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Playing a Man Down: Professional Sports and Stadium Finance—How Leagues and Franchises Extract Favorable Terms from American Cities

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PLAYING A MAN DOWN: PROFESSIONAL SPORTS AND STADIUM FINANCE—HOW LEAGUES AND FRANCHISES EXTRACT FAVORABLE TERMS FROM AMERICAN CITIES

Abstract: In an era of unprecedented profitability, expansion, and popularity of American professional sports leagues, it seems outrageous that cities and municipalities across the United States would continue to subsidize the funding of new stadiums for wealthy sports franchises. Yet despite the economic obstacles facing many of these cities and municipalities, the gratuitous public funding of stadiums across the United States persists. This reality stems from the extraordinary bargaining power that professional sports franchises maintain over the cities in which they are located. Indeed, threating to relocate a franchise brings forth a litany of cities that are ready and willing to offer favorable terms to fund a new stadium. Legislative efforts to restrict stadium finance have paradoxically forced municipalities into even less favorable stadium deals that relied on public tax dollars while other efforts to reform stadium financing have failed to gain traction among municipal governments and federal lawmakers. This Note evaluates the various methods of stadium financing by discussing the private and public sources of funding. This Note goes on to evaluate the application of the public purpose doctrine in restricting the issuance of public finance. Finally, this Note explores potential solutions to the challenges that face municipalities when it comes to stadium financing.

INTRODUCTION

Professional sports occupy a unique place in American culture, constituting one of the bedrocks of American civic identity.[1] It should come as no surprise, then, that when sports franchises relocate, it feels as if their host cities

[1] *See* Christine Emba, *Why Do We Care About Sports So Much?*, WASH. POST (Mar. 14, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/03/14/why-do-we-care-about-sports-so-much/?utm_term=.dbeb70198e44 [https://perma.cc/6TVG-UZWF] (discussing why Americans become so invested in sports); Michael Shackelford, *The Importance of Sports in America*, BLEACHER REP. (July 4, 2009), http://bleacherreport.com/articles/211946-the-importance-of-sports-in-america# [https://perma.cc/64BT-LE6R] (discussing why sports play such a large role in American culture). The history of sports in America is intertwined with some of the most significant moments in American history. *See* Shackelford, *supra.* For example, during the Civil War, Confederate and Union soldiers played baseball when they were not busy fighting. *Id.* Another example is the legendary baseball player Jackie Robinson, who captured the nation's attention when he broke the color barrier in professional baseball at the outset of the Civil Rights era in the United States. *Id.*

lose a portion of their civic identity.[2] Today, it seems like a new franchise threatens to leave and rip the heart out of its loyal fans more frequently than ever.[3] When this occurs, it is often the taxpayers who are left out to dry, as they are bereft of their sports franchise and often stuck with the stadium bill.[4]

Despite the perils of franchise relocation, and the tremendous investment in both physical and emotional capital required to support a team in the National Football League ("NFL"), National Basketball Association ("NBA"), Major League Baseball ("MLB"), or National Hockey League ("NHL"), sports fans and cities alike crave the benefits that a professional franchise can bring.[5]

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[2] *See* JOANNA CAGAN & NEIL DEMAUSE, FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT 1–4 (2002) (describing how the National Football League's ("NFL") Ravens franchise abandoned Baltimore for more lucrative grounds in Indianapolis); David Uberti, *How American Sports Franchises Are Selling Their Cities Short*, THE GUARDIAN (Sept. 22, 2014), https://www.theguardian.com/cities/2014/sep/22/-sp-how-american-sports-franchises-sell-cities-short [https://perma.cc/2CRT-CEYZ] (arguing that franchises sometimes fail to consider the impact they have on their host cities). Thousands of citizens fought to prevent the SuperSonics of the National Basketball Association ("NBA") from leaving Seattle for Oklahoma City by challenging the move in court and fighting for a seat at the city's negotiating table. Elizabeth Odian, *Preventing Sonicsgate: The Ongoing Problem of Franchise Relocation*, 18 SPORTS LAW. J. 67, 68 (2011).

[3] *See* Adam Hanau, Note, *NFL Team Relocations in the Age of Modern Stadium Finance: Motivations for a Team to Move and Implications for Smaller Markets*, 13 N.Y.U. J. L. & BUS. 235, 237 (2016) (discussing the economic and social impact of franchise relocation). Hanau suggests that, as opposed to the 1980s and 1990s, teams primarily relocate today for greater access to television markets or for increased cash-flow/valuation, usually in the form of increased opportunity for sports community development, personal seat licenses ("PSL"), and stadium sponsorships. *Id.* Although Hanau notes that television markets are attractive to NFL franchises, he emphasizes that television revenue is shared amongst the league's teams, thereby minimizing the television market as a factor. *Id.* at 265–66. On the other hand, citing the planned Inglewood, California, stadium built to house the Rams and the Chargers, Hanau notes that "master planned sports and entertainment communities"—so-called sportscomms—offer huge opportunities for cash-flow growth to defray the expenses of stadium construction. *Id.* at 245–46.

[4] *See* Martin Greenberg, *Sports Facility Financing and Development Trends in the United States*, 15 MARQ. SPORTS L. REV. 93, 112 (2004) (suggesting that the high cost of stadium construction, and the tax-exemptions provided for such construction, means that when franchises break their leases, while, perhaps, economically efficient, it creates high public exposure to financial losses). The relationship between landlord (city) and tenant (franchise) in stadium leases is not a simple landlord-tenant relationship; the impact on the community is much greater than that of a typical commercial lease. *Id.*

[5] *See* Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 174 (2002) (discussing how taxpayers subsidize stadium construction for the various leagues); *see also, e.g.*, Poe v. Hillsborough County, 695 So. 2d 672, 678–79 (Fla. 1997) (finding that the Tampa Bay Buccaneers instilled civic pride into the community and that the games and other stadium events furthered a public purpose by enhancing the community image and providing entertainment and cultural activities for residents). Some scholars even suggest that fans bind up their own identities with "their" team. Debra Laverie & Dennis Arnett, *Factors Affecting Attendance: The Influence of Identity Salience and Satisfaction*, 32 J. LEISURE RES. 225, 227, 230 (2000). When sports are the chosen leisure activity, fans experience increases in both social and emotional identity, leading to the creation of a common fan identity that transcends other societal limitations. *Id.* This identity also has a way of manifesting itself externally through public identification with a team or franchise. *Id.*

The costs associated with developing a stadium attractive enough to lure a franchise, however, are tremendously high; for example, the public contribution to U.S. Bank Stadium, the new home to the NFL's Minnesota Vikings, will total nearly $500 million.[6] The stadium construction costs are not the end of the story, however, as there are the additional costs of developing the surrounding infrastructure as well as social costs imposed on surrounding communities.[7] Moreover, the cost of a new stadium increases each year due to the stadium "arms race" taking place among franchises.[8]

There are additional challenges inherent in the development of any project requiring the land and resources of a stadium.[9] Eminent domain and the takings power issues are particularly thorny when, arguably, the primary benefits of sports stadia flow to the private team and owner.[10] These same concerns

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[6] Rochelle Olson, *New Vikings Stadium, 90 Percent Done, Is 'Right on Track,'*, STAR TRIB. (Minnesota) (Feb. 17, 2016), http://www.startribune.com/vikings-stadium-authority-and-its-general-contractor-close-to-settlement/368978151/ [https://perma.cc/KVJ3-AKNY].

[7] Jason Notte, *Opinion: This Kind of Stadium Funding Could Only Happen in Las Vegas*, MKT. WATCH (May 14, 2016, 7:14 PM), http://www.marketwatch.com/story/this-kind-of-stadium-funding-could-only-happen-in-las-vegas-2016-05-13 [https://perma.cc/5BAK-AC4U]. For example, the new stadium proposal of the NFL's Oakland Raiders funds the project through $300 million in private finance, $200 million in an NFL-backed loan, and $750 million in public finance. *Id.*

[8] Mildred Robinson, *Public Finance of Sports Stadia: Controversial but Permissible . . . Time for Federal Income Tax Relief for State and Local Taxpayers*, 1 VA. SPORTS & ENT. L.J. 135, 145–46 (2002). This is true even if one indexes for inflation. *Id.* at 156.; *United States Inflation Rate*, TRADING ECON., https://tradingeconomics.com/united-states/inflation-cpi [https://perma.cc/3G5V-RH3S] (providing historical rates of inflation). State-of-the-art facilities quickly become outdated, as the norm for stadium construction is constantly re-defined. Greenberg, *supra* note 4, at 104. One commentator has described the trend in stadium construction as a "sports version of the arms race," as each new stadium is more elaborate and more profitable. *Id.* This reflects, in part, a trend in stadium design toward more fan-friendly and consumer-oriented entertainment experiences. *Id.* The costs of stadium construction, however, are driven up by the trend toward the urban development of stadiums as well. Tim Chapin, *The Political Economy of Sports Facility Location: An End-of-the-Century Review and Assessment*, 10 MARQ. SPORTS L.J. 361, 382 (2000); Robinson, *supra*. This is true despite the fact that urban locations are superficially unattractive due to the aforementioned higher costs and increased distance from the primarily affluent fan-base. Chapin, *supra*, at 363–64.

[9] Michael Birch, *Take Some Land for the Ball Game: Sports Stadiums, Eminent Domain, and the Public Use Debate*, 19 SPORTS LAW. J. 173, 174 (2012); *see infra* notes 10–11 and accompanying text (discussing eminent domain issues in stadium finance).

[10] Birch, *supra* note 9, at 174 (2012). The Takings Clause establishes that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment provides an implicit acknowledgement of the government's power to take private property for a public use, also known as the power of eminent domain. *Id.* The Fourteenth Amendment extended the availability of the Takings Clause to the State. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 232 (1897) (finding that the city of Chicago could use takings power). The requirements of just compensation and public purpose serve as the two primary limitations on the use of eminent domain. U.S. CONST. amend. V. In the wake of the 2005 Supreme Court case *Kelo v. City of New London*, many state and municipal bodies have turned to eminent domain power to acquire the necessary land, resulting in a number of suits challenging the public use. *See, e.g.*, 545 U.S. 469 (2005); Goldstein v. Pataki (*Goldstein II*), 516 F.3d 50 (2d Cir. 2008) (finding re-development project, despite private benefit, to be public use); Goldstein v. Pataki (*Goldstein I*), 488 F. Supp. 2d 254

emerge when considering whether the state should aid in the financing of stadium construction projects when the financial benefits flow primarily to wealthy players and owners while the costs are borne by the average citizen who may never see the inside of the stadium.[11] Furthermore, any federal efforts to address the inherent challenges of financing a new stadium face competing interests.[12] On the one hand, courts and federal statutes are generally deferential to state and local government policy, particularly where it concerns taxation or specific projects such as stadium construction.[13] On the other hand, states and municipalities routinely cut deals that appear less than desirable to the local taxpayers and the federal government has previously implemented tax changes that have had dramatic impacts on how states and municipalities spend and raise money.[14] Further, in just this past year, the federal tax benefits awarded to national sports leagues have come under renewed scrutiny by President Trump and the Republican controlled Congress.[15]

This Note provides an overview of the most common costs associated with financing a stadium and the methods of financing available.[16] Part I of this Note discusses the various methods of private financing available in the construction of stadiums and provides a brief overview of their advantages and disadvantages.[17] Part II discusses the mechanics of how municipalities help

(E.D.N.Y. 2007) (finding condemnation did not violate public use requirement); Cascott, L.L.C. v. City of Arlington, 278 S.W. 3d 523 (Tex. App. 2009) (finding that lease terms did not violate the state constitution because they did not serve a purely private purpose). Even so, courts have been deferential to states and municipalities in their determination of public use. Birch, *supra* note 9, at 185–86.

[11] Robinson, *supra* note 8, at 155–56. The construction and tax benefits provided to sports stadiums are similar to the business and tax subsidies provided to corporate entities. Hanau, *supra* note 3, at 242. Corporations frequently leverage their financial and economic contributions against localities to extract favorable tax terms or local subsidies. Peter Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 394–95 (1996). Corporate relocation, however, also depends on other factors such as market wages, community education levels, the existence of similar businesses in the community, and the regulatory climate, thereby reducing the importance of local subsidies in relocation decisions. *Id.* at 391.

[12] Enrich, *supra* note 11, at 381–82; Robinson, *supra* note 8, at 139–40.

[13] *See, e.g.*, 28 U.S.C. § 1341 (2012) (barring federal court jurisdiction of cases seeking to enjoin or restrain the assessment, levy, or collection of state taxes where a remedy may be had in the state courts); United States v. Lopez, 514 U.S. 549, 581 (1995) (Rehnquist, C.J., concurring) (noting that states serve as laboratories of democracy and that they should have freedom to experiment with their public policy).

[14] Robinson, *supra* note 8, at 166 n.135 (citing as example the Economic Recovery Tax Act of 1981's "'loophole' closure and extensive changes in rate structures" for individuals and corporations).

[15] Steve Contorno, *How the Federal Tax Bill Could Make It More Expensive to Build the Rays a New Ballpark*, TAMPA BAY TIMES (Dec. 8, 2017), http://www.tampabay.com/news/How-the-federal-tax-bill-could-make-it-more-expensive-to-build-the-Rays-a-new-ballpark_163409005 [https://perma.cc/DJW6-36LV]; Ben Nuckols, *GOP Tax Bill Would Have Impact on Pro, College Sports*, WASH. POST (Nov. 7, 2017), http://stats.washingtonpost.com/fb/story.asp?i=20171107143230284621808&ref=hea&tm=&src= [https://perma.cc/9HDR-YBML].

[16] *See infra* notes 22–217 and accompanying text.

[17] *See infra* notes 22–73 and accompanying text.

finance stadium construction projects.[18] Finally, Part III evaluates the various methods of combatting or addressing issues with the public financing of stadium construction.[19] Part III also evaluates the proposed solutions to the public subsidization of stadiums and considers various leasing methods for protecting the taxpayer from "franchise free agency" and insulating municipalities from the infrastructure and construction cost overruns that are frequently associated with their construction.[20] Further, the Note considers what role the federal tax policy ought to play in promoting or discouraging certain methods of finance.[21]

I. PRIVATE FUNDING

The owners of professional sports franchises are the most immediate source of funding for the construction of professional stadiums.[22] For example, the constructions of Levi's Stadium in Santa Clara, California, MetLife Stadium in the Meadowlands, New Jersey, and the Los Angeles stadium at Hollywood Park, currently under construction, have all relied extensively on private, owner-backed, financing.[23] This Part provides an overview of the most common methods of private financing.[24] Owner backed financing, however, is by no means the rule.[25]

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[18] *See infra* notes 74–217 and accompanying text.

