Fordham Urban Law Journal

Volume 13 | Number 3 Article 4

1985

THE CONSTITUTIONALITY OF TAKING A SPORTS FRANCHISE BY EMINENT DOMAIN AND THE NEED FOR FEDERAL LEGISLATION TO RESTRICT FRANCHISE RELOCATION

Thomas W. E. Joyce, III

THE CONSTITUTIONALITY OF TAKING A SPORTS FRANCHISE BY EMINENT DOMAIN AND THE NEED FOR FEDERAL LEGISLATION TO RESTRICT FRANCHISE RELOCATION

I. Introduction

The possibility that a city may successfully take a sports franchise under its power of eminent domain[1] can no longer be deemed "a joke."[2] Despite the fact that condemnation[3] proceedings traditionally have been used to accomplish such limited public purposes as the "construction and maintenance of streets, highways and parks,"[4] two cities presently are engaged in legal efforts to acquire football teams by condemnation.[5] Should one of these actions prove successful, this type of action may proliferate.[6]

---

1. Eminent domain is a governmental power which may be used to acquire property for public use from an unconsenting owner provided the owner receives just compensation. *See* 1 NICHOLS ON EMINENT DOMAIN § 1.11 (rev. 3d ed. 1981); BLACK'S LAW DICTIONARY 470 (5th ed. 1979) (eminent domain is "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of a public character").

2. *See Oakland Blitzes the Raiders*, 100 NEWSWEEK 68 (July 26, 1982) (Raider's team counsel Moses Lasky termed Oakland's effort to acquire football Raiders by eminent domain "a joke").

3. Condemnation is the "[p]rocess of taking private property for public use through the power of eminent domain." BLACK'S LAW DICTIONARY 264 (5th ed. 1979). This Note will use the terms "condemnation" and "eminent domain" interchangeably.

4. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 72, 646 P.2d 835, 842, 183 Cal. Rptr. 673, 681 (1982).

5. The City of Oakland is currently appealing the trial court's most recent decision rendering judgment in favor of the Raiders football team and dismissing the entire action. *See* City of Oakland v. Oakland Raiders, No. 76044, Judgment at 1-2 (Cal. Super. Ct. Monterey County filed Aug. 10, 1984) (available in Fordham Urban Law Journal office). The City of Baltimore also is pursuing a condemnation proceeding against the Colts football team. *See* Indianapolis Colts v. Mayor and City Council of Baltimore, 741 F.2d 954, 955 (7th Cir. 1984) (court held that district court was without interpleader jurisdiction).

6. Should such a proliferation occur, lawyers representing owners of sports franchises will have to become more adept in the law of eminent domain. *See* Sullivan, *Oakland v. The Raiders: Eminent Domain Law Will Never Be The Same*, 13 No. 2 PROB. & PROP. NEWSLETTER 21, 24 (Fall 1984) (concluding that lawyers representing professional sports franchise owners must become familiar with eminent domain, antitrust, civil rights laws, diversity jurisdiction and injunction procedures) [hereinafter cited as Sullivan]. While the Constitution defines the outer limits of eminent domain law, state eminent domain law may provide further restrictions. *See infra* note 50 and accompanying text. However, it is interesting to note that

Cities are interested in preventing their teams from relocating because the operation of a sports franchise encourages recreational and spectator activity,[7] promotes civic pride,[8] provides employment opportunities and stimulates the local economy.[9] The magnitude of a municipality's interest in preventing team relocation increases when it subsidizes stadium constructions.[10] Sports franchises, however, often are enticed to relocate by the prospect of short-term financial gain despite the support they receive and their close associations with their communities.[11]

When a conflict arises between the franchise's interests and those of the community, a municipality may bring an eminent domain action in an effort to acquire the team and thereby protect its interests. Although recently publicized eminent domain cases have focused on the Constitution's public use requirement,[12] a number of other constitutional limitations may prevent a city from taking sports franchises.

This Note examines the constitutional public use, just compensation, right to travel and commerce clause limitations as applied to the taking of sports franchises by eminent domain. This Note concludes that eminent domain is an improper method of protecting

---

New York City did not attempt to acquire the football Jets by eminent domain when they decided to move to New Jersey.

7. *See infra* note 185 and accompanying text.

8. *See infra* note 186 and accompanying text.

9. *See infra* note 187 and accompanying text.

10. *See infra* notes 188-89 and accompanying text.

11. *See infra* note 190 and accompanying text.

12. The California Supreme Court has held that a city may acquire a sports franchise by condemnation if it can demonstrate a valid public use for its action. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 72, 646 P.2d 835, 843, 183 Cal. Rptr. 673, 681 (1982). This decision broadly interpreted the fifth amendment's public use limitation, U.S. CONST. amend. V, and caused fear that a city might use its eminent domain power to acquire ordinary businesses that intend to relocate. *See* Note, *Eminent Domain Exercised—Stare Decisis or a Warning:* City of Oakland v. Oakland Raiders, 4 PACE L. REV. 169, 192-93 (1983) [hereinafter cited as *Stare Decisis*]; *see also Oakland Blitzes the Raiders*, 100 NEWSWEEK 68 (July 26, 1982) (mentioning concern that City of Anaheim could take over Disneyland); Note, *Public Use in Eminent Domain: Are There Limits After* Oakland Raiders *and* Poletown?, 20 CAL. W.L. REV. 82, 107-08 (1983) (concluding that public use requirement was so broadly defined in City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982), and Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), that it was "no longer a restraint" and only legislative action could prevent endangerment of property rights) [hereinafter cited as *Are There Limits*]. Since the *Raiders* decision, the Supreme Court similarly has interpreted the constitutional requirement of public use in a broad manner and held that the role of courts in evaluating the validity of the use is very limited. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

cities' interests in preventing the relocation of sports franchises. Consequently, it suggests that only carefully drawn federal legislation can protect a city's interest in keeping its sports franchises without subjecting franchises to nonuniform and discriminatory treatment.[13]

II. *City of Oakland v. Oakland Raiders*

The variety of issues facing a city which attempts to condemn a sports franchise is illustrated by *City of Oakland v. Oakland Raiders*,[14] the first[15] and only[16] decided case involving a city's attempt to use its eminent domain power to acquire a professional sports team. In 1980, the Oakland Raiders (Raiders) announced its intention to move its football team to Los Angeles.[17] Subsequently, the City of Oakland brought an eminent domain action to acquire the property rights associated with ownership of the Raiders professional football team as a franchise member of the National Football League (NFL).[18]

The trial court granted summary judgment in favor of the Raiders and dismissed the City of Oakland's action with prejudice.[19] The court's decision was based on its finding that "no 'public use' essential to an eminent domain action could be found, and [that the city] lacked the authority to exercise eminent domain for the purpose of retaining the Raiders' franchise in Oakland."[20] The appellate court affirmed, stating that there was no statutory authorization for the "condemnation of the diverse contract rights necessary to operation of the Raiders' business enterprise."[21]

---

13. *See infra* Section VI.

14. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

15. *Id.* at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679.

16. There has not been a decision on the merits of the City of Baltimore's condemnation action against the Colts professional football team. Two opinions on interlocutory issues have been published. Indianapolis Colts v. Mayor of Baltimore, 733 F.2d 484, 488-89 (7th Cir. 1984) (granting Baltimore's motion for stay of Indiana district court's injunction which prohibited Baltimore from proceeding with its eminent domain action filed in Maryland, and denying Baltimore's request for order enjoining Colts from preparing to play football in Indianapolis pending appeal of interpleader action); Indianapolis Colts v. Mayor of Baltimore, 741 F.2d 954, 958 (7th Cir. 1984) (vacating district court's orders and dismissing suit because interpleader jurisdiction was improper and there was no other basis for federal jurisdiction in Indiana's district court).

17. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 63, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

18. *Id.* at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

19. *Id.*

20. *Stare Decisis, supra* note 12, at 170-71 (1983), *quoting* Brief for Appellant at 7, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (quoting Monterey County Superior Court's unpublished opinion).

21. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422, 430, 176 Cal. Rptr. 646, 650 (1981) (Cal. App. 3d opinion subsequently deleted).

On appeal, the Supreme Court of California considered whether there was sufficient factual controversy to warrant a trial on the merits over the following issues: (1) whether intangible property could be taken by eminent domain; and (2) whether the public use requirement was broad enough to encompass the taking of a sports franchise.[22] With respect to the first issue, the court held that taking intangible property by eminent domain was authorized because neither the federal[23] and state constitutions[24] nor the revised California eminent domain law[25] distinguished between real or personal property and tangible or intangible property.[26] On the second issue, the court concluded "that the acquisition and . . . operation of a sports franchise *may* be an appropriate municipal function."[27] The court remanded the case to the trial court to determine whether, on the facts, there was a valid public use to justify the city's proposed action.[28]

The superior court of Monterey County, in a bifurcated trial,[29] rendered a tentative decision in favor of the Raiders.[30] The trial court offered five grounds for its conclusion that the City of Oakland did not have the right to take the Raiders.[31] After a unique appeal

---

22. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

23. *See* U.S. CONST. amend. V.

24. *See* CAL. CONST. art. I, § 19.

25. *See* CAL. CIV. PROC. CODE § 1235.170 (West 1982) (broadly defining property subject to taking as including "real and personal property and any interest therein"); *see also* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 65, 646 P.2d 835, 838, 183 Cal. Rptr. 673, 676 (1982) (California's eminent domain law "appears to impose no greater restrictions on the exercise of the condemnation power than those which are inherent in the federal and state Constitutions").

26. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 68, 646 P.2d 835, 840, 183 Cal. Rptr. 673, 678 (1982) (emphasis added).

27. *Id.* at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.

28. *Id.* at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.

29. The trial was bifurcated so that during the first phase the taking issue could be decided and during the second phase, if necessary, the compensation issue could be decided. City of Oakland v. Superior Court of Monterey, 150 Cal. App. 3d 267, 270, 197 Cal. Rptr. 729, 731 (1st Dist. 1983).

30. *Id.* at 271, 197 Cal. Rptr. at 731.

31. The trial court gave five reasons for its conclusion that [Oakland] does not have the right to take the property in question: (1) the property is not located entirely within the boundaries of Oakland; (2) there is no reasonable probability that City will devote the property to a public use within seven years; (3) the property is not subject to acquisition by eminent domain "for the stated purpose"; (4) City did not adopt a resolution of necessity that conclusively establishes the matters set forth in [CAL. CIV. PROC. CODE] section 1240.030, did not adopt a resolution of necessity prior to the commencement of the eminent domain action,

process,[32] the appellate court reversed on each of the five grounds[33] and remanded to the trial court to rule on issues not previously decided,[34] notably, whether the stated purpose for the condemnation constituted a public use.[35]

---

and did not provide Raiders with the notice and opportunity to be heard as required by law; and, (5) the public interest and necessity required neither the proposed project nor the acquisition of the Raiders.

Id. at 273, 197 Cal. Rptr. at 732. *See generally Claim By Oakland On Raiders Denied*, N.Y. Times, July 23, 1983, § I, at 7, col. 6 (discussing proposals).

32. City of Oakland v. Superior Court of Monterey, 150 Cal. App. 3d 267, 272, 197 Cal. Rptr. 729, 731 (1st Dist. 1983). See Sullivan, *supra* note 6, at 22, which states:

> Oakland first attempted to obtain a Writ of Prohibition from the appellate court preventing the trial judge from entering judgment pursuant to the decision. When this was denied, Oakland filed an appeal from the judgment; at the same time, it asked the supreme court for a Writ of Mandate directing the trial judge to set aside his decision on the grounds that he failed to follow the "law of the case" as enunciated in the earlier supreme court decision. . . . [T]he supreme court granted the Writ and assigned the mandate proceedings to an intermediate appellate court. This meant that the California Supreme Court had agreed with Oakland's contention that no ordinary remedy at law existed and that the appeal in this matter was entitled to bypass the normal 18-month period that ordinary civil appellate matters face.

Id.

33. City of Oakland v. Superior Court of Monterey, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1st Dist. 1983). The court rejected each of the trial court's five grounds, *see supra* note 31, holding: (1) "as a matter of law . . . [the] Raiders did not rebut the prima facie showing that the property was located within the City of Oakland" and thus the "territorial restrictions of [CAL. CIV. PROC. CODE] were met," *id.* at 274, 197 Cal. Rptr. at 733; (2) the trial court erred as a matter of law in sustaining the Raiders' objection "that there was no reasonable probability that [Oakland] would devote the property to a public use within seven years" as required by CAL. CIV. PROC. CODE § 1250.360(d) (West 1982), 150 Cal. App. 3d at 274-75, 197 Cal. Rptr. at 733-34; (3) any objection based on CAL. CIV. PROC. CODE § 1250.360(e) (West 1982) was rejected by the supreme court in its prior decision and "the trial court exceeded its jurisdiction in reaching a contrary result," 150 Cal. App. 3d at 276, 197 Cal. Rptr. at 734; (4) "the trial court was foreclosed" by the law of the case in City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (vacating summary judgment), "from redetermining the legal effect of the late filing of the resolution of necessity and the late notice to Raiders," *id.* at 278, 197 Cal. Rptr. at 735; and (5) the law of the case precluded the trial court from finding "that the resolution of necessity was not adopted in accordance with the procedural requirements" and thereby eliminated its basis for jurisdiction to review CAL. CIV. PROC. CODE § 1250.370 objections. 32 Cal. App. 3d at 278-79, 197 Cal. Rptr. at 735-36. *See generally, Court Says Oakland Can Pursue Raiders*, N.Y. Times, Dec. 30, 1983, § I, at 20, col. 5 (general discussion of court's decision).

