

PILOTS AND PUBLIC POLICY: STEERING THROUGH THE ECONOMIC RAMIFICATIONS

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I. INTRODUCTION

In the spring of 2009, a replacement for venerable Yankee Stadium will open in the Bronx at a cost of more than \$1.3 billion, making it the most expensive stadium construction project to date in the United States.¹ The financing of this stadium project differs significantly from most other new sports facility construction projects and represents a significant change in public policy on the financing of professional sports facilities.² Early indications suggest that the financing method used to build the new Yankee Stadium could serve as a model for many other sports facility construction projects across the country.³

In 2006, the Internal Revenue Service (“IRS”) issued two Private Letter Rulings that enabled the new Yankee Stadium construction project to be financed by a tax-exempt bond backed by payments in lieu of taxes (“PILOT”).⁴ These rulings effectively allowed the Yankees access to low interest tax-exempt bonds, as opposed to privately issued taxable bonds with higher interest rates, to finance the construction of their privately owned sports facility.⁵ The IRS Private Letter Rulings were significant because they appear to circumvent certain provisions of the Tax Reform Act of 1986 that

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1. See Comm. on Corp., Auth. & Comm'n of the Assembly State of N.Y., *The House that You Built: An Interim Report into the Decision by New York City to Subsidize the New Yankee Stadium*, at 21-22 (2008), available at http://assembly.state.ny.us/member_files/092/20081105/report.pdf [hereinafter *Interim Report*] (quoting construction price of new Yankee Stadium and comparing seat prices in new Yankee Stadium to other U.S. stadiums).

2. See *id.* (commenting on use of payments in lieu of taxes, PILOTs).

3. See *id.* (noting use of tax-exempt city bonds to finance Yankee Stadium construction).

4. See I.R.S. Priv. Ltr. Rul. 200640001 (July 11, 2006) [hereinafter *Private Letter 1*] (analyzing PILOT plan in relation to building of Yankee Stadium and allowing it); I.R.S. Priv. Ltr. Rul. 200641002 (July 19, 2006) [hereinafter *Private Letter 2*] (analyzing further provisions and implications of PILOT plan).

5. See *Private Letter 1*, *supra* note 4 (examining benefits of low interest tax-exempt bonds over higher interest privately financed loans).

were intended to curb the use of tax-exempt bond financing for the construction of professional sports facilities.⁶

Following the IRS rulings, New York City issued tax-exempt public bonds to pay for the construction of the new Yankee Stadium. Due to the fact that the interest paid to these bondholders is exempt from federal income taxes, the bonds carry a lower interest rate than private bonds that are subject to federal income taxes.⁷ Over the thirty years between the bonds' issuance and maturity, this interest rate differential results in hundreds of millions of dollars saved in interest payments.⁸ The bonds' principal and interest will be paid by the Yankees' revenues generated from their new stadium.⁹

These rulings and the subsequent tax-exempt bond issuance, opened the floodgates to an additional wave of PILOT backed tax-exempt bonds for the construction of sports facilities, and this new wave shows no signs of slowing.¹⁰ The Yankee PILOT decision raises a number of important economic policy issues.¹¹ In this Article, we will discuss these policy issues and examine the behavior of the Yankees following the decision.

II. MLB'S ANTITRUST EXEMPTION, FRANCHISE MOVES AND PUBLIC SUBSIDIES

Major League Baseball ("MLB") has enjoyed an exemption from antitrust law for nearly one hundred years since the 1922 ruling in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.¹² Subsequent Supreme Court decisions have upheld the *Federal Baseball* precedent while noting that the decision's underlying reasoning, that baseball is not interstate commerce, is unquestionably flawed, at least given the modern

6. See *id.* (circumventing restriction on use of tax-exempt government bonds to finance sports facility construction); Private Letter 2, *supra* note 4 (circumventing restriction on use of tax-exempt government bonds to finance sports facility construction); see also Interim Report, *supra* note 1, at 25 (comparing payments under PILOT plan to "regular" property taxes).

7. See Interim Report, *supra* note 1, at 25 (describing how PILOT plan works).

8. See *id.* at 4 (reporting that annual interest savings to Yankees amounts to approximately \$7.7 million to \$15.7 million for thirty years, totaling between \$235 and \$471 million).

9. See *id.* at 2-3 (explaining how Yankees are funding their new stadium).

10. See Private Letter 1, *supra* note 4 (describing how Yankees organization will repay bonds using revenues generated from new Yankee Stadium).

11. See Interim Report, *supra* note 1, at 27-28 (arguing that new stadium will not create permanent significant employment or economic activity).

