COMMENTS

UNCONVENTIONAL DECISIONS: CHALLENGING THE USE OF HOTEL TAXES IN CONVENTION CENTER PROJECTS

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INTRODUCTION

“If you build it, they will come.” This phrase is often used to promote city projects to build or expand convention center space, but it does not always ring true. Regardless of the success or failure of such projects, they are expensive endeavors. While states regularly give funds for such projects, hotel tax revenues often supplement these funds. Given the uncertain projected benefits of these projects, local hotels can be disadvantaged by collecting the taxes. Some hotels have challenged these tax assessments as unconstitutional, but most have been unsuccessful. The decisions upholding these hotel taxes can be difficult to justify when examining the true benefits and burdens of convention center projects.

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2 See id. (“[T]he reality for many cities with new or recently expanded convention centers is not so rosy.”).

3 See, e.g., Gail Rippey, Authority Sends Letter Threatening to Sue Hoteliers, SUNDAY NEWS (Lancaster, Pa.), Dec. 22, 2002, at A1 (describing the progression of a $100 million convention center project).

4 See, e.g., Joel Berg, Ripple or Cripple Effect, CENT. PENN BUS. J., May 9, 2003, at 1, 17 (showing a project timeline where then-Governor Tom Ridge pledged $15 million to the convention center project in Lancaster, Pennsylvania).

5 Many other terms may be used to represent a “hotel tax,” including “bed tax,” “transient occupancy tax,” “hotel rooms tax,” “tourist room tax,” “tourist development tax,” “accommodations tax,” “hotel room occupancy tax,” “innkeepers tax,” “transient room tax,” “rental occupancy tax,” “hotel occupancy tax,” and “lodging tax.” See Jeff Nemerofsky, Sleepless Over the Hotel Tax, 25 S. ILL. U. L.J. 527, 527 n.1 (2001) (citations omitted). This Comment will use the term “hotel tax.”

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Part I of this Comment examines the recent history of development in urban areas, particularly in urban tourism development. In addition, Part I explores the support and funding of convention center projects, focusing on the controversial use of hotel taxes. In Part II, I explore the performance of convention center projects compared to projected results and the implications of increased hotel taxes. Part III presents the current landscape of U.S. constitutional challenges to hotel taxes. Finally, in Part IV, I illustrate the issues that emerge from recent decisions involving challenges to the use of hotel taxes to fund convention center projects. Specifically, I examine Pennsylvania cases, where all but one court ruled the hotel tax use constitutional. In conclusion, I recommend a change to the benefit/burden analysis in due process and equal protection challenges and a reconsideration of the presumption of constitutionality with public/private convention center projects involving adjoining hotels.

I. URBAN DEVELOPMENT

A. Background

Over the past few decades, many cities have undergone an “urban renaissance.” In 1976, Boston opened its famous Quincy Market. At a cost of more than $40 million, the renovation of three 150-year-old market buildings in downtown Boston exceeded retail sales expectations. Similarly, Baltimore revitalized its downtown at Inner Harbor by opening Harborplace and the National Aquarium in the early 1980s. The changing landscape of cities from manufacturing to service centers spurred such efforts to redevelop urban areas.

Recognizing this shift away from manufacturing, cities have developed a “corporate center strategy” consisting of “financial, administrative, and professional services and ‘an orientation toward luxury

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6 See DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 370–81 (3d ed. 2002) (explaining the growth initiatives, specifically tourism development and service growth, of many cities, including Boston, Atlanta, and Baltimore).

7 See id. at 370–71 (“Quincy Market would have to produce retail sales comparable to the most successful suburban shopping malls ($150 per square foot) to justify its unusually high development costs. Quincy Market shocked the experts by producing sales of $233 per square foot in its first year . . . .”).

8 See id. at 378–80 (“Harborplace succeeded beyond anyone’s expectations, attracting 18 million visitors the first year (like Quincy Market, it outpulled Disneyland), earning $42 million, and creating 2,300 jobs . . . . By 1992 more than 15 million visitors had toured the aquarium’s exhibits . . . .”).

9 See id. at 375–78 (describing the change over the last century of cities as “centers of manufacturing production” to “centers of high-level corporate services”). Between 1970 and 1997, the percentage of employees in services increased from 18.4 to 35.6; whereas, during the same period, the percentage of employees in manufacturing decreased from 30.1 to 12.5. Id. at 376.
consumption that is appealing to young corporate managers, educated professionals, convention goers, and the tourist trade. An important part of this “corporate center strategy” is the development of the tourism and entertainment industry. The positive image of this industry stems from the belief that it is “the industry without a smokestack,” i.e., it is “assumed that tourists spend money without taking anything out of the local economy.” Venturing into this “urban tourism” market can involve building “convention centers, sports stadiums, festival malls, and gaming casinos.” While Boston and Baltimore focused on retail sales with Quincy Market and Harborplace, cities are now also looking to attract meetings and conventions.

There has been a tremendous increase in the construction of convention centers and exhibit space since the 1970s. Furthermore, this market is expected to grow by almost thirty percent, or nearly sixteen million square feet of exhibit space, by 2006. Those cities planning either to build new convention center space or to expand existing space are attempting to capture a piece of the large meetings and conventions market. However, the demand for convention

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10 Id. at 378. Judd and Swanstrom illustrate this strategy using Baltimore’s revitalization effort:

Baltimore is an excellent test case of the corporate center strategy because it is there that the strategy was applied consistently over an extended period of time to revitalize a depressed downtown. . . . “Their [public and private sector] strategy, established at the outset, has been to convert the heart of the city into a culturally rich, architecturally exciting magnet where both affluent and middle-class families will choose to work, shop, and live.” . . . Baltimore is one of the nation’s most successful examples of the corporate center strategy.

Id. (footnotes omitted).

11 See id. at 382 (describing how cities develop tourism strategies).

12 Id.

13 Id.

14 For example, many cities in Pennsylvania have built, or are planning to build, convention centers. See infra Part IV.

15 See JUDD & SWANSTROM, supra note 6, at 383 (“Between 1970 and 1985 more than 100 convention centers were constructed in the United States . . . . By July 1998, 409 convention centers with exhibition space were operating in U.S. cities, and more than 70 percent of them had opened since 1970.”); Heywood T. Sanders, Convention Myths and Markets: A Critical Review of Convention Center Feasibility Studies, 16 ECON. DEV. Q. 195, 195 (2002) [hereinafter Sanders, Myths and Markets] (“The national total of convention hall exhibit space has grown dramatically . . . . from 25 million square feet of exhibit space in 1980 to 40.4 million in 1990 and 53.7 million in 2001.”).

16 Sanders, Myths and Markets, supra note 15, at 195.

17 See, e.g., Berg, supra note 4, at 1 (discussing the plans to construct a new convention center in Lancaster, Pennsylvania).

18 See, e.g., id. at 16 (mentioning the expansion of Baltimore’s convention center in 1997).

19 In 1992, “25,000-plus associations . . . spent $32 billion for meetings . . . and corporations spent an additional $29 billion on off-premises meetings and conventions.” JUDD & SWANSTROM, supra note 6, at 383.
center space has not kept pace with the increasing supply. Too often, city politicians promote convention center growth without understanding the complete economic picture.

B. Funding and Support

Convention center projects typically involve public funding and subsidies. Whether for the construction of a new convention center or for the expansion of an existing one, a common source of public funding comes in the form of hotel taxes. Hotel taxes are commonly "ad valorem" taxes, which are a percentage of the hotel room price added to the room price, but they can also be "unit" taxes, which represent a fixed amount in addition to the hotel room price. Overall taxes paid by hotel guests may also include a local general sales tax. The national average hotel tax is 12.36% and, a city reinvests, on average, 37% of this revenue in its travel and tourism indus-

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20 See discussion infra Part II.A (describing the realities of supply and demand in the convention center context).

