,500), the Cubs' parent company keeps \$436.50 that it would be forced to pay into the revenue sharing pool had the Cubs' box office price been \$1,500.²¹¹ Hence, the Tribune Company had a dual incentive to create Premium: to reach market-clearing ticket prices and to bilk its competitors out of revenue sharing funds.²¹²

and most beloved parks, is filled to capacity each summer. See Doug Pappas, *Boston Baseball: Chicago's Official Scalpers* (June 2003), available at <http://roadsidephotos.com/baseball/bb03-3.htm>.

202. See Derek Zumsteg, *Breaking Balls: Not-So-Fuzzy-Cubbies* (May 22, 2003), at <http://premium.baseballprospectus.com/article.php?articleid=1924>.

203. In fact, Premium never had to pay the Cubs with cash for the tickets. See text accompanying notes 219-20.

204. See Greg Couch, *A Textbook Case of Might vs. Right*, Chi. Sun-Times, May 1, 2003, at 127.

205. *Id.*

206. *Id.* Allen Sanderson, a sports economist at the University of Chicago, said that when other baseball owners hear of this, "they'll be mad at the Cubs, but also kicking themselves for not thinking of it first." *Id.*

207. 720 Ill. Comp. Stat. Ann. 375/1 (West 2003).

208. At least until a lawsuit was filed, at which time the Cubs hurried to make changes to try to "look legal." See Greg Couch, *Cubs Just Giving Fans the Business*, Chi. Sun-Times, Aug. 17, 2003, at 103A.

209. See *id.*

210. See Couch, *supra* note 204.

211. *Id.*; see also Zumsteg, *supra* note 202.

212. This tactic parallels Courty's tax evasion example. See *supra* note 71 and accompanying text. Best left for another time is the question of whether these practices merit the termination of Major League Baseball's antitrust exemption.

A class action lawsuit²¹³ was filed on behalf of consumers alleging that the Cubs had scalped almost 12,000 tickets through Premium,²¹⁴ that Premium was not a broker under Illinois law, that the Cubs were involved in Premium's business practices, and that those who had purchased tickets through Premium had suffered financial damage.²¹⁵ Furthermore, the Illinois Attorney General weighed whether to file criminal charges against the Cubs that could result in the forfeiture of their license to put on a baseball game.²¹⁶

During the trial, plaintiffs argued that the Cubs and Premium were one and the same, a direct violation of the scalping law.²¹⁷ Premium countered that it was Tribune Company, not the baseball team, that set up the independent broker, although a witness for the defendants could not explain why the legal fees in the case were on Premium's books.²¹⁸ Plaintiffs then questioned how a broker—presumably independent from the Cubs—with an initial capital infusion of only \$1,000 could afford to purchase over \$1 million in Cubs tickets for resale.²¹⁹ Defendants responded that this was a normal practice by which the companies paid each other through Tribune's intercompany account.²²⁰ Defendants also claimed that Premium did not divert tickets from fans because the tickets were taken from reserves meant for VIPs.²²¹ This meant that as the Cubs reached the National League playoffs in 2003, Premium had no tickets to sell at a time when other brokerages were the most active.²²²

The case was decided by a County Court in favor of the Cubs and the brokerage.²²³ The judge found that the Cubs gave Premium an edge over other brokers.²²⁴ However, the transactions between Premium and the Cubs were held to be sales because there was a

213. See *Cavoto v. Chi. Nat'l League Baseball Club, Inc.*, No 02 CH 18372 (Ill. Ch. Nov. 24, 2003).

214. See Rovell, *supra* note 3.

215. See Zumsteg, *supra* note 202. The commissioner of baseball, Bud Selig, has unsurprisingly remained silent about the questionable behavior of one of his fellow team owners. *Id.*

216. See Greg Couch, *Scalping Trial Puts Cubs in Precarious Position*, Chi. Sun-Times, Aug. 22, 2003, at 165.

217. See Couch, *supra* note 208.

218. See *id.*

219. See Greg Couch, *People's Court Decision Is in: Cubs Are Guilty*, Chi. Sun-Times, Nov. 21, 2003, at 167.

220. See Couch, *supra* note 208.

221. See Rovell, *supra* note 3.

222. *Id.*

223. See Maureen O'Donnell, *Cubs Prevail in Ticket Broker Case*, Chi. Sun-Times, Nov. 25, 2003, at 8.

224. See *Cavoto v. Chi. Nat'l League Baseball Club, Inc.*, No. 02 CH 18372 (Ill. Ch. Nov. 24, 2003). Specifically, for the Yankees series, purchases by individuals (including brokers) were restricted to four tickets per transaction, while Premium bought 1,755 tickets to the three games. *Id.* at 18-19.

transfer of ownership for a price, even if that consideration only was exchanged electronically in Tribune's intercompany accounts.²²⁵ The judge also decided that the Cubs' generosity in allowing Premium to return ninety percent of its unsold tickets did not prove that sales never occurred.²²⁶ The judge further ruled that the fact that Premium, a presumably independent broker, was able to obtain the high-demand seats²²⁷ reserved for VIPs and unavailable to the public, did not necessitate a finding that the Cubs controlled Premium.²²⁸ In effect, the judge ruled that under current Illinois law, common ownership of a team and a brokerage is legal, and that it is up to the legislature to enact limitations on that behavior.²²⁹ Thus recent jurisprudence has permitted a team's owners to openly scalp the team's tickets.

2. *The Producers*

In another highly publicized case of promoters maneuvering to retain consumer surplus, the producers of *The Producers* Broadway show began in 2001 to remove 50 of their best seats for each performance until the day of the show.²³⁰ They sold the normally \$100 tickets to "Broadway Inner Circle," the brokerage they created, for \$400, which in turn marked the tickets up a legal 20%²³¹ and resold them to the public at \$480.²³²

The promoters of the show did not hide that they were trying to get a part of the secondary market, justifying the premiums as "a means for high-paying customers to obtain good seats."²³³ In response to consumer backlash, *The Producers* donated for a short time \$150 of each ticket's price to the Twin Towers Fund, but continued to charge nearly \$500 per seat.²³⁴ Other promoters of Broadway shows expressed both admiration for declaring this war on scalpers as well as an interest in signing on to the campaign.²³⁵

225. *Id.* at 24.