34. City of Oakland v. Superior Court of Monterey, 150 Cal. App. 3d 267, 280, 197 Cal. Rptr. 729, 736 (1st Dist. 1983).

35. *Id.* at 279, 197 Cal. Rptr. at 736.

On remand, the superior court of Monterey County dismissed the eminent domain action.[36] The decision was based on several findings. First, the constitutional and statutory requirements of public use had not been met.[37] The court found that there could be no public use[38] because the NFL Constitution and By-Laws prohibit a city's ownership and operation of an NFL franchise.[39] Nor was it possible for the City of Oakland to retransfer the team to avoid these NFL rules because California's eminent domain law prohibits such retransfers.[40]

---

36. City of Oakland v. Oakland Raiders, No. 76044, Judgment at 1-2 (Cal. Super. Ct. Monterey County Aug. 10, 1984).

37. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 4-11, 16-19 (filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984) (available in Fordham Urban Law Journal office).

38. The court stated: "[t]he evidence thus discloses not the slightest possiblity that Oakland would be permitted the ownership or control of a league franchise. . . . [A]cquisition of the team, without a reasonable probability of its having the right to participate in the league, would not satisfy the public use requirement." *Id.* at 8. The court relied on Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984), which states that deference to the legislature's determination of public use is not required when it involves an impossibility. *Id.* at 2329 (1984); *see* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 5-6 (Cal. Super. Ct. Monterey County filed July 16, 1984) (citing *Midkiff*).

39. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 7-8 (Cal. Super. Ct. Monterey County filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984).

> [T]he Constitution and By-Laws of the National Football League provide that only a profitmaking person or entity organized for the purpose of operating a professional football club is eligible for membership; and the primary purpose of the entity operating the franchise shall be the operation of a professional football club.

Id. The Constitution and Bylaws of the NFL specifically provide that "[n]o corporation, association, partnership or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership." NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BYLAWS § 3.2(a) (1984).

40. The court stated:

> Section 1240.120 [CAL. CIV. PROC. CODE] appears to restrict the taking of property *with the intent to transfer it* to situations wherein such property is necessary to make effective the use of *other* property acquired to fulfill the principal purpose of the project. No other statutory provision authorizes a taking with the intent to transfer, and the statute is the sole source of Oakland's power to condemn property (*Section 1230.020*).

City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 10 (Cal. Super. Ct. Monterey County filed July 16, 1984) (emphasis in original) (footnotes omitted).

It would seem that either a finding that Oakland could acquire the Raiders on a permanent basis with a reasonable probability of having the right to participate in the league or a finding that the city could retransfer the team under state law would satisfy the constitutional requirement of public use since no impossibility

Second, the "local exercise of eminent domain over even one member club of the NFL with its attendant permanent siting and local control, would be an impermissible burden on interstate commerce."[41] The court found that the exercise of eminent domain over an NFL club would impermissibly burden interstate commerce,[42] in violation of the commerce clause of the United States Constitution[43] because the taking of a franchise would unduly burden other NFL members who depend on income from every team's gate receipts and who share equally the proceeds from the league's television contracts.[44]

Additionally, the court decided that the procedure followed by the city in commencing the action violated both California's statutory eminent domain procedures[45] and the constitutional right of due

---

would exist and deference to the legislature would be appropriate. *See supra* note 42 and accompanying text. But neither of these findings would necessarily satisfy California's statutory requirements of public use.

The California statutory requirements for public use were found to be an even greater barrier to the proposed taking than the constitutional requirements. The impossibility of taking the franchise and operating it as an NFL franchise, *see supra* note 39 and accompanying text, and the impossibility of retransferring the franchise under state law, *see supra* and accompanying text, were also found to violate the California Legislature's requirement that there be a reasonable probability that the public use be implemented within seven prospective years. *See* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 7 (filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984) (citing CAL. CIV. PROC. CODE § 1250.360(d) (West 1982)). Furthermore, a court's own determination of the necessity for condemnation is appropriate under California statute when the court finds that "gross abuse of discretion by the governing body has influenced or affected the adoption or contents of the resolution of necessity." City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 17 (citing CAL. CIV. PROC. CODE § 1245.255(b)). Given the court's finding that the resolution's adoption and contents were influenced by gross abuse of discretion, *id.* at 18, it went on to find that public interest and necessity did not require the acquisition of the Raiders. *Id.* at 19. The court found a gross abuse of the City of Oakland's discretion because:

> [(1)] [t]he City wilfully failed to follow the procedure and to give notice required by law[;] . . . [(2)] [t]he action was filed for the arbitrary and capricious purpose of restraining [t]he Raiders' relocation after bad faith negotiations by the Coliseum Commission had failed to consummate a new lease[;] . . . and [(3)] the lack of evidence before the governing body when the resolution was adopted.

Id. at 18.

41. *Id.* at 22.

42. *Id.*

43. U.S. CONST. art. I, § 8, cl. 3.

44. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 20 (filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984).

45. The court found that the city violated the procedural requirements of

process.[46] The court also concluded that this eminent domain action was not in violation of any constitutional right to travel even if the right were deemed to extend to business entities.[47] The trial court's judgment dismissing the City of Oakland's action with prejudice is currently being appealed.[48]

III. The Power of Eminent Domain

Since *Raiders* is illustrative of the variety of legal obstacles that may prevent a city from employing an eminent domain action to take a sports franchise, a discussion of the various legal issues presented in that case is warranted.

The power of eminent domain, which is inherent in a sovereign state, is operative even without specific constitutional enumeration.[49] Limitations on that power are enumerated in both federal and state constitutions as well as applicable regulations.[50] The constitutional requirements that private property be taken only for public use and

---

California's Eminent Domain Law. *See* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 12-16 (filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984). But the court found that the procedure followed was fundamentally unfair even without the statutory requirements that governed the case, *id.* at 14, since the "City purposely commenced [the] action without notice and without the adoption of a resolution of necessity." *Id.* at 13. The court further found that the use of eminent domain as a means to confine the club and influence it to negotiate a new and more favorable licensing agreement for use of the Oakland Coliseum, under all the circumstances, was "arbitrary, capricious, a gross abuse of discretion, and devoid of the fundamental fairness element of due process." *Id.* at 14-16 (Coliseum withdrew proposal and presented Raiders with less favorable one based on notion that Raiders were captive business; court found such bad faith action to violate fundamental fairness element of due process).

46. *Id.* at 12-16.

47. *Id.* at 23-24.

48. City of Oakland v. Oakland Raiders, No. 76044, Judgment (filed Aug. 10), *appeal docketed,* (Cal. Super. Ct. Monterey County Sept. 14, 1984). The Raiders are currently playing their home games in Los Angeles.

49. *See* Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390, 400 (1912); United States v. Jones, 109 U.S. 513, 518 (1883); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 676 (1982); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981); First Broadcasting Corp. v. City of Syracuse, 78 A.D.2d 490, 494, 435 N.Y.S.2d 194, 197 (4th Dep't 1981); 1 NICHOLS ON EMINENT DOMAIN § 1.14[2] (3d ed. 1980); Note, City of Oakland v. Oakland Raiders: *Defining the Parameters of Limitless Power*, UTAH L. REV. 397, 397 (1983) [hereinafter cited as *Defining the Parameters*].

50. *See* City of Thorton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 534, 575 P.2d 382, 388-89 (1978); Fiesinger v. State, 88 Misc. 2d 557, 559, 388 N.Y.S.2d 835, 837 (Ct. Cl. 1976).

that just compensation be awarded[51] are applicable to state governments through the fourteenth amendment.[52] Since municipalities are not sovereign entities, they have no inherent power of condemnation.[53] Municipalities may, however, exercise this power when they are expressly or impliedly authorized by the state to do so.[54]

Consequently, to determine whether a city has the power to take a sports franchise by eminent domain, it is necessary to consider the federal Constitution as well as the relevant state constitution and state eminent domain legislation.[55]

A. Property-Related Issues

1. Taking Intangible Property by Eminent Domain

While it has been argued that "the law of eminent domain does not permit the taking of 'intangible property not connected with

---

51. The fifth amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

52. *See* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2324 (1984); Chicago, Burlington R.R. v. Chicago, 166 U.S. 226, 233-241 (1897); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 838, 183 Cal. Rptr. 673, 676 (1982). Moreover, many states have adopted language similar or identical to that of the fifth amendment in their own constitutions. *See* 2A NICHOLS ON EMINENT DOMAIN § 7.1[2], [3] (rev. 3d ed. 1976); *Defining the Parameters, supra* note 49, at 397 n.7.

53. *See* Kohlasch v. New York State Thruway Auth., 482 F. Supp. 721, 723 (S.D.N.Y. 1980); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 838, 183 Cal. Rptr. 673, 676 (1982); Krambeck v. City of Gretna, 198 Neb. 608, 614, 254 N.W.2d 691, 694 (1977); *see also* Note *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 411-12 (1983) [hereinafter cited as *Judicial Review*].

54. *See* City of Fargo v. Harwood Township, 256 N.W.2d 694, 697 (N.D. Sup. Ct. 1977).

> Although the power of eminent domain is inherent in the State, a municipal corporation has no such inherent power and can exercise it only when expressly authorized by the Legislature. The power must be conferred upon a municipality expressly or by necessary implication and without such authorization it has no more right than any other corporation to condemn property.

Id.

55. This Note will confine its analysis to a discussion of eminent domain under the federal Constitution as it defines the outer limits of a state's eminent domain powers. *See Judicial Review, supra* note 53, at 412 ("[g]enerally eminent domain is a matter of state law, but its ultimate limits are prescribed . . . by the fourteenth amendment").

realty,' ''[56] it is clear that the federal Constitution does not prohibit such a taking.[57] Any such restriction, therefore, only can be based on a statutory or state constitutional provision.[58]

2. *Property Rights in a Sports Franchise Amenable to Acquisition Through a Successful Eminent Domain Action*

Although a city can obtain intangible property by use of its eminent domain power,[59] a question remains as to whether the city can obtain the right to participate in a sports league whose rules prohibit such participation. For example, the NFL's Constitution and By-Laws provide that only a profit-making person or entity with the purpose of operating a professional football club is eligible for league membership.[60] Based on these rules, the trial court in *City of Oakland*

---

56. *See* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982) (Raiders' argument which was not accepted by court).

57. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2872-74 (1984). In *Ruckelshaus*, the Court held that the takings clause applies to regulatory takings of intangible property in the form of trade secrets to the extent they are recognized as property interests under state law. *Id.* (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1982)); *see* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 68, 646 P.2d 835, 840, 183 Cal. Rptr. 673, 678 (1982); *see also* 1 NICHOLS ON EMINENT DOMAIN § 2.1[2] (3d ed. 1980) ("[p]ersonal property is subject to the exercise of the power of eminent domain. Intangible property, such as choses in action, patent rights, *franchises*, charters or any other form of contract, are within the scope of this sovereign authority as fully as land.") (emphasis added); Note, *Constitutional Law—California Eminent Domain Statute Allows The Taking of Any Type of Property Interests*—City of Oakland v. Oakland Raiders, 6 WHITTIER L. REV. 135, 149 (1984) ("the arguments supporting the proposition that *any* property or interest therein can be condemned are well founded in established eminent domain practice and theory") [hereinafter cited as *Property Interests*].

58. *See* 26 AM. JUR. 2D *Eminent Domain* § 73 (1966) ("Unless restricted by constitutional or statutory provisions, the right of eminent domain encompasses property of every kind and character, whether real or personal, or tangible or intangible . . .").

There has been criticism of the California Supreme Court's finding that intangible property in the form of a sports franchise can be taken under California state law. *See Defining the Parameters, supra* note 51, at 409-10 (finding 1975 statutory revision a reorganization and restatement of existing law which prohibited taking of intangible property and finding California Supreme Court's decision "probably incorrect"). However, there apparently is no disagreement that intangible property can be taken under the federal constitution. *See supra* note 57.

State law could prohibit the taking of intangible property. *See Property Interests, supra* note 57, at 149 (suggesting that sports franchises with no real connection to real property provide legislatures with sufficient basis to fine-tune their statutes and prevent attempts to take property of this sort).

59. *See supra* Section IV. A.

60. Any person, association, partnership, corporation, or other entity of

v. Oakland Raiders[61] found that, at least without joining the other NFL franchise members in the action, Oakland could not acquire the right to participate in the league.[62] Evidently, the court felt that joinder was required because the taking would affect the other owners' rights.[63] However, even if the other league members were joined, they would receive compensation for the city's interference with their ownership rights only if the league's rules were valid[64]

> good repute organized for the purpose of operating a professional football club shall be eligible for membership except: . . . No corporation, association, partnership or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership.

NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BYLAWS § 3.2 (1984); *see* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 7 (Cal. Super. Ct. Monterey County filed July 16, 1984) ("the Constitution and By-Laws of the National Football League provide that only a profit-making person or entity organized for the purpose of operating a professional football club is eligible for membership; and the primary purpose of the entity operating the franchise shall be the operation of a professional football club . . ."). League members also must approve a transfer of permanent ownership. NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BYLAWS § 3.5(b) (1984) ("All sales, transfers or assignments except a transfer referred to in Section 3.5 (c) hereof, shall only become effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League . . ."). However, the NFL Commissioner has testified that a "brief interim ownership" by a city "would not be inconsistent with the NFL Constitution . . . ." City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 73, 646 P.2d 835, 843, 183 Cal. Rptr. 673, 681 (1982). The National Basketball Association requires a majority vote of the N.B.A. Governors for transfer of a franchise. *See A Look at NBA Changes*, 71 No. 246 Star-Ledger (Newark) 108, col. 1 (Nov. 1, 1984).

61. No. 76044, Tentative Decision (Cal. Super. Ct. Monterey County filed July 16, 1984) (adopted in court's Statement of Decision Aug. 10, 1984).

62. *Id.* at 7-8 (1984) (on particular facts court found Oakland could "at most acquire the club's physical assets and perhaps the player contracts").

63. Joinder would not appear to be required under California law, however, since anyone can appear as a defendant and decisions will only bind persons named in the complaint and properly served. *See* CAL. CIV. PROC. CODE § 1250.230 and legislative comment (West 1982).

64. Antitrust law may provide a basis for invalidating some league rules. For example, in Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 397 (1984), the court invalidated the NFL rule requiring league approval for a franchise to move as an unreasonable restraint of trade under federal antitrust laws. *See* Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 157 (1984) ("In December of 1981, National Football League Commissioner Pete Rozelle testified before Congress that '[p]rofessional sports leagues are at a point where—because of the novel business form of a sports league—every league action, every league business judgment and every league decision can be characterized as an 'antitrust' issue.' ") (footnote omitted). State antitrust laws, however, do not apply to professional sports since they are involved in interstate commerce. *See*

and if the city's interference were so substantial that fairness required the public, instead of the owner, to bear the burden.[65]

Additionally, there remains a question as to the city's ability to acquire player contracts.[66] Since the right of eminent domain is superior to the right to contract,[67] a city may acquire the rights to the players' services. According to contract principles, however, where an employment contract contemplates the personal supervision and direction of the employer, that duty of supervision may not be delegated.[68] Consequently, where the players were hired to work under the personal supervision and direction of a particular employer, and that employer fails to perform his obligations, contract principles prohibit the city from acquiring the rights to the players' services.[69] The failure of a subsequent employer to perform the conditions of supervision discharges the players from further duties under their contracts and gives them the right to declare themselves free agents.[70]

Flood v. Kuhn, 407 U.S. 258, 284-85 (1972) (baseball); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 881 (S.D.N.Y. 1975) (basketball); Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 382-83, 668 P.2d 674, 677, 194 Cal. Rptr. 367, 370 (1983), *cert. denied,* 104 S. Ct. 1678 (1984) (football); HMC Management Corp. v. New Orleans Basketball Club, 375 So. 2d 700, 706-07 (La. Ct. App. 1979) (basketball); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 728-29 (Tex. Civ. App. 1974) (football). Note that only professional baseball enjoys an exemption from federal antitrust laws. Flood v. Kuhn, 407 U.S. 258, 282 (1972). *See generally* Note, *The Effect of Collective Bargaining on the Baseball Antitrust Exemption,* 12 FORDHAM URB. L.J. 807 (1984) (discussing baseball's unique exemption from antitrust law).

65. *See generally* Deltona Corp. v. United States, 657 F.2d 1184, 1190-92 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982) (discussing inverse condemnation and various tests for determining whether regulation effects a taking). Diminution in market value of the property is not sufficient, standing alone, to establish a taking. *Id.* at 1191.

66. *See* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 8 (Cal. Super. Ct. Monterey County filed July 16, 1984).

67. *See* West River Bridge Co. v. Dix, 47 U.S. 507, 531-34 (1848); City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 8 (Cal. Super. Ct. Monterey County filed July 16, 1984).

68. J. CALAMARI & J. PERILLO, CONTRACTS §§ 18-8, 18-25, at 640-41, 663 (2d ed. 1978) ("[a]n employer may not delegate his duty of supervision where the contract contemplated personal supervision and direction of the employer"); 4 CORBIN ON CONTRACTS § 865, at 438-39 (1951) (indicating contract contemplating personal supervision can only be assigned if condition of supervision is performed).

69. *See* 4 CORBIN ON CONTRACTS § 865, at 438-39 (1951); Sullivan, *supra* note 6, at 24.

70. Sullivan, *supra* note 6, at 24 ("[t]herefore, if the players contend that they agreed to play for Al Davis and that the change in ownership will deprive them of Al Davis' personal supervision and direction, it is possible that the players could have the right to declare themselves free agents at the time the team changes hands"); *see supra* note 68.

3. *Jurisdictional Limitations and the Situs of a Sports Franchise*

Where a state statute limits a city's condemning power to property inside its territorial limits,[71] the determination of a team's situs could deprive a city of its jurisdiction to condemn the team. This determination becomes more difficult because sports franchises are intangible property.[72] The California Supreme Court noted that "an intangible right has no territorial 'situs in fact' " and that the " 'location assigned to it depends on what action is to be taken with reference to it.' "[73] In *Raiders*, the California Supreme Court indicated that a sports franchise's situs could be determined by the location of the team's principal place of business, the designated site of its home games and the primary location of the team's tangible property.[74] Subsequently, a California appellate court "determined as a matter of law that the only possible situs for the Raiders was the City of Oakland" despite evidence that the Raiders' general partners, some of the coaches, players and a majority of season ticket holders did not reside there.[75] Since it is difficult to imagine a situation where a professional team's principal place of business, designated site for home games and primary locale for tangible property would not be

---

71. *See, e.g.*, CAL. CIV. PROC. CODE § 1240.050 (West 1982) ("local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers . . .").

72. *See supra* notes 56-58 and accompanying text.

73. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 74, 646 P.2d 835, 844, 183 Cal. Rptr. 673, 682 (1982); *see* CAL. CIV. PROC. CODE § 1240.050 (West 1982).

74. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 74-75, 646 P.2d 835, 844, 183 Cal. Rptr. 673, 682 (1982). The court found these criteria to satisfy *prima facie* the territorial restrictions but did not preclude the trial court from finding otherwise on an appropriate factual record. *Id.* (emphasis in original).

75. City of Oakland v. Superior Court of Monterey, 150 Cal. App. 3d 267, 274, 197 Cal. Rptr. 729, 733 (1st Dist. 1983).

> The evidence relied upon by the trial court as sufficient to rebut the prima facie case found by the Supreme Court is irrelevant. That evidence was: the general partners do not reside in Oakland, nor do some of the coaches, football players and other employees; the franchise territory of Raiders under the NFL Constitution includes the City of Oakland and the surrounding 75 miles; Raiders, under the NFL Constitution, have the right to play teams in franchise territories across the United States; Raiders share in NFL television contract proceeds "flowing in from across the country;" and Raiders' "economic and recreational influence" was not confined to Oakland.

Id. (footnote omitted).

in the city claiming eminent domain, this decision, if followed, would be dispositive.

However, using only the location of tangible assets to determine the situs of a sports franchise should be avoided. For example, the NFL Colts "fled Baltimore under the cloak of darkness" with eight moving vans full of equipment bound for Indianapolis in an effort to avoid Baltimore's eminent domain jurisdiction.[76] While the Colts apparently felt that moving tangible property alone was sufficient to change the team's situs,[77] this action does not satisfy the other two criteria established in *Raiders*.[78] Baltimore was still the team's principal place of business since the team transacted no business in Indianapolis prior to the date that the condemnation petition was filed[79] and was still the designated site for Colts home games. Moreover, as a practical matter, courts would be reluctant to allow an owner to insulate a team against valid acquisition by moving its tangible property as soon as it learned of an intended action to condemn the team.[80]

B. Public Use

1. Broadly Defined

Assuming that some sports franchise property is amenable to a taking, it is clear that the property taken must be for a "public use." Over the years, the term "public use" has been defined in

---

76. *See* Indianapolis Colts v. Mayor of Baltimore, 741 F.2d 954, 955 (7th Cir. 1984).

77. On March 27, 1984, Colts owner Robert Irsay learned that the Maryland Senate passed a bill granting the City of Baltimore the power to acquire the Colts by eminent domain. Irsay decided to move the team to Indianapolis and promptly executed a lease with the [Capital Improvement Board]. The Colts fled Baltimore under the cloak of darkness; eight moving vans full of Colts equipment arrived in Indianapolis on March 29.

On March 29, Maryland's governor signed into law the bill authorizing Baltimore to acquire the Colts by condemnation. Baltimore filed a condemnation petition against the Colts on March 30 in Maryland state court.

Id. at 955-56. The eminent domain action was subsequently removed to the federal district court in Maryland. *Id.* at 956.

78. *See supra* notes 74-75, 77 and accompanying text.

79. *See supra* note 77.

80. *Cf.* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 24 (Cal. Super. Ct. Monterey County July 16, 1984) (expressing concern that if right to travel limited power to condemn, owner could insulate intangible from acquisition by merely asserting desire to relocate it).

diverse and sometimes conflicting ways[81] enjoying both broad and narrow interpretations.[82] The broad view "equates public use with public advantage or public benefit and tends to define as a public use anything that benefits the state by creating jobs, promoting land sales, developing natural resources or increasing industrial activity."[83] The broad view prevailed through the first half of the nineteenth century, but temporarily gave way to the narrow view and reemerged in the twentieth century.[84] The intervening narrow view advocated a "use-by-public" test which gave courts more control over the exercise of the eminent domain power delegated to private enterprises by requiring that the public actually use the condemned property.[85] Although the traditional broad view has reemerged in the twentieth century[86] and the Supreme Court has repudiated the narrow "use-by-public" test,[87] some state courts still define public use according to the narrow view.[88]

Application of the broad interpretation of "public use" is necessary to accommodate the increasing role of government in meeting public needs.[89] However, arguably, under the present amorphous definition,

---

81. *Defining the Parameters, supra* note 49, at 402.

82. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § VII D, at 493 (2d ed. 1983) [hereinafter cited as NOWAK].

83. *Defining the Parameters, supra* note 49, at 403 (footnote omitted).

84. NOWAK, *supra* note 82, § VII D, at 493.

85. *Id.*; *see Defining the Parameters, supra* note 49, at 404.

86. *Defining the Parameters, supra* note 49, at 404-05.

87. The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use."

Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2331 (1984) (quoting Rindge Co. v. Los Angeles, 262 U.S. at 707); *see* Berman v. Parker, 348 U.S. 26, 33 (1954) ("[h]ere one of the means chosen is the use of private enterprise for redevelopment of the area . . . the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established . . ."); Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U.S. 30, 32 (1916).

88. *Defining the Parameters, supra* note 49, at 405 (citing Florida and South Carolina cases).

89. *See* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 72, 646 P.2d 835, 842, 183 Cal. Rptr. 673, 680 (1982); Barnes v. City of New Haven, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953) ("[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, [and] changing conceptions of the scope and functions of government . . ."); Roe v. Kervick, 42 N.J. 191, 207, 199 A.2d 834, 842 (1964) ("[t]he concept of public use is a broad one . . . [and to] be serviceable it must expand when necessary to encompass changing public needs . . .").

almost any taking could be deemed to be for a public use.[90] A property owner's chance of successfully contesting an eminent domain action is not only limited by the broad view of public use that most courts adopt[91] but also by courts' reluctance to review legislative determinations of public use.

2. *Limited Review*

While the Supreme Court has held that the fifth amendment's public use provision applies to the states through the fourteenth amendment,[92] the Court has performed an extremely limited role in reviewing legislative declarations that a particular condemnation is for a public use.[93] The Court recognized, in *Hawaii Housing Authority v. Midkiff*,[94] that it had "never held a compensated taking to be proscribed by the Public Use Clause" where the power of eminent domain was "rationally related to a conceivable public purpose."[95] The Court's justification for such limited review was that "it [would] not substitute its judgment for a legislature's judg-

---

90. See *Are there Limits, supra* note 12, at 108, which states: "[t]he constitutional limitation of public use has been defined so broadly that it is no longer a restraint. Consequently, property rights are endangered." *Id.*

91. *See supra* notes 83-88 and accompanying text.

92. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980) (citing Chicago Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226, 239 (1897) and Penn Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978)); *see* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2331 n.7 (1984).

93. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954); United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946); Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925).

> The decision in *Hawaii Housing Authority v. Midkiff* all but prohibits courts from independently assessing whether appropriations of property or regulatory takings serve a public use. Similarly, although courts in regulatory takings cases nominally must continue to decide whether "property" has been "taken," the decision in *Ruckelhaus v. Monsanto Co.* [104 S. Ct. 2862 (1984)] delegates to legislatures many of the critical determinations about the definition of property entitlements and the reasonableness of investment-backed expectations in property.

