Public Finance of Sports Stadia:
Controversial But Permissible . . . Time for
Federal Income Tax Relief for State and
Local Taxpayers

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INTRODUCTION

Public finance of many professional sports stadia is a fact. This is a
troublesome phenomenon because of the clear financial benefit to franchise
owners—far and away private parties. It is puzzling because this clearly private
benefit seems to run counter to notions of appropriate use of public resources.
Moreover, it is surprising: Congress sought to foreclose such undertakings in
1986 through an Internal Revenue Code amendment that removed sports stadia
from the list of activities for which state and local revenue bonds generating tax-
exempt interest were explicitly permitted.1 The amendment ultimately proved

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futile as construction proponents successfully borrowed through financial packages relying on public funds unrelated to stadium operation to defray attendant public debt. From the point of view of construction proponents, Yogi Berra had it right: "It ain't over till it's over."2 Clearly, borrowing for this purpose relying upon state and local bonds generating tax-exempt interest was not "over" after 1986. Thus, the questions remain. Should this controversial practice end for legal, economic, or public policy reasons?

A number of critics have called for an end to this use of public financing.3 First, there is concern about costs. Construction costs are substantial and the case for a moratorium seems particularly compelling when public support for stadium finance is compared with actual public outlays and presumed unmet public need in other areas. The average cost of constructing each of the twenty-four professional sports facilities built beginning in 1990 was between $200 million and $300 million,4 and construction costs continue to increase. For example, according to 1997 figures, the projected cost of the new Seattle Seahawks' Stadium in King County, Washington was $425 million. Public (state and local) sources are expected to provide $365 million of the $425 million.

Johnson, Douglas Leslie, Julie Roin, Paul Stephan, and Laurens Walker for their many helpful observations and suggestions. I thank my colleagues who participated in the October 22, 2001, Faculty Workshop and the students participating in the January 28, 2002, Student Scholarly Lunch Series at the University of Virginia for their comments and suggestions. I also thank the University of Virginia Law School Foundation for its financial support and our terrific library staff for its unfailing assistance. Finally, my warm thanks to Daniel Lissner for his indispensable and always enthusiastic research assistance.


projected cost, approximately 85%. During the same period, the new Seattle Mariners’ stadium, Safeco Field, was constructed and opened in 2000. In 1999, the projected cost of Safeco Field was $517 million with at least $340 million of this cost publicly financed. Comparatively, Seattle’s public schools, arguably an area in constant need of additional funding, had a total budget of $415.3 million for the 1997–98 academic year, with $309.3 million coming from state and local sources.

The same pattern is repeated in other recent projects. Pittsburgh provided an $803 million package to fund PNC Park, the new home of the Pittsburgh Pirates, and a new stadium for the Pittsburgh Steelers. The package also retired the debt on the old Three Rivers Stadium and paid for its demolition. Additional construction or substantial renovation projects in various planning stages are underway in cities including Chicago (National Football League (“NFL”) Bears), Cincinnati (NFL Bengals, Major League Baseball (“MLB”) Reds), Nashville (NFL Titans), Memphis (National Basketball Association (“NBA”) Grizzlies), and Detroit (NFL Lions). Both the New York Yankees and the New York Mets would have played in new homes if a tentative deal made with Mayor Rudolph Giuliani shortly before he left office had concluded. The combined cost of that package, repudiated by Mayor Michael Bloomberg, would have been $1.6 billion.

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7 See Seattle Public School, Funding Overview, http://www.ssd.k12.wa.us/bb/bb_bsumm.html (last visited May 5, 2002). Generally, among the fifty states, for this period the state of Washington ranked in the upper quintiles on a number of measures including: average proficiency in math—8th grade, 1996 (14); proficiency in reading—8th grade, 1998 (12); SAT scores, 1998 (1); pupil-teacher ratio, 1998 (3); and state and local education spending, 1996 (12). See generally Kendra A. Hovey & Harold A. Hovey, CQ’s State Fact Finder, Section 11 (CQ Press 2000). This is a useful comparison since currently approximately 90% of funding for public primary and secondary education comes from state and local sources. See generally Mildred Wigfall Robinson, Financing Adequate Educational Opportunity, 14 J.L. & Pol. 483 (1998).

Generally, among the fifty states, for this period the state of Pennsylvania ranked in the middle quintiles on a number of measures including: 1998 SAT scores (20 of 24); 1998 pupil-teacher ratio (21 of 50); and 1996 state and local education spending (27 of 50). See generally Hovey & Hovey, supra note 7.
In addition, the New Jersey Nets (NBA) and the New Jersey Devils (National Hockey League ("NHL")), both of which play in the Continental Airlines Arena at the Meadowlands, have threatened to leave the state unless a new arena is built by the beginning of the 2004 season.\(^9\) Similarly, the Charlotte Hornets (NBA) filed an application to move to New Orleans. The owners of the Hornets staunchly deny that they are using the tentative deal to gain leverage with Charlotte voters who have twice refused to pass referenda for a new publicly funded arena.\(^11\)

Northern Virginia remains in the picture as the site of yet another of these undertakings. A well-organized interest group has been quite deliberately laying the groundwork for an effort intended to culminate with a professional baseball franchise with a Virginia address.\(^12\) A great deal of publicity accompanies these proposals, generally with promises extending from renewed economic prosperity for the latest site (frequently without cost to the host city) to a new era of civic goodwill for all.\(^13\)

\(^9\) See David Kocieniewski, Newark Stadium Bill Dies in Final Session, N.Y. Times, Jan. 8, 2002, at B5. The article notes that incoming Governor McGreevey promised to press for passage of a package of bills to finance the stadium.


\(^12\) See, e.g., David Doig, General Superintendent, Chicago Park District, A Winning Lakefront/Soldier Field Plan, Chi. Trib., Apr. 15, 2001, at C16. The Superintendent identifies the "biggest winners" under Chicago's proposed lakefront improvement/Soldier Field renovation plan as "taxpayers, children, families and neighborhood-park users." He maintains that "Chicago taxpayers win because the $586 million project is not costing them anything." Id. The project is paid for by tourist taxes and the stadium's main tenant, the Chicago Bears." Id. The Superintendent continues, asserting that "[c]hildren and families who use the lakefront are winners because they will gain seventeen new acres of lakeshore and parkland at no cost, a close-in underground parking garage serving the museum campus and various other recreational amenities." Id. Lastly, he states that "[n]eighborhood-park users win because a renovated Soldier Field will generate at least $10 million in net, annual revenues for neighborhood-park programs." Id.; see also County of San Diego, Grand Jury Report (1997–98), available at http://www.co.san-diego.ca.us/cnty/cntydepts/safety/grandsection1.html (last visited Aug. 7, 2001) [hereinafter Grand Jury Report]. The San Diego Grand Jury maintained that "[t]he value of a major league baseball team goes well beyond economic issues. Major league baseball is a source of significant civic pride and favorable publicity." Id. In addition, the Grand Jury stated that "[a] baseball franchise is a cultural asset and like a civic theatre, convention center, opera, library, symphony, or beach meets the needs and interests of many citizens." Id.
Costs must be considered in the context of benefits, and franchise owners clearly realize financial benefits. The value of a team is directly related to the team's ability to generate net revenues and, while each league imposes its own rules about revenue distribution, in all the leagues, sports stadium revenues are an important factor in profitability.14 Thus, as stadium revenues increase, the value of the team increases—value that accrues to private owners since, with the exception of the Green Bay Packers (NFL), all major sports franchises are privately owned either individually or through publicly-traded corporations.15

Public benefit has been less clear. The two most comprehensive studies to date raise doubts about the likelihood of public benefit from these projects. These two studies concluded that generally, net economic benefits to cities subsidizing sports facilities are rare.16 There is some evidence, however, that new facilities built in blighted areas have positive spin-off unmatched in scope or funding by other redevelopment efforts.17

So the case for continued state latitude remains even in light of serious concerns. The absence of certainty is important. States currently operate within a legal environment accommodating broadly cast public purpose and public welfare. State supreme courts are construing public purpose quite expansively, and public spending can now unquestionably be undertaken to provide a variety of general citizen services deemed related to "matters of public order”—such as police and fire protection, streets and public lighting, and sewage treatment systems—and other matters of public welfare—such as libraries, parks, golf courses, museums, and marinas. Citizen preference and the level of available resources have dictated public spending patterns.

Further, states have functioned as laboratories for broad experimentation, including economic experimentation.18 This economic experimentation has included collateral public spending as well as direct financial incentives of various types. State courts have permitted this experimentation under the rubric of public purpose on the theory that such incentives can provide the catalyst for increased private sector economic activity. This hoped-for expansion of the private economic base would generate state benefit through increased tax collections and citizen benefit through expanded employment opportunities. In

14 See Raffo, supra note 4, at 2.
15 Id. at 2–7.
16 See id. at 7.
17 Id.
18 As Chief Justice William H. Rehnquist observed, "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." United States v. Lopez, 514 U.S. 559 (1995); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
recent years, the pace of this economic experimentation has accelerated, perhaps reaching a zenith with turnkey operations where appropriately designed publicly financed and constructed facilities are leased to private entities.\textsuperscript{19} Inevitably, with economic experimentation, and particularly with turnkey operations, private and public benefits have been very closely intertwined.

Historically, federal tax policy has economically accommodated and contributed indirectly to state spending across the spectrum by according exempt treatment to states' income, irrespective of whether services are free or provided on a fee-paid basis. This exempt treatment includes interest paid on state and local government's obligations with minimal federally imposed policy limitations prior to 1986 on the uses to which borrowed monies could be put.

The turnkey operation and comparable joint ventures have especially strained federal tax accommodation of state economic experimentation, and financing of sports stadia is at the apex of that concern. At the state level, the key issue has been whether this undertaking violates the constitutionally required standard of public purpose for sanctioned spending. Many states' highest courts have permitted the use of state resources for sports stadia, relying on legislative language that anticipated public benefit outweighs the undeniable private benefit.