12. See generally *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207-09 (1922) (providing case analysis and holding).

development of national media contracts.¹³ The courts, however, have not seen fit to extend the exemption to other sports such as boxing, football or basketball, even though granting only baseball this status is somewhat inexplicable.¹⁴

Among other consequences, baseball's antitrust exemption results in fewer MLB franchises than would exist absent the exemption.¹⁵ The restriction in the number of MLB franchises means that markets capable of supporting a MLB franchise do not have one.¹⁶ With the existence of these "open" markets, existing MLB franchises are given important leverage when negotiating with state and local governments over subsidies for the construction of new baseball stadiums.¹⁷ In addition, this antitrust exemption also provides the MLB with significant power to prevent any existing franchises from moving into New York City to fill any void left by the Mets' or Yankees' departure.¹⁸ While the National Football League ("NFL"), like MLB, also possesses significant monopoly power, the Ninth Circuit Court of Appeal's decision in *Los Angeles Memorial Coliseum Commission v. NFL*, demonstrated that absent an antitrust exemption, the NFL was unable to prohibit the Raiders' owner, Al Davis, from moving his football team to Los Angeles despite the NFL's wishes for him to stay in Oakland.¹⁹ Similarly, any

13. See *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) ("Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."); see also *Flood v. Kuhn*, 407 U.S. 258, 273 (1972) (holding that decision of *Federal Baseball*, to be changed, must be done through legislation).

14. See *United States v. Int'l Boxing Club*, 348 U.S. 236, 241 (1955) (holding that promotion of boxing contests can be regulated under Sherman Act, which regulates interstate commerce); see also *Radovich v. Nat'l Football League*, 352 U.S. 445, 448 (1957) (concluding that professional football can be regulated under antitrust laws); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) ("Basketball . . . does not enjoy exemption from the antitrust laws.").

15. See Rodney Fort, *Inelastic Sports Pricing*, 25 *MANAGERIAL & DECISION ECON.* 87, 87-94 (2004).

16. See Philip K. Porter & Christopher R. Thomas, *Public Subsidies and the Location and Pricing of Sports*, S. *ECON. J.* 1, 24 (2006).

17. See *id.* at 23-24 (noting that demand is higher than MLB team supply and that creates leverage for MLB franchises).

18. See *id.* (commenting that unlike other sports, MLB has anti-trust exemption so supply of MLB teams is controlled and intentionally kept low).

19. See *L.A. Mem'l Coliseum v. Nat'l Football League*, 726 F.2d 1381, 1387-88 (1984) (explaining reasoning of District Court, with which Supreme Court agreed, in concluding that restricting team location violates antitrust rules). The District Court cited three reasons for rejecting the NFL's argument. *Id.* at 1387. First, to say that this particular act did not violate antitrust rules would be to say that the NFL had other antitrust exemptions, and courts in the past have ruled that the NFL has in fact violated antitrust several times. *Id.* at 1388. Second, the court has found other sports organizations to be guilty of violating antitrust though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court rejected the NFL's ar-

threat by the Yankees to leave the New York City metropolitan area would be an empty one absent the antitrust exemption, as any number of small market owners would jump at the chance to play in a major market like New York City, even in an unrefurbished Yankee Stadium. Due to the antitrust exemption, however, the Yankees, in collusion with the MLB, could prevent such moves from occurring.²⁰

Threats made by both the New York Yankees and the New York Mets to leave the city of New York influenced the public financing of both the Yankees' new stadium and the Mets' new stadium, which are scheduled to open in New York City for the 2009 season.²¹ In a memorandum from Andrew M. Alper, then director of the New York City Industrial Development Agency ("NYCIDA"), to New York City Mayor Michael Bloomberg explaining why the Yankees were granted an exemption from the NYCIDA policy, Alper stated that failure to give the Yankees what they wanted would "result in the New York Yankees relocating the Team to a stadium outside the City."²² Similarly, in a memorandum from Alper to Mayor Bloomberg explaining why the Mets were granted a similar exemption from the NYCIDA policy, Alper stated that failure to give the Mets what they wanted would "result in the New York Mets relocating the Team to a stadium outside the City of New York."²³

Based on these two memoranda from the NYCIDA, it appears that both of the MLB teams in New York City used the threat of leaving to extract concessions from the City of New York.²⁴ Again, economic theory provides a clear explanation for why professional baseball teams have this power: they have significant market power and operate as unregulated monopolies.²⁵ Unlike most other in-

gument that the NFL's "clubs are not separate business entities whose products have an independent value." *Id.*

20. See Porter & Thomas, *supra* note 16, at 23-24 (determining that anti-trust exemption gives MLB significant power over MLB franchises due to limited number of teams).

21. See Memorandum from the N.Y.C. Indus. Dev. Agency to Mayor Michael Bloomberg, Deviation from Uniform Tax Exemption Policy for Yankees Ballpark Company 4 [hereinafter Yankees Memo]. The letter is undated but was likely sent prior to the Inducement Resolution of March, 17, 2007.

22. *Id.*

23. Memorandum from the N.Y.C. Indus. Dev. Agency to Mayor Michael Bloomberg, Deviation from Uniform Tax Exemption Policy for Queens Ballpark [hereinafter Mets Memo].

24. See Interim Report, *supra* note 1, at 9 (commenting on Yankees threat to leave New York City as major reason for subsidizing new Yankee Stadium).

