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Blinson v. State and the Continued Erosion of the Public Purpose Doctrine in North Carolina

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INTRODUCTION

In 2004, the North Carolina General Assembly approved legislation that provided Dell Inc. ("Dell") with more than $242 million in economic development incentives.[1] In 2007, Google Inc. ("Google") was also approved to receive up to $90 million over the next thirty years.[2] More recently, Goodyear Tire & Rubber Co. was approved to receive $25 million over the next ten years.[3] It is estimated that the total amount of economic development incentives given toward eight megaprojects by local North Carolina governments in the last decade exceeded $700 million.[4] An opinion poll released in August 2005 showed a majority of North Carolinians favoring such tax credits and other economic incentives to attract employers to the state.[5] These tax breaks, however, have sparked a controversial debate in the public sphere.[6] Although opinions vary

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1. Plaintiff Appellants' Brief at 4–5, Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (No. COA06-1258).

2. Op-Ed., *States Need Gumption to End Economic Incentives Game*, ASHEVILLE CITIZEN-TIMES (N.C.), Dec. 6, 2007, at B4.

3. James Romoser, *Two May Get Grants: They are Among Few that Qualify*, WINSTON-SALEM J. (N.C.), Sept. 12, 2007, at B1.

4. Richard Craver, *N.C. Learning How to Deal: Confidential Documents Show How State Has Played the Incentives Game to Lure Companies with Jobs, Capital Investment*, WINSTON-SALEM J. (N.C.), Aug. 14, 2005, at A1. Southern states appear to be offering the most in the form of economic development incentives. *See* John F. Sugg, *The Folly of Southern Hospitality: Dixie Leads the Way in Lavish Corporate Subsidies. As Other Parts of the Country Follow Suit, its Time to Ask Whether Such Incentives Work*, REASON, May 1, 2007, at 38. Georgia offered Kia Motors America $420 million in incentives; North Carolina offered This End Up Furniture $230 million; and Mississippi agreed to pay $296 million in incentives to Toyota Motor Corporation. *Id.* at 38–40.

5. Sabine Vollmer, *Poll Sparks More Debate About State Tax Breaks: Boosters, Critics at Odds Over Results*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 19, 2005, at 1D. The poll commissioned by the North Carolina Economic Developers Association showed sixty-two percent of 600 registered voters support the economic development incentives. However, critics have argued that the poll was designed to produce answers the North Carolina Economic Developers Association wanted to obtain to garner public support for economic development incentive packages. *Id.*

6. *See, e.g.*, Craver, *supra* note 4; James Romoser, *Policy Set for Major Change: Legislators May Reverse Bill's Veto*, WINSTON-SALEM J. (N.C.), Sept. 9, 2007, at A1;

greatly about the appropriateness of these economic development incentives, it is important to remember that a legal structure has been created under the North Carolina Constitution to govern the granting of public monies to lure businesses into the state.

The debate over economic development incentives was further amplified in June 2005 when, in *Blinson v. State*,[7] Robert F. Orr, a former Justice of the Supreme Court of North Carolina, representing the North Carolina Institute for Constitutional Law, challenged the incentives given to Dell to build a manufacturing plant near Winston-Salem. The Wake County Superior Court dismissed the complaint and held the incentives did not violate the North Carolina public purpose doctrine, which mandates public tax revenues to be used only for public purposes.[8] This Recent Development analyzes the 2007 decision by the Court of Appeals of North Carolina ruling on the legality of the Dell incentive package, affirming the district court's dismissal of the plaintiffs' complaint.[9] The court of appeals unanimously rejected the constitutional challenge of economic development incentives under the North Carolina public purpose doctrine embodied in the North Carolina Constitution.[10]

The term "economic development incentives," as used in this Recent Development, refers to cash or near-cash assistance used to attract corporations to the state.[11] Examples of near-cash assistance commonly used by local governments of North Carolina include credits under the state's corporate income tax, tax refunds on sales tax, and reimbursement for worker training costs.[12]

This Recent Development will argue that the holding in *Blinson* demonstrates an improper application of the North Carolina public

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Vollmer, *supra* note 5 (highlighting differing public opinions regarding the use of economic development incentives in North Carolina).

7. Complaint & Petition for Declaratory Judgment, Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (No. 05 CVS 8378), *available at* http://www.ncicl.org/assets/uploads/brief/2005.06.23-dell-complaint-w-exhibits.pdf.

8. *Id.* at *14; *see infra* notes 27–29 and accompanying text.

9. Blinson v. State, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

10. *Id.*

11. *See* Timothy J. Bartik, *Solving the Problems of Economic Development Incentives*, 36 GROWTH AND CHANGE 139, 140 (2005) (defining economic incentives as cash or near-cash assistance).

12. Jonathan B. Cox & Lynn Bonner, *Tire Makers Win State Incentives: A New Law that Broadens the Scope of Industrial Policy Makes Way for as Much as $60 Million to Improve N.C. Facilities*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 12, 2007, at 1A (outlining the incentive package given to Goodyear Tire & Rubber Co., which includes refunds on sales tax and payments for worker training costs); *see also* N.C. GEN. STAT. § 105-129.64 (2007) (authorizing tax credits for major computer manufacturing facilities).

purpose doctrine and was instead a decision based primarily upon improper judicial restraint. The *Blinson* court correctly stated the law of the public purpose doctrine but incorrectly applied the law when analyzing the constitutionality of the economic development incentives. This Recent Development will proceed in four parts. First, it will detail the North Carolina legislation enacted to promote economic development and the associated Dell incentive package. Second, this Recent Development will describe the *Blinson* court's interpretation and application of the public purpose doctrine relating to economic development incentives. In doing so, it will address applicable North Carolina precedent in the area of the public purpose doctrine in detail, including analysis of *Mitchell v. North Carolina Industrial Development Financing Authority*,[13] *Madison Cablevision, Inc. v. City of Morganton*,[14] and *Maready v. City of Winston-Salem*.[15] Third, this piece will analyze the court's incorrect application of the public purpose doctrine due to departure from precedent and improper deference to the legislature. Finally, this Recent Development will discuss the continued broadening of the scope of the public purpose doctrine as reflected in *Blinson* and the implications of this expansion.

I. THE COMPUTER LEGISLATION AND ITS CHALLENGES

Dell received incentives pursuant to the 2004 amendments to Chapter 105 of the North Carolina General Statutes ("Computer Legislation").[16] The legislature enacted these amendments to

13. 273 N.C. 137, 159 S.E.2d 745 (1968).

14. 325 N.C. 634, 386 S.E.2d 200 (1989).

15. 342 N.C. 708, 467 S.E.2d 615 (1996).

