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AMERICAN CITIES HELD HOSTAGE: PUBLIC STADIUMS AND PRO SPORTS FRANCHISES

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ABSTRACT

The price of building professional sports facilities, sometimes greater than \$1 billion, is often paid in part by taxpayers. But several persuasive studies by economists have found that the economic benefits of such a facility do not outweigh the costs to taxpayers. Nonetheless, municipal governments continue to fork over massive amounts of taxpayer dollars for such projects while a very limited number of individuals actually benefit from the construction. This Article highlights several recent examples of publicly-funded athletic venues which have failed to return profits to anyone except the sports teams' owners and limited corporate interests and discusses the legal infrastructures which can be used to combat this perceived misapplication of public funds.

INTRODUCTION

The United States is in the third decade of a publicly financed stadium-building boom. Several of the recent projects exceed \$1 billion.¹ Most of the stadiums have been built with substantial public funds and support.² A continuing flow of scholarly and business articles has documented the fact that most of the new stadiums have not produced net economic gain to the host areas as civic leaders and sports team owners promised. Despite this growing evidence, such stadiums continue to be built. This Article presents an ethical and legal analysis of the current stadium situation, and proposes a multi-part solution supported by the evidence to date. In Part I, the authors review the reports of the economic impact of such stadiums. In Part II, the authors analyze several of the recent major sports stadium financing transactions. In Part III, the authors examine several tools used by the proponents of stadiums to provide financing and avoid legal challenges, including: tax-exempt public bonds, condemnation of private lands, and anti-trust exemptions for major sports teams. Part IV examines possible strategies that might be adopted to prevent the abuse of American cities by major sports teams. This section includes a legal analysis of court and legislative actions that limit the *Kelo v. City of New London* decision that allowed em-

¹ *A Look at the World's Billion Dollar Stadiums*, ASSOCIATED PRESS (July 15, 2015, 10:00 AM), <http://pro32.ap.org/article/look-worlds-billion-dollar-sports-stadiums>.

² See *infra* appendix I, for a list of stadiums built or renovated between 2000 and 2015.

inent domain for private use rather than public use. This Article concludes with suggestions for future research and analysis.

I. REPORTED ECONOMIC IMPACT OF MAJOR SPORTS STADIUMS

“Most of the large and growing literature on the public financing of sports stadiums concludes that the costs far exceed the benefits.”³ This sentence begins an article reviewing the public goods created by a National Football League (“NFL”) team. The article references prior literature and then uses the Community Valuation Method (“CVM”) to determine the value that residents of Jacksonville, Florida, place on the NFL’s Jaguars.⁴ The value that residents placed on the team was less than Jacksonville spent to refurbish the stadium that hosts the team. Given that the Jaguars are the only major sports team in the city, these results are surprising. “Coupled with the large body of literature finding negligible economic impact of teams and stadiums on city and regional economies, the CVM results strengthen the case against public subsidy.”⁵

Some teams do own their own stadiums, such as the Washington Redskins and the Chicago Bulls. However, a current trend is for team owners to persuade or threaten their way into stadiums largely built at the public’s expense.⁶ Team owners, who would not otherwise see a reasonable return on their investment, are more likely to find a deal more attractive if they can have the stadium built with public funds or subsidies. To accomplish these substantial public subsidies, the team owners’ sales pitches are multifaceted. First, the team owners promise that the new stadiums will be required to keep a current pro sports team or to attract a new team. Second, the team owners argue that the economic benefits of the stadiums to the community will exceed the substantial costs involved. These promised benefits are both financial and intangible. Financial benefits include promises of increased tourism, increased employment, and overall economic growth of the community hosting the new sports facility.⁷ The intangible benefits

³ Bruce K. Johnson, Michael J. Mondello & John C. Whitehead, *The Value of Public Goods Generated by a National Football League Team*, 21 J. SPORT MGMT. 1, 1 (2007).

⁴ *Id.*

⁵ *Id.* at 19.

⁶ Bruce K. Johnson & John C. Whitehead, *Value of Public Goods from Sports Stadiums: The CVM Approach*, 18 CONTEMP. ECON. POL’Y 48, 48-58 (2000); see *All Things Considered: St. Louis Rams Consider Move to Los Angeles*, NPR (May 5, 2015) (on file with General OneFile); see also *infra* App. I.

⁷ Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI BUS. L. REV. 483, 491-492 (2002), <http://repository.law.miami.edu/umbl/vol10/iss3/2/>.

include increased civic pride and maintaining or moving a city into a higher profile.⁸ These latter benefits are difficult to measure. One study that developed a quantitative formula to study civic pride found that even a measurable amount of civic pride did not equal public support for pro sports stadiums.⁹ Team owners and politicians who seek public support based upon civic pride may find it increasingly difficult. Many American cities do not have a major sports team, but they still enjoy a positive public image and civic environment. An example is Austin, Texas.¹⁰

The team owners promote these alleged benefits, despite growing evidence that such stadiums do not meet their promised financial outcomes.¹¹ A 2003 study by economics professors Dennis Coats and Brad Humphreys predicted the current trends.¹² The authors observed that sports stadiums have about a 30-year lifespan. At the time of the study, stadiums were approximately 65% publicly funded.¹³ They also observed that trends favor single sport stadiums versus earlier multi-use facilities that further expand the public outlay. This in turn renders the stadium subsidies increasingly difficult to justify from an economic standpoint.

The authors suggested that the addition of amusement-park-like attractions drives up the cost of such facilities. These additional amusement facilities may have a shorter lifespan than the 30 years for a traditional sports stadium—further complicating the overall economic justification.¹⁴

One of the most famous multi-sport venues was the Houston Astrodome, completed in 1965, and host to the Houston Astros of Major League Baseball (“MLB”)¹⁵ and the Houston Oilers of the NFL. Additionally, the multi-use facility was host to the Houston Livestock Show and Rodeo, one of the largest events of its kind, which is held annually between the football and baseball seasons. Currently, each major Houston pro sports team has its

⁸ Irwin A. Kishner & David R. Hoffman, *Fields of Dreams: The Benefits of Public and Private Cooperation in Financing Professional Sports Stadiums*, 28 ENT. & SPORTS LAW. 20, 20 (2010).

⁹ Peter A. Groothuis et al., *Public Funding of Sports Stadiums: Public Choice or Civic Pride?*, 39 E. ECON. J. 515, 524 (2004).

¹⁰ Biz Carson, *Little Big Town*, 22 WIRED 52, 52 (2014).

¹¹ Johnson et al., *supra* note 3, at 49; Johnson et al., *supra* note 6.

¹² Dennis Coates & Brad R. Humphreys, *Professional Sports Facilities, Franchises and Urban Economic Development*, 3 PUB. FIN. & MGMT. 335, 350 (2003).

¹³ *Id.* at 338.

¹⁴ *Id.*

¹⁵ See Ryan Holeywell, *Take a Glimpse at the Eerie Interior of Houston's Astrodome*, RICE U. URBANEDGE BLOG, (Oct. 27, 2015), <http://urbanedge.blogs.rice.edu/2015/10/27/take-a-glimpse-at-the-eerie-interior-of-houstons-astrodome/#.WBFHgC0rKUK>.

own stadium, occupying valuable public lands and public capital.¹⁶ The building of single purpose stadiums intensifies the issue of how to dispose of huge facilities like the Astrodome that are outdated and now being replaced.¹⁷

An interesting aspect of the publicly financed building boom is the impact on the finances of the teams. Not surprisingly, a study of the impact of new stadiums reveals that NFL teams garnered substantial increases in revenue and franchise value.¹⁸ Such findings underscore the question as to whether the public should continue to subsidize such ventures, when the economic value to the community is not realized and the teams are earning increasing profits.

The special purpose stadiums not only consume greater public resources in most cases, but they may also not serve the teams as well as larger, multi-use venues. From 2006 through 2011, the Houston Dynamo, a Major League Soccer (“MLS”) team, played at Robertson Field, located on the grounds of the University of Houston. This public university stadium was able to accommodate over 30,000 fans. BBVA Compass Stadium, a new soccer-only stadium with a maximum capacity of about 22,000 fans, opened in 2012. Although the team now has its own facility, the Houston Dynamo will never be able to match their earlier top-attendance games since the new soccer-only stadium is roughly 8,000 seats smaller than Robertson Field.¹⁹

At the same time, a sociological analysis by sociology professors Kevin Delaney and Rick Eckstein suggests that public financing for stadiums has expanded, despite economic and other data not supporting such expenditures, due to behind-the-scenes support by corporate executives.²⁰ The theory behind the authors’ premise suggests that CEOs of major corporations find it easier to recruit high-level executives to a city with major sports

¹⁶ See THE OFFICIAL SITE FOR THE CITY OF HOUSTON, <http://www.houstontx.gov/about/houston/sports-rec.html> (last visited on Oct. 2, 2016).

¹⁷ See Andrew Dansby, *Once a Symbol of Ambition, Astrodome Turns 50 as an Eyesore*, HOUSTON CHRONICLE (April 4, 2015, 7:18 PM), <http://www.houstonchronicle.com/news/houston-texas/article/Once-a-symbol-of-ambition-Astrodometurns-50-as-6177697.php>.

¹⁸ Matthew Brown, Mark Nagel, Chad McEvoy & David Rascher, *Revenue and Wealth Maximization in the National Football League: The Impact of Stadia*, 13 SPORT MKTG. Q. 227, 227 (2004).

¹⁹ *All-Time MLS Attendance*, HOUSTON DYNAMO, <http://www.houstondynamo.com/history/stats/attendance> (last visited Oct. 22, 2015).

²⁰ Kevin Delaney & Rick Eckstein, *Urban Power Structures and Publicly Financed Stadiums*, 22 SOC. F. 331, 333 (2007).

teams.²¹ This again appears to support the thesis that the wealthy and powerful have manipulated the issue in their favor.

There are certainly advocates for the public support of stadiums funded by corporate executives. One article suggests that using the “leverage” of the team to integrate it into the fabric of life in the community will create a value to the community that may not be evident from an economic analysis.²² The authors suggest that it is politically improvident for elected officials to stop advocating for and providing public support for professional teams. Accordingly, looking past or failing to take into account the failed economic promises of the team owners is mandated.²³ However, this logic fades in light of the number of studies that continue to document the public’s refusal to vote to provide public financial support for teams.

II. REVIEW OF SEVERAL RECENT PRO SPORTS STADIUMS

It is not necessary or useful to review all the publicly supported pro sports stadiums since 1990, or even 2000. The authors have selected three recent examples of publicly subsidized pro sports stadiums to explore in more detail: BBVA Compass Stadium (2012, Houston, TX); Marlins Park (2012, Miami, FL); and U.S. Bank Stadium (2016, Minneapolis, MN).