25. See Porter & Thomas, *supra* note 16, at 24 (noting that because of limited number of teams and greater demand for MLB teams cities are subsidizing baseball stadiums).

dustries in the United States, the MLB receives special treatment under federal antitrust law.²⁶ Economic theory predicts that monopolies restrict output in order to realize monopoly rents.²⁷ In the case of the MLB, monopoly power is exercised by limiting the total number of teams in each league.²⁸ In this specific case, it means that the Yankees and the Mets were able to force state and local governments to grant them special benefits not available in other fields because of the antitrust exemption granted by the *Federal Baseball* decision.²⁹ If the MLB did not have this special protection, the Yankees and Mets would not have had another viable alternative market to threaten to move into. The new stadium construction projects would have been financed through other, traditional means, such as private bonds with a higher interest rate, not public tax-exempt bonds being paid out of general revenues.³⁰ The IRS rulings effectively turn state and local government into investment bankers for professional sports teams in New York City and give these privately held corporations access to tax-exempt bond funding that was explicitly prohibited by the Tax Reform Act of 1986.³¹

The justification for the deviation granted to both the Yankees' and Mets' stadiums was a threat to move out of New York City to another market that would support a professional baseball team.³² Again, the ultimate cause of the New York PILOT mess is the MLB's antitrust exemption, a public policy decision made by the federal courts that Congress has refused to overturn for nearly a century.³³

26. See *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207 (1922) (finding that MLB is not subject to federal antitrust laws); *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (reaffirming Supreme Court's decision in *Federal Baseball Club* that MLB is not subject to federal antitrust laws).

27. Dennis Coates & Brad R. Humphreys, *Do Economists Reach a Conclusion?: Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums and Mega-Events?*, 5 *ECON. J. WATCH* 294, 294-315 (2008).

28. See Porter & Thomas, *supra* note 16, at 23-24 (noting that supply of MLB teams does not meet demand by cities for MLB teams).

29. See Yankees Memo, *supra* note 21; Mets Memo, *supra* note 23.

30. See generally Private Letter 2, *supra* note 4 (discussing PILOT program and how it works in comparison to other tax programs or provisions).

31. See generally Private Letter 1, *supra* note 4 (illustrating provisions of PILOT program that exempts it from 1986 Tax Reform Act).

32. See Yankees Memo, *supra* note 21; Mets Memo, *supra* note 23.

33. See *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 200 (1922) (holding that MLB qualifies for antitrust exemption); see also *Toolson v. N.Y. Yankees*, 346 U.S. 356, 364-65 (1953) (holding that MLB qualifies for antitrust exemption); *Flood v. Kuhn*, 407 U.S. 258, 295-96 (1972) (holding that MLB qualifies for antitrust exemption).

III. HOW PILOTs DIFFER FROM OTHER STADIUM FINANCING

The PILOT decision has resulted in a financing deal for construction of the new Yankee Stadium that differs in important ways from how other new professional sports facilities have been financed in the post-1986 Tax Reform Act era.³⁴ Two examples make these differences clear.³⁵ Nationals Park opened in Washington, D.C. on May 4, 2006.³⁶ The stadium cost \$610 million and was financed through the sale of tax-exempt bonds issued by the City of Washington, D.C.³⁷ Because tax-exempt bonds were used to finance this stadium, the city's government had to raise taxes in order to pay the principal and interest on these bonds.³⁸ These payments must come out of general tax revenues to comply with the Tax Reform Act of 1986.³⁹ This requirement places an important limit on the amount of tax-exempt bonds available for financing and constructing professional sports facilities.⁴⁰ Additionally, paying the principal and interest on these bonds out of general tax revenues has budgetary effects.⁴¹ Because general tax revenues are collected from a broader group of local residents than the sports fans that enjoy the benefits of a new stadium, this requirement reduces the amount of money spent on new sports facilities financed using tax-exempt bonds and may reduce construction costs as well.⁴²

Another example is the building of AT&T Park, home of the San Francisco Giants, which opened on March 31, 2000.⁴³ The stadium cost \$357 million to build (\$426 million in 2007 dollars) and was privately financed.⁴⁴ No tax-exempt bonds were issued to pay for the facility construction by any state or local government.⁴⁵ The team had to pay a higher interest rate on the borrowed money than

34. See Interim Report, *supra* note 1, at 2-3 (requesting increased public financing for construction of new Yankee Stadium in New York City).