21 See Martha Cooke, *Wide Open Spaces*, MEETINGS & CONVENTIONS, Dec. 1, 2002, at 48 ("Sometimes a city's leadership, rather than demand, provides the impetus for building .... There's a larger political imperative that has little to do with the meetings industry." (quoting Heywood T. Sanders)).

22 See Sanders, *Myths and Markets*, supra note 15, at 208 ("Convention centers are almost invariably public projects.... [built because of] the investment of hundreds of millions of public dollars .....").

23 See, e.g., GA. CODE ANN. § 48-13-51(a)(3.1) (2004) (involving an "excise tax on [hotel] rooms, lodging, and accommodations" for the purpose of "funding, supporting, acquiring, constructing, renovating, improving, and equipping buildings, structures, and facilities, including, but not limited to, a trade and convention center, exhibit hall ...."); IND. CODE ANN. § 6-9-2.5-7.7(b) (West 2000) ("The county treasurer shall deposit in the convention center operating fund the amount of money received" from authorized hotel taxes.); KY. REV. STAT. ANN. § 91A.390(1) (Michie 2003) ("[T]he local governing body may impose a special [hotel] tax ... for the sole purpose of meeting the operating expenses of a convention center."); OHIO REV. CODE ANN. § 5739.09(A)(4)(b) (Anderson 2003) ("[R]evenue from the increase in [the hotel] rate shall be pledged and contributed to a convention facilities authority ... and be used to pay costs of constructing, expanding, maintaining, operating, or promoting a convention center ...."); 16 PA. CONS. STAT. ANN. § 2399.23(c) (West 2001) ("Eighty per centum of revenues to be received from [the authorized hotel] taxes ... shall be annually deposited ... for the use of the authority for convention center purposes.").

24 AM. ECON. GROUP, INC., IMPACT OF ROOM TAX INCREASES ON THE LODGING INDUSTRY 8 (Am. Hotel Found. 1998). In 1990, hotel taxes in New York City involved a 19.25% ad valorem tax and a $2 per day unit tax. Ellen Perlman, *Tourists Begin to Check out the Soaring Taxes on Travel*, GOVERNING, Jan. 1994, at 4 [hereinafter Perlman, Tourists], LEXIS, Nexis Library, GOVERN File.

25 AM. ECON. GROUP, INC., supra note 24, at 8.

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Some cities... reinvest most of that revenue into tourism development and promotion, such as convention centers, cultural programs, welcome centers and travel-related marketing.

While some view raising hotel taxes as a painless method of increasing revenues, it is not always as successful as envisioned.

To promote the use of public funds, both public and private sector leaders advance the notion that developing urban tourism will benefit everyone in the surrounding area. These supporters include "local public officials and influential business leaders," as well as "real estate developers, local media, labor leaders, and others who have a stake in the value of local real estate and economic performance." These supporters claim prosperity for everyone using the logic outlined by Judd & Swanstrom:

A healthy tax base is necessary to maintain the public services and infrastructure that the local economy and residents rely on; a healthy tax base, in turn, requires rising land values and business prosperity; in order to attract private investment, a city must offer a good business climate and special incentives that make it less expensive for mobile investors to locate there than in other cities; an increasing volume of private investment begins the cycle all over again, resulting in rising land values, a healthy tax base, better services, and a better business climate. Built into the logic underlying this argument... is the assumption that cities must be actively involved in creating the conditions for growth.

Not only do the supporters push for public funding, but they can also be "intolerant of opposition" to the growth initiative. When local

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27 Id. ("[S]ome cities... reinvest most of that revenue into tourism development and promotion, such as convention centers, cultural programs, welcome centers and travel-related marketing.").
28 Id. (charting the national average for all travel taxes).
29 See Ellen Perlman, Taxing Travelers to the Hilt, GOVERNING, Dec. 1994, at 20 [hereinafter Perlman, Taxing Travelers] ("To politicians, the attraction of tourism taxes is that for the most part they don't fall on their own constituents. Exporting taxes to visitors would seem to be a relatively painless way to diversify the tax base and increase revenues."); Perlman, Tourists, supra note 24, at 4 ("Because of political pressures on other revenue sources, raising taxes on hotel and motel rooms... is a relatively painless way for municipalities to diversify their tax base and find extra revenue... . Tours, after all, don't vote in local elections.").
30 For example, after New York City's hotel tax was increased to over 19% to help reduce the state deficit, the city experienced a downturn in visitors. See Perlman, Taxing Travelers, supra note 29, at 20 (describing the decrease of meetings held in New York City, including the loss of the Professional Convention Management Association's business). New York eventually repealed a portion of the hotel tax in 1994 to avoid reducing overall tax revenues. Id. "One study showed that although the state would have collected $463.2 million in tax revenue from the hotel tax between 1990 and 1996, it would have lost $962.8 million in sales and other taxes." Id.; see also discussion of hotel tax impact infra Part II.B.
31 JUDD & SWANSTROM, supra note 6, at 373.
32 Id. (referring to these supporters as "political coalitions" and "growth machines").
33 Id. (footnote omitted).
34 Id. at 374. For example, in Lancaster, Pennsylvania, the local media support for the convention center project even involved demands to sue the local hotels opposed to the use of ho-
media favor a convention center project, as they often do, the general public cannot make an informed decision about the project's feasibility because the media coverage paints an overly-positive picture and avoids negative opinions and facts.55

II. REALITIES OF CONVENTION CENTERS AND HOTEL TAXES

A. Convention Centers

Cities gain support for the construction or expansion of convention centers using the familiar rhetoric: "[m]ore space means more convention attendees, producing more spending, new jobs, and private development."56 To defend this position, many cities pay national accounting firms or economic research firms to develop feasibility studies that forecast positive results from increased convention space.57 Feasibility studies typically estimate demand for convention center space as growing between 5% and 8% per year.58 The actual data, however, support no such pattern of growth in demand.59 In
fact, the demand growth has decreased while supply growth has continued to increase.40 Despite recognizing the increased supply of convention center space, consultants nonetheless recommend that cities "build or expand to keep up with the competition and maintain their market share."41 A notable exclusion from these feasibility studies is any comparison of alternatives to the convention center plan.42

After cities use these feasibility studies to make predictions and recommendations, they use them to plan the construction and funding of convention centers. However, the actual results achieved from convention centers are often far below the numbers promised in these studies.43 Despite these failed promises, cities continue to rely

period change as indicative of longer term demand performance... is also particularly misleading.

Id. Sanders also questions the use of demand data from the annual Tradeshow Week 200 because this publication tracks only the 200 largest conventions each year. Id. at 199 ("[T]he Tradeshow Week 200 data have a clear upward bias in that they follow the largest and most successful events each year. Tradeshows that lag or fail drop out of the compilation, whereas rapidly growing events are included as they reach appropriate sizes.").

40 See Cooke, supra note 21, at 51 ("Demand growth is not at the level it had been, but supply growth is at unprecedented levels." (quoting Robert Canton of PricewaterhouseCoopers)).

41 Charles V. Bagli, A Convention Center Race May Spawn Losers, N.Y. TIMES, Apr. 3, 2002, at C8; see also Cooke, supra note 21, at 48 ("Exacerbating the surge [in supply] have been various market studies touting larger centers as the panacea to revitalize lackluster business districts... The landscape is dotted with cities that built convention centers to rejuvenate downtowns, and I can't think of a single example where it worked." (quoting Doug Ducate, president of the Center for Exhibition Industry Research)). A 1993 feasibility study for Washington, D.C. recognized increased supply, but concluded that "markets not increasing their supply of exhibit space to meet the increased size demands of expositions could fail to attract the lucrative business of the larger events." Sanders, Myths and Markets, supra note 15, at 202 (quoting a Deloitte & Touche feasibility study). In a second feasibility study for Washington, D.C. in 1997, the expansion of convention centers in other cities "was not seen as portending an imbalance in supply. Rather, 'these cities have generally recognized that larger facilities will be required to accommodate incremental growth... and that larger and more modern facilities will likely be necessary to attract incremental levels of even business, to remain competitive... .'" Id. at 202-03 (quoting a Coopers & Lybrand feasibility study).