BBVA Compass Stadium – Houston, Texas – Houston Dynamo (MLS)

Completed in 2012, public funds financed 37% of the Dynamo’s stadium as part of the \$95 million price tag.²⁴ Given the international community in Houston, the success of soccer is not surprising. What is surprising is that the public was pushed to contribute to this stadium when it already had a public facility that would have provided a larger seating capacity and led to higher ticket sales. As part of the selling of the partial public financing of the project to the public at large, an “Impact Report” was presented in 2013.²⁵ A statement from this report illuminates the approach taken by the proponents of such stadium financing deals:

²¹ *Id.* at 347.

²² Emily Sparvero & Laurence Chalip, *Professional Teams as Leverageable Assets: Strategic Creation of Community Value*, 10 *SPORT MGMT. REV.* 1, 2-3 (2007).

²³ *Id.* at 5.

²⁴ Timothy B. Kellison, *Civic Paternalism in Political Policymaking: The Justification for No-Vote Stadium Subsidies and the Public Response* 1, 2 tbl. 1.1 (2014) (unpublished Ph.D. dissertation, Florida State University) (on file with the Florida State University Libraries).

²⁵ BBVA Stadium Impact Report, Strategic Development Solutions, (2013), http://www.wave-landventures.com/pdfs/bbva_compass_stadium_impact_report_1375467777.pdf.

“Taxpayers provide the direct subsidies invested in a project via local, state or federal government programs, yet taxpayers do not have a direct vote on the specific project being funded. An impact report *serves to ensure continued taxpayer support of such funding efforts by defining a project’s community, environmental and economic impacts as well as its financial returns.*”²⁶

And yet, objective studies not paid for by the proponents of such stadiums, such as the ones cited above in Part I, indicate that the outcome for the public is far less favorable than the stadium advocates promise. The BBVA Compass Stadium Impact Report claims that the location was selected for the purpose of revitalizing “Houston’s highly-distressed East Downtown and adjacent neighborhoods.”²⁷ In fact, much of the new construction in the area discussed in the report required the bulldozing of Houston’s vibrant “Chinatown.” In the case of the Dynamo stadium, the economic projections of a substantial return to the community leave out an important control factor. The Houston area was already experiencing an unprecedented boom in real estate and development, which included the downtown area. An objective economic analysis would have compared the growth that would have taken place without the specific stadium project against the growth that was directly attributable to the project. It is important to note that the public support for the Dynamo stadium project was not put to a vote by public officials.²⁸

In the case of the Dynamo stadium, the public financial participation does not seem to have negatively impacted the political future of Houston’s mayor during the key funding of the project. Houston, combined with the surrounding Harris County, contributed the land, which was reportedly worth approximately \$15 million at that time, as well as \$20 million in “infrastructure improvements.”²⁹ City Controller at the time, Anise Parker ran for mayor of Houston as the Dynamo stadium was in the final stages of approval. She was not only elected, but she was reelected twice—leaving only due to term limits at the end of 2015. She was obviously not politically damaged by her financial support for the new stadium, Marlins Park, Miami, FL – Miami Marlins (MLB)

²⁶ *Id.* at 2 (emphasis added).

²⁷ *Id.* at 5.

²⁸ Sarah Talalay, *Marlins Stadium Update No. 100,308*, SUN SENTINEL, (Oct. 3, 2008, 5:23 PM), http://www.sun-sentinel.com/sfl-mtblog-2008-10-marlins_stadium_update_no_1003-story.html.

²⁹ Neil deMause, *Houston Dynamo Stadium Approved – No, Really This Time*, FIELD OF SCHEMES (Dec. 6, 2010), <http://www.fieldofschemes.com/2010/12/06/2848/houston-dynamo-stadiumapproved-no-really-this-time/>.

The campaign and then the substantial public financing for the Miami Marlins' new baseball stadium reads like the pages of a John Grisham novel. The Marlins pushed for a new stadium, so in 2008 the Dade County (FL) Commissioners voted to use \$347 million in public funds to construct the ballpark.³⁰ A former NFL team owner, Norman Braman, subsequently sued to prevent the use of public funds to finance the new stadium on the grounds that it violated the Florida constitution since the stadium primarily benefitted a private entity.³¹ Braman's suit failed at the trial court level and that decision was upheld on appeal.³² In a coup of circular reasoning, the Florida courts ruled that a public purpose was served since a public body had determined that it was in the public interest to finance this stadium.³³ This is despite the fact that 100% of the non-baseball revenue would also go to the Marlins.³⁴

Since the Marlins Stadium opened in 2012, the team has reportedly been plagued by poor ticket sales.³⁵ The Marlins' share of the stadium construction costs was \$135 million, but this also included the retention of naming rights, which was a valuable perk for the team. Additionally, part of the money was to be paid as a modest rent for the facility over the next 20 years—an amount far below the cost of capital even in today's world of cheap borrowing. As of October 2016,³⁶ the Marlins had been unable to sell rights to its stadium name, despite lucrative payments collected by other teams such as the Houston Texans, which garnered \$300 million over 30 years for its naming rights.³⁷

The *coup de grâce* in the Marlins Park saga may be that in 2013 the Securities and Exchange Commission ("SEC") filed suit in Federal District Court against the City of Miami and its Budget Director, Michael Boudreaux, for securities fraud in the manipulation of the city's finances to

³⁰ Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demand for Free Public Stadiums*, 6 RUTGERS J. L. & PUB. POL'Y 35 (2008).

³¹ See *Braman v. Miami-Dade County*, No. 08-03787-CA-15, 2008 WL 4189770, *1 (Fla. Cir. Ct. Sept. 9, 2008), *aff'd*, 18 So. 3d 1259 (Fla. Dist. Ct. App. 2009).

³² *Id.*

³³ *Id.* at 28-38.

³⁴ Edelman, *supra* note 30, at 45.

³⁵ Marc Edelman, *Will an Empty Marlins Park Create Backlash Against Sports Stadium Subsidies?*, FORBES (Feb. 21, 2013, 9:34 PM), <http://www.forbes.com/sites/marcedelman/2013/02/21/will-an-empty-marlins-park-create-backlash-against-sports-stadium-subsidies/#4068277f4bdf>.

³⁶ *Marlins Park* BALLPARKS OF AMERICA, <http://www.ballparksofbaseball.com/ballparks/marlins-park/> (last visited October 30, 12:17 AM).

³⁷ Edleman, *supra* note 30, at 46.

make it appear more financially stable when selling bonds to the public.³⁸ Those included bonds to fund the Marlins stadium.³⁹ Recently, the United State Supreme Court has been asked to overrule the denial by both the trial court and the 11th Circuit Court of Appeals of Boudreaux's motion to dismiss him from the case on qualified immunity grounds.⁴⁰

The political fallout from the public financial support of the Marlins stadium was much greater than the Dynamo stadium in Houston. Miami-Dade Mayor Carlos Alvarez was recalled in an election tied to public outrage over the stadium financing in March 2011.⁴¹ It does appear that reaction of communities to public financing of pro sports stadiums is highly localized.

U.S. Bank Stadium, Minneapolis, MN – Minnesota Vikings (NFL)

This stadium is being built on the site of the prior Vikings stadium, and has made the MarketWatch list of "5 Cities Getting the Worst Deal from Sports Teams."⁴² Currently its price tag is in excess of \$1 billion.⁴³ To put this amount into perspective, NASA's New Horizons satellite and its ten-year trip to Pluto cost less than this stadium will.⁴⁴ The public share of the billion-dollar total will be \$498 million, with \$150 million to be paid by the City of Minneapolis and \$384 million to be paid by the State of Minnesota.⁴⁵ In an interesting move, the City's portion will be paid by "redirecting" part of the current convention center taxes, which are being collected.⁴⁶ The State's share will come from gambling revenues and a one-time cigarette inventory tax.⁴⁷ Examining these sources leads to a key observation: these

³⁸ S.E.C. v. City of Miami, 581 F. App'x 757, 758 (11th Cir. Sept. 5, 2014), *rev'd sub nom.* Boudreaux v. S.E.C., (U.S. Mar. 17, 2015) (No. 14-1142).

³⁹ Douglas Hanks, *How a \$91 million loan on the Marlins ballpark will cost Miami-Dade \$1.2 billion*, MIAMI HERALD, Jan. 24, 2013, <http://www.miamiherald.com/news/business/economic-time-machine/article1946635.html>.

⁴⁰ Boudreaux v. S.E.C., (U.S. Mar. 17, 2015) (No. 14-1142).

⁴¹ Tim Elfrink, *Six Lies about the Marlins Stadium*, MIAMI NEW TIMES, May 5, 2011, <http://www.miaminewtimes.com/news/six-lies-about-the-marlins-stadium-6380692>.

⁴² Joe Kimball, *Vikings Stadium Makes MarketWatch List of 'Worst Deals from Sports Teams'*, MINNPOST, July 17, 2015, <https://www.minnpost.com/political-agenda/2015/07/vikings-stadium-makes-marketwatch-list-worst-deals-sports-teams>.

⁴³ U.S. Bank Stadium, STADIUMS OF PRO FOOTBALL, <http://www.stadiumsofprofootball.com/nfc/USBankStadium.htm> (last visited Oct. 30, 2016).

⁴⁴ Pat Kessler, *Reality Check: Trip to Pluto Cost Less Than Vikings Stadium*, CBS MINNESOTA, (July 15, 2015, 6:39 PM), <http://minnesota.cbslocal.com/2015/07/15/reality-check-trip-to-pluto-costs-less-than-vikings-stadium/>.

⁴⁵ U.S. BANK STADIUM COST AND FINANCING, <http://www.vikings.com/stadium/new-stadium/faq.html#cost> (last visited Oct. 1, 2016).

⁴⁶ *Id.*

⁴⁷ *Id.*

taxes could have been earmarked for healthcare, housing for the poor and elderly, and for education instead of financing a new stadium for a privately owned team which will be the sole recipient of the profits that are generated.

Similar to the suit filed against the Marlins Stadium, a former mayoral candidate in Minneapolis filed suit in state court to block the sale of the bonds sold to build the new Vikings Stadium.⁴⁸ Paralleling the outcome in Florida, the Minnesota Supreme Court denied the suit to block the public bonds' sale.⁴⁹ On the positive side, such suits underscore at least some unhappiness with the public funding approach and help to bring to the public's attention issues related to the financing. This is especially important in "no-vote" situations like the three stadiums discussed in this part of the article. In addition to the lawsuits, groups of citizens against publicly funded stadiums are emerging, and their presence underscores the discontent with how the stadiums are funded. The Citizens for Viking Stadium Democracy and Justice is a self-described group of "Minneapolis citizens seeking to compel the Minneapolis City Council to comply with provisions of the Minneapolis City Charter that require a popular referendum to authorize the city's role in financing and funding the new Vikings stadium."⁵⁰ When taxpayer money is on the table, taxpayers should have a voice.