[19] *See infra* notes 218–275 and accompanying text.

[20] *See infra* notes 228–252 and accompanying text.

[21] *See infra* notes 253–275 and accompanying text.

[22] Goodman, *supra* note 5, at 188.

[23] *See NFL Stadium Funding Information: Stadiums Opened Since 1997*, CONVENTIONS SPORTS & LEISURE, https://cbsminnesota.files.wordpress.com/2011/12/nfl-funding-summary-12-2-11.pdf [https://perma.cc/3XX3-9APQ] [hereinafter *NFL Stadium Funding Information*] (providing funding information on NFL stadiums); Jim Trotter & Eric D. Williams, *Chargers Chairman 'Looking Forward' After Announcing L.A. Move*, ESPN (Jan. 12, 2017), http://www.espn.com/nfl/story/_/id/18458293/chargers-announce-move-los-angeles-leaving-san-diego [https://perma.cc/26MP-SBMD] (discussing Chargers move to Los Angeles). The average construction cost of NFL stadiums constructed since 1997 is nearly six hundred million dollars and, apart from MetLife Stadium, all have employed some form of public financing. Martin Greenberg & Michael Gavin, *NFL G-3 and G-4 Credit Facility Has Made Possible New State-of- the-Art Stadiums*, GREENBERG L. OFF. (Apr. 1, 2016), http://www.greenberglawoffice.com/nfl-credit- facility-has- made-possible- new-state-of- the-art- stadiums/#_ednref7 [https://perma.cc/2X5A-3HP3]; NFL Stadium Funding Information, supra.

[24] *See infra* notes 30–73 and accompanying text.

[25] *NFL Stadium Funding Information*, *supra* note 23; *see infra* notes 74–217 and accompanying text. Further, at least one of the professional sports leagues has demonstrated a willingness to assist in defraying the financing costs of stadium construction. Benjamin Bolas, *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, 684 (2013). The NFL G-3 and G-4 loan programs serve as an example to the other professional sports leagues of one way in which the leagues themselves can contribute to the stadium construction costs. *Id.*

Section A this Part provides an overview of the most common types of franchise owner or private financing.[26] Section B briefly discusses the contributions of naming rights to financing stadium projects.[27] Section C discusses the recent impact of personal seat licenses and luxury suites.[28] Finally, Section D discusses the emerging method of stadium financing through the development of comprehensive sports communities.[29]

A. Owner and Developer Financing

The owner of the NFL's Los Angeles Rams, Stan Kroenke, will borrow nearly one billion dollars, in addition to his own cash contribution, to fund the construction of the most expensive, privately-financed sports complex in history.[30] The total cost of the complex is estimated to be nearly $2.7 billion.[31] The economic conditions of the past decade have contributed greatly to a rise in owner contributions toward stadium financing.[32] Accordingly, most owners of professional franchises possess the ability to fund at least a portion of the cost of a professional stadium, particularly when they stand to be one of the primary beneficiaries of the construction project.[33] Indeed, in recent years, with pub-

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[26] *See infra* notes 30–45 and accompanying text.

[27] *See infra* notes 46–50 and accompanying text.

[28] *See infra* notes 51–59 and accompanying text.

[29] *See infra* notes 60–73 and accompanying text.

[30] Elyse Glickman, *Kroenke to Borrow $1 Billion for Inglewood Stadium*, L.A. BUS. J. (Jan. 18, 2016), http://labusinessjournal.com/news/2016/jan/18/kroenke-borrow-1-billion-inglewood-stadium/ [https://perma.cc/6CR2-NYBU].

[31] *Id.*; Brian Libby, *The Rams' Inglewood Stadium Could Be a Game Changer in Planning*, ARCHITECT MAG. (Feb. 5, 2016), http://www.architectmagazine.com/practice/the-rams-inglewood-stadium-could-be-a-game-changer-in-planning_o [https://web.archive.org/web/20170115100649/http://www.architectmagazine.com/practice/the-rams-inglewood-stadium-could-be-a-game-changer-in-planning_o]. Not everyone is a winner in this deal, as the city of St. Louis, Missouri will continue to pay nearly six million dollars per year to pay off the stadium where the Rams had played for the previous two decades. Kelsey E. Thomas, *What the L.A. Rams Deal Says About Cities Building Stadiums*, NEXT CITY (Jan. 14, 2016), https://nextcity.org/daily/entry/la-rams-new-stadium-funding-nfl.

[32] Martin J. Greenberg & Dennis Hughes, Jr., *Sports.comm*: *It Takes a Village to Build a Sports Facility*, 22 MARQ. SPORTS L. REV. 91, 92 (2011). This shift can be attributed to 1) lack of political support; 2) decreased public support for funding state-of-the-art facilities; 3) limited state governmental capacity to finance such infrastructure projects; 4) forced state government spending prioritization; and 5) decreased desirability of using tax-exempt municipal bonds as finance tools. *Id.*

[33] *See* Eben Novy-Williams, *NFL Teams Split $7.3 Billion in Revenue, Packers Numbers Reveal*, BLOOMBERG (June 20, 2015, 4:00 PM), https://www.bloomberg.com/news/articles/2015-07-20/nfl-teams-split-7-3-billion-in-revenue-packers-numbers-reveal [https://perma.cc/8TWP-8JNF] (discussing the revenue shared by NFL teams and their owners). The average owner of an NBA franchise has a net worth of nearly $3.5 billion while the average net worth of owners of NFL, National Hockey League ("NHL"), and Major League Baseball ("MLB") franchises stands at $3.0 billion, $2.5 billion, and $2.0 billion respectively. *Id.* Moreover, in 2015, each NFL franchise received $226.4 million from league revenue sharing that did not even include additional revenue earned by individual franchises from sale of merchandise or tickets. *Id.*

lic funding growing scarcer and more politically risky, a number of franchise-owners have borne a higher portion of stadium construction costs.[34]

Owner financing refers broadly to investment by team owners in the construction of the stadium.[35] The main benefit of owner financing, for both cities and their citizens, is the ability of franchise-funded stadiums to serve as an anchor, preventing cities from falling victim to "franchise free agency" by enhancing the owner's stake in the success of the development project.[36] "Franchise free agency" is the colloquial term for the manner in which cities compete for the rights to host a professional franchise that often comes in the form of lucrative tax breaks or the promise of public funding for stadium construction.[37] By contrast, although the city bears the sole cost of stadium development, the individual leagues maintain bargaining power by restricting the potential number of teams that could serve as stadium occupants.[38]

Although the increase in ownership financing has decreased the need for public funding in some ways, the corresponding rise of stadium construction

[34] *See, e.g.*, Tim Tucker, *Falcons Secure $850M in Stadium Financing*, ATLANTA J.-CONST. (Aug. 29th, 2016), http://www.ajc.com/sports/football/falcons-secure-850m-stadium-financing/1hh8Aj1ni6jnAC6I2ZiluL/ [https://perma.cc/3NN6-STHM] (noting that only $200 million of the $1.5 billion came from public sources). Private financing of the most recently constructed stadiums, Levi's Stadium in San Francisco, California, MetLife Stadium in the Meadowlands, New Jersey, and AT&T Stadium in Arlington, Texas, accounted for 88%, 100% and 68% of the total stadium costs, respectively. *NFL Stadium Funding Information*, *supra* note 23. By contrast, the new stadium of the NFL's Minnesota Vikings, which opened in 2016, had nearly one-third of the stadium construction cost borne by the municipality. Brian Johnson, *Minnesota Vikings Stadium Cost Grows Again*, FIN. & COM. (Apr. 15, 2016, 2:58 PM), http://finance-commerce.com/2016/04/minnesota-vikings-stadium-cost-grows-again/ [https://perma.cc/A9MD-LMW7]. Accordingly, the municipal governments are responsible for approximately $498 million of the cost of construction for the Vikings' new stadium. *Id.*

[35] *See, e.g.*, Thomas, *supra* note 31 (discussing how owners can pay for the construction of a stadium).

[36] Katherine Leone, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 478–79 (1997).

[37] *Id.* at 478. Other than the practical limitations of franchise relocation, most of the major sports leagues restrict the ability of individual franchises to move. Greenberg, *supra* note 4, at 117–18. Although most leagues require the approval of at least 75% of the league owners before a franchise may relocate, total restraints on relocation have been found to be violations of anti-trust law. *Id. See generally* Nat'l Basketball Ass'n v. SDC Basketball Club, Inc, 815 F.2d 562 (9th Cir. 1987) (holding that NBA league rules on relocation violated anti-trust law); L.A. Mem'l Coliseum v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984) (finding three-quarter owner approval requirement to be an anti-trust violation). In *Los Angeles Memorial Coliseum v. National Football League*, the Ninth Circuit concluded that the NFL was not a single entity for the purposes of anti-trust law, reasoning that, although the teams agreed to common sets of rules and policies, they functioned as separate teams acting jointly for a competitive purpose. 726 F.2d at 1388.

[38] *See* Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 645 (2015) (discussing how leagues deliberately undersupply the market for franchises).

costs has outpaced the benefits associated with ownership financing.[39] Even where owners directly finance the construction of the stadium, there are additional costs that are not borne by the owner, such as the costs to develop the surrounding infrastructure to handle the increase in traffic, costs of utility work, and costs of additional services required by the stadium.[40]

Finally, owner financing provides an alternate benefit by encouraging owners to approach the stadium and development in the surrounding community as a long-term investment.[41] This type of investment can provide spillover benefits to the community—such as increased foot traffic or increased game day revenue for surrounding businesses—and may encourage further development through public-private partnerships, or public agency investment.[42]

There are some more recent examples of financing coming from private sources other than the team owners.[43] The recently opened T-Mobile Arena in Las Vegas, Nevada was financed, at a cost of approximately $375 million, by a

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[39] *See NFL Stadium Funding Information*, *supra* note 23. Although the Dallas Cowboys organization and its owner, Jerry Jones, financed 63% of the costs of constructing AT&T Stadium, the remaining 37%, or $444 million, was publicly financed. *Id.*

[40] Thomas, *supra* note 31. The costs of the future home of the NFL's Los Angeles Rams and Los Angeles Chargers will add up to nearly $60 million for utility and roadwork to be reimbursed by the city, as well as another $8 million per year for medical services, security, and shuttles for parking during events. *Id.*

[41] Hanau, *supra* note 3, at 245–46. Stan Kroenke, the owner of the NFL's Los Angeles Rams, described the team as "long-term investors." Sam Farmer & Nathan Fenno, *Q&A: Stan Kroenke Discusses His Picture-Perfect Vision for the L.A. Rams*, L.A. TIMES (Jan. 13, 2016, 8:22 PM), http://www.latimes.com/sports/nfl/la-sp-nfl-la-kroenke-20160114-story.html [https://perma.cc/4JHR-RHG9]. This reflects the reality that the costs of the project necessitate a lengthy recovery period, but also that the stadium was part of a larger development project that may take many years to be fully realized. *See* Hanau, *supra* note 3, at 245–46. Similarly, the owner of the NHL's Tampa Bay Lightning, Jeff Vinik, took a long-term, broad business approach to franchise stadium investment. Justine Griffin, *Vinik's Downtown Tampa Development Aims for Healthy Certification*, TAMPA BAY TIMES (Sept. 9, 2016), http://www.tampabay.com/news/business/realestate/surrounded-by-bloomin-onions-and-checker-burgers-can-tampas-new/2292947 [https://perma.cc/5U8Z-6U62]. Vinik's two-billion-dollar development plan now provides a blueprint for the development of the Channelside district in downtown Tampa Bay, Florida. *Id.*

[42] *See, e.g.*, Richard Danielson, *Port Tampa Bay Unveils $1.7 Billion Plan to Develop 45 Acres in Channel District*, TAMPA BAY TIMES (Aug. 14, 2015, 12:54 PM), http://www.tampabay.com/news/business/realestate/port-tampa-bay-to-unveil-vision-for-land-in-channel-district/2241164 [https://perma.cc/YPW6-AEAY] (discussing how Vinik plans to invest in the surrounding community). Following Vinik's proposed development of the neighboring Channelside District, the Tampa Port Authority released their own development plan calling for a redevelopment of the cruise terminal, construction of additional housing and parks, and a total investment of over $1.7 billion. *Id.* Even when these projects are privately funded, however, they require significant municipal infrastructure investment. *Id.*

[43] *See* Jennifer Robison, *Arena Opening Heightens Competition Among Existing Facilities*, LAS VEGAS REV.-J. (Apr. 5, 2016, 4:13 PM), http://www.reviewjournal.com/the-strip/t-mobile-arena/arena-opening-heightens-competition-among-existing-facilities [https://perma.cc/9NSY-ZJLV] (discussing how the new arena raises the bar for new stadiums).

partnership between MGM Resorts International and Anschutz Entertainment Group.[44] Though Las Vegas has attracted an NHL team since the completion of the arena, it is difficult to draw conclusions from the Las Vegas partnership because investors plan to recover most of their investment through tourist revenues.[45]

B. Naming Rights

Sports Authority Field, the Barclays Center, Levi's Stadium, and Amalie Arena are all stadiums that had costs born in part by the sale of stadium naming rights.[46] A vast majority of stadiums in use by the United States' professional sports leagues license their naming rights to corporations.[47] Naming rights provide constant exposure across multiple media platforms, not to mention the additional corporate benefit of having an urban centerpiece project marketing the corporate logo while serving as the colloquial Mecca of loyal sports fans.[48] Companies who are willing to pay for naming rights, such as Levi's or Mercedes-Benz, can expect to spend an average of $8 million to $12 million per year for over a decade or more.[49] For successful, high profile

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[44] *Id.*

[45] *Id.*; Mike Coppinger, *Las Vegas NHL Expansion Team Will Be Named the 'Golden Knights,'* USA TODAY (Nov. 22, 2016), http://www.usatoday.com/story/sports/nhl/2016/11/22/las-vegas-nhl-expansion-team-name-golden-knights/94308010/ [https://perma.cc/EBR9-7MZV].

[46] Alicia Jessop, *Levi's Gains Value Beyond Naming Rights in Its Partnership with the San Francisco 49ers*, FORBES (Oct. 19, 2014, 6:44 PM), https://www.forbes.com/sites/aliciajessop/2014/10/19/levis-gains-value-beyond-naming-rights-in-its-partnership-with-the-san-francisco-49ers/#59897ec656db [https://perma.cc/EX2T-CW9B]; Tim Marcin, *Atlanta Falcons New Stadium: Mercedes-Benz Buys Naming Rights to $1.5B Venue*, INT'L BUS. TIMES (Aug. 21, 2015, 11:51 AM), http://www.ibtimes.com/atlanta-falcons-new-stadium-mercedes-benz-buys-naming-rights-15b-venue-2063554 [https://web.archive.org/web/20170205123738/http://www.ibtimes.com/atlanta-falcons-new-stadium-mercedes-benz-buys-naming-rights-15b-venue-2063554]; Alicia Wallace, *Mile High Stadium Naming Rights Headed to the Denver Broncos*, DENVER POST (Aug. 3, 2016, 9:28 AM), http://www.denverpost.com/2016/08/03/mile-high-stadium-naming-rights-headed-denver-broncos/ [https://perma.cc/ME2W-3BH7]. Even though Sports Authority eventually went bankrupt, the Denver Broncos purchased and assumed the contract obligation intrinsic to the naming rights contract for Mile High Stadium. Wallace, *supra*.