42 See Sanders, Follies, supra note 37, at 63 ("While some studies compare new or expanded centers to a 'no expansion' alternative, they almost never extend their analysis beyond the narrow issue of more convention space.").

43 See id. at 63-69 (comparing the promised results of feasibility studies to the actual results in Houston, Los Angeles, Washington, D.C., Providence, Philadelphia, and Boston). For example, the 1981 feasibility study used to support the construction of a new convention center in Houston projected an annual attendance of 700,000. The actual attendance at the new convention center, which opened in 1987, was 180,687 in 1994, 186,576 in 1995, and 276,318 in 1996. Id. at 64. Similarly, Los Angeles used a 1983 feasibility study to support the expansion of the Los Angeles Convention Center. This study projected an attendance of 2.32 million in the first year after expansion, increasing to 3.7 million thereafter. The actual attendance for the three years following expansion in 1993 was 1.18 million, 1.3 million, and 1.83 million, respectively, which was roughly the same level as before the expansion. Id. at 65 (noting the fiscal impact of the failed expectations as an "annual shortfall in debt service and operating expense... [of] some $20 million" that is "paid out of general city funds that might have been used for other local public needs").
on feasibility studies to support the construction or expansion of local convention center space:

[T]hese feasibility studies have rarely been subject to serious review and examination. Their conclusions and forecasts are rarely reexamined for accuracy and reliability. And their data, methodologies, and substantive conclusions are effectively never subject to comprehensive or comparative analysis.

... Just as there is no mechanism for evaluating, critiquing, or independently assessing the feasibility studies, there is rarely a local institution or process for evaluating the performance or impact of convention centers. When centers fail to produce the attendance, hotel use, and visitor spending predicted, there is little political accountability and no real performance review. Convention center failure or underperformance... is thus followed by more consultant studies, which in turn call for even more: more exhibit space; more hotel rooms (increasingly with public subsidy); more amenities; and more public investment... to support the competitive positions of convention centers.44

Not only must cities begin to recognize the shortcomings of these feasibility studies, but courts determining the benefits of convention center projects must also be wary of the expected results in these studies.

A convention center that falls short of expectations can have serious implications for the surrounding community. In addition to having an underused “big box,” in some cases, local taxpayers will have to pay for any deficit caused by the convention center’s failure to attract the predicted number of conventioneers.46 Funding of a convention center project also comes at the expense of other city revitalization efforts. Opponents of convention center projects argue that “a city would fare much better by rebuilding neighborhoods and creating retail districts” and that “officials should think of their own residents first and rebuild the city to attract them, instead of conventioneers.”47 Understanding the realities of past convention center

44 Sanders, Myths and Markets, supra note 15, at 196, 209. Interestingly, Sanders has never encountered a feasibility study that advised against a convention center project. Patricia A. Poist, Critics Say: Don’t Believe the Hype, LANCASTER NEW ERA, Apr. 29, 2004, at A1 (discussing Sanders’s examination of feasibility studies).
45 See discussion infra Part IV (describing Pennsylvania cases involving constitutional challenges to hotel taxes funding convention center projects).
46 See, e.g., Poist, supra note 44 (indicating that Lancaster County taxpayers will have to pay for the convention center project if it fails because the County Commissioners guaranteed $40 million in bonds funding the project); Sanders, Follies, supra note 37, at 65 (discussing the $20 million “annual shortfall in debt service and operating expense” for the bigger convention center in Los Angeles that “is paid out of general city funds that might have been used for other local public needs”).
47 Poist, supra note 44.
projects should enable cities to plan their revitalization efforts more effectively by considering not only the shortcomings of convention center feasibility studies but also alternatives to building a convention center.

B. Hotel Taxes

As previously discussed, it is common for a state to authorize the use of hotel taxes to help fund a convention center. Local politicians view a hotel tax as a way of insulating the local residents from the burden of funding the project, but the politicians may overlook the overall impact that increasing hotel taxes has on local jobs, sales, and other tax revenues. The impact of hotel guests on a local economy is not limited to the guests' direct spending on the hotel room and the accompanying tax:

The full economic impact [begins] with hotel guests' direct spending . . . on rooms and . . . on a long list of items that included food and beverages, transportation, shopping, amusements, and various services in hotels and elsewhere. Sponsors of conventions and meetings at hotels, and those attending the meetings or conventions also purchased food; rented equipment, exhibit space, and meeting rooms; hosted hospitality suites; and bought a variety of business services.

. . . [The] circuit of economic activity . . . begins when overnight guests purchase their full complement of goods and services. From those receipts, hotels, restaurants, theaters, stores, etc. pay wages to their employees and make purchases from suppliers . . . . Suppliers, in turn, purchase goods and services from their own suppliers . . . .

During the process, all suppliers pay wages and other income to their employees, owners, etc. The households of workers then purchase a full complement of household goods and services as well as becoming overnight hotel guests beginning the circuit again.

The American Economics Group, Inc., funded by the American Hotel Foundation, studied the impact of hotel tax increases on these often-overlooked indirect areas. In 1997, hotel guests directly spent

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48 Sanders points out: [For all of the public dollars spent, few cities appear to have been saved by larger convention centers. For all of the persistent rhetoric of new jobs, new spending, and "economic multipliers," much of the evidence suggests that convention centers deliver far less than promised. Indeed, in a number of cases, the expenditure of hundreds of millions of public dollars appears to have had almost no impact on individual communities. Sanders, Follies, supra note 37, at 59.

49 See supra notes 23–28 and accompanying text (providing statistics and examples of state authorization).

50 AM. ECON. GROUP, INC., supra note 24, at 8.

51 Id. at 12 (references to diagrams omitted).

52 See id. (using 1997 data to determine the effect of hotel tax increases on jobs, wages, sales, and other tax revenues). It should be noted that when a portion of the hotel tax is used for
$303.9 billion nationwide, maintaining 12.4 million jobs and their associated $282.3 billion in wages and creating $215 billion in indirect sales.\textsuperscript{55} The impact study concluded that a 2\% increase in the national hotel tax would result in a loss of approximately 536,000 jobs, $11.4 billion in wages, $39.6 billion in total sales, and $280.2 million in state and local tax revenues.\textsuperscript{54} To help each state evaluate the impact of increasing hotel taxes, this study breaks down the national results into state-specific results. For example, a 2\% increase in Pennsylvania's hotel tax would result in a loss of approximately 10,200 jobs, $187.4 million in wages, $596.7 million in total sales, and $21.2 million in tax revenues.\textsuperscript{59} The study highlights the need for local politicians to consider not only the increase in the hotel tax revenues, but also the possible negative effects that an increased hotel tax will have on other aspects of the local economy.

III. U.S. CONSTITUTIONAL CHALLENGES TO HOTEL TAXES

A. Basic Challenges

Four U.S. constitutional challenges have been advanced against the enactment of hotel taxes\textsuperscript{56} based on the following provisions: the Equal Protection Clause,\textsuperscript{57} the Due Process Clause,\textsuperscript{58} the Commerce Clause,\textsuperscript{59} and the Privileges and Immunities Clause.\textsuperscript{60} These challenges have largely been unsuccessful, and neither the United States Supreme Court nor any of the United States Circuit Courts of Ap-

\textsuperscript{55} Id. at 33. This study distinguishes between "direct economic impact," which "results from the spending by overnight guests and meeting sponsors," and "indirect impact," which "follows from the subsequent spending of hotels, retailers, restaurants, etc. on goods and services from their suppliers." Id. at 12.

\textsuperscript{54} Id. at 33. Although hotel tax revenues would increase by $1.208 billion, tax revenues from other sources, including affected suppliers and workers, would decrease by $1.488 billion; therefore, the overall result is a loss of $280.2 million in tax revenues. Id.