On the federal level, the issue has both fiscal and policy facets: The cost of the indirect subsidy has escalated even higher, and there has been an unacceptable level of individual taxpayer benefit (in the form of tax-free receipt of income—the interest on the bonds). Driven in recent years by these concerns, Congress has acted to limit federal cost of this contextual subsidy in two major ways: (1) by more closely defining the kinds of projects eligible for financing through tax-exempt arrangements (theoretically closing the gap between public expenditure and direct public benefit), and (2) by limiting on a state-by-state basis the overall volume of state and local borrowing through the use of volume caps (thus decreasing federal cost).\textsuperscript{20}

Each actor's position is arguably correct. States should have maximum latitude within the confines of their respective state constitutions to define and implement policy—including economic policy—as legislative bodies deem appropriate. By the same token, Congress can act as it deems necessary to insure that the state itself defray any attendant cost, thus forcing the state to bear the cost of its experimentation or provision of public services and, correspondingly, limiting federal cost and indirectly protecting federal taxpayers. Congress, however, should not foreclose state experimentation that is constitutionally

\textsuperscript{20} The total volume of tax-exempt private-activity bonds issued by all political subdivisions in a given state is correctly limited to the greater of $75/resident or $225 million. 1.R.C. § 146(d) (2001).
permitted at both the state and federal level.

The issue has been forced quite dramatically by this use of public financing and in compelling fashion. To date, proponents of stadium construction have the advantage. Interest groups have effectively exploited both state law and federal tax law in ways allowing these construction projects to be financed on a federally tax-exempt basis. Franchise owners have been clear winners. Arguably, from the standpoint of control, states have also benefited; they enjoy continued relatively unfettered latitude in determining the scope and extent of appropriate activity.

But taxpayer outcry continues and predictably accompanies each announcement of a new project.\(^1\) It is critically important to note, however, that while this outcry denounces the use of “tax-exempt municipal bonds to subsidize” these building costs,\(^2\) the objection is actually to the increased financial burden borne by state-local taxpayers. Because much of this debt is serviced from public revenues unrelated to stadium operation, this group of taxpayers now bears more direct and indirect costs in both absolute and relative terms than was the case prior to the 1986 amendments. This Article will examine extant state constitutional policy and local, state, and federal tax policies that have in combination permitted these projects and urge meaningful relief for state and local taxpayers.

First, the Article will describe state courts’ increasingly expansive view of permissible public policy and explain how corresponding changes in permissible fiscal practices enable experimentation. Part II will discuss the role of the federal income tax noting the origin and effect of the tax-exempt treatment generally accorded to state income as well as to interest generated by state and local obligations. The Article will then briefly explain why the Internal Revenue Code as amended in 1986 did not end public subsidy of stadium construction. It will assert that barring this activity would have been inappropriate in any event since no contrary federal prohibition exists. It will then explore the actual effect of the amendment using data demonstrating that the changed language is directly related to the shift in financial burden from franchise owners primarily to taxpayers. Part III will examine the components of that burden, paying particular attention to its regressive nature. The Article will conclude this part of the discussion by arguing that while Congress can and should take steps necessary to protect the federal fisc, unless contrary federal constitutional policy exists, federal respect for maximum state latitude should not absolutely bar even


\(^2\) Id.
this kind of economic experimentation.

In any event, the need for relief for state and local taxpayers is unquestionable. This relief seems best accomplished by reinstating stadium construction as a self-liquidating project. This policy is consistent with what may be a generally accepted axiom: Where revenue bonds finance a project that has the potential to be fully or even partially self-liquidating, that potential should be harnessed to the greatest extent possible, and any funds generated by the improvement should be dedicated to the retirement of attendant indebtedness.

To that end, this Article will consider post-1986 reform suggestions, explaining how each proposal fails to provide this critical relief in the most effective manner. It will end by arguing that federal tax reform must reinstate the status quo ante, predicating the use of tax-exempt revenue bonds on service through revenues generated by the stadium itself. In order both to accord some protection to the federal fisc and to preserve state ability to pursue competing initiatives through the use of revenue bonds, the Article will suggest that stadium construction projects be approved on an individual basis by the Internal Revenue Service pursuant to requests for a volume cap variance initiated by the state and local government involved.

I. THE PRESENT BUILDING FRENZY

It has happened with such frequency in recent years that new reports seem like parodies. The events leading to the new stadium for the Tampa Bay Buccaneers (NFL) as reported in Poe v. Hillsborough County,23 follow the script:

The Tampa Bay Buccaneers (the "Bucs") NFL football team has played its home games in Tampa since 1976 in a stadium owned and operated by the Tampa Sports Authority (TSA). In 1995, the Bucs franchise was sold to a new owner. Prior to the sale, the new owner advised local public officials that the team required additional stadium-related sources, such as luxury suites, club seats, etc., in order to remain competitive with other NFL teams, and the team would seek to relocate to another city unless the TSA constructed a new stadium in Tampa offering the necessary amenities. The new owner reiterated his intention to move the team after the sale, but at no time submitted a relocation application to the NFL which requires approval by three-fourths of the member teams for such a move. Negotiations between the City of Tampa, Hillsborough County, and the TSA and the new owner of the Bucs commenced in the fall of 1995 and continued until an agreement for the construction of a new stadium was reached on August 28, 1996.24

23 695 So. 2d 672 (Fla. 1997).
24 Poe, 695 So. 2d at 673–74. See generally Emeline C. Acton & Mary Helen Campbell, Public
Since 1998, the Bucs have played in the $168 million Raymond James Stadium. Of this amount, $153 million came from public sources and $15 million was financed by private sources. Between 1992 and 2005, seventeen of the thirty NFL franchises are expected to move into new facilities at an average cost of $328.7 million. Approximately 69% of this amount, or $222.3 million, will be provided from public sources. Public support will range from a low of 23% ($55 million of $240 million) for Ericsson Stadium (Carolina Panthers) to 100% ($214 million) for the Georgia Dome (Atlanta Falcons) and the Trans World Dome ($257 million; St. Louis Rams).26

Why the relentless franchise quest for new facilities? Player salary demands are pinpointed as the reason. In recent years, as player salaries have continued to rise to ever more stratospheric levels, gate receipts have become an increasingly important income component for franchise owners ostensibly striving to meet players’ demands. Owners assert that in order to recruit and retain quality players, new facilities generating more robust revenue streams are critical. Though this theory may be debatable, the initial treatment of such

Funding of Sports Stadiums and Other Recreational Facilities: Can the Deal Be “Too Sweet”?; 27 Stetson L. Rev. 877 (1998); Cagan & deMause, supra note 3. Occasionally, the new “field of dreams” will already have been built on a speculative basis by public authorities in a non-franchise city with the hopeful suitor in hot pursuit of a prospective occupant. Two cities that have recently taken this approach are Indianapolis, Indiana, the first city to engage in this speculative behavior, and St. Louis, Missouri. See Adam Safir, If You Build It, They Will Come: The Politics of Financing Sports Stadium Construction, 13 J.L. & Pol. 937, 946–48 (1997).


26 Id.

27 E.g., Alex Rodriguez’ ten-year $252 million contract with MLB’s Texas Rangers: The Sporting News reported on the five highest salaries in 1998. These salaries ranged from Alonzo Mourning’s (NBA Miami Heat) $112 million to Mo Vaughn’s $80 million (Anaheim Angels). Additional perks available to these and other star athletes included access to private jets, luxury box seats and luxury suites, and tapping into owners’ connections. Sports Media Challenge, Athlete Perks -- Are They Worth It?, http://www.sports.mediacomchallenge.com/hotcorner/athperk.html (last visited March 28, 2002).

28 Rafoul, supra note 4, at 7–8; see also Linda Grant Williams, Use of Securitization Techniques in Financing Sports Facilities, 811 PLJ/Comm 757 (2000). As the price of star athletes has skyrocketed, so has the team owners’ perception that far more capital is required to maintain a roster of top-ranked athletes poised to win. Professional sports team owners have recognized that their ability to hire and retain these athletes depends upon generating the greatest possible revenues, much of which will emanate from the teams’ home sports venue. The configuration of older sports facilities is not ideally suited for maximum revenue production, because they typically feature far fewer luxury boxes, club
receipts is clear.
In the NFL, the home team retains 60% of gate receipts with the balance going to the league.²⁹ Importantly, the revenue generated by skyboxes, club seats, and personal seat licenses is not included in this pot.³⁰ In the NBA, the home team retains all gate receipts; in MLB, National League home teams retain 90% of gate receipts, and American League home teams retain 80% of gate receipts.³¹ Older stadia have not featured such amenities or, in some cases, have suffered by comparison: Luxury seating has not been sufficiently luxurious.³²

All too often, recent stadium construction has replaced older but serviceable facilities to which the biggest objections were occasionally age but, more frequently, comparatively lower prospective profitability.³³ As noted earlier, the cost of new facilities continues to escalate but with the cost of the most expensive skyboxes currently approaching $500,000,³⁴ the continuous pressure for new facilities is unsurprising. Furthermore, revenue from stadium advertising and sale of naming rights (agreements under which a private entity pays to have a stadium bear the entity’s name), have recently taken on increasing

seats, and other premium seating. Id. at 766.
³⁰ Id.
³¹ Id.
³² Id. at 297–98.
³³ Id.; see also Cagan & deMause, supra note 3. For example, stadia in Chicago and Baltimore fell prey to both these criticisms. Unfortunately, more than just quite serviceable facilities were lost when ballparks in these cities were abandoned. Solid neighborhoods were sacrificed. In addition, facilities only partially paid for have been abandoned, as in Seattle, and surrounding properties have been gutted without replacement facilities, as in downtown Detroit. In short, public sacrifices have been immediate and apparent.
³⁴ The expected 1999 rates for the newest 48-person luxury suites at Pro Player Stadium (NFL Miami Dolphins and MLB Florida Marlins) was to be $600,000 annually. Munsey & Suppes, Stadiums: Pro Player Stadium, http://www.sfo.com/~csuppes/NFL/misc/index.htm?/MiamiDolphins/index.htm(last visited May 5, 2002).

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financial importance. The surge in the number of named stadia is striking. One source reports that "[t]he frequency of the naming deals has increased from three in 1988 to forty-two named professional sports stadiums in 1998." In fact, as of August 2001, the number of named stadia had grown to at least fifty one, and a recent Wall Street Journal article reported that there are sixty-two named stadiums. More than one-half of NHL (53.8%) and NBA (51.7%) arenas are named, as are 40% of NFL facilities and 30% of MLB facilities. Recent examples of naming deals include CMGI Field in 2000 for the New England Patriots (NFL) for $114,000,000; Enron Field in 1999 for the Houston Astros (MLB) for $100,000,000; PSINet in 1999 for the Baltimore Ravens (NFL) for at least $100,000,000; and the Conseco Fieldhouse in 1998 for the Indiana Pacers (NBA) for $40,000,000. The astute observer will no doubt note that all of these entities have recently encountered financial difficulty of varying magnitude. Suffice it to say, that, as the Wall Street Journal article noted, financial difficulty has not been the universal norm. Boston's Fleet Center (NBA Celtics and NHL Bruins), San Diego's Qualcomm Stadium (NFL Chargers) and Washington, D.C.'s Fedex Field (NFL Redskins) are all examples of naming deals concluded by entities that continue to enjoy financial success.