35. See *id.* at 22 (showing two examples that illustrate differences from 1986 Tax Reform Act era).

36. See *id.* (referencing Nationals Park example).

37. See *id.* (discussing financing of Nationals Park).

38. See *id.* (outlining city's role in raising capital).

39. See *id.* (explaining provisions of 1986 Tax Act that must be met).

40. See *id.* (presenting limitations on use of tax-exempt bonds).

41. See *id.* (commenting on budgetary effect of providing private sport teams with public financing).

42. See *id.* (referencing limitations placed on using public funds to build stadiums).

43. See *id.* (discussing construction history of AT&T Park).

44. See *id.* (presenting stadium's total cost).

45. See *id.* (detailing how state financed ballpark's construction).

they would have if they had access to tax-exempt financing, making the construction project more costly to the team.⁴⁶

Clearly, the PILOT decision has had a profound effect on the Yankee Stadium construction project. The access to lower interest rates offered by tax-exempt funding, coupled with the lack of budget-related limits on costs has combined to produce the most expensive stadium construction project in the history of Major League Baseball, and indeed all of professional sports in North America.⁴⁷

IV. TICKET PRICES AND NEW FACILITIES IN MLB

Major League Baseball teams produce a product that can be replicated by only a few imperfect substitutes in the local economy.⁴⁸ Unlike other firms, MLB teams face little competition in the marketplace.⁴⁹ This market power gives MLB teams significant latitude when setting prices.⁵⁰ In most cases, firms facing competition set their prices at a level "that the market will bear," meaning that these businesses face significant price competition from other firms, which in turn limits their ability to raise prices.⁵¹ A business with many competitors cannot raise prices too much because its customers will turn elsewhere.⁵² MLB teams do not face this type of competition.⁵³ Because their product has so few close substitutes, teams can set prices based on what they consider best for their organization, such as basing prices upon market demand for the tickets.⁵⁴ In large markets, like New York City, this market demand can be quite large compared to the number of tickets sold in any season.⁵⁵ The only constraint on price increases faced by professional sports teams is the willingness of fans to pay these increased prices in sufficient numbers.⁵⁶

Porter and Thomas recently analyzed the political economy of ticket pricing in new publicly subsidized sports facilities. The

46. *See id.* (outlining impact of failure to use tax-free public funds).

47. *See id.* (describing availability of capital enabled by PILOT).

48. *See* Coates & Humphreys, *supra* note 27, at 294-95 (commenting on MLB's monopoly of baseball in America).

49. *See* Porter & Thomas, *supra* note 16, at 24 (focusing on lack of viable alternative baseball leagues).

50. *See id.* (describing lack of free market principals).

51. *See id.* (noting proper function of competition within markets).

52. *See id.* (discussing how free markets are pro-consumer).

53. *See id.* (commenting on lack of free market principals in MLB).

54. *See id.* (explaining how MLB can set higher prices).

55. *See id.* (detailing problems of supply and demand in MLB).

56. *See id.* (discussing broad spectrum of fans willing to pay).

model developed in the Porter and Thomas paper predicts that teams seeking public subsidies for new facility construction projects price their tickets below the profit maximizing level prior to the awarding of the subsidy and then raise ticket prices significantly after moving into the new facility.⁵⁷ This model provides important insight into the price setting behavior of the Yankees as they move into the new stadium.

Professional baseball teams offer tickets for sale at a wide variety of prices. Although the cost of attending a MLB game is often expressed in terms of an “average” or “median” ticket price, this simplification abstracts from actual choices facing consumers, who can have as many as fifteen different ticket prices to choose from when buying a ticket to a baseball game.⁵⁸

The New York Yankees’ increase in ticket prices at their new stadium has drawn a great deal of media attention.⁵⁹ In the 2008 season, the Yankees offered season tickets at fifteen different prices, ranging from \$12 per game for a full season ticket in the bleachers to \$325 per game for a full season ticket in the “Field Championship” section.⁶⁰ The average season ticket price at Yankee Stadium was \$106, and the median price was \$70.⁶¹ The price of Yankees’ 2009 season tickets in the new stadium will range from the same \$12 per game for a full season ticket in the bleachers, but now will top off at \$2,500 per game for a full season ticket in the “Legends” section.⁶² The price differences represent a 139% annual change in the average price of a Yankees’ ticket and a 669% annual increase in the price of the highest ticket price offered.

The average increase in the median price of a Yankees’ ticket from 2008 to 2009 was seven percent, with the per game price of a season ticket for the bleachers remaining unchanged at twelve dollars per game in the new stadium.⁶³ Although the team has heralded this as evidence that the “average fan” would not be priced

57. *See id.* (discussing price schemes employed by baseball owners).

58. *See* Major League Baseball, AMERICAN LEAGUE RED BOOK (1975-2006) [hereinafter RED BOOK]; Major League Baseball, NATIONAL LEAGUE GREEN BOOK (1975-2006) [hereinafter GREEN BOOK].

59. *See id.* (discussing media attention on ticket prices).

60. *See id.* (detailing full season ticket prices).

61. *See id.* (calculating average ticket prices).

62. N.Y. Yankees, Relocation Program Guide for the New Yankee Stadium (2008), available at http://newyork.yankees.mlb.com/nyy/ballpark/new_stadium_relocation_guide.jsp (last visited May 14, 2009) [hereinafter Relocation Guide].

63. *See id.* (analyzing price increases when Yankees switch from old Yankee Stadium to New Yankee Stadium).

out of the new stadium, at this time only full season ticket prices, and not the price of game day bleacher tickets, have been announced.⁶⁴ While the per game price paid by fans who purchase eighty-one bleacher tickets in advance has not changed, the price of a game day bleacher ticket (a better indicator of how much the “average fan” will have to pay) remains uncertain.