[47] *See, e.g.*, Brian Finkel, *NFL Stadiums with the Most-Expensive Naming Rights*, BLOOMBERG (Aug. 23, 2011, 2:55 PM), https://www.bloomberg.com/news/photo-essays/2011-08-23/nfl-stadiums-with-the-most-expensive-naming-rights [https://perma.cc/GXL6-7JDH] (listing the owners of naming rights for various NFL stadiums).

[48] *See* Jessop, *supra* note 46 (discussing how Levi's marketized their naming rights). For example, Levi's gained the ability to market through any representative of the San Francisco 49ers. *Id.* Furthermore, the cache of the naming rights spills over into other aspects of Levi's market, allowing them to launch products catered to their sponsorship and marketing potential in the team's store. *Id.*

[49] Louis Bien, *49ers' Levi's Stadium the 3rd-Biggest Naming Rights Deal in American Sports*, SB NATION (May 8, 2013, 5:31 PM), http://www.sbnation.com/nfl/2013/5/8/4313344/49ers-levis-stadium-biggest-naming-rights-contracts [https://perma.cc/RZY4-U5PH]; Phil W. Hudson & Maria Saporta, *Blank Confirms Mercedes-Benz Stadium Deal, Reveals New Stadium Pics*, ATLANTA BUS.

teams, or teams in the largest media markets such as New York and Los Angeles, deals approaching and exceeding twenty million dollars per year are not out of the question.[50]

C. Personal Seat Licenses and Luxury Suites

As an alternate means of funding, some teams have resorted to the sale of personal seat licenses ("PSL") to solicit contributions from the fans.[51] PSLs guarantee individual fans the right to purchase season tickets.[52] Luxury suites function in a similar fashion and allow groups or wealthy individuals to purchase access to any number of reserved, upscale seating.[53] Luxury suites often include food and beverage service, private access, and many other high-end amenities.[54]

Although PSLs are usually a one-time purchase when the venue opens, luxury suites provide revenues over the life of the venue and can account for millions of dollars of revenue annually.[55] For example, PSLs for the recently constructed Levi's Stadium sold from anywhere between $2000 and $80,000.[56]

CHRON. (Aug. 24, 2015, 10:20 AM), http://www.bizjournals.com/atlanta/news/2015/08/24/blank-confirms-27-year-naming-rights-deal-of.html [https://perma.cc/CAD6-PJVQ].

[50] Hudson & Saporta, *supra* note 49. For example, Citigroup's contract to name Citi Field, home of the New York Mets, provides the city with twenty million dollars per year over twenty years, as does MetLife Insurance's contract with the MetLife Stadium Company. *Id.*

[51] *See, e.g.*, Tyler Lauletta, *Warriors Fans Will Reportedly Have to Pay More Than $15,000 for the Rights to Buy Season Tickets at New Arena*, BUS. INSIDER (July 20, 2017, 4:21 PM), http://www.businessinsider.com/warriors-personal-seat-licenses-new-stadium-2017-7 [https://perma.cc/VYU9-BEKX] (discussing how the NBA's Golden State Warriors intend to finance part of their new stadium with PSLs).

[52] Danette Davis, *The Myth & Mystery of Personal Seat Licenses and Season Tickets: Licenses or More?*, 51 ST. LOUIS U. L.J. 241, 242–43 (2003). The specific terms of a PSL vary from franchise to franchise. *Id.* Some provide permanent guarantees while others expire after a term of years. *Id.* Additionally, many offer fans the right-of-first-refusal to purchase post-season tickets. *Id.* at 243.

[53] Sean Brown, *Crowdfunding: The Answer to the Sports Stadium Controversy*, 12 WILLAMETTE SPORTS L.J. 68, 74 (2015).

[54] *Id.*

[55] *See NFL Teams Score Big in the Suite Market*, ASS'N OF LUXURY SUITE DIRECTORS, https://www.alsd.com/content/nfl-teams-score-big-suite-market [https://perma.cc/5BDC-BVUJ] (discussing the profitability of suites in NFL stadiums). On the high end, the average cost for an NFL suite is $246,712 while the average low-cost suite is $64,597. *Id.* The total number of suites ranges by stadium, from three hundred suites in Arlington's AT&T Stadium to eighty suites in the new home of the Minnesota Vikings. *Id.* For more information on the other leagues suite performance, see *NBA Teams Score Big in the Suite Market*, ASS'N OF LUXURY SUITE DIRECTORS, https://www.alsd.com/content/nba-teams-score-big-suite-market [https://perma.cc/M7R4-ZMEZ]; *NHL Teams Score Big in the Suite Market*, ASS'N OF LUXURY SUITE DIRECTORS, https://www.alsd.com/content/nhl-teams-score-big-suite-market [https://perma.cc/PG6N-4UY8].

[56] Bill Disbrow, *49ers Fans Reselling Seat Licenses for Thousands Less Than They Paid a Year Ago*, CBS (Mar. 12, 2015, 10:35 AM), http://sanfrancisco.cbslocal.com/2015/03/12/49ers-fans-reselling-seat-licenses-for-thousands-less-than-they-paid-a-year-ago/ [https://perma.cc/U2Y5-SQ3M]. Although sound in theory, in practice, PSLs are a risky investment. *See id.* (discussing how the value declined). Purchasers risk losing their rights entirely if they decline to purchase season tickets. Davis, *supra* note

By contrast, luxury suites can cost $5000 to $10,000 per event at certain venues, such as Quicken Loans Arena—the home of the winners of the 2016 NBA Championship: the Cleveland Cavaliers.[57] The annual revenues that an individual suite draws from sporting events and other events such as concerts or monster truck rallies, can easily exceed $200,000.[58] For example, the 180 suites inside of Atlanta's recently constructed Mercedes-Benz Stadium are conservatively estimated to pull in an annual revenue of nearly $40 million.[59]

D. Sports and Entertainment Communities

Another model for sports stadium financing, sports and entertainment communities, provide a plethora of benefits and function primarily as centerpieces of broader surrounding real estate development.[60] In recent years, "master planned sports and entertainment communities" or "sports communities"—sports complexes that incorporate multiple alternative forms of entertainment or include broader regional and urban development projects—have emerged as a means of facilitating stadium finance.[61] The ability of additional development projects to provide avenues for revenue generation year-round increases the attractiveness of sports communities.[62] These communities are comprehensive development projects that aim to draw in consumers for commercial activities other than sporting events.[63]

Sports and entertainment communities have increased in popularity, likely reflecting a decreased public willingness to subsidize stadium costs.[64] They are

52, at 255. Furthermore, when a franchise struggles, as the NFL's San Francisco 49ers did in 2016, the value of the licenses drops dramatically due to the glut of tickets available on the ticket market. C.W. Nevius, *49ers' Business Model for Stadium Is Fizzling*, S.F. CHRON. (Apr. 15, 2016, 5:13 PM), http://www.sfchronicle.com/bayarea/nevius/article/49ers-business-model-for-stadium-is-fizzling-7251897.php [https://perma.cc/L8NZ-ERND]. Furthermore, although venue officials at Levi's Stadium suggested that they could collect nearly $900 million in revenue from the sale of these PSLs, they only collected slightly more than $31 million in 2015. *Id.*

[57] *See generally Cleveland Cavaliers Suites*, SUITE EXPERIENCE GROUP, https://www.suiteexperiencegroup.com/allsuites/nba/cleveland-cavaliers/ [https://perma.cc/N38X-FQVM]. Prices vary according to the game and the opponent. *Id.*

[58] *NFL Teams Score Big in the Suite Market*, *supra* note 55. Most teams, however, do not break out the percentage of their total revenue attributable to suite purchases. *Id.*

[59] *See Mercedes-Benz Stadium*, STADIUMS OF PRO FOOTBALL, http://www.stadiumsofprofootball.com/stadiums/mercedes-benz-stadium/ [https://perma.cc/Q7JZ-VM2A] (describing funding information for Mercedes-Benz Stadium).

[60] Greenberg & Hughes, *supra* note 32, at 92.

[61] *Id.* at 91; Hanau, *supra* note 3, at 237–38.

[62] Hanau, *supra* note 3, at 246. In addition to the direct revenue generation of sports communities, these development projects also provide additional incentive for cities to invest in the needed infrastructure to support a stadium. *Id.*

[63] *Id.*

[64] *Id.*; *see* Christopher Lee, *Creating Communities: Thirty Years of Sports-led Regeneration*, POPULOUS (Mar. 9, 2015), https://populous.com/posts/creating-communities-thirty-years-of-sports-

joint ventures between a state or municipality, a sports team, and a developer.[65] Sports communities require significant land-use planning to be successful, with an emphasis on finding appropriate land, developing the necessary infrastructure, and obtaining buy-ins from other investors who will make use of the development.[66] The success of these communities often depends on the location of the development, market timing, a properly marketed and targeted development, and, above all, securing the necessary financing.[67] They also benefit owners by providing a revenue stream that, unlike television revenues or ticket sales, is not shared with other franchises and that operates throughout the year.[68]

The idea of a sports-centered community—in contrast with previous industry trends that pushed stadia outside of city limits—emerged in 1993 with the failed bid by the owner of the NFL's New England Patriots, Robert Kraft, to construct a one billion dollar stadium and convention center in South Boston.[69] The project never came to fruition due in part to the unwillingness of Boston and the state of Massachusetts to provide funding for the venture.[70] Even so, after a brief overture with the city of Hartford, Connecticut, Robert Kraft and Massachusetts settled on the construction of the stadium in Foxborough.[71] The resulting venture, Gillette Stadium and Patriot Place, established a model for a new and appealing type of multi-use development.[72]

For those who would advocate for stadium development, sports communities offer an ideal avenue to attract public support: they provide ancillary

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led-regeneration/ [https://perma.cc/UPM5-GZRN] (discussing how sports and entertainment communities are successful at regeneration urban communities).

[65] Greenberg & Hughes, *supra* note 32, at 116; Hanau, *supra* note 3, at 246. In many cases, the developer and the franchise owner are one and the same, though this does not have to be the case. Hanau, *supra* note 3, at 246. Typically, the team owner purchases additional property surrounding the stadium, recognizing that the property value increases with the construction of the stadium and accompanying infrastructure. *Id.* Though other methods, such as eminent domain, can be used to acquire the necessary property. *See generally* 730 Equity Corp. v. N.Y. Urban Dev. Corp., 992 N.Y.S.2d 161 (N.Y. Sup. Ct. 2014).

[66] Greenberg & Hughes, *supra* note 32, at 116. Sports developments can support retail, residential, recreational, and business facilities. *Id.* at 115.

[67] *Id.*; *see, e.g.*, Brian Adams, Note, *Stadium Funding in Massachusetts: Has the Commonwealth Found the Balance in Private vs. Public Spending?*, 51 CATH. U. L. REV. 655, 657 (2002) (discussing the role of the Commonwealth of Massachusetts in developing new stadiums for the MLB's Boston Red Sox and the NFL's New England Patriots).

[68] Greenberg & Hughes, *supra* note 32, at 116; Hanau, *supra* note 3, at 246. Indeed, some scholars suggest sports communities pose a threat to the shared revenue model because they allow the "rich to get richer." Clay Moorhead, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 661–62 (2006).

[69] Greenberg & Hughes, *supra* note 32, at 117.

[70] *Id.*

[71] *Id.*

[72] *Id.* Patriot Place was designed to be a "self-sustaining, super-regional destination." *Id.* at 118.

benefits to the community, they can be used as tools of urban revitalization, and they make flashy centerpieces for urban development.[73]

II. PUBLIC FUNDING

Public funding remains the most common and perhaps the most controversial method of funding for the construction of the stadiums of professional sports franchises.[74] The most recent development in stadium financing involves the relocation of the NFL's Oakland Raiders from Oakland to Las Vegas that will be funded in part by nearly $750 million in public funds.[75] During the

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[73] *See* Elizabeth Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. Rev. 1061, 1061 (1995) (discussing how eminent domain can be used to secure land for urban revitalization projects). Sports developments can also serve as a "Special Activity Generator" ("SAG") by generating additional activity within urban districts that attract visitors from other areas of the city and suburbs. Greenberg & Hughes, *supra* note 32, at 94. Ideally, a SAG will support the surrounding commercial areas and eventually invigorate further investment in the area from private partners. *Id.*; *see, e.g.*, Kevin Baxter, *Expansion L.A. Soccer Team Plans New Stadium on Sports Arena Site*, L.A. TIMES (May 17, 2015, 6:00 PM), http://www.latimes.com/sports/soccer/la-sp-la-soccer-stadium-20150518-story.html [https://perma.cc/PSL7-6NF6] (discussing proposed construction of privately financed soccer stadium at sports community). Consequently, developing a SAG can generate spillover benefits for the surrounding community, spur construction, and potentially revitalize blighted communities. Greenberg & Hughes, *supra* note 32, at 94; *see, e.g.*, James Rizzo, *Stadium Development and Urban Renewal: A Look at Washington, DC*, M.I.T. DEP'T OF ARCH. (2008), https://dspace.mit.edu/bitstream/handle/1721.1/58643/315857329-MIT.pdf?sequence=2 [https://perma.cc/ATL4-WBT7] (discussing how the NHL's Washington Capital's Verizon Center in Washington, DC revitalized the urban district). *But see* Stephen Knox, *Atlanta's New Football Stadium Promises Urban Renewal, but Locals Have Heard That Before*, VICE (May 19, 2016, 1:55 PM), https://sports.vice.com/en_us/article/atlantas-new-football-stadium-promises-urban-renewal-but-locals-have-heard-that-before [https://perma.cc/8UCH-R9BV] (suggesting that most urban renewal promises are overblown, citing Atlanta's previous stadium as an example). Perhaps the most attractive feature of sports communities is their flexibility, as once the SAG is in place, the type of investment—be it commercial or residential—can adapt based on what succeeds. Greenberg & Hughes, *supra* note 32, at 185; Hanau, *supra* note 3, at 246. This adaptability makes sports developments especially lucrative as an ancillary investment. Hanau, *supra* note 3.