This study determined the expected losses by calculating the expected decrease in hotel occupancy from "fewer or shorter meetings, fewer overnight visitors, and shorter stays," the decrease in "sales of all affected industries and in the incomes of their owners and employees," and the corresponding decrease in state and local taxes. Id. at 6.

\textsuperscript{56} Id. at 71.

\textsuperscript{57} Nemerofsky, \textit{supra} note 5, at 527.

\textsuperscript{58} U.S. CONST. amend. XIV, § 1 ("[N]or shall any State... deny to any person within its jurisdiction the equal protection of the laws.").

\textsuperscript{59} Id. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law... ").

\textsuperscript{60} U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power To... regulate Commerce... among the several States...").

\textsuperscript{61} U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
peals have addressed the constitutionality of hotel taxes. The United States District Courts have considered the issue only a few times. In fact, these constitutional challenges are usually brought in state courts. The difficulty in challenging hotel taxes, or any state or local tax, begins with the initial presumption of constitutionality. There is a "familiar proposition that statutes... enjoy a presumption of constitutionality. Moreover, 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.'... It may be a leading reason why our tax system is so inhospitable to taxpayers." Consequently, the person challenging the hotel tax has the burden of proving its invalidity. To understand why these forms of challenges alone are typically insufficient to invalidate a hotel tax, it is important to understand how they have or could be argued.

1. Equal Protection Clause

Challenging a hotel tax under the Equal Protection Clause requires a showing that: "(1) at least two classes are created by the statute; (2) the classes are treated differently under the statute; and (3) the difference in treatment cannot be justified." Because states have been afforded great freedom in enacting taxes under various classifications, challengers face an uphill battle with an equal protection claim. The difficulty is not in satisfying the first two prongs of the test, but instead rests on the discrimination aspect of the third prong. The appropriate test to determine if the different treatment is unjustified is the "rational basis" test:

[T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The

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61 Nemerofsky, supra note 5, at 528.
62 Id. at 528 & n.12.
63 See infra Part IV (discussing Pennsylvania court decisions addressing the constitutionality of hotel taxes in convention center projects).
64 Allegheny County v. Monzo, 500 A.2d 1096, 1101 (Pa. 1985) ("It is well-settled that there is a presumption that tax enactments are constitutionally valid . . . .").
66 Monzo, 500 A.2d at 1101; see also Torbik v. Luzerne County, 696 A.2d 1141, 1145 (Pa. 1997) (per curiam) ("[T]ax challengers] must prove that the tax 'clearly, palpably and plainly violates the Constitution.' Any uncertainty must be resolved in favor of the validity of the statute.").
67 Nemerofsky, supra note 5, at 545.
68 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) ("States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.").
69 See Nemerofsky, supra note 5, at 545-49 (describing classes of resident and non-resident taxpayers and explaining the difference in treatment between these two classes).
rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."\textsuperscript{70}

When it is applied in tax cases, the rational basis test often becomes a benefit/burden test specifying that "a class of taxpayers generally suffers discrimination when the burden of a tax is unjustifiably greater than its benefit."\textsuperscript{71}

2. Due Process Clause

A state may enact a tax that does not violate the Due Process Clause if two conditions are met: "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."\textsuperscript{72} Given that a hotel tax is assessed to those physically present in the taxing state, the first requirement is easily satisfied.\textsuperscript{73} The second requirement involves a "simple but controlling question [of] whether the state has given anything for which it can ask return."\textsuperscript{74} Although this question is deemed "simple," it is anything but simple to apply.

Beyond considering the fundamental fairness of a tax,\textsuperscript{75} state courts often use the "public purpose doctrine" to indicate that a state taxing for private, not public, purposes will violate the Due Process Clause.\textsuperscript{76} The benefit/burden test used in equal protection analysis also plays a role in due process fairness analysis.\textsuperscript{77}

\textsuperscript{70} Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959) (emphasis added) (footnote omitted).

\textsuperscript{71} Nemerofsky, supra note 5, at 551. The Pennsylvania Supreme Court used this benefit/burden analysis in Allegheny County v. Monzo. See Monzo, 500 A.2d at 1102 ("Where the benefit received and the burden imposed is palpably disproportionate, a tax is . . . an arbitrary form of classification in violation of equal protection . . . .").

\textsuperscript{72} Nemerofsky, supra note 5, at 553.

\textsuperscript{73} See id. at 554 ("Since physical presence in the taxing state satisfies even the strictest jurisdictional requirements, . . . a hotel guest is generally considered as having some 'minimum connection' to the taxing State . . . .").

\textsuperscript{74} Id. at 554 (quoting Wisconsin v. J.C. Penney, 311 U.S. 435, 444 (1940)). Courts have used this question in the Commerce Clause challenge to hotel taxes. See infra note 85.

\textsuperscript{75} The concept of fundamental fairness is the basic analysis undertaken to determine if the second due process requirement has been satisfied. See Nemerofsky, supra note 5, at 554–55 ("[D]ue process is concerned with whether the tax is fundamentally fair.").

\textsuperscript{76} Id. at 556.

\textsuperscript{77} See Allegheny County v. Monzo, 500 A.2d 1096, 1102 (Pa. 1985) ("Where the benefit received and the burden imposed is palpably disproportionate, a tax is . . . a taking without due process under the Fourteenth Amendment to the United States Constitution . . . .").
3. Commerce Clause

The Commerce Clause challenge to hotel taxes involves the application of the dormant Commerce Clause, which "negates" state regulation of commerce by preventing local governments from engaging in economic isolationism or protectionism through taxation." Under the dormant Commerce Clause, a tax is valid "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." Before a hotel tax is put to this four-part test, the first hurdle is to demonstrate that occupying a hotel room involves interstate commerce and is therefore subject to scrutiny under the Commerce Clause. If this hurdle is overcome, those challenging the tax must show that it violates at least one of the four prongs above. In cases involving longer than a brief hotel stay, challengers to the tax will have a difficult time arguing that occupying a hotel room does not have a substantial nexus with the taxing state. It is equally unlikely that a court will find the tax to be unfairly apportioned. Previous challenges to hotel taxes under the Commerce Clause have focused on the third and fourth prongs of the test. However, these arguments have also failed because the hotel tax is found not to discriminate if it is the same for residents and nonresidents and courts are likely to find some fairly related service provided by the state in return.

4. Privileges and Immunities Clause

The Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which

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78 Nemerofsky, supra note 5, at 529.
80 See Nemerofsky, supra note 5, at 529–30 (arguing that "staying in a hotel infers that one is more or less 'on the move' from state to state" and could be considered interstate commerce for Commerce Clause purposes).
81 See id. at 532–34 (outlining numerous cases that illustrate a substantial nexus).
82 See id. at 534–36 (demonstrating that a hotel tax is most likely internally and externally consistent, which is a requirement to be fairly apportioned).
84 See, e.g., id. at 29–30 (indicating that "equal treatment of interstate commerce is the fundamental test of [the third prong]" and resolving the issue in favor of the hotel tax because it equally affects "resident or nonresident").
85 See, e.g., id. at 30–31 (using the "simple controlling question [of] whether the state has given anything for which it can ask return" for the fourth prong and finding fairly related services in "transportation, and police and fire protection" that are offered "to all those persons in the jurisdiction, including tourists, at any given time").
the citizens of State B enjoy.\textsuperscript{86} This clause will invalidate a tax only if the tax restricts a privileged activity in a way that does not involve a substantial state interest.\textsuperscript{87} In the context of hotel taxes, two privileged activities are possibly implicated: the right to travel and the right to conduct business. Yet it is unclear whether the restrictions on these activities involve a substantial state interest.\textsuperscript{88}

B. Who Has Standing to Challenge Hotel Taxes?

When considering who has a right to challenge the assessment of hotel taxes, the easy answer is: those who pay the tax (i.e., the hotel guests). Many commentators focus the challenge to hotel taxes on the fact that nonresidents bear the brunt of the tax burden.\textsuperscript{89} Similarly, those who support the use of hotel taxes to fund a convention center believe that only the taxpayers should be able to challenge the tax. The hotels that must collect the tax, however, also have a legitimate concern with the enactment of these taxes. Not only can the increased tax hinder a hotel's decision to increase its room rates,\textsuperscript{90} but it can also effectively cause a hotel to fund its own competition.\textsuperscript{91} For these reasons, the hotels collecting the tax often have standing to challenge its enactment.\textsuperscript{92}

\textsuperscript{86} Nemerofsky, \textit{supra} note 5, at 558 (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

\textsuperscript{87} See id. at 558–59. Nemerofsky states:

[I]t is necessary to undertake a two-step inquiry. "First, the activity in question must be 'sufficiently basic to the livelihood of the Nation'..... "Second, if the challenged restriction deprives nonresidents of a protected privilege... [the Supreme Court] will invalidate it only if... the restriction is not closely related to the advancement of a substantial state interest."

