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Keeping the Home Team at Home

In 1982, a federal district court judge ruled that the National Football League (NFL) could not prevent the Oakland Raiders from leaving Oakland to find a new home in Southern California.¹ Faced with the possible permanent loss of the Raiders, the city of Oakland initiated an eminent domain action against the Raiders franchise.² Initially, the acquisition of a football team by eminent domain appeared frivolous and absurd. Yet, the Raiders litigation continued for over five years before the United States Supreme Court denied the city's petition for certiorari.³

The city of Oakland brought the eminent domain action in 1980 to acquire all of the property rights associated with the NFL Oakland Raiders football franchise. The Superior Court of Monterey County granted summary judgment for the Raiders. On appeal, the California Supreme Court reversed and remanded,⁴ holding that California eminent domain law allowed the city the opportunity to prove that its attempted acquisition constituted a "public use." After trial in May 1983, the trial court entered judgment against the city.⁵ Following various procedural maneuvers by Oakland, the court of appeal issued a writ of mandate ordering the trial court to vacate its judgment and to determine issues in the case that had not yet been ruled on.⁶ On remand, the superior court again entered judgment for the Raiders.⁷ The court of appeal upheld this judgment on the grounds that the city's eminent domain action was invalid under the commerce clause of the United States Constitution, thus avoiding the "public use" issue.⁸ The California Supreme Court denied the city's petition for a hearing without comment.⁹ On appeal, the

1. The ruling was affirmed by the Ninth Circuit in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

2. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). For convenience, this Comment will refer to the California Supreme Court decision as *Raiders I*.

3. *City of Oakland v. Oakland Raiders*, 106 S. Ct. 3300 (1986).

4. *Raiders I*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

5. *City of Oakland v. Oakland Raiders*, No. 76044 (Cal. Super. Ct., Monterey County, July 22, 1983).

6. *City of Oakland v. Superior Court*, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983).

7. *City of Oakland v. Oakland Raiders*, No. 76044 (Cal. Super. Ct., Monterey County, Aug. 10, 1984).

8. *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 421, 220 Cal. Rptr. 153, 157 (1985). For convenience, this Comment will refer to the California appellate court decision as *Raiders II*.

9. *City of Oakland v. Oakland Raiders*, No. A029031 (Cal. Feb. 27, 1986) (order denying review after judgment by the court of appeal).

United States Supreme Court denied certiorari.¹⁰

The Raiders litigation has triggered much legal debate. Numerous commentators have openly criticized Oakland's novel use of eminent domain.¹¹ The debate centers on the clash between two, seemingly unrelated, legal trends which affect a city's attempt to acquire a sports franchise through eminent domain. First, the legal status of professional sports leagues, which has been a subject of continuing controversy for the past two decades,¹² burdens any discussion of a city's use of eminent domain to acquire a sports franchise. Second, recent Supreme Court decisions have extended the sovereign power of eminent domain so far as to virtually eliminate any meaningful constitutional restraint.¹³

In the Raiders litigation, the California courts have confronted these two trends with little precedential guidance. The courts have engaged in creative jurisprudence in an attempt to fit the acquisition of a sports franchise into established legal doctrine. The result has been a series of decisions that have failed to confront the unique legal issues raised by Oakland's initial attempt to acquire the Raiders.

The Raiders litigation has also prompted a flurry of activity involving franchise relocation. In 1984, the city of Baltimore, Maryland attempted to keep the Baltimore Colts from relocating through the exercise of eminent domain.¹⁴ When the Colts threatened to move to Indian-

10. *City of Oakland v. Oakland Raiders*, 106 S. Ct. 3300 (1986).

