

NOTE

A Delayed Blitz on the NFL's Blackout Policy: A New Approach to Eliminating Blackouts in Publicly Funded NFL Stadiums

*James Gross**

ABSTRACT

As cities continue to rely on the use of tax-exempt municipal bonds to build bigger, better, and more expensive professional sports stadiums to accommodate their local National Football League ("NFL") teams, taxpayers are ultimately the ones who foot the bill. At the same time, the NFL continues to enforce its blackout policy, preventing local television broadcasts of NFL games unless a minimum number of tickets are purchased before kickoff. As a result, NFL fans are often subjected to a double punishment by the NFL and their municipalities: they are forced to pay for the construction of a new NFL stadium, and are then prevented from watching the games played inside of these stadiums on television unless enough tickets are purchased to prevent the game from being blacked out. Although a number of challenges, both legal and political, have been brought against this policy in the past, each has ultimately failed, and the NFL's blackout policy still stands today.

* J.D., May 2014, The George Washington University Law School; B.A., History and Economics, 2011, Loyola University of Chicago. I would like to thank the staff of *The George Washington Law Review*, in particular John Chisholm, Courtney Murtha, Barbara Bruce, Laura D'Elia, Nicholas West, Scott Myers, Nathan Green, and Whitney Hermendorfer, for all of their time and effort spent in selecting and editing this Note. I would also like to thank my uncle, Mike Piepsny, Ohio State Representative Robert F. Hagan, and Mr. Jordan Finke for providing me with the background materials that inspired me to write this Note. Lastly, I want to thank my friends and family for their helpful comments and, most importantly, their endless support.

To solve this problem, this Note proposes that Congress amend the current Internal Revenue Code to except municipal bonds from tax-exempt status whenever these bonds are used to fund a stadium that is subject to broadcast blackouts based upon the number of tickets sold. The consequence of such an amendment would effectively be to force the NFL and NFL team owners to make a choice: either continue to receive public funding for new stadiums or continue to impose the NFL's blackout policy. They would not, however, be able to continue to take advantage of both of these options simultaneously. Taxpaying NFL fans would no longer be subject to a double punishment when they try to watch their local football team on television, and they would find themselves in a better overall financial position than they were in before.

TABLE OF CONTENTS

INTRODUCTION	1196
I. KICKOFF: THE NFL BLACKOUT RULE IN PUBLICLY FINANCED NFL STADIUMS	1198
A. <i>The NFL's Blackout Rule</i>	1198
B. <i>The NFL's Popularity Explosion on Television</i>	1200
C. <i>The Dawn of Today's NFL Blackout Rule</i>	1204
D. <i>Public Financing for Professional Sports Stadiums</i> ..	1206
II. THE GOVERNMENT ENTERS THE RED ZONE: POLICYMAKERS RECOGNIZE THE PROBLEM BUT HAVE YET TO FIND A SOLUTION THAT PUTS POINTS ON THE BOARD	1211
A. <i>Missed Tackles: State Governments Look at the Issue but Are Unable to Bring Down the Blackout Rule</i> ..	1212
B. <i>False Start: The Federal Government Acknowledges the Issue but Has Yet to Solve the Problem</i>	1215
III. BREAKING FREE FROM THE DEFENSE: A SOLUTION TO THE PROBLEM OF BLACKOUTS IN PUBLICLY FINANCED STADIUMS	1220
IV. A FIELD GOAL IN THE RED ZONE IS BETTER THAN NO POINTS AT ALL: WHY THIS SOLUTION, THOUGH NOT PERFECT, IS BETTER THAN NO SOLUTION AT ALL	1222
A. <i>The NFL Does Not Always Get What It Wants</i>	1223
B. <i>Tuesday Morning Quarterbacking: The Retroactivity Problem</i>	1224
C. <i>Dealing with the Nitpicky Coach: Let Not Perfect Be the Enemy of Good</i>	1225
CONCLUSION: TOUCHDOWN!	1226
APPENDIX A	1227
APPENDIX B	1228

INTRODUCTION

When Tim Stroth purchased season tickets for the Buffalo Bills in 1989 as a Father's Day gift for his father, Norman Stroth, the team was just about to embark upon its remarkable streak of reaching the Super Bowl in four straight seasons.¹ Tim had grown up one town over from Ralph Wilson Stadium—the home of the Buffalo Bills—and the tickets were a perfect gift for his father, who was a lifelong Bills fan.² Beginning in 1989, Tim and Norman enjoyed the golden age of Buffalo Bills football, taking in the games as father and son each week and cheering their hometown team to victory.³ Even when the Bills stopped winning and endured a thirteen-year playoff drought, Tim and Norman continued to support their team, spending approximately \$30,000 over the next two decades on tickets, concessions, parking, and team memorabilia to watch their beloved Bills each Sunday.⁴

Over the past three years, however, the eighty-six-year-old Norman has not been able to attend games with his son due to his limited mobility.⁵ During that same time frame, the Buffalo Bills have been blacked out on local television eight times, because, per National Football League (“NFL” or “League”) rules, the team was unable to sell tickets for all of the seats in Ralph Wilson Stadium before the deadline of seventy-two hours before kickoff.⁶ Whenever these blackouts occur, the Bills game is not broadcast on local television within seventy-five miles of the home stadium, thus barring local fans from watching their favorite team play.⁷ As a result, fans like Norman Stroth are unable to watch their hometown team play on Sundays despite years of supporting the franchise.

Perhaps even more troubling is that these very same fans who are prevented from watching the games unless the requisite number of tickets is sold are also the ones who are paying for the stadium. Buffalo taxpayers are currently providing a \$226 million subsidy for Ralph Wilson Stadium over the next ten years, funded through increases in local taxes.⁸ Thus, in order for Bills fans to watch games

1 Brian Murphy, *Game On: Sen. McCain, Fans Battle NFL over Blackout Rule*, TWINCITIES.COM (July 4, 2013, 12:01 AM), http://www.twincities.com/ci_23601230/game-sen-mccain-fans-battle-nfl-over-blackout.

2 *Id.*

3 *See id.*

4 *See id.*

5 *See id.*

6 *Id.*

7 *See id.*

8 *Id.*

played in the stadium that they are paying for, they must also collectively shell out millions of dollars to ensure that all of the tickets are purchased—to avoid a blackout. As Tim Stroth laments: “I don’t see the logic or justification for punishing fans like my dad who can’t afford the high cost of attending games or who simply want to watch their home team on TV, considering my local tax dollars are paying to operate it.”⁹

The experience of the Stroth family is one that has plagued NFL fans across the United States throughout the past fifty years.¹⁰ Although the number of games blacked out by the NFL has significantly dropped over the past half century (six percent of games were blacked out in 2011 compared with ten percent of games in 2010, twenty-five percent in 1998, and nearly sixty percent of games in 1975),¹¹ fans are still barred from watching their home team play on television within seventy-five miles of the stadium anytime an insufficient number of tickets is purchased before the game.¹² Notably, the number of blackouts appears ready to rise again due to a 4.5% decrease in total attendance at NFL games over the past five seasons, signaling that fans will be further prevented from watching their home teams play on Sundays.¹³ Although NFL blackouts themselves are undesirable for fans, they truly become problematic when they take place in stadiums that have been funded by taxpayer money. As a recent article noted, “[t]he NFL can continue, as always, to keep certain games off local television no matter how much public money went into a privately-owned stadium.”¹⁴

The enforcement of the NFL’s current blackout policy in stadiums built with taxpayer dollars imposes a double punishment upon loyal NFL fans: fans are prevented from watching a game played in a stadium that only exists because they were forced to pay hundreds of millions of dollars in taxes to fund its construction. In order to prevent fans from being forced to pay increased taxes to fund stadiums

⁹ *Id.* (internal quotation marks omitted).

¹⁰ Shaun Assael, *NFL Fans Blacked Out, Riled Up*, ESPN (Sept. 18, 2012, 4:17 PM), http://proxy.espn.go.com/espn/otl/blog/_name/assael_shaun/id/8395985/f.

¹¹ Mike Florio, *Blackouts Are Far Less Common Than They Used To Be*, NBCSPORTS PROFOOTBALLTALK (July 13, 2012, 10:36 AM), <http://profootballtalk.nbcsports.com/2012/07/13/blackouts-are-far-less-common-than-they-used-to-be/>.

¹² Kevin Clark, *Game Changer: NFL Scrambles to Fill Seats*, WALL ST. J., June 30, 2012, at A1; *infra* notes 19–21, 69–72 and accompanying text.

¹³ See Clark, *supra* note 12.

¹⁴ Dan Wetzel, *Vikings Get Their New Stadium, but Fans Are Still Subjected to ‘Blackout’ Rule*, YAHOO! SPORTS (May 10, 2012, 11:22 PM), <http://sports.yahoo.com/news/nfl—vikings-get-their-new-stadium—but-fans-are-still-subjected-to—blackout—rule.html>.

while simultaneously being prevented from watching their local teams play in those stadiums as a result of a blackout, Congress should amend the current tax code to essentially force the NFL and NFL team owners to make a choice: either subject fans to increased taxes for stadiums or subject them to blackouts if the requisite number of tickets is not sold, but not both.

This Note provides a solution to the problem of NFL blackouts in publicly funded stadiums by proposing an amendment to the current tax code that will prevent fans from being subjected to both higher taxes and blacked out home games. Before understanding why this proposal will solve the problem, it is important to fully comprehend the background of both the NFL's blackout rule and how stadiums receive public funding. Part I of this Note, therefore, will explore both the history and the current functions of the NFL's blackout rule and financing arrangements for professional sports stadiums. Part II will explain previous, failed attempts by Congress and state legislatures to address the problem. Part III will then propose a novel solution to this problem through a simple amendment to the current federal tax code, and Part IV will explain why this proposal will solve the problem when alternatives have failed.

I. KICKOFF: THE NFL BLACKOUT RULE IN PUBLICLY FINANCED NFL STADIUMS

To fully comprehend the problem presented by allowing blackouts to persist in publicly funded stadiums, two distinct topics must first be explained: (1) the origins of and present state of the NFL's blackout rule and (2) a brief history of stadium financing and an explanation of how financing for major professional sports stadiums works today.