[74] *See* Aaron Gordon, *With Raiders Headed to Vegas, the NFL Has Played the New Stadium Scam to Perfection*, VICE (Mar. 27, 2017, 5:10 PM), https://sports.vice.com/en_us/highlight/with-raiders-headed-to-vegas-the-nfl-has-played-the-new-stadium-scam-to-perfection [https://perma.cc/TZG2-55KL] (critiquing the NFL's success at gaining access to public funds to finance stadiums); Kevin Seifert, *With $6.7 Billion in Public Money, NFL Closes Stadium Era*, ESPN (Mar. 28, 2017), http://www.espn.com/blog/nflnation/post/_/id/234573/with-6700000000-in-public-money-nfl-stadium-era-closes [https://perma.cc/6P52-JBSZ] (discussing the vast sums of money that were dedicated to stadium finance in the last decade).

[75] *See* Paul Gutierrez, *Owners Vote 31–1 to OK Raiders Move; Dolphins Vote Against*, ESPN (Mar. 27, 2017), http://www.espn.com/nfl/story/_/id/19016323/raiders-move-las-vegas-approved-31-1 [https://perma.cc/59YV-349M] (discussing NFL approval of Raiders relocation). Although the proposed Las Vegas stadium will be partly funded by private contributions from the Raiders organization, it will include nearly $750 million in public funds, attributable, at least in part, to an increase in the Las Vegas hotel tax. *Id.*

1990's, an average of sixty-five percent of the costs of public stadiums were incurred by taxpayers.[76]

Stadiums were not always built with the public tax-dollar in mind.[77] For much of American sports history, private sources absorbed most, if not all, of the costs of constructing stadiums.[78] Fledgling sports leagues needed venues and the public had yet to buy into the leagues the way it has today.[79] Today, the bargaining positions have reversed: franchises hold all of the cards while cities anxiously wait for them to reveal their hands.[80]

This Part will provide a brief overview of the most common forms of public financing and will discuss the limitations and concerns with its use.[81] Section A addresses the limitations of public spending and taxation and how this applies in the stadium context vis-à-vis the public purpose doctrine.[82] Section B provides an overview of the basics and utility of municipal tax-exempt bonds and discusses how the federal tax code attempts to limit their efficacy in financing stadiums.[83] Section C discusses the practical justifications for public financing and evaluates the circumstances that drive municipalities to provide franchise-friendly deals.[84] Finally, Section D evaluates the economic justifications for subsidizing stadium development and considers what effect the construction has upon the taxpayer and the local economy.[85]

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[76] Scott Jensen, *Financing Professional Sports Facilities with Federal Tax Subsidies: Is It Sound Tax Policy?*, 10 MARQ. SPORTS L.J. 425, 427 (2000).

[77] Arline Schubert, *A Taxpayer's and a Politician's Dilemma: Use of Eminent Domain to Acquire Private Property for Sports Facilities*, 86 N.D. L. REV. 845, 849 (2010).

[78] Alexander K. Gold et al., *Why the Federal Government Should Stop Spending Billions on Private Sports Stadiums*, BROOKINGS (Sept. 8, 2016), https://www.brookings.edu/research/why-the-federal-government-should-stop-spending-billions-on-private-sports-stadiums/ [https://perma.cc/FF6A-FGNN] (providing data on how stadium finance has changed in the past two decades); Raymond J. Keating, *Sports Pork: The Costly Relationship between Major League Sports and Government*, CATO INST. 3–4 (Apr. 5, 1999), http://www.cato.org/pubs/pas/pa339.pdf [https://perma.cc/X8J6-VEJJ].

[79] *See* Keating, *supra* note 78, at 3–4. The early predecessors to today's dominant sports leagues came about in the early Twentieth Century, including the American Professional Football Association (1920) and the combination of the National and American Baseball leagues (1903). Brion Doherty, *NFL Stadiums and Antitrust: Yesterday, Today and Tomorrow*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 39, 42 (2007).

[80] *See* PAUL WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 264–65 (2000) (highlighting how the law fails to prevent municipal financing of sports facilities and instead serves to further weaken the cities' bargaining position, resulting in even more unfavorable deals).

[81] *See infra* notes 74–217 and accompanying text.

[82] *See infra* notes 86–99 and accompanying text.

[83] *See infra* notes 100–177 and accompanying text.

[84] *See infra* notes 178–187 and accompanying text.

[85] See *infra* notes 188–217 and accompanying text.

A. The Public Purpose Doctrine

One challenge to publicly funding stadiums and arenas is the public purpose doctrine.[86] Every state requires government funds to be spent for a public purpose.[87] An analogous requirement exists for municipal borrowing.[88] This public purpose requirement is analogous to the public use requirement in the eminent domain context.[89] Public use is thought to be a stricter standard.[90] As a corollary, public funds cannot be used to promote a purely private interest.[91] Courts vary in their conception of what constitutes a valid public purpose.[92]

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[86] Goodman, *supra* note 5, at 179.

[87] *See, e.g.*, Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551, 555 (Ariz. 1971) (holding that public funds are to be expended only for "public purposes"); Arens v. Village of Rogers, 61 N.W.2d 508, 519 (Minn. 1953), *appeal dismissed*, 347 U.S. 949 (1954) ("It is well settled that the legislature cannot authorize or require the expenditure of public funds by a municipal subdivision of the state for any purpose not essentially of a public nature."). The public purpose doctrine originated in the 1853 Pennsylvania Supreme Court case, *Sharpless v. Mayor of Philadelphia* where the court found that legislatures cannot take on debt for a purely private purpose. 21 Pa. 147, 168 (1853). There are several reasons to support a strong public purpose doctrine: 1) to protect private enterprise from government intrusion into the marketplace, 2) protect the taxpayer from speculative or inefficient government borrowing, and 3) prevent public officials from rewarding self-aggrandizement. 4 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 25:6, Westlaw (database updated Oct. 2017). Alternatively, local government's indebtedness may be controlled by constitutional restrictions, either in the form delineating limits to a government's ability to take on debt, or by requiring voter approval as a condition precedent to incurring debt. *Id.* Where the financing of stadium construction was secured by revenues produced by the stadium, however, courts have sometimes concluded that the indebtedness was not of the type contemplated by the constitutional restraints. *See, e.g.*, Alan v. County of Wayne, 200 N.W.2d 628, 681 (Mich. 1972) (citing Opinion of the Justices, 250 N.E.2d 547 (Mass. 1969)); Ginsberg v. City of Denver, 436 P.2d 685, 692 (Colo. 1968).

[88] *See, e.g.*, Bybee v. City of Minneapolis, 292 N.W. 617, 617 (Minn. 1940) (overturning issuance of bonds to finance construction of private railroad bridges); Carothers v. Town of Booneville, 153 So. 670, 671–72 (Miss. 1934) (striking down use of bonds for construction of private factory for the purpose of increasing employment); Hornstein v. Lister, 96 N.Y.S.2d 269, 269 (N.Y. App. Div.), *aff'd*, 93 N.E.2d 492 (N.Y. 1950) (overruling use of bonds to assist in leasing private property).

[89] *Compare* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that review of public use justification is "an extremely narrow one" and requires that the judiciary ought not substitute their judgment for legislature's unless the use "be palpably without reasonable justification") (internal quotations omitted), *with* Helvering v. Davis, 301 U.S. 619, 640 (1937) (holding that a court must determine whether the power to tax and spend was an exercise for benefit of the general as opposed to favored few), *and* United States v. Butler, 297 U.S. 1, 76–78 (1936) (implying that the "general welfare" restraint on power to tax and spend was real limitation, but that original meaning was disputed by the framers). Even so, the Court has not subsequently drawn this line as stringently as it suggested in *Helvering*. 301 U.S. at 640; *see, e.g.*, Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 515 (1937) (holding that public purpose is a practical question for the legislature).

[90] *See, e.g.*, Common Cause v. State, 455 A.2d 1, 21–23 (Me. 1983) (finding that the taxing and taking powers are subject to different standards, and can be applied more liberally as it pertains to public use in takings cases).

[91] 4-67 CHESTER JAMES ANTIEAU, ANTIEAU ON LOCAL GOVERNMENT LAW § 67.04, Lexis (database updated Sept. 2017). The public purpose doctrine is distinct from the stricter "public use" standard employed in eminent domain proceedings. *Id.*

[92] *See, e.g.*, Wilmington Parking Auth. v. Ranken, 105 A.2d 614, 619 (Del. Ch. 1954) ("[T]he phrase 'public purpose' is not susceptible of precise definition, and it is not possible to adopt a rigid

The public purpose doctrine embodies the idea that although expenditures can indirectly benefit private interests, the primary purpose must be for some public good.[93]

Courts today, however, generally view public purpose more liberally than their predecessors and have been reluctant to impose a strict interpretation.[94] In case after case, courts have granted legislatures wide latitude in determining what constitutes a public purpose and the holdings often turn on deferential readings of legislative history and congressional findings.[95]

For example, in 1997, the Supreme Court of Florida, in *Poe v. Hillsborough County*, held that the issuance of bonds to finance one hundred percent of the cost of the to-be-constructed Raymond James Stadium constituted a valid public use.[96] Even despite the obvious private benefit to the franchise owner, the court held that the development of "recreational facilities" constituted a public purpose.[97] Even where the financial arrangements disadvantage a public entity, it is not clear that a court would find a lack of public purpose.[98] This case demonstrates the extreme judicial deference to elected legislatures and recognition that their power over the purse is controlled through the ballot box.[99]

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rule by which to determine whether a purpose is to be held for public or private."); Opinion of the Justices, 208 N.E.2d 823, 826 (Mass. 1965) ("[A] direct public benefit of a reasonably general character . . . as distinguished from a remote or theoretical benefit.") (internal quotations omitted); Opinion to the Governor, 69 A.2d 531, 534 (R.I. 1949) (finding that there can be a public use where the government provides facilities for public convenience or welfare if it is difficult or impossible to be provided otherwise).

[93] 4-67 ANTIEAU, *supra* note 91, § 67.04.

[94] *See, e.g.*, City of Frostburg v. Jenkins, 136 A.2d 852, 855 (Md. 1957) (concluding that public purpose changes based upon differences in the social and economic conditions with which the government is concerned). *Common Cause*, 455 A.2d at 24 (establishing that what constitutes a public purpose is not set in stone and that even if something was not a public use in the past, it could very well be a public use today).

[95] *See, e.g.*, Barnes v. City of New Haven, A.2d 523, 528 (Conn. 1953) (stating that it is the job of the legislature to determine what constitutes a public purpose, and that this determination should only be overturned if it is patently wrong); Maready v. City of Winston-Salem, 467 S.E.2d 615, 621 (N.C. 1996) (holding that legislative determinations should be weighted heavily).

[96] 695 So. 2d 672, 676 (Fla. 1997).

[97] *Id.* (citing State v. City of Daytona Beach, 33 So. 2d 218 (Fla. 1948)).

[98] *See* King County v. Taxpayers of King Cty., 949 P.2d 1260, 1267–69 (Wash. 1997) (reciting taxpayer assertion that city's deal with the Mariners constituted an illusory promise or an illusion, holding that the court could not consider the wisdom or intelligence of the county's plan).

[99] *See id.* at 1267–69. One problem with holding legislators accountable for their votes supporting public subsidies is that supporters of stadium subsidies are far more likely to spend money to support the initiative than opponents are willing to fight it. Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-à-vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 292 (2003).

B. Federal Tax-Exempt Financing

Federal tax-exempt bonds were among the most common forms of financing for public stadiums in the 1970's and early 1980's.[100] Prior to the 1950's, team owners generally bore the whole cost of funding and constructing stadiums.[101] The 1950's brought on the marriage between sports and government that still endures today.[102] Between 1953 and 1979, thirty professional sports stadiums were built, and nearly seventy percent of the costs were borne by the taxpayer.[103] Although the percentage of total stadium costs covered by public financing options has declined in recent years, the overall costs have not, as newer stadiums provide more elaborate and more expensive amenities to attract fans, tourists, and marquee events such as the Super Bowl, NCAA Final Four, and NCAA College Football National Championship.[104] Section 1 below will provide an overview of the mechanics of tax-exempt municipal bonds.[105] Section 2 will then discuss the restraints on the use of tax-exempt bonds.[106]

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[100] Edelman, *supra* note 99, at 288. Although the trend toward municipality-funded stadiums began in the 1950s when Milwaukee spent general tax dollars to construct County Stadium for its professional baseball team, the real explosion in stadium development—and league expansion—did not begin until the 1960s. *Id.* at 286, 288.

[101] Schubert, *supra* note 77, at 849. America's first publicly funded stadium, the Los Angeles Memorial Coliseum, was built in 1923 and is still in use today. *Id.* At the time, the stadium was built in preparation for the 1924 Los Angeles Olympic bid. *Id.* Both Fenway Park and Wrigley Field were built around the same time period with solely private funding. *Id.* As the continued use of these venues demonstrates, the idea of a long shelf-life for professional stadiums may not be as far-fetched as it seems. *Id.*

[102] *Id.* (citing Brett Smith, *If You Build It, Will They Come? The Relationship Between Public Financing of Sports Facilities and Quality of Life in America's Cities*, 7 GEO. PUB. POL'Y REV. 45, 45 (2001)).

[103] Keating, *supra* note 78, at 12–13.

[104] *See College Football Playoff: Sites Announced for 2018–2020*, NCAA (Nov. 4, 2016), http://www.ncaa.com/news/football/article/2015-11-04/college-football-playoff-sites-announced-2018-2020 [https://perma.cc/ZT79-MK5K] (announcing that several newly constructed or newly renovated stadiums would host the college football playoff); *Five Future Final Four Sites Announced*, NCAA (Nov. 14, 2014, 9:20 PM), http://www.ncaa.com/futurefinalfour [https://perma.cc/W75R-6UJT] (providing locations of upcoming Final Four tournaments); Timothy Rapp, *Super Bowl 2019, 2020, and 2021 Dates, Locations Announced by NFL*, BLEACHER REP. (May 24, 2016), http://bleacherreport.com/articles/2642100-super-bowl-2019-2020-and-2021-dates-locations-announced-by-nfl [https://perma.cc/YTN6-8L75] (noting that several newly constructed or newly renovated stadiums would host the college football playoff). There appears to be a pattern in awarding Super Bowl bids, as all three announced hosts had either recently completed a new stadium or had undertaken significant renovations. Jenna Laine (@jennalaineespn), TWITTER (May 24, 2016, 5:01 PM), https://twitter.com/JennaLaineESPN/status/735214138515918854?ref_src=twsrc%5Etfw [https://perma.cc/D7M2-CUYY].

[105] *See infra* notes 107–141 and accompanying text.