At least two other less noted factors contribute to the quest for the newest, biggest, and best facility in the business. The first is the shifting notion of fan base. Tim Chapin speaks to the implausible current trend favoring relocation of sports teams to urban as opposed to suburban settings for sports stadia. Central city locations are theoretically less attractive because of the lack of proximity to an affluent middle- and upper-class fan base, high land costs, and transportation inaccessibility. Chapin agrees that the changing economics of professional team sports is the essential ingredient explaining this otherwise puzzling shift. He argues that luxury suites now drive the profitability of a modern team and the proven market for these accommodations has been corporate clientele geographically located in central cities. Proximity to this core clientele has

39 Thurm, supra note 38.
become a new priority.40 Thus, Chapin identifies “the combination of public dollars, economic development goals, and the economics of professional team sports” as the major factors in sports facility location.41

The second factor contributing to this trend is the changing perception of what constitutes an appropriate sports facility. In a recent book, Curt Smith writes of a view prevalent during the 1970s and 1980s: that the most desirable stadia were multi-sport facilities, i.e., those that would accommodate more than one sport. Hence, the New Orleans Superdome was built to house football and basketball. Other stadia were designed with other multiple sport usages in mind; the Seattle Kingdome for both football and baseball was one such example. Recently, notions of ideal patterns of usage have again shifted and dedicated stadia have once again become the norm.42

This frenetic activity has not gone unchallenged. A powerful and consistently raised objection to this high stakes game of sports stadia finance asserts that the outlook for meaningful public benefit from the investment per se is bleak. Historically, the promise of new and renewed public economic prosperity has, at best, borne mixed results. The story frequently told by most commentators across disciplines is one of absence of return on substantial public investment.43 In fact, all too often the newly housed enterprise has failed to meet financial projections. Many jurisdictions have wound up providing additional assets for construction as, even before the first kickoff, project after project has been plagued with cost overruns.44 Further, the specter of operational deficit

40 Ironically, and perhaps counter-intuitively, this shift is not driven by federal tax deductibility of skybox expense. Assuming that the taxpayer is able to establish that game attendance qualifies as an activity “directly related to a bona fide business discussion,” the properly substantiated business deduction will be limited to “the face value of such ticket.” For skyboxes or other private luxury boxes leased for more than one event, the deduction will be limited to the “sum of the face value of non-luxury box seat tickets” for the seats in the leased box. I.R.C. § 274(a)(1), (d)(2), (I)(1), (l)(2) (2001).
42 Curt Smith, Storied Stadiums: Baseball’s History Through Its Ballparks (2001); see, e.g., Grand Jury Report, supra note 13 (“When discussions about changes to San Diego Jack Murphy Stadium became public and construction began, concerns about its adequacy as a major league baseball facility surfaced. Strong sentiments were expressed for a separate baseball park more like old-time ballparks and the newest baseball-only facilities.”).
43 See Zimmerman, supra note 1.
44 Examples of cost overruns include $51 million for Cincinnati’s Paul Brown Stadium (likely to be publicly borne) and $28 million for Cleveland’s Browns Stadium (split between owner and city). See National Sports Law Institute of Marquette University Law School, Sports Facility Reports 2-1, app. 2 (Fall 2001), available at http://www.marquette.edu/law/sports/sh/appendix_2.htm (last visited Apr. 24, 2002).
looms as increasing numbers of corporate sponsors encounter financial difficulties.

In light of what are, at best, mixed economic prospects, why does this intense inter-city competition for franchises continue? One writer summarizes the dynamic fueling the current race for professional sports franchises as follows:

[T]he artificially low supply of franchises, combined with the lack of league control over franchise relocations, makes each club, in effect, a free agent in a market where demand for its product is artificially high. That market power permits a club to enforce its demands for a new facility provided on financially advantageous terms.\textsuperscript{45}

In short, the franchises are perceived by all relevant players to be in a superior bargaining position when location is at issue.

Of course, perceptions would be meaningless if public entities lacked either the legal capacity or fiscal resources necessary to respond to these demands. Quite deliberate public-private efforts, however, have successfully exploited the serendipitous confluence of several independent public sector factors in realizing these new fields of dreams. Specifically, when constitutionally challenged, stadium construction has been deemed in numerous state court decisions to serve that state’s required public purpose. All three levels of government have directly or indirectly provided financial subsidies: “The state and local subsidy is typically provided through below-market rents, guarantees, and direct payments on behalf of the team. The federal subsidy is provided when state or local bonds are used to finance the facility.”\textsuperscript{46} However inadvertently, a public-private partnership (very loosely speaking) has effectively exploited these factors in a number of states and succeeded in bringing new sports facilities to completion.

II. CONSTITUTIONAL LAW AND TAX BACKGROUND

A. Public Purpose Under State Constitutions

In fact, the “public purpose” finding is the only element common to each of these undertakings. As will be shown, financial packages have varied considerably from case to case and undoubtedly will continue to do so. To begin, briefly, public purpose as originally conceived demands expenditure of public funds for the public good and not for the benefit of private interests.\textsuperscript{47}


\textsuperscript{46} Id. at 1147.

\textsuperscript{47} 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
The argument against public purpose in this context is straightforward: Aid should not be provided to franchise owners, because this is tantamount to constitutionally prohibited direct financial assistance to private enterprise.\(^4\)

Public purpose, however, is not currently construed as narrowly as this formulation suggests. In reliance on stated legislative purpose\(^4\) and in sharp contrast with earlier cases,\(^5\) enabling legislation has withstood constitutionally based public purpose challenges in case after case. These recent cases have focused on perceived public benefit.\(^6\) Challenges to such legislation as special


\(^4\) Id. at 417.

\(^5\) See, e.g., Murphy v. Erie County, 268 N.E.2d 771 (N.Y. 1971). The plaintiffs conceded the public purpose argument in this case. It is nonetheless interesting to note that the Court relied on legislative formulation of public purpose. The New York State Legislature declared that the stadium's public use was "to furnish to, or foster, or promote among, or provide for the benefit of, the people of the county of Erie, recreation, entertainment, amusement, education, enlightenment, cultural enrichment." Murphy, 268 N.E.2d at 774 (citing L. 1968, ch. 252, § 2). The Legislature further stated that its use and occupation was for the improvement of "health, education, welfare, recreation, well-being and prosperity for the promotion of competitive sports for youth and the prevention of juvenile delinquency and for the advancement and improvement of trade, industry, science, agriculture and commerce." Id. (citing L. 1968, ch. 252, § 2). See also Ginsberg v. Denver, 436 P.2d 685, 688 (Colo. 1968) ("But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except perhaps where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.") (quoting Milheim v. Moffat Tunnel Dist., 211 P.2d 649 (Colo. 1949)); Florida v. Osceola County, 752 So. 2d 530 (Fla. 1999); Lifiteau v. Metro. Sports Facilities Comm'n, 270 N.W.2d 749 (Minn. 1978) (declaring public purpose satisfied and that revenue bonds do not create public debt); Bazell v. Cincinnati, 233 N.E.2d 864 (Ohio 1968) (finding public purpose satisfied and no lending of credit by city to private organization); Giordano v. Ridge, 737 A.2d 350 (Pa. Commw. Ct. 1999) (ruling that lending of credit by Commonwealth to Industrial Development Authorities does not violate state constitution provision).

\(^5\) See, e.g., 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 Justices, 250 N.E.2d 547 (Mass. 1969) (finding violation of public purpose).

\(^6\) Id.; see Meyer v. City of Cleveland, 171 N.E. 606 (Ohio Ct. App. 1930) Meyer was one of the first cases to address the contours of public purpose in this context. The city of Cleveland sought to construct a new stadium on its waterfront. The court noted that Cleveland's powers as a municipal corporation were not limited to "providing for police, pavements, water, light, sewer, docks and markets" but "[g]enerally speaking, anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes." Id. at 606-07; see also Murphy, 268 N.E.2d 771. In Murphy, plaintiffs challenged the constitutionality of a lease between Erie County and Kenford (a private party), under which Erie County would either operate the stadium under a 40-year lease or under a 20-year management contract in return for a percentage of the revenues as providing a private use for Kenford's benefit. Id. at 771. The court commented on the
legislation or to financial arrangements as unconstitutional lending of credit have similarly failed.52 Thus, state courts almost uniformly have failed to erect roadblocks directed at special legislation, lending of credit, and public purpose junctures. Instead, courts have deferred to legislative findings, and permitted such projects to move forward.53

B. Fiscal Latitude in State and Local Government

In addition to the very broad latitude judicially accorded state legislatures in formulating “public purpose,” legislative bodies have indirectly exercised broad discretion in financial matters through the creation of fiscally independent public authorities and directly in controlling/earmarking public revenues. State latitude has been critical to public involvement in these “joint ventures,” for without available fiscal resources and flexibility in manipulating them, this increasingly expansive view of appropriate spheres of state involvement would mean little. Fortunately for proponents of public involvement in stadium finance, the increasing flexibility in permissible state action has been paralleled by greater latitude in fiscal policy. Perhaps importantly, there has been little federal court oversight.54

A brief review of how state and local governments have borrowed and serviced the resulting debt as well as the use of loans, grants, and state and local tax incentives will be helpful in understanding the various components of legislative grant of the “broadest possible latitude” to the county for the operation of the stadium. Id. at 771. The opinion continued:

[The county’s residents will be obtaining the full benefit for which the stadium is intended, the ability to view sporting events and cultural activities, regardless of the identity of the party operating the stadium . . . .] A incidental private benefit is not enough to invalidate a project which has for its primary object a public purpose.

Id. at 774. The stadium became the home of the AFC’s Buffalo Bills.52 See Dale F. Rubin, Public Subsidies, Private Gain Stop Violating the Oregon Constitution, Cascade Policy Institute, Fiscal Insight #13 (Sept. 1996), at http://www.cascadepolicy.org/.%5Cpdf%5Clabor%5Crubin.htm (last visited Apr. 24 2002) (“[M]odern court decisions have created such broad exceptions to the lending of credit provisions that such provisions currently are virtually meaningless.”).

It is also of interest to note that at least one court has observed that the same results hold even if the arrangement is one that places the public entity in a poor economic position, relatively speaking. See King County v. Taxpayers of King County, 949 P.2d. 1260, 1268 (Wash. 1997).

