LEVELING THE PLAYING FIELD: PUBLICLY FINANCED PROFESSIONAL SPORTS FACILITIES

As the value of professional sports franchises has exploded, owners have sought new and better stadiums to accommodate and attract fans. This multibillion-dollar industry regularly shifts the burden of paying for billion-dollar stadiums onto taxpayers. Given team mobility and the limited number of franchises, teams wield great leverage over state and local governments and use this leverage to extort public aid. As recently seen in Georgia, state constitutional challenges to public financing plans have been unsuccessful due to excessive judicial deference. At the federal level, Congress has failed to close the Internal Revenue Code's loophole that encourages governments to issue and service the debt on tax-exempt bonds, despite widespread bipartisan support. This Comment examines and criticizes the use of public funds to finance professional sports facilities and argues that federal legislation is the only viable solution.

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I. INTRODUCTION

There is money in professional sports, but just how much? In 2014, sports teams, leagues, and facilities in the United States generated approximately $60.5 billion in revenue.[1] Between 2014 and 2015, the four major professional sports leagues—the National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and Major League Baseball ("MLB")—had combined annual revenues in excess of $31 billion.[2] An additional $34.9 billion was spent on sports advertising in 2015.[3] Nevertheless, it is common practice for state and local governments to publicly finance the construction or renovation of sports facilities. In the 1990s, an estimated $15 billion was spent on major league sports facilities—$11 billion of which came from state and local governments.[4] Twenty-nine of the thirty-one NFL stadiums were constructed or renovated with public funds, costing taxpayers $7 billion.[5]

This Comment will examine and criticize the use of taxpayer dollars to finance privately used professional sports facilities. Part II provides a brief introduction to stadium subsidies, including an overview of the Internal Revenue Code ("I.R.C.") loophole that permits the issuance of tax-exempt bonds for stadiums as well as the tax expenditures by state and local governments to service the debt on such bonds. Next, Part III discusses why public financing has

1. MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMI DURU, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 13 (4th ed. 2017).

2. *Id.* at 13–14 (NFL: $13 billion; NBA: $4.8 billion; NHL: $3.7 billion; MLB: $9.5 billion).

3. *Id.* at 14.

4. Martin J. Greenberg & Dennis Hughes, Jr., *Sports.comm: It Takes a Village to Build a Sports Facility*, 22 MARQ. SPORTS L. REV. 91, 91 (2011).

5. Travis Waldron, *Taxpayers Have Spent a 'Staggering' Amount of Money on NFL Stadiums*, HUFFINGTON POST (Sept. 10, 2015, 10:51 AM), http://www.huffingtonpost.com/entry/taxpayers-nfl-stadiums_us_55f08313e4b002d5c077b8ac.

become the norm and argues that the justifications for the practice are unpersuasive. Part IV analyzes state constitutional challenges to various stadium-financing plans, which have been largely unsuccessful due to excessive judicial deference. Part V provides an illustration of Atlanta, Georgia, a city which recently constructed two stadiums with public funds, and explores two recent challenges to the financing plans that reached the Georgia Supreme Court. Next, Part VI describes efforts in Congress and by the Department of the Treasury to stem the flow of public dollars into privately used stadiums, including the No Tax Subsidies for Stadiums Act of 2017 and the Tax Cuts and Jobs Act of 2017. Finally, this Comment concludes by offering potential measures to curtail the practice of publicly subsidizing stadiums and argues that such measures are necessary to protect the interests of American communities.

II. BACKGROUND

A. Financing Stadiums with Tax-Exempt Municipal Bonds

Generally, there are three financing options for the construction or renovation of stadiums: (1) completely private funding, (2) completely public funding, or (3) a combination of private and public funding.[6] The third option has become the prevailing stadium-financing method.[7] In order to raise the capital necessary to construct a stadium, state and local governments often resort to issuing bonds.[8] In the past, general obligation ("GO") bonds were frequently issued to finance stadiums.[9] GO bonds were backed by the "full faith and credit" of the issuer and were not tied to any specific assets.[10] Thus, GO bonds were generally repaid through tax increases.[11] GO bonds became a popular method for financing local railroads in the 1800s, but their low returns in that context prompted taxpayers to demand restrictions on their issuance.[12]

In the 1960s, municipalities began issuing revenue bonds, which are also known as industrial development bonds.[13] Unlike GO bonds, revenue bonds are attached to a specific source of revenue, such as an

6. James Gross, Note, *A Delayed Blitz on the NFL's Blackout Policy: A New Approach to Eliminating Blackouts in Publicly Funded NFL Stadiums*, 82 GEO. WASH. L. REV. 1194, 1206–07 (2014).

7. *Id.*

8. Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 207 (2005).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 208. During this same period, there were numerous amendments to state constitutions that sought to reduce governmental entanglement with private corporations. *See infra* Part IV.

13. Mayer, III, *supra* note 8, at 208.

increased sales tax or stadium revenues.[14] Another key difference is that voter referenda are not typically required for the issuance of revenue bonds.[15] Revenue bonds became particularly appealing to investors because, under the Revenue Act of 1913,[16] the bonds were exempt from federal income tax and could be issued at a lower interest rate than private activity bonds.[17]

In 1968, Congress attempted to curtail the use of tax-exempt revenue bonds when it passed the Revenue and Expenditure Control Act ("RECA").[18] The RECA set forth a two-prong test ("Private Activity Test") to determine whether a bond was a taxable private activity bond, as opposed to a tax-exempt municipal bond.[19] A bond was considered taxable if (1) more than 25% of the bond proceeds were used by a nongovernmental entity (termed the private use prong) and (2) debt service on more than 25% of the bond proceeds was secured directly or indirectly by property used in a trade or business (known as the private security prong).[20] The goal of the RECA was to ensure the actual users of a bond-funded project paid for the bond;[21] however, sports facilities were expressly exempted from the Private Activity Test because they were deemed "inherently quasi-public in nature."[22] Accordingly, sports franchises continued to successfully lobby municipalities for financing with tax-exempt bonds.

The federal government's first attempt to limit the use of tax-exempt bonds for stadiums came by way of the Tax Reform Act of 1986.[23] The Tax Reform Act abandoned the "inherently quasi-public in nature" exemption for stadiums, thereby subjecting stadium bonds to the Private Activity Test.[24] In addition, the RECA percentage requirements for both the private use prong and the private security prong were reduced from 25% to 10%.[25] Thus, under I.R.C. § 141, the private use prong is met if more than 10% of a bond's proceeds are to be used for any private business use.[26] Likewise, the private security prong is met if payment of more than 10% of a bond's proceeds are secured directly or indirectly by property dedicated to a private business use or by payments with respect to such property.[27] If both

14. Gross, *supra* note 6, at 1208.
15. Mayer, III, *supra* note 8, at 208.
16. Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114.
17. Gross, *supra* note 6, at 1208.
18. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 251; *see also* Gross, *supra* note 6, at 1208.
19. Gross *supra* note 6, at 1208–09.
20. Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS L.J. 173, 180 (2002).
21. Gross, *supra* note 6, at 1209.
22. *Id.*
23. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.
24. Gross, *supra* note 6, at 1209.
25. *Id.*
26. I.R.C. § 141(b)(1) (2012).
27. *Id.* § 141(b)(2).

prongs are met, a bond is deemed a private activity bond, which is taxable under I.R.C. § 103(a).[28] It is important to note that municipalities and teams actually *want* to fail one of the prongs so that bonds are deemed tax-exempt.[29] The private use prong is easily met because a privately owned sports team is generally the primary user of a stadium.[30] Thus, the focus is on the private security prong.[31]

A key goal of the Tax Reform Act was to eliminate tax-exempt financing for stadiums, thereby promoting private financing alternatives.[32] Instead, the Tax Reform Act merely changed the debt repayment structure.[33] To fail the private security prong, municipalities and teams structure debt repayment such that stadium revenue accounts for less than 10% of the total repayment, which leaves the government responsible for the remaining 90%.[34] Thus, the Tax Reform Act places an even heavier burden on taxpayers.[35] Nonetheless, this was the last piece of federal legislation that sought to address the issue.[36] In the meantime, the cost of constructing stadiums has skyrocketed and governments continue to provide funding through tax-exempt bonds.[37]

B. Taxpayers Bear the Financial Burden

In order to reach the 90% public funding threshold to qualify for tax-exempt bonds, governments generally resort to taxation.[38] Typically, separate, targeted taxes are necessary to ensure that a municipality remains deficit neutral.[39] This can result in taxpayers bearing the greatest financial burden while not enjoying a

28. *Id.* § 103(a).

29. Zachary A. Phelps, Note, *Stadium Construction for Professional Sports: Reversing the Inequities Through Tax Incentives*, 18 ST. JOHN'S J. LEGAL COMMENT. 981, 990 (2004).

30. *Id.*

31. *Id.*

32. Gross, *supra* note 6, at 1209–10.

33. *Id.* at 1210.

34. Mayer, III, *supra* note 8, at 210.

35. *See* Logan E. Gans, *Take Me Out to the Ball Game, but Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 763 (2010) (noting that public financing "has been further exacerbated by the fact that a bond with a section 103(a) exclusion must be ninety percent funded by sources outside of the stadium").

36. Gross, *supra* note 6, at 1210.

37. *See id.*

38. *See* Goodman, *supra* note 20, at 194. In addition to direct financial contributions, many stadiums also benefit from indirect subsidies. Benjamin S. Bolas, Comment, *Who is Going to Pay the Bills: An Examination of the Financing and Lease Options Available to the Buffalo Bills and Ralph Wilson Stadium*, 20 JEFFREY S. MOORAD SPORTS L.J. 663, 675 (2013). One indirect subsidy that is frequently used is property tax exemptions for a sports facility. *Id.* For example, the Dallas Cowboys franchise does not pay property taxes on AT&T Stadium, which saves the team approximately $17 million annually. *Id.* at 675 n.76.

39. Gans, *supra* note 35, at 763–64.

proportionate share of the associated benefits.[40] State and local governments have employed various taxation methods, all of which result in a misallocation of burden to benefit.