While the Vikings will pay more than \$500 million in construction costs, the team owners will recover their share of the total stadium costs easily.⁵¹ It is projected that the Vikings will receive over \$200 million just for the naming rights paid by U.S. Bank.⁵² The Vikings website also reports a projected income of \$125 million from selling "Stadium Builders Licenses,"

⁴⁸ Janet Moore, *Minnesota Supreme Court Asked to Dismiss Vikings Stadium Bond Suit*, STAR TRIBUNE (Jan. 15, 2014, 9:32 AM), <http://www.startribune.com/minn-supreme-court-asked-to-dismiss-vikings-stadium-bond-suit/239982631/>.

⁴⁹ Associated Press, *Minnesota Supreme Court Dismisses Vikings Stadium Suit*, WASH. H. TIMES (Jan. 21, 2014, 7:58 PM), <http://www.washingtontimes.com/news/2014/jan/21/minnesota-news-in-brief-at-758-pm-cst/?page=all>.

⁵⁰ *Citizens for Viking Stadium Democracy and Justice*, FACEBOOK, https://www.facebook.com/pages/Citizens-for-Viking-Stadium-Democracy-and-Justice/409145455868384?sk=info&tab=page_info.

⁵¹ Brian Bakst, *Vikings bump stadium share past \$500 million*, NEWS OK (Nov. 22, 2013, 9:16 AM), <http://newsok.com/vikings-bump-stadium-share-past-500-million/article/feed/620137>; Tom Goldstein, *Vikings stadium proposal isn't for the "people"*, CITY PAGES (Mar. 14, 2012), <http://www.citypages.com/news/vikings-stadium-proposal-isnt-for-the-people-6755964>.

⁵² Nick Halter, *U.S. Bank Confirms Naming Rights Deal for New Vikings Stadium*, MINN.ST. PAUL BUS. J. (June 15, 2015, 4:31 PM), <http://www.bizjournals.com/twincities/blog/sports-business/2015/06/u-s-bank-pays-220m-for-vikings-stadium-naming.html>.

which require annual purchase of season tickets in order to maintain the license.⁵³

The Minnesota stadium is so large that it requires both state and local support. Much like the situation in Houston, the key politicians in Minnesota do not seem to have paid the price for supporting these large public outlays. The Governor of Minnesota, Mark Dayton, remains in office. The Mayor of Minneapolis during the stadium approval process, R.T. Rybak, left office in 2014, deciding not to run after serving for three terms.⁵⁴

The No-Vote Trend for Public Financing Support for Pro Sports Stadiums

Financing proposals calling for substantial public funds impact the taxpayers in every jurisdiction that permits public financing for pro sports stadiums. The three examples above were no-vote situations. Moreover, a disturbing trend since 2000 is for such stadium financing deals to be approved by political bodies without a vote by the public.⁵⁵ In fact, the statistics may be stunning to some:

Since 2005, more than 30 stadium projects representing nearly 90% of all stadium development have been allocated over \$8.5 billion of public funds without any form of voter approval.⁵⁶

Frequent authors on sports management issues Timothy Kellison and Michael Mondello attribute the political will to approve such expenditures to a phenomenon they refer to as “civic paternalism.”⁵⁷ In short, even if the voters disapprove, the politicians think that they know better and the outcome will justify the disregard of the voters. It would seem that with the growing tidal wave of evidence that public subsidies are not justified by either economic impact or civic pride, that the no-vote approach should become increasingly unattractive in the United States. Moreover, although there is the argument that the voters can always vote their elected officials out of office if they disagree with their representatives’ votes, in view of the overwhelming evidence noted above indicating the failures of such projects to achieve the promised outcomes, the argument of abuse of power by those elected officials is becoming more valid and more powerful.

⁵³ U.S. BANK STADIUM COST AND FINANCING, *supra* note 45.

⁵⁴ Eric Roper, *Rybak authors book about tenure as Mpls. mayor*, STAR TRIBUNE (Oct. 26, 2015, 5:13 PM), <http://www.startribune.com/rybak-authors-book-about-tenure-as-mpls-mayor/337153251/>.

⁵⁵ Timothy B. Kellison & Michael Mondello, *Civic Paternalism in Political Policymaking: The Justification for No-Vote Stadium Subsidies*, 28 J. SPORT MGMT. 162, 162 (2014).

⁵⁶ *Id.*

⁵⁷ *Id.* at 165.

III. LEGAL AND LEGISLATIVE “ENABLERS” OF PUBLIC PRO SPORTS STADIUMS

Tax Exempt Bonds

Traditionally, bonds issued by state and local governmental organizations are tax exempt and are known collectively as “municipal bonds” or “munis.”⁵⁸ Generally, the yields are lower because public entities are viewed as low-risk bond issuers and the purchaser of the bonds would not be obligated to pay income tax on the interest.⁵⁹ The Tax Reform Act of 1986 changed the rules to allow clearly public purpose bonds to continue to be exempt, but defined multiple categories of bonds that would be subject to different rules that in some cases will make some or all of the income taxable.⁶⁰ The type of bond relevant to the financing of sports stadiums is a “private activity bond.”⁶¹ For any exemption at all, at least 95% of the funds raised from the sale of bonds must go to the stated purpose for the sale of the bonds.⁶² Persons subject to the Alternative Minimum Tax (“AMT”) in particular may find that they are not subject to tax on the bond dividend income directly, but the income is included in their gross income for purposes of the AMT.⁶³

Employees own some muni bonds through tax-deferred employee savings plans. Indeed, some individuals with modest amounts in the investment market may own some of these muni bonds. For optimal value, these bonds are held by investors in higher tax brackets who own them directly, rather than in a tax-deferred plan. Obviously, such bonds are heavily in the realm of persons and organizations wealthy enough to purchase bonds and to benefit from their tax advantaged status. The sensitivity to the tax deductibility of tax-exempt private activity bonds was illustrated following the enactment of the 1986 Act. The volume of munis dropped 75% from 1985 to 1986.⁶⁴ When the governmental organizations sell bonds, the interest of course be-

⁵⁸ William C. Spaulding, *Municipal Government Bonds*, THIS MATTER, <http://thismatter.com/money/bonds/types/government/municipal-bonds.htm> (last visited June 28, 2015).

⁵⁹ SEC. & EXCH. COMM’N, MUNICIPAL BONDS, <https://www.investor.gov/introduction-investing/basics/investment-products/municipal-bonds>.

⁶⁰ Spaulding, *supra* note 58.

⁶¹ See *Tax-Exempt Private Activity Bonds*, I.R.S. Pub. 4078 (Rev. 9-2005), <http://www.irs.gov/pub/irs-pdf/p4078.pdf> (last visited June 28, 2015).

⁶² 26 U.S.C. § 142 (2016).

⁶³ See Spaulding, *supra* note 58.

⁶⁴ Gerald Auten & Edward Chung, *Private Activity Tax-Exempt Bonds*, INTERNAL REVENUE SERV., www.irs.gov/pub/irs-soi/86ebprac.pdf (last visited June 29, 2015).

comes the responsibility of the public. No matter what is said in public, the reality is that generally all of the resources of the government agency that issued the bonds are dedicated to paying that interest and ultimately retiring the bonds. This is especially true since The Tax Reform Act of 1986 required that only 10% of the funds used to pay off tax-exempt private activity bonds for stadiums or convention centers may come from ticket sales and concessions.⁶⁵ This would appear to limit the use of such bonds. However, if the public agencies issuing these bonds use tax proceeds from other sources, for instance, a hotel tax, then such revenue can be used to make up the difference without making the bonds taxable. To estimate the magnitude of the tax subsidy:

Tax exemptions on interest paid by muni bonds that were issued for sports structures cost the U.S. Treasury \$146 million a year, based on data compiled by Bloomberg on 2,700 securities. Over the life of the \$17 billion of exempt debt issued to build stadiums since 1986, the last of which matures in 2047, taxpayer subsidies to bondholders will total \$4 billion, the data show.⁶⁶

Despite the promoters' statements to the contrary, the reality is that the stadiums tend to benefit the wealthy—those wealthy enough to buy the tax advantaged bonds, buy the tickets and luxury box seats at the new stadiums, and of course, largely for the super-rich, own the teams as well. In a recent display of wealth and excess, Steve Ballmer, former CEO of Microsoft, paid \$2 billion for the Los Angeles Clippers of the National Basketball Association (“NBA”).⁶⁷ Ironically, this massive price tag did not include a stadium, since the Clippers play at the Staples Center in Los Angeles, a privately owned venue. The Staples Center is host to four major sports teams, the Lakers and the Clippers of the NBA, the Los Angeles Kings of the National Hockey League (“NHL”), and the Women’s National Basketball (“WNBA”) team the Los Angeles Sparks.⁶⁸ This fact adds new force to the question as to why pro teams each need to have their own stadiums and why any type of “public welfare” should be provided. In fact, this approach

⁶⁵ See Aaron Kuriloff & Darrell Preston, *In Stadium Building Spree, U.S. Taxpayers Lose \$4 Billion*, BLOOMBERG BUS. (Sept. 4, 2012, 11:01 PM), <http://www.bloomberg.com/news/articles/2012-09-05/in-stadium-building-spree-u-s-taxpayers-lose-4-billion>.

⁶⁶ *Id.*

⁶⁷ ESPN News Services, *Steve Ballmer New Clippers Owner*, ESPN (Aug. 13, 2014), http://espn.go.com/los-angeles/nba/story/_/id/11343259/steve-ballmer-officially-new-owner-los-angeles-clippers.

⁶⁸ *About Staples Center*, STAPLES CTR., <http://www.staplescenter.com/about/about-staples-center> (last visited June 25, 2015).

turns the allegedly progressive United States income tax system on its head by advantaging the wealthy at the expense of the lower and middle-income taxpayers.⁶⁹

Use of Public Condemnation Power to Build Stadiums for Private Benefit

In addition to raising the money to build new sports stadiums, the real estate on which the stadiums are located also needs to be acquired. Parallel to the use of public dollars to finance construction, is the use of the public power of eminent domain to acquire the property. Traditionally, the power of eminent domain has been only invoked, as delimited by the 5th and 14th Amendments to the United States Constitution, to acquire private property for a public purpose. The Supreme Court's 2005 decision in *Kelo v. City of New London*,⁷⁰ however, turned this legal mandate on its head and permitted the City of New London, Connecticut, to use eminent domain for a solely economic taking. As noted above, eminent domain has been used primarily to justify the taking of private property for many public purposes, including: revitalizing blighted regions,⁷¹ reorganizing housing markets,⁷² and reinvigorating sluggish economies, but all of the purposes have been within a public realm.⁷³ *Kelo* addressed the "important question of when eminent domain may constitutionally be used to take property for projects that are not publicly owned and operated facilities."⁷⁴ Justice Stevens, in writing the majority decision, notes that the taking at issue in *Kelo* served a public purpose, satisfying the interpretation dictated by precedent, which were increased tax revenues, reduced unemployment, and other expected companion benefits to collectively benefit the public. By the Court's reasoning, such benefits allow the *Kelo* taking to be categorized as serving a "public purpose."⁷⁵ Ironically, as noted above, these are the identical arguments put forth to justify spending public money to construct private sports stadiums.