53 See generally Michael J. Cremonese, Building New Stadiums With Your Money Whether You Like It Or Not: The Pennsylvania Constitution Does Not Prohibit The Use Of Public Funds to Construct New Stadiums, 37 Duq. L. Rev. 423 (1999) (reviewing supreme court decisions from a number of states, each finding that public finance of stadium construction serves that state’s public purpose and is, thus, constitutional).

54 28 U.S.C. § 1341 (2001) (barring federal court jurisdiction of cases seeking to enjoin or restrain the assessment, levy, or collection of state taxes where a plain, speedy, and efficient remedy may be had in the courts of the state).
currently extant financing packages. This section briefly explores how state and local governments borrow. In this context, it is important to remember that most state and local governments are constitutionally required to have balanced budgets, although borrowing for capital expenditures is sanctioned.

The bulk of state and local government obligations historically have been general credit or “full faith and credit” obligations of the issuing body.\(^{55}\) The principal and interest of these bonds are paid from revenues generated by exercising the taxing authority of the issuer. The borrower does not pledge particular assets to guarantee the servicing of these bonds. Importantly, state constitutions almost universally require that such issuances be approved by voter referendum.\(^{56}\)

In contrast to general obligation bonds, revenue bonds are not backed by the issuer’s general credit. Instead, while also grounded in the borrower’s public purpose, these bonds are secured by an identified revenue stream.\(^{57}\) In its purest form, revenue to pay the principal and interest of revenue bonds is derived from the sale of public services such as travel on a toll road, service from a sewage treatment plant, or rents generated through a lease with a public agency. Unlike general obligation bonds and because general revenues are not implicated in debt repayment, voter referenda, while permitted, are not constitutionally required to approve the issuance of revenue bonds.\(^ {58}\)

C. Federal Tax Considerations

At the federal level, from the inception of the income tax system, the income of state and local governmental units has escaped taxation.\(^ {59}\) Further, and importantly in a market in which government would find it difficult to pay going rates of interest on borrowed monies simply because of fiscal constraints, the interest generated on governmental obligations (revenue from governmental coffers) has been treated as tax-exempt in lenders’ hands. The tax exemption essentially acts as a substitute for the higher interest likely to be paid by a private borrower.\(^ {60}\) This had been true for both general obligation and revenue bonds.\(^ {61}\)


\(^{57}\) Flushing Nat’l Bank, 358 N.E.2d at 850.

\(^{58}\) See R. William Ide, III, & Donald P. Ubell, Financing Florida’s Future: Revenue Bond Law in Florida, 12 Fla. St. U.L. Rev. 701, 705 (1985) (stating that revenue bonds are used in place of general obligation bonds because they do not require voter approval).

\(^{59}\) Exempt treatment has been held not to be required by the federal constitution but is deemed to be appropriately permitted by statute. See South Carolina v. Baker, 485 U.S. 505 (1988).

\(^{60}\) Andrew Gasper, Note: Senator Moynihan’s Field of Dreams: If You Build It, They Will Come...But Not At the Federal Taxpayers’ Expense: A Proposal to Curb Tax-Exempt Bond
By 1986, a watershed year in the history of tax legislation, revenue bonds had come to dominate the financial markets.\textsuperscript{62} Borrowing to finance the construction of professional sports stadia was by no means the major factor in this explosive growth,\textsuperscript{63} but it was a part of this activity. Use of revenue bonds for this purpose represented a paradigm shift; prior to 1966, whenever stadia were built by public entities, general obligation bonds were the primary mode of borrowing.\textsuperscript{64} Between 1966 and 1986, as the confluence of expansive notions of public policy and increased fiscal flexibility progressed, in addition to general obligation bonds, other revenue streams were tapped and revenue bonds were used to finance construction in some instances.\textsuperscript{65} In an effort to control the explosion of borrowing through these devices generally, amendment of the Internal Revenue Code in 1986 included modifications to the section controlling tax-exempt treatment of interest on revenue bonds. Among other things, the amendments prohibited exempt status for interest generated by bonds now newly characterized as “private activity bonds”\textsuperscript{66} unless they were qualified within the


\textsuperscript{61} There is an important distinction between general obligation and revenue bonds. Both generate tax-exempt interest, but an additional increment in public costs is present with revenue bonds because of comparative higher risk of non-performance by the issuer.

\textsuperscript{62} In 1976 the volume of private activity bonds was about $8.5 billion, or about 25% of the long-term tax-exempt bond market. The volume of private activity bonds rose to more than $25 billion in 1982, representing 48% of the tax-exempt bond market. Greater risk necessitated higher rates of interest for revenue bonds, but this higher rate remains below market rate for private borrowers. See 1982 Report of the Conference Committee on the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”).

\textsuperscript{63} During the 1970s, state housing financing agencies responded to the dual problems of frozen subsidies for multi-family housing and increasing mortgage rates with mortgage subsidy bonds. The proceeds of the bonds were used either to provide funds for mortgages to be made through local lenders or to purchase mortgages already financed by those lenders. The combination of tax-exempt interest and high security made these bonds very attractive to investors. By percentage, bonds issued for this purpose by state and local governments increased from 1.8% in 1976 to 20.4% in 1979. It is estimated that, without congressional intervention, 31.9% of tax-exempt issuances would have been mortgage subsidy bonds in 1980. See H.R. Rep. No. 96-1167, th.2, at 542 (1980).

\textsuperscript{64} See Linda Grant Williams, Use of Securitization Techniques in Financing Sports Facilities, 811 PLU/Comm 757, 768 (2000).

\textsuperscript{65} Id.; see also Zimmerman, supra note 1.

\textsuperscript{66} Purposes for which revenue bonds could be floated had ranged from projects quite traditionally public in nature (airports, water treatment systems, sewer systems) to those less so (football arenas). Curbs on permitted purposes were intended to limit the use of what came to be characterized in the act as “private activity bonds.” The House Ways and Means Committee was concerned about both the cost to the federal fisc imposed by these bonds and the corrosive effect that increasing investment by higher-income taxpayers in the rapidly growing volume of tax-exempt bonds had had on taxpayer confidence in the overall tax system. Thus, the committee sought to bolster taxpayer confidence by limiting the use of tax-exempt bonds to those functions deemed most essential to the general public.
meaning of the Internal Revenue Code.

Revenue bonds floated in order to finance the building of sports stadia fell within this newly created category. Quite logically, these bonds had been secured by the stadium itself and serviced by revenues generated from the operation of stadia used predominately if not exclusively by the professional franchise.\(^{67}\) Consistent with the Internal Revenue Code of 1954, the interest on these revenue bonds had been accorded tax-exempt treatment. The 1986 amendments to the Internal Revenue Code deny exempt status on the interest of any “private activity bond” that is not “a qualified bond (within the meaning of section 141).”\(^{68}\) A private activity bond does not qualify for tax-exempt status if it meets either the private business use test\(^{69}\) and private security or payment test or the private loan financing test.\(^{70}\)

The ten percent (10%) private business use test of Section 141(b)(1) is met if more than ten percent of the proceeds of an issue are used in a trade or business of a nongovernmental person.\(^{71}\) Given the level of franchise usage, bonds issued to that point would not meet the business use test. The private security or payment test relates to the nature of the security for, and the source of, the payment of debt service on an issue.\(^{72}\) Where the payment of debt service on an issue is secured by an interest in property used or to be used in a private business use, the issue meets the private security or payment test. As noted, the bonds were secured by the stream of revenues generated by the stadium and as such would be deemed private. Thus, the bonds failed both tests and, in the context then existing, Congress seemed to have moved effectively to thwart public financing for these enterprises.\(^{73}\)

D. Bringing It All Together

On the state and local level, however, two important financial changes were...
occurring that undercut the potential for congressional control. First, in this era, public funds were increasingly earmarked in order to finance public purpose projects broadly defined (i.e., tax increment financing using earmarked property tax proceeds to pay for public improvements incident to urban renewal projects). Importantly, bonds so constructed were frequently characterized as revenue bonds. There was a corresponding and broader (though unrelated) use of a variety of targeted fees and charges in furtherance of attempts both to expand the revenue base and to export local costs. While obviously includable in general revenues (as was frequently the case), these targeted fees and charges have also routinely been earmarked for a particular purpose. For example, room taxes, meal taxes, and lottery proceeds have frequently been earmarked for elementary and secondary education. Importantly, though earmarking revenue has generally been condemned by political scientists and economists for a variety of reasons, such schemes have consistently passed state constitutional muster.

Taken together, these developments meant that pursuant to appropriate enabling legislation financial resources to service bonds obviously being used to finance stadia construction could be cobbled together from a variety of revenue sources unrelated to the stadium itself since earmarking even general source revenue was deemed to be an appropriate legislative prerogative. Recent financing packages have tapped lottery proceeds, sales tax increases, “sin tax” increases, hotel and motel occupancy taxes, and car-rental fees to service the bonds. The most unusual source has been a surcharge on players’ salaries. Further, these arrangements survive state constitutional challenge since they are

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74 With tax increment financing, property tax proceeds are used to service bonds issued by a municipality to underwrite infrastructure improvements in a blighted area. Property tax proceeds driven by pre-improvement assessments within the area determine the level of support for the local governmental entity; post-improvement property tax proceeds are earmarked to pay for public improvements and to service the bonds. Tax increment financing schemes have been held constitutional in a number of states. See, e.g., Tax Increment Fin. Comm'n v. Dunn Constr. Co., 781 S.W.2d 70 (Mo. 1989); Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374 (Colo. 1980). But see Muskegon Urban Renewal Auth. v. Excise Bd., 1993 Okla. LEXIS 102 (Okla. 1993) (held unconstitutional).

75 These tended to be fees and charges imposed upon voluntary consumption, a factor that quite likely contributed to public acceptance.


77 Id. at 12–14.

78 See, e.g., Gasper, supra note 60, at 347.

79 MLB’s PNC Park (Pittsburgh Pirates) opened in March 2001. It was constructed at a cost of $237 million. To assist in retiring the attendant indebtedness, a 1% wage tax is to be levied on players who do not live in the city. The tax is expected to raise $7 million for the project. Munsey & Suppes, Ballparks: PNC Park, at www.ballparks.com/baseball/national/pithpk.htm (last updated Aug. 2001).
undergirded by public purpose, and interest generated by the bonds is treated as tax-exempt interest on governmental bonds for federal income tax purposes since care is always taken to insure that "no more than 10% of the debt was secured by the stadium itself." As a result, stadium finance has shifted from user-borne enterprise related sources to the public at large as unrelated revenues are tapped in order to service stadium-related indebtedness.\textsuperscript{80} Finally, because these are not qualified private activity bonds, the amounts borrowed are not included within the respective state's volume cap.