226. *Id.* at 26.

227. *Id.* at 17.

228. *Id.* at 32.

229. See O'Donnell, *supra* note 223.

230. See Jesse McKinley, *For the Asking, a \$480 Seat*, N.Y. Times, Oct. 26, 2001, at A1.

231. See Elizabeth Block, *Supplementary Practice Commentaries to Chapter 11-C, Title G, Regulation of Sale of Theatre Tickets*, in N.Y. Arts & Cult. Aff. Ch. 11-C. A 2001 bill amended section 25.03(4) of NY ACAL, which sets forth the maximum premium price at which a ticket can be resold, increasing that price from \$5 and 10%, whichever is greater, to \$5 and 20%, whichever is greater, above the face value of the ticket. *Id.*

232. See McKinley, *supra* note 230.

233. *Id.*

234. *Id.*

235. See Robin Pogrebin & Jesse McKinley, *Mixed Notices for the \$480 Ticket*,

There have been as many as ten²³⁶ Broadway shows selling VIP tickets through Broadway Inner Circle at prices far above what their own box offices charge.²³⁷ Still, *The Producers* continues to make the most headlines with the program: Because Matthew Broderick and Nathan Lane, *The Producers'* original leads, are returning to the show, its promoters are now holding back 100 orchestra seats from the 1706-seat St. James Theater for sale at \$480—only through Broadway Inner Circle.²³⁸ Orchestra seats for New Year's Eve 2003 cost \$1,500.²³⁹ While this practice may “create[] animosity between your average theatergoers and your high-class stiff,”²⁴⁰ it has created only high profits for promoters.

3. Variable Pricing for Sports Events

As the Chicago Cubs and *The Producers* have demonstrated, promoters have discovered the folly of charging less than market-clearing prices for high-demand tickets. Sports teams are also heeding Einav and Orbach's advice²⁴¹ to charge different prices for different goods. Variable ticket pricing is a simple strategy for charging more for tickets when popular opponents come to town.²⁴² Pricing is determined based on variables such as the rivalry between the teams, day of the week, and month of the year.²⁴³ The San Francisco Giants baseball team knows that it is competing with ticket brokers and other secondary market actors: “It might send the wrong signal to your fans, that you are trying to squeeze the last dollar out of them, but the scalpers by your stadium are doing exactly that.”²⁴⁴ This Giants executive has justified his team operating as a scalper by saying that scalpers charge more for popular games, so teams themselves should be able to do the same thing.²⁴⁵

Given the immense popularity of the 100th matchup between storied college football rivals like Ohio State and Michigan, for which

N.Y. Times, Oct. 27, 2001, at A11.

236. Not counting *The Producers* in Los Angeles.

237. See <http://www.broadwayinnercircle.com> (last visited Nov. 24, 2003).

238. See Matthew Braine, *Two Stars Bring High Talent and Prices*, at <http://thecelebritycafe.com/features/1044.html> (last visited Jan. 25, 2004).

239. See McKinley, *supra* note 4.

240. See Braine, *supra* note 238.

241. See *supra* Part I.C.3.

242. See Darren Rovell, *Sports Fans Feel Pinch in Seat (Prices)* (June 21, 2003), at <http://espn.go.com/sportsbusiness/s/2002/0621/1397693.html>.

243. *Id.* Special events, like fireworks displays, also command higher ticket prices. *Id.*

244. *Id.* The chief operating officer of the Giants, Larry Baer, acknowledged that his team charges fans \$1 to \$5 more for games played Friday–Sunday, but believes this ultimately holds down prices for season tickets. *Id.*

245. *Id.*

even the 107,501-seat Michigan Stadium can sell out and tickets can be scalped for five and six times face value,²⁴⁶ promoters have begun to realize that mimicking scalpers' practice of charging more when demand rises is the way of the future.

4. Online Secondary Markets

Many sports teams have implemented "services" whereby season ticket holders may sell their tickets online at prices at or above face value.²⁴⁷ The service, usually a link from a team's website, is a profit center for teams, which charge a fee to both buyers and sellers and take a percentage of the resale price.²⁴⁸ Ticketmaster's version of the service, TeamExchange, is used by seventeen professional and collegiate teams, including Madison Square Garden's New York Knicks, Rangers, and Liberty.²⁴⁹ These services appropriate and improve upon scalpers' middleman function, allowing season ticket holders who cannot attend games to (1) receive more than face value for tickets, which scalpers rarely pay; (2) accomplish the transaction from the convenience of their own home; and (3) pay promoters a percentage of every transaction.²⁵⁰ The only problem is that this process is exactly what the scalping statute prohibited: first, these tickets are routinely sold for more than the 20% legal maximum; and, second, teams using these services avoid that part of the law which prohibits promoters from selling tickets at more than the printed face value. Although the services' user agreements place the burden of complying with state laws on users, they do not prevent illegal transactions from taking place.²⁵¹ The only way teams using such systems have avoided criminal liability is through a lack of enforcement on the part of district attorneys.²⁵²

246. See Andy Gardiner, *Michigan-Ohio State: Free Ticket (For a Price)*, USA Today, Nov. 19, 2003, at 3C.

247. See Jim Caple, *All Hail Ticket Scalpers!*, available at: <http://espn.go.com/page2/s/caple/010821.html> (last visited Jan. 25, 2004).

248. See Mulrean, *supra* note 2.

249. See Tom Di Nome, *Hot Tickets, Hawked Legitimately Online*, N.Y. Times, July 3, 2003, at G8.

250. See Derek Zumsteg, *Breaking Balls: Mariners 1 Million, Scalpers 1*, Feb. 3, 2004 (describing Mariners Marketplace, a service provided on the team's website by which ticket holders sell unwanted tickets to the team (for a fee), then the team resells the tickets to consumers (for another fee)), at <http://premium.baseballprospectus.com/article.php?articleid=2537>.

251. See Mulrean, *supra* note 2.

252. See Robert E. Freeman & Daniel Gati, *Internet Ticket Scalping: If You Can't Beat 'em, Join 'em*, Ent. & Sports Law., Fall 2003, at 6. This Note was titled independently months before discovering Freeman & Gati's article, but the authors' sentiment is shared: If legal action is not pursued against these teams, promoters "will have successfully joined the very group of people they have tried to eliminate since the early 1900s." *Id.* at 8.