⁶⁹ Dwight H. Merriam & Mary Massoron Ross, *Introduction* to EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT, at xvii (Dwight H. Merriam & Mary Massoron eds., American Bar Association 2006).

⁷⁰ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁷¹ *Berman v. Parker*, 348 U.S. 26, 35 (1954).

⁷² See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).

⁷³ See *Kelo*, 545 U.S. at 478.

⁷⁴ Dwight H. Merriam & Mary Massoron Ross, *Introduction* to EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT, at xvii (Dwight H. Merriam & Mary Massoron eds., American Bar Association 2006).

⁷⁵ *Kelo*, 545 U.S. at 484.

In his dissent to the Supreme Court of Connecticut's decision regarding *Kelo* prior to its appeal to the Supreme Court of the United States, Justice Zarella summarized the effect of *Kelo*:

[This] expansive interpretation [...] represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and [...] raise[s] the specter that the power will be used by government to favor purely private interests.⁷⁶

Furthermore, the majority acknowledged, "The government's pursuit of a public purpose will often benefit individual private parties,"⁷⁷ but concluded there exists "no basis for exempting economic development from our traditionally broad understanding of public purpose."⁷⁸

The public outcry following the *Kelo* decision was expressed largely in articles from sources such as *The Economist*, which ran a column containing the language "Americans used to believe that their constitution protected private property,"⁷⁹ as well as various law review publications, including the Harvard Environmental Law Review, which wrote that "the Supreme Court has left homeowners in a state of uncertainty."⁸⁰ Such articles seem to have been written with the goal of leaving the reader expecting "men with bulldozers"⁸¹ within days. Of course, the actual path of development has been different than predicted due to the cacophonous response to the *Kelo* ruling. While *Kelo* serves to remedy potential "hold-out" problems in redevelopment scenarios, it opens the door to under-compensation for those whose property is taken without consent.⁸²

As of October 2016, three hundred and nine cases have cited *Kelo*, one hundred and eighty-five of these cases have been federal cases.⁸³ Of those decisions, three were Supreme Court cases. None of the three Supreme Court cases cited *Kelo* in the majority opinion, only in concurring or dis-

⁷⁶ *Kelo v. City of New London*, 843 A.2d 500, 575 (2004) (Zarella, J., dissenting), *aff'd*, 545 U.S. 469 (2005).

⁷⁷ *Kelo*, 545 U.S. at 485.

⁷⁸ *Id.*

⁷⁹ *Hands Off Our Homes: Property Rights and Eminent Domain*, THE ECONOMIST, Aug. 20, 2005, at 71 (emphasis added).

⁸⁰ Eric Rutkow, Note, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261, 279 (2006).

⁸¹ *See id.*

⁸² *See* Richard Posner, *The Kelo Case, Public Use, and Eminent Domain*, THE BECKER-POSNER BLOG (June 20, 2005, 9:09 PM), <http://www.becker-posner-blog.com/2005/06/the-kelo-case-public-use-and-eminant-domain--posner-comment.html>.

⁸³ LexisNexis Shepardization of *Kelo v. City of New London*, <https://advance.lexis.com> (follow "Shepardize this document" hyperlink from *Kelo v. City of New London*, 545 U.S. 469 (2005)).

senting opinions.⁸⁴ Three state court cases criticized the decision,⁸⁵ but none thus far have declined to follow *Kelo*. Given the substantial precedential value of Supreme Court rulings, the judiciary's failure to criticize *Kelo* is not particularly startling.⁸⁶

However, state courts have much more leeway when they are interpreting their own constitutions. Of the decisions that distinguished themselves from *Kelo*, two stand out by virtue of their analysis contrasting *Kelo* with their respective issues. The first, *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuno*, focused on the plaintiff's claim that if title to their lands were transferred to public agencies, "those agencies could not be trusted to carry out the public purposes"⁸⁷ required by Law 489, and transfer the title of public lands to the plaintiff.⁸⁸ It was argued that the transfer of lands back to public agencies did not meet the public use requirement of the Takings Clause.⁸⁹ The court held:

Irrespective of whether the Fideicomiso is, as it claims, a private owner of lands considered private property under Puerto Rican law, it cannot obtain the relief it seeks if its "public use" argument fails. Unlike the ancillary questions identified by the district court, this is a question of federal constitutional law. Because the Fideicomiso cannot prevail on its argument that Law is not for "public use," as discussed below, abstention is unwarranted.⁹⁰

The second case, which deserves mention, is *Rumber v. District of Columbia*.⁹¹ The issue in *Rumber* was the District of Columbia's exercise of its eminent domain power over plaintiff's property.⁹² Plaintiff property owners "contend that the defendants are unauthorized to exercise eminent domain and that the plaintiffs will be injured if and when the defendants exercise eminent domain over their properties."⁹³

⁸⁴ See, e.g., *Horne v. Dept. of Agric.*, 556 U.S. 729, 752 (Thomas, J. concurring).

⁸⁵ *Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. Ct. App. 2010); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1122 (Ohio 2006); *In re A Permanent Right-Of-Way*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 239, *16 (Pa. County Ct. 2014).

⁸⁶ Elisabeth Sperow, *Perspective on Kelo v. City of New London: The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 425–26 (2007).

⁸⁷ *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 7 (1st Cir. 2010).

⁸⁸ P.R. Laws Ann. tit. 23 § 5048.

⁸⁹ *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 77 (1st Cir. 2010).

⁹⁰ *Id.*

⁹¹ *Rumber v. District of Columbia*, 2005 U.S. Dist. LEXIS 16935, at *1-2, (D.D.C. July 19, 2005).

⁹² *Id.*

⁹³ *Id.*

The question presented in *Kelo* was “whether the city’s proposed disposition of [that] property [for the purpose of economic revitalization,] qualifies as a ‘public use’ within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.” [...] The Supreme Court, relying on the *Berman* case [...] reaffirmed that “transforming a blighted area into a ‘well-balanced’ community through redevelopment” is a legitimate public use under the Fifth Amendment.⁹⁴

The plaintiffs argued in *Rumber* that *Kelo* forbids the type of purpose of eminent domain powers proposed by the District of Columbia, since private parties are being used to accomplish the taking and revitalization, but the “one-to-one transfer admonished in *Kelo* is not present in this case.”⁹⁵ The property in contention was clearly in a blighted area and as the Supreme Court said again in *Kelo*, “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”⁹⁶

At the same time, individual states may adopt eminent domain statutes that differ from the federal government’s prescribed definition of eminent domain, so long as the state laws remain consistent with the minimal requirement of the federal standard. Scores of states have exercised this right in direct reaction to the *Kelo* holding.

All but six states (New York, Hawaii, New Jersey, Massachusetts, Oklahoma, and Arkansas) have enacted some form of legislation that either increases that state’s citizens’ protection against eminent domain takings or substantially reforms the state’s eminent domain clause.⁹⁷ Of those states that have passed *Kelo*-responsive legislation, their responses may be categorized into “five major categories of reactive legislation: (1) Authorization for public use; (2) restriction of use to blighted properties; (3) enhanced public notice, hearing, and negotiation criteria; (4) local government approval; and (5) prohibiting eminent domain for specific purposes,”⁹⁸ such as economic development, to increase tax revenue or employment, or to transfer property to another private entity.

⁹⁴ *Id.* at *10 (internal citations omitted).

⁹⁵ *Id.* at *12.

⁹⁶ *Berman v. Parker*, 348 U.S. 26, 35 (1954).

⁹⁷ See *Enacted Legislative Action Since Kelo*, CASTLE COALITION, <http://castlecoalition.org/enacted-legislation-since-kelo> (last visited June 28, 2015).

⁹⁸ Randy J. Bates, II, *What’s the Use? The Court Takes a Stance on the Public Use Doctrine in Kelo v. City of New London*, 57 MERCER L. REV. 689, 711–12 (2006) (internal citations omitted).

STATE RESPONSES BY CATEGORY

Category	Number of States	States
Prohibiting Eminent Domain for Specific Purposes	23	AL, AK, AZ, CO, FL, GA, ID, IL, KS, LA, ME, MI, MO, NE, NH, NM, OR, SD, TN, TX, VT, WV, WI
Authorization for Public Use	12	AZ, DE, GA, IN, IA, MN, NV, NC, ND, SC, VA, WY
Restriction of Use to Blighted Properties	13	AL, FL, GA, IA, IL, IN, KS, MT, NC, PA, SC, WV, WI
Enhanced public notice, hearing, and negotiation criteria	8	CT, GA, IA, MN, MO, RI, UT, WV
Local Government Approval	4	CT, IN, MI, RI

In view of the number of states that enacted legislation in the aftermath of *Kelo*, it is clear that the *Kelo* decision got the attention of lawmakers across the country who took issue with the holding in the case and took the steps to ameliorate its impact.

State Supreme Courts across the country were also swift in their response to *Kelo*. Just over a year after *Kelo*, the Ohio Supreme Court decided *City of Norwood v. Horney*.⁹⁹ In *Horney*, the city, which was suffering financially, agreed to transfer property to a development company redeveloping an area of the city.¹⁰⁰ The Ohio Supreme Court held that the trial court and the appellate court erred in finding that the appropriation of the owners' property was permitted.¹⁰¹ The trial court had properly found an abuse of discretion

⁹⁹ *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

¹⁰⁰ *Id.* at 1124.

¹⁰¹ *Id.* at 1142.

in the City's finding that the area targeted for redevelopment was a slum, blighted, or deteriorated.¹⁰² However, the Supreme Court found that the trial court had erred in finding that judicial review of condemnations was limited and had to be deferential to the municipality.¹⁰³ Because the city could not justify its taking of the property on either the basis that the neighborhood was deteriorating, or on the basis that the redeveloped area would bring economic value to the city, there was no showing that the taking was for public use.¹⁰⁴ As a matter of Ohio law, any taking based solely on financial gain is void.¹⁰⁵

The South Dakota judiciary placed even tighter reins on the state's eminent domain power than suggested by either *Kelo* or Ohio law. In *Benson v. State*, South Dakota's Supreme Court firmly stated that Article VI, Section 13 of South Dakota's Constitution "provides its landowners more protection against a taking of their property than the United States Constitution."¹⁰⁶ The court contrasted its reading of the South Dakota Constitution with the interpretation of the United States Constitution utilized by the *Kelo* court.¹⁰⁷ The South Dakota Court reaffirmed that its "use by the public" test, which "requires that there be a 'use or right of use on the part of the public or some limited portion of it,'"¹⁰⁸ "continues to be the law of this jurisdiction."¹⁰⁹ Overall, South Dakota has substantially limited its eminent domain power after *Kelo*.