16. *See* Act of Nov. 4, 2004 (Extra Session), ch. 105, sec. 1, 2004 N.C. Sess. Laws 1, 1–7 (codified at N.C. GEN. STAT. §§ 105-129.60 to .66 (2005)); Act of Nov. 4, 2004 (Extra Session), ch. 105, sec. 2, § 105-129.4, 2004 N.C. Sess. Laws 7, 7–8 (codified at N.C. GEN. STAT § 105-129.4 (2005)); Act of Nov. 4, 2004 (Extra Session), ch. 105, sec. 3, § 105-164.14(j)(2)-(3), 2004 N.C. Sess. Laws 8, 8–9 (codified at N.C. GEN. STAT. §§ 105-164.14(j)(2)-(3) (2005)); Act of Nov. 4, 2004 (Extra Session), ch. 105, sec. 4, § 105-259(b) 2004 N.C. Sess. Laws 9, 9 (codified at N.C. GEN. STAT. § 105-259(b) (2005)). Article 3A, the Bill Lee Act, was repealed on January 1, 2007. N.C. GEN. STAT. § 105-129.2A(a) (2007). It was replaced with Article 3J, the Replacement of Bill Lee Act ("Replacement Act"). N.C. GEN. STAT. §§ 105-129.80 to .89 (2007). The Replacement Act streamlined and continued many of the credits for industries eligible under the Bill Lee Act, including technology companies. The new law went into effect on January 1, 2007, and contains a sunset provision through January 1, 2011. N.C. GEN. STAT. § 105-129.82(a) (2007). Article 3G, the article specifically created to authorize the bulk of the Dell incentive package, contains a sunset provision through January 1, 2020. N.C. GEN. STAT. § 105-129.66 (2007). Thus, the Dell incentive package will provide at least fifteen years of tax incentives to the corporation.

"enhance existing tax incentives and to provide a tax credit for certain major computer manufacturing facilities."[17] The North Carolina General Assembly explicitly laid out seven purposes, purportedly all public purposes, for the enactment of the Computer Legislation.[18] The purposes focused on developing North Carolina's computer manufacturing and distribution industry through tax policies and programs that encourage companies to locate in the state.[19]

Shortly after the passage of the Computer Legislation, the Forsyth County Board of Commissioners and the City of Winston-

17. *Blinson v. State*, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

18. Act of Nov. 4, 2004 (Extra Session), ch. 105, § 1, 2004 N.C. Sess. Laws 204, 1, 1–2 (codified at N.C. GEN. STAT § 105-129.60 (2005)). The General Assembly stated:

> (1) It is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for the citizens of the State in strategically important industries.
>
> (2) Both short-term and long-term economic trends at the regional, State, national, and international levels have made the successful implementation of the State's economic development policies and programs both more critical and more challenging; in particular, national trade policies and the resulting impact on domestic competitiveness have made the retention of manufacturing jobs more difficult at a time of transition in the national, State, and regional economies.
>
> (3) Manufacturing employment in the State has been disproportionately affected by trade policies and global economic trends, resulting in the loss of jobs by many in the State's capable industrial workforce.
>
> (4) Computer manufacturing and distribution has been an important industry for the State and has prospered in this State due to our strong and productive workforce, focused worker training programs, research capabilities, tradition of innovation, and concentration of companies.
>
> (5) The computer manufacturing and distribution industry will remain a vital part of the world's, nation's, and State's future economy as society becomes more dependent on advanced computer technology.
>
> (6) It is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.
>
> (7) The State must be an innovative leader in creating policies and programs that encourage the maintenance of manufacturing jobs in this country and State and in the development of efforts to support manufacturers during the transitional period as they adapt to rapidly changing global conditions.

Id.

19. *Id.*

Salem adopted local resolutions authorizing the use of an economic development incentive package to attract Dell to Winston-Salem. Attracted by the package, Dell subsequently announced its plan to build a major computer manufacturing facility in the county.[20] In the agreement detailing Dell's plans to locate its facility in Forsyth County, Dell committed to create at least 1,700 jobs at an average wage of $28,000 per year and to make a capital investment of at least $100 million.[21] The agreement asserted various public benefits including "job creation, economic diversification and stimulus and training in technology, and computer assembly and manufacturing skills."[22] Despite the fact that Dell's plan proposed an overwhelmingly positive impact on Forsyth County, the plan encountered resistance at its inception.[23] Much of the dispute over the Dell economic development incentive package arose from the fact that the plan amounted to an astounding $242 million in state and local tax incentives.[24]

The objections to the Dell incentive package were not novel ones. Since states and localities first began providing economic development incentives to businesses to attract them to the state, taxpayers have brought lawsuits challenging their legality under state constitution public purpose doctrines.[25] These taxpayer lawsuits attack the use of tax incentives and other forms of public subsidies that provide financial benefit to private businesses while burdening states, cities, or counties through foregone tax collection that would otherwise fund schools and other public services.[26] Present in nearly every state constitution, public purpose doctrines seek to ensure that

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20. *Blinson*, 186 N.C. App. at 331, 651 S.E.2d at 272.

21. *Id.* at 333, 651 S.E.2d at 273.

22. *Id.*

23. *See, e.g.*, Complaint & Petition for Declaratory Judgment, *supra* note 7, at 1–2; Craver, *supra* note 4 (citing critics of the Dell incentive packages).

24. *See* Plaintiff Appellants' Brief, *supra* note 1, at 4–5.

25. *See, e.g.*, Hawkins v. City of Greenfield, 230 N.E.2d 396, 396 (Ind. 1967); Brady v. City of Dubuque, 495 N.W.2d 701, 701–02 (Iowa 1993); *In re* Application of Okla. Dev. Fin. Auth. *ex rel.* Goodyear Tire & Rubber Co., 89 P.3d 1075, 1075 (Okla. 2004).

26. *See* Gregory W. Fox, Note, *Public Finance and the West Side Stadium: The Future of Stadium Subsidies in New York*, 71 BROOK. L. REV. 477, 480 (2005). See *id.* at 507 for a thorough discussion of the evolution of the public purpose doctrine.

> The public purpose doctrine was originally designed by state legislatures to curb corruption and exploitation of the public by legislators and railroad developers during the late 1800s. The public concern during that period was that tax dollars were being designated to repay bonds issued for the private benefit of railroad owners.

Id.

taxpayer dollars are spent on projects that provide a public benefit, not a benefit to private entities.[27] North Carolina has such a doctrine in article V, section 2(1) of its constitution which states, "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."[28] Furthermore, article V, section 2(7) states, "[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only."[29]

II. PUBLIC PURPOSE CLAUSE JURISPRUDENCE IN ECONOMIC DEVELOPMENT INCENTIVE CASES

In *Blinson*, the Court of Appeals of North Carolina interpreted the public purpose doctrine as applied to the use of economic development incentive packages in North Carolina.[30] In order to understand *Blinson*, one must look to precedent used by the North Carolina courts. To guide its analysis, the *Blinson* court began with a case decided by the Supreme Court of North Carolina in 1989—*Madison Cablevision, Inc. v. City of Morganton*.[31] *Madison Cablevision* is the controlling case for interpreting the public purpose doctrine in North Carolina.[32] The case involved a challenge to a North Carolina statute that authorized cities to "finance, acquire, construct, own, and operate a cable television system."[33] The *Madison Cablevision* court stated, "[t]he initial responsibility for determining what is and what is not a public purpose rests with the

27. *See* Michael E. Libonati, *The Law of Intergovernmental Relations: IVHS Opportunities and Constraints*, 22 TRANSP. L. J. 225, 239 (1994) (stating the public purpose doctrine "commits state courts to reviewing the actions of state and local government units to appraise whether the challenged undertaking primarily benefits the public rather than the private sector").