5. Ticketmaster's Online Auction System

In another important development, America's largest ticket seller, Ticketmaster, is set to begin auctioning the best tickets to events through its own website.²⁵³ Promoters are thus not only abandoning the practice of charging "uniform prices for differentiated goods,"²⁵⁴ they have moved directly into the realm of price discrimination—selling the same product at different prices depending on the buyers' willingness to pay more or less.²⁵⁵ Further, Ticketmaster is price discriminating by only placing the best seats at a given event on the auction block, putting to rest consumers' hopes that even tickets to undesirable events could be had for less than the fictional "face value."²⁵⁶ For events at which scalpers operate, it is a truism that even the least expensive seats were underpriced, so auctions would only increase promoters' profits at those events. However, at less popular events, where a sold out venue is not imminent, a moderate fan of the performer might not be willing to pay full price for the worst seat, say \$50, but would be willing to pay below face value for a ticket through an auction. If that fan's highest bid—the fan's reservation price—is \$20 and nobody bids higher on that given seat, the fan will be able to attend for \$30 less than the "face value" of the ticket. Ticketmaster thus realizes that for events that are not guaranteed sellouts, the auction method should only be used for the seats that are always in high demand—the best ones. By restricting auctions to only the best seats, Ticketmaster is price discriminating against the most rabid fans who will bid up front row seats, but forcing everyone else to pay Ticketmaster's price for nosebleed sections.

Amazingly, given their brazen acceptance of other means of price increases, some promoters are frightened of consumer reaction to such a plan. The vice president of ticket sales at the Pepsi Center, home to the Denver Nuggets, Colorado Avalanche, and many concerts, said that auctioning tickets is "extortion of fans."²⁵⁷ Whether promoters do not want to risk the "embarrassing situation" of having seats in virtually the same location sell for significantly different amounts or whether they really believe they are "gouging

253. See Chris Nelson, *Ticketmaster Auction Will Let Highest Bidder Set Concert Prices*, N.Y. Times, Sept. 1, 2003, at C6.

254. See Einav & Orbach, *supra* note 46, at 1.

255. See Tishler, *supra* note 20, at 99.

256. See Rex Moore, *Ticketmaster Going Once . . .*, at <http://www.fool.com/news/commentary/2003/commentary030910rm.htm> (last visited Jan. 25, 2004).

257. See Russell Adams, *Ticket Auction? Wait and See: Teams Reluctant to Let Ticketmaster Auction Best Inventory; Risks Cited* (Sept. 8, 2003), at <http://www.stubhub.com/sites/corpsite/?gSec=news&gAct=news&article=090803a>.

fans,” most teams are taking a wait-and-see approach to auctions.²⁵⁸ Given promoters’ willingness to implement the profitable strategies described above, it is likely that, as with all of Broadway following *The Producers*, once one team shows that auctions work, the rest will jump on the bandwagon.²⁵⁹

6. Other Strategies

Although the last few years have seen an explosion in promoter efforts to retain consumer surplus, other strategies have flown under the radar for years. As mentioned above, sports teams provide season ticket holders the opportunity to purchase those same seats for the playoffs.²⁶⁰ Teams require consumers to pay increased prices for playoff games because there is more demand for those tickets. Additionally, teams require season ticket holders to pay for every possible playoff game—ten games or more—in advance, but, rather than refund the price of unused tickets, teams simply credit fans’ season ticket accounts for the following year. Thus promoters earn interest-free loans on the backs of season ticket holders,²⁶¹ a practice that is considered a respectable way of doing business.

Promoters know that season tickets—seats that are never available through the box office—often end up in the hands of scalpers who plan to resell them. Promoters implicitly endorse this practice by preemptively charging season ticket holders a fee known as a “Personal Seat License” simply to have the right to purchase season tickets.²⁶² Scalpers have no problem paying because even with the added cost—climbing at some venues to as high as \$5,400 per seat²⁶³—they will still make a profit. Consumers, however, must pay this surcharge because it is the only way for them to buy season tickets.²⁶⁴ One of North America’s leading concert promoters, Toronto-based Concert Productions International, employs a plan similar to sports teams’ personal seat licenses.²⁶⁵ For a flat annual fee on top of the price for individual tickets, individuals can purchase the best seats

258. *Id.*

259. *See supra* note 235 and accompanying text.

260. *See supra* Part I.D.3.

261. *See* Greg Couch, *Cubs’ Ticket Scam of ‘03 Looks Very Familiar*, Chi. Sun-Times, Sept. 11, 2003, at 135. Couch estimated that a team that sells 15,300 season tickets can extract from fans a \$10.2 million interest-free loan for four months. *Id.*

262. *See* Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. Miami Bus. L. Rev. 483, 503 (2002) (explaining how a city can negotiate a favorable financial deal to build a sports stadium).

263. *Id.*

264. *Id.* at 504 (describing wealthy patrons’ additional option of purchasing an entire luxury suite).

265. *See* Pukier, *supra* note 38, at 282.

before they go on sale to the public.²⁶⁶ Most of these fees are paid by scalpers,²⁶⁷ likely because very few consumers have an interest in attending an entire year's worth of concerts. Many fans complain about the fact that they have to pay promoters a fee for the privilege of buying their tickets. Again, the law does not consider this practice extortionate behavior on the part of promoters, but simply another way of bringing in revenues.

With season tickets in such high demand, especially for football teams that have fewer than a dozen home games a year, promoters have begun to exploit fans' desire to obtain season tickets. The waiting list to purchase New York Jets season tickets is approximately ten to fifteen years long.²⁶⁸ The Jets are now charging fans \$50 a year simply for a place on the list.²⁶⁹ Originally the team's plan was to pocket these fees, but when consumer groups and the Attorney General expressed concern, the Jets agreed to apply the fees, which will be capped at \$500, to the purchase of season tickets once a fan reaches the top of the list.²⁷⁰ More than 15,000 fans are now paying solely for the privilege of waiting on line.²⁷¹ When they get to the front of the line, they will pay promoters another fee—the personal seat license—for the privilege of buying tickets. Then the fans will pay whatever price the promoter sets for those tickets. This remains legal under New York's scalping law.