A. *The NFL's Blackout Rule*

The NFL's blackout rule has its roots closely intertwined with the foundation of the League in the 1920s. As the League continued to gain popularity, radio and television technology increasingly became more readily available to the common fan.¹⁵ These alternative means of listening to or viewing a game on the radio or television caused NFL owners to grow concerned about the potential impact these means could have on ticket sales.¹⁶ These concerns reached their apex

¹⁵ See Alan Fecteau, *NFL Network Blackouts: Old Law Meets New Technology with the Advent of the Satellite Dish*, 5 MARQ. SPORTS L.J. 221, 223 (1995).

¹⁶ See *id.* at 226.

when the television began to displace the radio in American homes.¹⁷ Fearful that fans would prefer to watch or listen to a game from the comfort of their own homes or at a local bar, rather than buy a ticket and go to the stadium for the game, NFL teams chose not to sell television rights to home games.¹⁸ The NFL ultimately codified this policy in Article X of its bylaws, which, as described by the court in *United States v. NFL* ("*NFL I*"),¹⁹ provides that

no club shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another League City on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game by use of a station within 75 miles of its home city, unless permission for such broadcast or telecast is obtained from the home club.²⁰

The practical effect of Article X was to prevent all live broadcasts of all outside games into a team's home territory.²¹ Fans could never watch their home team, or any other team, on television when their team had a home game, and when their team played away from home they could only view broadcasts of their local team's game, but no other outside games.²²

Fans grew increasingly frustrated with this policy and began to put pressure on the federal government to institute a change.²³ In 1953, the Department of Justice brought an antitrust action against the NFL²⁴ under Section 1 of the 1890 Sherman Act.²⁵ The case presented two key issues in relation to television blackouts: (1) whether "the provision which prevents the telecasting of outside games into the home territories of other teams on days when the other teams [were] playing at home [was] illegal";²⁶ and (2) whether it was legal to restrict telecasts of any game other than that of the local team in the local team's territory whenever that team was playing away from home.²⁷

¹⁷ See *id.* at 224.

¹⁸ *Id.* at 226.

¹⁹ *United States v. NFL (NFL I)*, 116 F. Supp. 319 (E.D. Pa. 1953).

²⁰ *Id.* at 321; see also Fecteau, *supra* note 15, at 226.

²¹ Fecteau, *supra* note 15, at 226.

²² *NFL I*, 116 F. Supp. at 321.

²³ See *id.*; see also Fecteau, *supra* note 15, at 226.

²⁴ *NFL I*, 116 F. Supp. at 321.

²⁵ Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2012).

²⁶ *NFL I*, 116 F. Supp. at 322.

²⁷ *Id.* at 326. The case also looked at other issues, such as the legality of blacking out radio

In bringing its case, the United States government alleged that the blackout provision of the NFL's bylaws constituted an illegal and unreasonable restraint on trade that harmed consumers.²⁸ In response, the NFL argued that the blackout policy was necessary to protect ticket sales, to protect weaker teams, and to preserve the League itself.²⁹ The district court ultimately found the NFL's argument to be persuasive on the first issue, holding that blackouts of games played in a home team's territory when that team was playing at home were not illegal because they were necessary to protect ticket sales in the home stadium.³⁰ On the second question, however, the court disagreed with the NFL and found blackouts of other games on days when the home team was playing an away game to be illegal.³¹ The court found against the NFL on this issue because there was "not one shred of evidence" that broadcasts of other games in a home team's territory when that team was playing away from home had any negative effect on attendance numbers for subsequent home games.³²

The result of the district court's decision was to permit NFL teams to continue to black out all NFL games whenever a team had a home game in order to protect ticket sales, but it barred teams from blacking out other games when the home team was playing away from home.³³ The NFL chose not to appeal the ruling, and as a result, this model for blacking out home games remained in effect for the next decade.³⁴ A new technological development, however, would again force the NFL to rethink its blackout rule: the continued advancement of national television broadcasts.³⁵

B. The NFL's Popularity Explosion on Television

In 1958, the New York Giants lost in overtime to the Baltimore Colts—twenty-three to seventeen—in the NFL championship game, in what is now known as "the greatest game ever played."³⁶ By all

broadcasts under the Sherman Act and whether the NFL commissioner's power to prevent all radio and television broadcasts was illegal. *Id.* at 327.

²⁸ *Id.* at 321.

²⁹ *Id.* at 325–26.

³⁰ *Id.* at 325. Notably, the court relied heavily on a finding that home games for the Los Angeles Rams in 1950 that were not blacked out had significantly lower attendance numbers than games that were blacked out. *Id.*

³¹ *Id.* at 326.

³² *Id.*

³³ Fecteau, *supra* note 15, at 226.

³⁴ *Id.* at 227.

³⁵ *See id.*

³⁶ *Id.*

accounts, the game was not, in fact, particularly well played; rather, the "greatest game ever played" moniker was created because the game drew more than fifty million viewers across the entire country.³⁷ The game represented the incredible potential that the NFL possessed and the vast opportunity that national television presented for the League.³⁸ In his work *The Story of Football*, Robert Leckie noted that "television has enabled pro football to challenge pro baseball as the national pastime," and that "television has been the making of pro football."³⁹ This television potential presented the NFL with a fresh problem: how best to reap the benefits of the national television explosion while also protecting local ticket sales through its current blackout policy.⁴⁰

The potential benefits that new national television exposure presented for football were first recognized by the NFL's rival league, the American Football League ("AFL").⁴¹ Although the AFL struggled to generate significant revenue from ticket sales, it entered into a television contract with the American Broadcasting Company ("ABC") for the exclusive right to broadcast each of the league's games.⁴² The revenue from the television contract was then distributed equally among the teams in the AFL, therefore allowing even struggling franchises with poor ticket sales to turn a profit.⁴³ This approach was a deviation from a previous model, which had allowed each team to make its own regional broadcast agreements with local television stations.⁴⁴

Recognizing the benefits of the AFL's contract with ABC and desiring to compete with the rival league, the commissioner of the NFL, the legendary Alvin "Pete" Rozelle, entered into a similar ex-

37 *Id.* Although the game did have an exciting finish, as the Baltimore Colts won in sudden-death overtime after they kicked a field goal at the end of regulation to extend the game, the stats from the game are underwhelming. No wide receiver or running back from either team had over 100 yards receiving or rushing. And although the game featured seventeen future members of the Pro Football Hall of Fame, the game also included six fumbles, an interception, multiple missed field goals, and conservative play calling. See *1958 NFL Championship Game Box Score*, PRO FOOTBALL HALL OF FAME, http://www.profootballhof.com/history/release.aspx?release_id=3011&print=y (last visited Aug. 28, 2014); *Greatest Game Ever Played*, PRO FOOTBALL HALL OF FAME, http://www.profootballhof.com/hof/release.aspx?release_id=1805 (last visited Aug. 28, 2014).

38 See Fecteau, *supra* note 15, at 228.

39 ROBERT LECKIE, *THE STORY OF FOOTBALL* 159–60 (1974 ed.).

40 Fecteau, *supra* note 15, at 228.

41 *Id.* at 228–29.

42 *Id.* at 229.

43 *Id.*

44 See *id.*

clusive agreement with the Columbia Broadcasting System ("CBS") for all NFL games in 1961.⁴⁵ Under this initial agreement, CBS had the exclusive right to broadcast NFL games in exchange for an annual fee of \$4,650,000, which was divided equally among each of the fourteen teams in the League.⁴⁶ In *United States v. NFL* ("*NFL II*"),⁴⁷ the United States government challenged this new national television contract as contrary to the judgment in *NFL I*, entered nearly a decade earlier in 1953.⁴⁸ Citing the impermissible elimination of competition among teams that resulted from the NFL's television contract, the district court agreed that the NFL's new television contract violated the 1953 judgment and was therefore illegal.⁴⁹

Upset about the district court's ruling and realizing that the television contracts they had made with ABC and CBS were in jeopardy, both the NFL under Pete Rozelle and the leaders of the AFL immediately began to lobby Congress to create a law that would overturn the adverse decision.⁵⁰ After only seventy-two days, Congress responded by passing the Sports Broadcasting Act of 1961.⁵¹ This Act permitted the NFL, AFL, and other sports leagues to pool their television rights and sell them to a single television station, just as the AFL and NFL had done with their arrangements with ABC and CBS, respectively, before the adverse ruling issued by the Eastern District of Pennsylvania in *NFL II*.⁵² The Act also included a blackout provision that adopted a portion of the district court's original 1953 ruling from *NFL I*.⁵³ Thus, the Act allowed the leagues to continue to black out all games within seventy-five miles of a city at will whenever a team played at home in order to protect ticket sales.⁵⁴ This practice survived a constitutional challenge and was upheld in the 1962 case of *Blaich v. NFL*,⁵⁵ again because of the argument that blackouts were necessary for the protection of ticket sales.⁵⁶

⁴⁵ See *United States v. NFL (NFL II)*, 196 F. Supp. 445, 446 (E.D. Pa. 1961); Fecteau, *supra* note 15, at 229.

⁴⁶ *NFL II*, 196 F. Supp. at 446.

⁴⁷ *United States v. NFL (NFL II)*, 196 F. Supp. 445 (E.D. Pa. 1961).

⁴⁸ *Id.* at 446.

⁴⁹ *Id.* at 447.

⁵⁰ Fecteau, *supra* note 15, at 229-30 & n.37.

⁵¹ See *id.*; Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291-1295 (2012)).

⁵² Fecteau, *supra* note 15, at 230.

⁵³ *Id.*

⁵⁴ See *id.* at 230-31, 235.

⁵⁵ *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962).