28. N.C. CONST. art. V, § 2(1).

29. N.C. CONST. art. V, § 2(7).

30. Blinson v. State, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

31. 325 N.C. 632, 386 S.E.2d 200 (1989) (addressing the constitutionality of the North Carolina General Statutes which authorize the financing, acquisition, construction, ownership, and operation of a cable television system).

32. The Supreme Court of North Carolina continues to utilize *Madison Cablevision* in determining the constitutionality of government expenditures under the public purpose clause. *See, e.g.*, Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 339, 554 S.E.2d 331, 333 (2001); Maready v. City of Winston-Salem, 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996).

33. *Madison Cablevision*, 325 N.C. at 636, 386 S.E.2d at 201.

legislature; its determinations are entitled to great weight."[34] The court also noted that there is a presumption in favor of the constitutionality of the statute.[35] However, the "ultimate determination of whether the activity or enterprise is for a purpose forbidden by the Constitution of the state" lies with the court.[36] In order to strike a balance between these two seemingly inapposite tenets, the *Madison Cablevision* court attempted to find solid legal footing by focusing on the ultimate benefit of the statute authorizing cities to own and operate cable television systems. *Madison Cablevision* established "[t]wo guiding principles . . . for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons."[37]

In describing this rule of application, the Supreme Court of North Carolina stated:

> Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the *ultimate net gain or advantage must be the public's* as contradistinguished from that of an individual or private entity.[38]

The court further stated that it had not specifically defined "public purpose" and, therefore, will determine whether the purported action is constitutional based on the particular circumstances of each case.[39] Thus, in *Madison Cablevision*, the Supreme Court of North Carolina established how a reviewing court determines whether a state or local government action is constitutional under the public purpose clause: a court must give legislative determinations "great weight," but the court must make the ultimate determination of whether an activity is

34. *Id.* at 644–45, 386 S.E.2d at 206 (1989) (citations omitted).

35. *Id.* (quoting *In re* Housing Bonds, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)).

36. *Id.* at 645, 386 S.E.2d at 206 (citations omitted). The standard to be applied by a reviewing court is *de novo*. If the legislature has declared an act or expenditure to be for a public purpose, its conclusions are given "great weight" and the action is presumed to be constitutional. *Id.* However, this is not conclusive, and the court must make its own independent legal determination of whether the act is in violation of the public purpose clause. *Id.*

37. *Id.* at 646, 386 S.E.2d at 207 (internal citations omitted).

38. *Id.* (emphasis added) (quoting Martin v. N.C. Hous. Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672–73 (1970)).

39. *Id.*

constitutional through application of the two-prong test.[40] The North Carolina courts have consistently used the two distinct prongs of the *Madison Cablevision* test in subsequent North Carolina cases.[41]

The *Blinson* court also relied on *Maready v. Winston-Salem,*[42] which outlined how the public purpose doctrine is specifically applied to economic development incentives.[43] In *Maready*, a Supreme Court of North Carolina case from 1996, the plaintiffs challenged a North Carolina statute authorizing twenty-four economic development incentive projects given by Winston-Salem and Forsyth Counties where the projected package totaled approximately $13 million.[44] The counties granted the incentives to private companies for job training, site preparation and upgrading, and parking facilities.[45] The *Maready* court held that the statute authorizing economic development incentive programs was constitutional under the public purpose doctrine.[46] The court clearly delineated the *Madison Cablevision* two-prong test of determining whether a municipality has acted with a public purpose, and it concluded that the challenged statute furthered a public purpose after applying the two-prong test, as follows.[47] In addressing the first prong, the court stated that an action "involves a reasonable connection with the convenience and necessity of the particular municipality"[48] if similar action has been held by the court in the past to be within the scope of permissible government involvement.[49] The court concluded the statute passed this first prong because "economic development has long been recognized as a proper governmental function."[50] In addressing the

40. *Id.*

41. *See* Michael McKnight, Comment, *Don't Know What a Slide Rule is for: The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of* Kelo v. City of New London, 28 CAMPBELL L. REV. 291, 309–12 (2006).

42. 342 N.C. 708, 467 S.E.2d 615 (1996).

43. Blinson v. State, 186 N.C. App. 328, 337–38, 651 S.E.2d 268, 275–76 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

44. *Maready,* 342 N.C. at 713, 467 S.E.2d at 618–19. Plaintiffs challenged N.C. GEN. STAT. § 158-7.1, the statute which authorizes local governments to make economic development incentive grants to private corporations. *Id.* Pursuant to the statute, the economic development incentives shall have the purpose of increasing the "population, taxable property, agricultural industries and business prospects . . . ." N.C. GEN. STAT. § 158-7.1(a) (2007).

45. *Maready,* 342 N.C. at 713, 467 S.E.2d at 618–19.

46. *Id.* at 727, 467 S.E.2d at 627.

47. *Id.* at 722, 467 S.E.2d at 624; *supra* note 37 and accompanying text.

48. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 632, 646, 386 S.E.2d 200, 207 (1989).

49. *Maready*, 342 N.C. at 722, 467 S.E.2d at 624.

50. *Id.* at 723, 467 S.E.2d at 624.

second prong, the issue most contentious in these types of cases, the *Maready* court stated that activities are considered constitutional "so long as they primarily benefit the public and not a private party."[51] The court concluded the statute passed this second prong because the "self-proclaimed end is to 'increase the population, taxable property, agricultural industries and business prospects of any city or county' "; the "natural consequences" from the statute will yield "net public benefit"; and the statute "should create a more stable local economy."[52] The *Maready* court held the economic development incentives given to the private corporations were constitutional by reasoning that the "public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected."[53]

In its analysis of whether the economic development incentives served a public purpose, the *Maready* court reviewed other North Carolina precedent, including *Mitchell v. North Carolina Industrial Development Financing Authority*.[54] The Supreme Court of North Carolina in *Mitchell* ruled the Industrial Facilities Financing Act, which authorized the state to issue revenue bonds in order to finance the construction of private corporate facilities, unconstitutional.[55] In doing so, the Supreme Court of North Carolina joined the Supreme Courts of Nebraska, Florida, Idaho, Maine, Massachusetts, and Washington in holding the issuance of revenue bonds to private corporations to be unconstitutional.[56] The Supreme Court of Nebraska reasoned that "general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public [purpose] as distinguished from a private purpose."[57] According to the *Maready* court, the court in *Mitchell* "rightly concluded that direct state aid to a private enterprise, with only limited benefit accruing to the public, contravenes fundamental

51. *Id.* at 724, 467 S.E.2d at 625. The North Carolina Court of Appeals also followed this statement of the law in *Peacock v. Shinn* in 2000, in which a taxpayer challenged the constitutionality of the construction of the Charlotte Coliseum. Peacock v. Shinn, 139 N.C. App. 487, 493, 533 S.E.2d 842, 847 (2000) ("Under the second prong of the public purpose guidelines, activities are considered constitutional so long as they *primarily* benefit the public and not a private party.").

52. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

53. *Id.* at 725, 467 S.E.2d at 625.

54. *See id.* at 717, 467 S.E.2d at 621 (discussing Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968)).

55. *Mitchell*, 273 N.C. at 156, 159 S.E.2d at 758.

56. *Id.*

57. *Id.* at 152, 159 S.E.2d at 756 (citation omitted).

constitutional precepts."[58] The *Maready* court distinguished the case before it from *Mitchell* by noting that the primary effect of the Industrial Facilities Financing Act was to benefit private enterprises, whereas the challenged economic development incentives statute in *Maready* was to yield ultimate public benefit.[59]

Furthermore, the *Maready* court's analysis of *Mitchell* sheds additional light as to why the court held the challenged statute in *Maready* to be constitutional. First, the *Maready* court noted that the General Assembly in *Mitchell* passed the Industrial Facilities Financing Act reluctantly, whereas the General Assembly in *Maready* passed the economic development incentives statute enthusiastically.[60] Juxtaposing the statute at issue to the one in *Mitchell*, the *Maready* court stated, "[t]he converse is true here in that the Assembly has unequivocally embraced expenditures of public funds for the promotion of local economic development as advancing a public purpose."[61] The *Maready* court placed emphasis not on the weighing of public benefits versus private benefits but on the legislature's zeal between the *Maready* development incentive act and the *Mitchell* Industrial Facilities Financing Act.[62] Second, the court acknowledged that its ruling amounted to a shift in constitutional interpretation despite the differences in the facts of the two cases. The *Maready* court reasoned that, with the "passage of time and accompanying societal changes," the ruling in *Mitchell* would change to allow government to "provide a site and equip a plant for private industrial enterprise."[63] In doing so, the court acknowledged the developing "trend" of expanding the scope of the public purpose doctrine in North Carolina.[64]

Consistent with *Maready*, the *Blinson* court also ruled economic development incentives do not violate the public purpose doctrine

58. *Maready*, 342 N.C. at 718, 467 S.E.2d at 622.

59. *Id.* at 718, 725, 467 S.E.2d at 622, 625 (distinguishing *Mitchell* by noting that, in that case, private industry was the primary benefactor and "any benefit to the public [was] purely incidental").

60. *Id.* at 717–18, 467 S.E.2d at 621–22.

61. *Id.* at 717–18, 467 S.E.2d at 622.

62. *See* McKnight, *supra* note 41, at 310 ("[T]he Maready majority opinion outlined another factor for courts to consider when determining whether a governmental expenditure is for a public purpose: the circumstances surrounding the enactment of the legislation.").

63. *Maready*, 342 N.C. at 720, 159 S.E.2d at 623.

64. *See id.* at 722, 467 S.E.2d at 624. See *infra* Part IV for a discussion of this broadening of the scope of the public purpose doctrine in North Carolina.

embodied in the North Carolina state constitution.[65] Indeed, the court of appeals in *Blinson* could not distinguish the case from *Maready*, holding "[w]e are bound by *Maready* ... and, therefore, affirm the trial court's decision dismissing plaintiffs' complaint."[66] The *Blinson* court stated that *Maready* conclusively held public expenditures for economic development incentive programs to be a constitutional public purpose.[67] Applying the public purpose doctrine relating to economic development incentives, the *Blinson* court confirmed that "[t]he task of the judiciary is to determine whether the *aim* of the legislation is primarily public and not to weigh the public benefit against the private benefit by making findings as to the projected monetary value of each."[68] Therefore, the *Blinson* court stated that it could consider the legislative documents—such as the text of the Computer Legislation, the County and City Resolutions, and the agreement with Dell—when determining whether the economic development incentives given to Dell were for public purposes.[69] Such considerations would help the court assess whether the asserted *aim* was to benefit the public. Through review of the text of the legislation and asserted purposes of benefiting the public, the court found that the aim and primary motivation behind the statute was for public benefit and therefore constitutional.[70]

III. *BLINSON'S* FAILURE IN APPLYING THE PUBLIC PURPOSE DOCTRINE

The *Blinson* court correctly stated the law of the public purpose doctrine but incorrectly applied the law when analyzing the constitutionality of economic development incentives. Specifically, the *Blinson* court incorrectly applied the second prong of the *Madison Cablevision* test, because it followed the holding in *Maready* and thus exercised improper deference to the state legislature.

65. Blinson v. State, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

66. *Id.*

67. *Id.* at 339, 651 S.E.2d at 276.

68. *Id.* at 340–41, 651 S.E.2d at 277–78 (citing *Maready*, 242 N.C. at 724, 467 S.E.2d at 625) ("We look instead to whether the purpose of 'an act will promote the welfare of a state or local government and its citizens.' ").

69. *Id.* at 336, 340, 651 S.E.2d at 275, 277–78 ("The task of the judiciary is to determine whether the *aim* of the legislation is primarily public.").

70. *See supra* note 18 (listing the seven asserted public purposes for which the Computer Legislation was enacted). "Thus, under *Maready*, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose." *Blinson*, 186 N.C. App. at 339, 61 S.E.2d at 276.

Maready, however, was simply the first step in the misapplication of the *Madison Cablevision* test, and thus *Blinson* was wrong to rely on the *Maready* court's analysis.[71] Additionally, the court fully ignored another Supreme Court of North Carolina case, *Briggs v. City of Raleigh*,[72] which announced a balancing test in order to guide the court's determination of the appropriate level of deference to the legislature.[73]

As established in *Madison Cablevision*, it is the ultimate responsibility of the court to determine whether a municipality's action benefits the public, as opposed to private parties.[74] Under this second prong, activities are considered constitutional "so long as they *primarily* benefit the public and not a private party."[75] Any benefit to the private entity can only be incidental.[76]

The *Blinson* court erred when it dismissed the claim without evaluating whether the public benefits exceeded the private benefits.[77] The petitioner's brief asserted various factual arguments demonstrating that the private entity, Dell, primarily benefited from the economic development incentives, and the benefit to the public was only incidental.[78] First, the petitioner's brief argued that the primary benefit is to Dell and to Dell employees, as the franchise and sales tax subsidies, transportation infrastructure, and tax credits and refunds go directly to the corporation.[79] Granted, this alone would not fail the test of constitutionality, because "the mere fact that the

71. *See infra* notes 103–09 and accompanying text. *Maready*'s incorrect decision affected the lower courts in North Carolina. If *Maready* had correctly applied precedent, then *Blinson* would have as well. *Blinson*, however, followed *Maready* and was incorrectly decided.