First, governments have resorted to general sales tax increases.[41] Although these increases are generally applied in geographic areas where potential spectators reside, stadiums are often constructed in urban areas where indigent and minority groups—who derive limited benefits from a stadium—bear the greatest financial burden.[42] Second, municipalities often employ "tourist taxes," which apply to hotel rooms and rental cars.[43] Tourist taxes, however, are overinclusive, as a majority of tourists will neither visit nor use a city's stadium.[44] Third, governments have imposed "sin taxes" on products such as tobacco and alcohol.[45] However, the correlation between people who use these products and those who benefit from a stadium is attenuated at best.[46] Fourth, governments have resorted to taxing local businesses.[47] Although the justification for imposing business taxes is that stadiums theoretically provide greater economic benefits to businesses than to residents, many industries do not benefit from stadiums.[48] Finally, a few municipalities have imposed consumer taxes on stadium-related goods and services, such

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40. Goodman, *supra* note 20, at 193.

41. Gans, *supra* note 35, at 766.

42. Goodman, *supra* note 20, at 194.

43. *Id.* at 195. This method is often popular among resident-voters, as the cost of a stadium is theoretically passed on to nonresidents. *Id.* The San Diego Chargers capitalized on this sentiment in a 2016 campaign video prior to a tourist tax referendum to finance a new $1.8 billion stadium. *See* Brent Schrotenboer, *Chargers to San Diego Voters: Make Rival Fans Pay for New Stadium*, USA TODAY (Aug. 13, 2016, 8:55 PM), http://www.usatoday.com/story/sports/nfl/chargers/2016/08/12/san-diego-new-stadium-hotel-taxes-los-angeles/88629534. The video urged voters to support the tax increase on hotel rooms and stated, "[W]hat could be sweeter than Raiders, Broncos and Patriots fans all helping pay for the project when they pay their hotel bill?" *Id.* Notably, on November 8, 2016, only 43% of San Diego voters supported the referendum, well short of the two-thirds majority needed for approval. David Garrick, *Stadium Measures Lose Badly*, SAN DIEGO UNION-TRIB. (Nov. 9, 2016, 12:55 AM), http://www.sandiegouniontribune.com/news/elections/sd-me-election-chargers-20161106-story.html.

44. Goodman, *supra* note 20, at 195. Similarly, a tourist tax could negatively affect a local economy because potential tourists may choose to visit a city with lower taxes. *Id.* at 195–96.

45. *Id.* at 196.

46. *See* Gans, *supra* note 35, at 767–68. In addition, the use or abuse of these products is more prevalent among lower-income individuals. *Id.*

47. *Id.* at 768.

48. For example, Detroit is currently financing a stadium with property taxes paid by businesses in the downtown area. Louis Aguilar, *Red Wings Arena Cost at $627M, Could Go Higher*, DETROIT NEWS (Nov. 5, 2015, 10:26 AM), http://www.detroitnews.com/story/business/2015/11/04/report-cost-new-red-wings-arena-rises/75146516/. The largest property taxpayer in the area is General Motors, which will not benefit from the new stadium. *See id.*

as tickets, concessions, and parking.[49] Although this seems like the most logical way to ensure that those who benefit from a stadium bear the costs, this approach is not commonly used.[50]

III. ARGUMENTS AGAINST PUBLIC FINANCING

The practice of publicly financing professional sports stadiums has been widely criticized by the media,[51] scholars,[52] and taxpayers.[53] Nevertheless, proponents of publicly financed stadiums support their stance for three primary reasons. First, advocates suggest that stadiums have a beneficial economic impact on surrounding communities.[54] Second, proponents contend that failing to publicly finance a stadium will result in the team leaving for another city that will provide such an incentive.[55] Finally, supporters argue that a new stadium provides indirect benefits to citizens.[56] However, these arguments are unpersuasive for several reasons: (1) the financial benefits of stadiums are grossly overstated;[57] (2) federal legislation could resolve the issue of team relocation;[58] (3) the financial burden is placed on citizens and businesses that do not benefit, directly or indirectly, from a sports facility;[59] (4) other governmental programs are more deserving of tax dollars;[60] (5) sports franchises are capable of financing stadiums without subsidies;[61] and (6) perfectly operational stadiums are being abandoned and demolished.[62]

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49. Gans, *supra* note 35, at 765.

50. *Id.* at 766.

51. Indeed, both right-leaning Breitbart News and left-leaning Huffington Post have been critical of publicly funded stadiums. *See* Dylan Gwinn, *Charles Barkley: Public Funding for Stadiums 'Rips Off Poor People'*, BREITBART (Jan. 9, 2017), http://www.breitbart.com/sports/2017/01/09/charles-barkley-public-funding-stadiums-rips-off-poor-people/ (noting that "the idea that private businesses, especially those run by billionaires, should pay for their own facilities has some merit"); Waldron, *supra* note 5.

52. *See, e.g.*, Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace: The Battle to Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 418 (1999).

53. *See infra* Part IV (describing state constitutional challenges to stadium-financing plans by taxpayer opponents).

54. Sean Brown, *Crowdfunding: The Answer to the Sports Stadium Controversy*, 12 WILLAMETTE SPORTS L.J. 68, 80 (2015).

55. Gans, *supra* note 35, at 771.

56. Brown, *supra* note 54, at 82.

57. *Id.* at 85; *see infra* Subpart III.A.

58. *See infra* Part VI.

59. *See supra* Subpart II.B (discussing the overly broad taxes that are employed to pay for stadiums).

60. Gans, *supra* note 35, at 777; *see infra* Subpart III.D.

61. *See infra* Subpart III.E.

62. Gans, *supra* note 35, at 781. For example, while Wrigley Field and Fenway Park are over a century old, the Georgia Dome was demolished and replaced after only twenty-five years of operation rather than renovated at a

A. The Economic Benefits Do Not Justify the Costs

The economic benefits of professional sports facilities are grossly overstated and do not justify public financing. There is a "clear consensus" among academic economists that publicly financed stadiums are not fiscally beneficial.[63] As stated in one study,

> There now exists almost twenty years of research on the economic impact of professional sports franchises and facilities on the local economy. The results in this literature are strikingly consistent. No matter what cities or geographical areas are examined, no matter what estimators are used, no matter what model specifications are used, and no matter what variables are used, articles published in peer reviewed economics journals contain almost no evidence that professional sports franchises and facilities have a measurable economic impact on the economy.[64]

Similarly, economists agree that there is no credible evidence to suggest that stadiums have a positive impact on citizens' incomes or local tax revenues.[65] In addition, there is overwhelming evidence to suggest that stadiums do not, in fact, create so many jobs for local citizens as to justify the public financing of stadiums.[66] According to another study, "[P]rofessional sports teams create fewer than four-tenths of one percent of all of the jobs in the locality."[67] Furthermore, jobs that are created by stadiums are typically part-time, low-skill, and low-wage.[68] Despite the limited economic benefits of stadiums, courts are quick to tout the windfall of tourism dollars and career opportunities that a stadium will bring when financing plans are challenged under state constitutions.[69]

Local taxpayers largely foot the bill for new sports facilities. Despite the fact that they are promised jobs and increased tax revenue, neither of these promises are supported by evidence or come to fruition. Rather, the beneficiaries of publicly financed stadiums, from an economic standpoint, are the sports franchises. Therefore, when considering only the economic justifications for publicly funding stadiums, there is no support for the widespread practice.

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lower cost. *See* Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1793–94 (2016).

63. Dennis Coates & Brad R. Humphreys, *Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums, and Mega-Events?*, 5 ECON. J. WATCH 294, 301 (2008).

64. *Id.* at 302.

65. *Id.* at 310.

66. *Id.* at 301.

67. Courtney Gesualdi, Note, *Sports Stadiums as Public Works Projects: How to Stop Professional Teams from Exploiting Taxpayers*, 13 VA. SPORTS & ENT. L.J. 281, 288 (2014).

68. *Id.*

69. *See infra* Part IV.

B. The Threat of a Team Leaving

At the heart of the issue of publicly funded stadiums is the power professional sports teams wield over state and local governments in the negotiation process. Arguably, the greatest pressure on a government to fund a stadium is the threat of a team relocating to a city that provides a better deal.[70] This issue is especially relevant at a time when there are numerous cities competing for a limited number of professional sports franchises.[71] Teams are essentially able to hold a city hostage and threaten to leave unless their demands are met. Indeed, this is not an idle threat. Franchises such as the Brooklyn Dodgers and St. Louis Rams have followed through on such a threat.[72] As noted by former Washington D.C. Mayor Sharon Pratt Kelly, elected officials are faced with a prisoner's dilemma:

> If no mayor succumbs to the demands of a franchise shopping for a new home then the teams will stay where they are. This, however, is unlikely to happen because if Mayor A is not willing to pay the price, Mayor B may think it is advantageous to open up the city's wallet. Then to protect his or her interest, Mayor A often ends up paying the demand price.[73]

Elected officials are forced to either irresponsibly spend public funds on a stadium or jeopardize their career as the politician who "lost" the local team.[74] As further discussed in Part VI, federal legislation could effectively limit teams' ability to relocate and thus remedy the gross imbalance in bargaining power between teams and state and local governments.

C. Indirect Benefits of Stadiums

Advocates of publicly funded stadiums argue, somewhat convincingly, that professional sports teams provide indirect benefits to citizens. It is undisputed that professional sports are an important aspect of many people's lives. Indeed, on February 7, 2016, 72% of all U.S. households with televisions in use were tuned into the Super Bowl matchup between the Carolina Panthers and the Denver Broncos.[75] The presence of a professional sports team is a source of civic pride, not only in the team itself but also in the city. However, the problem with relying on indirect benefits, such as civic pride, to justify public financing is that civic pride is not necessarily quantifiable. Furthermore, no matter which taxation method is used,

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70. Gans, *supra* note 35, at 771.
71. *Id.*
72. *Id.*
73. Goodman, *supra* note 20, at 212.
74. Mayer, III, *supra* note 8, at 206.
75. *Super Bowl 50 Draws 111.9 Million TV Viewers, 16.9 Million Tweets*, NIELSEN (Feb. 8, 2016), http://www.nielsen.com/us/en/insights/news/2016/super-bowl-50-draws-111-9-million-tv-viewers-and-16-9-million-tweets.html.

it will undoubtedly burden citizens or businesses that do not take pride in the local team.