[106] *See infra* notes 142–177 and accompanying text.

1. Tax-Exempt Bonds: How Do They Work?

Like any large real estate development project, stadiums require land, extensive financing, permitting, and detailed studies to determine the impact that the construction would have on the environment, transportation, infrastructure, and on the community.[107] State and municipal governments have, for some time, used tax-exempt development bonds to finance the cost of constructing sports stadiums.[108]

Typically, municipalities employ one of two types of bonds to finance large-scale projects: 1) general obligation bonds or 2) revenue bonds.[109] General obligation bonds (sometimes known as "full-faith-and-credit bonds") are the broadest and most secure type of borrowing available to municipal governments.[110] They are backed by the full faith and credit of the issuing entity.[111] This security is especially apparent as it pertains to state-issued general obligation bonds because states cannot declare bankruptcy.[112] Lending entities view municipal projects as safe investments because general obligation bonds are secured by the municipality's general taxing power, thus encouraging their

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[107] Anoop Bhasin, *Tax-Exempt Bond Financing of Sports Stadiums: Is the Price Right*, 7 VILL. SPORTS & ENT. L.J. 181, 185 (2000).

[108] *Id.* at 182.

[109] Christine Sgarlata Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455, 1465–66 (2013). Municipal bonds experienced a rapid increase in popularity during the mid-1970s as municipalities sought new ways to finance the growing needs for infrastructure and public services. *Id.* at 1458. As of 2013, there were $3.7 trillion in outstanding municipal bonds. *Id.* In comparison, there was $235 billion in total outstanding municipal bonds in 1975. *Id.*

[110] Joshua Kennon, *Municipal Bonds: Revenue vs. General Obligation*, THE BALANCE (Sept. 29, 2016), https://www.thebalance.com/general-obligation-vs-revenue-municipal-bonds-357926 [https://perma.cc/MYF2-7AZ8]. A general obligation bond is a debt instrument representing a monetary obligation insured by a government's taxing power. *Id.* General obligation bonds derive much of their security from the way they are issued. *Id.* Because most general obligation bonds are issued only after taxpayers vote on their issuance, the general population is often committed to the expenditure. *Id.* Secondly, municipalities frequently build-in more than sufficient assets into the issuance language, providing investors assurance of repayment. *Id.* In recent years, however, prominent municipal bankruptcies have called into question the security afforded by general obligation bonds. *See generally* Randall Pollard, *Feeling Insecure—A State View of Whether Investors in Municipal General Obligation Bonds Have a Mere Promise to Pay or a Binding Obligation*, 24 WIDENER L.J. 19 (2015) (discussing how Detroit's filing for municipal bankruptcy has contributed to the continuing controversy as to whether general obligation bondholders have a secured lien). Though general obligation bonds require a municipality to pledge their "full faith and credit," without the creation of a lien by state law, during financial distress or bankruptcy, municipalities may leave investors holding mere promises to pay. *See generally id.* (discussing the effects of municipal bankruptcy). This increases not only the risk of loss to investors, but also the cost of borrowing for all municipalities—even those who may truly pledge their full faith and credit. *Id.* at 21–22. This recent development "jeopardizes" a primary means of financing public services and infrastructure. *Id.*

[111] Kennon, *supra* note 110.

[112] Chung, *supra* note 109, at 1470.

purchase.[113] That being said, non-state issuers, may, in some circumstances, seek bankruptcy protection under chapter 9 of the bankruptcy code.[114]

General obligation bonds can be further divided into two sub-categories: 1) unlimited-tax general obligation bonds and 2) limited-tax general obligation bonds.[115] Municipalities back unlimited-tax general obligation bonds with their entire taxing power and may use sales taxes, sin taxes, or any other sources of revenue to repay the investors.[116] By contrast, limited tax general obligation bonds are backed by a specific tax power, such as a ten cent soda tax or a special property tax.[117] Municipalities frequently issue both types of bonds when raising money to finance stadium construction.[118]

Tax increment financing is also attractive in the stadium finance context, however it may run afoul of the tax-exempt requirements.[119] It is one prominent use of limited tax general obligations bonds.[120] Tax increment financing plans allow a local government unit to freeze the assessed property value in an underdeveloped area and apply any future increase in property tax revenue directly to development projects in that particular area.[121] The development

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[113] 4 MARTINEZ, *supra* note 87, § 25:5. Federal law regulating the use of municipal bonds has typically taken an investor-centric approach. Chung, *supra* note 109, at 1461–62. Federal regulatory policy rarely considers the risks faced by non-investor stakeholders, such as municipal governments and taxpayers. *Id.* Because general obligation bonds typically require the full faith and credit of municipalities, in the event that the revenues used for bond service decline, they must use their taxing power or reduce spending on other needed infrastructure or services. *Id.* This reality can have tragic results when recession strikes, as taxpayers must either contribute more relative income to service municipal bonds, or face cuts to needed services. *Id.*

[114] Chung, *supra* note 109, at 1470–71. Chapter 9 of the Bankruptcy code imposes several restrictions on the eligibility of municipalities to declare bankruptcy. *Id.* at 1470–71. "Political . . . realities," however, frequently prevent municipalities from declaring bankruptcy. *Id.* at 1472 (citing former Massachusetts Representative Barney Frank's statement that "[n]o State, no State legislators, no governor, can allow any one of its municipalities to default because then every other municipality would pay through the nose").

[115] *See* Kennon, *supra* note 110.

[116] *Id.*

[117] *Id.* Typically, using these funds, the municipality establishes a development authority, and may even establish multiple development authorities with varying development goals. Laura Bassett, *Tax Increment Financing as a Tool for Redevelopment: Attracting Private Investment to Serve a Public Purpose—The Example of Michigan*, 41 URB. LAW. 755, 755 (2009). Once the municipality approves the tax increment financing ("TIF") plan, they issue limited tax general obligations bonds secured by the expected increases in property tax revenues. *Id.* at 759.

[118] Bhasin, *supra* note 107, at 182.

[119] *See, e.g.*, Jessie Van Berkel, *St. Paul Studies Tax Increment Financing at Site Around Soccer Stadium*, STAR TRIB. (Minnesota) (Sept. 14, 2017), http://www.startribune.com/st-paul-studies-tax-increment-financing-at-site-around-soccer-stadium/444292773/ [https://perma.cc/JJE7-X9YC] (discussing how St. Paul is investigating the use of TIF to construct a new soccer stadium for an MLS team).

[120] *See* Bassett, *supra* note 117, at 755 (discussing how TIF uses limited tax general obligation bonds).

[121] *Id.* at 757.

authority then employs the funds to stimulate private development and public improvements within the designated geographic area.[122]

Alternatively, a municipality may employ revenue bonds.[123] Revenue bonds are bonds payable from the income of the projects financed by the bond proceeds.[124] As opposed to general obligation bonds, revenue bond holders retain no claim over the funds and property of the municipality.[125] Nor do revenue bonds result in general obligations upon the municipality.[126] Instead, their repayment is payable entirely from the revenue producing project.[127] Unlike general obligation bonds, taxpayer approval of the issuance may not be required.[128] The revenue used to finance revenue bonds usually comes from a dedicated tax, but generally serves to limit the imposition of the tax burden to a particular source.[129] The federal government regulates the circumstances under which municipalities may issue these bonds, in addition to relevant state restrictions.[130] Revenue bonds are frequently used to finance stadium construction.[131]

Interest from municipal bonds is excluded from gross income under certain, specified conditions.[132] Section 103 of the Internal Revenue Code ("IRC") provides that gross income does not include interest on any state or political subdivision bond, except for a private activity bond that is not a qualified bond.[133] Qualified bonds issued to pay for stadium construction and renovation could fit in this exemption so long as they avoid characterization as a

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[122] *Id.* at 759.

[123] 15 EUGENE MCQUILLIN, MCQUILLIN MUNICIPAL CORPORATIONS § 43:14, Westlaw (database updated July 2017). Revenue bonds may be classified as a sub-category of special obligation bonds alongside revenue certificates, or "contract debts," alternatively referred to as "self-liquidating bonds." *Id.*

[124] *Id.* Theoretically, over the life of the facility, the project should generate sufficient revenues to amortize the issued debt. Chung, *supra* note 109, at 1466. Consequently, revenue bonds have seen frequent use in the construction of projects such as toll roads, toll bridges, utilities, and the like. *Id.*

[125] 15 MCQUILLIN, *supra* note 123, § 43:14.

[126] *Id.*

[127] *Id.* Some municipalities may subsidize payments from the dedicated revenue with general tax revenue. *See* Ann Judith Gellis, *Mandatory Disclosure for Municipal Securities: A Reevaluation*, 36 BUFF. L. REV. 15, 23 (1987). This is especially true during the development phase of a project as the dedicated revenues have yet to accrue. *Id.*

[128] Chung, *supra* note 109, at 1466.

[129] *Id.*

[130] Bhasin, *supra* note 107, at 182. Tax-exempt bonds became a subject for federal regulation after the Supreme Court in 1895, in *Pollock v. Farmer's Loan & Trust Co.*, ruled that the federal government had the authority to permit state and municipal governments to finance the development of various utility projects with them. 157 U.S. 429, 585–89 (1895). The Supreme Court later ruled that the federal government could regulate the issuance of these bonds in 1988, in *South Carolina v. Baker*, 485 U.S. 505, 515 (1988) (upholding the constitutionality of Tenth Amendment claim).

[131] *See* Bhasin, *supra* note 107, at 182 (noting that states "emphasize the use of" revenue bonds "to finance sports stadiums").

[132] *See* I.R.C. § 103(a) (2012).

[133] *Id.*

private activity bond.[134] Stadiums can benefit from this exemption despite their overwhelmingly private usage.[135] As a consequence, issuers benefit from a reduction in bond-servicing cost.[136] This means that lower than market bond interest rates still provide a market yield to the purchaser because of the decreased tax burden.[137] Aside from the obvious reduced tax yield, this has an augmented effect over the life of the bond.[138] For example, a $225 million stadium, completely financed with government bonds, would result in lost tax revenues of $75 million.[139] When you consider that the most recent stadiums constructed for NFL franchises cost $1.7 billion and $1.2 billion, the immense tax cost becomes apparent.[140] Because both revenue bonds and general obligation municipal bonds are eligible for tax-exempt interest, they are vital vehicles to raise the capital used in the construction of a new or renovated stadium.[141]

2. Restraints on the Use of Tax-Exempt Bonds for Venue Financing

The use of tax-exempt bonds to finance stadiums caught the eyes of the U.S. Congress once before.[142] Federal restraints on the issuance of tax-exempt development bonds went through two rounds of revision in the 1980s as Congress sought to discourage their use in subsidizing private projects and reduce the lost tax revenue inherent in issuing tax-exempt bonds.[143] The first revision set the stage for the subsequent targeting of tax-exempt bond financing for stadium projects.[144]

Congress revised the IRC with the Deficit Reduction Act of 1984 ("1984 Act") in part to slow the issuance of tax-exempt industrial development bonds,

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[134] Bhasin, *supra* note 107, at 183 (discussing how municipalities fit their bonds within the tax-exempt requirements).

[135] *See id.* (discussing how municipalities fit their bonds within the tax-exempt requirements).

[136] *How Do Municipal Bonds Work?*, MUNICIPALBONDS.COM (June 24, 2015), http://www.municipalbonds.com/education/the-basics-of-municipal-bonds/ [https://perma.cc/4XEF-3U62].

[137] Jensen, *supra* note 76, at 430.

[138] *Id.*

[139] *Id.*

[140] *See* Marcin, *supra* note 46 (discussing the cost of Mercedes-Benz Stadium); *NFL Stadium Funding Information*, *supra* note 23 (providing the costs of recent stadium projects).

[141] *See* INTERNAL REVENUE SERV., PUB NO. 4079, TAX-EXEMPT GOVERNMENTAL BONDS 4 (2016), https://www.irs.gov/pub/irs-pdf/p4079.pdf [https://perma.cc/94DX-ZML7] (discussing how tax-exempt bonds can be used for municipal projects).

[142] Goodman, *supra* note 5, at 182.

[143] *Id.* This first attempt at targeting lavish spending in stadium finance was largely successful. *Id.* This revision reduced the volume of qualified private activity bonds. Bhasin, *supra* note 107, at 183. Qualified private activity bonds form a sub-category of development bonds that provide interest excluded from gross income. 1 MERTENS LAW OF FEDERAL INCOME TAXATION § 8:48, Westlaw (database updated Dec. 2017).

[144] Goodman, *supra* note 5, at 182; *see infra* notes 156–177 (discussing the 1986 revision to the Internal Revenue Code).

but in doing so, largely ignored the benefits and uses of these bonds for urban re-development projects.[145] Industrial development bonds are a type of bond—distinct from general obligation bonds and revenue bonds—used to assist a private actor that is unwilling or otherwise unable to finance a project.[146] Ostensibly, they were used to improve the economic condition of the relevant area.[147]

The 1984 Act contained two main restrictions on the use of industrial development bonds.[148] First, it imposed a volume limitation by capping the use of bonds under section 146 of the IRC, restricting the state's capacity to issue these bonds.[149] Notably, at that time, the IRC did not prohibit the use of these tax-exempt bonds for the construction of private stadiums because the private purpose remained a qualified use.[150]

Secondly, the 1984 Act revised section 141 of IRC to "prohibit[] . . . the use of bond proceeds to acquire land, currently used properties, and other facilities."[151] Consequently, politicians were forced to rely on eminent domain authority to acquire the necessary land for future projects—increasing the cost of construction.[152] Furthermore, the measure restricted the ability to use bond finance to construct luxury boxes and health facilities in stadiums—components at the heart of the need for the new construction to begin with.[153] Although these amendments reduced the tax subsidy afforded by the federal government,

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[145] Bhasin, *supra* note 107, at 183; *see* I.R.C. § 141(b)-(d) (2012) (enumerating private business test, private security or payment test, and private loan financing test). *See generally* I.R.C. §§ 141–147 (establishing limitation on the use of "private activity bonds"). For a discussion of what constitutes a private activity bond see *infra* notes 159–177 and accompanying text.

[146] *Industrial Development Revenue Bonds—IDRBs*, INVESTOPEDIA, https://www.investopedia.com/terms/i/idrb.asp [https://perma.cc/3UF4-HEGH].

[147] Stan Provus, *CDFA Spotlight: The Basics of Industrial Development Bonds*, CDFA (July 7, 2006), https://www.cdfa.net/cdfa/cdfaweb.nsf/0/BE597705BA591F2588257936005F06C3 [https://perma.cc/294P-P6WL].

[148] *See* I.R.C. § 146(b)(1).