72. 195 N.C. 223, 141 S.E. 597 (1928).

73. *See infra* notes 96–98 and accompanying text.

74. *See supra* note 36 and accompanying text.

75. Maready v. City of Winston-Salem, 342 N.C. 708, 724, 467 S.E.2d 615, 625 (1996) (emphasis added).

76. *See id.* at 725, 467 S.E.2d at 625 ("While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental."); *see also* Peacock v. Shinn, 139 N.C. App. 487, 494, 533 S.E.2d 842, 847 (2000) (holding Charlotte's erection, maintenance, and operation of the Charlotte Coliseum constitutional because the activity provided only an incidental private benefit and served a primary public goal).

77. *See* Blinson v. State, 186 N.C. App. 328, 340–41, 651 S.E.2d 268, 277–78 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E. 2d 240 (2008) ("The task of the judiciary is to determine whether the *aim* of the legislation is primarily public and not to weigh the public benefit against the private benefit.").

78. *See* Plaintiff Appellants' Brief, *supra* note 1, at 25–27; *see also* Fox, *supra* note 26, at 482 (arguing in the context of tax incentives given by cities for the building of sports stadiums, that there are massive private benefits given to these business which dwarf the "speculative benefits to the public").

79. *See* Plaintiff Appellants' Brief, *supra* note 1, at 5.

agreements benefited private parties [is] not dispositive."[80] However, the fact that the tax benefits go directly to the corporation is one factor among many that could be used to argue that the primary benefit is to the private actor, not the public. Second, the incentive package includes a reimbursement of property taxes for the next fifteen years, tax credits against Dell's corporate income, and a refund of sales and use taxes paid on building materials and equipment added to the new Dell facility.[81] Therefore, the legislation's asserted purpose in gaining increased tax revenue from the corporation holds less weight since there will be little public benefit from property tax, corporate tax, or sales and use tax collections for an extended period of time.[82] Third, as then North Carolina Supreme Court Justice Robert Orr stated in the *Maready* dissent, the creation of new jobs and a higher tax base does not automatically result in a significant benefit to the public.[83] Justice Orr, who was the petitioner's attorney in *Blinson*, argued in dissent that there is no evidence to support this assumption of a public benefit due to an increased tax base.[84] None of these issues were considered by the court.[85] These are issues that should be addressed before ruling whether an economic development incentive package is constitutional under the public purpose doctrine. *Madison Cablevision,* as correctly interpreted in *Maready,* requires the court to determine whether the public *primarily* benefits from the Dell incentives.[86]

Factually, the *Blinson* court did not analyze the package reports presented to the state and local governments outlining the purported public benefits.[87] Petitioner sought to highlight several economic issues that would point to the conclusion that the Dell incentive package was primarily for a private purpose.[88] For example, the

80. *Blinson*, 186 N.C. App. at 340, 651 S.E.2d at 277 (noting that benefits to private individuals alone are insufficient to make out a claim under the North Carolina public purpose clause).

81. *See* Plaintiff Appellants' Brief, *supra* note 1, at 24–25 (stating that, with cash grants and reimbursements from local governments, Dell would not pay property taxes for the next fifteen years and would possibly have reduced taxes for up to twenty-five years).

82. The state will receive some tax benefit because employees of the corporation will be paying state taxes. However, this is of minimal benefit to the state when compared to the large tax credits granted to the corporation since the employees are paid so little, some less than $20,000 a year. *See infra* notes 149–50 and accompanying text.

83. Maready v. City of Winston-Salem, 342 N.C. 708, 735, 467 S.E.2d 615, 631 (1996) (Orr, J., dissenting).

84. *Id.*

85. *Blinson*, 186 N.C. App. at 341, 651 S.E.2d at 278.

86. *See supra* note 51 and accompanying text.

87. *Blinson*, 186 N.C. App. at 338, 651 S.E.2d at 276.

88. Plaintiff Appellants' Brief, *supra* note 1, at 24–25.

package consisted of a tax credit up to 100% of corporate income and corporate franchise tax liability, foregone tax revenue, and a refund of sales and use taxes paid.[89] The briefs filed by the respondents contained no discussion relating to an analysis performed by the legislature of the actual public benefits received from the Dell incentive package.[90]

Another issue the court could have evaluated to determine if the action primarily benefited the public was to conduct a review of legislative reports of actual past economic development incentive programs to see if the associated package reports correctly estimated the public benefits.[91] An analysis of past economic incentive development projects could have revealed whether the reports met or failed to meet the expectations for the public (community growth, increase in jobs, increase in tax base, etc.). Such a review ensures that the legislature does not automatically defer to the reports and studies performed by the "very private corporation that stands to benefit from" these economic development incentives.[92]

While purporting to uphold North Carolina precedent, in reality, the *Blinson* court did not apply the correct precedent. It appears from the *Blinson* ruling that in order for an economic development incentive package to survive state constitutional challenges, the legislation merely has to assert that the legislation's purpose is to benefit the public.[93] According to North Carolina precedent, however, the test is to determine whether a state or local government's action actually does primarily benefit the public or primarily benefit a private actor, not merely whether the aim of the legislation was to benefit the public.[94] In *Briggs v. City of Raleigh*,[95] the Supreme Court of North Carolina addressed whether taxpayer money used to finance the construction of a state fairground was

89. *Id.*

90. Defendant Appellees' Brief of the Local Defendants, Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (No. COA06-1258); Brief for State Defendant-Appellees, Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (No. COA06-1258); Brief of Defendant-Appellee Dell, Inc., Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) (No. COA06-1258).

91. *See* Fox, *supra* note 26, at 514 (discussing the public purpose doctrine as it relates to public financing of sports stadiums). Fox suggests courts should look at other cities that have financed sports stadiums and convention centers and whether those projects have meet expectations for public benefit. *Id.*

92. *Id.* at 515.

93. Blinson v. State, 186 N.C. App. 328, 341, 651 S.E.2d 268, 278 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

94. *See supra* note 51 and accompanying text.