One method that can be used to gauge public sentiment regarding a publicly funded stadium is voter referenda. As previously noted, however, referenda are not typically required prior to issuance of revenue bonds.[76] Nevertheless, between 1980 and 1999 approximately one half of stadium referenda containing public subsidy arrangements failed.[77] Interestingly, of those that failed, "half [of the stadiums] were ultimately publicly financed outside of the direct democracy process."[78] The referendum process has been criticized because stadium proponents can often control the time of the vote and "relegate the ballot to a single issue."[79] In addition, stadium owners have ample resources to campaign in favor of a stadium referendum.[80]

D. Public Funds Are Diverted from More Deserving Programs

Other governmental programs—such as those that promote education, health, and safety—are more deserving of tax dollars than sports facilities. In many instances, these programs suffer when public funds are diverted to finance stadiums. An illustrative example is Detroit circa 2013. The city had more than $18 billion in long-term debt and had an operating deficit of more than $400 million.[81] Detroit's financial situation was so dire that 40% of its streetlights were turned off to cut costs.[82] On July 18, 2013, Detroit filed for Chapter 9 bankruptcy.[83] On July 24—just six days later—the state approved the sale of $450 million in bonds to finance a new arena for the NHL's Detroit Red Wings.[84] Of that amount, $250 million will be secured and paid by property taxes imposed on businesses in downtown Detroit.[85] Astonishingly, that money was earmarked for Detroit public schools and the Red Wings will keep *all* revenue generated by the stadium.[86]

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76. Mayer, III, *supra* note 8, at 208.
77. Goodman, *supra* note 20, at 215.
78. *Id.*
79. *Id.* at 214.
80. *Id.* at 213. For example, Seattle Seahawks owner Paul Allen, cofounder of Microsoft, spent $6 million to support a stadium referendum. *Id.* at 213–14. Allen also paid the entire cost of the stadium referendum vote and was able to schedule the vote in the month of June rather than have it included on the November ballot. *Id.* at 214.
81. Martin Z. Braun, *Detroit Billionaires Get Arena Help as Bankrupt City Suffers*, BLOOMBERG (Sept. 3, 2013, 11:08 AM), https://www.bloomberg.com/news/articles/2013-09-03/detroit-billionaires-get-hockey-arena-as-bankrupt-city-suffers.
82. *Id.*
83. *Id.*
84. *Id.*
85. Aguilar, *supra* note 48.
86. *Id.*

E. Private Financing Is a Viable Alternative

The sports teams that benefit from a newly constructed facility can and should bear the financial burden. Two recently constructed NFL stadiums—MetLife Stadium in East Rutherford, New Jersey, and AT&T Stadium in Arlington, Texas—demonstrate the viability of private financing. MetLife Stadium, which is home to the New York Jets and New York Giants, cost roughly $1.6 billion and was financed entirely by private sources.[87] Notably, however, the old Giants Stadium, which was demolished to make way for MetLife Stadium, carried $110 million in debt that is still being paid off by residents of New Jersey.[88] Two-thirds of the $1.2 billion spent to construct AT&T Stadium, home to the Dallas Cowboys, came from private sources.[89] Unfortunately, MetLife Stadium and AT&T Stadium are exceptions to the general trend.[90]

IV. STATE CONSTITUTIONAL CHALLENGES

Taxpayer opponents of publicly funded professional sports facilities often seek to enjoin financing plans under state constitutional protections. In response to states' extensive investments in and assistance to private industries in the 1800s, states engaged in a wave of constitutional amendments.[91] Specifically, state constitutions were amended to require that public funds only be expended for public purposes (public purpose provisions), to prohibit the lending of state credit to private enterprise (lending of credit clauses), and to place limitations on municipal debt (debt limitation clauses).[92] To further protect taxpayers, many states have enacted provisions mandating uniformity of tax assessments and rates (uniformity clauses) and prohibiting special laws (special law provisions).[93] Taxpayer opponents have frequently sought

87. Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 109 tbl.2 (2012).

88. Brown, *supra* note 54, at 88.

89. Bolas, *supra* note 38, at 685. One way that sports franchises can generate revenue to finance a stadium is through the sale of naming rights. The Cowboys franchise sold the naming rights to their stadium to AT&T for upwards of $19 million per year. Kyle Whitfield, *Report: AT&T Naming Rights for Dallas Cowboys' Stadium $17-19M a Year*, DALLAS NEWS (July 25, 2013), http://www.dallasnews.com/news/news/2013/07/25/report-att-naming-rights-for-dallas-cowboys-stadium-17-19m-a-year.

90. Bolas, *supra* note 38, at 686. More representative is the Indianapolis Colts's $720 million Lucas Oil Stadium. *Id.* The Colts franchise, which is valued at $2.175 billion, contributed only $100 million towards construction, while public funds accounted for the remaining 86%. *Id.*

91. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911 (2003).

92. *Id.* at 911–12.

93. *Id.* at 927.

judicial recourse under these provisions;[94] however, state courts have bastardized these protections, granting nearly unlimited deference to their respective legislatures. One possible explanation for this judicial abstention is that, in a majority of states, judges are elected and are reluctant to rule against the local sports franchise for fear of losing reelection.[95]

A. Public Purpose Doctrine

Opponents of publicly funded stadiums often turn to litigation under public purpose provisions. Under the public purpose doctrine, public funds, or those that are derived from taxes, may only be expended for "public purposes."[96] However, the public purpose requirement has become merely an illusory protection, especially in the context of stadium funding. In all but two cases, courts have held that public funds may be used to construct or acquire stadiums because they serve a public purpose.[97]

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94. *See* Ginsberg v. City & County of Denver, 436 P.2d 685, 688 (Colo. 1968); Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997); Brandes v. City of Deerfield Beach, 186 So. 2d 6, 11 (Fla. 1966); Cottrell v. Atlanta Dev. Auth., 770 S.E.2d 616, 618 (Ga. 2015); Savage v. State, 774 S.E.2d 624, 627 (Ga. 2015); Friends of Parks v. Chicago Park Dist., 786 N.E.2d 161, 163 (Ill. 2003); Kelly v. Marylanders for Sports Sanity, Inc., 530 A.2d 245, 246 (Md. 1987); *In re* Opinion of the Justices, 250 N.E.2d 547, 549 (Mass. 1969); Alan v. Wayne County, 200 N.W.2d 628, 641 (Mich. 1972); Lifteau v. Metro. Sports Facilities Comm'n, 270 N.W.2d 749, 750–51 (Minn. 1978); Moschenross v. St. Louis County, 188 S.W.3d 13, 18 (Mo. Ct. App. 2006); Rice v. Ashcroft, 831 S.W.2d 206, 207 (Mo. Ct. App. 1991); Bazell v. City of Cincinnati, 233 N.E.2d 864, 868 (Ohio 1968); Meyer v. City of Cleveland, 171 N.E. 606, 607 (Ohio Ct. App. 1930); Allegheny Inst. Taxpayers Coal. v. Allegheny Reg'l Asset Dist., 727 A.2d 113, 111 (Pa. 1999); Martin v. City of Philadelphia, 215 A.2d 894, 895 (Pa. 1966); Ragsdale v. City of Memphis, 70 S.W.3d 56, 59 (Tenn. Ct. App. 2001); Backman v. Salt Lake County, 375 P.2d 756, 760 (Utah 1962); Citizens for More Important Things v. King County, 932 P.2d 135, 135 (Wash. 1997); King County. v. Taxpayers of King Cty., 949 P.2d 1260, 1262 (Wash. 1997); CLEAN v. State, 928 P.2d 1054, 1056 (Wash. 1996); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 428 (Wis. 1996).

95. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725–26 (1995) (noting that in thirty-eight states most or all judges are elected).

96. It should be noted that general public purpose requirements in state constitutions are often supplemented with further restrictions on specific forms of assistance. Specifically, public purpose requirements are often incorporated into uniformity clauses and lending of credit clauses. *See, e.g.*, ALASKA CONST. art. IX, § 6 (incorporating a public purpose requirement into a lending of credit provision by stating that "[n]o tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose"); MINN. CONST. art. X, § 1 (incorporating a public purpose requirement into a uniformity clause by providing that "[t]axes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes").

97. *See Brandes*, 186 So. 2d at 12; *In re Opinion of the Justices*, 250 N.E.2d at 547.

One of the first cases to uphold a stadium plan under the public purpose doctrine was *Meyer v. City of Cleveland*.[98] In that case, a taxpayer challenged the issuance of $2.5 million in tax-exempt municipal bonds to fund a stadium for the Cleveland Indians.[99] Unlike most modern stadium agreements, however, the City of Cleveland would derive revenue from the stadium itself.[100] In upholding the financing plan, the court took an expansive view of public purpose, defining it as "anything calculated to promote the education, the recreation or the pleasure of the public . . . ."[101]

In contrast, the Supreme Court of Florida, in *Brandes v. City of Deerfield Beach*,[102] invalidated a stadium-financing plan under a public purpose provision.[103] In *Brandes*, a taxpayer challenged the issuance of $1.5 million in bonds to pay for a spring training facility for the Pittsburgh Pirates.[104] After noting that "[t]he mere incidental advantage to the public resulting from a public aid in the promotion of private enterprise is not a public or municipal purpose," the court held that the plan violated the state's constitutional provision prohibiting municipal taxation for nonmunicipal purposes.[105]

Recent court decisions, however, have consistently held that stadiums constitute a public purpose, even if the project is not funded by stadium revenue.[106] In justifying this position, courts are quick to accept the purported economic benefits of stadiums without actually considering the plausibility of such claims.[107] Rather, courts have opted to grant unquestioning deference to state legislatures.[108]

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98. 171 N.E. 606 (Ohio Ct. App. 1930).

99. *Id.* at 606.

100. *See id.* at 608.

101. *Id.* at 607. Other early cases that upheld stadium plans under public purpose challenges include *Ginsberg v. City & County of Denver*, 436 P.2d 685, 689 (Colo. 1968); *Alan v. Wayne County*, 200 N.W.2d 628, 653, 681 (Mich. 1972); *Lifteau v. Metro. Sports Facilities Commission*, 270 N.W.2d 749, 753–54 (Minn. 1978); *Bezel v. City of Cincinnati*, 233 N.E.2d 864, 870 (Ohio 1968); *Martin v. City of Philadelphia*, 215 A.2d 894, 896 (Pa. 1966).

102. 186 So. 2d 6 (Fla. 1966).

103. *Id.* at 12.

104. *Id.* at 7–8.

105. *Id.* at 12.