[149] Bhasin, *supra* note 107, at 183–84; *see* I.R.C. § 146(b)(1) (setting the cap at 50% of state ceiling on bond issuance for any given year). In other words, state's set limitations on the issuance of tax-exempt bonds, and any individual state entity can only issue up to 50% of that cap. I.R.C. § 146(a), (b)(1).

[150] Bhasin, *supra* note 107, at 183.

[151] *Id.* Section 141 defines what constitutes a private activity bond, provides the exceptions on what constitutes a private activity bonds, and defines what constitutes a qualified bond. I.R.C. § 141.

[152] Birch, *supra* note 9, at 193–195 (discussing the economic costs and benefits of using eminent domain to secure land for the construction of a football stadium). In many cases, issuing bonds would reduce the cost to the municipality because they would be able to avoid the litigation costs associated with eminent domain proceedings. This is not true where the land is held by many individual landowners. *See* Chen, *supra* note 73, at 469 (explaining the high cost of eminent domain proceedings).

[153] Goodman, *supra* note 5, at 182; *see* Robinson, *supra* note 8, at 144–45 (noting that skyboxes and other luxury amenities are major contributors to the cost of professional stadiums, but also are key to prospective profitability); John D. Finerty, Jr., Comment, *Subverting the Internal Revenue Code in the "Game" of Sports Stadium Financing*, 1 MARQ. SPORTS L.J. 301, 308 (1991) (discussing how parties avoided the restraints on suite construction).

they had the side effect of passing those costs on to local taxpayers.[154] The idea was that when municipalities financed these projects, they no longer received the beneficial treatment afforded by the IRC, therefore, when the bonds became due, the additional debt service required by bond-holders would be satisfied with local tax revenue.[155]

In 1986, the landscape of available public finance changed dramatically.[156] Congress passed the Tax Reform Act of 1986 in an attempt to restrict the benefit to private corporations, and in particular, to professional sports franchises, due to the federal tax-exempt bond structure.[157] The broad goal was to eliminate the issuance of private activity bonds for the construction of sports stadiums by implementing more stringent public use requirements.[158]

To qualify for tax-exempt status, Congress implemented the "Private Activity Test."[159] The first prong, the "business use" test, required that no more than ten percent of the bond proceeds be used for the benefit of a private business.[160] The second prong, the "security" test, restricted tax-exempt bonds to only those bonds where less than ten percent of the bond principal was secured by an interest in property used for private business or by revenues from such property.[161] Thus, the "security" test prohibits revenue derived from rents or other value procured by an interest in the property.[162] The second prong, however, resulted in a counterintuitive outcome:[163] rather than encouraging public entities to seek beneficial rental agreements with the franchise lessees, the ten

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[154] Bhasin, *supra* note 107, at 184–85; *see infra* notes 178–187 and accompanying text.

[155] Scott Greenberg, *Reexamining the Tax Exemption of Municipal Bond Interest*, TAX FOUNDATION (July 21, 2016), https://taxfoundation.org/reexamining-tax-exemption-municipal-bond-interest/ [https://perma.cc/D5Q7-FMNQ] (suggesting that tax-exemptions for municipal bonds amount to subsidies for local governments).

[156] Goodman, *supra* note 5, at 182. The bill's sponsor, New York Senator Daniel Patrick Moynihan stated that the purpose of the revision was to "eliminate tax-exempt financing of professional sports facilities [entirely]." 142 CONG. REC. 6306 (1996) (statement of Sen. Moynihan).

[157] Goodman, *supra* note 5, at 183.

[158] 142 CONG. REC. 6306 (1996) (statement of Sen. Moynihan); *see* WEILER, *supra* note 80, at 264–65 (highlighting how the law failed to prevent municipal finance of sports facilities and instead only served to further weaken cities' bargaining position and resulted in even more unfavorable deals).

[159] *See* I.R.C. § 141 (providing the private activity test).

[160] *Id.* § 141(b)(1). Private business use is defined as any "use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit," and not used by a member of the general public. *Id.* § 141(b)(6)(A).

[161] *Id.* § 141(b)(2). The statute provides: "if the payment of principal of, or interest on, more than 10 percent of the proceeds of a bond issue is directly or indirectly-(A)(i) secured by any interest in the property used or (ii) payments in respect of such property or (B) derived from payments in respect of such property, or borrowed money, used or to be used in a private business use." *Id.*

[162] Bhasin, *supra* note 107, at 187.

[163] 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, 210 (2005) (discussing how the change in the tax treatment resulted in municipalities merely changing the method of debt repayment, rather than ceasing the problematic funding altogether); Gold et al., *supra* note 78.

percent security restriction prevented them from doing so.[164] Municipalities could no longer use the rents derived from stadium leases to pay down more than ten percent of the debt service if they wished to qualify for the tax-exempt bonds.[165]

Alternatively, a limitation on the issuance of these bonds exists where private activity bonds become non-qualified—private activity bonds not afforded the Federal tax exemption for their interest—if they are so characterized under the private loan-financing test.[166] The private loan financing test is triggered only where the municipal entity used the bond proceeds to loan *directly* to a private party and loan amount exceeds the relevant statutory amount.[167] This test is more limited than the private business test of the first prong in that the municipality must offer a direct or indirect loan therein triggering the application of section 141(c) of the IRC.[168] This two-pronged test limited the options available for stadium financing, and direct lending to private sports franchises has long been out of the question.[169]

Instead of preventing stadium developers from using tax-exempt bonds for an ostensibly private purpose, developers and franchises alike re-characterized their bonds to fall under the new tax-exempt definition.[170] Other franchises and

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[164] Bhasin, *supra* note 107, at 187–88; Goodman, *supra* note 5, at 184. Daniel J. Lathrope, *Federal Tax Policy, Tax Subsidies, and the Financing of Professional Sports Facilities*, 38 S. TEX. L. REV. 1147, 1156–58 (1997). In fact, the 1986 tax code revision marks the beginning of the current era of sports finance, dominated by the exponentially rising costs of stadium finance, unprecedented stadium construction. Goodman, *supra* note 5, at 184. In fact, some scholars have suggested that municipal debt-financing necessarily results in favorable terms to the professional sports tenant because it places the tax burden directly on the shoulders of the taxpayer. Dennis Zimmerman, *Subsidizing Stadiums*, *in* SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 119, 137–38 (Roger G. Noll & Andrew Zimbalist eds., 1997).

[165] INTERNAL REVENUE SERV., *supra* note 145, at 5.

[166] I.R.C. § 141(c).

[167] *Id.* § 141(b)(3). Precisely, "if the amount of the proceeds of the issue which are to be used (directly or indirectly) to make or finance loans (other than loans described in paragraph (2) to persons other than governmental units exceeds the lesser of (A) five percent of such proceeds, or (B) $ 5,000,000" then the bond would be non-qualified. *Id.* § 141(c). The IRS also suggests that indirect benefits could also trigger this test. INTERNAL REVENUE SERV., *supra* note 145, at 5.

[168] *Compare* I.R.C. § 141(b)(1) (establishing the private activity test for bond issuance), *with Id.* § 141(c) (laying out restraints on direct lending).

[169] Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL'Y 35, 57 (2008); *see* 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, 397–99 (1999) (discussing prohibitions against state and local governments lending to private enterprises). For example, article VII, § 10 of the Florida Constitution states that: "[n]either the state nor any county . . . shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person." FLA. CONST. art. VII, § 10.

[170] DENNIS ZIMMERMAN, CONG. RESEARCH SERV., TAX-EXEMPT BONDS AND THE ECONOMICS OF PROFESSIONAL SPORTS STADIUMS 5–6 (1996).

state and municipal entities simply rushed their stadium projects to market, resulting in many of the bond issuances being grandfathered in to the tax-exempt provisions.[171] State and municipal governments, however, would not be denied the opportunity to participate in the "big leagues" and in order to do so, they turned to the taxpayer for funding: financing the tax-exempt bonds through general obligation tax funds, and restricting the portion of the bonds funded through revenue generated by the venue.[172]

By forcing interested states and municipalities to turn to general tax revenue for stadium financing, Congress unintentionally shifted the tax burden away from the franchises themselves and onto other taxpayers.[173] Rather than discouraging municipalities from subsidizing the cost of stadiums, public support for professional stadiums increased.[174]

For example, in funding the construction of AT&T Stadium, home of the NFL's Dallas Cowboys, the city of Arlington, Texas secured their municipal bonds by raising the sales tax one half of one cent, raising the hotel-motel tax by 2%, and additionally raising the rental car tax rate by 5%.[175] All in all, municipal bonds accounted for a taxpayer check worth $325 million to the Dallas Cowboys.[176] Ironically, rather than protecting municipal taxpayers, the 1986

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[171] Bhasin, *supra* note 107, at 184.

[172] Jensen, *supra* note 76, at 433; Mayer, *supra* note 163, at 210–11 (discussing how municipalities would not be denied their stadium, finding new sources of revenue to service the debt).

[173] Jensen, *supra* note 76, at 433. Sales taxes, tourist taxes, sin taxes, and lodging taxes were all popular tax alternatives. *Id.* at 430. Other methods include lotteries, ticket surcharges and others. *See, e.g.*, Greenberg, *supra* note 44, at 122. There are twenty potential tax and quasi-tax revenue streams that can be considered to finance a stadiums: "(1) Alcohol and or tobacco Tax; (2) General Retail Sales Tax; (3) Special District Taxation; (4) Tax Increment Financing; (5) Pari-mutuel Tax; (6) Insurance Premium Tax; (7) Utility Tax; (8) Permit & Licensing Tax; (9) Property Tax; (10) Mineral Tax; (11) Surplus Property Tax; (12) Property Transfer Tax; (13) Property Donation; (14) Property Sale; (15) Redirected Tax from Stadium; (16) Special Lottery; (17) Eating & Drinking Establishments, Food & Beverage Sales Tax; (18) Ticket Surcharge; (19) Parking Surcharge; (20) Room Tax." Jensen, *supra* note 76, at 431 n.40.

[174] Courtney Gesualdi, *Sports Stadiums as Public Works Projects: How to Stop Professional Teams from Exploiting Taxpayers*, 13 VA. SPORTS & ENT. L.J. 281, 284 (2014). Congress attempted to limit the ability to pass on the cost to taxpayers by allowing for voter referenda, these referenda frequently face the practical challenges raised by few, vocal, direct beneficiaries and a disparate, often quiet, tax-bearing public. *See* Jensen, *supra* note 76, at 434 (discussing the limitations of voter referenda). Some states, either through the state constitution, legislation, or through the municipal charter, provide interested taxpayers the opportunity to initiate their own referenda on laws imposed by the local government. *Id.* In many cases, these referenda can be used to reject newly imposed taxes, exemptions, or municipal expenditures. *Id.*

[175] Skip Sauer, *Cowboys Stadium Financing*, SPORTS ECONOMIST (July 11, 2010), http://thesportseconomist.com/2010/07/11/cowboys-stadium-financing/ [https://perma.cc/TSP5-QC74]. The city of Arlington did, however, tax some of the immediate beneficiaries of the stadium by imposing a three-dollar parking tax and a 10% ticket tax. *Id.*

[176] *Id.*

amendment encouraged aggressive exploitation of primarily regressive, non-business related bond service.[177]

C. Why Public Funding?

The need for public financing of professional stadiums reflects the reality that the market for professional franchises is a seller's market.[178] Franchises hold all of the cards because there are only so many of them to go around—thirty-two in the NFL, thirty-one in the NHL, thirty in the MLB, and thirty in the NBA.[179] That's not to say it has to be this way; American sports are peculiar in their socialist approach to competition.[180] Where European teams move up and down the ranks based on their competitive success, American teams are permanent fixtures that, although identified with a community, are controlled by the league and the budget of the owners.[181]

Cities that refuse to play ball with the leagues or their aggressive owners often either lose their beloved franchise or never have the opportunity to attract one in the first place.[182] The federally sanctioned sports monopolies are, without question, a major factor in the stadium arms race.[183] In fact, there is strong

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[177] Robinson, *supra* note 8, at 155. Even more problematic, the regressive taxation commonly used to fund stadia after the passage of the 1986 amendment falls primarily on taxpayers who will never see the inside of the facility. *Id.* In the case of tourist taxes—sin taxes, hotel taxes, and the like—fan bases tend to be heavily local, and the tourists who do attend the games constitute a miniscule proportion of the larger tourist population. *Id.* Worse, in the case of general taxes, such as sales taxes, property taxes, and restaurant taxes, the taxpayers tend to be disproportionately lower income individuals. *Id.* This becomes especially problematic when one realizes that the average increase of ticket prices for three of the four major sports leagues over the past five years was triple the inflation rate. *Id.* at 156.

[178] Edelman, *supra* note 169, at 37.

[179] Cork Gaines, *The 32 NFL Teams Are Worth More Than Every MLB and NBA Team Combined*, BUS. INSIDER. (Aug. 21, 2014, 4:48 PM), http://www.businessinsider.com/nfl-teams-value-2014-8 [https://perma.cc/J4JG-MX7L]; Dan Rosen, *Las Vegas Awarded NHL Franchise*, NHL.COM (June 22, 2016), https://www.nhl.com/news/nhl-expands-to-las-vegas/c-281010682 [https://perma.cc/8GJ9-2AL4]. As of the 2017 season, there will be thirty-one teams in the NHL with the addition of the Las Vegas Golden Knights. Rosen, *supra*.

[180] Derek Thompson, *Why American Sports Are Socialist*, THE ATLANTIC (June 20, 2016), http://www.theatlantic.com/business/archive/2016/06/why-american-sports-are-socialist/487640/ [https://perma.cc/2WH2-T767].

[181] *Id.*

[182] Edelman, *supra* note 169, at 37, 48.