⁵⁶ *Id.* at 323-24. In the case, a number of plaintiffs sought to enjoin the NFL from black-

The affirmation of the Sports Broadcasting Act of 1961 through the *Blaich* decision granted professional football essentially unlimited power to black out all games whenever a team played at home, even if the game was a league championship.⁵⁷ Although the competition between the AFL and NFL did initially result in fewer blackouts as each league tried to gain the upper hand, the leagues merged in 1966 and created a single professional football monopoly known collectively as the NFL.⁵⁸ Without competition from the rival AFL, Pete Rozelle again focused on using the blackout rule to protect ticket sales whenever a team played at home.⁵⁹ This resulted in local blackouts for the early Super Bowls, even when all of the tickets for these games had been sold, all in the name of protecting attendance numbers.⁶⁰ Although fans tried to mount challenges to such blackouts, *Blaich* had already set the precedent that such blackouts were legal, and consequently, the NFL continued to implement them as it saw fit to protect ticket sales.⁶¹ NFL fans located within the seventy-five mile radius of the home team's territory who were unable to procure tickets were left with no alternative other than to travel to hotels outside of the blacked out territory in order to watch their local teams play on Sundays.⁶²

Despite the unfairness that the League's blackout policy presented to NFL fans, Congress did little to intervene for another decade.⁶³ In the early 1970s, however, the historically dismal Washington Redskins began to win football games, resulting in an increased demand for tickets to Redskins games in the nation's capital.⁶⁴ When

ing out the League championship game, to be held at Yankee Stadium in New York City. *Id.* at 320. The plaintiffs urged that Congress intended the Sports Broadcasting Act of 1961 to only apply to regular season games, and not to league championships. The NFL disagreed and argued that the Act applied to all of its broadcasts because of the importance of protecting the sale of tickets for home games. *Id.* The district court sided with the NFL and found no special language for championship games in the Act, thus finding that the NFL could legally black out the otherwise sold-out game. *Id.* at 321–22, 324. In finding for the NFL, the court also expressed doubt about the plaintiffs' constitutional due process challenge to the Act, thus upholding the newly passed Act and scoring a major victory for the NFL. *See id.* at 322–24.

⁵⁷ *Id.*

⁵⁸ *See* Fecteau, *supra* note 15, at 231.

⁵⁹ *See id.*

⁶⁰ *See, e.g.,* Jason Lisk, *Rubin, Rozelle, the Redskins, and Super Bowl Blackouts*, PRO-FOOTBALL-REFERENCE.COM (Feb. 5, 2010), <http://www.pro-football-reference.com/blog/?p=5967>.

⁶¹ *See* Fecteau, *supra* note 15, at 231.

⁶² *See* Jerry Kirshenbaum, *Chirp-Chirp, Crunch-Crunch*, SPORTS ILLUSTRATED, Oct. 1, 1973, at 38, 39.

⁶³ *See* Fecteau, *supra* note 15, at 233.

⁶⁴ *Id.*

a number of congressmen and even the President, Richard Nixon, found that they were unable to purchase tickets for the sold out games and were also prevented from watching their hometown heroes on television each Sunday due to the blackout policy, they sought to address the issue.⁶⁵ Finally, the politicians understood the burden that the blackout policy placed upon the average NFL fan and sought to institute a change.⁶⁶

C. *The Dawn of Today's NFL Blackout Rule*

The result of members of Congress being unable to watch the Redskins play was Public Law 93-107,⁶⁷ which amended the Communications Act of 1934⁶⁸ with respect to television broadcasts of professional sporting events. The crucial portion of the Act changed the status quo of the NFL's blackout policy by preventing teams from indiscriminately blacking out games regardless of the number of tickets that had been sold.⁶⁹ Instead, a game could only be blacked out if all tickets that were available at least 120 hours before kickoff had not been sold seventy-two hours before the game began.⁷⁰ For the first time, Congress had banned blackouts in the home territories of teams if all tickets had been sold seventy-two hours prior to game time.⁷¹ Although Pete Rozelle and the NFL were certainly unhappy about the new law, the League was still free to black out any home game that did not sell 100% of its tickets seventy-two hours before kickoff. This continued ability to black out games under certain conditions also precluded the League from again raising an argument about the necessity of protecting ticket sales through the use of blackouts.⁷²

⁶⁵ *Id.*; see also Lisk, *supra* note 60.

⁶⁶ See Lisk, *supra* note 60.

⁶⁷ Communications Act Amendments of 1973, Pub. L. No. 93-107, 87 Stat. 350 (repealed Dec. 31, 1975).

⁶⁸ Communications Act of 1934, 47 U.S.C. §§ 151-615b (2006).

⁶⁹ The most important portion of the statute read as follows:

If any game of a professional sports club is to be broadcast by means of television pursuant to a league television contract and all tickets of admission for seats at such game which were available for purchase by the general public one hundred and twenty hours or more before the scheduled beginning time of such game have been purchased seventy-two hours or more before such time, no agreement which would prevent the broadcasting by means of television of such game at the same time and in the area in which such game is being played shall be valid or have any force or effect.

Communications Act Amendments of 1973 § 1.

⁷⁰ *Id.*

⁷¹ Lisk, *supra* note 60.

⁷² The NFL tried to argue, to no avail, that this policy would encourage "no-shows" at

Public Law 93-107 shaped the blackout policy that still remains in effect today. Although the law expired on December 31, 1975, and was not renewed due to lobbying from the NFL, the NFL has voluntarily adhered to its terms ever since it expired.⁷³ This policy has also been affirmed by the courts. In addition to the aforementioned challenges brought under the 1890 Sherman Act, other challenges against the blackout policy have been brought under the Copyright Act of 1976,⁷⁴ the Federal Communications Act of 1934,⁷⁵ and the Americans with Disabilities Act of 1990.⁷⁶ Each of these challenges failed, and the NFL continues to black out games whenever the ticket requirement is not met.

Initially, blackouts took place at an alarming rate, as fifty-three percent of games were blacked out in 1974, the year following the issuance of Public Law 93-107, and almost sixty percent of games were blacked out in 1975.⁷⁷ That number steadily declined over subsequent decades, as it dropped to fifty percent for the 1978 season and was down to twenty-nine percent before the 1982 strike season.⁷⁸ Following this strike season, the number of games blacked out rose to forty-six percent in 1983 and then began to steadily decline, reaching forty percent in 1988, twenty-five percent in 1998, and hitting as low as four percent in 2007.⁷⁹ Most recently, ten percent of games were blacked out in 2010, and six percent were blacked out in 2011.⁸⁰

Today, blackouts remain relatively rare because a local television affiliate or other company often will purchase all remaining tickets before the seventy-two hour deadline as an act of goodwill to prevent a local blackout.⁸¹ The blackout rule still exists, however, as evidenced by the sixteen blackouts that occurred during the 2011–2012

games if there was poor weather or a team was having a particularly poor showing, which would diminish the stadium experience and result in lower stadium concession revenues. The NFL also pointed to the adverse effect the law would have on hotels and bars located just outside of the seventy-five mile blackout radius, as fans would no longer need to travel to these destinations on Sundays to watch their favorite teams play. See Kirshenbaum, *supra* note 62, at 39.

⁷³ Opposition of the NFL at 9 n.14, Petition for Rulemaking to Eliminate the Sports Blackout Rule, MB Docket No. 12-3 (FCC Feb. 13, 2012).

⁷⁴ Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012); see, e.g., *NFL v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986).

⁷⁵ See, e.g., *NFL v. Alley, Inc.*, 624 F. Supp. 6 (S.D. Fla. 1983).

⁷⁶ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); see, e.g., *Stoutenborough v. NFL*, 59 F.3d 580 (6th Cir. 1995).

⁷⁷ Florio, *supra* note 11.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Fecteau, *supra* note 15, at 234.

season.⁸² Although 16 blackouts out of a total of 256 games is a relatively low number, the blackout rule has resulted in particularly high blackout rates for games in cities such as Cincinnati and Tampa Bay, which had 75% and 71.4% of their games in 2011 blacked out, respectively.⁸³ The cities that are affected by blackouts can also change from year to year, meaning that no city is really ever truly safe from blackouts.⁸⁴

Recently, in response to decreased ticket sales and massive television popularity, the NFL proposed reducing the ticket-sale requirement for blackouts to eighty-five percent in exchange for a higher percentage of revenue shared with the League from the teams that choose to participate at this lower percentage.⁸⁵ Although many teams ultimately did choose to participate in this program, at least three teams (the Indianapolis Colts, the Buffalo Bills, and the San Diego Chargers) refused and continued to enforce blackouts unless one hundred percent of tickets were sold seventy-two hours before kick-off.⁸⁶ Even if some teams choose to participate in this eighty-five percent program, it is clear that the NFL does not intend to lift its blackout rule voluntarily anytime soon.

D. Public Financing for Professional Sports Stadiums

To fully comprehend the problem presented by blackouts of games in publicly funded stadiums, it is also important to understand how these stadiums are financed during their construction and subsequent maintenance. Traditionally, financing for the construction and

⁸² Clark, *supra* note 12.

⁸³ Comments of Sports Fans Coalition, Inc.; National Consumers League; Public Knowledge; League of Fans; Media Access Project at 7, Petition for Rulemaking to Eliminate the Sports Blackout Rule, MB Docket No. 12-3 (FCC Feb. 13, 2012) [hereinafter Comments of Sports Fans Coalition]. The presence of the Cincinnati Bengals at the top of the blackout list in 2011 also indicates that blackouts are not directly tied to team success. *See id.* The Bengals finished the 2011 season with a record of nine wins and seven losses, good enough for a playoff spot. *See Cincinnati Bengals History: 2011*, CINCINNATI BENGALS, <http://www.bengals.com/team/history/bengalshistory2011.html> (last visited Aug. 28, 2014). Thus, a lack of attendance can be a result of many different factors, including a fan base's perception of ownership or the high cost of tickets in a bad economy, and is not solely based upon the win and loss record of a franchise. *See* Comments of Sports Fans Coalition, *supra*, at 7.

⁸⁴ *See, e.g.*, Daniel Kaplan, *Up to 12 NFL Teams May Face Blackouts*, SPORTS BUS. J. (Aug. 31, 2009), <http://www.sportsbusinessdaily.com/Journal/Issues/2009/08/20090831/This-Weeks-News/Up-To-12-NFL-Teams-May-Face-Blackouts.aspx>.