The extent of the shift to use of unrelated taxes and fees is emphatically borne out by data reporting on post-1986 financing techniques. A 1997 article reports that, at that time, at least 19 local governments across the country were using or had used travel (hotel & motel) taxes to support stadiums.\textsuperscript{81} Other recent specific examples include $310 million from a five-county 1/10 cent sales tax for MLB's Milwaukee Brewers' $399 million Miller Park (opened in 2001),\textsuperscript{82} and $175 million from a combination of rental-car, hotel and casino taxes for MLB's Detroit Tigers' $360 million Comerica Park (opened in 2000).\textsuperscript{83}

The building frenzy has not been halted; financing has simply veered off in unanticipated directions.\textsuperscript{84} The Code as amended has done nothing to shore up the public entity's perceived bargaining disadvantage, to restore public confidence in the integrity of the system, or to achieve greater protection of the federal fisc. Moreover, state and local taxpayers are inappropriately more burdened by expense attendant to constitutionally permissible economic experimentation than they were prior to Code amendment.

\textsuperscript{80} See, e.g., David Burke, Legislative Reform: The Stop Tax-Exempt Arena Debt Issuance Act, 23 J. Legis. 149, 150 (1997) ("[T]he burden of paying off the stadium debt is unfavorably redistributed from the owners to the general public ... as state lotteries, sales taxes, car rental fees, and alcohol and tobacco taxes are substituted for stadium related revenues.").


\textsuperscript{82} Munsey & Suppes, Ballparks: Miller Park, at http://www.ballparks.com/baseball/national/miller.htm (last updated Nov. 2001.)

\textsuperscript{83} Munsey & Suppes, Ballparks: Comerica Park, at http://www.ballparks.com/baseball/american/detpbl.htm (last updated Apr. 24, 2002); see also Methods of Financing and Potential Sources of Construction Funds for Professional Sports Stadiums, at http://msfc.com/fundingsources.htm (last visited Apr. 4, 2002). This website selectively lists sources of funds provided both publicly and privately from 1994 to the present for a number of construction projects. Unfortunately, it does not report actual figures.

\textsuperscript{84} A comment attributed to Senator Moynihan professed congressional ignorance toward the idea that city governments could be pressured by sports franchise owners to devise financings that were allowed under Section 141. Gasper, supra note 60, at 89.
III. THE REALITIES AND EFFECTS OF PRESENT FINANCING PRACTICES

When one examines where the money to build comes from and how returns on the investment are realized, as well as what kinds of spin-off economic activity might result, it is small wonder that returns so far have fallen short of projections. Monies invested come from public pockets to either enable stadium construction or defray the cost of related public infrastructure improvements. Returns flow into private tills as franchise owners receive the benefits of, for example, skybox leases, club seating, naming deals, sweetheart leasing arrangements, maintenance agreements, and property tax breaks.

From the perspective of state and local taxpayers, this shift in financing has been particularly undesirable. As has been noted, the 1986 amendments have resulted in a shift to earmarked general revenues from retail sales taxes, reliance on a host of excise taxes, and accounting tactics otherwise accepted as legitimate to underwrite the revenue bonds floated.\textsuperscript{85} Therefore, and ironically, congressional limits on local government’s ability to utilize a purer form of revenue bond (hallmarking reliance on revenue from the stadium itself) in this context have led to the aggressive exploitation of a host of regressive, non-enterprise related sources to service bonds.\textsuperscript{86}

To further heighten this irony, these levies are statistically likely to be borne by taxpayers who do not utilize the facility. Data suggest that fan bases tend to be highly localized rather than heavily tourist oriented.\textsuperscript{87} Further, fans wherever

\textsuperscript{85} See infra text accompanying note 72.
\textsuperscript{86} State-local levies tend to be regressive because, with the exception of property taxes and retail taxes, they are frequently structured as flat-rate levies with no adjustment for ability to pay. Thus, hotel/motel taxes, “sin” taxes, car rental taxes, and admission, concession, and parking taxes will be borne most heavily by the least affluent segment of the population. To the extent that lottery proceeds are tapped to service this indebtedness, the same criticism applies. Though not technically a tax, empirical data establishes that the least affluent are the most likely to participate in this activity and, as a result, suffer a regressive effect. See, e.g., Citizens for More Important Things v. King County, 932 P.2d 133 (Wash. 1997) (upholding the earmarking of public funds, including certain license plate and lottery sales revenues (state) and sales and use taxes (county), for the preconstruction costs of a baseball stadium).
\textsuperscript{87} See Joseph L. Bast, Heartland Executive Summary Sports Stadium Madness: Why It Started, How to Stop It, at http://www.heartland.org/studies/sports/madness-ps.htm (last visited May. 3, 2002). “A stadium would indeed generate new money for a metropolitan area if it attracted a significant percent of its fans from outside the immediate area.” Id. This is not generally the case for baseball and basketball, where the number and frequency of games means that most of the market for ticket sales is metropolitan. Football games, because there are fewer of them and they are scheduled on weekends, draw fans from greater distances. However, due to the small number of football games, just eight regular season home games means that the total number of fans attending football games throughout the season is much smaller than the number attending baseball or basketball games. Id. at 4; see also Gasper, supra note 60, at 124 (observing that studies by sports economists conclude that the majority
located may well be unable to take advantage of the entertainment offered there even if they were inclined to do so. Access to professional sports events is becoming increasingly financially problematic for the "average fan." A recent article reported that ticket price increases for three of the four major sports in the past five years tripled the inflation rate. An evening of baseball now costs a family of four in excess of $150. Average fans are literally being priced out of the market.\textsuperscript{88}

Moreover, especially in an urban setting, the tax burden from these excises adds to the increased general tax burdens borne by area residents. There may be additional general costs attributable to the public costs of related and necessary infrastructure improvements as well as neighborhood disruption or, in some cases, destruction.\textsuperscript{89} Infrastructure improvement, land acquisition, and site remediation are frequently components of stadium construction. Further, and especially where new construction has a suburban citing, any jobs created are likely to be seasonal and low-paying\textsuperscript{90} and may well represent poor substitutes for earlier employment opportunities now no longer available.\textsuperscript{91} Finally, assuming for the sake of argument that some degree of economic vitality is

of fans are local, repeat attendees, not people who travel extensively to see the teams).

\textsuperscript{88} See Paul Farhi, It's a Whole New Ballgame, Wash. Post, Dec. 30, 2001, at A1; see also http://www.heartland.org/studies/sports/madness-ps.htm (last visited Apr. 18, 2001). Scott A. Jensen, Comment: Financing Professional Sports Facilities With Federal Tax Subsidies: Is It Sound Tax Policy, 10 Marq. Sports L.J. 425, 425 (2000). Of interest here is Driskill v. Dallas Cowboys Football Club, 1973 U.S. Dist. LEXIS 13397 (N.D. Tex. 1973) (sustaining the defendants' motion for summary judgment in suit challenging as violative of antitrust law an arrangement between the Dallas Cowboys and the City of Irving requiring the purchase of a Texas Stadium revenue bond in order to purchase regular season tickets). The plaintiff alleged that the arrangement denied him the opportunity to purchase "choice" ticket locations since season ticket holders received preferred seating locations. This tie-in is quite likely the economic ancestor of the personal seat license—the current tie-in arrangement of preference. The difference between required purchase of a revenue bond and a personal seat license is more than cosmetic: The purchase price of the revenue bond was received by the governmental borrower; the proceeds from sale of a personal seat license go to the franchise.

\textsuperscript{89} See Kenneth L. Shropshire, Stadium and Arena Financing, Including the Problem of Franchise Relocation, 758 ALI-ABA 473 (1999). In Chicago, an existing urban neighborhood was cleared out to make room for thousands of parking spaces near Comiskey Park. Id. at 482. Note that these costs are to be borne by the least able tax base as construction is more and more in urban as opposed to suburban settings.

\textsuperscript{90} See id. The typical sports franchise on non-game days probably employs fewer than fifty people, excluding the athletes. Employment may increase to around 2000 people for game day operations. The most visible workers are the peanut vendors, ticket takers, and ushers. Id. at 482.

\textsuperscript{91} See Safir, supra note 24 at 953, n.104. The economy is not really expanding, and other entertainment opportunities (movies, restaurants, etc.) may be compelled to close as consumers opt for the newer, costlier entertainment. The theory here is that there are no new disposable entertainment dollars, only increased competition for the limited number of such dollars in the hands of consumers.
achieved as a result of this activity, in many instances little of the benefit may be received by the governmental entity. Potential returns are all too frequently bartered away as location incentives in the form of sales, income, and property tax abatements\(^{92}\) or some other non-"debt"\(^{93}\) arrangement (i.e., contractual arrangements such as the ticket guarantee made by the city of San Diego to the NFL San Diego Chargers.)\(^{94}\) Other additional public costs may flow from maintenance contracts on the stadium or sweetheart leases for parking or related facilities.

Additionally, this earmarking undermines the extent to which proceeds from such taxes might be used for competing “public purposes.” Proceeds from “sin taxes”—i.e., taxes on cigarettes—might otherwise be earmarked to support associated health-care costs of smoking-related illnesses and anti-smoking educational efforts.\(^{95}\) Public education has also been a frequent beneficiary of

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\(^{92}\) See, e.g., County of Erie v. Kerr, 373 N.Y.S.2d 913 (N.Y. App. Div. 1975) (upholding as lawful exempt treatment for real property tax purposes of the exclusive use leasehold interest conveyed to the Buffalo Bills in the municipally owned stadium); see also Cuno v. DaimlerChrysler Inc., 154 F. Supp. 2d 1196 (N.D. Ohio 2001) (demonstrating the same point, though in a slightly different context). The U.S. District Court for the Northern District of Ohio ruled that a 10-year property tax exemption and investment tax credit approximating $280 million granted by an Ohio city and school districts to carmaker DaimlerChrysler to induce it to remain in the city violated neither the equal protection clause of the Ohio Constitution nor the commerce clause of the U.S. Constitution. Finally, see Robert Tomeho, In Toledo, a Tension Between School Funds and Business Breaks, Wall St. J., July 18, 2001, at A1 (commenting on the impact of tax abatements on funding for education).