[183] *Id.* at 37; Rodney Fort, *Direct Democracy and the Stadium Mess*, *in* SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS, *supra* note 164, at 140 (discussing how owners through their leagues' collective authority, limit the number of teams in the leagues intentionally rather than leaving the results to natural competition). Fort suggests that two indicators illustrate the leagues' restraint of competition. *Id.* First, that occasionally competing leagues do form, and second that when the leagues announce an intention to expand, there are numerous buyers for the league to choose from. *Id.* A case study of the MLB during the 1960s demonstrates just that when the supply of MLB teams jumped from sixteen to twenty-four teams, the rate of stadium subsidies fell from the high nineties to approximately 60%. John Siegfried & Andrew Zimbalist, *The Economics of Sports*

evidence to suggest that the professional leagues deliberately under-supply professional franchises in order to hold the threat of relocation over loyal fan-bases to ensure high value public subsidies.[184]

The winds of public financing, however, have begun to change.[185] The financial crisis of 2008 and resulting recession forced municipalities to become more frugal.[186] Citizen pressure on municipal governments, due in part to animosity toward subsidizing "billionaire owners," and limited state and municipal resources have necessitated a shift away from fully publicly funded projects.[187]

D. The Public Benefits of Professional Franchises: Are They Real?

It would seem intuitive that the construction of a professional stadium and existence of a professional franchise would provide a net boost to the local economy.[188] Indeed, the construction of a stadium requires countless jobs to be filled, including riveters, contractors, engineers, architects, and electricians.[189] Further, some scholars claim that for every dollar spent on professional sports, nearly $1.75 is returned to the economy.[190] Additionally, stadiums can serve as cornerstones of economic revitalization projects by transforming blighted communities into attractive destinations.[191]

Facilities and Their Communities, 14 J. ECON. PERSP. 95, 96 (2000). The inter-league competition demonstrates just how the league monopoly contributes to the higher subsidy rates for professional venues. *Id.* The MLB expansion of the 1960s came in direct response to the potential launch of the rival Continental League, and once that proposal was abandoned, the next wave of expansion found a willing market of buying cities looking to establish their own franchise. Edelman, *supra* note 169, at 42. Attorney William Shea and former Dodgers General Manager Branch Rickey proposed the creation of the Continental league in 1959. Edelman, *supra* note 99, at 287. The idea was to bring teams to non-MLB markets, but, in response, the MLB expanded from sixteen to twenty-four teams, partially meeting the demand for new teams and undercutting the up-start continental league. *Id.* Notably, during this period, the average percentage of public funding dropped from nearly 100% of facility costs to just about 60%. *Id.*

[184] Edelman, *supra* note 169, at 48. Many major sports markets are not represented in one or more of the major professional sports leagues: Houston (no NHL team), Seattle (no NHL or NBA team), San Diego (no NBA, NHL, or NFL team), Tampa Bay (no NBA team), and Baltimore (no NHL or NBA team). *Id.*

[185] Greenberg & Hughes, *supra* note 32, at 92.

[186] *Id.*

[187] *Id.*

[188] Thomas V. Chema, *When Professional Sports Justify the Subsidy, a Reply to Robert A. Baade*, 18 J. URB. AFF. 19, 20 (1996) (responding to Robert Baade's empirical research regarding the economic justifications for professional sports stadiums).

[189] Gesualdi, *supra* note 174, at 287. Scholars dispute the economic benefits of stadiums as construction projects. *See, e.g.*, Siegfried & Zimbalist, *supra* note 183, at 108–09. The problem, they suggest, is that every dollar spent on sports stadium construction brings with it opportunity cost that could be spent on other necessary municipal services. *Id.*

[190] Goodman, *supra* note 5, at 201.

[191] *See* Irwin Kishner & David Hoffman, *Field of Dreams: The Benefits of Public and Private Cooperation in Financing Professional Sports Stadiums*, 28 ENT. & SPORTS LAW. 20, 21 (2010) (citing Baltimore's Inner Harbor and Cleveland's Gateway district as examples).

But beyond even the construction-related employment, professional franchises employ hosts of marketing staff, game-day employees, coaches, scouts, reporters, and lawyers.[192] Additionally, bringing in opposing fans and visiting reporters and staff and using the stadium as concert venues or event sites outside of the professional team's season results in further commerce.[193]

Beyond the economic benefits that advocates point to, there are political realities that support the construction of stadiums as well.[194] Sports fans make up an influential political voting bloc whose voting desires are easily measurable: does the city support the local franchises?[195] Popular support for sports franchises stems from the intangible benefits that sports franchises are said to provide.[196] Though they are not readily quantifiable, city pride, collective identity, national recognition, and public participation in sports are beneficial aspects of urban life.[197] When a family turns on their television to watch their local team, they receive some of the benefits of supporting their local franchise.[198]

Unlike other forms of entertainment, professional sports have a wider geographic appeal, pulling in cross-country visitors and generating a positive publicity for potential economic migrants.[199] Companies may also be encouraged to open offices in a city that has been "validated" by the existence of a sports franchise.[200] Furthermore, professional franchises provide entertainment opportunities for corporations seeking to lure clients as corporations are the biggest consumer of luxury suites—in part a reflection of their utility as marketing devices.[201] There are additional benefits to property owners, local businesses, and community members whose property value rises as a consequence of the proximity to a stadium.[202]

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[192] *Id.*; Siegfried & Zimbalist, *supra* note 183, at 104. Sports teams employ, on average, somewhere between seventy and 130 full-time employees. Siegfried & Zimbalist, *supra* note 183, at 104. On a per-game basis, the average team might add another 1000 to 1500 day-of jobs, aggregating to another thirty full-time yearly jobs. *Id.*

[193] Sharianne Walker & Michael Enz, *The Impact of Professional Sports on the Local Economy*, 29 W. NEW ENG. L. REV. 149, 151–52 (2006). For example, Red Sox fans patronize numerous bars and restaurants near Fenway Park. Birch, *supra* note 9, at 205.

[194] Bhasin, *supra* note 107, at 192–93.

[195] *Id.*

[196] Birch, *supra* note 9, at 205.

[197] *Id.*; *see* Kishner & Hoffman, *supra* note 191, at 21 (suggesting that a stadium is a significant community amenity and valuable cultural asset). The authors further suggest that competition between cities provides value as well and provides a way for industrious cities to promote their national profile. Kishner & Hoffman, *supra* note 191, at 21.

[198] Kishner & Hoffman, *supra* note 191, at 21. In fact, many of these intangible benefits form the foundational blocks supporting stadium grants as public use. *Id.*

[199] Siegfried & Zimbalist, *supra* note 183, at 99–100.

[200] Chema, *supra* note 188, at 21; Gesualdi, *supra* note 174, at 287.

[201] Robinson, *supra* note 8, at 145.

[202] Chema, *supra* note 188, at 21.

The rosy outlook on the construction of professional stadiums and their accompanying franchises, however, does seem to tarnish a bit under scrutiny.[203] The purported economic benefits that are said to come with a new stadium are embellished.[204] The direct benefits—spending, construction, and jobs—may not be the most efficient taxpayer investment, or, as some scholars would suggest, may not be noticeably different from forgoing the investment entirely.[205] A few scholars even suggest that cities with major sports franchises actually have a comparatively lower economic growth rate than those without, thus slowing any potential increases to per capita income.[206] For example, the dollars spent on entertainment at MetLife Stadium in New Jersey, or Citi Field in New York, are dollars that could otherwise be spent on Broadway.[207] Furthermore, most jobs generated by these venues are low-skilled, low-wage jobs with little long-term staying power.[208]

The intangible benefits provided by professional sports franchises are difficult to quantify and impossible to accurately weigh.[209] The positive externalities intrinsic in hosting a professional franchise stem from their validating effect on fans and citizens and the "enhanced" municipal image bestowed by the franchise.[210] Even so, large portions of the public fail to perceive the existence of these intangible benefits.[211]

Furthermore, the true cost of the stadium subsidy is not proportionately borne by those who benefit from it.[212] In particular, where stadium construction projects double as methods of urban re-development and re-vitalization, the residents who stand with the most to lose are the existing, typically low

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[203] *See, e.g.*, Richard C. Auxier, *Everyone Should Cheer the End of Tax-Exempt Bonds for Sports Stadiums*, TAX POL'Y CTR. (Nov. 6, 2017), http://www.taxpolicycenter.org/taxvox/everyone-should-cheer-end-tax-exempt-bonds-sports-stadiums [https://perma.cc/QW66-PAUT] (discussing how the benefits are overblown and suggesting that proposals to eliminate the tax benefit are sound public policy).

[204] Siegfried & Zimbalist, *supra* note 183, at 103. In fact, there is shocking unanimity among independent academic sources suggesting that there is "no statistically significant positive correlation between sports facility construction and economic development." *Id.*

[205] Goodman, *supra* note 5, at 203. At least two economists suggest that the effect of stadium construction projects outside of the direct benefits to the construction industry is not "measurably different from zero." *Id.*

[206] *Id.* at 204. This can be attributed to the so-called "negative multiplier:" the proposition that for every dollar spent, that dollar goes to finance the stadium, accompanied by a corresponding decrease in spending attributed to the higher tax burden necessary to finance the stadium to begin with. *Id.* at 203.

[207] *See* Siegfried & Zimbalist, *supra* note 183, at 105 (discussing the substitution effect).

[208] *Id.* at 104.

[209] Birch, *supra* note 9, at 202.

[210] Siegfried & Zimbalist, *supra* note 183, at 102–03. In touting the esoteric benefits of stadium construction, proponents are acknowledging that the value of the subsidy is difficult to justify as a business decision. *Id.* at 103.

[211] *Id.* at 103.

[212] Goodman, *supra* note 5, at 194–95.

income, residents.[213] Couple this with the fact that sales taxes, sin taxes, and a number of the other forms of taxation commonly used to secure the development bonds, are regressive taxes that fall most heavily on poorer residents.[214] Furthermore, because of rising ticket prices, especially when new stadiums open, lower income residents are doubly penalized because they bear a disproportionately large share of the tax while they receive a disproportionately small share of the benefits.[215]

Additionally, the tax dollars used to subsidize the construction of a professional stadium bear an opportunity cost as they could otherwise be invested in the arts, in local infrastructure, or school-building.[216] Although it is not a foregone conclusion that these uses are preferable, it bears noting that the money is typically a net drain on the city's coffers.[217]

III. GETTING CITIES BACK IN THE GAME

As public opposition has grown toward publicly subsidized stadium construction projects, several proposals have emerged to affect lasting changes—though none have gained sufficient momentum until recently.[218] Courts have consistently held that subsidizing stadiums constitutes a public purpose and refused to sustain challenges to their public financing.[219] Although Congress has, at various times, considered reform of the tax-exempt bond rules relating to the construction of stadiums, none of the proposed legislation has made it to a vote.[220]

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[213] Christopher Carbot, *The Odd Couple: Stadium Naming Rights Mitigating the Public-Private Stadium Finance Debate*, 4 FLA. INT'L U. L. REV. 515, 535 (2009).

[214] *Id.*; Siegfried & Zimbalist, *supra* note 183, at 101–02. Sports consumers have also grown more affluent over time, and the successes of PSLs demonstrate this. Siegfried & Zimbalist, *supra* note 183, at 102. Even acknowledging the perceived consumer surplus of stadium construction, a large portion of voting residents do not perceive or realize the benefits of sports facility construction. *Id. at* 103. Even at a pure demographic level, the size of the population bearing the tax or financial burden is far larger than the population who could possibly enjoy the stadium's direct benefits. Carbot, *supra* note 213, at 535.

[215] Carbot, *supra* note 213, at 535.

[216] *See* Siegfried & Zimbalist¸ *supra* note 183, at 108–09.

[217] *Id.* at 108.

[218] *See infra* notes 228–252 and accompanying text (discussing various attempts at reforming professional sports leagues and stadium financing).

[219] *See, e.g.*, Poe v. Hillsborough County., 695 So. 2d 672, 674 (Fla. 1997) (finding that the construction of Raymond James Stadium constituted a public purpose despite owners not contributing to the construction costs); Kelly v. Marylanders for Sports Sanity, Inc., 530 A.2d 245, 251 (Md. Ct. App. 1987) (finding that stadium opponents could not force a referendum because the actions of the Maryland Stadium Authority were an appropriate expenditure for state purposes and thus exempt from a referenda requirement); King County. v. Taxpayers of King Cty., 949 P.2d 1260, 1269 (Wash. 1997) (finding that Seattle Mariners Safeco Field served a 'valid public purpose' and that all benefits to private organizations were ancillary).

[220] Bhasin, *supra* note 107, at 196–97.

Other proposals to reform stadium financing—such as breaking up the major sports leagues to encourage inter-league competition or providing for relegation and promotion from lower-level leagues—suffer from their over-breadth or infeasibility.[221] Even more recent attempts, like former President Barack Obama's budget proposal to eliminate the payment and security test for bonds financing professional sports facilities failed to muster the necessary support to effectuate change.[222] Further, the House of Representatives proposed a more recent change that would have removed the tax-exempt status of bonds used for stadiums, but the reconciled bill did not include this provision.[223] This Part argues that though the previous attempts at reform failed, some compromise can be found.[224]

Section A of this Part evaluates the previous attempts to reform the tax-exempt bond scheme and discusses potential solutions moving forward.[225] Section B evaluates potential regulatory solutions to the challenges of franchise relocation, expansion, and the accompanying stadium construction.[226] Section C argues that reform to the IRC is necessary, but that the fundamental approach should be permissive rather than paternal, allowing municipalities flexibility, while not singling out sports in comparison to other commercial enterprises.[227]

A. Reform to Tax-Exempt Bonds

Even if the 1986 Tax Reform Act was well-intentioned, it failed to accomplish its intended purpose and instead passed off an even heavier cost to state and local governments beholden to professional franchises.[228] Rather than reducing the power of sports franchises over communities, the 1986 Tax Reform Act increased competition between cities and restricted their available incentives to attract or retain franchises.[229]

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[221] *See generally* Grow, *supra* note 38, at 641–43 (suggesting the creation of an agency designed to regulate league expansion and relocation, but acknowledging that some reform attempts fail to consider political factors).

[222] *Compare* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016, at 127 (2015) (showing proposed changes in tax revenue associated with private activity test), *with* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (showing President Obama's solution did not make it into the final budget). Because sports stadiums will satisfy the private business use test in almost every case, nearly all professional sports stadiums would be taxable under this system. *See* Gesualdi, *supra* note 174, at 284.

[223] *See generally* H.R. REP. NO. 115-409 (2017) (Conf. Rep.).

[224] *See infra* notes 228–275 and accompanying text.

[225] S*ee infra* notes 228–237 and accompanying text.

[226] S*ee infra* notes 238–252 and accompanying text.

[227] S*ee infra* notes 253–275 and accompanying text.

[228] Bhasin, *supra* note 107, at 190.

[229] *Id.*

Two legislative fixes were proposed in the late 1990s.[230] The first, the Team Relocation and Taxpayer Protection Act, aimed to combat public subsidies by preventing teams from threatening to leave communities.[231] The bill would have prohibited teams who broke lease agreements from receiving the benefits of tax-exempt bonds in future stadium financing.[232] Critics of the bill, however, were quick to point out that the bill unfairly discriminated against professional sports teams while leaving out other corporations that frequently change communities in pursuit of the most favorable tax incentives.[233] Furthermore, overly stringent restrictions on franchise movement run the risk of being anti-competitive, thus preventing markets from being served efficiently.[234]

The second proposal, the Stop Tax-Exempt Arena Debt Issuance Act ("STADIA") attempted to protect taxpayers by ending the tax subsidy for sports stadium bonds entirely.[235] The bill aimed to reclassify stadium bonds as private activity bonds, thereby preventing them from realizing the tax-exempt benefits.[236] The complete bar proved fatal to the legislation, however, as state and local political units, members of the bond industry, and franchises opposed the federal intervention preventing them from pursuing their ostensibly public purpose.[237]

B. Increased Regulation of Sports Leagues

With the incredible bargaining power of professional sports leagues, some scholars would suggest that the only means of reigning in their power would be through increased regulation of their operations.[238] Congress undoubtedly

[230] *Id.* at 193–95.