⁸⁵ Clark, *supra* note 12.

⁸⁶ *See, e.g.*, Dan Alexander, *Despite NFL Rule Change, More Blackouts Coming to Buffalo*, FORBES (July 13, 2012, 1:17 PM), <http://www.forbes.com/sites/danalexander/2012/07/13/despite-nfl-rule-change-more-blackouts-coming-to-buffalo/>.

maintenance of professional sports stadiums occurs in one of three ways: (1) completely private financing, (2) completely public financing, or (3) a combination of both private and public financing.⁸⁷ In recent years, this third option has become the norm for stadium construction,⁸⁸ and this has led to a debate about what role public financing should play for professional sports facilities that will generate a profit for the private owners of the team.⁸⁹ To fully understand these financing mechanisms, it is important to look briefly at the history of stadium financing, and then to observe how stadium construction projects are most commonly financed today.

Although public financing for professional sports stadiums dates back to the nineteenth century,⁹⁰ it was not until the 1950s and 1960s that a new era of publicly financed stadium construction exploded across America.⁹¹ Whereas some of the stadiums built before this era had been financed completely through private means (such as Wrigley Field in Chicago and Fenway Park in Boston),⁹² these newer stadiums used general obligation bonds ("GO bonds") as a means to provide public funding for these projects.⁹³ These GO bonds originally became popular during the railroad boom of the late 1800s and were issued by a municipality but were not tied to any specific assets.⁹⁴ The municipality would then repay the bonds through general tax increases.⁹⁵ These bonds, however, often resulted in much lower returns to the community than if the municipalities had invested their money elsewhere, causing taxpayer backlash and resulting in many state legislatures passing laws to make many of these bonds illegal.⁹⁶

As professional sports leagues began to expand and more cities wanted to attract professional sports franchises, municipalities began to look for other means of offering stadium construction incentives for teams.⁹⁷ As a result, these municipalities began to offer revenue-

⁸⁷ Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 196 (2005).

⁸⁸ *Id.* at 197.

⁸⁹ See, e.g., Mayer, *supra* note 87; Jack F. Williams et al., *Public Financing of Green Cathedrals*, 5 ALB. GOV'T L. REV. 123 (2012); Logan E. Gans, *Take Me Out to the Ball Game, but Should the Crowd's Taxes Pay For It?*, 29 VA. TAX REV. 751 (2010).

⁹⁰ Mayer, *supra* note 87, at 207.

⁹¹ Gans, *supra* note 89, at 754–55.

⁹² *Id.* at 754.

⁹³ See Mayer, *supra* note 87, at 207.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 207–08.

⁹⁷ *Id.*

based bonds, also known as municipal bonds or industrial development bonds ("IDB").⁹⁸ Unlike GO bonds, these bonds were attached to a specific source of revenue, such as stadium revenues or, more generally, an increased sales tax.⁹⁹ These bonds were attractive to investors because they were exempt from federal income tax per the Revenue Act of 1913,¹⁰⁰ which allowed municipalities to issue the bonds with a lower interest rate than private corporate bonds.¹⁰¹ This income tax exemption allows the investor to receive a higher actual rate of return than she would from a private bond, even though the interest rate may be nominally lower.¹⁰² As a result, these municipal bonds are more likely to be purchased by potential investors.¹⁰³ This new means of publicly financing stadiums surfaced just as cities began to compete with one another for new sports franchises by trying to offer more public financing for a new stadium—and other tax incentives—than any other city.¹⁰⁴ The result was a number of new multi-sport stadiums publicly financed through tax-exempt municipal bonds, such as Pittsburgh's Three Rivers Stadium.¹⁰⁵

Congress tried to curtail the use of such bonds with the 1968 Revenue and Expenditure Control Act ("RECA"),¹⁰⁶ which sought to reform the 1913 Revenue Act.¹⁰⁷ Under the RECA, a bond could only be considered an IDB or municipal bond if it met two requirements: first, more than twenty-five percent of the bond proceeds were used

⁹⁸ Williams et al., *supra* note 89, at 130–31.

⁹⁹ Mayer, *supra* note 87, at 208.

¹⁰⁰ Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114.

¹⁰¹ See Williams et al., *supra* note 89, at 130–31.

¹⁰² See *id.*

¹⁰³ More generally, municipalities issue these municipal bonds when they want to fund a large project such as a stadium but know they do not have enough funds to pay for the project out of pocket. Instead, the municipality seeks to raise the revenue by issuing municipal bonds to potential investors. By issuing these bonds, the municipality is essentially borrowing the money from the investors in exchange for a promise to repay the loan to the investors with interest. As noted above, these bonds are attractive to investors because they are a form of investment that is exempt from income tax. These bonds are also attractive to municipalities because this income tax exemption allows them to issue the bond at a lower interest rate than any loan they could have obtained in the private market. Investors are thus more likely to purchase these bonds than a private bond, even though the private bond offers a higher nominal interest rate. The municipality then takes the money it has received in exchange for these bonds and uses it to fund the project for which it initially issued the bonds. Finally, the city will recoup the money it has borrowed from issuing these bonds through tax increases and other forms of security in order to repay the bonds with interest to the original investors. See *generally id.*

¹⁰⁴ Gans, *supra* note 89, at 755.

¹⁰⁵ *Id.*

¹⁰⁶ Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 251.

¹⁰⁷ Gans, *supra* note 89, at 756–57.

by a nongovernmental entity, and second, more than twenty-five percent of debt service payments were paid directly or indirectly by property used in a trade or business.¹⁰⁸ More simply, the goal of the RECA was to ensure that only users of the particular project financed by the bonds ended up repaying the bonds, rather than the public as a whole.¹⁰⁹ Stadiums were expressly exempted from these twenty-five percent requirements under the RECA, however, because they were deemed “inherently quasi-public in nature.”¹¹⁰ Having avoided a curtailment of public funding for sports stadiums, professional sports team owners continued to lobby cities for further stadium construction in the 1970s and 1980s.¹¹¹ As millionaire and billionaire owners obtained millions of dollars in taxpayer money to finance their new facilities, taxpayers again became incensed and lobbied Congress to reform the tax laws.¹¹²

Congress did just that with the 1986 Tax Reform Act.¹¹³ Under this Act, stadiums were no longer exempted as “inherently quasi-public in nature” and thus were now subject to the percentage requirements listed in the RECA in order for their bonds to qualify as “public.”¹¹⁴ Furthermore, the percentage requirements for a bond to qualify as public were reduced from twenty-five percent to ten percent.¹¹⁵ Thus, municipal bonds issued for stadium construction could only be exempt from federal income tax if “no more than 10% of the stadium debt [was] secured by the revenues produced by the stadium itself.”¹¹⁶ The 1986 Tax Reform Act is now codified in the United States Code at I.R.C. § 103¹¹⁷ and I.R.C. § 141.¹¹⁸

As noted by Senator Daniel Patrick Moynihan, the original intent of the 1986 Tax Reform Act was to “eliminate tax-exempt financing of professional sports facilities [altogether].”¹¹⁹ If only ten percent of stadium debt could be paid for from stadium revenue to obtain tax-exempt federal bond status, Congress thought no municipality would

¹⁰⁸ Williams et al., *supra* note 89, at 131.

¹⁰⁹ See *id.*

¹¹⁰ *Id.* (internal quotation marks omitted).

¹¹¹ See Gans, *supra* note 89, at 757.

¹¹² See *id.*

¹¹³ Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; see also Mayer, *supra* note 87, at 209.

¹¹⁴ See Mayer, *supra* note 87, at 209.

¹¹⁵ *Id.* at 209–10.

¹¹⁶ *Id.* at 210.

¹¹⁷ I.R.C. § 103 (2012).

¹¹⁸ I.R.C. § 141 (2012).

¹¹⁹ Williams et al., *supra* note 89, at 131 (internal quotation marks omitted).

issue such bonds because doing so would put too much burden on the taxpayer.¹²⁰ Instead, stadium owners would have to find a new, private method for financing stadium construction and renovation projects.¹²¹ Despite these good intentions, however, as cities remain desperate to feature professional sports teams in new stadiums, the effect of the Act has merely been to change the debt repayment structure.¹²² A heavier burden is thus imposed on taxpayers more so than before, as they are now responsible for ninety percent of the municipal debt whenever these bonds are issued for stadium construction and maintenance.¹²³

The 1986 Tax Reform Act marks the last time that Congress addressed this issue, and as a result of the practical effects of this legislation, taxpayers are continually asked to foot the bill for the stadiums in their cities. Stadium construction and renovation have increased in recent years as single-sport stadiums have only become more popular.¹²⁴ Stadium costs have also continued to rise, as evidenced by the recent \$1.3 billion stadium built for the Dallas Cowboys¹²⁵ and the \$975 million stadium recently approved for the Minnesota Vikings.¹²⁶ Despite being responsible for ninety percent of the repayment, cities have continued to agree to provide tax-exempt municipal bonds for such construction in order to keep their teams in town, rather than risk losing them to other municipalities that can promise brand-new, publicly funded stadiums.¹²⁷

¹²⁰ See *id.* at 131–32.

¹²¹ See *id.*

¹²² Mayer, *supra* note 87, at 210.

¹²³ See *id.* at 210–11.

¹²⁴ See Gans, *supra* note 89, at 756.

¹²⁵ *Id.* at 759.

¹²⁶ Doug Belden, *Vikings Stadium: Dayton Signs \$975 Million Bill*, TWINCITIES.COM (May 14, 2012, 12:01 AM), http://www.twincities.com/ci_20619809/vikings-stadium-bill-signing-scheduled-noon; see Wetzel, *supra* note 14.