Other states, like Minnesota, which have had judicial responses to *Kelo*, while still constraining eminent domain power, are lukewarm by comparison to the states mentioned above. In *Eagan Economic Development Authority v. U-Haul Co. of Minnesota*, the Supreme Court of Minnesota addressed the legality of a "quicktake" condemnation by the Eagan Economic Development Authority ("EDA").¹¹⁰ The Minnesota Supreme Court held that the applicable Redevelopment Plan was binding on the EDA and did

¹⁰² *Id.* at 1136.

¹⁰³ *Id.*

¹⁰⁴ *City of Norwood*, 853 N.E.2d 1115 at 1124, 1136.

¹⁰⁵ *Id.* at 1142 (Ohio 2006) (holding that Article I, Section 19 of the Ohio Constitution voids any taking based solely on an economic or financial benefit).

¹⁰⁶ *Benson v. State of South Dakota*, 710 N.W.2d 131, 146 (S.D. 2006).

¹⁰⁷ *See id.* (discussing that South Dakota has consistently imposed "public use" requirements that are stricter than the federal baseline adopted by the *Kelo* court).

¹⁰⁸ *Id.* (quoting *Ill. Cent. R.R. Co. v. E. Sioux Falls Quarry Co.*, 144 N.W. 724 (1913)).

¹⁰⁹ *Id.*

¹¹⁰ *Eagan Econ. Dev. Auth. v. Uhaul of Minn.*, 787 N.W.2d 523, 525 (Minn. 2010).

not require the condemning authority to have a formal development agreement before condemning private property.¹¹¹

Nevertheless, the state legislatures and their judiciaries continue to find ways, roundabout ways, to constrict the scope of application of *Kelo*. For example, in *State ex rel. Jackson v. Dolan*¹¹² anti-*Kelo* legislation sheltering under the Missouri state constitution was upheld by the Supreme Court of Missouri, *en banc*, thus giving it full precedential authority in Missouri and almost certainly preventing disruption by federal case law. While recognizing that *Kelo* authorizes the use of the Fifth Amendment takings clause to take private property for economic development, and without any contrary interpretation of the Missouri takings clause, which is worded very similarly, the court found that

[t]he legislature, which is the branch of government elected to determine public policy, made the policy decision to enact §523.271 to rein in the “public use” of economic development approved in *Kelo*. The statute prohibits the use of eminent domain for solely economic development purposes in Missouri.¹¹³

The court goes on to do very close analysis of the exact wording of the statute, and also to lay out the statute’s definition of “economic development”:

Under the statute, economic development is defined as ‘use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health.’¹¹⁴

Although the court provides some fairly big loopholes for developers and their friends in municipal entities to try to take advantage of in future cases, in this instance it concludes that since the Authority that wanted to take the Trust’s private property had *only* [“solely”] economic development as its justification, it was prohibited from taking the property.¹¹⁵

In 2014, the Supreme Court of Pennsylvania, Middle District, held that a municipal authority could *not* “exercise its eminent domain powers to condemn an easement over privately-owned land, where the sole purpose of the

¹¹¹ *Id.* at 539.

¹¹² *See* State et al. v. Dolan, 398 S.W.3d 472, 482-83 (Mo. 2013) (holding that the Port Authority’s taking is “for solely economic purposes” and therefore violates Missouri law).

¹¹³ *Id.* at 478.

¹¹⁴ *Id.* at 479.

¹¹⁵ *See id.* at 482-83 (“[E]conomic development may not be the *sole* purpose of a taking” therefore “[t]he Port Authority failed to demonstrate a purpose that was in addition to economic development.”).

easement is to supply a private developer with land to install sewer drainage facilities needed for a proposed private residential subdivision.”¹¹⁶

While the court does carefully criticize *Kelo*, ultimately it decides that legislation subsequent to *Kelo*, 26 Pa.C.S. §204(a), constituted a prohibition of public taking of private property for use by private enterprise.¹¹⁷ In Pennsylvania, even if the taking confers a public benefit, if it is going to be used for private enterprise, it is prohibited. Here, where the use of an easement acquired via a public taking would BE a private developer’s development of a residential subdivision, the taking falls within the post-*Kelo* legislative prohibition.

Also in 2014, the Georgia Supreme Court in *Darling International, Inc. v. Carter et al.*¹¹⁸ laid out the amendments to the Georgia Constitution and the Landowner’s Bill of Rights and Private Property Protection Act. The court noted that as of 2006, in Georgia, “the public benefit of economic development with respect to authority for exercising the power of eminent domain”¹¹⁹ is no longer justification for the taking of private property. Sadly for the original Plaintiff, however, the court found that the particular taking in this case occurred before the new legislation went into effect, and was therefore valid under *Kelo*.¹²⁰

These cases can be seen as part of a slow-motion backlash against *Kelo*, and they indicate that states wishing to close the *Kelo* window can fairly easily do so, although they must parse very carefully the actual language they put in their statutory enactments.

While it is still in many states quite possible for a sports team or municipality to acquire the real estate on which to build a sports stadium by eminent domain, as evidenced by the *Kelo* decision, the majority of stadiums reviewed for this article were primarily purchased by the entity constructing the stadium.

The Traditional Anti-Trust Exemption of Pro Sports and Court Rulings

The premise behind anti-trust laws in the United States is to create a more level playing field for businesses and organizations in order to pro-

¹¹⁶ Reading Area Water Auth. v. Schuylkill River Greenway Ass’n, 100 A.3d 572, 573-584 (Pa. 2014).

¹¹⁷ *Id.* at 575.

¹¹⁸ Darling Int’l Inc. v. Carter, 754 S.E.2d 347, 349-354 (Ga. 2014).

¹¹⁹ *Id.* at 354.

¹²⁰ *Id.* at 354-355.

mote fair trade and fair competition.¹²¹ A key requirement of federal anti-trust law application is the presence of interstate commerce.¹²² Considering the multi-state schedules of pro sports teams and the mass marketing of team paraphernalia, most professional teams easily meet this requirement and therefore should be fully subject to the anti-trust laws. There is one notable exception: Major League Baseball. In 1922, the Supreme Court held that baseball did not involve interstate commerce, providing the league with a longstanding, substantial exemption from anti-trust regulations.¹²³ This precedent has been called into doubt,¹²⁴ disagreed with,¹²⁵ or followed with reservations,¹²⁶ as many jurisdictions see the exemption for what it is: an aberration.

“Major League Baseball is a collective monopoly, with nearly complete control over where teams locate. It is difficult to fight back against a monopoly — even if you are a public municipality.”¹²⁷ Currently, baseball’s anti-trust exemption serves as a legal enabler that allows professional sports teams to demand new and often single-sport stadiums with in many cases substantial public subsidies.¹²⁸ Professional sports leagues are typically covered by the same anti-trust notions as other businesses, but with a unique application because of the uniqueness of the industry. The leagues require competition on the field, but cooperation for things such as scheduling and intellectual property licensing.¹²⁹ For example, where the act of dividing markets is typically per se illegal, the court will look at this act under the rule of reason for professional sports teams.¹³⁰ The practical effect has been that the other major pro sports teams enjoy a nearly *de facto* MLB level of exemption from the anti-trust laws when the “rule of reason” is applied to various challenges that have been raised in the courts over the years.

¹²¹ 117 AM. JUR. PROOF OF FACTS 3D *Prosecution or Defense of Antitrust Actions Relating to College or Professional Sports* § 6 (2010).

¹²² *Id.* at § 4.

¹²³ *Federal Baseball Club of Baltimore v. Nat’l League of Prof. Baseball Clubs* 259 U.S. 200, 209 (1922).

¹²⁴ *Butterworth v. Nat’l League of Prof. Baseball Clubs*, 644 So.2d 1021, 1025 (Fla. 1994) (holding antitrust exemption did not extend to sale and location of baseball franchises).

¹²⁵ *Laumann v. Nat’l Hockey League*, 56 F.Supp.3d 280, 295 (S.D.N.Y.) (explaining antitrust exemption did not apply to territorial broadcasting restrictions).

¹²⁶ *Major League Baseball v. Crist*, 331 F.3d 1177, 1189 (11th Cir. 2003).

¹²⁷ Edelman, *supra* note 30.

¹²⁸ *Id.*

¹²⁹ AM. JUR. PROOF OF FACTS 3D, *supra* note 121, at 9.

¹³⁰ *See L.A. Mem’l Coliseum Com’n v. Nat’l Football League*, 726 F.2d 1381, 1392, 1395 (9th Cir. 1984).

Defenders of baseball's anti-trust exemption contend that removing the anti-trust exemption will not fix the current problem surrounding MLB sports teams and publicly funded stadiums.¹³¹ They argue that exposing the league to anti-trust regulations will have no greater impact on the demands placed upon the public for tax subsidies than the league's current self-imposed regulations. Other sports leagues continue to demand subsidies from cities for stadiums, and anti-trust laws are ineffective in protecting the public from this economic harm.¹³² Upholding an exemption that keeps the MLB unreachable from anti-trust law will not alleviate the issues that critics use as justification for the exception.

The issue involving the other major sports is more complex. Without a specific Congressional exemption, the other major sports have managed to be deemed not in violation of Section 1 of the Sherman Anti-Trust Act.¹³³ Law Professor Jessie Markham explains that judges traditionally have used two approaches to evaluate anti-trust claims under Section 1 of the Sherman Anti-Trust Act. First, a *per se* approach. This was used when a blatant anti-competitive act occurred and there was little need for further analysis. The second approach was the "rule of reason" approach where the defendants were given a great deal more leeway to explain the actions they had taken. The rule of reason, by its very nature, is a flexible, some might call it a "vague" standard.¹³⁴ Markham argues that the situation has become more difficult to interpret as judges are finding fewer cases meet the *per se* standard, thereby inviting a less structured analysis under the rule of reason. As more cases are being decided under such vague standards, Markham and others allege that there is no real standard that leads to inconsistent rulings across the United States.¹³⁵ It is under these conditions that the other major sports teams have been able to enjoy monopoly markets even without the specific exemption afforded to MLB.

Media Blackouts and Pro Sports Teams

Further evidence of the monopoly power of pro sports are the blackout rules that prevent fans of their local teams from watching games played in their Home Television Territory ("H.T.T."), unless they have purchased

¹³¹ Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 219 (2012).

¹³² *Id.*

¹³³ Paul D. Staudohar, *The Scope of Pro Football's Antitrust Exemption*, 50 LAB. L.J. 34, 36 (1999).

¹³⁴ Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 594 (2012).