Leading Cases of the 1983 Term, 98 HARV. L. REV. 87, 225-26 (1984) [hereinafter cited as *Leading Cases*]. "Whereas *Midkiff* limits the role of courts in assessing the public uses of takings, *Ruckleshaus v. Monsanto Co.* limits the ability of courts to determine whether a regulatory taking has occurred in the first instance." *Id.* at 228.

94. 104 S. Ct. 2321 (1984) (holding that public use clause did not prohibit Hawaii from taking title in real property from lessors, with just compensation and transferring it to lessees in order to reduce land oligopoly).

95. *Id.* at 2329-30. The Court, however, noted that it had invalidated a compensated taking of property where the order was not claimed to be a taking for public use in Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403, 416 (1896). 104 S. Ct. at 2329.

ment as to what constitute[d] a public use 'unless the use be palpably without reasonable foundation.' "[96] Additionally, courts generally are reluctant to review socioeconomic legislation.[97] Consequently, since the Court deems eminent domain actions to be socioeconomic in nature,[98] judicial review of a legislative determination of what constitutes a public use is unlikely.

Great deference and a presumption of constitutionality must be accorded to socio-economic legislation in situations where the legislation neither violates a specific constitutional prohibition nor operates with prejudice against discrete and insular minorities.[99] Since the public use clause has been interpreted as a constitutional prohibition,[100] a court could apply a more stringent standard of review

---

96. 104 S. Ct. at 2329 (citing United States v. Gettysburg Elec. R.R., 160 U.S. 668, 680 (1896)).

97. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (Court refused to perform substantive due process analysis of social or economic legislation).

98. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2330 (1984) ("empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts . . .").

> In its two major takings cases last Term, *Hawaii Housing Authority v. Midkiff* [104 S. Ct. 2321 (1984)] and *Ruckelshaus v. Monsanto Co.*, [104 S. Ct. 2862 (1984)] the Supreme Court completed a trend toward placing takings largely outside the realm of judicial review by treating governmental expropriation of property as simply another form of socioeconomic regulation. Both cases limit the role of courts and expand that of legislatures in enforcing the fifth amendment's command that "private property [shall not] be taken for public use, without just compensation."

Leading Cases, supra note 93, at 225-26.

99. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 and accompanying text (1938). Footnote 4 limits the Court's holding by stating:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted).

100. *See supra* note 92 and accompanying text.

to eminent domain legislation despite its socioeconomic attributes.[101] Without providing such review, the public use clause will be deprived of its value as a limitation on governmental takings.[102] Moreover, *Midkiff's* limit on judicial review applies only to the public use clause of the federal Constitution and can be avoided where a state constitution's public use requirement is interpreted narrowly.[103] Ignoring the federal standard[104] might be provident in light of arguments that land use is a traditional local concern.[105]

---

101. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *see supra* notes 98-99 and accompanying text.

102. See *Judicial Review, supra* note 53, at 425, which states:

> The public use clause protects a property owner from certain government transactions. And however uncertain its boundaries, it is explicit in the Constitution and must be interpreted in each case if it is to have any content at all. Interpretation, in turn, implies limits on government, for to accept *any* proposal as a public use is to treat the constitutional language as surplusage.

Id. (emphasis in original) (footnote omitted).

Moreover, increased judicial review may be warranted where local decision-making bodies attempt to condemn property for third parties. *Id.* at 432-34. *But see* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2331 n.7 (1984) ("[i]t would be ironic to find that state legislation is subject to greater scrutiny under the incorporated 'public use' requirement than is congressional legislation under the express mandate of the Fifth Amendment . . .").

103. *See* Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-92 (1965) ("even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground for decision depriving this Court of jurisdiction to review the state judgment") (citations omitted); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased"); *Judicial Review, supra* note 53, at 441 ("As a general proposition, a state court interpreting its own constitution has more latitude than a federal court interpreting an identically worded federal constitutional provision . . .").

104. In the sphere of eminent domain, courts have been reluctant to interpret state constitutions more strictly than the federal constitution. *See* Williams & Doughty, *Studies on Legal Realism:* Mount Laurel, Belle Terre *and* Berman, 29 RUTGERS L. REV. 73, 84 n.34 and accompanying text (1975) ("most state courts followed the Supreme Court's lead . . ."). Courts are not so reluctant to interpret state constitutions more strictly than the federal Constitution in other areas of the law. *See* Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case For Realism*, 48 TENN. L. REV. 241, 252 (1981) ("doctrine of substantive due process is very much alive in the state courts").

105. *See Judicial Review, supra* note 55, at 444 (" 'state courts' adherence to federal standards of review and federal rules of law is inconsistent with the active role that they should play in local land use matters . . .").

3. *Public Use Applied to Sports Franchises*

While no court has held that a municipality can acquire or operate a professional sports team,[106] the broad definition and the limited review applied to legislative determinations of public use[107] indicate that the limitation is broad enough to encompass such a taking.[108] Recreation has been deemed a legitimate public purpose which justified acquisitions of land to be used for baseball fields,[109] county fairs,[110] and municipal stadiums.[111]

Cities and states increasingly have become involved in attracting sports teams to their area by making loans,[112] attempting to purchase teams[113] or building stadiums and offering attractive

---

106. *See* City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 70, 646 P.2d 835, 841, 183 Cal. Rptr. 673, 679 (1982) ("[n]o case anywhere of which we are aware has held that a municipality can acquire and operate a professional football team, although we are informed that the City of Visalia owns and operates a professional Class A baseball franchise . . . apparently, its right to do so never has been challenged in court . . .").

107. *See supra* notes 81-105 and accompanying text.

108. *See Leading Cases, supra* note 93, at 231 ("[p]ublic authorities may now be able to condemn property ranging from football teams to steel mills").

109. *See* City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 333 P.2d 745 (1959) (holding contract whereby city agreed to convey land to Dodgers baseball club for erection of stadium was valid since city received benefits serving legitimate public purposes). Note, however, that this case did not involve an acquisition by eminent domain. *Id.*

110. *See* County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1964) (acquired property to be used for parking at county fair by eminent domain).

111. *See* New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 556-58, 566, 292 A.2d 580, 635-36, 641 (upholding law creating specific public entity to build sports complex, through eminent domain if necessary), *aff'd,* 61 N.J. 1, 292 A.2d 545 (1972). "Indeed, as long ago as 1930 an Ohio appellate court discovered numerous examples of such publicly owned facilities across the country: 'In fact, within the forty-eight states of the Union ninety-three municipal stadiums have been erected, or are in the process of erection . . . .' " City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 71, 646 P.2d 835, 842, 183 Cal. Rptr. 673, 680 (1982) (citing Meyer v. City of Cleveland, 35 Ohio App. 20, 25, 171 N.E. 606, 607 (1938)). Both Candlestick Park and Anaheim Stadium are municipally owned. *Id.* at 71, 646 P.2d at 841, 183 Cal. Rptr. at 680. Shea Stadium and Yankee Stadium also are examples of municipally owned stadiums. *See* Barbanel, *Shea Stadium Won't Get Artificial Turf,* N.Y. Times, Nov. 15, 1984, at B22, col. 3.

112. *See Raiders Paid $3M by L.A. as Part of Loan,* 71 No. 276 Star-Ledger (Newark) 27, col. 5 (Dec. 1, 1984).

113. *See Louisiana Governor Intent on Keeping Team at Superdome—Saints for Sale: $75M Price Tag,* 71 No. 273 Star-Ledger (Newark) 86, col. 3 (Nov. 28, 1984) ("[t]he New Orleans Saints can be had for $75 million and, apparently, the state of Louisiana wants to have them as much as ever"); *see also* Jaffe, *Authorization*

leases.[114] If these activities are deemed to be for the public's use, then the acquisition of a sports franchise by eminent domain may be a logical means to accomplish this public purpose.[115]

Since a city's condemnation of a sports franchise serves the purpose of encouraging recreational and spectator activity,[116] promoting civic pride[117] and stimulating the local economy,[118] it probably would satisfy the public use requirement.[119] However, while the Supreme Court has deferred to legislative determinations of public use, it would apply a higher standard of review when deference to a legislature's public use determination is " 'shown to involve an impossibility.' "[120] or when the use is " 'palpably without reasonable foundation.' "[121] Consequently, if the taking of a sports franchise constituted an impossibility or was without a reasonable foundation, it would be subject to a higher degree of scrutiny.[122]

---

for Ball Park Placed on the Fast Track, 71 No. 288 Star-Ledger (Newark) 60, col. 1 (Dec. 13, 1984). The bill would permit the New Jersey Sports and Exposition Authority to buy sports franchises as a means of keeping them from leaving the state. The bill subsequently was enacted. *See* Jaffe, *Kean Enacts Baseball Effort, Hails Jersey as Sports Capital*, 71 No. 294 Star-Ledger (Newark) 1, col. 1 (Dec. 19, 1984).

114. *See* Jaffe, *Authorization for Ball Park Placed on the Fast Track*, 71 No. 288 Star-Ledger (Newark) 60, col. 1 (Dec. 13, 1984) (Sports Authority had preliminary talks with certain baseball club's representatives about relocating to New Jersey pursuant to pending bill); *Saints Sold for $64 Million, Seek New Lease*, 72 No. 13 Star-Ledger (Newark) 59, col. 1 (Mar. 13, 1985) ("sale was contingent on four things—the new lease, approval by the NFL, a virtual donation of state land across Lake Pontchartrain for a training facility, and removal of taxes on all Superdome events . . .").

115. The California Supreme Court posed, but did not definitively answer, the question of whether "the obvious difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility, [is] legally substantial . . . ." City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 72, 646 P.2d 835, 842, 183 Cal. Rptr. 673, 680 (1982).

116. *See infra* note 185 and accompanying text.

117. *See infra* note 186 and accompanying text.

118. *See infra* note 187 and accompanying text.

119. *But see* Martin v. City of Philadelphia, 420 Pa. 14, 18, 215 A.2d 894, 896 (1966) (city by engaging "in the private business of promoting sports events" through operation and ownership of team might be engaging in private rather than public use because city would take part in business aspect).

120. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329 (1984) (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

121. *Id.* at 2329 (1984) (quoting United States v. Gettysburg Elec. R.R., 160 U.S. 668, 680 (1896)).

122. The standard would be stricter than the usual test of whether the eminent domain power exercised is "rationally related to a conceivable public purpose." Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329 (1984); *see Leading Cases, supra* note 93, at 228.

While the Michigan Supreme Court's decision to uphold the taking of neighborhood properties for reconveyance to General Motors Corporation as a site for construction of an assembly plant[123] might lead some to believe that almost no taking would be struck down on public use grounds, courts might be more likely to strike down an attempt to take an ongoing business.[124] The taking of a business is conceptually very different from traditional takings of land. Courts might find unreasonable a legislative determination that it is necessary to condemn a business to achieve various benefits for the public.[125] Legislatures could be found to have abused their discretion since the validation of such a taking might open the floodgates of litigation

123. The court upheld the taking since the benefit received by the municipality was a clear and significant one and since the benefit to the private interest was merely incidental. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981). The city condemned the land so that General Motors would build an assembly complex in the city after its proposed close-down of its Cadillac and Fisher body plants. *Id.* at 636, 304 N.W.2d at 460 (Fitzgerald, J., dissenting). The Michigan Supreme Court, however, purported to use a heightened level of scrutiny stating: "[w]here, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Id.* at 634-35, 304 N.W.2d at 459-60. The building of the new General Motors plant was estimated to result in the employment of 6,150 persons in the factory itself as well as the generation of other employment, business and tax revenue but the costs of the project were estimated to equal nearly $200,000,000 and to involve the displacement of 3,438 persons and the destruction of 1,176 structures. *Id.* at 645 n.15, 304 N.W.2d at 464 n.15 (Fitzgerald, J., dissenting). See Sullivan, *supra* note 6, at 23, which states that the cost to the city was $20 million and the land was sold for $8 million. The General Motors plant has never been built. *Id.*

It has been suggested that the non-economic rights of the homeowners in *Poletown* may have led the Supreme Court to decide the case differently. *See Leading Cases, supra* note 93, at 233. The rationale is that either the political power lost by the residents or the unrelievable pain caused by the loss of their homes might make money compensation inadequate so that just compensation could not be awarded and, therefore, the Court could declare the taking unconstitutional. *Id.* at 233-35.

124. Chief Justice Bird's concurring opinion in City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982), illustrates a reluctance to allow a taking of an ongoing business. Chief Justice Bird felt compelled to concur in the *Raiders* decision because the court could not question the wisdom of such a taking unless "the municipality acted in an arbitrary or capricious fashion, or its act represents a 'gross abuse of discretion . . . ,' " and the limited record before the court, in its review of the grant of summary judgment, did not show a violation of these standards. *Id.* at 79, 646 P.2d at 846-47, 183 Cal. Rptr. at 685. However, Chief Justice Bird had "serious misgivings about the wisdom of the city's action and the possible future ramifications of a holding that the State has the power to take an ongoing business to prevent it from leaving a particular area . . . ." *Id.* at 79, 646 P.2d at 847, 183 Cal. Rptr. at 685.