106. *See* Poe v. Hillsborough County, 695 So. 2d 672, 679 (Fla. 1997); Cottrell v. Atlanta Dev. Auth., 770 S.E.2d 616, 618, 623 (Ga. 2015); Savage v. State, 774 S.E.2d 624, 633 (Ga. 2015); Friends of Parks v. Chicago Park Dist., 786 N.E.2d 161, 169 (Ill. 2003); Moschenross v. St. Louis County, 188 S.W.3d 13, 22 (Mo. Ct. App. 2006); Ragsdale v. City of Memphis, 70 S.W.3d 56, 72, 74 (Tenn. Ct. App. 2001); King County v. Taxpayers of King Cty., 949 P.2d 1260, 1266, 1269 (Wash. 1997); Citizens for More Important Things v. King County, 932 P.2d 135, 137 (Wash. 1997); CLEAN v. State, 928 P.2d 1054, 1059–61 (Wash. 1996); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 433 (Wis. 1996).

107. Rubin, *supra* note 52; *see CLEAN*, 928 P.2d at 1061 ("[A] professional sports franchise provides jobs, recreation for citizens, and promotes economic development and tourism.").

108. *See, e.g.*, *Ragsdale*, 70 S.W.3d at 72 ("These decisions of the legislative bodies are entitled to great deference."); *CLEAN*, 928 P.2d at 1066 (describing

Although it certainly is not the role of a state judiciary to make legislative decisions, courts have rendered the public purpose doctrine largely rhetorical and without impact on irresponsible government spending.

B. Lending of Credit Clause Challenges

As the scope of the public purpose doctrine expanded, courts simultaneously eroded the protections under lending of credit clauses. Forty-six states have constitutional provisions that prohibit the use of public money to aid private enterprise.[109] The Washington Constitution is typical in providing that "[t]he credit of the state shall not, *in any manner* be given or loaned to, or in aid of, any individual, association, company or corporation."[110] Although the plain text of these provisions would seemingly prohibit public fund expenditures to finance privately used sports facilities, courts have refused to interpret them accordingly.[111] For example, in *CLEAN v. State*,[112] the court applied the above-referenced lending of credit clause in a case challenging the financing plan for the Seattle Mariners's stadium.[113] The court's review was limited "to determin[ing] whether a gift of state funds ha[d] occurred."[114] After noting that the legislature did not act with "donative intent" and that the stadium would be publicly owned, the court held that the clause did not preclude the expenditure of public funds.[115]

In a similar challenge to the financing plan for the Milwaukee Brewers's stadium under the Wisconsin lending of credit clause,[116] the state's highest court noted that ruling against the financing plan "would put in jeopardy many of our current state subsidies, such as unemployment compensation, welfare, and tuition grants. This we decline to do."[117] Indeed, the court analogized a multimillion-dollar stadium subsidy to welfare and unemployment benefits. Numerous courts have inexplicably come to the same conclusion when reviewing challenges under lending of credit clauses.[118]

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the legislature's decision to finance a stadium as "necessary for the 'immediate' preservation of the public peace, health or safety" and stating that "legislative declarations of emergency [are entitled to] substantial deference").

109. *See* Rubin, *supra* note 52, at 412 n.103 (listing such provisions).

110. WASH. CONST. art. VIII, § 5 (emphasis added).

111. *See, e.g.*, *CLEAN*, 928 P.2d at 1056; *Libertarian Party of Wis.*, 546 N.W.2d at 438.

112. 928 P.2d 1054 (Wash. 1996).

113. *Id.* at 1056.

114. *Id.* at 1061.

115. *Id.* at 1062.

116. WIS. CONST. art. VIII, § 3 (providing "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation").

117. Libertarian Party of Wis. v. State, 546 N.W.2d 424, 438 (Wis. 1996).

118. *See* Ginsberg v. City & County of Denver, 436 P.2d 685, 688, 691 (Colo. 1968); Savage v. State, 774 S.E.2d 624, 637–38 (Ga. 2015); Moschenross v. St. Louis County, 188 S.W.3d 13, 21–22 (Mo. Ct. App. 2006); Rice v. Ashcroft, 831

C. *Debt Limitation Clause Challenges*

Debt limitation clauses, which limit municipal borrowing power, are a minor impediment to publicly financing a stadium. Most states have enacted debt limitation clauses that restrict the amount of debt the state or its subdivisions may take on,[119] specify the time within which debt must be repaid,[120] or require legislative or voter approval before new debt may be incurred.[121] However, the financial burden of funding a stadium often surpasses the permissible amount of debt that a locality is able to take on. To avoid this problem, states have developed three mechanisms that avoid constitutional limitations on public debt.[122]

First, states have created special stadium districts to oversee the financing, construction, maintenance, and operation of stadiums.[123] The debt of a stadium district is not subject to the municipality's limitation, so when a government has issued all of its permissible debt, it can start fresh by creating a stadium district.[124] Stadium districts are generally vested with the power to issue bonds and to levy and collect taxes to finance stadium construction.[125] While some districts are composed of only a single county, others encompass several counties and municipalities.[126]

Second, states have evaded debt limitation provisions by creating public authorities.[127] A public authority is essentially a private

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S.W.2d 206, 209–10 (Mo. Ct. App. 1991); Ragsdale v. City of Memphis, 70 S.W.3d 56, 68, 70 (Tenn. Ct. App. 2001).

119. *See, e.g.*, GA. CONST. art. IX, § 5, para. 1 (limiting county and municipal debt to 10% of assessed property valuation); IND. CONST. art. XIII, § 1 (capping municipal debt at 2% of assessed property valuation).

120. *See, e.g.*, MO. CONST. art. VI, § 26(f) (requiring municipal debt to be paid off within twenty years).

121. *See, e.g.*, CAL. CONST. art. XVI, § 18 (requiring that local government debts be approved by two-thirds of local electorate); GA. CONST. art. IX, § 5, para. 1 (requiring the "assent of a majority of the qualified voters" before a county may take on new debt); S.C. CONST. art. X, § 13 (requiring new state debt be approved by either a popular referendum or two-thirds of each legislative house).

122. Goodman, *supra* note 20, at 177.

123. Parlow, *supra* note 87, at 84. States have taken various approaches to creating special stadium districts. Several states have passed legislation that specifically creates stadium districts. *Id.* at 83. For example, the Colorado legislature created the Major League Baseball Stadium District and the Metropolitan Football Stadium District. *Id.* Other states have created stadium districts via state constitutional amendments. *Id.* Finally, some states have codified general stadium district provisions but delegate the authority to create districts to local governments. *See* N.C. GEN. STAT. § 160A-479 (2017).

124. Goodman, *supra* note 20, at 177.

125. Parlow, *supra* note 87, at 85–86.

126. *Id.* at 84. The geographic area of a stadium district may be set forth in the enabling state statue or, as is the case in North Carolina, conterminous with the boundaries of the units of local government that established the district. *See* N.C. GEN. STAT. § 160A-479.2(a) (2017).

127. Goodman, *supra* note 20, at 178.

corporation that has the power to issue bonds.[128] Much like special districts, the debt of a public authority is unrelated to the debt of a municipality and is not subject to the municipality's limitation.[129]

Third, states have used special funds to make debt service payments on bonds.[130] Special funds, which are not subject to debt limitations, are often composed of tax revenues.[131] Although taxpayers have challenged stadium districts, public authorities, and special funds under state constitutional provisions that prohibit special legislation and require uniformity in taxation, they have been largely unsuccessful.[132]

The state of Missouri used the public authority mechanism to finance a stadium for the St. Louis Cardinals.[133] More specifically, St. Louis County entered into an agreement with a public authority whereby the authority would issue $46 million in bonds and the county would service the bond debt with tax revenues over a period of thirty years.[134] In *Moschenross v. St. Louis County*,[135] the financing agreement was challenged under the state's debt limitation clause, which mandates "any indebtedness" be retired "within twenty years from the date contracted."[136] The court refused to acknowledge that the county's agreement to make payments on the bonds constituted indebtedness.[137] Instead, the court determined that the agreement obligated the county "merely to request annual appropriations for repayment of the bonds" and held that the agreement did not violate the debt limitation clause.[138]

D. Uniformity and Special Legislation Clause Challenges

Taxpayer opponents have also challenged stadium-financing plans under state uniformity clauses and special law provisions. There is extensive overlap in the judicial interpretation of both uniformity clauses and special law provisions.[139] A typical uniformity clause in the Minnesota Constitution provides that "[t]axes shall be

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *See infra* Subpart IV.D.
133. Moschenross v. St. Louis County, 188 S.W.3d 13, 17 (Mo. Ct. App. 2006).
134. *Id.* at 17.
135. 188 S.W.3d 13 (Mo. Ct. App. 2006).
136. MO. CONST. art. VI, § 26(f).
137. *Moschenross*, 188 S.W.3d at 20–21.
138. *Id.* at 20; *see also* Savage v. State, 774 S.E.2d 624, 635 (Ga. 2015); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 436–37 (Wis. 1996) ("In the present case, the District's bonds are payable solely from a special fund that does not include any property tax revenues. In this respect, the District's bonds are analogous to special assessment bonds which do not create an indebtedness.").
139. Rubin, *supra* note 52, at 410. It should be noted that uniformity provisions and special law provisions often appear in the same clause of state constitutions. *See* GA. CONST. art. III, § 6, para. 4(a).

uniform upon the same class of subjects . . . ."[140] Similarly, a special law provision in the Washington Constitution states, "The legislature is prohibited from enacting any private or special laws . . . [f]or assessment or collection of taxes, or for . . . granting corporate powers or privileges."[141]

In 1995, the Washington state legislature, responding to the Seattle Mariners's threat to abandon the state, passed the Stadium Act.[142] The Stadium Act authorized counties with a population over one million to create a special stadium district, which in turn would have the power to impose taxes and construct a baseball stadium.[143] However, the only county with the requisite population was King County, which encompasses Seattle.[144] In *CLEAN*, the Washington Supreme Court swiftly rejected a claim that the Stadium Act was special legislation, despite the fact that it clearly targeted Seattle and privileged the Mariners.[145] According to the court, "[A]ny exclusions from the statute's applicability as well as the statute itself[] must be rationally related to the purpose of the statute."[146] The court upheld the classification after touting the economic benefits of the stadium.[147]

V. CASE ILLUSTRATION: ATLANTA, GEORGIA

Atlanta, Georgia serves as a prime illustration of the current status of funding professional sports stadiums. Atlanta is home to the MLB's Braves, the NBA's Hawks, and the NFL's Falcons. In the 1990s, Atlanta financed the construction of three stadiums: the

140. MINN. CONST. art. X, § 1.

141. WASH. CONST. art. II, § 28.

142. CLEAN v. State, 928 P.2d 1054, 1058 (Wash. 1996).

143. *Id.* Interestingly, just days before the Stadium Act was passed, a referendum was put to King County voters to approve a tax increase. The referendum was rejected. Rubin, *supra* note 52, at 405.