Most research on ticket pricing in professional sports focuses on simple average ticket prices based on the price of all tickets offered by a team. Rodney Fort recently surveyed the literature on ticket pricing in professional sports.⁶⁵ Much of this literature uses average prices across all ticket categories to analyze team-pricing decisions.⁶⁶ As the above example of recent changes in the Yankees’ ticket prices demonstrates, however, teams offer tickets for sale at a number of different prices and do not typically change ticket prices uniformly across all ticket prices offered.⁶⁷ An analysis of changes in the average ticket price may not reflect changes in ticket prices like those made by the Yankees in advance of their move into their new stadium.

We collected data on the individual prices charged by every MLB team for all tickets offered over the period 1975-2006, with the exception of the 2002 MLB season.⁶⁸ The sources of this MLB ticket price data are the American League *Red Book* and National League *Green Book*, which are published annually by MLB.⁶⁹ The *Red Book* and *Green Book* contain detailed ticket price data, including a list of the price of every ticket offered for sale to walk up ticket buyers in each season.⁷⁰ The *Red Book* and *Green Book* do not contain information about the price of season tickets or how many seats were available at each price.⁷¹

On average, MLB teams offered tickets at about six different price levels in any season, with one team, the Arizona Diamondbacks, offering the highest amount with fifteen different

64. *See id.* (outlining only season ticket prices, not individual game ticket prices).

65. *See* Fort, *supra* note 15, at 87 (examining inelasticity of sport ticket pricing).

66. *See id.* (commenting on methodology utilized).

67. *See* Comm. on Corp., Auth. & Comm’n of the Assembly State of N.Y., The Request for Increased Public Financing for Construction of a New Yankee Stadium in New York City (2008) [hereinafter Request for Increased Public Financing].; *see also* Relocation Guide, *supra* note 62.

68. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

69. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

70. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

71. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

ticket-pricing levels.⁷² In part, these differences in ticket prices reflect differences in the viewing experience for fans: a fan sitting in the first row behind home plate experiences the game in a different way than a fan sitting in the last row of the upper deck.⁷³ Fans are willing to pay more for the experience of sitting in the first row behind home plate than they are for the experience of sitting in the last row of the upper deck. The large number of different prices offered by MLB teams suggests that they have many options available to them when changing prices.⁷⁴ It also suggests that changes in the average or median price of a ticket may not reflect changes in ticket prices across the board.

Over the period of 1975-2006, the average annual increase in the average ticket price charged by MLB teams playing in the same stadium as the previous season was 7.71%.⁷⁵ The average annual increase in the median ticket price of 7.51% was a similar change.⁷⁶ Because MLB teams offer tickets at many different prices, the change in the average or median ticket price may not reflect the overall pattern of ticket price changes from year to year.⁷⁷ An alternative way of looking at price changes is to examine how the highest priced and lowest priced tickets change. The average annual increase in the highest priced ticket offered by MLB teams playing in the same stadium over the period of 1975-2006 was 9.21%.⁷⁸ The average annual increase in the lowest priced ticket offered by MLB teams over this period was 9.68%.⁷⁹ Teams playing in existing stadiums tended to raise the price of tickets at the upper and lower end of the price range more than tickets in the middle of the price range.⁸⁰

In stark contrast to MLB teams that continue to play in the same stadiums year after year, MLB teams playing in new stadiums

72. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

73. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

74. Fort, *supra* note 15, at 91-92 (concluding that more goes into ticket pricing than attempts to maximize profit and accordingly varying ticket pricing levels); Porter & Thomas, *supra* note 16, at 11-22 (postulating that team owners base their ticket prices upon many things including bidding wars for public subsidies).

75. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

76. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

77. Porter & Thomas, *supra* note 16, at 15-16 (calculating ticket prices).

78. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

79. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

80. See RED BOOK, *supra* note 58 (noting that prices ranged significantly more at upper and lower ends of pricing spectrum than for middle range priced seats); GREEN BOOK, *supra* note 58 (noting that prices ranged significantly more at upper and lower ends of pricing spectrum than for middle range priced seats).

have, on average, increased their prices at a higher annual rate.⁸¹ The average annual increase in the average ticket price charged by an MLB team playing in a new stadium over the period of 1975-2006 was 21.01%; the average increase in the median ticket price was 14.95%. There were seventeen new baseball stadiums opened during the period of 1975-2006. In part, these ticket price increases reflect a different experience for fans in a new stadium, but they also depend on the market power of MLB teams. The increases at the top and bottom of the price range charged by MLB teams in new stadiums differed even more than the changes in the average or median prices. The average annual increase in the highest ticket price offered by MLB teams playing in a new stadium was 34.56%.⁸² The average increase in the lowest priced ticket offered was 7.21%.⁸³ Ultimately, it is the high-end tickets that tend to see the biggest price increases when a team moves into a new MLB stadium.