¹²⁷ This was precisely the excuse that NFL Owner Art Modell used when he decided to move the Cleveland Browns to Baltimore following the 1994 season. At the time the move occurred, the Cleveland Browns had been playing in Cleveland for more than fifty years and were one of the most tradition-rich and popular franchises in the NFL. When Modell was interviewed about his decision to move the team, he offered the infamous excuse that he was left with no choice. Although the *Cleveland Plain Dealer* later revealed that the city had, in fact, offered to build a new stadium and Modell really decided to move the franchise because he was nearly bankrupt, the episode serves as a cautionary tale of how NFL owners can hold a municipality hostage by threatening to move a team if a new stadium is not built. See Mary Kay Cabot, *Art Modell's Decision to Move Cleveland Browns Haunted Him for Rest of Life*, CLEVELAND.COM (Sept. 6, 2012, 9:16 PM), http://www.cleveland.com/browns/index.ssf/2012/09/art_modell_never_really_recove.html; Mark Naymik, *Art Modell Was Offered a Stadium for the Cleveland Browns*

To pay the hundreds of millions of dollars due on these bonds, cities and states have turned to a number of different means, each of which further burdens taxpayers. Among the most popular means of meeting the ninety percent public-funding level are increased sales taxes, increased tourist taxes, sin taxes on alcohol and cigarettes, taxes on lottery proceeds, and even taxes on small businesses.¹²⁸ These taxes pass the costs of the stadiums directly onto the American taxpayer, and it is estimated that United States taxpayers contributed between \$6 billion and \$10 billion towards stadium financing from 1990 to 2001 alone.¹²⁹ With continually bigger, better, and more expensive stadiums being built each year, the burden on taxpayers is unlikely to subside anytime soon.

II. THE GOVERNMENT ENTERS THE RED ZONE: POLICYMAKERS RECOGNIZE THE PROBLEM BUT HAVE YET TO FIND A SOLUTION THAT PUTS POINTS ON THE BOARD

Although the NFL blackout rule and the means of financing a stadium facially appear to be unrelated, the two areas of concern become intertwined when NFL fans are subjected to blackouts of their favorite teams' games in publicly financed stadiums. And although the number of NFL blackouts has steadily decreased in recent years,¹³⁰ the NFL has endured a 4.5% decline in total attendance since its peak during the 2007 season.¹³¹ This decline in attendance, compounded by rising ticket and game day costs,¹³² has increased fears that more

and Passed, CLEVELAND.COM (Sept. 13, 2012, 8:00 PM), http://www.cleveland.com/naymik/index.ssf/2012/09/art_modell_gateway_stadium.html.

¹²⁸ Mayer, *supra* note 87, at 210–11.

¹²⁹ See Gans, *supra* note 89, at 758; see also *Taking a Look at New and Remodeled NFL Stadiums*, ST. LOUIS POST DISPATCH (May 20, 2012, 12:00 AM), http://www.stltoday.com/sports/football/professional/taking-a-look-at-new-and-remodeled-nfl-stadiums/article_c4769793-55f4-58f8-9de5-fdeaa9fb07a3.html.

¹³⁰ Only six percent of games were blacked out during the 2011 NFL season, a number far lower than the ten percent of games blacked out in 2010, twenty-five percent of games blacked out in 1998, and forty percent of games blacked out in 1988. Florio, *supra* note 11.

¹³¹ Mike Florio, *After Peaking in 2007, NFL Attendance Steadily Has Declined*, NBC-SPORTS PROFOOTBALLTALK (July 8, 2012, 9:39 PM), <http://profootballtalk.nbcsports.com/2012/07/08/after-peaking-in-2007-nfl-attendance-steadily-has-declined/>.

¹³² The average cost of a ticket to an NFL game has increased by fourteen percent since 2007, and it is currently estimated that it would cost a family of four approximately \$440 to attend a single NFL game. See Daniel Bukszpan, *NFL Game-Day Costs for Fans*, YAHOO! SPORTS (Oct. 4, 2012, 3:31 PM), <http://sports.yahoo.com/news/nfl—nfl-game-day-costs-for-fans.html>; Jed Hughes, *NFL Decade-Low Attendance Inspires New TV Blackout Rules*, BLEACHERREPORT (Oct. 5, 2012), <http://bleacherreport.com/articles/1360162-nfl-decade-low-attendance-inspires-new-tv-blackout-rules>.

blackouts may be on the horizon.¹³³ As a result, more taxpayers are at risk of being unable to watch their home teams play football games in the stadiums that they funded. Recently, individuals at both the state and federal level attempted to reconcile the problem, but no solution has yet resulted from these efforts.

A. Missed Tackles: State Governments Look at the Issue but Are Unable to Bring Down the Blackout Rule

In recognition of this problem, a number of state legislators have attempted to introduce legislation that would ban NFL blackouts in publicly funded NFL stadiums. For example, State Representative Robert F. Hagan, a member of the Ohio House of Representatives, recently proposed a bill that would “prohibit a professional sports team for whom a sports facility was constructed using public funds from entering into a contract that prohibits the broadcast of the sports team’s games based upon the number of tickets sold.”¹³⁴ The bill would have particular relevance in Ohio, where the Cincinnati Bengals had seventy-five percent of their games blacked out in 2011 while playing in the publicly funded Paul Brown Stadium.¹³⁵ State Representative Brendan Boyle of the Pennsylvania House of Representatives proposed a similar bill in Pennsylvania, noting that the stadiums of the Philadelphia Eagles and the Pittsburgh Steelers have received a total of \$160 million in taxpayer subsidies in recent years.¹³⁶

This issue has been particularly prominent in Minnesota,¹³⁷ where the state legislature recently agreed to build a new \$975 million stadium for the Minnesota Vikings.¹³⁸ Of the total \$975 million price tag, the team, owned by billionaire Zygi Wilf and his family, will pay for less than half (\$427 million), while the state of Minnesota and the city

¹³³ See, e.g., Alexander, *supra* note 86.

¹³⁴ LSC 129 2844-1, 129th Gen. Assemb., Reg. Sess. (Ohio 2011–2012). The author would like to extend a special thank you to Representative Hagan and his staff for their willingness to share the proposed bill and the accompanying Ohio Legislative Service Commission’s review.

¹³⁵ Comments of Sports Fans Coalition, *supra* note 83, at 7; see also Reed Albergotti & Cameron McWhirter, *A Stadium’s Costly Legacy Throws Taxpayers for a Loss*, WALL ST. J., July 12, 2011, at A1.

¹³⁶ More specifically, the Pittsburgh Steelers received \$85 million in subsidies and the Philadelphia Eagles received \$75 million in taxpayer funds for their new stadiums. Letter from Brendan Boyle, Pa. State Representative, to All House of Representative Members of the Commonwealth of Pa. (Sept. 13, 2010) (on file with The George Washington Law Review).

¹³⁷ See, e.g., Brian Murphy, *Vikings Blackout Amendment Unlikely to Stick to Stadium Bill, Says Senator*, TWINCITIES.COM (May 10, 2012, 12:01 AM), http://www.twincities.com/vikings/ci_20588443/vikings-blackout-amendment-unlikely-stick-stadium-bill-says.

¹³⁸ Belden, *supra* note 126.

of Minneapolis will cover the remaining cost (Minnesota will cover \$398 million through gambling revenue and Minneapolis will cover \$150 million through sales, restaurant, liquor, and lodging taxes).¹³⁹ Although he ultimately signed the bill passed by the Minnesota legislature approving the funding for the new stadium,¹⁴⁰ the Governor of Minnesota initially lamented the high cost that the construction will place on the state's citizens.¹⁴¹ In response to the attempts of ownership to further shift the cost of stadium construction onto Minnesota Vikings fans, Governor Mark Dayton sent a stern letter to the Wilf family, declaring that the stadium is meant to be a "People's Stadium" and one that belongs to the people of Minnesota, not merely the team and its owners.¹⁴² In this spirit, Minnesota State Senator Roger Chamberlain introduced an amendment to the stadium bill that would ban NFL blackouts in the stadium because it was to be funded with taxpayer money.¹⁴³ When introducing the amendment, State Senator Chamberlain acknowledged that although the Vikings had not suffered a blackout of an NFL game since 1997, the continued possibility of a blackout in a stadium funded by taxpayer dollars presented the risk of double punishment that the taxpayers of Minnesota could face anytime a blackout did occur.¹⁴⁴ When asked about his amendment, Senator Chamberlain summed up the entire problem with a succinct sentence: "If we're going to hand over hundreds of millions of dollars [to build the stadium], at least make sure the fans get to watch [the game]."¹⁴⁵

Despite the recognition by members of state legislatures of this potential double punishment for NFL fans who pay for a stadium and then are unable to watch games played within it, attempts to solve the problem at the state level have continually failed. The proposals of Representative Hagan in Ohio and Representative Boyle in Pennsylvania face a number of legal challenges that make their bills unlikely to ever be put to a vote, let alone signed into law in the state and enforced. As noted by the Ohio Legislative Service Commission in response to Representative Hagan's proposal, any attempt by the

¹³⁹ See *Taking a Look at New and Remodeled NFL Stadiums*, *supra* note 129.

¹⁴⁰ See Belden, *supra* note 126.

¹⁴¹ Letter from Mark Dayton, Governor of Minn., to Zygi Wilf and Mark Wilf, Owners, Minn. Vikings (Nov. 13, 2012), available at http://mn.gov/governor/images/11_2011Wilf_letter.pdf.

¹⁴² See *id.*

¹⁴³ See Murphy, *supra* note 137.

¹⁴⁴ See *id.*; Wetzel, *supra* note 14.