\textit{Id.} (quoting Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978) and Supreme Court of Va. v. Friedman, 487 U.S. 59, 65 (1988), respectively).

\textsuperscript{88} See id. at 560–62 (discussing the various rationales used by the Supreme Court in enforcing the Privileges and Immunities Clause).

\textsuperscript{89} See Nemerofsky, \textit{supra} note 5, at 527 (“It doesn’t seem fair that municipalities can impose hefty hotel taxes on their out-of-town guests to fund local ‘pet’ projects...”) (emphasis added); Schmudde, \textit{supra} note 65, at 100, 105 (“Taxes are imposed on those areas where a nonresident is most likely to partake—hotels and rental cars.... The perception of local authorities and the courts has been that these ‘foreigners,’ the nonresidents, are using the [convention center] and therefore should pay for it.”) (emphasis added). In fact, nonresident hotel guests, or potential hotel guests, have brought actions to challenge hotel taxes. See, e.g., Paustian, 3 Pa. D. & C.4th at 18 (“Plaintiffs... shall be certified as representative of the members of class A, which shall consist of: ‘All non-residents... who have, or in the future will, stay overnight in a hotel room subject to the [hotel tax used to fund a convention center]...’”).

\textsuperscript{90} See, e.g., Allegheny County v. Monzo, 500 A.2d 1096, 1100 (Pa. 1985) (finding that the hotel tax “discouraged [the hotel] from raising its rates because the tax increases the room rental fee”).

\textsuperscript{91} See, e.g., id. (“[T]he imposition of the tax causes the hotels outside of the City of Pittsburgh to finance their competitors located in the City of Pittsburgh...”). For another example of hotels effectively funding their competition, see \textit{infra} Part IV.B.2.

\textsuperscript{92} See, e.g., Monzo, 500 A.2d at 1100 (finding that the hotel had standing to challenge the tax because the hotel had a direct, substantial, and immediate interest in the tax and because the
C. Appropriate Constitutional Challenges to Hotel Taxes Funding Convention Center Projects

Often, the opponents of hotel taxes being used to fund a convention center are the local hotels that must collect the tax. Given the possible constitutional challenges outlined above, these opponents are essentially limited to the equal protection and due process arguments. The local hotels are not citizens of another state; therefore, the privileges and immunities challenge does not apply. Likewise, the Commerce Clause argument is difficult to apply when local hotels, and not out-of-state residents, challenge the hotel tax as "economic isolationism or protectionism." To prevail in a challenge of hotel taxes funding a convention center project, local hotels must demonstrate that the burden of the tax outweighs the benefit, which would indicate either an equal protection or due process violation.

IV. CASES IN PENNSYLVANIA INVOLVING CONSTITUTIONAL CHALLENGES TO HOTEL TAXES FUNDING CONVENTION CENTER PROJECTS

A. Background

Pennsylvania provides a good example of how courts have evaluated the use of hotel taxes to fund convention center projects. Challenges to such projects have been decided in Pittsburgh (Allegheny County v. Monzo), Philadelphia (Leventhal v. City of Philadelphia), Wilkes-Barre (Torbik v. Luzerne County), Reading (Eways v. Board of Commissioners), and Lancaster (Bold Corp. v. County of Lancaster). Although these are state cases, the Pennsylvania courts evaluated the local hotels' challenges to the enactment of hotel taxes not only on state constitutional grounds, but also on U.S. constitutional grounds.

The challenges to these hotel taxes began in Allegheny County. In late 1977, Allegheny County, pursuant to the Hotel Room Rental hotel was "significantly affected and harmed by the operation of the tax"); cf. Lartnece Inv. Co. v. Fort Wayne-Allen Co. Convention & Tourism Auth., 603 F. Supp. 1210, 1220–21 (N.D. Ind. 1985) (finding that the hotel had standing to pursue only its equal protection claim).

See infra Part IV (discussing the constitutional challenges of local hotels in Pennsylvania).

See Nemerofsky, supra note 5, at 529 (discussing the isolationism rationale behind the dormant Commerce Clause).

See supra notes 71, 77 (discussing the benefit/burden analysis in Monzo).


801 A.2d 469 (Pa. 2002).
Tax Statute, 101 enacted a hotel tax to fund a convention center in downtown Pittsburgh. 102 A hotel located near the county dividing line challenged the constitutionality of the hotel tax. 103 After determining that the hotel had standing to challenge the tax 104 and recognizing the presumption of constitutionality, 105 the Pennsylvania Supreme Court invalidated the hotel tax using equal protection, due process, uniformity, and special legislation arguments:

[T]he subject taxing scheme "is at once a taking of private property without due process of law, an arbitrary form of classification, an appropriation of money from one group to the benefit of another, that it is unequal in its operation or effect upon similar businesses, and that it is local or special legislation contrary to both the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania." 106

The court's equal protection and due process arguments focused on the benefit/burden analysis:

Where the benefit received and the burden imposed is palpably disproportionate, a tax is not only a taking without due process under the Fourteenth Amendment to the United States Constitution, but also an arbitrary form of classification in violation of equal protection . . . .

. . . .

In light of the foregoing principles, it becomes patently clear that the legislation in question does not pass constitutional muster. An examination of the incidence of this tax and its effects establishes that a substantial portion (perhaps a majority) of the class taxed are afforded no benefits whatsoever, while being significantly burdened.

While the court's ruling in Monzo could have been seen as a serious threat to future hotel taxes being used to fund convention centers, in fact, the Monzo decision appears to have provided the argu-

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101 Monzo, 500 A.2d at 1097 n.1 (citing 16 PA. CONS. STAT. § 4970.2 (1977), which authorizes the enactment of a hotel tax in second class counties to "be used for all purposes which a public authority may determine to be reasonably necessary to the support, operation and maintenance of a convention center or exhibition hall").
102 Id. at 1097–98, 1104.
103 Id. at 1098.
104 Id. at 1100; see supra note 92.
105 Monzo, 500 A.2d at 1101 ("It is well-settled that there is a presumption that tax enactments are constitutionally valid and that the burden of proving invalidity is upon the person challenging the tax.").
106 Id. at 1106 (quoting the trial court's opinion).
107 Id. at 1102, 1104. Likewise, the benefit/burden analysis illustrated a violation of the state uniformity standards. Id. at 1102–04 (citing the Pennsylvania Constitution's provision on uniform taxation and holding that the tax's burden outweighed the benefits conferred on the affected class). The court also found that the statute authorizing the hotel tax was special legislation prohibited by the state's constitution because it applied only to second class counties and Allegheny County was the only second class county in Pennsylvania. Id. at 1105–06 ("Due to the limited duration of the statute, there is no possibility that any other county would achieve second class status . . . . The result is that the statute enacted and the tax imposed is for the purpose of funding one convention center in the entire Commonwealth.").
ments required to survive a constitutional challenge. In 1986, Pennsylvania enacted the Convention Center Authority Act ("1986 Act") authorizing first class cities\(^{108}\) to impose a hotel tax to fund a convention center.\(^{109}\) As the only first class city in Pennsylvania,\(^{110}\) Philadelphia enacted such a hotel tax.\(^{111}\) Using the same general arguments as in Monzo (i.e., equal protection, due process, uniformity, and special legislation), the Pennsylvania Supreme Court ruled the tax constitutional in Leventhal v. City of Philadelphia.\(^{112}\) To distinguish its decision from Monzo, the court noted several differences in the specific facts of the case. First, the court mentioned that unlike the hotel in Monzo, which was near the county border and fifteen miles from downtown, the hotel in this case was near the Philadelphia International Airport and only seven miles from the convention center.\(^{113}\) Next, the court pointed to the evidence that "all [hotels in Philadelphia] stand to benefit from the proposed convention center."\(^{114}\) Finally, the court dismissed the special legislation argument because the legislature enacting the Act made findings as to the specific benefits of a convention center in a first class city.