III. LEGAL IMPLICATIONS OF CURRENT DEVELOPMENTS

Traditionally, promoters sold theater and sports tickets at prices far below market clearing levels, allowing scalpers to engage in arbitrage to capture consumer surplus.²⁷² But with the rise of the Internet, with its facility for bringing together ticket buyers and sellers, the barriers to entry onto the secondary market were effectively lifted. Modern promoters thus have little compunction about behaving in the same way as thousands of registered eBay users. The economic discussion of scalping in Part I was not included to change the reader's negative opinion of the people who sell tickets on the secondary market. Nor were the business practices of promoters described in Part II included so that this Note could advocate criminalization of those strategies. On the contrary, the first two sections of this Note were designed to highlight the incongruence between what is forbidden to scalpers but

266. *Id.* In 1991 the fee was \$500 for two tickets. *Id.* at 282 n.8.

267. *Id.*

268. See Jeane MacIntosh, *Spitzer Sacks Jets Tix Scheme*, N.Y. Post, Nov. 11, 2003, at 19.

269. *Id.*

270. *Id.*

271. *Id.*

272. See *supra* Part I.

permitted to promoters. This marginalization of one section of a class of businesspeople is an inequitable application of law under the Fourteenth Amendment, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁷³

The New York scalping law is unconstitutional because it both deprives individuals of their property rights without due process and treats similarly situated parties differently.

A. Due Process

In *Nebbia v. New York*,²⁷⁴ the Supreme Court held that due process requires that laws “not be unreasonable, arbitrary or capricious, and that the means selected . . . have a real and substantial relation to the object sought to be obtained.”²⁷⁵ The rational relationship test is extremely deferential to legislatures. However, the New York legislature’s goals²⁷⁶ bear, at best, an immaterial relation to the means proposed to achieve them. This Note next explains how scalping does not, as argued by the legislature, harm consumers.

1. Scalping as Harm

Having described how promoters surrender profits by underpricing tickets and how scalpers acquire tickets for resale,²⁷⁷ this section discusses whom, if anyone, scalping harms. The range of commentary includes those who consider scalpers “unethical” and “domineering” criminals who perpetrate “rampant abuses” on consumers²⁷⁸ such that federal legislation is required to stop them.²⁷⁹ One author believes scalping to be an unfair trade practice that states can regulate under existing laws.²⁸⁰ Still others regard scalping as an activity that creates

273. U.S. Const. amend. XIV.

274. 291 U.S. 502 (1934).

275. *Id.* at 525.

276. *See supra* note 17 and accompanying text.

277. *See supra* Part I.

278. *See* Sheree Rabe, *Ticket Scalping: Free Market Mirage*, 19 Am. J. Crim. L. 57, 68-69 (1991) (condemning scalpers as unethical and domineering for extorting the public, and demanding federal anti-scalping legislation to protect citizens from scalpers’ interference with the free market).

279. *Id.*; *see also* Paul J. Criscuolo, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 Seton Hall J. Sport L. 189, 220-21 (1995). “In short, the problems associated with ticket scalping require the need for comprehensive action on a national scale.” *Id.*

280. *See* Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37

both benefits and problems such that existing laws are overbroad.²⁸¹ Tishler's theory is that the legal system does not need to protect consumers, who benefit from transactions with scalpers,²⁸² but that it should safeguard promoters, whose practice of creating goodwill by intentional underpricing is defeated by scalping.²⁸³ Tishler is correct that consumers mostly benefit from the secondary market, though this Note disputes his contention that promoters need protection.

a. *Harms to Consumers*

Views on scalping's impact on consumers fall into one of two camps.²⁸⁴ The first camp believes that scalpers foreclose the public's opportunity to purchase tickets at low box office prices and unreasonably raise prices to extortionate levels.²⁸⁵ This is the viewpoint from which anti-scalping legislation is enacted.²⁸⁶ The second view is that scalping is "capitalism at its purest level."²⁸⁷ From this perspective, the scalper is "a humble businessperson and a fan's best friend."²⁸⁸ Neither of these extreme positions adequately illustrates how scalpers affect the market.²⁸⁹

The most prevalent argument against scalping is that it deprives individuals of the ability to attend an event if they cannot afford scalpers' high prices.²⁹⁰ This wrongly assumes that all consumers would be able to obtain tickets at box office prices if scalpers did not intrude.²⁹¹ Were this true, the box office price would be the same as the market clearing price, and there would be no way for scalpers to make a profit.²⁹² As Tishler states, "[w]herever scalpers can earn 'exorbitant prices,' there would be in the absence of a resale market a substantial number of consumers who could not obtain a ticket at the box office, or any other, price."²⁹³ Picture this scenario where scalping does not exist: An event to which 60,000 people want tickets goes on

U. Miami L. Rev. 71, 88-92 (1982). Diamond believes that if scalpers were not present, all consumers would have access to tickets at uniform prices. *Id.* Thus, he believes scalping should be prosecuted as an unfair trade practice. *Id.*

281. See Happel & Jennings, *supra* note 47, at 14; see also Pukier, *supra* note 38, at 300.

282. See Tishler, *supra* note 20, at 114.

283. See *id.* at 118.

284. *Id.* at 108-09.

285. See *id.*; see also Diamond, *supra* note 280, at 78-79.

286. See Tishler, *supra* note 20, at 109; see also N.Y. Arts & Cult. Aff. Law § 25.01 (McKinney 1984 & Supp. 2004).

287. See Caple, *supra* note 247.

288. *Id.*

289. See Tishler, *supra* note 20, at 109.

290. See, e.g., Criscuolo, *supra* note 279, at 192.

291. See Tishler, *supra* note 20, at 110.

292. See *id.*

293. *Id.*

sale at a venue with 50,000 seats. Recall that promoters prevent the public from purchasing as many as one-fourth of the tickets from the box office in favor of season ticket holders, VIPs, and to engage in “ice.” No matter how the remainder of the tickets are distributed, more than 10,000 people will be unable to attend. Scalpers make it possible for at least a portion of those people—those who value attendance most highly—to attend the event.