95. 195 N.C. 223, 141 S.E. 597 (1928).

being used for a public purpose and, thus, constitutional.[96] The Supreme Court of North Carolina announced a balancing test where the "ultimate advantage" to the public must outweigh advantages to the private entity.[97] Only when the outcome of this balancing test is unclear should the court defer to the legislature.[98] Subsequently, in 1968, the Supreme Court of North Carolina in *Mitchell* applied this constitutional test, holding that an enactment is unconstitutional "[i]f . . . an enactment is *in fact* for a private purpose, . . . [and] it cannot be saved by legislative declarations to the contrary."[99] Therefore, an enactment or incentive development does not pass constitutional muster simply because the legislature declares it to be for a public purpose. The action must also be *in fact* for a public purpose.

The *Briggs* balancing test is consistent with the second prong established by the *Madison Cablevision* court. Under *Madison Cablevision*, "the ultimate net gain or advantage must be the public's."[100] The private advantages, however, must be incidental.[101] Accordingly, the second prong of *Madison Cablevision* is essentially the same balancing test as established in *Briggs* where the court must ensure the public benefits outweigh the private benefits.[102] Taken together, long-standing North Carolina precedent, beginning with *Briggs* in 1928, continuing to *Mitchell* in 1968, and culminating in *Madison Cablevision* in 1989, requires reviewing courts to make the determination whether public advantages do in fact outweigh the private benefits.

Starting with *Maready* and then *Blinson*, the North Carolina courts misapplied *Madison Cablevision* and ignored *Briggs* altogether by neither properly applying the second prong of the *Madison Cablevision* test nor performing the balancing test. The *Maready* court "eyeball[ed]"[103] the second prong and understood it as merely stating that an act that promotes the welfare of a state or a local

96. *Id.* at 225, 141 S.E. at 599.

97. *Id.* at 226, 141 S.E. at 600 (quoting Town of Bennington v. Park, 50 Vt. 178 (1877)); *see also* Martin v. N.C. Hous. Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 673 (1970) (directly citing *Briggs* by stating the ultimate net gain must be the public's).

98. *Briggs*, 195 N.C. at 226, 141 S.E. at 600.

99. Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968) (emphasis added).

100. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (quoting *Martin*, 277 N.C. at 43, 175 S.E.2d at 672–73).

101. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 725, 467 S.E.2d 615, 625 (1996).

102. *See supra* note 38 and accompanying text.

103. McKnight, *supra* note 41, at 315.

government and its citizens is for a public purpose.[104] The court performed no analysis to determine whether the asserted public benefits of the *Maready* economic development incentives—increase in population, increase in taxable property, increase in tax revenues, etc.—outweighed the private benefits to the corporations.[105] As one commentator stated, the court inappropriately assumed "that economic development and job creation carried a far greater benefit to the public as a whole than to the individual companies who also profited from the government's actions in those cases."[106] The *Blinson* court then relied upon *Maready* in its application of the second prong of *Madison Cablevision*.[107] The *Blinson* court, in blindly following *Maready*, also failed to perform a balancing test to determine whether the public primarily benefits from the incentives.[108] Instead, the *Blinson* court merely cited *Maready* by stating, "[t]he public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected."[109]

The *Blinson* court gave too much deference to the legislature. Under *Madison Cablevision*, the legislative determination that the economic development incentive package granted to Dell was constitutional is "entitled to great weight."[110] Although some deference to the legislature is appropriate, the "ultimate advantage" to the public must outweigh advantages to the private entity[111] and that determination must be made by the court.[112] Moreover, it is an interesting fact that the economic development incentive package offered to Dell was only considered in a special one-day session of the

104. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

105. Blinson v. State, 186 N.C. App. 328, 335–41, 651 S.E.2d 268, 274–78 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008). Because *Maready* involved only the challenge of the economic development incentive statute, N.C. GEN. STAT. § 158-7.1 (2007), the legislature did not in fact evaluate the outweighing of public versus private benefits. The *Maready* court stated, "[t]he expenditures this statute authorizes *should* create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy." *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added).

106. McKnight, *supra* note 41, at 315–16.

107. *Blinson*, 186 N.C. App. at 337–38, 651 S.E.2d at 275–76.

108. *Id.*

109. *Id.* at 337, 651 S.E.2d at 275.

110. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 645, 386 S.E.2d 200, 206 (1989).

111. *See supra* note 38 and accompanying text.

112. *See supra* note 36 and accompanying text.

North Carolina General Assembly.[113] In this session, a senior budget adviser for Governor Easley "repeatedly told legislators that any changes to the package would kill the deal for the plant and a projected 1,500 jobs."[114] Critics of economic development incentives suggest that legislative determinations may be "more political than economic."[115] It is possible that politicians have a strong interest in emphasizing the creation or retention of jobs in the state without appropriately considering the economic costs of a package, and courts should be aware of these political circumstances when deciding whether to defer to the legislature. The courts are charged with the ultimate responsibility to ensure a particular tax expenditure primarily benefits the public.[116]

A number of academics have proposed different considerations courts should use in applying the balancing test of *Briggs* and the second prong of the *Madison Cablevision* test. For example, one scholar suggests that courts should analyze empirical data and "require a clear benefit to the public before deciding [whether] an expenditure is for a public purpose."[117] In reviewing the cost-benefit analysis, courts should be aware of the false assumption that benefits can be measured only by looking at the projected increase in the tax base alone.[118] This assumption is incorrect because only a portion of the new jobs go to local residents and the unemployed.[119] Courts also need to ensure that the legislature has considered other important factors in the cost-benefit analysis such as environmental costs, the quality of the new jobs, and who is being hired for those new jobs.[120] The courts should not ignore these considerations.

The *Blinson* court looked only to whether the aim of the legislation was for a public purpose and did not ensure the legislature performed an adequate analysis of whether the incentives were in fact for a public purpose.[121] To rely merely on the stated aim of the legislation is an example of improper judicial restraint. Simply because the legislation supporting the economic development

113. *See* Craver, *supra* note 4.

114. *Id.*

115. *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives For Business*, 110 HARV. L. REV. 377, 402 (1996).

116. *Id.*

117. McKnight, *supra* note 41, at 316.

118. *See* Bartik, *supra* note 11, at 146.

119. *Id.*

120. *Id.* at 149–50.

121. Blinson v. State, 186 N.C. App. 328, 340–41, 651 S.E.2d 268, 277–78 (2007), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 240 (2008).

incentive packages states a public purpose does not make the actual packages given to private entities constitutional under the second prong of the *Madison Cablevision* test. Pursuant to the *Madison Cablevision* two-prong test, the court has the ultimate responsibility of determining whether the public *primarily* benefited from these incentives.[122]

IV. BROADENING OF THE DOCTRINE

The *Blinson* case is just one example of the continued erosion of the public purpose doctrine in North Carolina.[123] As reflected in both *Maready* and *Blinson*, the North Carolina courts have begun providing extreme deference to legislative judgment, essentially abdicating judicial responsibility under the state constitution to invalidate legislative undertakings that violate the public purpose doctrine.[124] Accordingly, the continued broadening of the scope of the public purpose doctrine as reflected in *Blinson* represents improper judicial restraint and reflects the trend of inadequate judicial protection against unconstitutional government action.