144. *CLEAN*, 928 P.2d at 1063.

145. *Id.* As the court kindly pointed out, "[I]t is certainly possible that in the not too distant future another county or counties may grow that large." *Id.* at 1064.

146. *Id.* at 1063 (quoting City of Seattle v. State, 694 P.2d 641, 649 (Wash. 1985)).

147. *Id.* at 1064; *see* Cottrell v. Atlanta Dev. Auth., 770 S.E.2d 616, 621 (Ga. 2015) (holding a statutory classification scheme to be neither arbitrary nor unreasonable because of the purported economic benefits afforded to local businesses); Lifteau v. Metro. Sports Facilities Comm'n, 270 N.W.2d 749, 755 (Minn. 1978) (upholding a stadium taxing district in a uniformity clause challenge and noting that "[i]n a situation such as the present one, where absolute equality cannot be obtained, the legislature's determination should stand if there is a reasonable basis for its choice"); Libertarian Party of Wis. v. State, 546 N.W.2d 424, 431 (Wis. 1996) (upholding a stadium taxing district under a special law provision and stating that the classification of district was "open, germane and relate[d] to true differences between the entities being classified" (quoting City of Brookfield v. Milwaukee Metro. Sewerage Dist., 426 N.W.2d 591, 598 (Wis. 1988))).

Georgia Dome, Turner Field, and Philips Arena. The Georgia Dome has since been demolished and replaced by the Falcons's new home, Mercedes-Benz Stadium, which was also constructed with public funds.[148] The Braves abandoned Turner Field for the publicly financed SunTrust Park in nearby Cobb County.[149] Finally, the Hawks's Philips Arena is currently being renovated, largely at taxpayer expense.[150] In 2015, the Georgia Supreme Court unanimously upheld the financing plans for both Mercedes-Benz Stadium and SunTrust Park under the state constitution.[151]

A. Atlanta Falcons: Georgia Dome to Mercedes-Benz Stadium

When the Georgia Dome opened in 1992, it was the largest domed stadium in the world.[152] Publicly owned by the Georgia World Congress Center Authority ("GWCCA"), the Georgia Dome came with a price tag of $214 million and was completely financed publicly through revenue bonds backed by a hotel tax.[153] However, eighteen years later, in 2010, the Falcons's management demanded a new stadium rather than renovating the Georgia Dome at a lower cost.[154] In 2013, the Atlanta City Council voted 11-4 in favor of issuing $200 million in revenue bonds that would be paid by increases to the existing hotel tax.[155] The city also committed to pay "an undefined hundreds of millions more to defray maintenance and operations through 2050."[156] The new Mercedes-Benz Stadium, which is also owned by the GWCCA, was originally projected to cost under $1 billion; however, that estimate later rose to $1.6 billion.[157]

Atlanta Mayor Kasim Reed claimed that "the construction of a new stadium will lead to the revitalization of some of the city's most historic neighborhoods [and] create well-paying jobs . . . ."[158] However, the claim that the stadium will create well-paying jobs is

148. *See infra* Subpart V.A.
149. *See infra* Subpart V.B.
150. *See infra* Subpart V.C.
151. *See* Savage v. State, 774 S.E.2d 624, 641 (Ga. 2015); Cottrell v. Atlanta Dev. Auth., 770 S.E.2d 616, 625 (Ga. 2015).
152. De Barbieri, *supra* note 62, at 1793.
153. Parlow, *supra* note 87, at 104 tbl.2.
154. De Barbieri, *supra* note 62.
155. *Cottrell*, 770 S.E.2d at 618.
156. De Barbieri, *supra* note 62, at 1794. It is estimated that the total public commitment will be in excess of $600 million. *Id.* at 1795.
157. Carla Caldwell, *Officials: Mercedes-Benz Stadium Cost Rises to $1.6 Billion*, ATLANTA BUS. CHRON. (June 16, 2016), http://www.bizjournals.com/atlanta/morning_call/2016/06/officials-mercedes-benz-stadium-cost-rises-to-1-6.html.
158. Press Release, Mayor's Office of Commc'ns, City of Atlanta Approves Resolution Authorizing the Use of the City's Hotel-Motel Tax Revenues to Partially Fund a New Professional Sports Stadium (Mar. 18, 2013), https://www.atlantaga.gov/Home/Components/News/News/1783/672?npage=48&arch=1.

unsupported by history and empirical research.[159] Furthermore, Mercedes-Benz Stadium was built immediately adjacent to the Georgia Dome, so the claim that it will "revitalize" the neighborhood is unconvincing.

The parties entered into a complex financing plan in an attempt to evade constitutional limitations. First, the city entered into a Hotel Tax Funding Agreement with the Atlanta Development Authority.[160] Under the Hotel Tax Funding Agreement, the Atlanta Development Authority agreed to issue revenue bonds and the city agreed to make payments from hotel taxes to be pledged as security for the bonds.[161] Essentially, the city will collect the hotel tax and transfer the proceeds to the Atlanta Development Authority, which will use such proceeds to service the bond debt. Second, the Atlanta Development Authority entered into a Bond Proceeds Agreement with the GWCCA.[162] Under the Bond Proceeds Agreement, the Atlanta Development Authority agreed to place the proceeds of the sale of the bonds into a special project fund, which the GWCCA would use to actually fund stadium construction.[163]

1. Cottrell v. Atlanta Development Authority

In *Cottrell v. Atlanta Development Authority*,[164] a group of local pastors challenged the stadium-financing plan under the Georgia Constitution's uniformity clause, intergovernmental contracts clause, and revenue bonds clause.[165] In a unanimous decision, the Georgia Supreme Court rejected all three arguments.[166]

The plaintiffs first argued that the statute permitting tax districts to extend any hotel tax used to "fund a successor facility to the multipurpose domed facility" was a special law in violation of the uniformity clause.[167] Since Atlanta was the only taxing entity in the state to impose a hotel tax to fund a "predecessor" facility, it was

159. *See supra* Subpart III.A.
160. *Cottrell*, 770 S.E.2d at 619.
161. *Id.* at 619–20.
162. *Id.* at 620.
163. *Id.*
164. 770 S.E.2d 616 (Ga. 2015).
165. *Id.* at 618, 620, 622.
166. *Id.* at 625.
167. GA. CODE ANN. § 48-13-51(a)(5)(B)(i) (2018). The uniformity clause of the Georgia Constitution, which incorporates a special law provision, states,

> Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

GA. CONST. art. III, § 6, para. 4(a).

impossible for any other taxing entity to fall under the provision.[168] However, the court reviewed the statute to determine whether it applied uniformly "on all taxing authorities which come within the scope of its provisions" and whether the statutory classification was arbitrary or unreasonable.[169] According to the court, although Atlanta was the only taxing entity that took advantage of the hotel tax to fund a predecessor "multipurpose domed facility," other entities had the opportunity to do so, despite the fact that the "window has now closed for additional entities to begin funding their own multipurpose domed stadium facilities . . . ."[170] The court held that the statutory classification scheme was neither arbitrary nor unreasonable because of the purported economic benefits afforded to local businesses.[171]

In addition, the plaintiffs alleged that the bond transaction violated a clause in the Georgia Constitution providing that "[t]he obligation represented by revenue bonds shall be repayable only out of the revenue *derived from the project* . . . ."[172] As stated above, the Atlanta Development Authority would have no role in the ownership or operation of the stadium, and the city would transfer tax proceeds to the group for debt service on the bonds.[173] However, the court inexplicably determined that the hotel tax would be collected in connection with GWCCA's ownership and operation of the stadium and would constitute lawful revenue from the stadium.[174] Indeed, the court held, without reference to authority, that taxes imposed by the city would qualify as "revenue derived from the project."[175]

Finally, the Tax Funding Agreement between the city and the Atlanta Development Authority was challenged under the

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168. *See Cottrell*, 770 S.E.2d at 621. This is quite similar to the claim in *Moschenross v. St. Louis County*, 188 S.W.3d 13, 18 (Mo. Ct. App. 2006), discussed in Subpart IV.C *supra*.

169. *Cottrell*, 770 S.E.2d at 621.

170. *Id.* Conversely, the Georgia Supreme Court had previously stated, "It is not necessary that every county in the state, at the time of the passage of the law, should fall within its operation, *but it is necessary that none should be excepted in such a way that it can never fall within its provisions*." Shadrick v. Bledsoe, 198 S.E. 535, 542 (Ga. 1938) (emphasis added) (quoting Thomas v. Austin, 30 S.E. 627, 628 (Ga. 1898)).

171. *Cottrell*, 770 S.E.2d at 621.

172. The revenue bonds clause in the Georgia Constitution states,

> Any county, municipality, or other political subdivision of this state may issue revenue bonds as provided by general law. The obligation represented by revenue bonds shall be repayable only out of the revenue derived from the project and shall not be deemed to be a debt of the issuing political subdivision. No such issuing political subdivision shall exercise the power of taxation for the purpose of paying any part of the principal or interest of any such revenue bonds.

GA. CONST. art. IX, § 6, para. 1.

173. *Cottrell*, 770 S.E.2d at 622.