Another facet to this anti-scalping argument is that scalpers monopolize the marketplace by removing the supply of tickets from the box office, thus enabling themselves to set exorbitant prices.²⁹⁴ On the contrary, it is promoters that have complete control over prices when scalpers do not enter the market.²⁹⁵ By creating a secondary market, scalpers increase competition among all parties selling tickets while at the same time increasing the convenience and accessibility of tickets. This happens because scalping allows individuals to take advantage of the income produced by their time and to still see the event. Fans can also profit by waiting to buy from scalpers until the event is about to begin, at which time scalpers risk losing their investment if they do not sell at a price agreeable to consumers.²⁹⁶

Critics of scalping often complain that the demand-based pricing structure of the secondary market is “unfair” to consumers.²⁹⁷ This sentiment is likely derived from consumers’ belief that they are entitled to consumer surplus.²⁹⁸ Tishler answered:

Where promoters choose not to reap the available profits, their practice should not create an entitlement to receive the ticket at the below market price. More importantly, their practices cannot bestow such an entitlement on all consumers because some consumers will necessarily be unable to obtain tickets at that price. The law should leave the protection of irrational consumer preferences to market participants who have a built-in incentive to maintain goodwill. Where these market participants cannot protect consumers against perceived harms, laws should not try to do so. Such laws will necessarily be unjust to some consumers, and they are likely to be ineffective in achieving their goals.²⁹⁹

Tishler viewed promoter underpricing as an attempt to curry goodwill with consumers, a practice that hypothetically leads to long-

294. See Diamond, *supra* note 280, at 79.

295. See Tishler, *supra* note 20, at 110. See *supra* Part II.B. for a description of how promoters are now asserting their monopoly power.

296. See Pukier, *supra* note 38, at 288 (explaining that scalpers can miscalculate the demand for tickets, especially when a concert promoter announces a second show after the tickets for the first have sold out).

297. See, e.g., Diamond, *supra* note 280, at 85.

298. See Tishler, *supra* note 20, at 112; see also Pukier, *supra* note 38, at 292-93 (describing the research of Kahneman et al.).

299. Tishler, *supra* note 20, at 113-14.

term profits. However, if promoters—those with the biggest incentive—are unable to prevent the existence of a secondary ticket market, laws that try to do so will be ineffective. Worse, anti-scalping legislation will injure consumers who want to buy these tickets but do not want to break the law.

Other harms to consumers include nuisance issues. Scalpers are accused of congesting traffic by conducting transactions near exit ramps and outside parking lots. Some complain that the “Who needs tickets?” cry of scalpers looking for customers harasses other patrons.³⁰⁰ Critics also cite the possibility that scalpers sell counterfeit tickets as reasons to ban scalping entirely.³⁰¹ Although these are legitimate state concerns, it is difficult to view these problems seriously given the puzzling lack of enforcement. This especially holds true if one accepts the argument “regarding the inevitable chaos and disorder that results from the activities of scalpers.”³⁰² These issues lend themselves more to regulation of scalping than an outright ban.³⁰³ Courty, for example, cited an experiment by the city of Phoenix which permitted scalping for the NBA All-Star Game, but only in a designated area next to the venue where the game was to take place.³⁰⁴

b. Harms to Promoters

In the preceding section, this Note contended that scalping should not be viewed as a practice that injures consumers. Tishler writes that we must not simply legalize resale for its consumer benefit, because that ignores the supply side of the ticket market in which promoters intentionally underprice.³⁰⁵ Next, this Note examines his contention that because scalpers directly undermine the business goals of promoters, the promoters are entitled to legal protection.³⁰⁶

Because promoters most often support scalping prohibitions, they

300. *Id.*

301. *Id.* at 114; *see also* Bershada & Ensor, *supra* note 112, at 95 n.74 (describing the intimidation tactics scalpers employ); Criscuolo, *supra* note 279, at 198-99 (describing the congestion and danger that may arise from scalping); W. Zachary Malinowski, *Fate Frowns on Suspected Super Bowl Ticket Scalpers*, Providence J., Feb. 6, 2004, at A1 (describing how two Boston men bought \$2,800 tickets to the Super Bowl but were turned away at the stadium's entrance because the tickets were counterfeit. Luckily for the victims, the scalper, a Providence, Rhode Island resident, was on the same flight back from Houston, where the victims pointed him out to police waiting at the airport.)

302. Pukier, *supra* note 38, at 296.

303. *See* Tishler, *supra* note 20, at 114-15.

304. *See* Courty, *supra* note 14, at 175 (citing Stephen K. Happel & Marianne M. Jennings, *Herd Them Together and Scalp Them*, Wall St. J., Feb. 23, 1995, at A14).

305. *See* Tishler, *supra* note 20, at 115.

306. *See id.* at 115-16.

are seemingly the most likely victims of any harm scalping allegedly causes.³⁰⁷ A 1991 public debate over California's scalping law did not include comments from either consumers or consumer groups.³⁰⁸ Similarly, when the New York State Legislature held hearings on an extension to section 25 of NY ACAL, the Attorney General, representatives of ticket brokers and theater owners—but not consumers—presented facts and opinions.³⁰⁹ This absence of representation suggests that despite the media portrayal of scalpers as parasites on consumers, the public does not feel that scalping is such a problem. The League of American Theaters and Producers cited “the high cost of tickets and the availability of tickets [as] two issues which continually inhibit increased attendance” at Broadway shows.³¹⁰ This research presumes that scalpers cause scarcity and high prices, leading to smaller turnouts. However, promoters are not necessarily harmed by the secondary ticket market. When scalpers obtain tickets from consumers who can no longer use their tickets, the scalper acts solely as a middleman, benefiting promoters in two ways.³¹¹ First, scalpers transfer these tickets to consumers who will use them, increasing attendance and thus the “hype” of attending a popular live event.³¹² Second, if these tickets went unused, promoters would not receive the revenues associated with parking, refreshments, souvenirs, and other concessions.³¹³

Scalpers also have a more complementary financial relationship with promoters than most people realize. Scalpers purchase blocks of tickets to concerts, enabling promoters to count on a certain percentage of up-front money to finance a show.³¹⁴ Similarly, sports promoters rely on season ticket purchases for much of their revenue.³¹⁵ Were it not for the market liquidity provided by scalpers (in the sense that scalpers purchase most of their inventory from season ticket holders who cannot attend a game and then resell to fans without tickets), consumers would purchase fewer season ticket packages, thereby lowering promoter revenues.³¹⁶ Next, the goodwill argument for making ticket prices accessible to all fans is weakened by promoters' practice of holding back the best seats in a venue for

307. *See id.* at 115-17.