¹⁴⁵ Wetzel, *supra* note 14.

state legislature to solve the issue may be preempted by federal law.¹⁴⁶ The Commission noted that it “appears that federal law condones blackouts,” because the practice of blackouts is protected by both federal antitrust laws and Federal Communications Commission (“FCC”) regulations.¹⁴⁷ Therefore, the Commission concluded that “it appears federal law allows blackout policies, at least at the professional level, to occur, and the bill may be preempted because the bill prohibits activity in which federal law appears to allow a sports team to engage.”¹⁴⁸

In addition to the legal hurdles that state legislatures face when trying to address this problem, they must also deal with a potentially more powerful foe: the clout of the NFL itself. Despite significant bipartisan support for State Senator Chamberlain’s blackout amendment that sought to protect the Minnesota Vikings’s new stadium as a true “People’s Stadium,” the amendment was promptly struck out at the committee level and was not included in the bill that ultimately came to the State Senate’s floor for vote.¹⁴⁹ In response to the rejection of his amendment, Senator Chamberlain could only muster a frustrated laugh when he said: “What the NFL wants . . . the NFL gets.”¹⁵⁰ When NFL spokesman Greg Aiello was asked about the rejected amendment, he merely replied: “Our understanding is that the amendment was eliminated by [a Senate] committee Therefore, we see no need to comment.”¹⁵¹ Governor Dayton also softened his stance on the matter after NFL Commissioner Roger Goodell came to Minnesota and warned the Governor and the state legislative leaders that this proposal was likely Minnesota’s last chance to ensure the Vikings would not move to a new city.¹⁵² As Governor Dayton noted when he signed the bill, “[Goodell’s message was that] [t]his was our last sure opportunity . . . [a]nd I think it had a major effect—turned [the opposition] around.”¹⁵³

As a result of issues of preemption and the lobbying power of the NFL, state legislatures have continually been prevented from enacting

¹⁴⁶ Letter from Julie A. Rishel, Attorney, Ohio Legislative Serv. Comm’n, to Robert F. Hagan, Ohio State Representative (Sept. 20, 2012) (on file with The George Washington Law Review).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Wetzel, *supra* note 14.

¹⁵⁰ *Id.* (internal quotation marks omitted).

¹⁵¹ *Id.*

¹⁵² See Belden, *supra* note 126.

¹⁵³ *Id.*

any sort of legislation that solves this problem. Therefore, if a solution to the problem of blackouts in publicly funded stadiums is going to be found, it will most likely have to come from the federal government.

B. False Start: The Federal Government Acknowledges the Issue but Has Yet to Solve the Problem

Legislators at the federal level have also started to take notice of the inherent unfairness of prohibiting NFL fans from watching games played in stadiums that their tax dollars have paid for. In a letter to NFL Commissioner Roger Goodell on February 2, 2012, a group of United States congressmen wrote:

Given the significant changes that have occurred since the adoption of these [blackout] regulations, including the commitment of substantial tax dollars to the construction and renovation of stadia and the vast diversification and growth of the Leagues' revenue sources, we believe it is time for the NFL to re-consider and end its blackout policy.¹⁵⁴

The congressmen then suggested that if the NFL insisted on continuing to use the blackout policy, it should do so not based upon whether all tickets had been sold, but rather whether the number of tickets sold had met the average capacity of stadiums across the NFL.¹⁵⁵ This measure would then help less populous cities with large stadiums that may struggle to fill seats.

A little over a week later, a group of United States senators sent a letter to all of the commissioners of the major sports leagues, including Commissioner Goodell.¹⁵⁶ This letter was issued in the wake of the FCC's decision to seek comment on a petition filed by a sports lobby that sought the elimination of all sports blackout rules.¹⁵⁷ The letter again emphasized the unfairness of the blackout rule to the public, particularly as ticket prices continue to rise while the country attempts to pull itself out of a difficult economy.¹⁵⁸ The senators then urged the FCC "to take a broad look at sports blackouts and to con-

¹⁵⁴ Letter from Brian Higgins, Corrine Brown, Gus Bilirakis, Dennis Ross and Kathleen C. Hochul, Members of Congress, to Roger Goodell, Comm'r, Nat'l Football League (Feb. 2, 2012) (on file with The George Washington Law Review).

¹⁵⁵ *Id.*

¹⁵⁶ Letter from Richard Blumenthal, Sherrod Brown, Tom Harkin, Frank Lautenberg and Debbie Stabenow, U.S. Senators, to the Sec'y, Chairman, and Comm'rs of the Fed. Comm'n's (Feb. 13, 2012) (on file with The George Washington Law Review).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

sider comprehensive reform that ensures fans' access to sports programming."¹⁵⁹

On the same day, February 13, 2012, both the NFL and a coalition of lobbies acting on behalf of sports fans filed their comments to the FCC on a Petition for Rulemaking to Eliminate the Sports Blackout Rule.¹⁶⁰ In their brief, the fans' lobbyists noted that, at the very least, "the public—sports fans—should be able to watch the games that they helped to finance."¹⁶¹ And while the NFL's brief opposing the petition focused upon the necessity of maintaining the blackout rule in order to protect stadium revenues through attendance, it did not address the argument against the use of the blackout rule in publicly funded stadiums.¹⁶² The FCC's decision to solicit briefs from each side did have some effect, as shortly thereafter the NFL agreed to allow teams to voluntarily lower the ticket-sales requirement from one hundred percent to eight-five percent before a blackout occurred.¹⁶³ In exchange, teams that lowered their ticket-sales requirements were required to give up more revenue than they otherwise would have under the previous agreement.¹⁶⁴ Though many teams agreed to the NFL's modified blackout policy, some teams, such as the Indianapolis Colts, San Diego Chargers, and Buffalo Bills, continue to abide by the previous one hundred percent ticket-sales requirement.¹⁶⁵

Although the congressmen who initially wrote to Commissioner Goodell applauded the willingness of the NFL to relax its blackout policy,¹⁶⁶ the federal government has started to look at the issue of blackouts more seriously over the past year. On May 9, 2013, Senator John McCain proposed the Television Consumer Freedom Act of 2013¹⁶⁷ on the Senate floor,¹⁶⁸ mostly directed at ending the practice of "bundling" used by television companies to force consumers to

¹⁵⁹ *Id.*

¹⁶⁰ Compare Comments of Sports Fans Coalition, *supra* note 83, with Opposition of the NFL, *supra* note 73.

¹⁶¹ Comments of Sports Fans Coalition, *supra* note 83, at 3.

¹⁶² Opposition of the NFL, *supra* note 73.

¹⁶³ See Alexander, *supra* note 86.

¹⁶⁴ Dan Alexander, *Legislators to Goodell: New NFL Blackout Rule Isn't Good Enough*, FORBES (July 23, 2012, 1:42 PM), <http://www.forbes.com/sites/danalexander/2012/07/23/legislators-to-goodell-new-nfl-blackout-rule-isnt-good-enough/>.

¹⁶⁵ See Alexander, *supra* note 86.

¹⁶⁶ See Alexander, *supra* note 164.

¹⁶⁷ Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013).

¹⁶⁸ See Joe Flint, *John McCain Introduces Television Consumer Freedom Act of 2013*, L.A. TIMES (May 9, 2013, 2:39 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-mccain-cable-20130509,0,2224732.story#axzz2vaPdmMvM>.

purchase a package of television channels rather than just the few that the consumer wants to actually watch.¹⁶⁹ But the very end of Senator McCain's bill also contained the following provision:

Sec. 5. Sports Blackout Repeal for Publicly Financed Stadiums.

The Commission shall amend subpart F of part 76 of subchapter C of chapter I of title 47, Code of Federal Regulations (47 C.F.R. 76.92 et seq.), to prohibit the application of sports blackout regulations to the broadcast of a sporting event taking place in a venue the construction of which was financed, in whole or in part, by the Federal Government or a State or local government.¹⁷⁰

Senator McCain recognized the unfairness of the double punishment imposed on fans under the current blackout rules, noting that “[w]hen the venue in which these sporting events take place has been the beneficiary of taxpayer funding, it is unconscionable to deny those taxpayers who paid for it the ability to watch the games on television when they would otherwise be available.”¹⁷¹ Although the bill appears unlikely to pass due to resistance from the television companies,¹⁷² the proposal, along with Senator McCain's vocal opposition to the NFL's blackout policy, has brought the issue into the national spotlight.¹⁷³

The attention given to the blackout policy by the federal government culminated on December 17, 2013, when the FCC unanimously voted to adopt a Notice of Proposed Rulemaking that would eliminate the blackout policy altogether. Noting that “[t]he sports industry has changed dramatically in the last 40 years” and that the economic rationale underlying the blackout rule “may no longer be valid,” the FCC has proposed to eliminate the blackout rule completely and is now seeking comment from the affected parties on the potential benefits and harms of its proposed action.¹⁷⁴ One of the five FCC commissioners, Commissioner Ajit Pai, has already pledged to vote against the NFL and the blackout rule, recently stating: “The time has come for

¹⁶⁹ *Id.*

¹⁷⁰ S. 912 § 5.

¹⁷¹ Flint, *supra* note 168 (internal quotation marks omitted).

¹⁷² *See id.*

¹⁷³ *See, e.g.,* Ted Johnson, *John McCain Blasts NFL After Three Playoff Games Barely Avoid Blackouts*, CHI. TRIB. (Jan. 3, 2014, 10:30 PM), <http://www.chicagotribune.com/sns-201401032040reedbusivarietytn1201025110-20140103,0,5773679.story>.

¹⁷⁴ Sports Blackout Rules, 79 Fed. Reg. 4138, 4140 (proposed Dec. 17, 2013) (to be codified at 47 C.F.R. pt. 76).

the FCC to repeal its sports blackout rule.”¹⁷⁵ Commissioner Pai called upon his fellow commissioners to join him in ending the blackout rule, noting: “I don’t believe the government should intervene in the marketplace and help sports leagues enforce their blackout policies. [The FCC’s] job is to serve the public interest, not the private interests of team owners.”¹⁷⁶ The notice and comment period for the proposal to eliminate the blackout rule concluded on March 25, 2014, and the FCC is expected to vote on the matter by early fall of 2014.¹⁷⁷

At first glance, it appears that the FCC’s proposed rulemaking would eliminate the problem faced by NFL fans altogether, as they would no longer be subjected to blackouts, no matter how many tickets were sold for a given event or whether a stadium was publically financed. But there are three key considerations that would make celebration by NFL fans premature.