\(^{93}\) Generally, indebtedness includes existing obligations. A long-term bond obligates the borrower to repay the entire indebtedness over that pre-determined period of time. Hence, the entire amount is taken into consideration and is considered indebtedness. On the other hand, even if a contractual obligation is to exist for a period of years, the public entity’s obligation is treated as annual where the obligation to pay is predicated upon the current receipt of valid consideration. In that case, the obligation is only a current expense for that annual amount since there is no existing obligation to pay the entire contract price. See, e.g., Rider v. City of San Diego, 959 P.2d 347 (Cal. 1998) (holding that the city of San Diego did not incur indebtedness by agreeing to make rental payments for the expansion of the city’s convention center since the bonds were subject to annual appropriation by the city to defray use and possession incident only to that year).

\(^{94}\) This arrangement was the subject of a recent report on the NBC Nightly News. NBC Nightly News (television broadcast, July 11, 2001). Under that provision of the contract between the City of San Diego and the San Diego Chargers, city officials guaranteed a paid attendance of 60,000 tickets for all Charger home games for a ten-year period beginning in 1997. The dollar amount of this consideration is to be either paid directly to the team or deducted from the rental payment owed by the Chargers to the city for use of Qualcomm Stadium. Grand Jury Report, supra note 13, at Section I: The Ticket Guarantee.

lottery proceeds or tourist (hotel-motel-meals-rental cars) taxes.\textsuperscript{96} Obviously, one use precludes the other. This is arguably an inappropriate tradeoff.

Similarly, public benefit has been measured by determining the extent to which the investment has generated public benefit—jobs and increased tax revenues—in a vacuum. What are the opportunity costs? Might the same return be realized more efficiently? Early studies suggest that the latter may be true. The extent to which urban undertakings were a part of those studies, however, is unclear. If a better result is realized for urban as opposed to suburban siting, that consideration is potentially important. Appropriate data needs to be generated and analyzed. In the meantime, public costs should be controlled and taxpayers protected to the extent possible.

Overall, costs both direct and indirect are likely to be substantial and broad-ranging. The ultimate question of benefit remains unanswered but in the interim, state and local taxpayers must be protected from inordinate costs as these questions are resolved.

IV. SOLUTION? STRUCTURALLY, STATE AND LOCAL VOTERS NEED HELP

Recent experience establishes quite convincingly that this activity will not diminish on its own. Self-policing is out of the question; too many franchise owners continue to request—demand—new facilities or, less frequently, substantial renovations to existing facilities.\textsuperscript{97} For example, the NBA Grizzlies chose to move from Vancouver to Memphis (rather than Louisville) on the strength of a financial package including a new arena expected to cost $200 million to $250 million, in spite of the fact that Memphis had built a $65 million arena seating 19,000 only ten years earlier in 1991.\textsuperscript{98}

There is at least one option unavailable to municipalities: A team cannot be

\textsuperscript{96} Id. From 1980 to 1998, lottery sales across all states increased from $2,393,000,000 to $35,588,000,000. From 1965 to 1995, government received $92,922,000,000 from this activity. Of this amount, approximately 60\% went to education. U.S. Census Bureau, Table 529, Lottery Sales—Type of Game, 1980 to 1998 and Use of Proceeds, 1964–95, Statistical Abstract of the United States: 1999, at http://www.census.gov/prod/www/statistical-abstract-us.html (last visited Feb. 11, 2002).

\textsuperscript{97} See generally Cagan & DeMause, supra note 3, at 28–41. The following quotes may also reflect owner attitudes. Cleveland Browns owner Art Modell, who moved his team to Baltimore in exchange for a new stadium built entirely at public expense, stated: “The pride and presence of a professional football team is more important than 30 libraries. In addition, Miami Heat political campaign manager Mike Murphy stated: “Some politicians want to kill the new waterfront park, and keep the tourist money for their wasteful spending” Cagan & DeMause, Top 10 Dumbest Reasons to Build a New Stadium, at http://www.fieldsofchampions.com/top10/index.html (last visited Apr. 29, 2002).

compelled by an injunction to remain in a given city. Zimmerman notes that
effective curbs on this activity would have to emanate from one of three points:
(1) a state’s constitution, (2) a state’s statutes, or (3) organized taxpayer
opposition since “state-local taxpayers must be willing to pay at least 90% of the
debt service from some revenue source other than stadium-generated
revenue.”

State legislatures have not rejected these projects. As the preceding
discussion has shown, legislative declarations of public benefit respected as
controlling by state supreme courts dynamically construing public purpose have
been the critical grounding for these projects, and front-line elected public
officials, constitutionally empowered to either pursue or reject these projects,
seem no more able to say no. Rather, a number of them have said, “none wants
to be known as the [governor/mayor/city council] that let the team get away.”
The Grizzlies’ move to Memphis provides a recent example of legislative
support. The state of Tennessee has pledged its support for the new arena
comparable to that provided to Nashville five years earlier when the Houston
Oilers became the Tennessee Titans: a sales tax rebate on tickets, refreshments
and souvenirs.

That leaves voter opposition as the bar. This, of course, assumes that voter
input is possible in the first place. Under the proposal as it then existed, a
referendum was not required to validate the Grizzlies’ proposed arena.

99 See, e.g., L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381 (9th Cir. 1984)
(holding that the NFL’s attempt to prevent Raiders football team from moving was a violation of the
Sherman Act); see also City of Oakland v. Oakland Raiders, 32 Cal. 3d 60 (Cal. 1982) (holding that
teams are property that can be claimed by a municipality under eminent domain).
100 See John R. Dorocak, Tax Advantages of Sports Franchises: Part I - The Stadium, 1999 Law
Review of Michigan State University Detroit College of Law 579, 587 (1999), available at
argued that the change in the 1986 law was not meant to prohibit tax-exempt financing for sports
stadiums but rather to require a broad based voter approval: This requirement was designed to limit
the availability of the federal tax exemption to private projects that have significant value to the
residents of the local community, as evidenced by their collective willingness to repay the bonds that
finance them from general revenues.”).
101 See supra note 45.
102 E.g., several members of the San Diego City Council told a grand jury inquiring into the
circumstances surrounding the 1995 ticket purchase guarantee contract, discussed supra note 95, that
“they ‘did not want to be part of the council that lost the [San Diego Chargers football] team.’” Grand
103 Megan Woolhouse, Announcement Brings Celebration—And Questions—in Memphis: Some See
Team As Asset; Others Call Cost Too High, available at http://www.courier-
104 Id.
many cases, public authorities oversee these projects. Public authorities are independent from general-purpose governmental entities and may possess fiscal powers solely under entity control. As such, the electorate may not participate in decisionmaking at all. If voters have an opportunity to react to the proposal, it is certainly true that, in a number of instances, voters have said “no” to public finance of such projects and have been able to make it stick. For example, MLB’s San Francisco Giants now play in Pacific Bell Park. The park, opened in 2000, was built at a cost of $319 million and was entirely privately financed. It became the first privately financed ballpark built for Major League Baseball since Dodger Stadium opened in 1962. There were four unsuccessful ballot measures from 1987 to 1992 calling for public financing. Other privately financed arenas completed since 1988 include Boston’s Fleet Center for the NBA Boston Celtics and the NHL Boston Bruins, Portland’s Rose Garden Arena for the NBA Portland Trailblazers, and St. Louis’ Kiel Center, home of the NHL St. Louis Blues. These are, however, a minority of completed projects.

There have also been a host of projects ratified by voters in appropriate referenda. These include the 1996 referenda approving hotel and rental car taxes to help fund the NFL Detroit Lions’ Ford Stadium and the MLB Houston Astros’ Enron Field, and a 1999 referenda approving hotel and rental car taxes to help fund San Antonio’s Alamodome for the NBA Spurs. Note, however, that these are all excise taxes that the voters themselves don’t expect to pay. Rather, tourists are expected to bear these levies. The voters in Harris County, home of the Houston Astros were most careful on this point: They exempted themselves from the rental car tax. Importantly, even here it is difficult to argue that “state-local taxpayers [are themselves] willing to pay at least 90% of the debt service from some revenue source other than stadium-generated revenue.”

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107 Private Financing, supra note 105.
110 Building a Ballpark, supra note 108.
111 See supra note 1. Zimmerman recognizes this, as the following statement indicates: “These user-type financing fees met little resistance among state-local taxpayers, probably because nonusers of the stadium perceived it to be a free good—general taxes were not being levied to pay for the stadium.” See Zimmerman, supra note 1.
Even where the collective judgment rejects these proposals, that opposition may be effectively undone by a public/private coalition through a resort to financial arrangements not requiring voter input at all.\footnote{See id. (discussing the difference between general obligation and revenue bonds).} Pittsburgh’s PNC Park again provides an example. In 1997, voters in a surrounding eleven-county area rejected a half-cent sales tax increase in order to build a new ballpark, football stadium, and enlarged convention center. The referendum failed. Nevertheless, an alternative plan relying on sources not requiring a referendum allowed the project to move forward.\footnote{Robert Dvorchak, PNC Park: The Political Struggle Over Financing PNC Park Went Into Extra Innings (Apr. 15, 2001), http://www.post-gazette.com/pirates/20010415pncbuildtext9.asp (last visited June 5, 2001).} Similarly, the Washington legislature approved a public finance package for Seattle’s Safeco Field after voters rejected a 1995 attempt at public financing.\footnote{Building a Ballpark, supra note 108.}

Moreover, there is always the unanticipated case. After a failed 1995 effort in Washington to authorize by referendum an increase in the sales tax to be earmarked for Kingdome repair, a special 1996 referendum personally financed by billionaire NFL Seahawk owner Paul Allen authorized the funding of a new stadium/exhibition center for the team. The 1996 election cost Mr. Allen $6,000,000 while opponents spent $160,000. That was the first time that a referendum had been individually financed, and the campaign was the most expensive in Washington history. The referendum passed 51.1% to 48.9%.\footnote{Rodney Fort, Stadiums and Public and Private Interests in Seattle, 10 Marq. Sports L.J. 311, 315 (2000). Fort offers the following analysis of the problem: \textit{This refusal to authorize} would seem a pretty clear directive, but imagine the situation now facing state and local politicians. From their perspective, nothing could be worse than a close vote that fails. If they leave it as the vote dictated, nearly as many constituents are angry as would be if they intervene and find the funding anyway. \textit{How can there be any political profit in this issue? But, in this situation, if you irritate the politically less potent and help the politically potent, re-election chances can be enhanced, on net. We can deduce that those must have been the political margins, since the ‘will of the people’ was overridden by a unified response of elected representatives at all levels.} Id. at 313.} Two overall conclusions seem fairly drawn. First, even where taxpayers approve public financing, they do not expect to pay the burden themselves. Second, taxpayers have frequently rejected these funding proposals only to have that judgment thwarted in ways legitimate but immune to challenge. Voter activism has not been and will not prove to be a reliable barrier to these projects. Voters as a group are neither as tightly organized nor as well funded as stadium proponents. When the moment of decision arrives, the nod will go to stadium
proponents—the political group deemed more strategically important.  