174. *Id.*

175. *Id.* (quoting GA. CONST. art. IX, § 6, para. 1).

intergovernmental contracts clause.[176] This clause requires contracts between government entities to "deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide."[177] The plaintiffs argued that the Atlanta Development Authority lacked authority to undertake the project under the state's statute governing developmental authorities because it would not actually construct or own the stadium.[178] The court rejected this argument, noting that the Atlanta Development Authority has authority to issue revenue bonds to pay for "*any project*," despite the organization having no role in the acquisition, construction, development, ownership, or operation of the stadium.[179] The court held that the Atlanta Development Authority had the authority to fund the cost of another governmental entity's project because it served a public purpose.[180]

Years prior, the Georgia Supreme Court struck down the issuance of revenue bonds for the construction of manufacturing facilities, which would be leased to private industries, on grounds that it did not serve a public purpose.[181] In doing so, the court foreshadowed the current abuse of revenue bonds:

> This amendment would permit the county to issue bonds for a purely private purpose; for example, to secure funds to construct a building or plant to be leased to and occupied by an already existing and operating business with a perfectly adequate building which would perform the same functions, employ the same number of people, and add nothing in the way of industry, or alleviate unemployment, or otherwise contribute to the public good.[182]

Sound familiar? The Falcons were an existing and operating business with a perfectly adequate stadium. Mercedes-Benz Stadium will perform the same functions as the Georgia Dome and will not alleviate unemployment.

176. *Id.*; *see* GA. CONST. art. IX, § 3, para. 1(a).
177. GA. CONST. art. IX, § 3, para. 1(a).
178. *Cottrell*, 770 S.E.2d at 622–23; *see* GA. CODE ANN. § 36-62-2(6)(H)(i) (2018) ("'Project' includes . . . [t]he acquisition, construction, improvement, or modification of any property, real or personal, which shall be suitable for or used as or in connection with . . . [s]ports facilities . . . .").
179. *Id.* (quoting GA. CODE ANN. § 36-62-6(a)(13) (2018)).
180. *Id.* at 623.
181. Smith v. State, 150 S.E.2d 868, 872 (Ga. 1966).
182. *Id.* at 871.

B. Atlanta Braves: Turner Field to SunTrust Park

Turner Field cost $235 million and was entirely publicly financed.[183] The stadium was formerly the Centennial Olympic Stadium and was constructed for the 1996 Olympic Games.[184] The Braves entered into a rent-free lease agreement for a term of twenty years with the Atlanta-Fulton County Recreation Authority.[185] One National League pennant and sixteen years later, the Braves were seeking a new home. In 2013, the Braves announced that the team would be relocating to a new $722 million stadium in nearby Cobb County.[186] Cobb County and the Cobb-Marietta Coliseum and Exhibit Hall Authority ("Coliseum and Exhibit Hall Authority") agreed to issue $368 million in revenue bonds, and another $24 million came from other sources of public funding.[187] The new stadium, SunTrust Park, is owned by the Coliseum and Exhibit Hall Authority and leased to the Braves.[188]

The SunTrust Park financing plan was similar to that of Mercedes-Benz Stadium. More specifically, the stadium plan consisted of four critical agreements: (1) a Development Agreement, which provided that the Braves would oversee stadium construction and the Coliseum and Exhibit Hall Authority would retain title;[189] (2) an Operating Agreement, which granted the Braves a license for exclusive use of the stadium and the right to *all* stadium revenue for at least thirty years;[190] (3) a Bond Resolution, which authorized the Coliseum and Exhibit Hall Authority to issue revenue bonds for up to

183. NAT'L SPORTS LAW INSTIT. OF MARQ. UNIV. LAW SCH., MAJOR LEAGUE BASEBALL 2 (2012), https://law.marquette.edu/assets/sports-law/pdf/sports-facility-reports/sfr-v13-mlb.pdf.

184. *Id.*

185. NAT'L SPORTS LAW INSTIT. OF MARQ. UNIV. LAW SCH., LEASE SUMMARY (2012), https://law.marquette.edu/assets/sports-law/pdf/ls-mlb-atlanta.pdf. In its maiden year, Turner Field had total attendance of 3.46 million, but that number declined to 2.32 million in the very next year. David Mark, *Taking One for the Team: The Persistent Abuse of Eminent Domain in Sports Stadium Construction*, 5 FIU L. REV. 781, 802 (2010).

186. Ira Boudway & Kate Smith, *The Braves Play Taxpayers Better Than They Play Baseball*, BLOOMBERG BUSINESSWEEK (Apr. 27, 2016), https://www.bloomberg.com/features/2016-atlanta-braves-stadium/; Craig Calcaterra, *The Braves Are Leaving Turner Field After the 2016 Season*, NBC SPORTS (Nov. 11, 2013, 9:08 AM), http://mlb.nbcsports.com/2013/11/11/report-the-braves-are-leaving-turner-field-after-the-2016-season.

187. Savage v. State, 774 S.E.2d 624, 628 (Ga. 2015). The Cobb County Commission approved the plan without public debate by having commissioners stand in the hallway, a practice known as a "rolling quorum." Neil DeMause, *Cobb County and the Braves: Worst Sports Stadium Deal Ever?*, VICE SPORTS (June 9, 2016), https://sports.vice.com/en_us/article/cobb-county-and-the-braves-worst-sports-stadium-deal-ever.

188. *Savage*, 774 S.E.2d at 628.

189. *Id.*

190. *Id.* at 628–29.

$397 million;[191] and (4) an Intergovernmental Agreement ("IGA") between the Coliseum and Exhibit Hall Authority and Cobb County in which the latter agreed to issue the bonds and the county agreed to pay for the bonds by using "any funds lawfully available to it."[192]

1. Savage v. State

In *Savage v. State*,[193] Cobb County residents challenged the issuance of the stadium bonds, alleging violations of the intergovernmental contracts clause, debt limitation clause, gratuities clause, and revenue bonds clause. In another unanimous decision, the Georgia Supreme Court upheld the financing plan for SunTrust Park.[194]

The plaintiffs first argued that the IGA violated the Georgia Constitution's intergovernmental contracts clause, which requires contracts between governmental entities to (1) be for "joint services, for the provision of services, or for the joint or separate use of facilities or equipment" and (2) "deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide."[195] The court admitted that the Coliseum and Exhibit Hall Authority's "services" under the IGA were limited in that it was only obligated to issue the bonds, hold title to the property, and license the property exclusively to the Braves.[196] Nevertheless, the court determined that the intergovernmental contracts clause does not require a local authority to provide "extensive" services and found that the Coliseum and Exhibit Hall Authority's issuance of bonds qualified as a "service."[197]

With regard to the second intergovernmental contracts clause requirement, the court found that Cobb County's authority under the Georgia Constitution, which permits the provision of "parks" and "recreational facilities,"[198] did not bar the county from financing the stadium with tax revenue through the IGA.[199] Finally, the court considered whether a public purpose provision in the Georgia Constitution deprived the Coliseum and Exhibit Hall Authority or

191. *Id.* at 629.
192. *Id.*
193. 774 S.E.2d 624 (Ga. 2015).
194. *Id.* at 641.
195. GA. CONST. art. IX, § 3, para. 1(a). The intergovernmental contract clause also requires the contract be between "political subdivision[s] of the state" and for a period "not exceeding 50 years." *Id.* However, these requirements were not disputed in *Savage*. *See Savage*, 774 S.E.2d at 629–31.
196. *Savage*, 774 S.E.2d at 631.
197. *Id.*
198. GA. CONST. art. IX, § 2, para. 3(a)(5).
199. *Savage*, 774 S.E.2d at 633. The court also determined that the Coliseum and Exhibit Hall Authority's governing statute, which permits it to construct facilities for "athletic contests," authorized the Coliseum and Exhibit Hall Authority to issue the bonds. *Id.* at 632.

Cobb County of the right to undertake the project.[200] After touting the purported "economic benefits" of the stadium and describing it as a "catalyst for revitalization," the court stated, "We will defer to the express findings of the [Coliseum and Exhibit Hall Authority] and the county that the stadium project will provide public benefits."[201]

Second, the plaintiffs alleged that the issuance of stadium bonds violated the debt limitation clause, which prohibits counties from taking on debt "without the assent of a majority of the qualified voters of such county."[202] There was no referendum presented to Cobb County voters; however, the court noted that the issuance of bonds did not create new debt because the pledged security was "revenues from the IGA."[203] It is worth pointing out that "revenues from the IGA" are tax revenues and Cobb County incurred a substantial amount of debt under the IGA. Nevertheless, the court held that, because the "county has no *direct* liability for the stadium project bonds" and "debt incurred under a valid intergovernmental contract is not subject to the debt limitation clause," the claim must fail.[204] The court justified this position by stating that a contrary ruling would jeopardize "services ranging from hospitals, roads, and recreation facilities to police, fire, animal control, and other public safety services."[205]

Third, the IGA was challenged under the Georgia Constitution's gratuities clause.[206] In prior cases, the Georgia Supreme Court required a showing of a "substantial benefit" in exchange for the government's consideration.[207] However, in this case, the court deferred to Cobb County's finding that the Coliseum and Exhibit Hall Authority's issuance of the bonds "to be sufficient consideration for the promised payments."[208] According to the court, it could not review whether Cobb County received "enough benefits" or whether the county "commissioners made the correct decision, but only whether it

200. *Id.* at 633; *see* GA. CONST. art. IX, § 4, para 2 (stating that counties "may expend public funds to perform any public service or public function as authorized by this Constitution or by law or to perform any other service or function as authorized by this Constitution or by general law").

201. *Savage*, 774 S.E.2d at 633–34.

202. GA. CONST. art. IX, § 5, para. 1(a).

203. *Savage*, 774 S.E.2d at 635.

204. *Id.* (emphasis added).

205. *Id.* at 637. This is the same slippery slope argument made by the court in *Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424, 438 (Wis. 1996).

206. *Savage*, 774 S.E.2d at 630; *see* GA. CONST. art. III, § 6, para. 6 (a)(1) ("Except as otherwise provided in the Constitution, . . . the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public . . . .").

207. *Savage*, 774 S.E.2d at 637 (citing Avery v. State, 761 S.E.2d 56, 60 (Ga. 2014)).

208. *Id.*

was a lawful one."[209] Thus, the court held the IGA did not amount to an impermissible gratuity.[210]

Fourth, the plaintiffs argued that the IGA violated the lending of credit clause, which prohibits counties "through taxation, contribution *or otherwise*, to appropriate money for or lend its credit to any person or to any nonpublic corporation . . . ."[211] In a single paragraph, the court rejected this claim because the stadium will be owned by the Coliseum and Exhibit Hall Authority and Cobb County had not agreed to pay "for anything to be owned by the Braves . . . ."[212] The court's holding appears to be contrary to the plain text of the lending of credit clause. The phrase "contribution *or otherwise*" does not limit the lending prohibition to direct financial contributions to property owned by a private corporation.