125. *See supra* note 121 and accompanying text.

and result in a trend toward government coercively taking ownership of the means of production. Such a trend is unlikely, however, since a city could replace most of the benefits derived from particular businesses by devoting its resources to attracting other similar businesses to the locale.

Even if courts refuse to defer to legislative determinations of necessity for the taking of normal ongoing businesses, the likelihood of a city's successful condemnation of a sports franchise may depend on its ability to distinguish sports franchises from other types of businesses. Arguably, sports franchises are unique and different from other businesses.[126] Professional sports teams can be distinguished from other businesses because: (1) the public develops a strong interest in professional sports franchises, and they provide a source of local pride;[127] (2) they provide the public with entertainment and encourage recreational and spectator activity;[128] (3) cities and municipalities often lease stadiums at prices which do not cover stadium construction costs;[129] and (4) they are a source of substantial revenues for the community in which they play.[130] While it is conceivable that an ordinary business could satisfy some of these distinctions, it is unlikely that it could meet all four. Therefore, the readiness of courts to adopt these distinctions may be the key to the successful condemnation of a sports franchise.

C. Just Compensation

The fifth amendment's mandate that just compensation be paid for private property taken for public use[131] applies to the states through the fourteenth amendment.[132] Just compensation generally is measured by the fair market value of the property taken.[133]

---

126. Senator Arlen Specter of Pennsylvania and former San Francisco Mayor Joseph Alioto feel that it is a bad analogy to compare a sports franchise to a steel plant. *See The Eagles Leave Philadelphia*, ABC News Nightline, Dec. 12, 1984, Transcript of Show #928 at 6-7 (available in Fordham Urban Law Journal office).

127. *See infra* note 186 and accompanying text.

128. *See infra* note 185 and accompanying text.

129. *See infra* note 189 and accompanying text.

130. *See infra* note 187 and accompanying text.

131. The fifth amendment provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

132. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

133. United States v. 564.54 Acres of Land, 441 U.S. 506, 509 (1979). The time as of which compensation is assessed varies among jurisdictions. *See* 3 NICHOLS ON EMINENT DOMAIN § 8.5 (3d ed. 1974). Under California law:

Evidence other than fair market value generally is admissible only "when market value has been too difficult to find, or when its application would result in manifest injustice to [an] owner or [the] public . . . ."[134] Thus, the question that naturally arises is whether sports franchises have a readily determinable fair market value such that consideration of other evidence, such as the cost to replace the team, would be inappropriate.

Fair market value is defined as the property's worth when put to its highest and best use, including potential uses that can be anticipated with reasonable certainty.[135] Therefore, a determination of a sports franchise's value could be based on evidence of its worth if operated in another city. While capitalization of future profits is an acceptable method of determining fair market value,[136] the more common measure is the price a willing buyer would pay to a willing seller.[137] Nevertheless, an owner of a condemned sports franchise

---

> the date of valuation is the date of commencement of the proceeding, if the trial of the issue of compensation takes place within one year from the date of filing the action. *Where no deposit has been made and the date of trial is more than one year from the date of filing, the date of valuation is the date of trial* unless the delay was the fault of the defendant.

Sullivan, *supra* note 6, at 24 n.10 (citing CAL. CIV. PROC. CODE §§ 1263.110-1263.150) (emphasis in original).

134. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950); *see* City of Atlanta v. Hadjisimos, 168 Ga. App. 840, 840-41, 310 S.E.2d 570, 572 (1983) ("Testimony other than that of a property's fair market value is generally admissible only when the property has some unique or special value so that fair market value will not afford just and adequate compensation . . .").

135. State, Through Dep't of Highways v. Luling Indus. Park, Inc., 443 So. 2d 672, 677 (La. Ct. App. 1983); *see* NOWAK, *supra* note 82, § VII E, at 495-96.

136. Ozark Gas Transmission Systems v. Barclay, 662 S.W.2d 188, 191 (Ark. Ct. App. 1983). Note that this court allowed the capitalization of income approach in determining the fair market value of real estate used as a peach and apple orchard. *Id.* The court allowed the capitalization approach because the prospective revenue was derived from the property itself rather than from a business operated on the land and since a willing buyer would consider these revenues in estimating the property's market value. *Id.* This distinction would not preclude the owner of a sports franchise from using this approach since the profits are derived directly from the property condemned, here the business entity itself, and relocation will not enable the owner to continue reaping such profits.

137. While the Supreme Court usually employs the fair market value standard and allows a condemnee to receive " 'what a willing buyer would pay in cash to a willing seller' at the time of the taking . . ." as compensation for his loss, it is not the sole measure of compensation. United States v. 564.54 Acres of Land, 441 U.S. 506, 511-12 (1978) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)); *see* Colonial Pipeline Co. v. Weaver, 310 S.E.2d 338, 341 (N.C. Sup. Ct. 1984).

might argue that fair market value is insufficient compensation since the purpose of awarding fair market value is to allow the condemnee to enter the market with the sum awarded and replace the condemned property with a substitute, identical in kind and quality.[138] Sports franchises are scarce in number and are not readily replaceable. As a result, the application of the fair market value rule, which "presupposes the existence of a broad market with frequent trading in articles of an identical character with the article lost,"[139] is inappropriate.

The owner of a sports franchise should be allowed to introduce evidence of the price he must pay to replace his team with a similar franchise within a reasonable period of time. This cost might be higher than the price paid by prior franchise purchasers due to the infrequency of sales and the possible reluctance to sell to a particular buyer who might have plans to move the team to a different location.[140] Awarding the condemnee the replacement value of his property would enable him to maintain his livelihood and to retain the status appurtenant to owning a professional sports franchise.[141] Even if the condemnor were successful in proving that there was a sufficient market for sports franchises,[142] replacement value still might be a fairly accurate measure of damages as it should arguably approximate the team's fair market value.

---

138. *Cf.* McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 183, 159 N.E. 902, 904 (1928) ("strict rule that market value or market price is an exclusive measure of damage does not apply" to buildings used as brewery during prohibition).

139. *Id.* at 182, 159 N.E. at 904 (citations omitted). Market value would be an inappropriate measure of value when there is no ascertainable market value for the property or where the use of market value would cause injustice to the owner. United States v. 564.54 Acres of Land, 441 U.S. 506, 512 (1979) (quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

140. *See Tose Announces Eagles to Stay in Philadelphia*, 71 No. 291 Star-Ledger (Newark) at 2, col. 5 (Dec. 16, 1984) (Eagles football team owner, Leonard Tose, said: "[t]hroughout these difficult negotiations, my foremost desire has been to keep the Eagles in Philadelphia"); *see also Bucks on the Market*, N.Y. Post, Feb. 6, 1985, at 61, col. 1 (Milwaukee Bucks basketball team owner said "[w]hile we will discuss the sale of the club to any interested party . . . Milwaukee-based offers will have the highest priority").

141. Al Davis, the owner of the Raiders was quoted as saying: "[t]he team's my life, it's been my life, my work for 20 years." Lindsey, *Oakland Cites Eminent Domain In Effort to Regain Football Team*, N.Y. Times, May 17, 1983, at 14, col. 5.

142. Recent sales of professional football teams have been for similar prices and might enhance the argument that there is a readily determinable fair market value. The Dallas Cowboys, the Denver Broncos, the New Orleans Saints and the Philadelphia Eagles were recently sold for $72 million, $70 million, $64 million and $65 million, respectively. Anderson, *One Opinion for Oakland*, N.Y. Times, March

A condemnee also might argue that his team constitutes unique property made up of the personal service contracts of specific athletes and that such an asset is irreplaceable, and no market value can be assessed.[143] This argument, however, might leave the condemnee at a loss for a measure of just compensation.[144] Nevertheless, a more innovative measure of a team's value might be given credence through such an argument.

While the Supreme Court, in interpreting the fifth amendment's compensation requirement, has "sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken,' "[145] it, generally, has adjusted compensation downward rather than upward from the market value.[146] When the government's claim of public use in the condemnation of sports franchises is less traditional and more tenuous, a more liberal attitude toward compensation should be adopted to prevent the usurpation of power by legislative bodies and to curtail the use of eminent

---

22, 1984, at B14, col. 1; *Saints Sold for $64 million, Seek New Lease*, 72 No. 13 Star-Ledger (Newark) at 59, col. 1 (Mar. 13, 1985); *Tose: My Idea to Stay in Philly*, 72 No. 13 Star-Ledger (Newark) at 59, col. 1 (1985). The New Orleans Saints originally were offered for sale at a price of $75 million. *See Saints for Sale: $75M Price Tag*, 71 No. 273 Star-Ledger (Newark) at 86, col. 3 (Nov. 28, 1984). One writer, however, has suggested that "the Raiders' franchise could prove to be worth well in excess of $100 million" based on ticket sales, network television and cable television proceeds, concessions and local radio contracts. Sullivan, *supra* note 6, at 23-24.

143. " 'Proof of a single sale is not enough to establish a market value.' " McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 182, 159 N.E. 902, 904 (1928) (quoting T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 244, at 495 (9th ed. 1920)).

144. It has been suggested that "[j]ust compensation is a flexible, equitable doctrine that empowers courts to declare certain actions unconstitutional when compensation is not 'just'—thus insuring that takings do not result in manifest injustice." *See Leading Cases, supra* note 93, at 234. It remains to be seen, however, whether a taking of property that is inextricably part of the individual or which aggregates political power will be struck down on a theory that no form of money compensation would be just. *Id.* at 233-35; *see also supra* note 123 (discussing suggestion that noneconomic rights of homeowners may influence Supreme Court's decision in takings case). That being so, it appears unlikely that a court would strike down a taking of a sports franchise thinking no amount of money compensation would be just. However, the difficulty in valuing a sports franchise might persuade a court to permit broad evidence to be introduced on the theory that it is better to overcompensate than to undercompensate the condemnee for his loss based on the just compensation clause.

145. United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

146. *See id.* at 512-13, n.7; *see, e.g.*, United States v. Cors, 337 U.S. 325, 332-34 (1949).

domain in areas beyond the realms intended by the drafters of the fifth amendment.

IV. Right to Travel

Logically, the commencement of an action in eminent domain for the purpose of preventing a team from relocating raises the issue of whether business entities, like natural persons, enjoy a constitutional right to travel.[147] Although the right to travel is not found in any specific constitutional provision,[148] it has been "firmly established and repeatedly recognized."[149] Originally, this right was viewed as a right to travel to the seat of government to petition for redress of grievances,[150] but, in recent years, it has been viewed more broadly.[151] Since it is at least partially based on the commerce

---

147. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 22-24 (Cal. Super. Ct. Monterey County filed July 16, 1984).

148. United States v. Guest, 383 U.S. 745, 758 (1966). Justice Harlan, dissenting in Shapiro v. Thompson, 394 U.S. 618 (1969), noted that:

> [o]pinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal or state governments: the Commerce Clause; the Privileges and Immunities Clause of Art. IV, § 2; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Due Process Clause of the Fifth Amendment.

Id. at 666 (Harlan, J., dissenting) (footnotes omitted). The Court has not, however, seen fit to ascribe the source of this fundamental right to any particular constitutional provision. *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969). The failure to identify the source of the right has obscured its limits. The right of interstate travel is judged by a higher standard than is the right to travel abroad. *See* Califano v. Aznavorian, 439 U.S. 170, 176-77 (1978) (justifications for penalizing right to travel abroad need not be compelling, as with right of interstate travel, but rather rationally based).

149. United States v. Guest, 383 U.S. 745, 757 (1966).

150. Crandall v. State of Nevada, 73 U.S. 35, 44 (1867).

> [A citizen] has the right to come to the seat of the government to assert any claim he may have upon the government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. . . . [T]his right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

Id. at 44.

151. *See* Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (Court invalidated statutory prohibition of welfare benefits to residents of less than a year since "the purpose of deterring the in-migration of indigents . . . is constitutionally impermissible"). Justice Brennan noted "that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout . . . [the] land uninhibited by regulations which unnecessarily burden or restrict this movement." *Id.* at 629.

clause,[152] arguably, the right applies to business entities.[153]

One court already has determined that, even if the right to travel applied to business entities, it was not a valid objection to a taking by eminent domain.[154] The court stated that: "the fact that such acquisition of property prevents its relocation, or interferes with the desire of its owner to move to another location, would not be a valid objection to the taking."[155] The court noted that a contrary result would enable an owner of an intangible to "insulate it from acquisition by merely asserting a desire to relocate it."[156]

V. Commerce Clause

The Constitution's commerce clause,[157] which impliedly limits the power of states to interfere with or impose burdens on interstate commerce,[158] is a formidable barrier to cities seeking to take sports franchises by eminent domain.[159] However, the Supreme Court has

---

152. United States v. Guest, 383 U.S. 745, 758 (1966) (citing Edwards v. California, 314 U.S. 160 (1941)).

153. If the right to travel is deemed to extend to business entities based on the Commerce Clause, *see supra* note 148 and accompanying text, it would not preclude congressional legislation to restrict the movement of sports franchises, *see supra* note 126 and *infra* section VI, since it specifically grants Congress the power to regulate interstate commerce. *See* Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 120 (1975) (commerce clause "has its limitations" as constitutional source of right to travel since "it acts only as a restraint against the states"); *see also* Note, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1141 n.63 (1975) ("the modern right to travel cannot be grounded in the commerce clause or the nature of the Union, because many recent decisions forbid *federal* government action restricting travel . . .").

154. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 24 (Cal. Super. Ct. Monterey County filed July 16, 1984) (adopted in court's Statement of Decision filed August 10, 1984).

Even if such a right extends to business entities, there is a conceptual problem in finding that a business entity's right to travel is violated when a city takes ownership of that business by eminent domain. It would seem that a condemned business would still have the right to relocate, the only difference being that the city, as owner, would have the option of exercising that right.

155. *Id.* at 24.

156. *Id.*

157. Clause 3 provides in pertinent part: "[Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

158. Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 652 (1981).

159. *See* City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 20-22 (Cal. Super. Ct. Monterey County filed July 16, 1984) (adopted in court's Statement of Decision filed Aug. 10, 1984). The court held that acquisition of the Raiders' franchise by eminent domain "would unduly burden and obstruct interstate

long recognized that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[160] Thus, a commerce clause analysis is aimed at determining when state actions impermissibly burden or affect interstate commerce.

In determining whether a state action violates the commerce clause, under *Pike v. Bruce Church, Inc.*, a court considers: (1) whether the statute operates in a discriminatory manner; (2) whether the burden on interstate commerce is excessive in relation to its putative local benefits despite the evenhanded operation of the regulation; and (3) whether alternative means could promote the local purpose as well without placing as great a burden on interstate commerce.[161] If a state or local statute is within any of these criteria, it may be held unconstitutional under the commerce clause.[162] However, a state or local government's power is not subject to the restraints of the commerce clause when it enters the market as a participant.[163]

---

commerce in violation of the Commerce Clause of the U.S. Constitution." *Id.* at 20.

160. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (quoting Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945)).

161. The general rule that emerges is that:

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

162. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

163. The Court in White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983), stated that: "*Alexandria Scrap* and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208; *see* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). The test of whether a state is acting as a market participant is "whether the challenged 'program constituted direct participation in the market.' " Reeves, Inc. v. Stake, 447 U.S. 429, 436 n.7 (1980); *see* White v. Mass. Council of Constr. Employers, 460 U.S. 204, 208 (1983) (reaffirming principle that direct participation in market is necessary to be market participant).

As a result, the issue of whether a state or local government, in exercising its sovereign[164] power of eminent domain, is acting pursuant to its role as regulator or as a market participant is the crucial determinant of whether commerce clause analysis is necessary at all.[165] When a government seeks to condemn a sports franchise, it has chosen neither to regulate[166] that team by passing legislation prohibiting it from moving nor to purchase the business on the open market thereby becoming a market participant.[167] Instead, the government's action places it between the regulator and the market participant because it uses its eminent domain power to cause a forced sale which it could not do as an ordinary market participant. By choosing this middle course, a state might hope to obtain certain advantages in the market. First, it might keep the team at its present location despite the fact that regulation to this end would be subject to commerce clause analysis. Furthermore, a city could force a sale, which it could not do as a mere market participant. The team could be retransferred subject to the condition that it not be moved, and as a result, the capital outlay could be recovered by the governmental unit in a relatively short period of time.[168] However, since the Supreme Court recently held that the power of eminent domain is coterminous with the state's police power,[169] it appears that eminent domain proceedings will be treated in the same manner as regulatory action. Thus, the city should not be permitted to employ this middle

---

164. The issue is further complicated by the fact that the power of eminent domain is an inherent aspect of sovereignty and as such may deserve greater protection from invalidation under the commerce clause.

165. *See supra* notes 161-63 and accompanying text.

166. Takings occur in two ways: (1) when a public body formally condemns property and "obtains the fee simple pursuant to eminent domain proceedings," Deltona Corp. v. United States, 657 F.2d 1184, 1190 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982), and (2) when governmental actions under the police power "destroy the use and enjoyment of property in order to promote the public good" and thereby constitute a regulatory taking. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting); *see Leading Cases, supra* note 93, at 226 n.4 (discussing two types of takings).

167. *See* Martin v. City of Philadelphia, 420 Pa. 14, 18, 215 A.2d 894, 896 (1966) (court noted that city by operating and owning team would be engaging "in the private business of promoting sports events"); *see also Are There Limits, supra* note 12, at 89-90 (discussing *Martin*). By owning and operating a team, a city would meet the definition of a market participant since it would be directly participating in the market. *See supra* note 163.

168. If a city were to immediately retransfer the team to a third party it would not be acting as a market participant since it would not be directly participating in the market. *See supra* note 163.

169. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329 (1984).

course and should be treated as a market participant only after it actually acquires the team.

Since professional sports franchises are involved in interstate commerce,[170] a city's effort to acquire a team by eminent domain will survive attack under the commerce clause only if it passes the test set forth in *Pike v. Bruce Church, Inc.*[171] A city that tries to prevent a team from leaving by exercising its power of eminent domain can be viewed as placing barriers to the production of entertainment.[172] In essence, the city wants to insure that production of the entertainment occur only in its locale on those occasions when the team is designated as the home team. The product may then be introduced into interstate commerce by various media including television and radio broadcasts. It is clear that if a city were to introduce legislation prohibiting a team from leaving its location it would violate the commerce clause since a "[s]tate is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."[173]

---

170. Flood v. Kuhn, 407 U.S. 258, 284-85 (1972) (state antitrust laws not applicable to baseball due to burden on interstate commerce); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 881 (S.D.N.Y. 1975) (state antitrust laws not applicable to basketball since interstate commerce); Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 383-84, 668 P.2d 674, 677-78, 194 Cal. Rptr. 367, 370-71 (1983), *cert. denied*, 104 S. Ct. 1678 (1984) (state antitrust laws not applicable to football); HMC Management v. New Orleans Basketball Club, 375 So. 2d 700, 706-07 (La. Ct. App. 1979) (state antitrust laws not applicable to basketball); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 728-29 (Tex. Civ. App. 1974) (state antitrust laws not applicable to football). Note, however, that baseball is the only sport that is presently exempt from federal antitrust laws. Flood v. Kuhn, 407 U.S. 258, 282 (1972); *see supra* note 64.

171. 397 U.S. 137, 142 (1970); *see supra* notes 161-62 and accompanying text.

172. Despite the fact that member clubs of sports leagues compete to a certain degree, they are involved in a joint venture organized for the purpose of providing entertainment nationwide. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 21 (Cal. Super. Ct. Monterey County filed July 16, 1984) (citing Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387-90 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 397 (1984)).

173. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928) (citing Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923) and Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911)). In *Foster-Fountain Packing*, the Court invalidated the conditions imposed on the interstate movement of meat and other parts of shrimp under the Louisiana Shrimp Act, since the provisions are not intended to retain shrimp for consumption and use within the State of Louisiana but rather to favor the canning of the meat and manufacture of the bran in Louisiana. *Id.* at 13. One factor distinguishing shrimp from sports franchises is that shrimp are deemed to be owned and controlled by the state for the benefit of its people. Louisiana in *Foster Packing*, however, released its hold and terminated

Consequently, the exercise of eminent domain to take a sports franchise would operate to discriminate in favor of local interests since it would necessarily deprive other locations of this privately owned property.[174]

In applying the *Pike* balancing test, a court must weigh the putative local benefits against the burden on interstate commerce.[175] The putative local benefits include providing the community with a source of entertainment,[176] pride,[177] jobs[178] and substantial revenues.[179] The superior court of Monterey County determined that these benefits were outweighed by the burden on interstate commerce since such a taking would disrupt the balance of economic bargaining on stadium leases throughout the nation.[180]

Lastly, a city might be able to purchase or aid a private person in the purchase of a team on the market and thereby promote its local purpose without placing as great a burden on interstate commerce.[181] Such a purchase would not involve the coercion inherent in an exercise of eminent domain and would, therefore, be less burdensome to interstate commerce.

Since the local exercise of eminent domain to prevent sports franchise relocation arguably would violate the commerce clause, legislation to protect a city's interests in restricting franchise relo-

---

its control over shrimp taken "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce . . . ." *Id.* at 13.

174. *See supra* note 163 and accompanying text.

175. *See supra* note 161 and accompanying text.

176. *See infra* note 185 and accompanying text.

177. *See infra* note 186 and accompanying text.

178. *See infra* note 187 and accompanying text.

179. *See id.*

180. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 21-22 (Cal. Super. Ct. Monterey County filed July 16, 1984).

181. The existence of less burdensome alternatives is a sufficient justification for striking down state or local legislation as a violation of the commerce clause. *See, e.g.*, Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976); Dean Milk Co. v. Madison, 340 U.S. 349 (1951); *see also supra* note 161 and accompanying text. The provision of the NFL Constitution and By-Laws that requires members to be profitmaking persons or entities might prevent cities from purchasing an NFL team on the market. *See supra* notes 39, 60, 64 and accompanying text. However, a city's brief interim ownership might not be inconsistent with the NFL requirement. *See supra* note 60 and accompanying text. Even if a sports league's rules are valid under antitrust law, *see supra* note 64, and are deemed to prohibit a city from owning a franchise for any period of time, a city could still aid a private person or entity who wished to purchase a team and locate it in that city. Arguably, such action would be less burdensome to interstate commerce than acquisition of a team by eminent domain.

cation must come from Congress.[182] Congress is best suited to place restrictions on movement of sports franchises since it may strike a proper balance between the harm to local entities and the consequences to interstate commerce.[183] Congressional action of this sort should expressly preempt local efforts to take sports franchises by eminent domain[184] in order to provide for uniformity among the states.

VI. Proposed Federal Legislation to Protect Cities' Interests in Restricting Franchise Relocation

A. City and Community Interests Which Justify Placing Restrictions on Sports Franchise Relocation

The public has a strong interest in professional sports franchises. In addition to providing entertainment,[185] sports franchises provide community members with a source of local pride.[186] "[C]ommunities in which professional sports teams play derive substantial revenues and employment opportunities from the operation of such teams."[187]

Prompted by local public interest in a particular sports team, municipalities, through municipal stadium authorities, generally authorize capital construction bonds to finance construction of a stadium to house the sports team.[188] Usually, the stadium is leased to

---

182. City of Oakland v. Oakland Raiders, No. 76044, Tentative Decision at 22 (filed July 16, 1984).

> Should relocation threaten disproportionate harm to a local entity, regulation, if there is to be any relative to a business in interstate commerce, should come at the Federal level since only then can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a uniform manner.

Id.

183. *Id.*

184. *See infra* notes 255-56 and accompanying text.

185. S. 287, 99th Cong., 1st Sess. § 101(a)(1), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see* S. 172, 99th Cong., 1st Sess. § 2(a)(2), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (bill regarding professional football teams only).

186. S. 287, 99th Cong., 1st Sess. § 101(a)(1), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see* S. 172, 99th Cong., 1st Sess. § 2(a)(1), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) ("professional football teams" provide "a source of pride to their supporters").

187. S. 287, 99th Cong., 1st Sess. § 101(a)(9), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see* S. 172, 99th Cong., 1st Sess. § 2(a)(3), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) ("substantial tax revenues and employment opportunities derive from the operation of professional football teams to the cities and regions in which they are located").

188. S. 287, 99th Cong., 1st Sess. § 101(a)(3), 131 CONG. REC. S663, S665 (daily

sports teams by the municipal stadium authority for a minimal price which does not fully reimburse the public for stadium construction costs.[189] This subsidy provides the locality with further impetus to keep its sports teams from relocating. Nevertheless, professional sports teams may be enticed to relocate, in spite of the close association with and the support they receive from their community, for immediate and greater financial gain.[190]

"[S]tability in the location of professional sports teams . . . enhances the quality of athletic competition . . ." in the teams' respective league.[191] Nevertheless, teams have become more likely to relocate because of the scarcity of major league sports teams. This paucity coupled with the failure of leagues to expand and accommodate the public's needs has led to detrimental bidding wars among cities to lure sports franchises.[192] As a result, there is a need for legislation to discourage the unnecessary relocation of sports teams

---

ed. Jan. 24, 1985); *see* S. 172, 99th Cong., 1st Sess. § 2(a)(4), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (bill regarding professional football teams only).

189. S. 287, 99th Cong., 1st Sess. § 101(a)(4), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985); *see* S. 172, 99th Cong., 1st Sess. § 2(a)(4), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (bill regarding professional football teams only).

190. S. 287, 99th Cong., 1st Sess. § 101(a)(6), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985). "It's the fans who seem to suffer most when a much-loved ball team moves from one city to another, but there are those who say that as the game of musical cities continues, professional sports is suffering as well." *The Eagles Leave Philadelphia*, ABC News Nightline, Dec. 12, 1984, Transcript of Show #928 at 2.