Interestingly, the court used Pannell Kerr Forster’s\(^{115}\) feasibility study to support the finding that the convention center would benefit hotels throughout Philadelphia.\(^{116}\) As previously discussed, convention center feasibility studies often miss the mark on their predictions,\(^{117}\) as was the case with the Pennsylvania Convention Center in

\(^{108}\) 53 PA. CONS. STAT. ANN. § 101 (West 1997) ("[Cities] containing a population of one million or over shall constitute the first class.").


\(^{111}\) PHILA., PA., CODE §§ 19-2400 to -2405 (1986).

\(^{112}\) 542 A.2d at 1335 (finding "no constitutional infirmity in either the Tax, or its enabling Act").

\(^{113}\) Id. at 1331-32.

\(^{114}\) Id. at 1333 (noting that in Monzo "[t]here was no proof of any kind—either legislative findings or factual evidence—that the Pittsburgh Convention Center would benefit the county").

\(^{115}\) See id. at 1334-35 (citing the legislature’s findings that linked Pennsylvania’s general welfare with the promotion of business and tourism in first class cities).

\(^{116}\) Pannell Kerr Forster ("PKF") is one of a group of accounting and consulting firms often hired by cities to evaluate the feasibility of convention centers. See supra Part II.A and note 37 (discussing the use of accounting and consulting firms to develop feasibility studies that forecast positive results from increased convention space).

\(^{117}\) Leventhal, 542 A.2d at 1333-34. The PKF report indicated that hotels throughout Philadelphia would benefit by "overflow convention demand and displaced hotel room demand . . . from the increased demand generated by the new convention center." Id. at 1334. "The overflow demand that will not be accommodated by center city hotels is estimated to average 24,200 room-nights annually from 1992 to 1996." Id. at 1334 n.6.

\(^{118}\) See supra Part II.A.
Philadelphia. In finding the hotel tax constitutional, the court also emphasized the 1986 Act's legislative findings on the benefits of a convention center, which were not sufficient in Monzo. The court noted:

The Legislature made specific findings that: (a) the general welfare of this Commonwealth is dependent upon the continual encouragement, development, growth and expansion of business, commerce and tourism within the Commonwealth; (b) the development of a major convention center is most appropriate in a city of the first class; (c) the purpose of such a center should be the promotion of business and tourism in such a city; and (d) the development of such a convention center will provide benefits to the hotel industry throughout the entire area of such a city where such a center is developed.

In Monzo, the court noted the appropriate legislative finding: "[t]hat the purpose and intent of this act being to benefit the people of this Commonwealth by among other things, increasing their commerce and prosperity, and not to unnecessarily . . . burden or interfere with existing business by the establishment of competitive enterprises." Aware of the Monzo decision, the legislature was careful in drafting the 1986 Act to avoid the result in Monzo. Notably, the legislative findings in the 1986 Act did not include the limiting provision regarding the burden to existing business found in Monzo.

The Leventhal court also noted:

There was evidence presented that smaller counties lack many features necessary to attract major conventions. Meeting planners of the

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119 Evaluating the PKF report’s predictions about the Pennsylvania Convention Center, Sanders finds:
Convention-center attendance was roughly in line with PKF’s predictions. The problem comes with hotel-room demand. Rather than the 700,000 room nights predicted by PKF’s feasibility study, total room nights in 1996 and 1997 were below 500,000, and nearly half of that attendance is from the Philadelphia metropolitan area.

... And, while national conventions have chosen to meet in the city, their delegates do not stay long. The average stay of convention attendees is 1.5 nights—half of the figure assumed in the feasibility study. . . . [T]he Pennsylvania Convention Center is filled, but largely with local and regional visitors who stay only briefly and spend little.

Sanders, Follies, supra note 37, at 67–68.

120 See Leventhal, 542 A.2d at 1335 ("These legislative findings are given great weight by this Court... ").

121 See Allegheny County v. Monzo, 500 A.2d 1096, 1106 (Pa. 1985) ("Neither the legislative history nor the trial testimony indicates any reason or peculiar need of the class of counties authorized to enact the tax.")

122 Leventhal, 542 A.2d at 1334–35 (citing 53 PA. CONS. STAT. ANN. § 16,202 (West 1998) (repealed 2002)).


124 See Leventhal, 542 A.2d at 1334 ("The drafters of the Act were aware of Monzo when they drafted this legislation... . The General Assembly spent numerous hours debating the merits of building a convention center in Philadelphia...").

125 See supra note 123 and accompanying text.
major conventions and trade shows seek major city locations for their events for several reasons, including prestige, convenience to major transportation and communication facilities, and availability of cultural, shopping, dining, and entertainment attractions. Despite this recognition, the court later upheld similar hotel taxes in smaller markets without noting the potential difficulties these smaller markets can face.

In Torbik v. Luzerne County and Eways v. Board of Commissioners, hotels in Luzerne and Berks counties challenged the constitutionality of the Third Class County Convention Center Authority Act of 1994 ("1994 Act"), which authorized the creation of a convention center authority and the use of hotel taxes to fund a convention center project. Again, the courts in both cases ruled the hotel tax constitutional. As in Leventhal, the legislative findings regarding the benefits of a convention center played a significant role in these decisions.

**B. Lancaster County**

While the rationale and benefit/burden analysis in the previous cases are questionable at best, the outcome in Pennsylvania's most recent case—Bold Corp. v. County of Lancaster—is startling. The decision to uphold the assessment of a hotel tax in Lancaster County to help fund a convention center project in downtown Lancaster may

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126 Leventhal, 542 A.2d at 1335 (citation omitted).
127 For examples of such cases, see Bold Corp. v. County of Lancaster, 801 A.2d 469 (Pa. 2002); Torbik v. Luzerne County, 696 A.2d 1141 (Pa. 1997); Eways v. Bd. of Comm’rs, 717 A.2d 8 (Pa. Commw. Ct. 1998); infra notes 128–32 and accompanying text; infra Part IV.B.
129 Id. § 4, 1994 Pa. Laws at 1379.
130 Id. § 23, 1994 Pa. Laws at 1398.
131 See Torbik, 696 A.2d at 1149 ("We conclude that the hotel room rental tax provision of the [1994] Act . . . [is] constitutional."); Eways, 717 A.2d at 17 (concluding that the benefit of the tax outweighs the burden to hotel owners).
132 See Torbik, 696 A.2d at 1146 ("[T]he legislature made a public policy decision that the Convention Center will provide benefits to the local and state economy."); Eways, 717 A.2d at 17 ("The legislative findings in that Act were that the development of convention centers will encourage and stimulate economic development in the area surrounded by the convention center and, once again, we will defer to those findings.").
133 Bold Corp. v. County of Lancaster, 801 A.2d 469, 478 (Pa.) ("Bold Corp. IV") (upholding the trial court’s benefit/burden analysis favoring the convention center project), vacating 790 A.2d 1099 (Pa. Commw. Ct.) ("Bold Corp. III") (remanding the case to the trial court "for a proper benefit and burden analysis, including necessary findings of fact and conclusions of law"), remanded to 809 A.2d 1096 (Pa. Commw. Ct. 2002) (unpublished table decision) (affirming trial court’s decision). In these cases, the Pennsylvania Supreme Court and Commonwealth Court evaluated the trial court’s decision to uphold the hotel tax. See Bold Corp. v. County of Lancaster, 77 Lancaster L. Rev. 502 (Ct. C.P. 2001) ("Bold Corp. II") (upholding the constitu-
not be surprising on its face given the cases after Monzo. The unique facts of this case, however, highlight the troubling pattern of finding these hotel taxes constitutional.