No MLB team moving into a new stadium in the past thirty-three years has increased the price of the most expensive ticket offered for sale as much as the Yankees have in 2009.⁸⁴ The 669% increase in the price of the highest tickets offered by the Yankees is twenty times larger than the average annual increase in the highest ticket price offered by MLB teams moving into new stadiums, and more than three times larger than the next largest annual increase in the highest ticket price offered.⁸⁵

The annual increase in the average price of a ticket offered in 2000 by the San Francisco Giants, the last team to move into a new privately financed stadium, was 21.3%.⁸⁶ On the other hand, access to relatively low cost tax-exempt bonds under the PILOT ruling allowed the Yankees to build the most expensive baseball stadium in the history of baseball.⁸⁷ Because of the lavish nature of the new stadium, the Yankees are able to pass on extraordinary ticket price increases to their fans. In addition, part of these extraordinary ticket price increases may be attributed to strategic behavior on the

81. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

82. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

83. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

84. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

85. RED BOOK, *supra* note 58; GREEN BOOK, *supra* note 58.

86. See GREEN BOOK, *supra* note 58 (calculating that annual increase in highest priced ticket offered by Giants was 9.52% and increase in lowest price ticket offered was 66.6%).

87. See Private Letter 1, *supra* note 4 (allowing tax-exempt bonds to be used to help finance stadium); Private Letter 2, *supra* note 4 (allowing tax-exempt bonds to be used as well).

part of the Yankees, as predicted by the public choice model of ticket pricing and subsidies developed by economists Philip K. Porter and Christopher R. Thomas.⁸⁸

V. THE FALLACY OF NEW JOB CREATION IN SPORTS FACILITY CONSTRUCTION

One clear theme emerges from the PILOT financing of the new Yankee Stadium: the belief that the new Yankee Stadium would be an engine of economic growth in the local economy. This alleged economic benefit was sufficient justification for granting this exceptional privilege to the Yankees.⁸⁹ The importance of job creation associated with both the construction and ongoing operation of the new stadium were mentioned repeatedly as the primary justification in both the public and private debates of this controversial project.⁹⁰

The claim of significant economic benefits resulting from a sports stadium's construction and operation is problematic. First, the reports of these so-called "economic benefits" are based on are forecasts, not actual counts of jobs created or income earned in and around the new stadium. In the PILOT issue and every other sports facility construction project studied, these forecasts of economic benefits are treated as factual assessments, rather than forecasts. Statistically, forecasts, in and of themselves, are not useful data unless they measure the statistical uncertainty associated with the data measured. The claimed future economic benefits from the new Yankee Stadium were never placed in this context.⁹¹ This severely limits their use for informing economic policy decisions. This

88. See Porter & Thomas, *supra* note 16, at 3-11 (explaining public choice model).

89. See Private Letter 1, *supra* note 4 (finding in Yankee's favor that that bonds do not meet either private security or payment test or private loan financing test and are therefore outside definition of private activity bonds); Private Letter 2, *supra* note 4 (finding in Yankee's favor utilizing similar test, and applying similar reasoning to other areas including "parking lots" for non-private activity bond classification); see also N.Y.C. Indus. Dev. Agency, Yankees Ballpark Company, NYCIDA Project Cost/Benefit Analysis (2006), available at <http://www.goodjobsny.org/Yankeesida.pdf> [hereinafter Yankees NYCIDA Analysis] (citing economic growth and job creation as reason for public financing of new Yankee Stadium).

90. See Yankees NYCIDA Analysis, *supra* note 89 (analyzing alleged rationale for public PILOT financing); see also Private Letter 1, *supra* note 4 (noting benefits of PILOT programs under Treas. Reg. §1.141-4(e) for non-private activity bond classification).

91. See Interim Report, *supra* note 1, at 27 (showing no evidence of economic benefit from stadium construction); see also Private Letter 1, *supra* note 4 (neglecting to include measure of uncertainty as to economic benefits); Private Letter 2, *supra* note 4 (neglecting measure of uncertainty as to economic benefits).

problem has already surfaced in the Yankee Stadium PILOT decision, as the claim of thousands of full time jobs made at the time the exemption was granted has proven to be wildly overstated.⁹²

Second, there is no evidence in the large body of peer reviewed scholarly research on the economic impact of professional sports facilities that indicates that any professional sports facility construction project or the ongoing operation of any such facility has generated tangible economic benefits in the local economy.⁹³ In fact, economists widely agree on this point, and it is supported by decades of evidence and data.⁹⁴ Even if the new Yankee Stadium is the most expensive stadium construction project in history, it is unlikely to generate any significant economic benefit for New York City.

Among the most abused and commonly cited justifications from subsidy-seekers is the claim of tangible economic benefit of construction jobs created during stadium construction projects. This justification is commonly used due to its apparent self-evidence. One has to simply drive by a construction site and observe workers busy at work to confirm these claims of economic benefits in the community. This view, however, is overly simplistic and does not identify the true value of these projects. Determining the actual *net* economic benefit generated by sports stadium construction projects requires calculating the number of jobs that are created or improved that would not have otherwise been in the absence of the project. Moreover, it requires considering how many of the workers filling those jobs would have been unemployed if the project had not taken place.⁹⁵ According to economic theory, only this small subset of the total number of jobs created by a stadium construction project can be counted as part of the economic impact of the

92. See Interim Report, *supra* note 1, at 27-28 (concluding that there has been no evidence shown to support theory that building new Yankee stadium will create new, not already available, jobs).