V. EXPLORING AVENUES OF FEDERAL INTERVENTION—THE CASE FOR RETURNING TO THE PURE REVENUE BOND MODEL AS THE FINANCING INSTRUMENT OF CHOICE

In the final analysis, as was true in 1986, Congressional action remains the most promising avenue to greater control. That action must almost certainly focus on how bonds are used as the financing mechanism of choice. Congress has failed once in its attempt to curb this activity and has been unable to date to enact any subsequent legislation. I have argued that this activity should not as a policy matter and probably cannot as a practical matter be halted by prohibiting the use of bonds generating tax exempt interest. The opportunity for meaningful relief for state and local taxpayers remains however.

Several prior proposals aimed at curbing perceived abuses have attempted to utilize alternatively an income tax and a non-income tax approach and have fallen into three major categories. Approaches have included: (1) compelling league financial assistance for localities incident to franchise relocation; (2) permitting litigation-free relocation only in defined circumstances; and (3) either limiting or eliminating use of private activity bonds for this purpose. In my view, non-tax approaches miss the mark entirely and will ultimately afford no protection to vulnerable taxpayers. A tax approach will provide relief only if predicated upon the traditional revenue bond model. This approach has not been explored in the present environment. The following sections review each prior approach in turn beginning with the non-tax suggestions and then suggest a fourth alternative: borrowing through qualified private activity bonds but with no volume cap. This Part will begin with the non-tax class of proposals.

A. The Stadium Financing and Franchise Relocation Act of 1999

In 1999, Senator Arlen Specter (R-PA), an outspoken critic of stadium finance from public resources, proposed this bill in an effort to curb franchise relocation and to provide some level of financial protection for local governments. Specifically, baseball and football would be permitted to retain antitrust exemption as long as 10% of their broadcasting revenues were contributed into a trust fund. The trust fund would be used to pay up to 50% of construction costs as long as local governments provided $1 of financing for every $2 from the fund. Further, all four major sports would be accorded an antitrust exemption that would permit denial of a member team’s relocation

116 Id. at 313.
request.117 Focusing solely on the trust fund requirement, and assuming that meaningful sums were entrusted,118 the proposal misses the mark. If the tax law were to remain unchanged, any local contribution would still have to be made from non-enterprise sources. Thus, there would be no relief from the regressive burden borne by taxpayers.

Similarly, several earlier proposed bills would attempt to regulate franchise moves by granting limited antitrust immunity. Four of the five bills in this group would permit a representative public entity to challenge proposed relocation through civil action. Further, two of the bills would provide relief to localities losing a franchise.119 Once again, however, a critical piece is missing. None of these proposals curb reliance upon public revenues unrelated to stadium operation. This is where the real problem lies. Comparatively speaking, the most promising avenue of reform is likely to be through amendment to the Internal Revenue Code.120

B. Barring Use of Publicly Borrowed Funds in Stadium Construction

Another prominent critic of this situation has been former Senator Daniel Patrick Moynihan (D-NY) who also characterized the practice as a transfer of a federal tax subsidy to franchise owners who did not need it. Beginning in 1996, he sought to end this financing through a failed bill, the Stop Tax-Exempt Arena Debt Issuance Act (STADIA).121 In the bill, Senator Moynihan proposed an amendment to the Internal Revenue Code122 intended to limit if not eliminate reliance on borrowed funds to finance stadia. That bill would have amended Section 141 by classifying as “private-activity” bonds any bond issue where the proceeds that are to be used (directly or indirectly) to provide professional sports facilities exceed the lesser of (a) five percent of such proceeds or (b) $5,000,000. Direct or indirect use of public monies from whatever source to service the bonds would be enough to invoke a “private activity” characterization. Reliance on public payments, however generated, would invalidate the bonds. Thus, the amendment would have encompassed the variety of unrelated revenue sources

118 This assumption may well be unwarranted. See id. at 205–06 (reporting on industry testimony asserting that the trust funds would be woefully under funded in light of the level of expense).
119 See Safir, supra note 24, at 958–60.
120 See also Baker, supra note 29, at 298–99 (summarizing other non-tax alternatives suggested during the 1996 hearings on “Challenges Facing the Future of the Professional Sports Industry” conducted by the Committee of The Judiciary of the United States Senate).
121 See Gasper, supra note 60, at 343.
122 Id.
discussed earlier and, if passed, would effectively end taxpayer borrowing through revenue bonds generating tax-exempt interest as subsidy for stadium construction. The bill, however, was never reported out of committee.

In hindsight, the failed bill would clearly have created at least as many questions as it purported to answer. Even assuming that all avenues of taxpayer subsidized borrowing were finally foreclosed, public participation in such projects would not necessarily have ended. The Moynihan bill was intended to halt use of public funds for stadium construction and compel instead a shift to reliance on gate receipts to service the bonds causing construction costs to be borne by franchise owners and supporters. This outcome is certainly unobjectionable. Contemporary debate, however, suggested that public costs could well increase if, as predicted, public entities shifted from tax-exempt to taxable bonds to finance stadium projects. Of course, the key point is the underlying assumption that such construction projects would continue.

Further, as has been pointed out, other avenues of financial assistance remain and would likely continue to be exploited. Government subsidies may fall into several categories including but not limited to tax-exempt financing. Other categories include property or other tax breaks and infrastructure assistance. For example, what of funds to be spent for improvement of infrastructure generally? Frequently, stadium construction is accompanied by infrastructure upgrades. Are funds expended to acquire property to be converted to complimentary uses addressed? In fact, Senator Moynihan

123 See id. at 347.
124 That approach tracks the first option mentioned by Zimmerman to curb use of tax-exempt bonds in this manner: elimination of stadium tax-exempt bond finance. Zimmerman, supra note 1, at n.113. The federal government should terminate the subsidy it provides to professional teams and players through tax-exempt financing of stadiums, areas, and ballparks. Id. at 1164.
125 The inclusion of general obligation bonds and revenue bonds muddles this issue.
126 And use of proceeds of operation becomes even less objectionable if revenues from lease of skyboxes, club seating and personal seat licenses were also used for this purpose. See Baker, supra note 29, at 297.
128 See Chapin, supra note 41, at 376 (pointing out that “[e]ven in cases where the public sector is not helping to cover construction costs they are often on the hook for major infrastructure upgrades and other concurrent investments in the district surrounding a new facility”).
129 The Ohio Revised Code defines sports facility as: “a sports facility that is intended to house major league professional athletic teams, including a domed stadium, together with all parking facilities, walkways, and other auxiliary facilities, real and personal property, property rights, easements, and interests that may be appropriate for, or used in connection with, the operation of the facility.” Ohio Rev. Code Ann. § 307.696(A)(3) (Anderson 2001). This is a very broad definition. See Lee Geige, Cheering for the Home Team: An Analysis of Public Funding of Professional Sports Stadia in Cincinnati, Ohio, 30 U. Tol. L. Rev. 459, 478 (1999) (describing the definition of the term “sports
intended that the subsection as amended reach any facility that generates monetary benefits to those who use the facility for sports but excluded all infrastructure improvements that connect to larger public-use systems.\textsuperscript{130}

What of non-debt arrangements? Cities can resort and have resorted to outright contribution\textsuperscript{131} or to some contractual arrangement not treated as debt under applicable state law.\textsuperscript{132} Arrangements such as these are not affected at all by this proposed legislation. In the long term, the Moynihan approach would have been unlikely to work. It, too, would have likely proven susceptible to manipulation by clever lawyers. Taxpayers would continue to play no meaningful role in the negotiations and would be no better protected.

Finally, there is the policy question: Should the independence of state and local officials be restricted by eliminating any possibility that bonds generating tax-exempt interest might be used for this specific purpose in order to control costs to the federal fisc? As this Article has argued, unless federal law prohibits the activity, absolute proscription is inappropriate and undesirable. It would ultimately thwart the experimentation that has been deemed a particularly desirable role for the respective states.

In only two instances are there presently outright prohibitions against the use of governmental bonds: Municipalities may not use tax-exempt governmental bonds (1) to finance the takeover of investor-owned electric and gas utilities or (2) to finance extra-territorial residential rental property.\textsuperscript{133} This avenue should not be pursued further.

\footnotesize{facility” provided in the Ohio Revised Code).

\textsuperscript{130} Gasper, supra note 60, at 62.

\textsuperscript{131} See, e.g., Denver Plans to Sell Land for Stadium for $1 (Aug. 4, 1998), http://sportsillustrated.cnn.com/football/nfl/news/1998/08/04/browns_site/ (last visited Feb. 27, 2002) (describing how the city of Denver plans to sell a site that will be used for a football stadium and is valued at $40 million to the stadium district for $1); see also Safir, supra note 24, at 961 (discussing Phoenix’s $238 million contribution for the Bank One Ballpark).

\textsuperscript{132} For example, leases and sale-leasebacks may be used. Under a lease obligating a public entity, the annual rental is the only debt incurred. That obligation becomes a successive annual obligation in each year of the lease. There will be no violation of debt limitation provisions as long as the annual lease payment can be met out of current revenues. Obviously, this characterization may become problematic when cumulative rentals are equivalent to the cost of the improvement. See, e.g., City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass’n, 408 P.2d 818, 834 (Ariz. 1965). Another possibility is contingent financing. In this scenario, the financing of capital improvements is guaranteed through contingent pledges of municipal support in guarantee of possible default. A variant of this may well be the guarantee of ticket purchase made by the City of San Diego to the San Diego Chargers. See supra text accompanying notes 94–95.

\textsuperscript{133} See Zimmerman, supra note 1. Zimmerman also notes that there is precedent for tax-exempt treatment for private-activity bonds that facilitate economic activity. Small issue industrial development bonds continue to be permitted. These bonds are subject to state volume caps.
C. Exempt Bonds Under the Volume Cap

Overall, reform must be more nuanced than the approach suggested earlier by Senator Moynihan. As has been shown, the sources of public investment are quite varied and defy the relatively simple solution earlier proposed to date by Congress: amendment of the Code in a manner intended to thwart the use of revenue bonding arrangements. From the standpoint of state and local taxpayers, the best federal tax approach would be one that reduces profitability for team owners and protects the electorate at large from reactive schemes that result in even greater cost with what remains, at best, questionable benefit. To this end, the best approach would be to require that bonds floated for this purpose be more than ninety percent underwritten by revenues generated by the stadium itself, thus imposing a sort of revenue-sharing scheme.