In 1998, the city of Lancaster unveiled its revitalization strategy, including a proposed downtown convention center.134 When it became apparent that the Lancaster County Commissioners planned to create a convention center authority and pass a hotel tax to fund the project pursuant to the 1994 Act,135 local hotels informed the commissioners that the 1994 Act did not give them the authority to enact the tax.136 Lancaster County already had approximately 72,000 square feet of convention center space at the Lancaster Host Resort and Convention Center, and the 1994 Act’s scope was limited to counties without existing convention centers in excess of 40,000 square feet.137 Despite this information, on September 15, 1999, the Lancaster County Commissioners approved the formation of the Lancaster County Convention Center Authority (“LCCCCA”) and passed a 5% hotel tax to help fund the convention center project.138

1. Special Legislation

In October 1999, State Senator Gibson Armstrong proposed an amendment to the 1994 Act in House Bill 148 (“Armstrong Amendment”),139 which originally involved only county appropriations for Flag Day and payments to historical societies.140 The legislature en-

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137 § 2(c)(1), 1994 Pa. Laws at 1377 (“This act shall not apply to a county which has an existing convention center which covers an area of more than 40,000 square feet.”).
138 Ernest Schreiber & Todd R. Weiss, To Applause, Hotel Tax Passes: New Levy Allows Downtown Project to Move Ahead, LANCASTER NEW ERA, Sept. 15, 1999, at A1. This 5% hotel tax is composed of a 3.9% hotel room rental tax and a 1.1% hotel excise tax. Bold Corp. IV, 801 A.2d at 471. All of the revenues from the 1.1% hotel excise tax will go to the Pennsylvania Dutch Convention and Visitors Bureau (“PDCVB”) to promote tourism in Lancaster County. Id. The revenues from the 3.9% hotel room rental tax rate are divided so that 80% will go to the LCCCCA to fund the convention center project and 20% will go to the PDCVB to promote tourism in Lancaster County. Id.
acted the Armstrong Amendment as the new Third Class County Convention Center Authority Act ("1999 Act") in November 1999. The only significant difference between the 1999 Act and the 1994 Act was the defined scope. While the 1994 Act specified that it "shall not apply to a county which has an existing convention center which covers an area of more than 40,000 square feet," the 1999 Act specified that it "shall not apply to a county which has an existing convention center owned by, leased by or operated by an existing authority or the Commonwealth which covers an area of more than forty thousand square feet."

In their lawsuit opposing the tax, the hotels argued that the Armstrong Amendment was "impermissible special legislation passed solely for the benefit of Lancaster County." The county pointed to the language of the 1994 Act defining a convention center as "[a]ny land, improvement, structure, building, or part thereof, or property interest therein, whether owned by or leased by or to or otherwise acquired by an authority" to demonstrate that the scope limitation of the 1994 Act did not apply to counties with existing convention centers. The legislative history, however, supports a conclusion that the 1994 Act, which did not define "existing convention center," did not apply to counties with existing private convention centers and, more specifically, applied only to Berks and Luzerne counties:

[T]his is a "may" bill, and it is a bill that is limited to third class counties with an exclusion of third class counties that already have a convention center of 40,000 square feet, or a third class county that has a joint planning commission.

... What we are asking for here is very limited authority for two counties, basically Berks and Luzerne... .

at http://www2.legis.state.pa.us/WU01/LI/BI/BT/1999/0/HB0148P2489.pdf. Thanks to the Lancaster hotels' attorneys for raising this point.

141 16 PA. CONS. STAT. ANN. §§ 2399.1-2399.23 (West 2001).

142 See Bold Corp. I, 77 Lancaster L. Rev. 171, 173 (Ct. C.P. 2000) ("The re-enactment revised only the scope section of the Act. . . .").


144 16 PA. CONS. STAT. ANN. § 2399.2(c)(1) (emphasis added).

145 Bold Corp. III, 790 A.2d 1099, 1102 (Pa. Commw. Ct. 2002). The hotels sought a ruling similar to Monzo, where the court decided that the statute was special legislation because "the tax imposed is for the purpose of funding one convention center in the entire Commonwealth." Allegheny County v. Monzo, 500 A.2d 1096, 1105-06 (Pa. 1985).


147 Schreiber, supra note 136 (discussing the views of the county's legal advisor).


Thanks to the Lancaster hotels' attorneys for raising this point.
Likewise, the Armstrong Amendment's attempt to clarify the 1994 Act indicates that the original intent of the 1994 Act was the opposite of the clarification. Despite these arguments and the suspect timing of the Armstrong Amendment, the trial court dismissed the hotels' special legislation claim.

2. Benefit/Burden Analysis for the Public/Private Project

At the time of the trial in December 2000, the convention center project involved more than simply building a new convention center. Along with the construction of a 100,000 to 114,000 square-foot convention center, the proposal included an adjoining 294-room first class hotel ("convention center hotel"). In fact, "construction of both facilities is interdependent; the convention center will be built only if the adjacent hotel is built and the hotel will be built only if the convention center is built." The county stressed that the convention center and the convention center hotel were financially independent from each other and, more important, that the convention center hotel would be privately owned and financed. Penn Square Partners ("PSP") is the private group developing the convention center hotel.

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150 In St. Joseph Lead Co. v. Township of Potter, the Pennsylvania Supreme Court dealt with a statute clarification and held that "[i]t is elementary that the legislature cannot create authority retroactively simply by passing 'clarifying' legislation. The intent of the legislature must be determined as of the time the original act was passed. If anything, the [clarified] Act indicates that the previous statute meant the exact contrary." 157 A.2d 638, 642 (Pa. 1959). Thanks to the Lancaster hotels' attorneys for raising this point.


152 Bold Corp. IV, 801 A.2d 469, 471 (Pa. 2002). Initially, the LCCCA used a feasibility study prepared by Ernst & Young to propose a public/private convention center project consisting of a 61,000 square-foot convention center and an adjoining 281-room full-service hotel. See Mark E. Johnson, Ridge Shows Lancaster City the Money: State Commits $15 Million to Convention Center, INTELLIGENCER J. (Lancaster, Pa.), Nov. 5, 1999, at A1 (referencing Ernst & Young's report on the proposed center's size and the adjoining hotel's details). Then the LCCCA hired PricewaterhouseCoopers ("PwC") to determine the feasibility of a larger convention center. PRICEWATERHOUSECOOPERS LLP, MARKET AND ECONOMIC ANALYSES FOR THE PROPOSED CONVENTION CENTER IN DOWNTOWN LANCASTER 1 (November 2000) (on file with author). The PwC study proposed a convention center with 100,000 to 114,000 square feet of total public space. Id. at 60.

153 Bold Corp. IV, 801 A.2d at 471.

154 Id.

155 PSP is a "private, for-profit partnership formed by three Lancaster businesses—High Real Estate Group, Fulton Bank and the Lancaster Newspapers Inc., publishers of the Lancaster New Era, the Intelligencer Journal and Sunday News." Debra Erdley & Richard Gazarak, Lancaster
In conducting the benefit/burden analysis for the hotels' due process and equal protection claims, the trial court determined that it had to consider both the convention center and its adjoining hotel because of the close connection between them. As in the previous cases, the projected benefit to the existing hotels is the increased demand for hotel rooms generated by convention center visitors. The trial court recognized that the convention center hotel would decrease the benefit received by the existing hotels, but it did not consider any additional burden of the new convention center hotel. Although the trial court found that the convention center hotel "will increase the available room supply in Lancaster County by 50,000 to 55,000 room nights per year," it concluded that this increased supply was not a burden to the other local hotels:

The [convention center] hotel is only relevant to the extent that it takes away any benefit from the [existing hotels] that would be derived from the convention center. . . . To the extent that there are room nights put into the market above and beyond this absorption of convention center business, that is merely capitalism at work.