¹³⁵ *Id.*

special broadcast packages at additional cost. These packages often include far more games than the fan might want to purchase, but the packages are the only way to access the local games the fan might be seeking. This was illustrated in the *Laumann* case,¹³⁶ and the parallel case involving Major League Baseball, the *Garber* case.¹³⁷ As discussed above in this section, the historical anti-trust exemption for pro sports, especially for MLB, is still largely enforced and still impacting many aspects of team behavior. However, it does appear to be having a rougher time in the courts lately as it relates to blackouts, as the class action settlements in the *Laumann* and *Garber* cases illustrate.¹³⁸

In fact, such exclusive broadcasting agreements protecting the H.T.T. of various pro teams were specifically authorized by the Sports Broadcasting Act of 1961, and referenced in the *Laumann* and *Garber* cases.¹³⁹ This gift to the four pro sports listed in the Act, football, baseball, basketball and hockey, was courtesy of the United States Congress. This was characterized as an exception to the anti-trust laws.¹⁴⁰ The Act can be interpreted to specifically allow the type of blackout policies that have been the bane of fans for years.¹⁴¹ The Act does contain a provision that this media exemption does not extend the anti-trust exemption beyond such media agreements.¹⁴² Although, the impact of this provision seems minimal in light of the aggressive and anti-competitive activities of pro teams discussed herein.

An article describing the situation of three football playoff games during January 2014 where local fans would not be able to watch the games on television due to the blackout rules referenced above labeled the blackout situation as “stupid.”¹⁴³ Logically, the blackout rules serve to protect home game attendance. Fans cannot watch the game on local television, so they are compelled to go to the team’s home stadium to watch the game. How-

¹³⁶ See *Laumann v. Nat’l Hockey League*, 56 F. Supp. 3d 280, 286-88 (S.D.N.Y. 2014).

¹³⁷ *Garber v. Off. of the Comm’r of Baseball*, 120 F. Supp. 3d 334 (S.D.N.Y. 2014).

¹³⁸ See Jeff Zalesin, *MLB Fans Get Initial OK for TV Antitrust Settlement*, LAW 360 (Jan. 25, 2016, 8:40 PM), <https://www.law360.com/articles/750519> (detailing the results of the MLB antitrust settlement in *Garber*). See also, Max Stendahl, *NHL Settlement Approved in Broadcast Antitrust Case*, LAW 360 (Sept. 1, 2015, 2:18 PM), <http://www.law360.com/articles/697822> (discussing the NHL antitrust deal in *Laumann*).

¹³⁹ See *Laumann*, 56 F. Supp. 3d 280, 293 (S.D.N.Y.). See *Garber*, 120 F. Supp 3d 334, 338 (S.D.N.Y.).

¹⁴⁰ 15 U.S.C. § 1291 (2012).

¹⁴¹ 15 U.S.C. § 1291 (2012).

¹⁴² 15 U.S.C. § 1294 (2012).

¹⁴³ Brad Tuttle, *Why Millions of NFL Fans Might Not Be Able to Watch Their Team’s Playoff Games*, Time (Jan. 2, 2014), <http://business.time.com/2014/01/02/why-millions-of-nfl-fans-might-not-be-able-to-watch-their-teamsplayoff-games/>.

ever, for a large variety of reasons, including high ticket prices and traveling to the location from outlying areas of the many large American metroplexes, many fans cannot attend live games. In fact, the system of blackouts serves a dual purpose for pro sports teams of driving up ticket prices, since the fans cannot watch the games live on television, and at the same time, driving up the price of sports cable contracts, which in turn is passed along to the fans.

Competition and Teams Changing Markets

One factor that is often mentioned with regard to teams leaving or threatening to leave their current location is that the city failed to provide a heavily subsidized public sports stadium. However, a closer examination of pro sports teams that have moved since 2000 present a different dimension to the story. Most of the teams moved because they were not able to make a profit in their previous markets. This is consistent with basic capitalism. Businesses are not required to stay put into financial obsolescence if they can find another location where they can be profitable. Teams that moved for reportedly financial reasons include the NBA's Vancouver Grizzlies to Memphis in 2001; the NBA's Charlotte Hornets to New Orleans in 2002; MLB's Montreal Expos to Washington, D.C. in 2005; and the NHL's Atlanta Thrashers moved to Canada and became the Winnipeg Jets in 2011.

The Vancouver Grizzlies' owner faced losses reportedly as high as \$40 million in a season.¹⁴⁴ This appears to be one of the less controversial relocations of a pro team. The Charlotte Hornets went from a strong position to a weak one with annual losses reported to be in the \$15 million to \$20 million range. However, the timing is a bit suspicious given that the relocation followed a public vote that turned down financing a new facility in Charlotte. New Orleans offered \$10 million in relocation costs and promised more money from the City's hotel tax.¹⁴⁵ As noted elsewhere in this article, a concern here is that public funds often promised to help the needy are being hijacked for what appear to be private interests.

Montreal's team had suffered so long that MLB was considering closing the franchise altogether. Although the move itself was not controversial due to the losses sustained in Montreal, Washington pledged \$400 million to

¹⁴⁴ David Williams, *Making Tracks: Remembering How the Grizzlies Moved from Vancouver to Memphis*, COM APPEAL (Apr. 26, 2014, 9:36 PM), <http://www.commercialappeal.com/news/making-tracks-remembering-howgrizzlies-moved-vanc>.

¹⁴⁵ Mary Foster, *Owners Approve Hornets' Move to New Orleans*, USA TODAY (May 10, 2002, 8:48 PM), <http://usatoday30.usatoday.com/sports/nba/hornets/2002-05-10-owners-relocation.htm>.

build a new stadium.¹⁴⁶ The promise of public money did not so much lure the Montreal team away from its home city, as it did to help Washington win out in a competition with other cities that bid for the team.¹⁴⁷ Such a use of public funds in a city with significant poverty and financial woes raises legitimate questions of priorities. Note that some miles away along the Washington Beltway stands the privately owned stadium of the Washington Redskins.

In another move that was based on financial hardship, the Atlanta Thrashers moved to Winnipeg, Canada. The team had struggled for attendance in Atlanta and no local group came forward to buy the team.¹⁴⁸ This type of relocation should not invoke a rationale for building public stadiums in light of the reasons behind the moves.

Some teams move for reasons of opportunity, and in some cases, reaction to a refusal to fund the team owners' demands for a public stadium in their home location. The refusal of the state of Washington to raise \$500 million to build a new basketball stadium is implicated in the Seattle SuperSonics' move to Oklahoma City in 2007. The relocation did not go smoothly and lawsuits were filed to prevent the relocation of the team¹⁴⁹. However, Oklahoma City voters had approved \$120 million in public tax incentives to help lure the team and close the deal. Subsequently, *Forbes* reported that the team's value has increased steadily.¹⁵⁰ So, it can be argued that a lack of municipal support caused the loss of the Sonics, and the offer of such support helped Oklahoma City land the team. However, another observation is that even without public support, the team would have been moved to increase its value.

In a recent move that is at least in the direction of free enterprise, the New Jersey Nets relocated to Brooklyn, New York, in 2012. The team became the Brooklyn Nets and plays in the privately owned Barclays Stadium, following a change of ownership of the team. The move was not with-

¹⁴⁶ Hal Bodley, *Selig Confirms Expos' Move*, USA TODAY (Sept. 29, 2004), http://usatoday30.usatoday.com/sports/baseball/nl/expos/2004-09-29-washington-move_x.htm.

¹⁴⁷ *Id.*

¹⁴⁸ ESPN News Services, *Thrashers Headed to Winnipeg*, ESPN (June 1, 2011), <http://sports.espn.go.com/nhl/news/story?id=6610414>.

¹⁴⁹ See *Basketball Club of Seattle LLC v. Prof. Basketball Club LLC*, No. 2:08-cv-00623 (W.D. Wash. filed Apr. 21, 2008); and *City of Seattle v. Prof. Basketball Club LLC*, No. 2:07-cv-01620 (W.D. Wash. filed Oct. 9, 2007).

¹⁵⁰ Christopher Helman, *The Sordid Deal That Created the Okla. City Thunder*, FORBES, June 13, 2012, <http://www.forbes.com/sites/christopherhelman/2012/06/13/the-sordid-story-of-how-aubrey-mcclendon-and-palstransformed-the-seattle-sonics-into-the-oklahoma-city-thunder>.

out controversy since eminent domain was used to obtain some of the land for the development that includes the team's home in Barclays Stadium.¹⁵¹

Winners and Losers

A fascinating situation continues to develop in California. Los Angeles ("L.A."), America's second largest city, does not have a pro football team. Years ago, the Raiders left for Oakland, California, and the Rams left for St. Louis, Missouri. Since that time, various efforts have been made to bring a pro football team to that area. At the end of 2015, there were two competing proposals for construction of a stadium in the L.A. area. The "Carson City" proposal was valued at \$1.7 billion and reportedly would be privately financed.¹⁵² It was claimed by the proponents of this option that both the Oakland Raiders and the San Diego Chargers would come to play in this new stadium.¹⁵³ The second proposal is the "Inglewood" plan, which is reportedly worth \$1.8 billion and also privately financed. The key proponent of the Inglewood plan is Stan Kroenke, the owners of the St. Louis Rams. Obviously, this presented the likelihood of the Rams returning to Los Angeles if the Inglewood plan was adopted.¹⁵⁴ The cities of St. Louis and San Diego were both under extreme pressure to commit to new stadium deals in an effort to prevent their teams from leaving. The city of St. Louis had been considering a proposal to build a downtown stadium estimated to cost about \$985 million to help keep the Rams there.¹⁵⁵ The Chargers' attempt to gain a new stadium in the San Diego area has hit many obstacles since 2003. In general, most plans involved the public giving the team land. Then, the team would develop the land for residential and commercial use, subsequently using those proceeds to finance the construction of a new privately

¹⁵¹ Harvey Araton, *Nets, After a String of Homes, Hope to Settle into Brooklyn*, N.Y. TIMES, July 4, 2012, http://www.nytimes.com/2012/07/05/sports/basketball/nets-move-to-brooklyn-with-legitimacy-insight.html?_r=0; See also discussion *infra* regarding use of eminent domain for private purposes.

¹⁵² Tim Logan & Nathan Fenno, *Carson City Council Gives Unanimous Approval to NFL Stadium*, L.A. TIMES, Apr. 15, 2015, <http://www.latimes.com/sports/nfl/la-sp-nfl-stadium-carson-20150422-story.html>.

¹⁵³ Gene Cubbison & Andie Adams, *Carson Council Approves Bolts-Raiders Stadium Efforts*, NBC SAN DIEGO, Apr. 22, 2015, <http://www.nbcsandiego.com/news/local/Carson-Council-Set-to-Kick-Off-Bolts-Raiders-Stadium-Efforts-300864591.html#ixzz3a53NldVC>.