191. S. 287, 99th Cong., 1st Sess. § 101(a)(7), 131 CONG. REC S663, S665 (daily ed. Jan. 24, 1985).

192. [R]elocations of professional sports teams are likely to occur more frequently, when the number of communities which believe they can adequately support a team exceeds the number of franchises made available by professional sports leagues; . . . because maintaining the number of franchises in a league below the level of demand increases the value of the existing franchises, increases the bargaining power of the holders of existing franchises with stadium authorities, and causes revenues from broadcasting (to the extent such revenues are shared) to be shared by fewer teams, previous increases in the number of franchises in any league generally have not been solely in response to the demand of the communities which seek such a franchise.

S. 287, 99th Cong., 1st Sess. § 302(2), (3), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985); *see id.* § 101(b), 131 CONG. REC. at S665 ("increased frequency of bidding contests between communities regarding the location of professional sports teams (which contests are in most cases not in the best interests of such communities) has necessitated the establishment of a procedure by which important community interests are considered in the relocation decision process . . .").

that receive adequate financial and nonfinancial support from their communities.[193]

Only federal legislation can provide a uniform and nondiscriminatory remedy for municipalities in every state. Attempts by local governmental units to restrict franchise relocation are likely to operate in a discriminatory manner and subject sports franchises to disparate treatment.[194] Furthermore, because the local exercise of eminent domain arguably violates the commerce clause,[195] Congress must protect community interests through carefully drawn legislation that operates in a uniform and nondiscriminatory manner.[196]

Congress may legislate in this area under its commerce power[197] since sports teams are engaged in interstate commerce. Professional teams use materials that are shipped in interstate commerce, travel interstate to compete[198] and have their games broadcast nationally.[199] Moreover, stadiums often serve as a focal point for urban renewal projects that receive federal assistance.[200]

B. Current Proposals for Federal Legislation

Congress currently is considering various proposals that would restrict the ability of professional sports teams to leave cities that have supported them.[201] "Proposals now under consideration in Congress involve either giving the N.F.L. and other professional leagues limited antitrust exemptions so that they could block their teams from skipping town without good reason, or authorizing Federal

---

193. *See* S. 287, 99th Cong., 1st Sess. § 101(b), 131 CONG. REC. S665 (daily ed. Jan. 24, 1985); 131 CONG. REC. S288 (daily ed. Jan. 3, 1985) (statement of Sen. DeConcini) ("[u]nless Congress acts, leagues may be unable to expand due to instability in team location policies . . . and uncertainty as to revenue distribution").

194. *See supra* notes 161, 174 and accompanying text.

195. The local exercise of eminent domain to take a sports franchise would violate the commerce clause. *See supra* notes 157-84 and acompanying text.

196. Only Congress can strike the proper balance between the harm that sports franchise relocation causes to local entities and the consequences to interstate commerce that would result from restricting the ability of sports franchises to relocate. *See supra* notes 182-83 and accompanying text.

197. U.S. CONST. art. I, § 8, cl. 3.

198. *See* S. 172, 99th Cong., 1st Sess. § 2(a)(6), 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985) (referring to professsional football teams).

199. *Id.*

200. S. 287, 99th Cong., 1st Sess. § 101(a)(5), 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985).

201. *See* Taylor, *Legislators Study Defenses to Keep Teams in Place*, N.Y. Times, Jan. 20, 1985, § 5, at 12, col. 1 [hereinafter cited as *Legislators Study Defenses*].

arbitrators and courts to veto team moves, or some combination of the two approaches."[202]

1. Senator DeConcini's Proposal

Senator DeConcini has stated that he will introduce legislation "designed to protect sports communities from arbitrary abandonment by club owners . . . ."[203] The best way to accomplish this goal, according to Senator DeConcini, is to allow sports leagues to prevent member teams from moving in spite of antitrust challenges and to allow leagues to enforce rules that "tend to promote comparable economic opportunities for member clubs."[204] Moreover, he states that "farsighted revenue sharing rules adopted by some leagues . . . [will curb] the temptation for teams to hopscotch across the country seeking marginal economic advantage at the expense of loyal fans" if they are made enforceable.[205] He concludes, therefore, that antitrust

---

202. *Id.* Senators Dennis DeConcini, Arlen Specter and Slade Gorton have proposed such legislation. *Id.*

203. 131 CONG. REC. S287 (daily ed. Jan. 3, 1985) (statement of Sen. DeConcini). Senator DeConcini has subsequently introduced his bill. *See* S. 298, 99th Cong., 1st Sess., 131 CONG. REC. S682, S683 (daily ed. Jan. 24, 1985).

204. 131 CONG. REC. S287 (daily ed. Jan. 3, 1985); *see* S. 298, 99th Cong., 1st Sess. § 2(1)(a), 131 CONG. REC. S683 (daily ed. Jan. 24, 1985) ("it shall not be unlawful by reason of any provision of the antitrust laws for a professional team sports league and its member clubs . . . to enforce rules or agreements authorizing the membership of the league to decide that a member club of such league shall not be relocated from its league-franchised home area provided that nothing in this subsection shall otherwise affect the applicability or nonapplicability of the antitrust laws to any action instituted by a municipality or other public authority challenging the relocation of a club from its league-franchised home area . . ."). This proposal "would overrule the decisions by a Federal judge, jury and appeals court that the N.F.L.'s effort to block the Raiders' move from Oakland to Los Angeles was a conspiracy among economic competitors to restrain trade, in violation of the antitrust laws." *Legislators Study Defenses, supra* note 201, at col. 2. The National Football League's rule requiring three-fourths of its member teams to approve the movement of one team into another team's league territory has been held to violate federal antitrust law. *See* Los Angeles Memorial Coliseum Comm'n v. N.F.L., 726 F.2d 1381, 1386, 1395-98 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 397 (1984). *See generally* Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 221 (1984) (discussing invalidation of NFL rule under antitrust law).

205. 131 CONG. REC. S287 (daily ed. Jan. 3, 1985) (statement of Sen. DeConcini); *see* S. 298, 99th Cong., 1st Sess. § 2(1)(b), 131 CONG. REC. S683 (daily ed. Jan. 24, 1985) ("it shall not be unlawful by reason of any provision of the antitrust laws for a professional team sports league and its member clubs . . . to enforce rules or agreements for the division of league or member club revenues that tend to promote comparable economic opportunities for the member clubs of such a league . . .").

laws should not be applied to intraleague agreements.[206] By giving the power to the sports leagues, Senator DeConcini believes that the legislation will be more effective since the courts and Congress will not be put in the position of "second-guessing the [properly exercised] business judgment of leagues."[207]

2. *The Professional Football Stabilization Act*

Senator Arlen Specter of Pennsylvania has introduced a bill entitled the "Professional Football Stabilization Act" (Stabilization Act).[208] The Stabilization Act would make it unlawful for professional football teams to relocate if they have played home games in a municipality for six or more continuous years unless one of the following exceptions is met:[209] (1) a party other than the team materially breached a provision of the stadium lease agreement that is essential to profitability, and the breach cannot be remedied within a reasonable time;[210] (2) the stadium the team currently uses is "inadequate for the purposes of profitably operating the team," and the stadium authority has demonstrated no intent to remedy the inadequacies;[211] or (3) the team either has incurred new annual losses for the three immediately preceding years or has suffered losses over a shorter term that "endanger the continued profitability of the team."[212]

Even if one of the three exceptions is met, an owner who attempts to relocate by sale must give "the governmental authority"[213] the

---

206. 131 CONG. REC. S287, S288 (daily ed. Jan. 3, 1985) (statement of Sen. DeConcini)

207. *Id.* Senator Deconcini's proposal is favored by the NFL. *See Legislators Study Defenses*, *supra* note 201, at col. 2. The bill will not be retroactive. *Id.* at col. 2.

208. S. 172, 99th Cong., 1st Sess., 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985).

209. *Id.* § 4.

210. *Id.* § 4(1).

211. *Id.* § 4(2).

212. *Id.* § 4(3). "[I]n computing net losses of the team, no personal obligations or losses of the owner may be included in salaries, other compensation or expenses to owners or owners' family members except to the extent they are ordinary, reasonable and necessary compensation and expenses." *Id.* Subsection three further requires that a team seeking to relocate notify the "local governemental authority at least one hundred and twenty days before relocation." *Id.*

213. Alternatively, any person the governmental authority selects shall have a right of first refusal. *Id.* § 4(3).

> Where an owner intends to sell the team and relocate it, the governmental authority shall decide whether the criteria for relocation have been satisfied and if it finds that they have been, the governmental authority or any person it selects shall have a right of first refusal and may make an offer to purchase and retain the team. If any such retention offer

right of first refusal.[214] If the authority makes an offer to purchase and retain the team that is substantially equal to the relocation offer, the move will be disallowed.[215] The owner could circumvent this restriction, however, by moving the team himself and subsequently making the sale to the prospective purchaser in the new location. Under the bill, an owner who could not meet one of the three exceptions could not force a city to present him with a comparable offer and might have no choice but to retain ownership of his team.[216] If none of the three exceptions were met, the municipality could bring a civil action in the federal district court to prevent the team's relocation.[217] Additionally, the bill would exempt from antitrust law intraleague agreements which restrict the movement of any member team provided that these agreements are in accordance with the Stabilization Act.[218]

3. *The Professional Sports Team Community Protection Act*

Senator Slade Gorton of Washington has introduced a bill entitled the "Professional Sports Team Community Protection Act" (Protection Act),[219] which would apply to "any proposed relocation of a professional baseball, basketball, football, or hockey team which plays its home games in a community within the United States . . . ."[220] The relocation restrictions of the bill would apply

---

substantially equals the relocation offer, then relocation shall be unlawful.

Id.

214. *Id.* The governmental authority is granted the right of first refusal in subsection three of section four but it would presumably apply to the first two subsections.

215. *Id.*

216. *Id.*

217. *See id.* §§ 4(3), 6.

218. *Id.* § 5.

219 S. 287, 99th Cong., 1st Sess., 131 CONG. REC. S663, S665 (daily ed. Jan. 24, 1985). The stated policy of the bill is to:

> discourage the unnecessary relocation of any professional sports team which is receiving adequate support from the people in the community in which such team plays, and to encourage, to the extent practicable, continuity and stability in the location of professional sports teams. The increased frequency of bidding contests between communities regarding the location of professional sports teams (which contests are in most cases not in the best interests of such communities) has necessitated the establishment of a procedure by which important community interests are considered in the relocation decision process.

Id. § 101(b).

220. *Id.* § 110, 131 CONG. REC. at S667. The act would include only major league baseball, basketball, football or hockey teams, *see id.* § 401(3), 131 CONG.

neither to a league decision, pursuant to a lawful league rule, to refuse to allow a member team to relocate nor to any relocation within the team's community.[221]

Under the bill, a professional sports team could not leave its community and relocate unless two criteria are met: (1) its league determines that the proposed relocation is necessary and appropriate after consideration of the policy and purpose of the legislation and certain enumerated factors;[222] and (2) either an arbitration board has approved the relocation[223] or the relevant community has provided notice that it does not desire that an arbitration board be established.[224] On the other hand, if the Board of Arbitrators finds that

---

REC. at S668, that are members of a league "which has been engaged in competition in such sport for more than seven years" except that the seven-year requirement will not apply to Title II of the act which applies to agreements relating to sponsored telecasting. *See id.* §§ 202(f), 401(2), 131 CONG. REC. at S667-68. This provision would enable franchises in new leagues, such as the United States Football League, to move about freely for seven years and, thereby, increase the league's chances of establishing itself. For a general discussion of the bill, see *Legislators Study Defenses, supra* note 201, at cols. 2-3.

221. S. 287, 99th Cong., 1st Sess. § 104(c), 131 CONG. REC S663, S666 (daily ed. Jan. 24, 1985).

222. *Id.* § 104(a)(1), 131 CONG. REC. at S665; *see also id.* § 101(b) (statement of policy); § 102 (purpose of title); § 104(b) (enumerated factors to be considered when determining whether team may relocate). The enumerated factors to be considered are:

> (1) the adequacy of the stadium in which the team played its home games in the previous season and the willingness of the stadium authority to remedy any deficiencies in such facility; (2) the extent to which fan support for the team has been demonstrated during the team's tenure in the community; (3) the extent to which the team has, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment, and any other form of public financial support; (4) the degree to which the owner or management of the team has contributed to any circumstance which might otherwise demonstrate the need for such relocation; (5) whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued financial viability of the team; (6) the degree to which the team has engaged in good faith negotiations with members and representatives of the community concerning terms and conditions under which the team would continue to play its games in such community; (7) whether any other team in its league is located in the community in which the team is currently located; (8) whether the team proposes to relocate to a community in which no other team in its league is located; and (9) whether the stadium authority, if public, is not opposed to such relocation.

Id. § 104(b), 131 CONG. REC. at S666.

223. *Id.* § 104(a)(2), 131 CONG. REC. at S666.

224. *Id.* § 104(a)(2).