Stadium revenues tapped for this purpose could include lease payments, revenues from parking, and concessions, as well as revenues from advertising, naming opportunities, and club and skybox seating. This should also, necessarily, curb the earmarking of general revenues, and reduce reliance on regressive user fees and charges and the host of excise taxes that have been increasingly tapped for this purpose. The public entity would share meaningfully in the profitability of the enterprise and at the state and local level, the cost of that enterprise would be primarily borne by those actually using the facility. This approach also requires minimal federal administrative oversight; once the bonds are qualified, stadium operation need not be monitored on an ongoing basis in order to assure appropriate public/private usage.

Approaching reform in this way entails something of a paradigm shift in two ways. First, Congress has rarely, if ever, included consideration of the impact of amendment of the Internal Revenue Code on the economic fortunes of states and localities. It is incontrovertible that such changes in recent years have had far-reaching, often negative implications for state economies. Given its focus on

134 Fort, supra note 115, at 316 ("Typically, when a team moves into a new stadium, lease arrangements are dramatically altered in their favor. This can be worth millions of dollars to the team. Interestingly, these lease alterations also represent millions of dollars that could go to defray the annual cost of the stadium."). Of course, this shift would not be risk-free. A number of highly visible companies that paid millions for naming rights have encountered financial difficulties and filed for bankruptcy. They include Enron (Houston baseball), TWA (St. Louis football) and PSINet (Baltimore football). See Farhi, supra note 88. Indeed, the seeming correlation between naming venture and financial difficulty has led one commentator to make the tongue-in-cheek suggestion that there might be a jinx. See Thurm, supra note 38, at A1. In any event, the risk of adverse outcome if financial difficulty is encountered by a naming entity would be right where it should be: on stadium users.

135 E.g., Economic Recovery Tax Act of 1981, Pub. L. No. 97-34. ("loophole" closure and extensive changes in rate structures as the two affected piggy-backed systems); Economic Growth and Tax
the impact of the earlier legislation and analysis of the resultant state and local fiscal practices, the amendatory process unfolding as described has such considerations at the heart of the action proposed. Second, even where impact on state and local government has been considered, it has focused on government \textit{qua} government. Amendment intended to protect a politically impotent group has not been the norm. The amendment proposed, however, would have that effect: The legions of taxpayers who bear the indirect cost of "public" projects undertaken without their participation in the debate or in spite of their rejection of that economic burden would be protected. The cost of such projects would be primarily borne by those directly benefiting from and utilizing the facility.

The several writers advocating this approach have made volume cap applicability a part of this recharacterization.\textsuperscript{136} This is basically old wine in new bottles. As noted earlier, after 1986, state-local taxpayers would have had to effectively object to this use of public resources. That did not happen. Under this reformulation, taxpayer activism is again critical—this time as successful interest groups for competing public fund usage. As the next section explains, that kind of effective activism is no more likely under this new regime than it has been post-1986 to date. Ideally, bonds floated for stadium finance should be extra-cap.

D. Exempt Bonds Pursuant to an Application for Volume Cap Variance

My envisioned approach would permit borrowing through qualified private activity bonds as described above. This change must not, however, bring with it volume cap inclusion. To redefine the volume cap to include bonds floated for this additional purpose could, in the final analysis, again prove most detrimental to the taxpayers least able to bear additional public costs without meaningful returns.

This is likely to be the case because other bonds presently included within the respective state’s volume cap are generally fairly easily tied into more traditional notions of public welfare. If bonds for stadium construction were included under the volume cap, bonds for these other now competing purposes would quite probably be "crowded out."\textsuperscript{137} Interest groups for these competing

\textsuperscript{136} See, e.g., Lathrope, supra note 45 at 1163 ("Reclassifying bonds used for tax-exempt financing of sports facilities would force bonds issued . . . to compete with other forms of financing subject to the cap."); Zimmerman (noting that a second option would allow stadium bonds to be issued only as tax-exempt private-activity bonds subject to the private-activity bond volume cap); Dorosak, supra note 100, at 607 (discussing a federal tax law change so that bonds used to finance stadia are private activity bonds counting against the state cap).


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usages undoubtedly exist, but are unlikely to be interest groups capable of prevailing against the interests supporting new stadia. Assuming that the stadium proponents succeed in having their project funded with qualified private activity bonds, there simply would be little or nothing left in the state's "line of credit." Lack of funding for included projects could well undercut the state's ability to provide safe, sanitary housing (qualified residential rental projects), undercut clearly permissible policy (mortgage subsidy bonds to facilitate home ownership, and student loan bonds to make education more accessible or impede delivery of public services (exempt facilities such as mass commuting facilities, facilities for the furnishing of water, sewerage facilities and facilities for the local furnishing of electric energy or gas).

Importantly, there would be no public opportunity to monitor specific legislative choices and establish voter preferences at the ballot box. Because these projects are all potentially self-liquidating and hence ideal candidates for funding using revenue bonds, none ordinarily require voter referendum before being undertaken. Thus, voter ability to object to and reorder priorities established by state and local government through its use of this borrowing power would be limited solely to political action and, as a result, quite compromised.

Furthermore, the failure to include exempt bonds permitted for stadia construction under the volume cap as presently conceived does no fundamental violence to underlying policy. The cap was conceived and imposed when mortgage subsidy bonds were particularly desirable instruments of investment and were capturing an increasingly large percentage of the market. There was simply no end in sight.\textsuperscript{138} The same certainly does not presently hold true for stadium financing projects even in the face of increasing construction costs. There are only so many franchises and given the combination of ever increasing costs and the decreasing number of likely markets, there is unlikely to be either an inordinate number of future moves or a significant number of expansion franchises.\textsuperscript{139} Finally, forcing users to internalize the cost should result in limits

\textbf{http://www.nablj.org/library/edex/pdf/deprivactbonds88-95.pdf} (last visited May 3, 2002) (reporting that "[f]or 1995, the aggregate limit on new money bond issues subject to the volume cap was $15.1 billion, excluding carryovers from prior years. The aggregate issuance of new money tax-exempt private activity bonds subject to these volume cap limitations was $14.8 billion for 1995.") Id.

\textsuperscript{138} In fact, between 1988 and 1995, fifty percent or more of all long term private activity bonds volume was related to mortgage revenue bonds (the congressionally-sanctioned successor to mortgage subsidy bonds) or Section 501(c)(3) bonds. See Nutter, supra note 137.

\textsuperscript{139} For example, Commissioner Selig (MLB) has recently announced that the number of major league baseball franchises will be reduced by two teams. See Downsizing the American Game, Wall St. J., Nov. 8, 2001, at A22. Competition is increased but controlling the absolute number of franchises.
on such costs simply by virtue of market forces. At some point, further price increases will simply no longer be absorbed by users. Congress need not fear market capture from these bonds.

This approach is admittedly pragmatic. It assumes that state public purpose will remain broad enough to treat economic subsidy for professional sports as constitutionally permissible. Further, it assumes that the public sector will remain in a relatively weaker bargaining position. It also concedes that political pressures are such that it is next to impossible to terminate all such activity. My objective is to attempt to craft an approach that concedes to realities while providing as much protection as possible to the taxpayers likely to be least able, financially or politically, to negotiate a protective approach.

Finally, I concede that this contextual return to the purer form of revenue bond does nothing to protect federal taxpayers generally. My proposed shift is not protective of the federal fisc. Senator Moynihan’s approach, if successful, would have accomplished that. I join others, however, in arguing that Senator Moynihan’s approach would ultimately have proven unsuccessful: STADIA would not have had its intended effect.

In my view, the costs of stadium construction, if socialized at all, should be socialized as broadly as possible. The vagaries of state and local finance presently allow socialization of the expense on that level. As a result, the expense is presently all too often borne by those least able to bear such costs. Congressional attempts to thwart these far-flung schemes may inadvertently impose impermissible limits on policymaking below the federal level. Overall, the more progressive structure of the federal tax system would spread any public costs involved in these projects more equitably while forcing those directly benefited by this construction to internalize some, if not most, of that cost.

CONCLUSION

Construction of professional sports stadia remains, however marginally, a permissible variant of state economic experimentation. State and local taxpayers are most burdened by public expense attendant to construction of professional sports stadia. Further, they are likely to be the group least able both politically

imposes some element of cost control. The same comment might be made about several of the exempt activities included under the volume cap. There will be only so many airports and solid waste disposal facilities constructed in a given region in any one-tax year. This suggests that the volume cap is potentially over inclusive, a fact likely recognized for Congress has removed several activities from under the volume cap. In fact, qualified veterans mortgage bonds, qualified § 501(c)(3) bonds, and private activity bonds for airports, docks and wharves are excluded from the volume cap. See I.R.C. § 146(g). Those activities more likely to generate indeterminate demand—housing, student loans—appropriately remain under the volume caps.
and economically to bear that burden. Congressional action has created this situation and congressional action should be taken to correct it.

The pro-facility argument asserting broad public benefit accruing from expenditures for stadia has not been completely refuted; benefit more narrowly defined may be realized and should be permitted if proven particularly efficacious in urban settings.\(^{140}\) In the meantime, construction costs should not be borne by taxpayers at large through the use of unrelated revenues to defray expense; users should bear these costs. It may be unrealistic—possibly unwise—to try to legislate the problem out of existence—i.e., to force the cessation of activity. Congress should nevertheless act to make this activity as financially self-sustaining as possible. Redefining these bonds as qualified private activity bonds issued pursuant to a request for variance from the permissible volume cap will bring long-overdue relief to inappropriately burdened state and local taxpayers.

\(^{140}\) Chapin has commented on the changing nature of this argument:

As [the] pro-facility argument has been undermined [employment impacts, tax revenues, and spin-off benefits], facility advocates have begun to link these projects to a slightly different set of economic development goals. Rather than arguing that sports stadia and arenas lead to broad-based economic development, proponents have increasingly targeted these projects to microarea, or district-level development. These projects, proponents argue, can help physically revitalize central city cores and re-establish the centrality of the center city as a place of recreation, tourism and business.

Chapin, supra note 41, at 377.