308. *See id.* at 116.

309. *See* Kandel & Block, *supra* note 53, at 491.

310. *Id.* at 503.

311. *See* Pukier, *supra* note 38, at 289-90.

312. *Id.* at 290.

313. *Id.*

314. *See* Rabe, *supra* note 278, at 63.

315. *Id.*

316. *Id.*; *see also* Bershada & Ensor, *supra* note 112, at 91 (describing Ticketron and the New Jersey Theatre Association's 1982 communication to the Attorney General pressuring the state to remove the criminal sanctions from ticket scalping).

those who can afford to buy an entire season's worth of tickets.³¹⁷ It is also likely that promoters enjoy the benefits of "ice": despite the illegality of commercial bribery, there has been only one prosecution under section 25.23 of NY ACAL in the last 35 years.³¹⁸

Tishler argues that scalpers harm promoters because, by underpricing tickets, promoters earn higher long-term profits; "otherwise, we would not see below-market ticket prices as a stable phenomenon."³¹⁹ As Part II.B. demonstrates, promoters of all kinds of events are now setting ticket prices as high as the market will bear.

2. Due Process Analysis

New York's scalping law purports to prevent fraud, "the using of false representations to obtain an unjust advantage or to injure the rights or interests of another."³²⁰ For the most part, scalping involves no deception: Consumers understand that they are buying tickets from an unauthorized reseller. They understand that they are paying more than face value. Often they come armed with a computer printout of the venue's seating chart so they know exactly which tickets they are purchasing. Proponents of prohibiting scalping point to the existence of fraudulent tickets, but scalpers have no more incentive to incur the cost of counterfeiting than the promoter's employees in the box office. In fact, scalpers have a strong disincentive to sell fraudulent tickets, as their business, like any, depends on their reputation to reliably provide the services offered. If consumers who buy from a scalper are forbidden from entering a venue because of phony tickets, that scalper will lose more business from bad word-of-mouth than could be gained by preying on one consumer.

Recall that the ticket resale industry is populated more by corporate brokerages, which advertise and rely on establishing a network of buyers and sellers, than by street-corner scalpers, who may not have the same interest in maintaining their reputation. Although scalpers might therefore have more incentive to counterfeit than brokers, small-scale scalpers are unlikely to have the capital required to produce credible forgeries, nor the capability to distribute them widely enough to justify the investment. The danger of consumers purchasing fraudulent tickets does not rise to a level that justifies—and is thus not rationally related to—a price ceiling on ticket resale.

New York's law also purports to prevent extortion and exorbitant

317. See Pukier, *supra* note 38, at 294.

318. See Kandel & Block, *supra* note 53, at 506; see also *supra* notes 53-55 and accompanying text.

319. See Tishler, *supra* note 20, at 117.

320. See 6 Oxford English Dictionary 152 (2d ed. 1989).

prices, defined as “to overcharge.”³²¹ Synonyms for “excessive” include “Exceeding what is right, proportionate, or desirable.”³²² As explained above, consumers who buy tickets on the secondary market are not acting unreasonably when they pay high prices. They receive exactly what they pay for because their reasoning involves the conscious decision that they are going to attend a given event no matter the cost. Consumers who would rather have entertainment tickets than their money are in no need of protection from the New York State Legislature.

The “similar abuses” the law seeks to protect may be the congestion and harassment of scalpers congregating near venues to sell tickets. Even if these concerns are severe enough to merit legislative attention—doubtful given scalpers’ tiny presence among the thousands of vendors, tailgaters, and fans at most events—a law that prohibits selling tickets on the secondary market is not rationally related to these harms. Rather, the scalping law is meant to protect consumers from alleged fraud and extortion, not a crowd in front of a stadium.

B. *Equal Protection*

Even if we accept the dubious premise that a law is needed to protect consumers from price gouging, section 25 of NY ACAL would still be unconstitutional. Unlike when *Gold* and even *Concert Connection* were decided, this provision now unreasonably discriminates between two groups engaging in identical business practices.³²³ It is illogical to argue that marking up a \$45 ticket to \$1,500, as does Wrigley Field Premium, or even a \$100 ticket to \$480, as does *The Producers*, is a “reasonable profit” when it comes from a promoter but extortionate price gouging when done by scalpers.

Scalpers are routinely accused of denying consumers access to tickets at box office prices and reselling them for an unreasonable profit. As the actions of the Chicago Cubs and *The Producers* have shown, promoters are doing exactly the same thing. Mark McGuire,³²⁴ the original president of Premium and a vice-president of the Cubs, said that the plan was to overcome the public relations blow of owning Premium and then to contract with other Chicago sports teams to scalp their tickets as well.³²⁵ The Cubs said that this “will change the way ticketing is done in this country.”³²⁶ Jim Klenk, lead

321. See 5 Oxford English Dictionary 607 (2d ed. 1989).

322. *Id.* at 501.

323. See *supra* Part II.B.

324. The Cubs’ president Mark McGuire should not be confused with Mark McGwire, the retired All-Star first baseman.

325. See Couch, *supra* note 208.

326. Couch, *supra* note 219.

counsel for Premium in the lawsuit, “was fond of saying that that’s how business is done in America today.”³²⁷ With the ascension of Broadway Inner Circle and sports teams entering the secondary ticket market, he seems exactly right. Klenk also said that the existence of Premium actually made the resale market more competitive.³²⁸ On the other hand, the Cubs’ stated policy is to refuse ticket sales to brokers.³²⁹

The existence of brokers either harms consumers or it does not. The Cubs cannot have it both ways. Now that the Illinois court has ruled it legal for the owners of the Cubs to hold back tickets,³³⁰ other teams are likely to attempt the same thing. Further, if promoters argue that they are making “reasonable” profits from ticket sales, then extra charges like personal seat licenses—which go far beyond the administrative costs that should already be factored into ticket prices—are *per se* unreasonable. Moreover, Internet-auction-based price discrimination and online secondary markets on team websites are only electronic versions of a scalper’s street corner business.