Since the public purpose doctrine was first discussed in North Carolina in the 1887 case *Wood v. Commissioners of Oxford*,[125] the North Carolina courts have continued to expand the scope of what constitutes a "public purpose."[126] The Supreme Court of North Carolina has stated that "a slide-rule definition to determine public purpose for all time cannot be formulated."[127] This statement appears to be the origin of the deferential nature of judicial review present in

122. *See* Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) ("[T]he ultimate net gain or advantage must be the public's . . . ." (quoting Martin v. N.C. Hous. Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672–73 (1970) (citations omitted))).

123. The *Blinson* court followed *Maready* in holding economic development incentives are constitutional under the North Carolina public purpose doctrine, departing from the well reasoned analysis found in *Mitchell*. *See supra* notes 65–70 and accompanying text.

124. *See supra* Part III.

125. 97 N.C. 227, 230–34, 2 S.E. 653, 655–56 (1887) (holding the use of public funds to issue bonds and make a donation for the purpose of railroad construction constitutional under the public purpose doctrine).

126. *See* McKnight, *supra* note 41, at 295–98, 306–12; *see also* Maready v. City of Winston-Salem, 342 N.C. 708, 721–22, 467 S.E.2d 615, 623–24 (1996) (listing North Carolina courts where activities have been held to be for a "public purpose" and acknowledging a "trend toward broadening the scope of what constitutes a valid public purpose").

127. Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

public purpose decisions.[128] However, North Carolina courts have consistently stated the correct public purpose test, which is that the "ultimate advantage" to the public must outweigh advantages to the private entity.[129] With each case subsequently evaluating whether a particular undertaking is in violation of the public purpose doctrine, the North Carolina courts "have permitted an increasing number of activities to qualify as a public purpose."[130] The broadening of the definition of "public purpose" by itself does not necessarily mean that the courts have improperly applied the public purpose doctrine, but it does suggest the development of a troubling trend of improper deference to the legislature in North Carolina.[131]

Many state legislators would argue that the broadening of the scope of the public purpose doctrine is a positive development and that economic development incentives are important today because so many other states are competing for these businesses to locate in their states.[132] State officials note that North Carolina has been transitioning from a furniture, textiles, and tobacco industry to one based on technology, health sciences, pharmaceuticals, and financial services, and North Carolina must play the "incentives game" in order to maintain a competitive business environment.[133] This argument can be used by legislatures to justify the broadening of the public purpose doctrine, because economic development incentives will arguably benefit the public by attracting businesses to the state. As Justice Orr asserted in his *Maready* dissent, "it is evident from a wide range of sources included in the record that the primary argument for such assistance to private industry is that 'all the states are doing it' and, thus, that North Carolina must do it too in order to be competitive."[134] The argument that "all the states are doing it" is unrelated to the issue of whether the use of economic development

128. *Id.* (noting that the legislature's determination of what constitutes a "public purpose" is "entitled to great weight").

129. *See* Briggs v. City of Raleigh, 195 N.C. 223, 226, 141 S.E. 597, 600 (1928); *see also Maready*, 342 N.C. at 716, 467 S.E.2d at 621 (quoting *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750 (1968)); Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (quoting Martin v. N.C. Hous. Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672–73 (1970)).

130. McKnight, *supra* note 41, at 294.

131. *See infra* notes 155–60 and accompanying text.

132. *See, e.g.*, Enrich, *supra* note 115; *see also Maready*, 342 N.C. at 725–26, 467 S.E.2d at 626–27 (stating "courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives" and citing the cases in the other states upholding economic development incentives).

133. *See* Craver, *supra* note 4.

134. *Maready*, 342 N.C. at 738, 467 S.E.2d at 633 (Orr, J., dissenting).

incentives in a particular situation can withstand a constitutional challenge. More than asserting that "all states are doing it," courts need to ensure the public benefits of economic development incentives are well reasoned and qualified. The public purpose doctrine of the North Carolina constitution requires courts to use a far greater level of scrutiny to protect and ensure public funds are used for public purposes.

Although courts and commentators have stated many legal arguments in order to analyze the respective roles of the judiciary and the legislature in making decisions regarding economic development incentives, policy arguments also creep into the debate at certain points. On one hand, the corporations do create new jobs. Dell agreed that it would employ 1,500 people in Winston-Salem.[135] Google committed to create as many as 210 new jobs at a new plant in Lenoir.[136] As a part of the incentive package given to Dole Foods, the company is expected to employ 500 people in Gaston County.[137] The state granted incentives to Goodyear in order to keep a plant that employs 2,750 people in Fayetteville, North Carolina.[138] There are various social and economic benefits resulting from new jobs—employment rates increase, earnings for local residents increase from moving to better-paying jobs in a tighter local labor market, property values increase, and the tax base increases for the state and local governments.[139]

On the other hand, some argue that economic development incentives offered by state and local governments represent bad economic policy. Critics note that, when states participate in economic development incentive programs, they are engaged in a "race to the bottom," in which states begin to adopt policies contrary to their citizens' interest in an effort to attract new jobs and new investment.[140] This leaves all states who participate in the economic development incentives game with greatly diminished tax revenue for

135. *See* Vollmer, *supra* note 5.

136. Jonathan B. Cox, *Legislative Panel to Look at Incentives to Lure Jobs*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 1, 2007, at D3.

137. *See* Vollmer, *supra* note 5.

138. Jonathan B. Cox, *Goodyear May Get Top Incentive: Lawmakers Could Authorize a Substantial Award for Fayetteville Tire Maker Next Week—If They Override Gov. Easley's Veto*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 8, 2007, at D1.

139. *See* Bartik, *supra* note 11, at 140, 143.

140. *See* Enrich, *supra* note 115, at 380 ("Interstate competition is healthy up to a point, but it can also reach a pitch at which the costs of competition outweigh the benefits.").

critical government services such as education.[141] This "race to the bottom" results from states engaging in "bidding wars" in order to attract businesses to the state,[142] and since 1995, North Carolina has actively participated in this "bidding war."[143]

Economic incentives also drain essential tax revenue from the state and local governments.[144] A nonprofit group cited a North Carolina Department of Revenue report showing that tax breaks offered under North Carolina's tax incentives diverted $79.1 million in taxes the businesses would have otherwise owed in 2004 alone.[145] Furthermore, critics note that business interests dominate the debate regarding economic incentives, and policymakers often overstate the benefits and understate the costs of economic development incentives.[146] Costs and benefits associated with these packages are often speculative. As noted by Professor Enrich in an article discussing state tax incentives given to businesses, the "measurement of [the] net costs to the state is problematic," because the costs are often indirect and involve uncertainty.[147] It is difficult to measure the costs associated with foregone revenues, increased demands on the state's infrastructure, and the potential for increased costs of labor and land to other businesses located in the state.[148] Additionally, many of the jobs created are low paying; for example, some of the jobs at Dell will pay less than $20,000 a year.[149] As such, critics note there will be little in the way of an increased state income tax benefit resulting from low paying jobs.[150]

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141. *See id.* at 466–67 ("Although a particular state may reap temporary benefits by offering a particular incentive, over time, the incentive competition erodes the states' collective ability to derive tax revenues from major portions of the business community. . . .").