[231] *Id.* at 193–94. The legislation would combat frequent relocations by preventing franchises from receiving tax-exempt bonds for construction at their new location if: 1) the franchise would be leaving a facility that was financed by a federal, state or municipal entity; 2) the attendance of home games averaged at least 75% of normal capacity in the past year; and 3) the state or local government had voted for a tax to finance a new or improved facility within a year of when the franchise announced an intention to leave. *Id.*

[232] *Id.*

[233] *See* Lathrope, *supra* note 164, at 1164 (describing how the bill would deny subsidies to franchises with existing leases who broke their leases to relocate).

[234] Bhasin, *supra* note 107, at 194. In fact, this method of preventing stadium subsidies would be overtly protectionist, depriving franchises entirely of their competitive tools and possibly resulting in severe economic consequences. *See id.* (arguing that a limitation on franchise relocation would be protectionist and anti-free market).

[235] *Id.* at 195.

[236] *Id.*

[237] *Id.* at 197; *see* Andrew Gasper, *Senator Moynihan's Field of Dreams: If You Build It, They Will Come . . . But Not at the Federal Taxpayers' Expense*, 17 VA. TAX REV. 341, 349–51 (1997) (discussing how the Stop Tax-Exempt Arena Debt Issuance Act ("STADIA") legislation demonstrated Congress's dislike of inter-state/inter-city competition for sports franchises—a cornerstone of competitive sports markets).

[238] Grow, *supra* note 38, at 640–41.

has the regulatory authority under the commerce clause power.[239] Because of the extensive entry barriers present in the industry, such as high labor costs, venue costs, and media contracts, the formation of competing, commercially successful leagues seems unlikely without government intervention.[240] Moreover, renewed regulation of the major sports leagues would not be particularly novel, as Congress proposed to create a Federal Sports Commission to do just that in 1972.[241]

Of the most common proposals to restrict the teams' bargaining power, restricting franchise free agency—their ability to relocate at will—appears to be the most feasible and effective option.[242] The fact that the demand for a professional franchise is far greater than the current supply creates a franchise's superior bargaining position.[243] By restricting the ability of franchises to relocate at will, it would be possible to return some power to state and municipal governments.[244] Restricting relocation alone, however, would likely be inefficient and, at the very least, would leave many markets under-served.[245] The demands for franchises change with time, and if there were additional burdens on franchise relocation, teams may not be able to relocate to developing urban centers.[246]

An alternative to simply limiting relocation would be to enable a regulatory agency to direct the leagues to expand into new markets as the demand for new teams becomes economically viable.[247] Two main factors weigh in favor of this strategy: first, a regulatory agency, familiar with the leagues business model and attuned to the public's demands, would be able to navigate the complexities of forced expansion; and second, a regulator would be able to

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[239] Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 130–31 (1997).

[240] *Id.* at 133–34.

[241] *See* MICHAEL DANIELSON, HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS 291 (1997) (noting that a Federal Sports Commission, proposed in 1972 to restrict franchise movement, never got off the ground). The proposed authority would be limited to regulating 1) the leagues' television blackout restrictions; 2) the leagues' entry draft processes; 3) the limitations on competition in player free agency; and 4) the sale of professional sports teams. Steven R. Rivkin, *Sports Leagues and the Federal Antitrust Laws*, *in* GOVERNMENT AND THE SPORTS BUSINESS 387, 409 (Roger G. Noll ed., 1974).

[242] *See* Grow, *supra* note 38, at 645 (discussing how a restraint on franchise relocation could help combat stadium finance costs).

[243] *See id.* (discussing how franchise free agency contributes to franchise bargaining power).

[244] *Id.* at 645–46.

[245] *See* John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1037 (suggesting that market conditions do not result in the efficient number of franchises, thereby justifying regulation).

[246] *But see* Grow, *supra* note 38, at 645–46 (suggesting additional regulation may be necessary).

[247] *Id.* at 645.

control the leagues development, thereby restricting their ability to extract egregious terms from localities.[248]

Some critics of the professional sports leagues' monopoly power have called for divestiture to replace the major sports leagues with multiple smaller, more competitive leagues.[249] In theory, multiple leagues would increase competition that would lead to an expansion into different markets and greater bargaining power for municipalities that were interested in hosing professional franchises.[250] But divestiture proposals are infeasibility and are subject to public opposition, not to mention the impossible complexity of re-allocating teams from the existing leagues.[251] Further, the competitive success of multiple, overlapping sports leagues would be far from certain, as history has demonstrated a natural tendency toward sports league monopolies.[252]

C. Remaining Options

The enormous bargaining power that sports leagues wield against state and municipal governments demonstrates the necessity of reform to federal tax policy permitting the tax-exempt funding of stadiums or further regulation of sports leagues.[253] Though most proposals suffer from their over-breadth or their infeasibility, market trends in sports financing have demonstrated that public finance is not necessary to achieve a successful and profitable franchise.[254] Furthermore, it is not out of the question that the public purpose doctrine could be reformed.[255] In stadium financings, the private beneficiaries include franchise owners, professional players, and the employees—construction workers, architects, and media—who service the stadium.[256] Local corpora-

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[248] *Id.*; *see* John C. Dodge, *The Baseball Monopoly as Public Utility: Is It Time for Regulation?*, 13 ENT. & SPORTS LAW. 3, 6 (1995) (observing that utility regulators have decades of experience deciding franchising issues like expansion and relocation).

[249] Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 656 (1989); Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 646.

[250] Ross, *supra* note 249, at 656.

[251] Grow, *supra* note 38, at 631–32.

[252] *Id.* at 633 (noting that, over the years, despite the emergence of numerous competitor leagues, only baseball's American League has survived).

[253] *Id.* at 640–41; *see* Weiler, *supra* note 80, at 264–65 (discussing how current tax policy has contributed to the poor bargaining position of cities).

[254] Bhasin, *supra* note 107, at 194 (arguing that STADIA has perverse economic incentives); Dodge, *supra* note 248, at 6; *see supra* notes 31–41and accompanying text (discussing various examples of owner and developer financing). Certain types of public subsidies, however, may be beneficial in encouraging redevelopment projects. Bassett, *supra* note 117, at 755.

[255] *See, e.g.*, Dale F. Rubin, *Public Purpose in the Northwest: A Sinkhole of Judicial Interpretation—the Case for Alternatives in the Delivery of Public Services and the Granting of Subsidies*, 32 IDAHO L. REV. 417, 430–32 (1996) (discussing possible reforms to public purpose doctrine jurisprudence).

[256] Goodman, *supra* note 5, at 191–92. Franchise owners who receive publicly subsidies for stadiums do not necessarily reap direct benefits from the stadium itself. *Id.* Many franchise owners real-

tions also benefit, as they are afforded new means of wooing customers and rewarding employees.[257] Although some would argue that these consumers will be able to receive a public benefit by purchasing tickets, the benefit is not always attainable by the interested public.[258]

The challenge is that stadiums are designed such that only a limited amount of the public who wish to purchase a ticket may do so.[259] Consequently, the individual benefit pales in comparison to the direct financial benefit to the players and franchise owners whose bottom lines are increased.[260] This leaves two distinct options available for reform: a change in tax policy that would promote public-private partnerships with respect to sports franchises by focusing on sports complexes as broader development projects, or a the creation of a regulatory agency focused on controlling league expansion and relocation.[261] The latter would require increased federal intrusion into a province of primarily state and local governance.[262] This it is not without precedent, however.[263] As noted, Congress has previously considered such an agency.[264] With the next round of stadium construction just around the corner, perhaps as early as 2020, the time to take action is now.[265]

The second option would come by way of tax reform that would restrict the ability of stadium construction projects to qualify for tax-exempt bonds, either through a stronger, more aggressive public purpose doctrine, or a redefinition of the appropriate terms for tax-exempt bonds.[266] In theory, municipalities ought not to directly fund stadiums and arenas because they constitute

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ize their gains over the long-term through franchise appreciation. *Id.* Without a doubt, however, publicly subsidized stadiums can contribute directly to this increase in franchise value. *Id.*

[257] *Id.*

[258] *See* E.M. Swift, *Hey, Fans: Sit on It!*, SPORTS ILLUSTRATED, May 15, 2000, at 70 ("Ticket prices go up an average of 35% when a team moves into a new facility."). *But see* Poe v. Hillsborough County, 695 So. 2d 672, 678–79 (Fla. 1997) ("[T]he Buccaneers instill civic pride and camaraderie into the community.").

[259] Goodman, *supra* note 5, at 191–92. Consequently, taxpayers who directly contributed to the financing are frequently denied admission due to high ticket prices, high demand for tickets, or other inability. *See* Swift, *supra* note 107, at 70.

[260] *See* Goodman, *supra* note 5, at 188–90.

[261] *See* Greenberg & Hughes, *supra* note 32, at 183–84 (discussing sports complexes as center of economic developments); Grow, *supra* note 38, at 642–43 (discussing potential creation of a regulatory agency).

[262] *See* Gellis, *supra* note 127, at 72 (arguing that because of the tax-exempt nature of the municipal finance, there should be additional regulation such as more rigorous reporting requirements).

[263] Grow, *supra* note 38, at 645–46.

[264] *See supra* notes 249–250 and accompanying text (discussing proposed regulatory authority to govern professional sports).

[265] *See* Seifert, *supra* note 74 (suggesting there may be a new round of construction by 2020).

[266] *See* Jensen, *supra* note 76, at 456 (arguing that one approach would be to require a certain return on investment for municipalities who seek to qualify their bonds for tax-exempt status).

unconstitutional financial assistance to a private enterprise.[267] Although courts have traditionally been reluctant to step in and impose on the decisions of municipal governments, the egregious nature of financing stadiums—especially when such a small economic benefit actually flows to taxpayers—suggests that such deference should not be given.[268] What seems certain, however, is that the 1986 tax-exempt bond restrictions go too far in restricting the means of municipalities to secure their bonds, resulting counterintuitively in increased financing costs and reduced bargaining power for municipalities.[269]

Consequently, the optimal approach would be to restrict the amount of financing that could come from the municipality by requiring the franchise to find private financing equal or greater to the public contribution.[270] This could be done by enabling the IRS or another federal agency to review the terms of the stadium financing agreements to determine the eligibility for tax-exempt status.[271] The revision to the IRC previously proposed by Congress takes one major step in this direction by eliminating the ability for municipalities to qualify for the tax-exempt municipal bonds when the funds are directed toward stadium construction.[272] Although this may address Franchise Free Agency, however, it singles out stadium construction while other business entities commonly receive this preferential treatment from cities and municipalities.[273]

In combination with a loosening of the restrictions imposed by the 1986 Act, requiring additional qualifications to qualify for tax-exempt status would

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[267] *See generally* Brandes v. City of Deerfield Beach, 186 So. 2d 6 (Fla. 1966) (holding that taxing power may not be used or pledged for private enterprise); Opinion of the Justices, 250 N.E.2d 547 (Mass. 1969) (finding violation of public purpose); Robinson, *supra* note 8, at 154–156 (discussing how funds used in stadium construction directly benefit teams and ownership with the financial ability to finance the stadium absent public assistance).

[268] *See* Poe, 695 So. 2d at 676 (giving deference to the Tampa Sports Authority).

[269] Robinson, *supra* note 8, at 154–56.

[270] *See* Greenberg & Hughes, *supra* note 32, at 182–83 (arguing that public-private partnerships may become essential to finance stadiums).

[271] *See, e.g.*, Kevin P. McManimon, *Tax Exempt Bonds for Stadiums: IRS Ruling Indicates Interpretation of Regulations Governing Project Financing*, N.J. L.J. (May 4, 2007), https://www.law.com/njlawjournal/almID/900005480475/ [https://perma.cc/H6HZ-XUBS] (discussing IRS letter ruling sanctioning construction of MetLife Stadium).

[272] Eben Novy-Williams, *Sports Stadium Projects Lose Tax-Exempt Status in GOP Tax Plan*, BLOOMBERG (Nov. 2, 2017, 4:34 PM), https://www.bloomberg.com/news/articles/2017-11-02/sports-stadium-projects-lose-tax-exempt-status-in-gop-tax-plan [https://perma.cc/8X4R-TE4Q].

[273] *See, e.g.*, Emily Badger et al., *Dear Amazon, We Picked Your New Headquarters for You*, N.Y. TIMES (Sept. 9, 2017), https://www.nytimes.com/interactive/2017/09/09/upshot/where-should-amazon-new-headquarters-be.html [https://perma.cc/UHB7-B6JP] (discussing how many cities are competing to host Amazon's new headquarters by offering extensive tax breaks and payouts to attract Amazon); Henry Grabar, *Your City Will Lose the Contest for Amazon's New HQ*, SLATE (Sept. 8, 2017, 4:54 PM), http://www.slate.com/articles/business/metropolis/2017/09/your_city_will_lose_the_contest_for_amazon_s_new_hq.html [https://perma.cc/322L-7A48] (arguing that, although it seems attractive to bring in a headquarters for a corporation like Amazon, there is a large cost imposed upon the citizens).

result in an improved municipal bargaining position and make public finance less attractive to sports franchises.[274] This approach has two primary advantages: first, it would require team owners and the leagues to buy-in; and second, it would encourage additional investment in development, thereby allowing the benefits of public finance to flow back toward those who contributed.[275]

CONCLUSION

Building a state-of-the-art stadium is a difficult, yet profitable, endeavor. The current landscape of stadium financing deprives municipalities of effective means of bargaining with anti-competitive sports leagues who wield the limited number of their teams as bargaining chips to extort franchise and league friendly construction contracts. Compounding that, the dispersed costs and direct benefits make public opposition to stadium construction difficult. Progress can be made in preventing overtly franchise-friendly deals, however, by requiring league and franchise financial contributions and by using tax mechanisms to reallocate the tax burden more heavily upon those who stand to gain the most. Although regulatory schemes suffer from their over-breadth and political infeasibility, a cohesive approach to reform the restraints on the issuance of tax-exempt bonds in combination with a re-conceptualization of how municipalities view stadium construction could yield a more taxpayer friendly environment as we enter a new era of stadium construction.

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[274] Robinson, *supra* note 8, at 166.
[275] Greenberg & Hughes, *supra* note 32, at 182–83, 186; Robinson, *supra* note 8, at 166.