C. Consequences of Eliminating Section 25

If, as this Note suggests, the scalping law is struck down, the ticket business will not devolve into chaos. On the contrary, eliminating section 25 of NY ACAL will provide several positive results. First, promoters will be forced to profit-maximize to the extent they are not already doing so, which eliminates the income opportunity for scalpers. By selling a \$100 ticket for \$480, the producers of *The Producers* have appropriated \$380 of consumer surplus. Scalpers may be able to find individuals who value tickets at more than \$500, but not enough to maintain a regular business.

If, in line with Tishler’s theory, promoters want to keep certain ticket prices at below-market levels, they can protect themselves by implementing more effective measures than a contractual provision that forbids resale. Simple technological solutions include printing barcodes that list the original purchaser’s name when scanned or storing a digital signature of purchasers and requiring a countersignature for admission. Barcodes are already printed on tickets to protect the promoter against accepting fraudulent tickets, and digital signature devices are ubiquitous at supermarkets and retail

327. *Id.*

328. See Rovell, *supra* note 3.

329. See Couch, *supra* note 208.

330. See *supra* notes 213-29 and accompanying text. Notably, on January 30, 2004, a ticket scalper in Seattle successfully challenged the enforcement of that city’s scalping law on equal protection grounds. See *infra* notes 335-60 and accompanying text (Epilogue).

stores. If promoters insist that there is goodwill to protect, a free market, not the legislature, will force them to protect it.

Striking down section 25 does not preclude the legislature from enacting new legislation to deal with legitimate harms to consumers. The threat of fraudulent tickets has already been addressed by promoters. But, if the legislature sees it as dangerous to consumers, a scalping regulation might require that licensed brokers post a material bond in the event a consumer is denied entrance on the basis of tickets purchased from a scalper. If congestion at venues is deemed an important consumer issue, the new regulation might include a section like section 25.11 of NY ACAL, which prohibits sales of tickets within 1,500 feet of a venue.³³¹

CONCLUSION

Striking down the scalping law is necessary. New York's Attorney General believes it, too.³³² According to Eliot Spitzer, "Consumers will be better off if we deregulate scalping, let the market function and get rid of the corruption in the box office."³³³ When entertainment tickets are resold for more than the box office price, it is because promoters intentionally set prices below market levels and scalpers capture the difference between the promoter's valuation and that of consumers. Now that promoters have taken their own steps to eliminate consumer surplus from the ticket market, legislation prohibiting scalping is both unnecessary and unconstitutional.

EPILOGUE

Very recently, a ticket scalper in Seattle successfully challenged the enforcement of that city's scalping law on the same equal protection grounds this Note advocates.³³⁴

In *Seattle v. Charlesworth*,³³⁵ the defendant was arrested outside SAFECO Field, the Seattle Mariners' home stadium, for offering to sell baseball tickets above face value in violation of section 5.40.060 of

331. See N.Y. Arts & Cult. Aff. Law § 25.11 (McKinney 1984 & Supp. 2004).

332. See John Tierney, *The Big City: Scalping Law Trims Wallets of Knick Fans*, N.Y. Times, June 3, 1999, at B1. Eliot Spitzer suggested, "Perhaps [promoters] could eliminate the middleman... and auction off tickets on Ebay [sic] directly to consumers." *Id.*

333. See Pogrebin & McKinley, *supra* note 235.

334. See Peter Lewis, *Ticket Scalping Cases Tossed*, Seattle Times, Jan. 31, 2004, at A1.

335. *Seattle v. Charlesworth*, No. 420709, 430650, 428837, slip op. (Seattle Mun. Court Jan. 30, 2004).

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the Seattle Municipal Code.³³⁶ The Mariners' website, however, allowed season ticket holders to resell unwanted tickets at prices far above face value, with the Mariners taking a 25% cut of each transaction.³³⁷ Furthermore, the Mariners, in a concerted effort to discourage street scalping in favor of their own secondary market,³³⁸ hired off-duty Seattle police officers and placed them under the command of their Director of Security.³³⁹ Thus, employees of the city—state actors—arrested and prosecuted street scalpers but “prosecuted no cases based on ticket scalping from the website.”³⁴⁰

The defendant argued that the city's selective enforcement of its scalping law was an equal protection violation, claiming, “(1) disparate treatment of similarly situated individuals; (2) that the disparate treatment [was] intentional, purposeful, or deliberate; (3) and that it [was] based upon an arbitrary, capricious, or unjustifiable standard.”³⁴¹ Recall that to prevail on a rational basis test—where courts presume the state actor behaved rationally and the burden of proof falls upon the party challenging the law—is exceedingly difficult.³⁴² The court held that the defendant satisfied his burden of proof for all three elements, so this decision represents a significant victory. First, the court found no “difference in legislative intent between online scalpers and street level scalpers.”³⁴³ Because Seattle receives the same tax revenue whether a ticket is first sold in person or online, the court held street scalpers and online scalpers to be similarly situated.³⁴⁴ Next, the court found the disparate treatment to be intentional, purposeful and deliberate, citing the Mariners' hiring of Seattle police officers to “buy tickets from scalpers for the purpose of initiating prosecutions,”³⁴⁵ combined with the team and city's lack of enforcement of the scalping ordinance for sales made through the website.³⁴⁶ Finally, the court held that “the legislative purpose in enforcement and collection of tax revenue” necessitated a finding that the city's selective enforcement is “based on an arbitrary classification, not rationally related to [a] legitimate state interest.”³⁴⁷ Thus the defendant made a *prima facie* showing of a selective

336. *Id.* at 1. The statute provides, “It shall be unlawful for anyone . . . to sell or offer to sell an admission ticket or card at a price in excess of the price printed, stamped or written thereon.” *Id.* at 5.

337. *Id.* at 2; *see also supra* Part II.B.4.