In further explanation, the trial court stated:

The Court sympathizes with the [existing hotels] to the extent that the market continually requires outselling your competition. However, this is the nature of capitalism and has nothing to do with the imposition


156 Bold Corp. II, 77 Lancaster L. Rev. 502, 511 (Ct. C.P. 2001) ("The Court is satisfied that the connection between the convention center and the adjoining hotel is so quid pro quo that each must be considered in the benefit/burden analysis.").

157 LCCCA hired PwC to "determine whether there was market demand for a convention center in downtown Lancaster, quantify any such demand and analyze the financial and economic impacts of the recommended facility." Bold Corp. IV, 801 A.2d at 471. For a discussion of the unreliability of such feasibility studies, see supra Part II.A.

158 According to the Pennsylvania Supreme Court:

The [trial] court found that events held at the proposed convention center could reasonably be expected to generate 20,000 to 30,000 hotel room nights annually. Approximately 45% of those rooms are expected to be booked by the proposed new hotel, leaving 11,000 to 16,000 room nights per year to spill over to existing convention-quality hotels.

Bold Corp. IV, 801 A.2d at 472.

159 Bold Corp. II, 77 Lancaster L. Rev. at 511 ("The only relevant burden [the convention center hotel] will have is the extent to which it takes away the benefits of the convention center from the other Lancaster County hotels.").

160 Bold Corp. III, 790 A.2d 1099, 1103 (Pa. Commw. Ct. 2002). This increased supply of room nights available in Lancaster County is not offset by an equivalent increased demand from convention center visitors. See supra note 158.

161 Bold Corp. II, 77 Lancaster L. Rev. at 511.
of the tax itself. Thus, the extent to which a new hotel will create additional competition for the [existing hotels] is irrelevant. This capitalism argument is difficult to justify. How can the increased competition from the convention center hotel be ignored when the convention center hotel is not a strictly private project? Without the assessment of the hotel tax, there would be no convention center project. And, without the convention center project, there would be no convention center hotel.

Complicating this benefit/burden analysis are the details of the public/private partnership, including some changes to the arrangement after the trial court's initial decision emphasized that "[e]ven though the hotel will not come without the convention center, the hotel is not to be funded with public monies. Thus, the [existing hotels] are not funding the hotel that will adjoin the proposed convention center." The convention center hotel developer has received public money in the form of no-interest loans from the City of Lancaster Redevelopment Authority ("CLRA"). In 2000, the Pennsylvania Department of Community and Economic Development ("DCED") gave the CLRA a $2 million grant for the convention center project. The CLRA then loaned this money to PSP. The DCED then gave a similar $2 million grant to the CLRA, which the CLRA loaned to PSP in the fall of 2002. Not only does PSP not have to pay interest on this $4 million loan, but it also does not have to repay the loan for twenty years, if at all. By February 2004, PSP had received $7.25 mil-
lion in redevelopment loans from the city. PSP also plans to seek “$5 million in tax increment financing and $1 million from the city in waived fees and other incentives.” In addition, High Associates—an affiliate of one of the partners of PSP—has received $1.4 million in professional and advisory fees from the LCCCA.

The concessions the LCCCA has given to PSP also blur the public/private line. Knowing that the feasibility study indicated that the convention center would probably not succeed without an adjoining hotel, PSP threatened to abandon the convention center hotel plan if the LCCCA did not choose the same management firm PSP had chosen for the convention center hotel. Despite LCCCA’s own Tourist Industry Task Force’s recommendation of SMG, in September 2001, the LCCCA chose Interstate Hotels to manage the convention center.

Shared management was just one of PSP’s proposals to take advantage of public subsidies. PSP also proposed shared meeting space, as well as collaborative purchasing and design efforts. An agreement with the LCCCA allowed PSP to forgo spending for the meeting, kitchen, and ballroom space required to build a first class hotel. Instead of PSP incurring these construction costs, the LCCCA will build the necessary space in the convention center and lease it to the convention center hotel for only $100 a year for ninety-nine years. Along with this public subsidy, the convention center will receive only five percent—a share considered low in the hotel industry—of the gross food and beverage sales for the use of the leased spaces by the convention center hotel. Because of these special considerations given to PSP by the LCCCA, the hotel tax effectively helps fund the

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171 Id.
172 See supra note 155.
173 See Not-Yet-Existing Convention Center Spends $1.4M on Consultants, Feb. 25, 2004 (questioning the $1.4 million payment when the project has not been moving forward), at http://www.thewgalchannel.com/news/2873531/detail.html.
174 See Bernard Harris & Tom Murse, Single Operator for Hotel, Center, LANCASTER NEW ERA, Sept. 12, 2001, at D12.
175 See id. ("[PSP] had threatened to abandon the hotel plan if Interstate [Hotels] was not chosen to operate both sides of the public-private project.").
176 Id. The LCCCA’s task force recommended SMG because, as “the largest operator of public meeting space, [it] could attract many more events to the center.” Id. Along with SMG, the task force also considered Interstate Hotels, but found that Interstate Hotels had “comparatively little experience.” Id. In addition, the task force argued that using Interstate Hotels posed a conflict of interest because it would have an incentive to favor the adjoining hotel. Id.
177 Id.
178 Di Fonzo, supra note 164.
179 Rippey, supra note 3.
180 Id.
private convention center hotel. That is, the hotel tax forces existing hotels to fund their competition.

Not only does the tax help to fund the private convention center hotel, but it also may be used directly to fund another hotel. In July 2004, the LCCCA considered buying the Brunswick Hotel in downtown Lancaster just blocks from the proposed site of the convention center and adjoining convention center hotel. 181 Although the LCCCA voted not to buy the Brunswick Hotel, it has not ruled out such a purchase in the future. 182 In fact, the LCCCA views this hotel as "an important factor in the overall success of the convention center project. It will be an overflow hotel where guests who don't want to pay Marriott prices go if they want to stay in downtown ... ." 183 With this view, the LCCCA is openly considering the possibility of using the hotel tax proceeds to purchase a hotel that will compete with other local hotels for the convention center hotel overflow. As with the private convention center hotel, the local hotels, through the hotel tax, may help to fund more competition in the future.

CONCLUSION

With a better understanding of the shortcomings of projected benefits of convention center projects and the implications of increasing hotel taxes, it is time for courts to reconsider the constitutionality of funding convention centers with hotel taxes. At a minimum, a serious overhaul to the benefit/burden analysis in due process and equal protection claims is needed. No longer should the feasibility studies from hired consultants play such a prominent role in assessing the benefits of convention center projects. In addition, because it is too easy for politicians to support taxing visitors for local projects, courts should closely scrutinize legislative findings.

An even stronger case for unconstitutionality exists when the convention center project involves an adjoining hotel in a public/private partnership. Here, the presumption of constitutionality cannot stand.

A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another... The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by

182 Id. (quoting the LCCCA’s executive director, who said: “I wouldn’t rule anything out. The move today was more about timing than anything else.”).
183 Id.
184 AM. ECON. GROUP, INC., supra note 24, at 8 (“[Hotel] taxes are often used by politicians as a way of exporting the tax burden out of the state or local area.”).
ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand.\textsuperscript{185}

Until it is proven that the so-called private hotel will not receive funding from the convention center, directly or indirectly, the burdens of the project should be presumed to outweigh the benefits to the existing hotels. Likewise, any decision upholding the constitutionality of the hotel tax should be contingent on the continued separation of the public/private relationship to ensure that the hotel tax will not effectively fund the competition.

\textsuperscript{185} United States v. Butler, 297 U.S. 1, 61 (1936) (emphasis added).