142. *See id.* at 380. *But see* Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 451–52 (1997) (arguing there is no "race to the bottom" as empirical studies that seek to evaluate this "race to the bottom" are inconclusive).

143. *See* Craver, *supra* note 4 (reporting that North Carolina has bid against other states in an effort to attract FedEx Corp., Nucor Corp., DuPont Corp., R.J. Reynolds Tobacco Co., Merck & Co., and Dell, Inc. into the state).

144. *See* Enrich, *supra* note 115, at 413.

145. David Rice, *Businesses in N.C. Don't Pay Excessive Taxes, Group Says*, WINSTON-SALEM J. (N.C.), Nov. 12, 2005, at B1.

146. *See* Bartik, *supra* note 11, at 140.

147. Enrich, *supra* note 115, at 402.

148. *Id.*

149. Vollmer, *supra* note 5. One of the amendments enacted in the Computer Legislation allowed Dell to pay less than the previous average annual wage required and still receive the tax credits. Craver, *supra* note 4.

150. *See* Bartik, *supra* note 11, at 145 (stating that benefits of an incentive package will be reduced if it involves lower paying jobs). Interestingly, there has not been universal

As a means of reviewing these and other policy positions, the North Carolina General Assembly recently set up a joint select committee in 2007 to review the financial incentives given to the corporations.[151] According to paperwork for the committee, the members of the committee are to examine whether "the extent that benefits generated from companies that get incentives exceed their costs" and whether there are "safeguards that ensure the state gets more than it gives."[152] It seems troubling that this panel was established in 2007, after the incentives were approved and given to both Dell and Google. The legislature should have addressed these very issues when approving the incentive packages, and the reviewing courts should not have deferred to the legislature in finding the economic development incentives as being constitutional if this cost-benefit analysis did not occur.[153] It is unclear if the legislature adequately analyzed whether the benefits to the public exceeded the benefits to the private entities prior to approving the incentives given to Dell.[154] Furthermore, under the public purpose doctrine, the courts have the responsibility to make the final determination of whether the benefits do in fact exceed the costs.

Because this issue has become so highly publicized and political, there is increased pressure on the courts to abdicate responsibility for determining whether the action primarily benefits private entities or

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support by North Carolina legislators for the use of economic development incentives. Two lawmakers have tried to garner support for an interstate pact or a congressional crackdown to end the use of economic development incentives. *See* Op-Ed., *supra* note 2 (noting that Representatives Phillip Frye and Pryor Gibson have tried to assess whether a pact to stop the "bidding war" among states to lure businesses is feasible).

151. Cox, *supra* note 136. For public documents relating to the committee, see North Carolina General Assembly—Joint Select Committee on Economic Development Incentives, http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=29 (last visited Dec. 17, 2008).

152. Cox, *supra* note 136.

153. *See* Madison Cablevision, Inc. v. City of Morgantown, 305 N.C. 634, 645, 386 S.E.2d 200, 206 (1989) (noting that, according to the two-prong test, the legislature should have already analyzed whether the benefits to the public exceed the costs prior to granting the package).

154. The cost-benefit analysis at the state legislative level may have been inadequate, as the North Carolina General Assembly approved the Computer Legislation in a special one-day session (held in November 2004), and the facts disclosed in the opinion and briefs reference no specific cost-benefit analysis of the actual incentives given to Dell performed at the state legislative level. *See* Craver, *supra* note 4; *see also* Plaintiff Appellants' Brief, *supra* note 1, at 4; Defendant Appellees' Brief of the Local Defendants, *supra* note 90, at 4–5. The Dell incentive package itself was passed in November 2004 and was decided at the county level after the Computer Legislation was enacted. *See* Plaintiff Appellants' Brief, *supra* note 1, at 4–5.

the public.[155] The courts are reluctant to second guess legislators on legislation that aims to benefit the community. Yet this pressure should not prevent the courts from properly applying the balancing test established in *Briggs* and *Madison Cablevision* to determine whether the public benefits outweigh the private benefits.

The continuing erosion of the public purpose doctrine in North Carolina can also have more severe consequences beyond using public funds to benefit corporations. As argued by one scholar, the application of the public purpose doctrine by the courts has led to qualifying an increasing number of activities as a public purpose, a practice that can dangerously cross into state eminent domain powers.[156] The U.S. Supreme Court noted in *Kelo v. City of New London*[157] that the government, through the Fifth Amendment power of eminent domain, may condemn the private property of one party and grant the property to another party, as long as it is "rationally related to a conceivable public purpose."[158] The outcome turned on whether the City's development plan served a "public purpose,"[159] and the Court ruled that the redevelopment plan was for a public purpose.[160] Thus, according to the most recent ruling on the public purpose doctrine in North Carolina, *Blinson* would stand for the proposition that the State may condemn private property for a corporation for the purpose of economic development.

CONCLUSION

Erosion of the public purpose doctrine in North Carolina, as reflected by the cursory judicial review of state and local government action in *Blinson*, has rendered the doctrine "inadequate to safeguard public funds from abuse by private interests."[161] As required by long-standing North Carolina precedent established in *Briggs* and *Madison Cablevision*, the judiciary must make the determination that a state or

155. *See* Order, Blinson v. State, No. 05 CVS 8378 (Super. Ct. Wake County May 12, 2006), *available at* http://www.ncicl.org/assets/uploads/brief/2006.05.10-dell-trial-order.pdf ("This issue is a political question best addressed to the legislature. The legislature sets the policy of the State.").

156. *See* McKnight, *supra* note 41, at 293, 316–17 (arguing that the ruling in *Maready* "appear[s] to permit economic development as a justification for taking private property under the state's eminent domain laws").

157. 545 U.S. 469 (2005).

158. *Id.* at 490 (Kennedy, J., concurring).

159. *Id.* at 480 ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.' ").

160. *Id.* at 490.

161. McKnight, *supra* note 41, at 294.

local government action primarily benefits the public and not a private party, and the public purpose doctrine as established by this precedent serves as necessary protection against unconstitutional government action. The Court of Appeals of North Carolina and the Supreme Court of North Carolina should review the reasoning in *Blinson*, or even the underlying case of *Maready*, and correctly balance the public benefits with the private benefits resulting from economic development incentive packages given to Dell. At a minimum, the North Carolina courts should confirm that the legislature has adequately performed a cost-benefit analysis to ensure the public primarily benefits from the economic development incentives, not the corporations.

ANNE C. CHOE