¹⁵⁴ Tim Logan & Nathan Fenno, *Carson City Council Gives Unanimous Approval to NFL Stadium*, CAP. GAZETTE, Apr. 21, 2015, <http://www.capitalgazette.com/la-sp-nfl-stadium-carson-20150422-story.html>.

¹⁵⁵ David Hunn, *9 St. Louis Aldermen Call for Public Vote on New Football Stadium*, ST. LOUIS POST-DISPATCH, May 15, 2015, http://www.stltoday.com/news/local/govt-and-politics/st-louis-aldermen-call-for-publicvote-on-new-football/article_0d7f93c5-6d62-5eb8-8236-b25fd7c9482.html.

owned stadium. To date, the San Diego plan has not been successful, so the Chargers are clearly open to a proposal from the L.A. area.¹⁵⁶

In January 2016, the NFL owners declined the Carson City plan and approved the move of the Rams to the L.A. area as proposed by Kroenke.¹⁵⁷ The mayor of St. Louis commented that “The NFL ignored the facts, the loyalty of St. Louis fans who supported the team through far more downs than ups, and the NFL ignored a strong market and viable plan for a new stadium.”¹⁵⁸ However, the statement of NFL Commission Roger Goodell may have more relevance to the subject of sport-extortion:

[Relocation is] painful for the fans, the communities, the teams, for the league in general. Stability is something that we've taken a great deal of pride in and in some ways a bittersweet moment because we were unsuccessful in being able to get the kind of facilities that we wanted to get done in their home markets.¹⁵⁹

This statement by Goodell stands as a threat to other cities that if the NFL team owners do not get exactly what they want and quickly, they can expect the team to move. It certainly appears as if St. Louis tried to keep the team. The New York Times reported: “In St. Louis, a group led by Missouri Gov. Jay Nixon has proposed building a \$1.1 billion stadium, 40 percent of which would be paid for with public money.”¹⁶⁰ Similar to the stadiums reviewed in Section II, above, the state court sided with the stadium proponents. Missouri Circuit Court Judge Frawley ruled that the St. Louis ordinance requiring a public vote on the stadium was invalid and further, that another ordinance requiring that the stadium be adjacent to the city’s convention center was not an impediment since the proposed stadium would be in the general area of the convention center.¹⁶¹

¹⁵⁶ David Garrick, *Past Failures Key to Chargers’ L.A. Pitch*, THE SAN DIEGO UNION TRIB., June 27, 2015, <http://www.utsandiego.com/news/2015/jun/27/chargers-stadium-nfl-pitch-unsuccessful-attempts/4/?st#articlecopy>.

¹⁵⁷ *Rams Headed Back to Los Angeles; Chargers Have Option to Join*, ESPN.com, Jan. 13, 2016, http://espn.go.com/nfl/story/_/id/14558668/st-louis-rams-relocate-los-angeles.

¹⁵⁸ Dan Hanzus, *Around the NFL*, NFL.COM, Jan. 12, 2016, <http://www.nfl.com/news/story/0ap-3000000-621645/article/rams-to-relocate-to-la-chargers-first-option-to-join>.

¹⁵⁹ *Id.*

¹⁶⁰ Ken Belson, *A Primer on the N.F.L. Relocating a Team to Los Angeles*, N. Y. TIMES (Jan. 10, 2016), <http://www.nytimes.com/2016/01/11/sports/football/nfl-los-angeles-relocation-vote-oakland-san-diego-st-louis.html>.

¹⁶¹ *Order and Judgement, Reg’l Convention & Sports Complex Auth. v. City of St. Louis*, No. 1522-CC00782, 2015 WL 7693059 at 9, 21 (Mo. Cir. Ct. Aug. 3, 2015).

At least two lawsuits have already been filed against the Rams football team in response to the announcement of the move to L.A.¹⁶² Four fans have filed a lawsuit to recover for themselves and other fans their expenditures on team-branded merchandise over the last 15 years.¹⁶³ They allege that Kroenke promised to keep the Rams in St. Louis and therefore they were defrauded.¹⁶⁴ A second suit was filed by holders of Private Seat Licenses, “PSLs.” That suit claims that the holders of the PSLs have the right to purchase season tickets into the future and that the PSLs they hold do not designate a stadium in St. Louis.¹⁶⁵ If successful, the plaintiffs then might be able to sell their PSLs to fans in L.A., where it is assumed the PSLs would be more valuable due to the larger population base.¹⁶⁶ Even if the plaintiffs win both lawsuits, it is unlikely that it would stop the Rams move to L.A. At best, the suits, if successful, would make the departure more expensive.

The L.A. pro football situation leads to two significant observations. First, there are situations where private funding of football stadiums can occur in a free market. Second, with limited teams available, even when a city is willing to spend over \$400 million to build a new stadium, it may not be able to retain the team. Third, eliminating the anti-trust exemption from pro football might have resulted in a new expansion team being available to L.A., thereby avoiding most of the conflicts discussed in this subsection.

IV. PROPOSED SOLUTIONS TO FREE AMERICAN CITIES FROM SPORT-EXTORTION

This section offers solutions to some of the controversies previously discussed. First, make bonds for such predominantly private uses fully taxable at the federal level, which sets an example for the states to also stop issuing tax-exempt bonds. According to a recent article, and consistent with the bil-

¹⁶² John Breech, *Rams Facing Two Lawsuits From Fans in St. Louis Over Move to L.A.*, CBS SPORTS (Jan. 21, 2016, 8:53 PM), <http://www.cbssports.com/nfl/eye-on-football/25457755/rams-facing-two-lawsuits-from-fans-in-st-louis-kroenke-misread-situation>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

lion dollar subsidies noted above, there is a proposal on the table to do just that at the federal level.¹⁶⁷

Second, remove all anti-trust protections for pro sports. The basic argument is that the pro sports teams need to cooperate in order to have league play. However, there is a distinction between competition on the field and competition off the field. The agreements that appear to facilitate competition on the field can be the same cause of competition restriction off the field, leading to violations of anti-trust laws.¹⁶⁸ It does not make sense to hold some leagues accountable while giving other leagues a free pass. It is possible for professional sports teams to compete on the field without the anti-trust protections that hinder economic competition off the field. The logic that anti-trust exemptions and protections promote competition within professional sports is flawed. Under this failed logic, the anti-trust laws would not be applied to the major auto manufacturers since they need to cooperate in order to compete in organized auto racing around the world.

Third, a major public education campaign needs to be launched to further educate the public on the fallacy that building, or at least subsidizing, with public funds the construction of major sports stadiums contributes more to local economies than simply using existing tax dollars to support traditional public purposes. When public funds are used to build sports facilities, it is accomplished by reducing investment in other areas of government spending.¹⁶⁹ This is confirmed with unequivocal statements like: “Yet, independent work on the economic impact of stadiums and arenas has uniformly found that there is no statistically significant positive correlation between sports facility construction and economic development.”¹⁷⁰ Much can be accomplished with smart regulatory policies to encourage business development that does not involve funding privately owned pro sports teams.

Fourth, politicians and citizens in the states that have not enacted post-*Kelo* legislation barring the use of the power of eminent domain for the

¹⁶⁷ Elaine S. Povich, *Is Obama Proposal the End of Taxpayer-Subsidized Sports Stadiums?*, USA TODAY (Mar. 16, 2015, 1:24 PM), <http://www.usatoday.com/story/news/politics/2015/03/16/stateline-obama-proposal-taxpayer-subsidized-sports-stadiums/24845355/>.

¹⁶⁸ Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Market?*, 60 TENN. L. REV. 263, 263 (1993), http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1155&context=law_faculty_scholarship.

¹⁶⁹ See generally Sarah Wilhelm, *Public Funding of Sports Stadiums* (Univ. of Utah Ctr. for Pub. Policy & Admin., Policy Brief Apr. 30, 2008), http://gardner.utah.edu/_documents/publications/finance-tax/sports-stadiums.pdf.

¹⁷⁰ John J. Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. OF ECON. PERSP. 95, 103 (2000).

benefit of private enterprises should enact such legislation. The Dallas Cowboys' stadium and the New Jersey Nets arena were both built on land attained through eminent domain.¹⁷¹ And the trend continues as: “[T]hree more cities—Sacramento, Washington, D.C., and Atlanta—have all announced their readiness to use eminent domain to build new venues for their own professional sports franchises.”¹⁷² Preventing the taking of private land for this purpose is hard to accomplish without legislation.¹⁷³ However, the United States Supreme Court has previously stated that courts are to give deference to the preferences of local legislatures on this matter.¹⁷⁴ When public power cannot be used improperly to support private enterprise, this creates a more realistic situation for economic analysis. As discussed above, Los Angeles has two, and possibly a third, competing private sector proposals for major stadiums on the table. Perhaps part of that rationale is the well-reported financial problems of the state of California. However, taking the option of public use of eminent domain off the table means the localities are less likely to be subjected to sport-extortion.

Fifth, as long as the courts use a vague standard like the rule of reason, as explained above, pro sports teams may still escape the anti-trust rules and continue to extort both municipalities and their fans. Circuits differ in how they apply the rule of reason to professional sports leagues. An act that would typically violate anti-trust law may get upheld in the Ninth Circuit if no less restrictive means exist, or upheld in the District of Columbia Circuit Court of Appeals if the purpose of the alleged violation is not significantly anticompetitive.¹⁷⁵ The solution to the vague application of the rule of reason is to restructure the rule into categorical analysis that will allow for predictable anti-trust law application.

Sixth, to avoid sport-extortion, community ownership of sports teams should be encouraged. Community ownership may be another key to reversing the current situation of sport-extortion. The Green Bay Packers are famously the only team that is owned by the community where it plays.¹⁷⁶

¹⁷¹ Peter Montine, *Forced Turnovers: Using Eminent Domain to Build Professional Sports Venues*, 9 WASH. J. L., TECH. & ARTS 331, 331 (2014).

¹⁷² *Id.* at 333.

¹⁷³ *Id.* at 346.

¹⁷⁴ *Id.*

¹⁷⁵ See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1396 (9th Cir. 1984); *Smith v. Pro Football*, 593 F.2d 1173, 1183 (D.C. Cir. 1978).

¹⁷⁶ Dave Zirin, *Those Non-Profit Packers*, THE NEW YORKER (Jan. 25, 2011), <http://www.newyorker.com/news/sporting-scene/those-non-profit-packers>.