Finally, the plaintiffs argued that the bond issuance violated the revenue bonds clause.[213] Similar to the claim in *Cottrell*, the *Savage* plaintiffs contended that the financing plan violated the clause's requirement that "revenue bonds shall be repayable only out of the revenue derived from the project . . . ."[214] After admitting that Cobb County agreed "to levy ad valorem taxes" to satisfy its commitments under the IGA, the court held that payments made under the contract constituted "project revenue."[215]

In upholding SunTrust Park's financing plan, the court cautioned that "aspects of the deal structure at issue may push the law about as far as it can go . . . ."[216] The court also stated that it did "not discount the concerns [plaintiffs] have raised about the wisdom of the stadium project and the commitments Cobb County has made to entice the Braves to move there."[217] According to the court, however, "[T]hose concerns lie predominantly in the realm of public policy entrusted to the County's elected officials . . . ."[218] The Georgia Supreme Court's unfettered deference in *Savage* and *Cottrell* is demonstrative of the general approach taken by state courts in challenges to publicly financed sports facilities.

C. Atlanta Hawks: Philips Arena Renovation

Last, but not least, in 1999, Atlanta publicly financed 91% of the $213.5 million Phillips Arena for the NBA's Hawks.[219] Sixteen years

209. *Id.*
210. *Id.*
211. GA. CONST. art. IX, § 2, para. 8 (emphasis added).
212. *Savage*, 774 S.E.2d at 637.
213. *Id.* at 638.
214. GA. CONST. art. IX, § 6, para. 1; *see Savage*, 774 S.E.2d at 638.
215. *Savage*, 774 S.E.2d at 638.
216. *Id.* at 641.
217. *Id.*
218. *Id.*
219. Parlow, *supra* note 87, at 112 tbl.3. More specifically, the privately owned Philips Arena was financed by (1) $62.5 million from a 3% car-rental tax,

and zero conference titles later, the Hawks were seeking a new or better home. In November 2016, Atlanta Mayor Kasim Reed and the Hawks announced a $192.5 million renovation of Philips Arena.[220] Of that amount, Atlanta will contribute $142.5 million.[221] Among other changes, the renovation will "alter the look of the luxury boxes" and add "a state-of-the-art video system."[222] To finance the project, the city extended the car-rental tax to raise $110 million and will contribute $12.5 million from the sale of Turner Field; the remaining $20 million will come from a series of future land sales by the city.[223]

VI. ATTEMPTS TO CURTAIL PUBLIC FINANCING AT THE FEDERAL LEVEL

There are numerous economic, social, and ethical reasons why professional sport facilities should not be built with public funds. Despite these countervailing considerations, state and local governments continue to cave to the demands of franchises, often due to a fear of losing a team to a city that is willing to offer a better deal. Courts have refused to intervene and continue to grant unfettered deference to their respective legislatures. Thus, taxpayers are without recourse at the state level.

The solution must come by way of federal legislation. As noted by one commentator, "Only Congressional action can prevent a responsible city, which denies its team a new publicly financed stadium, from being punished by the team's move to a fiscally irresponsible city that lures the team away with the promise of a new stadium."[224] Numerous bills introduced by Democrats and Republicans alike have taken different approaches in an attempt to curtail the practice of publicly financing sports facilities. These bills largely fall into two categories. First, legislators have proposed closing the I.R.C. loophole that permits the issuance of tax-exempt bonds for stadiums. Second, several bills have proposed restricting sports franchises' ability to relocate.

A. Failed Legislative Attempts to Level the Playing Field

As noted in Part II, a goal of the Tax Reform Act was to eliminate tax-exempt financing for stadiums altogether, but it inadvertently

(2) $130.75 million in revenue bonds to be paid from arena revenue, and (3) $20 million in private funding from Turner Broadcasting. NAT'L SPORTS LAW INSTIT. OF MARQ. UNIV. LAW SCH., NATIONAL BASKETBALL LEAGUE 1 (2012), https://law.marquette.edu/assets/sports-law/pdf/nba-2013.pdf.

220. *Hawks Partner With Atlanta to Invest $192.5M in Philips Arena*, ESPN (Nov. 1, 2016), http://www.espn.com/nba/story/_/id/17947286/atlanta-hawks-city-planning-1925-million-philips-arena-renovation.

221. *Id.*

222. *Id.*

223. *Id.*

224. Gans, *supra* note 35, at 782.

opened the floodgates.[225] Indeed, one of the drafters of the Tax Reform Act, Senator Patrick Moynihan (D-NY), noted that the changes to I.R.C. § 141 sought "to eliminate tax-exempt financing of professional sports facilities [altogether]."[226] Subsequently, in 1996, Senator Moynihan introduced the Stop Tax-Exempt Arena Debt Issuance Act ("STADIA"),[227] which proposed closing the I.R.C. loophole that allows stadium bonds to remain outside the private activity classification.[228] More specifically, STADIA would have created a new subsection in I.R.C. § 141 that applied to professional sports facilities and classified bonds used to finance them as private activity bonds.[229] Thus, governments would have only been able to issue taxable private activity bonds, which would "virtually end the subsidization through the federal government for bonds issued to construct stadiums."[230]

Similarly, in March 2016, Representative Steve Russell (R-OK) introduced the No Tax Subsidies for Stadiums Act ("2016 Act").[231] The 2016 Act proposed creating a new subsection in I.R.C. § 149 applicable to sports facilities.[232] Specifically, it would have denied I.R.C. § 103(a) tax-exempt status "to any bond issued as part of an issue any proceeds of which are to be used to provide a professional entertainment facility."[233] Both the 2016 Act and STADIA would

225. *See supra* Subpart II.A.

226. 142 CONG. REC. S6306 (daily ed. June 14, 1996) (statement of Sen. Moynihan).

227. Stop Tax-Exempt Arena Debt Issuance Act of 1997, S. 434, 105th Cong. (1997).

228. Phelps, *supra* note 29, at 995–96.

229. S. 434. STADIA would have redrafted I.R.C. § 141(e) as follows:

> For purposes of this title, the term "private activity bond" includes any bond issued as part of an issue if the amount of the proceeds to the issue which are to be used (directly or indirectly) to provide professional sports facilities exceeds the lesser of:
>
> (A) 5 percent of such proceeds, or
>
> (B) $5,000,000.

Id.

230. Phelps, *supra* note 29, at 997. STADIA did not make it out of the Senate Committee on Finance. *See S.434 - Stop Tax-Exempt Arena Debt Issuance Act*, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/senate-bill/434/actions?q=%7B%22search%22%3A%5B%22Stop+Tax-Exempt+Arena+Debt+Issuance+Act+of+1997%2C+S.+434%22%5D%7D&r=1 (last visited Mar. 28, 2018).

231. No Tax Subsidies for Stadiums Act of 2016, H.R. 4838, 114th Cong. (2016).

232. *Id.* § 2.

233. *Id.* The 2016 Act defined "professional entertainment facility" as any facility used as a "stadium or arena for professional sports exhibitions, games, or training" at least five days per year. *Id.* The 2016 Act was never reported on after being referred to the House Committee on Ways and Means. *See H.R.4838 - No Tax Subsidies for Stadiums Act*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/4838/all-actions?q=%7B

have stemmed the loss of federal revenue incurred through the issuance of tax-exempt stadium bonds.

The Team Relocation Taxpayer Protection Act of 1996,[234] introduced by Senators John Glenn (D-OH) and Mike DeWine (R-OH), proposed amending the I.R.C. to deter franchise relocation.[235] Under the bill, which applied only to NFL franchises,[236] if a team played its games in a facility other than its contracted facility before the termination of its contract, it would have been prohibited from benefiting "directly or indirectly, from any expenditure of Federal funds" and would not have been eligible for any "federal tax exclusion, deductions, credits, exemptions, or allowances."[237] Accordingly, bonds issued to finance the NFL team's new facility would not have been exempted from federal taxes under I.R.C. § 103(a).[238]

Other bills have attempted to limit the power of franchises to relocate without amending the I.R.C. In essence, if teams cannot threaten to relocate, the bargaining power of state and local governments will increase dramatically. The Professional Sports Franchise Stabilization Act of 1992 ("PSFSA")[239] would have prohibited a franchise from relocating unless it notified the local government of its intention to relocate and negotiated in good faith to avoid relocation.[240] The PSFSA would also have permitted a franchise to relocate if it incurred an annual net loss for three consecutive years.[241] A similar bill, the 1995 Fans Rights Act,[242] set

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%22search%22%3A%5B%22No+Tax+Subsidies+for+Stadiums+Act+of+2016%2C+H.R.+4838%22%5D%7D&r=1 (last visited Mar. 28, 2018).

234. Team Relocation Taxpayer Protection Act of 1996, S. 1529, 104th Cong. (1996).

235. *See id.* § 2(a)(2) (stating that "[t]he purpose of this section is to deter" the harmful effects of franchise relocation on interstate commerce).

236. The bill was a direct response to "the financing arrangements Baltimore employed to pluck the Browns from Cleveland . . . ." Katherine C. Leone, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 509 (1997).

237. S. 1529, § 2(b)(1)(A)–(B).

238. *See id.* The bill was never reported on once it reached the Senate Committee on Finance. *See S.1529 - Team Relocation Taxpayer Protection Act of 1996*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/senate-bill/1529/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22Team+Relocation+Taxpayer+Protection+Act+of+1996%2C+S.+1529%22%5D%7D&r=1 (last visited Mar. 28, 2018).

239. Professional Sports Franchise Stabilization Act of 1992, H.R. 5713, 102d Cong. (1992).

240. *Id.* § 2(a)(1).

241. *Id.* § 2(a)(2)(C). The PSFSA was never reported on once it reached the House Subcommittee on Commerce, Consumer Protection and Competitiveness. *See H.R.5713 - Professional Sports Franchise Stabilization Act of 1992*, CONGRESS.GOV, https://www.congress.gov/bill/102nd-congress/house-bill/5713/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22Professional+Sports+Franchise+Stabilization+Act+of+1992%2C+H.R.+5713%22%5D%7D&r=1 (last visited Mar. 28, 2018).