93. See generally Coates & Humphreys, *supra* note 27, at 296 (finding no economic benefits to local economies due to operation or construction of sporting venues).

94. See *id.* at 302-09 (surveying prior research as to economic benefits of stadium building and operation).

95. See Dennis Zimmerman, *Subsidizing Stadiums: Who Benefits, Who Pays?*, in *SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS* 119, 121-33 (Roger G. Noll & Andrew Zimbalist eds. 1997) (discussing difficulties in assessing benefits of stadiums in respect to stadium financing through public subsidies, noting that jobs created are one of the potential benefits of stadium construction); see also Coates & Humphreys, *supra* note 27, at 297-300 (discussing how proponents of stadium subsidies focus on tangible benefits, such as jobs and tax revenue enhancement).

project.⁹⁶ Calculating this number cannot be accomplished by a simple inspection of the construction site, and assuming that every worker observed on the job site represents new economic benefit to the local economy is erroneous.⁹⁷

The net economic benefit created by stadium construction projects is much smaller than the total economic benefit (which can be easily found by simply adding up the total amount of spending associated with the project) because of the presence of opportunity costs and the double counting that typically takes place when non-economists attempt to estimate these benefits.⁹⁸ Opportunity cost is the cost of foregone alternatives.⁹⁹ In the case of the new Yankee Stadium, the facility generates significant opportunity costs for the City of New York and the local community.¹⁰⁰ NYCIDA President Seth Pinsky, before the New York State Assembly on July 2, 2008, stated that his agency receives hundreds of requests each year for public tax-exempt funding for construction projects.¹⁰¹ Logistically, the materials and supplies currently allocated to construction of the new stadium could have been used on other construction projects.¹⁰² Additionally, the construction workers employed on this project could have worked on other projects. Economic theory tells us that only those construction workers who would not have had a job if the stadium were not built can be counted as net economic benefit from the project.¹⁰³ According to the Bureau of Labor Statistics, the unemployment rate for construction workers in

96. See Coates & Humphreys, *supra* note 27, at 300-02 (explaining that calculating benefit of job creation due to stadium construction is not simple endeavor, and that various academics and economists have criticized methods used in promotion materials released by stadium proponents).

97. See *id.* at 304 (“In general, the results of this study do not support a positive correlation between professional sports and job creation.”).

98. See *id.* at 302-06 (discussing opportunity costs associated with stadium construction projects and empirical evidence from economists supporting lack of affect on local economies by large construction projects).

99. See *id.* at 308-11 (providing as example of opportunity costs, tax collections used to pay stadium debt that could have gone to other public projects with higher rates of social return on project).

100. See Request for Increased Public Financing, *supra* note 67 (noting that New York City could have issued billion plus dollars of tax-exempt bonds to finance any number of alternatives).

101. See *id.* at 28-29 (commenting that NYCIDA has helped fund over three-hundred projects and many more have applied for public tax-exempt funding).

102. See Yankees Memo, *supra* note 21 (discussing possible opportunity costs associated with stadium construction).

103. See Zimmerman, *supra* note 95, at 122-23 (discussing analysis of estimates of economic benefits associated with construction of NFL's Baltimore Raven's stadium, including jobs created or lost, and concluding that stadium was poor investment in terms of income or jobs generated).

August of 2008 was 1.9%.¹⁰⁴ This low unemployment rate means that the actual number of new construction jobs created by the new Yankee Stadium project was a tiny fraction of the total number of jobs created by the project.¹⁰⁵

The prospects for long-term economic benefits resulting from the operation of the stadium are equally dim. While it is undoubtedly true that the new Yankee stadium will attract in excess of four million fans per year, the old Yankee Stadium, which stands just one block south of the new facility, has similarly drawn over four million fans per year for each of the past four years. Contrarily, the new stadium promises to draw fewer fans because its capacity is nearly 6,000 seats less than the old Yankee Stadium.¹⁰⁶ Furthermore, due to the fact that the new Yankee Stadium offers significantly improved eating and drinking options inside the stadium, economic activity is being drawn away from the local, surrounding neighborhoods and into the stadium itself.¹⁰⁷

VI. UNTENDED CONSEQUENCES OF THE PILOT DECISION

Despite the unseemly events surrounding the financing plan for the new Yankee Stadium, the financing of this new baseball stadium is economically desirable to certain individuals.¹⁰⁸ Economist Dennis Zimmerman pointed out that tax-exempt financing of professional sports facilities is dependent on the application of the benefit principle of taxation to the financing deal and the goal of professional sports facility public policy.¹⁰⁹ If the policy goal is to eliminate public subsidies from the professional sports facility con-

104. See U.S. Dep't of Labor, Bureau of Labor Statistics, Table A-11 Unemployed Persons by Industry and Class of Worker, Not Seasonally Adjusted (Feb. 6, 2009), available at <http://www.bls.gov/news.release/empsit.t11.htm> (detailing unemployment rate for construction workers at 15.3% as of December 2008).