112,000 shareholders own the team.¹⁷⁷ The team has enjoyed stable management and sold out seasons, as well as success on the gridiron.¹⁷⁸ Ironically, the community ownership model has been banned since 1960 when the NFL amended its Constitution to prevent non-profit ownership.¹⁷⁹ By definition, it would be hard for a team to leave or extort its community if communities could be owners of some of the teams. “Compare this to other cities, where owners tend to maximize their own profits or simply leave the community at the drop of a hat.”¹⁸⁰

Seventh, the United States Council of Mayors’ has formed the Mayors Professional Sports Alliance.¹⁸¹ The description from the organization’s website is:

The Mayors Professional Sports Alliance, chaired by Indianapolis Mayor Gregory A. Ballard, is composed of mayors from cities with major league sports teams - National Football League, National Basketball Association, National Hockey League, Major League Baseball and Major League Soccer. Its mission is to share among the mayors information, resources, and support on issues related to professional sports and to work effectively with leagues, players and owners.¹⁸²

Acting in concert through such an organization, the mayors of cities throughout the United States could agree not to accede to sport-extortion. Clearly, if no city agrees to the extortion then teams will still need to be somewhere. Would a team leave New York City to relocate to Tallahassee, Florida? Teams would gravitate to where they can actually make money without public subsidies. There will be some disruption due to financial reasons as discussed in Part II of this article, but it is unlikely the financial impact would be anything like the present money grab taking place throughout America.

CONCLUSION

The authors of this Article are not ingenuous enough to expect that the suggested reforms above will all be enacted, or that even some of the re-

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* The rule is now found in the NFL Constitution of 1970. See NAT’L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. III § 3.2(A) (2006 Rev.), http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

¹⁸⁰ James H. Miller, *Report from the President*, 8 WIS. POLICY RES. INST. REP. No. 9 (1995).

¹⁸¹ See MAJOR PROFESSIONAL SPORTS ALLIANCE, <http://mayorcitiesports.org> (last visited Oct. 4, 2016).

¹⁸² *Id.*

forms will be enacted in the near future. However, there is growing public resistance to the excesses documented in Parts I and II of this Article. Hopefully, this Article, the numerous articles and cases cited in this Article, and public pressure will lead to significant changes in the way pro sports are regulated in the United States. Further, that the expectation that the public should finance even part of such large and profitable private enterprises will not persist.

For future research, each stadium project that is built, in the process of being built, or proposed to be built, should be subjected to the most rigorous economic analysis. Promises of financial gains and employment opportunities for the host communities should be held to the highest standards of independent review. On a parallel track, legal scholars should perform a detailed analysis of judicial decisions in major anti-trust and eminent domain cases and insure that such analyses are publicized to the bench and the Congress.

League	Team	Stadium Name	City	Year Built	Cost	Private Funds	Public Funds	% Public Funds	Owner
NFL	Minnesota Vikings	New Viking's Stadium	Minneapolis, MN	2016	1027 M	529 M	498 M	48.5%	Minnesota Sports Facilities Authority
MLS	San Jose Earthquakes	Avaya Stadium	San Jose, CA	2015	100 M	100 M	0	0%	Wolff & Fischer
NFL	San Francisco 49ers	Levi's Stadium	Santa Clara, CA	2014	1310 M	1196 M	114 M	8.7%	City of Santa Clara
MLB	Miami Marlins	Marlins Park	Miami, FL	2012	634 M	125.2 M	508.8	80.3%	Miami-Dade County

NBA	Brooklyn Nets	Barclays Center	Brooklyn, NY	2012	1048 M	728 M	320 M	30.5%	Forest City Enterprises
MLS	Houston Dynamo	BBVA Compass Stadium	Houston, TX	2012	95 M	60 M	35 M	36.8%	AEG, Brener International Group, Golden Boy Promotions
MLS	Sporting Kansas City	Sporting Park	Kansas City, KS	2011	215 M	91 M	124 M	57.7%	Kansas Unified Development, LLC.
NFL	New York Giants / Jets	MetLife Stadium	East Rutherford, NJ	2010	1600 M	1600 M	0	0%	Giants Stadium LLC and Jets Development LLC
MLB	Minnesota Twins	Target Field	Minneapolis, MN	2010	545 M	195 M	350 M	64%	Hennepin County
NBA	Orlando Magic	Amway Center	Orlando, FL	2010	480 M	60 M	420 M	87.5%	City of Orlando
MLS	New York Red Bulls	Red Bull Arena	Harrison, NJ	2010	222 M	111 M	111 M	50%	Red Bull Park, LLC
MLS	Philadelphia Union	PPL Park	Chester, PA	2010	122 M	49 M	73 M	64%	Delaware County Waterfront Improvement Authority

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NHL	Penguins	Consol Energy Center	Pittsburgh, PA	2010	321 M	14.4 M	306.6 M	95.5%	Sports & Exhibition Authority of Pittsburgh and Allegheny County
NFL	Dallas Cowboys	AT&T Stadium	Arlington, TX	2009	1194 M	750 M	444 M	37.2%	Arlington, Texas
MLB	New York Mets	Citi Field	New York, NY	2009	800 M	103 M	697 M	87.1%	New York Mets
MLB	New York Yankees	Yankee Stadium	Bronx, New York	2009	1500 M	164 M	1336 M	89.1%	Yankee Stadium
NFL	Indianapolis Colts	Lucas Oil Stadium	Indianapolis, IN	2008	719.6 M	100 M	619.6 M	85.5%	Indiana Stadium and Convention Building Authority
MLB	Washington Nationals	Nationals Park	Washington, DC	2008	611 M	73.3 M	537.7 M	88%	D.C. Sports Commission
MLS	Real Salt Lake	Rio Tinto Stadium	Sandy, UT	2008	110 M	64.9 M	45.1 M	41%	Dell Loy Hansen
MLS	Toronto FC	BMO Field	Toronto, Canada	2007	63 M	18.3 M	44.7 M	71%	Maple Leaf Sports & Entertainment (MLSE)

MLS	Colorado Rapids	Dick's Sporting Goods Park	Commerce City, CO	2007	131 M	19.7 M	111.4 M	85%	City of Commerce City
NHL	Devils	Prudential Center	Newark, NJ	2007	375 M	165 M	210 M	56%	David Blitzer and Joshua Harris
NFL	Arizona Cardinals	University of Phoenix Stadium	Glendale, AZ	2006	455 M	147 M	308 M	67.7%	Arizona Sports & Tourism Authority
MLB	St. Louis Cardinals	Busch Stadium	St. Louis, MO	2006	411 M	135.6 M	275.5 M	67%	St. Louis Cardinals
MLS	Chelsea FC	Toyota Park	Bridgeview, IL	2006	98 M	14.7 M	83.3 M	85%	Village of Bridgeview, Ill.
NBA	Charlotte Bobcats	Time Warner Cable Arena	Charlotte, NC	2005	265 M	0	265 M	100%	City of Charlotte
MLS	FC Dallas	Toyota Stadium	Frisco, TX	2005	105 M	98.7 M	6.3 M	6%	City of Frisco in partnership with Hunt Sports Group (HSG), the Frisco Independent School District, and Collin County

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MLB	Philadelphia Phillies	Citizen's Bank Park	Philadelphia, PA	2004	458 M	229 M	229 M	50%	City of Philadelphia
MLB	San Diego Padres	Petco Park	San Diego, CA	2004	449 M	145.9 M	303.1 M	67.5%	City of San Diego (70%), Padres (30%)
NHL	Jets	MTS Centre	Winnipeg, Canada	2004	133.5 M	93 M	40.5 M	30.3%	True North Sports and Entertainment
NFL	Philadelphia Eagles	Lincoln Financial Field	Philadelphia, PA	2003	512 M	331 M	181 M	35.4%	City of Philadelphia
MLB	Cincinnati Reds	Great American Ball Park	Cincinnati, OH	2003	325 M	45 M	280 M	86.2%	Hamilton County
NBA	Houston Rockets	Toyota Center	Houston, TX	2003	202 M	0	202 M	100%	Harris County
MLS	LA Galaxy	StubHub Center	Carson, CA	2003	150 M	150 M	0	0%	Anschutz-Entertainment-Group
NHL	Coyotes	Gila River [Jobing.com] Arena	Glendale, AZ	2003	220 M	65 M	155 M	70.5%	City of Glendale
NFL	Detroit Lions	Ford Field	Detroit, MI	2002	500 M	245 M	255 M	51%	Detroit/Wayne County Stadium Authority

NFL	Houston Texans	NRG [Reliant] Stadium	Houston, TX	2002	474 M	185 M	289 M	61%	Harris County
NFL	New England Patriots	Gillette Stadium	Foxborough, MA	2002	325 M	253 M	72 M	22.2%	Robert Kraft
NFL	Seattle Seahawks	CenturyLink Field	Seattle, WA	2002	430 M	130 M	300 M	69.8%	Washington State Public Stadium Authority
NBA	San Antonio Spurs	AT&T Center	San Antonio, TX	2002	175 M	28.5 M	146.5 M	83.7%	Bexar County
NFL	Denver Broncos	Sports Authority Field at Mile High	Denver, CO	2001	400.8 M	100.2 M	300.6 M	75%	Denver Metropolitan Football Stadium District (MFSD)
NFL	Pittsburgh Steelers	Heinz Field	Pittsburgh, PA	2001	280.8 M	122.8 M	158 M	56.3%	City of Pittsburgh
MLB	Milwaukee Brewers	Miller Park	Milwaukee, WI	2001	413.9 M	120.4 M	293.5 M	70.9%	Southeast Wisconsin Professional Baseball District, Milwaukee Brewers
MLB	Pittsburgh Pirates	PNC Park	Pittsburgh, PA	2001	262 M	50 M	212 M	80.9%	City of Pittsburgh Sports & Exhibition Authority

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NBA & NHL	Dallas Mavericks & Stars	American Airlines Center	Dallas, TX	2001	420 M	295 M	125 M	29.8%	City of Dallas
NFL	Cincinnati Bengals	Paul Brown Stadium	Cincinnati, OH	2000	449.8 M	24.7 M	425.1 M	94.5%	Hamilton County
MLB	San Francisco Giants	AT&T Park	San Francisco, CA	2000	357 M	342 M	15 M	4.2%	China Basin Baseball Corporation
MLB	Detroit Tigers	Comerica Park	Detroit, MI	2000	300 M	185 M	115 M	38.3%	Detroit/Wayne County Stadium Authority
MLB	Houston Astros	Minute Maid Park	Houston, TX	2000	268 M	88 M	180 M	67.2%	Harris County Sports Authority
NBA	Miami Heat	American Airlines Arena	Miami, FL	2000	194 M	79.5 M	114.5 M	59%	Miami-Dade County
NHL	Blue Jackets	Nationwide Arena	Columbus, OH	2000	150 M	0	150 M	100%	Franklin County Convention Facilities Authority
NHL	Minnesota Wild	Xcel Energy Center	St Paul, MN	2000	170 M	40 M	130 M	76.5 %	City of Saint Paul

Appendix prepared by Karen Charis, MBA, under the direction of Dr. Schein, from publicly available sources updated through January 2016.

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