338. *See* Zumsteg, *supra* note 250.

339. *Charlesworth*, slip op. at 3.

340. *Id.* at 4.

341. *Id.*

342. *See* text accompanying notes 188-89.

343. *Charlesworth*, slip op. at 6.

344. *Id.*

345. *See id.*

346. *Id.*

347. *See id.*

enforcement violation of the Equal Protection Clause, overcoming *Nebbia's* strong presumption that the state actor behaved constitutionally.³⁴⁸

The court explicitly rejected the city's defenses to the equal protection claim. First, Seattle was unable to convince the court that the Mariners had a legitimate commercial interest in its ticket sales such that scalping on the Mariners' website should be distinguished from street level scalping.³⁴⁹ The court's finding on this issue is in direct contradiction to the rationale in *Kelly-Sullivan*, where the New York court stressed "the hazards of highly competitive enterprise and the need for large capital investment" as reason enough to separate promoters from scalpers.³⁵⁰ The *Charlesworth* court correctly recognized that scalping is scalping, whether it takes place on the street or online, whether engaged in by individuals or by large corporate promoters.

As an alternative defense, the city raised "the practical difficulties of pursuing online offenders; in effect, the ease of enforcement"³⁵¹ as a permissible purpose for the disparate treatment. The judge held, however, that the city had not made the permissible decision to "deploy its resources in on[-]street activities rather than in online investigations"³⁵² because it was the Mariners who had hired the off-duty police officers rather than the city making this determination on its own. This explanation might make it seem as though the Mariners' involvement precluded Seattle from using the ease of enforcement defense that would otherwise have absolved the city of wrongdoing. However, the court implied that even had the Mariners not hired off-duty police to enforce the scalping law, Seattle would still have been found to have selectively enforced it: The court's factual findings included a detailed description of the Seattle Police Department's Intelligence Unit, which is "sophisticated in computer investigations with the skill and training to determine what forensics are needed to investigate scalping over the internet."³⁵³ Also, because users of the Mariners' scalping system "volunteered their private information," with buyers registering a name, address, user name, and password, and sellers providing a credit card number in addition to the data they already provided when they purchased season tickets,³⁵⁴ the court likely would have rejected Seattle's claim that it is easier to enforce street scalping than Internet scalping. Therefore, the city was not able

348. *See supra* text accompanying notes 163-65.

349. *See Charlesworth*, slip op. at 6.

350. *Kelly-Sullivan, Inc. v. Moss*, 39 N.Y.S.2d 797, 801 (App. Div. 1943).

351. *Id.* at 7.

352. *Id.*

353. *Id.* at 4.

354. *Id.* at 2.

to demonstrate a permissible purpose for the classification of website scalpers as legal and street scalpers as criminals.

The *Cavoto* and *Charlesworth* cases demonstrate that anti-scalping legislation reflects an outdated reality, a time before promoters began to sell tickets on the secondary market. The Cubs successfully defended their lawsuit only on a technicality, namely that the baseball team and Wrigley Field Premium were separate subsidiaries of Tribune Company. This loophole allowed the court to hold that because common ownership of a team and a brokerage was legal under Illinois law, the Cubs had done nothing wrong. The *Cavoto* case is being appealed, and angry fans are calling for new legislation designed to force Tribune to close the doors of Wrigley Field Premium. The *Charlesworth* case did not present a definitional dilemma similar to the one in Chicago. Because a promoter was clearly scalping its own tickets, the court correctly concluded that the city could not prosecute scalping on the street level but ignore scalping facilitated by a promoter's website.

This decision, although significant for the street scalpers who will no longer fear prosecution, is unlikely to alter the current direction of the ticket business: Promoters like the Mariners will not choose to give up their own scalping simply to allow prosecution of street scalpers by state actors. Promoters acting on the secondary market have gained a valuable revenue source that was previously unavailable only because they chose not to exploit it,³⁵⁵ and this new profit center makes it doubtful we will see a return to the time when promoters did not scalp their own tickets. Furthermore, fans will prefer the convenience of promoters' online secondary markets to the prospect of looking for tickets on the street, even considering promoters' 25% fee.³⁵⁶ Promoters can also make the valid claim that their service eliminates the risk of purchasing counterfeit tickets from street scalpers because the only tickets sold on their websites come from registered season ticket holders.

Importantly, promoters will not even take a public relations hit for scalping tickets. This is because consumers appreciate the helpful middleman function of scalpers—bringing together fans who no longer want to attend an event with those who do. The public abhors scalpers' profitable arbitrageur function that results in "unfair" high ticket prices,³⁵⁷ without realizing that the two are intertwined. Fans' outrage over the Cubs' scheme arose as a result of Tribune's shameless plan to eliminate the middleman function by effectively

355. See *supra* Part I.C.4.

356. The fees charged by eBay do not seem to discourage the millions of secondary ticket market transactions processed there. See *supra* notes 15, 28.

357. See text accompanying note 38.

selling tickets to themselves. Despite the quote from the Cubs' attorney that opens this Note,³⁵⁸ promoters in the future will probably not make the same mistake when unveiling new promoter scalping mechanisms. The final, and perhaps most significant reason promoters are unlikely to give up their own scalping in favor of prosecuting street scalpers is that by entering the secondary market, promoters have appropriated such a high percentage of street scalpers' revenue streams that street scalpers can no longer be viewed as legitimate competitors, eliminating promoters' rationale for advocating enforcement of scalping laws against street scalpers.

In addition to utilizing an equal protection argument in line with the one advocated by this Note, the *Charlesworth* court also spoke to the due process argument. The court heard testimony from a Seattle detective that scalpers do not engage in "pedestrian interference, harassment, assault or theft."³⁵⁹ Fittingly, the court found that street scalping does not pose a threat to fans: "Ticket scalping does not prevent a safe and secure environment outside SAFECO field."³⁶⁰ Because street scalping is not dangerous to consumers, who often benefit from the transactions, there is no sound reason to prohibit it. Because promoters engage in scalping of their own, any further enforcement against street scalping while overlooking the scalping efforts of promoters should be found unconstitutional.

358. See *supra* note 3 and accompanying text.

359. *Charlesworth*, slip op. at 2.

360. *Id.* at 5.