First, the NFL strongly opposes the change and has vowed to fight the proposal.¹⁷⁸ On February 24, 2014, the NFL filed its response to the FCC’s notice of proposed rulemaking, citing the infrequency of NFL blackouts, the economic necessity of the blackout policy to ensure that NFL teams maximize ticket sales and revenues, and the “longstanding recognition that live attendance improves both the stadium experience and the quality of games that are viewed on television”—each as a compelling reason that the FCC should leave the status quo alone.¹⁷⁹ As the FCC draws closer to holding its final vote, the NFL has also launched an extensive lobbying campaign to protect the blackout rule, flooding the FCC with meeting requests and letters from purported NFL fans who want to *maintain* the blackout rule.¹⁸⁰ The NFL has even resorted to using Hall of Fame players to advocate for the preservation of the blackout rule. Former Pittsburgh Steelers and Hall of Fame wide receiver Lynn Swann recently stated in a radio interview that the blackout rule “helps grow the game and helps main-

175 Will Brinson, *FCC Commissioner: ‘Time Has Come’ to Repeal NFL Blackout Rule*, CBSSPORTS.COM (Aug. 12, 2014, 8:31 PM), <http://www.cbssports.com/nfl/eye-on-football/24658169/fcc-commissioner-time-has-come-to-repeal-nfl-blackout-rule> (internal quotation marks omitted).

176 *Id.* (internal quotation marks omitted).

177 Maury Brown, *To the NFL and Beyond, FCC Will Vote to Lift Sports Blackout Rule by Early Fall*, FORBES (Aug. 13, 2014, 10:00 AM), <http://www.forbes.com/sites/maurybrown/2014/08/13/to-the-nfl-and-beyond-fcc-will-vote-to-lift-sports-blackout-rule-by-early-fall/>.

178 See Flint, *supra* note 168.

179 Comments of NFL at 8–13, Petition for Rulemaking to Eliminate the Sports Blackout Rule, MB Docket No. 12-3 (FCC Feb. 24, 2014).

180 Julian Hatter, *NFL Blitzes FCC to Save Blackout Rule*, THE HILL (Aug. 7, 2014, 9:06 PM), <http://thehill.com/policy/technology/214623-nfl-blitzes-fcc-to-save-blackout-rule>.

tain it" and is necessary to "protect the game so the widest number of people possible can view it and keep it on free TV for those people who don't buy cable packages."¹⁸¹

Second, the NFL also argues that the FCC lacks the authority to repeal the blackout rule, and that to do so would be against congressional intent.¹⁸² By making this argument, the NFL appears likely to appeal any adverse ruling by the FCC, thus dragging out the legal process for as long as it takes to protect its interest in retaining the blackout rule.

Third, and perhaps most importantly, the National Association of Broadcasters, also in opposition to the FCC's proposed rule, has noted that the response to the end of the blackout rule may be "the migration of sports to pay-TV platforms."¹⁸³ If this migration were to happen, NFL fans would actually be put in a *worse* position than they were in before, as they would have to continue to fund NFL stadiums and *always* pay to watch NFL games on television, regardless of the number of tickets that are sold. The NFL has already implicitly threatened to shift to such a pay-TV system if the blackout rule is repealed. The League recently set up a website to "protect football on free TV" with links for users to contact Congress and the FCC to urge them to maintain the rule.¹⁸⁴ Even Commissioner Pai recognizes this problem, as he recently noted in a speech in Buffalo, New York: "I realize that eliminating the rule is no silver bullet. Even without the FCC's blessing, there could still be dark screens any given Sunday."¹⁸⁵ To Buffalo Bills fans like Norman Stroth affected by blackouts, Commissioner Pai could only concede: "I can't promise Buffalo residents that they'll be able to watch all Bills games on television if we get rid of the rule."¹⁸⁶ Thus, even if the FCC ultimately decides to eliminate the NFL's blackout policy, the results may not be nearly as beneficial as they initially appear.

¹⁸¹ *Id.* (internal quotation marks omitted).

¹⁸² Comments of NFL, *supra* note 179.

¹⁸³ Todd Shields & Erik Matuszewski, *U.S. FCC Proposes Ending Sports Blackout Rule for Pay TV*, BLOOMBERG (Dec. 19, 2013, 2:15 PM), <http://www.bloomberg.com/news/2013-12-18/u-s-fcc-proposes-ending-sports-blackout-rule-for-pay-tv.html>.

¹⁸⁴ Hattem, *supra* note 180.

¹⁸⁵ Brown, *supra* note 177.

¹⁸⁶ *Id.*

III. BREAKING FREE FROM THE DEFENSE: A SOLUTION TO THE PROBLEM OF BLACKOUTS IN PUBLICLY FINANCED STADIUMS

As noted above, initial attempts by state legislators to solve this problem have failed,¹⁸⁷ and although the FCC is currently considering the elimination of the blackout policy altogether, doing so could actually put NFL fans in a worse position than they are in now.¹⁸⁸ Any solution to the problem of NFL blackouts in publicly funded stadiums needs to take a middle of the road approach that both protects NFL fans from the double punishment of taxation and the blackout policy and recognizes that the NFL wants to maintain its blackout rule, so as to avoid the possibility of the NFL moving to a pay-TV format in the future.

Congress could strike this exact middle ground by enacting an amendment to the current federal tax code. As noted above, section 103 of the current Internal Revenue Code exempts interest earned on state and local bonds from income tax.¹⁸⁹ This exemption makes these bonds an attractive means of financing public stadiums due to the resulting lower interest rate for the city and comparatively higher rate of return for investors.¹⁹⁰ But the use of these bonds also presents a problem, because the revenue obtained from events played within the stadium can be used to pay back no more than ten percent of the debt, putting the remaining ninety percent on the backs of the taxpayers.¹⁹¹ To address the problem presented by blackouts of NFL games in stadiums that have been funded by municipal bonds, Congress should amend I.R.C. § 103 by adding a fourth exception to subsection (b), which lists the relevant exceptions. This new provision would except state and local bonds from the income tax exemption if those bonds are used to fund a professional sports stadium that is subject to blackouts based upon the number of tickets sold to a particular event. This new exception, or subsection (b)(4), would read as follows:

Bonds issued to fund the construction, renovation, or general maintenance of a professional sports stadium that is subject to blackouts based upon the number of tickets sold to an event. This exception applies even if the bond meets all

¹⁸⁷ See *supra* Part II.A.

¹⁸⁸ See *supra* Part II.B.

¹⁸⁹ I.R.C. § 103 (2012). For the full text of § 103, please refer to Appendix A.

¹⁹⁰ See *supra* notes 101–02 and accompanying text.

¹⁹¹ I.R.C. §§ 103, 141.

other applicable requirements of qualified private activity bonds per section 141 [I.R.C. § 141].¹⁹²

The immediate impact of this amendment would be to except municipal bonds issued for the construction of stadiums that are subject to ticket-sales-based blackouts from an income tax exemption. Without an income tax exemption, municipal bonds could no longer be issued at a lower interest rate by the municipality. The bonds would also no longer offer the higher rate of return for investors because any interest gained on these bonds would be taxable as income. And most importantly, cities would be free to use stadium revenues to repay a higher percentage of their current debts, instead of the ten percent limit that they currently face. These factors would immediately diminish the attractiveness of these municipal bonds for both municipalities and investors, as these bonds would be placed into the same competitive market as private bonds.

As a result, investors would be less likely to purchase municipal bonds when they are offered by states or localities. Therefore, if a stadium owner wants to maintain the blackout policy for his new stadium, he would no longer be able to rely on municipal bonds to fund it. Instead, the owner would have to look at other financing alternatives that are not as dependent on taxpayer reimbursement. This result would alleviate the burden on taxpayers whenever a blackout rule is still in effect, because a municipality would no longer be forced to rely nearly exclusively upon its citizens to repay its debts—cities could instead use a much higher percentage of the revenues from the stadium itself to help with the cost, placing the burden on the NFL stadium owner, rather than the taxpayers.

More importantly, the net effect of this amendment would be to force the NFL and NFL team owners to make a choice: they could either continue to impose the blackout rule but miss out on hundreds of millions of dollars of taxpayer funding from municipal bonds, or they could continue to receive large tax subsidies for their stadiums but lose the ability to black out games based upon the number of tickets sold. By forcing the NFL and team owners to make this choice, concerns about the double punishment of taxpaying fans would be eliminated.¹⁹³ But by giving the NFL a choice in the first place (instead of removing the blackout rule altogether as the FCC seeks to do), NFL teams would be free to continue to use the blackout rule to

¹⁹² For the full text of how this amended subsection would appear, please refer to Appendix B.

¹⁹³ Wetzel, *supra* note 14.

maximize their revenues through ticket sales, to protect the "stadium experience and the quality of games that are viewed on television,"¹⁹⁴ and—most importantly to fans—to continue to offer games for free on television instead of moving to a pay-TV format.

The benefits of this proposal can most effectively be demonstrated through the experience of the Stroth family. Taxpayers like Norman Stroth could still be subjected to higher sales taxes at the local grocery store, increased sin taxes on liquor and cigarettes, or sports surcharges tacked onto restaurant bills.¹⁹⁵ Mr. Stroth could also still be subjected to blackouts and be unable to watch his beloved Buffalo Bills play on Sundays because his poor health prevents him from watching the game in person at the stadium.¹⁹⁶ But he could no longer be subjected to both hardships simultaneously.

Lastly, the NFL's retained ability to black out games would mean that the NFL would not have to turn to a pay-TV model, allowing fans everywhere to continue to have the ability to watch NFL games on television for free. As a result, millions of taxpayers, much like Norman Stroth, would ultimately be better off, as they would no longer be subjected to the double punishment that has plagued taxpaying NFL fans for decades.¹⁹⁷

IV. A FIELD GOAL IN THE RED ZONE IS BETTER THAN NO POINTS AT ALL: WHY THIS SOLUTION, THOUGH NOT PERFECT, IS BETTER THAN NO SOLUTION AT ALL

Although the proposed amendment to the tax code stands to protect taxpayers and NFL fans from being subjected to both increased taxes to pay for stadiums and blackouts of games in those same stadiums, opponents of the amendment are likely to make three main arguments: (1) the proposal would face heavy opposition from the NFL lobby and is not likely to be passed, (2) the amendment would not apply retroactively and thus would not have a wide impact, and (3) even if passed, fans would still be subject to either higher taxes or to NFL blackouts, so it is not a perfect solution. Although these three concerns are facially valid, the remainder of this Note will explain why this proposal, although not perfect, provides a unique solution to this problem that puts NFL fans and taxpayers in a better situation than they were in before.