"the proposed relocation is not necessary and appropriate, the Board shall disapprove the proposed relocation."[225] If the Board finds the relocation is necessary and appropriate but also receives a sufficient offer of retention from a prospective purchaser who will not relocate the team,[226] the owner has the option of either accepting the offer[227] or rejecting the offer and keeping the team in its present locale.[228]

The Protection Act provides for limited judicial review to determine if the enumerated factors were specifically considered[229] if review is sought within thirty days after the decision.[230] Judicial review of the determinations of compensation[231] and satisfaction of league criteria[232] would be limited to consideration of whether the "decision was arbitrary, capricious, or an abuse of discretion, or was a violation of any applicable Federal or State law."[233]

Furthermore, the Protection Act exempts from antitrust laws agreements by a majority of league members to share telecasting revenues.[234] It also prohibits publicly owned facilities from unreasonably denying access to professional sports teams.[235] Lastly, based on a number of findings,[236] the Protection Act would make the failure of Major League Baseball and the NFL to expand, according to

---

225. *Id.* § 107(d).

226. In order for an offer of retention to be sufficient it must be "equal to or greater in value than the proposed relocation," *id.* § 107(g), 131 CONG. REC. at S667, and it must satisfy the league's criteria for transfer of membership as determined by a majority vote of league members. *Id.* § 107(f)(2), 131 CONG. REC. at S666-67.

227. *Id.* § 107(f)(2), 131 CONG. REC. at S666-67. If more than one offer of retention is sufficient the team owner may only elect to accept that offer which is preferred by the league. *Id.* ("[I]f the team owner elects to accept any [offer of retention], the team owner shall accept any offer which is preferred by the league . . .").

228. *Id.*

229. *See id.* § 108(b), (c), 131 CONG. REC. at S667.

230. *Id.* § 108(d).

231. *See id.* § 108(e).

232. *See id.* § 107(f)(2), 131 CONG. REC. at S666-67.

233. *Id.* § 108(e), 131 CONG. REC. at S667.

234. *Id.* § 201.

235. *Id.* § 202. Furthermore, each stadium shall be made available at "substantially comparable rates, rentals, and other charges and under nondiscriminatory and substantially comparable rules, regulations, and conditions." *Id.* § 202(a)(1).

236. *Id.* § 302, 131 CONG. REC. at S667-68. One important finding is that the special treatment afforded to the leagues by Congress under antitrust laws might continue to perpetuate the scarcity of franchises if not coupled with measures to prevent leagues from unreasonably failing to respond to the public's need for sports franchises. *Id.* § 302(8), 131 CONG. REC. at S668.

the Act, a violation of the Sherman Antitrust Act.[237] The bill would not apply retroactively to actions filed prior to January 24, 1985[238] and, therefore, would not affect Baltimore's and Oakland's efforts to condemn the Colts and Raiders respectively.

C. Analysis and Recommendations

The Professional Sports Team Community Protection Act appears best suited to protect the interests of cities in restricting franchise relocation. Unlike the Stabilization Act,[239] the Protection Act provides complete relief to all major sports leagues.[240] Furthermore, the relief contemplated by the Protection Act, unlike Senator DeConcini's proposal,[241] does not depend totally on sports leagues to protect local interests since it also requires an arbitration board to approve team relocation.[242] The presupposition that sports leagues will adequately protect the interests of individual communities is flawed since, due to league revenue sharing plans which make expansion less profitable to current league members, leagues have not always expanded to accommodate the needs of communities.[243]

While the DeConcini proposal[244] and the Stabilization Act[245] might

---

237. *Id.* § 303.

238. *Id.* § 110, 131 CONG. REC. at S667.

239. S. 172, 99th Cong., 1st Sess., 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985).

240. S. 287, 99th Cong., 1st Sess. § 110, 131 CONG. REC. S663, S667 (daily ed. Jan. 24, 1985). Senator DeConcini's proposal would also apply to all sports. *See* 131 CONG. REC. S288 (daily ed. Jan. 3, 1985) (statement of Sen. DeConcini); *see also* notes 203-07 and accompanying text (discussing Sen. DeConcini's proposal).

241. *See supra* notes 203-06 and accompanying text.

242. *See supra* notes 222-28 and accompanying text.

243. [B]ecause maintaining the number of franchises in a league below the level of demand increases the value of the existing franchises, increases the bargaining power of the holders of existing franchises with stadium authorities, and causes revenues from broadcasting (to the extent such revenues are shared) to be shared by fewer teams, previous increases in the number of franchises in any league generally have not been solely in response to the demand of the communities which seek such a franchise[.]

S. 287, 99th Cong., 1st Sess. § 302(3), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985). In the absence of legislation expansion is not likely to occur in the near future. NFL Commissioner Pete Rozelle has stated: "I thought we would have expanded to 30 teams by now, . . . [b]ut the league owners have been concerned. They want to pick their own owners and make sure there is some degree of stability in a franchise." *Rozelle says NFL Financially Sound*, 72 No. 12 Star-Ledger (Newark) at 64, col. 5 (Mar. 12, 1985).

244. S. 287, 99th Cong., 1st Sess. § 302(3), (4), (6), (7), (8), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985).

245. *See supra* note 239 and accompanying text.

help limit unnecessary franchise relocation, only the Protection Act would protect communities from unnecessary relocation[246] and, at the same time, aid cities without franchises in their efforts to obtain teams by requiring certain leagues to expand.[247] Although forced expansion may seem to be a drastic measure, it is justified by the fact that the antitrust exemption Congress has given to league agreements for the sharing of revenue from telecasts has resulted in a scarcity of teams.[248] Therefore, a major strength of the Protection Act is that it would not discriminate in favor of communities which already have teams because its restriction on team movement is flexible enough to allow consideration of the comparative needs of other communities before a determination of the necessity of relocation is made. Further, it would be coupled with a provision to aid other viable communities in their effort to obtain teams by requiring limited expansion.

The Stabilization Act could harm the bargaining position of teams seeking to negotiate stadium lease agreements because it would prohibit teams from relocating unless the lease offer were so inadequate as to render operation of a team unprofitable.[249] By contrast, the Protection Act would encourage fair dealing in the negotiation of stadium lease agreements because an uncompetitive lease offer would be considered in both the league's and the arbitration board's determinations of the necessity of relocation.[250] The Protection Act

---

246. S. 287, 99th Cong., 1st Sess. § 104, 131 CONG. REC. S663, S665-66 (daily ed. Jan. 24, 1985).

247. *See id.* § 303, 131 CONG. REC. at S668.

248. *See id.* § 302, 131 CONG. REC. at S667-68. While it may be argued that Congress should not involve itself in the professional sports market, *see supra* note 207, it is apparent that the sports market does not possess all the characteristics of a free market system and, as a result, it has not responded to the demand for professional sports franchises. *See* S. 287, 99th Cong., 1st Sess. § 302(3), (6), (7), (8), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985). There are significant barriers to entry in the sports market. For example, the National Football League's rules prohibit a buyer from purchasing a team without the approval of the league's members. *See supra* note 60. Furthermore, the NFL's rules prohibit cities from purchasing franchises on more than an interim basis and may prohibit any ownership whatsoever. *See supra* note 60 and accompanying text. These barriers have led to detrimental bidding wars between cities to obtain sports franchises. *See supra* note 192 and accompanying text. Moreover, leagues have incentive to resist expansion because expansion would decrease the value of existing teams and reduce their proportion of shared revenues. *See* S. 287 99th Cong., 1st Sess. § 302(3), 131 CONG. REC. S663, S667-68 (daily ed. Jan. 24, 1985); *supra* note 243 and accompanying text.

249. S. 172, 99th Cong., 1st Sess. § 4, 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985).

250. *See* S. 287, 99th Cong., 1st Sess. § 104(b)(3), 131 CONG. REC. S665, S665-66 (daily ed. Jan. 24, 1985).

would allow for consideration of particular facts, such as an uncompetitive lease offer, because it does not limit its application to any *per se* rules. Instead, the Protection Act would allow a relocation determination to vary according to particular fact situations after consideration of certain enumerated factors.[251]

The guided flexibility of the Protection Act is one of its greatest assets. While the Stabilization Act contains very objective *per se* profitability-based exceptions to its general restriction on franchise relocation,[252] its failure to consider facts that are unrelated to profitability could unjustly prevent a sports team from relocating. For example, the Stabilization Act would not allow a team to relocate if it were making a minimal profit despite the fact that another community would derive greater benefits from the team's presence and provide the team with greater local support. Furthermore, the Stabilization Act is not flexible enough to prevent the relocation of a team, although such action would cause substantial harm to the community, if it could not meet the arbitrary requirement that the team be located in the community for the prior six years.[253]

The Protection Act would allow for the solicitation of offers of retention, but, unlike the use of eminent domain actions, it would leave the owner with the option of retaining ownership of the team in its present location or accepting an adequate offer of retention.[254] Therefore, an owner would not be forced to sell his team.

The Professional Sports Team Community Protection Act should be enacted by Congress since it best protects communities' interests in preventing sports franchises from relocating. However, it should be amended to include a provision that expressly preempts[255] local

---

251. *See id.* § 104; *supra* note 222 and accompanying text.

252. S. 172, 99th Cong., 1st Sess. § 4, 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985).

253. *See id.* § 4.

254. S. 287, 99th Cong., 1st Sess. § 107(f)(2), 131 CONG. REC. S663, S666-67 (daily ed. Jan. 24, 1985).

255. The inclusion of an express preemption provision would be the most effective way to prevent a proliferation of discriminatory and nonuniform state eminent domain actions.

> The goals of an express preemption [provision] . . . should be to prevent subtle or incremental state encroachment into a field that Congress has chosen expressly to reserve for federal law. . . . Once Congress has declared its express intent to preempt or to save a state law, it has largely *obviated judicial inquiry into considerations other than those concerning the text of the preemption provision.*

Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1316 (1984) (emphasis added).

use of eminent domain[256] to prevent franchise relocation as of the date the bill is enacted. The inclusion of an express preemption provision would prevent the improper use of eminent domain and would insure that communities would be provided with adequate relief. Moreover, the provision would prevent a community from

---

256. Federal legislation that preempts the use of eminent domain by state or local governments would not be an unconstitutional violation of the tenth amendment. Although the power of eminent domain is a traditional aspect of state sovereignty, the tenth amendment will not bar congressional action that deprives states of this power or limits its exercise. *See* Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

Until recently the tenth amendment sheltered states from some of the mandates of federal legislation passed pursuant to Congress' power to regulate interstate commerce. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). Recently, however, the Court overruled *National League of Cities* and its progeny in Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135, 4136 (U.S. Feb. 19, 1985), stating the "principal and basic limit on the federal commerce power is that inherent in all congressional action—the built in restraints that our system provides through state participation in federal government action." *Id.* at 4142. However, the dissent indicated that the Court may return shortly to its former position. *Id.* at 4149 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court"). Therefore, a look at whether federal legislation could preempt states from using their power of eminent domain to take sports franchises under the former line of cases is worthwhile.

In Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 287-88 (1981), the Supreme Court set forth a three-part test based on *National League of Cities* to determine when congressional legislation based on the commerce clause contravened the tenth amendment and was therefore invalid.

> First there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Id. at 287-88 (citations omitted).

Although the power of eminent domain is indisputably an attribute of state sovereignty, there is little question that the federal government could regulate or preempt a state's power to take sports franchises by eminent domain under the abandoned *National League of Cities* standard, since the operation of a sports franchise is not an integral part of the traditional state activities generally immune from federal regulation. *See* Transportation Union v. Long Island R.R. Co., 455 U.S. 678, 685 (1982) ("operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*"). Furthermore, it is important to note that satisfaction of *Hodel's* three requirements would not guarantee that a tenth amendment challenge to congressional power would succeed based on the prior standard because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 288 n.29 (1981).

instituting an eminent domain action after it had failed to prevent a team from relocating under the federal law.

VII. Conclusion

United States courts have paid little attention to the fifth amendment's requirements of public use and just compensation. The deference given to legislative determinations of public use, the broad definition given to the term "public use" coupled with conservative awards of compensation and the governments' right to reconvey property, have given state and local governments every incentive to test the limits of their eminent domain power.

Although the growth of public use may be attributed to the rationale that the concept must expand to meet the complex and ever-changing needs of society, it should not be applied in a manner that violates the rights of individuals. State courts should recognize their duty to enforce the public use requirement of their own state constitutions. However, if they continue to give great deference to legislative bodies, they should be more liberal in their awards of compensation where the subject of condemnation is less traditional. A broad range of evidence, therefore, should be allowed at trial to establish just compensation for the taking of a sports franchise. The failure to award compensation that is truly just would leave both the fifth amendment's public use and just compensation clauses "without any teeth."

Legislation regulating sports team relocation is necessary since cities have provided benefits to teams and, therefore, should not be subject to the harm that accompanies unnecessary relocation. The exercise of eminent domain to take a sports franchise arguably violates the commerce clause, and, therefore, legislation to protect the interests of cities in restricting sports franchise relocation must come from Congress. Moreover, Congress is best suited to provide relief that is uniform and non-discriminatory. The Professional Sports Team Community Protection Act would provide such relief.

This Act would protect the interests of cities with and without sports teams and would not unnecessarily restrict relocation. It would require consideration of numerous factors in order to insure a just result. At the same time, the Protection Act would allow flexibility so that the circumstances of a particular fact situation could be considered. Therefore, the Protection Act should be enacted with the addition of a clause that expressly preempts cities from instituting eminent domain actions to further restrict team relocation.

Thomas W.E. Joyce III