242. Fans Rights Act of 1995, S. 1439, 104th Cong. (1995).

forth specific criteria that a team would have had to meet before it could relocate.[243] However, the Fans Rights Act was different from the PSFSA in that it would have exempted professional sports leagues from antitrust laws in the enforcement of relocation rules.[244] Thus, the Fans Rights Act would have made the individual leagues responsible for relocation decisions.[245] Finally, the 1996 Fan Freedom and Community Protection Act ("FFCPA") also sought to deter franchise relocation.[246] Under the FFCPA, if a franchise relocated, its registered trademark would have become the property of the league and been reserved for future use by a team in the community that lost the team.[247] The FFCPA would also have required the relocated team's league to offer the abandoned city an expansion team.[248]

These are just a few of the many failed bills that have sought to address the issue of publicly funded professional sports facilities.[249] The sheer number of bipartisan attempts to remedy this issue shows that federal legislators recognize that the current system is broken.

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243. *See id.*

244. *Id.*

245. *See id.* The bill was never reported on once it reached the Senate Committee on Commerce, Science, and Transportation. *See S.1439 - Fans Rights Act of 1995*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/senate-bill/1439/actions?q=%7B%22search%22%3A%5B%22Fans+Rights+Act+of+1995%2C+S.+1439%22%5D%7D&r=1 (last visited Mar. 28, 2018).

246. Fan Freedom and Community Protection Act of 1996, H.R. 2740, 104th Cong. § 2 (1996) (noting that "[c]urrent law does not protect the rights of sports fans nor the interests of communities" from the harm caused by franchise relocation).

247. *Id.* § 3.

248. *Id.* § 5. No further action was taken once the FFCPA reached the House Committee on the Judiciary and the House Committee on Commerce. *See H.R.2740 - Fan Freedom and Community Protection Act of 1996*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/house-bill/2740/all-actions?q=%7B%22search%22%3A%5B%22Fan+Freedom+and+Community+Protection+Act+of+1996%22%5D%7D&r=1 (last visited Mar. 28, 2018).

249. *See* Stadium Financing and Franchise Relocation Act of 1999, S. 952, 106th Cong. (1999) (proposal that would guarantee a continuation of the antitrust exemption for the NFL and MLB under the Sports Broadcasting Act, which permits the leagues to jointly sell television rights, if each league contributed 10% of all television revenue to a stadium trust fund); Professional Sports Franchise Relocation Act of 1998, H.R. 3817, 105th Cong. (1998) (proposal that would exempt leagues from antitrust liability for restricting team relocation and imposing procedural requirements restricting mobility); Sports Antitrust Reform Act of 1996, S. 1767, 104th Cong. (1996) (proposal that would impose criteria that must be met before a franchise could relocate); Professional Sports Antitrust Clarification Act of 1996, S. 1696, 104th Cong. (1996) (proposal that would grant professional sports leagues antitrust immunity for decisions related to franchise movement); Sports Relocation Reform Act of 1996, H.R. 3805, 104th Cong. (1996) (proposal that would impose procedural requirements and criteria that must be met before a team could relocate, such as fan loyalty and the extent to which a team has negotiated in good faith).

B. 2016 and 2017 Department of the Treasury Revenue Proposals

Under the Obama administration, the Department of the Treasury also sought to end the use of tax-exempt bonds to finance professional sports facilities. In its budget proposals for the 2016 fiscal year, the administration included an item titled "Repeal Tax-Exempt Bond Financing of Professional Sports Facilities."[250] The proposal would have eliminated the private security prong for bonds used to finance professional sports facilities while leaving the private use prong in place.[251] Thus, bonds "would [have been] taxable private activity bonds if more than ten percent of the facility is used for private business use."[252] The Department of the Treasury estimated that, if adopted, the proposal would have increased federal revenue by $542 million between 2016 and 2025.[253] The proposal received limited consideration in the Republican-controlled Congress and was unsuccessful.[254] The Department of the Treasury included an identical item in its budget proposals for the 2017 fiscal year,[255] but it was also rejected.

C. The No Tax Subsidies for Stadiums Act of 2017

On February 1, 2017, Representative Russell introduced a bill similar to the 2016 Act, also titled the No Tax Subsidies for Stadiums Act ("2017 Act").[256] Like the prior bill, the 2017 Act proposes amending the I.R.C. to disallow the issuance of tax-exempt bonds for stadium financing; however, the 2017 Act takes a slightly different approach. Specifically, the 2017 Act would add a new subsection to I.R.C. § 141 stating, "In the case of any issue any proceeds of which are to be used to provide a professional sports stadium, such issue shall be treated as meeting the [private security prong] of subsection (b)(2)."[257] This would effectively end the use of tax-exempt bonds for stadiums and close the inadvertently created loophole. State and local governments would no longer be under great pressure to structure debt repayment in a way that leaves taxpayers responsible

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250. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 85 (2015).

251. *See id.*

252. *Id.*

253. *Id.* at 293.

254. Travis Waldron, *Obama Doesn't Want Federal Tax Dollars Paying for Any More Sports Stadiums*, HUFFINGTON POST (Feb. 9, 2016, 7:51 PM), http://www.huffingtonpost.com/entry/obama-budget-taxpayers-stadiums_us_56ba3d4ee4b0c3c5504f0dc7.

255. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 83 (2016).

256. No Tax Subsidies for Stadiums Act of 2017, H.R. 811, 115th Cong. (2017).

257. *Id.* § 2(a). The 2017 Act defines the term "professional sports stadium" as "any facility (and appurtenant real property) which, during at least 5 days during any calendar year, is used as a stadium or arena for professional sports exhibitions, games, or training." *Id.*

for 90% of bond debt. Further, stadium revenue could finally be used to service more than 10% of bond debt. As noted by Representative Russell, "When Senator Coburn [(R-OK)] and President Obama agree on a budget proposal, you know it is a necessary measure to work on."[258]

D. A Blown Save: The Tax Cuts and Jobs Act

The most recent failed attempt to curb public financing for professional sports facilities came with the tax reform efforts in 2017. The Tax Cuts and Jobs Act ("TCJA"), when introduced in the House on November 2, 2017, contained a provision that would have denied tax-exempt status for bonds used to finance stadiums.[259] Specifically, section 3604 of the TCJA, titled "No Tax-Exempt Bonds for Professional Stadiums," would have amended I.R.C. § 103(b), which lists exceptions to § 103(a) tax-exempt bonds, to include any "professional stadium bond."[260] In its report on section 3604, the House Committee on Ways and Means stated that it "believe[d] it is appropriate to close the loophole that allows tax-exempt financing of stadiums for the benefit of professional sports teams."[261] However, the provision was not ultimately included in the final bill.[262] Senator Dean Heller (R-NV) took credit for killing the provision in a press release, stating that he "was able to protect the tax exemption for stadium bonds, which is critical to preserving the influx of business and growth associated with the construction of the Raiders stadium in Las Vegas."[263] Not surprisingly, the NFL and MLB lobbied Congress on "issues related to tax reform" in 2017.[264]

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258. Press Release, Office of Congressman Steve Russell, Congressman Russell Introduces Bill to End 30-Year-Old Tax Loophole (Mar. 23, 2016), https://russell.house.gov/media-center/press-releases/congressman-russell-introduces-bill-end-30-year-old-tax-loophole.

259. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 3604 (2017).

260. *Id.* The proposed bill defined "professional stadium bond" as "any bond issued as part of an issue any proceeds of which are used to finance or refinance capital expenditures allocable to a facility . . . which, during at least 5 days during any calendar year, is used as a stadium or arena for professional sports exhibitions, games, or training." *Id.*

261. H.R. REP. NO. 115-409, at 670 (2017).

262. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

263. Press Release, Office of Senator Dean Heller, Heller Applauds U.S. Senate's Passage of Tax Cuts for Nevada's Middle-Class Families (Dec. 20, 2017), https://www.heller.senate.gov/public/index.cfm/pressreleases?ID=EC6775F3-F785-45B2-9BA2-1AE559B7D4F0. The Nevada legislature recently approved a plan to provide $750 million for the Raiders stadium through tax-exempt bonds backed by a new hotel tax. *See* Mike Ozanian, *Raiders Move to Las Vegas Bucks Trend in NFL Stadium Financing*, FORBES (Jan. 24, 2017, 9:30 AM), https://www.forbes.com/sites/mikeozanian/2017/01/24/raiders-move-to-las-vegas-bucks-trend-in-nfl-stadium-financing/#43dbb24f516b.

264. Arthur Delaney & Travis Waldron, *New Tax Law Lets Billionaire Team Owners Keep Building Stadiums with Your Money*, HUFFINGTON POST (Jan. 12,

VII. CONCLUSION

The Internal Revenue Code encourages public funding of professional sports facilities. By granting tax-exempt status for stadium bonds without allowing stadium revenue to secure more than 10% of the bond debt, state and local governments are forced to pay for the bonds with tax revenue. Although the No Tax Subsidies for Stadiums Act of 2017 would not end the practice of publicly funding stadiums, it would close the current loophole. Indeed, that alone would have a substantial effect. At the federal level, the bill would stem the loss of revenue that is incurred every time tax-exempt stadium bonds are issued and thus effectively end subsidization by the federal government. At the state level, it would eliminate the enormous incentive (i.e., tax-exempt status) that compels localities to issue the bonds. Stadium revenue could be used as security and governments could seek greater financial contributions from teams, while relying less on tax dollars. Governments would no longer be compelled to service 90% of bond debt.

The No Tax Subsidies for Stadiums Act of 2017 is a step in the right direction; however, it alone is not sufficient. Even if tax-exempt bonds are not available, franchises will use their excessive bargaining power to extort public funds through other financing arrangements. Until federal legislation addresses team relocation, cities will be faced with a prisoner's dilemma given the limited number of professional franchises and the dozens of cities willing to cave for a new team. To level the playing field, Congress should legislate to require sports franchises to negotiate in good faith to avoid relocation. In addition, such legislation should allow teams to relocate if certain fiscal criteria are met, such as an annual net loss for three consecutive years. This would effectively balance the business interests of sports franchises against the interests of taxpayers and state and local governments.

Professional sports are an integral part of American society; however, this passion has led state and local governments to publicly fund multibillion-dollar stadiums for multibillion-dollar sports franchises. Nevertheless, courts have left taxpayers without recourse under state constitutions, and Congress has failed to take action to rectify the problem. Until federal legislation is enacted, taxpayers will continue to be at the mercy of professional sports franchises.

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2018, 2:18 PM), https://www.huffingtonpost.com/entry/tax-subsidy-sports-stadiums_us_5a58eae5e4b04f3c55a23064.

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