¹⁹⁴ Comments of NFL, *supra* note 179, at 13.

¹⁹⁵ See *supra* Introduction.

¹⁹⁶ See *supra* Introduction.

¹⁹⁷ See *supra* Introduction.

A. *The NFL Does Not Always Get What It Wants*

First and foremost, detractors are likely to point to the incredibly robust bargaining power of the NFL as a large obstacle to ever passing this amendment. It is the lobbying power of the NFL that has helped the blackout policy remain in effect over the past fifty years, and this lobbying power is also the reason that congressmen send letters to Commissioner Goodell asking him to change the NFL's policy rather than simply introducing legislation on the House or Senate floor.¹⁹⁸ And as State Senator Chamberlain succinctly remarked after his bipartisan blackout amendment was quickly eradicated at the committee level in Minnesota, "What the NFL wants . . . the NFL gets."¹⁹⁹

Yet, as noted above, there have been multiple instances over the past fifty years in which the NFL did not, in fact, get what it wanted. The most obvious example comes from Public Law 93-107, in which despite the NFL's insistence that blackouts were needed for every home game—regardless of attendance—Congress still passed a bill banning such blackouts as long as the requisite number of tickets was sold seventy-two hours before kickoff.²⁰⁰ And although that bill expired after only one year, the NFL has continued to self-impose this same policy ever since out of fear that Congress may eradicate the blackout rule all together.²⁰¹

The NFL has also recently shown a willingness to make changes to its policies in the face of political pressure. In February 2012, when the NFL was forced to respond to a petition to end all blackouts (accompanied by strong letters of support from United States senators and congressmen) filed before the FCC, the NFL backed down from its existing blackout policy.²⁰² In doing so, the NFL agreed to allow teams to broadcast games even if only eighty-five percent of tickets have been sold seventy-two hours before kickoff.²⁰³ Although there is no doubt that the NFL has an incredibly strong lobby, this lobby is not invincible, as evidenced by the general—albeit very slow—erosion of the NFL's stance on its blackout policy and the FCC's recent decision to propose eliminating the blackout policy altogether.

Furthermore, the current proposal to this problem is less likely to be stopped by the NFL lobby because it gives the NFL a choice. At

198 See *supra* notes 154–55 and accompanying text.

199 Wetzel, *supra* note 14 (internal quotation marks omitted).

200 See *supra* notes 67–72 and accompanying text.

201 See *supra* note 73 and accompanying text.

202 See *supra* notes 154–64 and accompanying text.

203 See *supra* notes 163–65 and accompanying text.

no point would the amendment bar all blackouts of games; rather, it would only outlaw blackouts if a stadium has been built with taxpayer funds obtained through tax-exempt municipal bonds. The NFL would be free to continue to enforce its blackout policy as long as NFL owners are willing to accept more financial responsibility for the construction and maintenance of NFL stadiums. The NFL may also appreciate this ability to maintain its blackout policy in order to protect ticket sales in the future. As the size of televisions and clarity of high definition broadcasts only enhance the game day experience of fans watching from the comfort of their own homes, the NFL may again need to use its blackout policy to combat the inevitable decline in stadium attendance. This proposal allows the NFL to maintain this option so that owners can continue to protect themselves in the future.

Finally, because this bill is directed at protecting the common taxpayer, federal legislators are less likely to cast their votes in favor of the NFL when the NFL is unable to provide a rational basis for why this amendment would be harmful. Although the NFL has long argued that the blackout policy is needed in order to maintain attendance numbers, as it most recently did in its brief before the FCC, it has never provided an argument for why individuals who pay for stadiums should subsequently be prevented from watching the events that take place inside those stadiums.²⁰⁴ Unlike a blanket ban on blackouts, this amendment is construed in a narrow fashion for the exact reason that the NFL lobby would be less likely to successfully oppose it.

B. Tuesday Morning Quarterbacking: The Retroactivity Problem

Detractors of this proposed amendment may also argue that although the intention of the bill is strong, it would have no practical effect because it would be impossible to apply retroactively and new stadiums are infrequently built. These detractors are correct in the sense that any proposed amendment to I.R.C. § 103 would not apply retroactively, for the simple reason that the interest rates on municipal bonds issued before the amendment could not be changed.²⁰⁵ This argument ultimately fails, however, because even though new stadiums are not built very often, the amendment also covers renovations and maintenance, which do occur on a regular basis.²⁰⁶

Although maintenance fees may sound insignificant, these costs can often extend into the millions of dollars, again at the expense of

²⁰⁴ See *supra* note 162 and accompanying text.

²⁰⁵ See *supra* note 103.

²⁰⁶ See, e.g., *Taking a Look at New and Remodeled NFL Stadiums*, *supra* note 129.

the taxpayer.²⁰⁷ Because of the current leverage that NFL teams have in their respective cities, owners often require their respective cities to cover these fees.²⁰⁸ Cities often use municipal bonds to pay for the maintenance and repairs.²⁰⁹ It is precisely in this manner that the new amendment to I.R.C. § 103 would draw NFL teams that have no intention of building new stadiums into its framework and would therefore either prevent blackouts in their stadiums or force owners to pay for the repairs themselves.²¹⁰ Either way, the taxpaying NFL fan again avoids the perils of a double punishment.

C. Dealing with the Nitpicky Coach: Let Not Perfect Be the Enemy of Good

Finally, opponents of this solution may argue that this amendment is ultimately not strong enough because it still subjects fans to either blackouts or increased taxes to pay for stadiums, even if they are no longer subject to both of these pitfalls simultaneously. These individuals argue that the blackout rule should be eradicated altogether.²¹¹ Any agreement that falls short of that mark, such as this proposed amendment that would allow blackouts in nonpublicly funded stadiums, would be viewed as a failure.

This position overlooks two important facts. First, despite repeated attempts to eliminate the NFL's blackout rule for the past fifty years, and multiple periods of protest, the rule still remains today.²¹² And second, as most recently suggested in relation to the FCC's proposal to ban blackouts, the NFL could decide to no longer broadcast its games for free and instead move to a pay-TV format.²¹³ This option would put fans in a worse position than they are in now, regardless of whether the blackout policy is no longer in effect. Thus, although it is not perfect, this proposed amendment provides a unique

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ Currently, twenty-one NFL teams play in stadiums that were either built or renovated through the use of tax-exempt municipal bonds. See Aaron Kuriloff & Darrell Preston, *In Stadium Building Spree, U.S. Taxpayers Lose \$4 Billion*, BLOOMBERG (Sept. 5, 2012, 12:01 AM), <http://www.bloomberg.com/news/2012-09-05/in-stadium-building-spree-u-s-taxpayers-lose-4-billion.html>.

²¹⁰ Notably, this solution would also lessen the amount of leverage that NFL teams have over cities and could prevent NFL teams from threatening to move elsewhere if they do not receive funding for a new stadium. See *supra* note 127 and accompanying text.

²¹¹ This is the position that the sports fan lobbyists took in the recent petition before the FCC. See Comments of Sports Fans Coalition, *supra* note 83.

²¹² See *supra* notes 65–76 and accompanying text.

²¹³ See *supra* notes 183–86.

solution that alleviates the burden currently placed upon the shoulders of NFL fans everywhere while also recognizing the interests of the NFL.

CONCLUSION: TOUCHDOWN!

The current NFL blackout policy unfairly subjects NFL fans like the Stroth family to blackouts of games played in stadiums that those same fans paid for with their tax dollars. To solve this problem, Congress should amend the tax code to except municipal bonds used to fund stadiums subject to blackouts based upon the number of tickets sold from tax-exempt status. This amendment would effectively force the NFL and NFL owners to choose between two outcomes: they could either continue to enforce the blackout policy but forego large tax subsidies from municipalities and states provided through municipal bonds, or they could continue to receive such funding but no longer subject local taxpayers to ticket-sales-based blackouts. In forcing the NFL and NFL owners to make this choice, the Stroth family and all taxpaying NFL fans would emerge as the real winners.

APPENDIX A

I.R.C. § 103 (2012)

§ 103. Interest on State and local bonds

(a) Exclusion

Except as provided in subsection (b), gross income does not include interest on any State or local bond.

(b) Exceptions

Subsection (a) shall not apply to—

(1) Private activity bond which is not a qualified bond

Any private activity bond which is not a qualified bond (within the meaning of section 141 [I.R.C. § 141]).

(2) Arbitrage bond

Any arbitrage bond (within the meaning of section 148 [I.R.C. § 148]).

(3) Bond not in registered form, etc.

Any bond unless such bond meets the applicable requirements of section 149 [I.R.C. § 149].

(c) Definitions

For purposes of this section and part IV [I.R.C. §§ 141–150] —

(1) State or local bond

The term “State or local bond” means an obligation of a State or political subdivision thereof.

(2) State

The term “State” includes the District of Columbia and any possession of the United States.²¹⁴

²¹⁴ I.R.C. § 103 (2012).

APPENDIX B

PROPOSED AMENDMENT TO I.R.C. § 103(b)²¹⁵

(b) Exceptions

Subsection (a) shall not apply to—

(1) Private activity bond which is not a qualified bond

Any private activity bond which is not a qualified bond (within the meaning of section 141 [I.R.C. § 141]).

(2) Arbitrage bond

Any arbitrage bond (within the meaning of section 148 [I.R.C. § 148]).

(3) Bond not in registered form, etc.

Any bond unless such bond meets the applicable requirements of section 149 [I.R.C. § 149].

(4) Bond issued to fund the construction, renovation, or general maintenance of a professional sports stadium that is subject to blackouts based upon the number of tickets sold to an event.

This exception applies even if the bond meets all other applicable requirements of qualified private activity bonds per section 141 [I.R.C. § 141].

215 The additional provision proposed in this Note is underlined.