105. See *id.* (providing unemployment rates for numerous sectors).

106. See N.Y. Yankees, New Yankee Stadium Comparison, available at http://newyork.yankees.mlb.com/nyy/ballpark/new_stadium_comparison.jsp (comparing statistics between old and new stadiums, including seating for old stadium at 56,886 and new stadium at 52,325).

107. See *id.* (noting nearly three times dining and lounge accommodations in new stadium compared to old stadium)

108. See generally Zimmerman, *supra* note 95, at 121-22 (providing economic analysis of public subsidies of stadium financing).

109. See *id.* at 119-20 (discussing cost benefit analysis as applied to stadium financing through subsidies and taxation and noting each taxpayer's contribution to publicly provided services should be function of benefits received from that service). Zimmerman further notes that this principle helps discourage over- or under-provision of public services, especially applicable to professional sports financing where most of the benefits accruing are consumed privately rather than collectively. See *id.*

struction, then the Yankee PILOT rulings are disastrous.¹¹⁰ This precedent opens up new avenues for the subsidization of professional sports and effectively overturns the prohibitions against the use of tax-exempt bonds to finance new sports facility construction projects in the 1986 Tax Reform Act without the consent of Congress. This is likely to lead to even larger subsidies for the construction of professional sports facilities.¹¹¹ Additionally, there is little reason to believe that such subsidization will stop with professional sports franchises. Given the weak theoretical and empirical foundations upon which the Yankees' claim of promoting economic development rests, nearly any enterprise could claim that their own capital expenditures promote economic development with similar credibility.

Conversely, if the public policy goal on subsidies for the construction of professional sports facilities is to conform to the benefit principle of taxation (also known as the "user-pays principle"), the Yankee PILOT decision is an improvement. Prior to the Yankee PILOT decision, funds to pay off tax-exempt bonds issued to finance professional sports facility construction projects typically came from general tax revenues, specific broad based revenue generation programs like lotteries, rental car taxes, hotel taxes or other sources of funds like Tax Increment Financing districts.¹¹² Using government revenues from broad based sources like sales, property or income taxes violates the benefit principle of taxation because the group that benefits from the subsidies, team owners, professional athletes and fans, is only a small segment of the local economy while the group that pays for the subsidies, taxpayers, is a much larger group, which may not see the benefit of their tax subsidies.¹¹³

Under the Yankee PILOT ruling, the tax-exempt bonds issued to finance construction of the new stadium will be paid using revenues generated by the team in the new facility.¹¹⁴ Revenues paid by fans of the team who attend games and from the team itself (to the

110. See Private Letter 1, *supra* note 4 (discussing proposition of tax-exempt bonds for construction of new Yankee Stadium).

111. See generally Tax Reform Act of 1986, 26 U.S.C. § 336(a) (2000).

112. See Private Letter 1, *supra* note 4 (noting financing differences between different options available generally); see also Interim Report, *supra* note 1, at 2-5 (detailing plan and other considerations behind decision for financing new Yankee Stadium).

113. See Interim Report, *supra* note 1, at 25 (discussing implications and state legislative/executive plans and position behind use of PILOT program).

114. See *id.* at 12-14 (discussing IRS concerns regarding financing program and resolution).

extent that the incidence of this effective tax also falls on the team are the primary source of these revenues) will pay off the tax-exempt bonds. Therefore, under the Yankee PILOT ruling, the beneficiaries of the subsidy bear the cost.

It is important to note that this is a second best outcome, because the federal government is still forgoing the tax revenues that would have been collected if the new Yankee Stadium had been financed using private, taxable bonds.¹¹⁵ In this sense, all federal taxpayers are subsidizing the Yankees and their fans by an amount equal to the foregone federal tax revenues.¹¹⁶ This subsidy would still exist, however, if the tax-exempt bonds were paid off using general tax revenues.

Ultimately, policy-makers will soon be forced to address the public funding of private construction projects: whether it is desirable to significantly expand the number of projects eligible for tax subsidies in exchange for a more direct connection between those receiving benefits from the projects and those paying the taxes.¹¹⁷ Conversely, whether the state and municipal bond tax exemption should only narrowly extend to true public works, even if this means taxing the populace more broadly when certain segments of the population are more apt to benefit from certain projects. The IRS's decision in the case of Yankee Stadium appears to contradict, at the very least, the spirit of the Tax Reform Act of 1986. Given this contradiction, the issue should elicit renewed legislative and judicial attention.

115. *See id.* at 24-25 (discussing additional funding concerns and representations by several parties, including unanswered questions).

116. *See id.* at 15-19 (reviewing assessment of land beneath new Yankee Stadium and assessed value).

117. *See id.* at 12-22 (reviewing IRS issues and questions that have arisen regarding value of land and proposed methods of funding that could have been considered).