11. See Sackman, *Public Use—Updated* (*City of Oakland v. Oakland Raiders*), 1983 INST. ON PLAN. ZONING & EMINENT DOMAIN 203; Smolker, *Prisoners of Oakland: Triumph of Power over Sportsmanship*, 16 J. BEVERLY HILLS B.A. 174 (1982); Sullivan, *Oakland v. The Raiders: Eminent Domain Law Will Never Be the Same*, 13 PROB. & PROP. 21 (Fall 1984); *The California Supreme Court Survey—A Review of Decisions, January 1982-June 1982*, 10 PEPPERDINE L. REV. 167, 236 (1982); Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857 (1983); Note, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation*, 13 FORDHAM URBAN L.J. 553 (1985) [hereinafter Note, *Taking a Sports Franchise*]; 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 (1984); Note, *Eminent Domain Exercised—Stare Decisis or a Warning: City of Oakland v. Oakland Raiders*, 4 PAGE L. REV. 169 (1983) [hereinafter Note, *Stare Decisis*]; Note, *City of Oakland v. Oakland Raiders: Defining the Parameters of Limitless Power*, 1983 UTAH L. REV. 397 [hereinafter Note, *Defining the Parameters*]; Note, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown?*, 20 CAL. W.L. REV. 82 (1982) [hereinafter Note *Public Use in Eminent Domain*]. But see, Note, *Anticipating an Instant Replay: City of Oakland v. Oakland Raiders*, 17 U.C. DAVIS L. REV. 963 (1984) (supporting the eminent domain action of the city of Oakland) [hereinafter Note, *Anticipating an Instant Replay*].

12. See *infra*, notes 89, 223, 239.

13. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); see also *infra* text accompanying notes 37-48.

14. In response to negotiations between Baltimore Colts owner Robert Irsay and the city of Indianapolis, the Mayor and City Council of Baltimore sought to condemn, by exercise of eminent domain, the Colts football franchise and all football-related property rights. On February 24, 1984, bills were introduced in both houses of the Maryland legislature to amend the Charter of Baltimore

apolis, Indiana, the State of Maryland empowered Baltimore to condemn the Colts. A number of other professional sports franchises have also threatened to relocate,¹⁵ rendering the problem of sports franchise relo-

City to empower the city to take sports franchises by eminent domain. H. Delegates Emergency Bill 1716, Md. Leg., 1984 Sess. (1984); S. Emergency Bill 1042, Md. Leg., 1984 Sess. (1984). On March 27, 1984, Irsay learned of the proposed law and moved the team to Indianapolis in what has been referred to as the midnight exodus from Baltimore. On March 29, Maryland's governor signed the bill into law. Emergency Ordinance No. 32, ch. 6, 1984 Md. Laws 18. Baltimore filed a condemnation action against the Colts on March 30 in state court. The Colts removed the proceeding to federal district court in Maryland and then filed an interpleader action in federal district court in Indiana. The Indiana court granted the Colts an injunction which prohibited Baltimore from proceeding with its eminent domain action in Maryland. The Seventh Circuit reversed the injunction and dismissed the suit. *Indianapolis Colts v. Mayor and City Council of Baltimore*, 741 F.2d 954 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1753 (1985). The circuit court found the interpleader action to be merely an attempt to acquire jurisdiction over the city of Baltimore in Indiana federal district court so as to avoid the eminent domain action in Maryland district court.

In the eminent domain action in Maryland, a federal judge dismissed the condemnation proceeding largely on the grounds that Baltimore did not have territorial jurisdiction over the Colts franchise. *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985).

15. The importance of the problem becomes obvious with a brief sketch of the current state of franchise relocation in professional sports. In addition to the Colts and the Raiders in the NFL, the Philadelphia Eagles nearly relocated to Phoenix, Arizona. After days of negotiations, the Mayor of Philadelphia and NFL Commissioner Pete Rozelle managed to keep the Eagles in Philadelphia. Despite taking no action in the Colts case, the NFL affirmed its commitment to franchise stability by filing suit against Eagle owner, Leonard Tose. *National Football League v. Philadelphia Eagles Football Club*, No. 84-6131 (E.D. Pa. filed Dec. 14, 1984). The estimated cost to Philadelphia taxpayers to retain the Eagles will be at least \$30 million over the next 20 years. 131 CONG. REC. S285 (daily ed. Jan. 3, 1985).

In 1984, the St. Louis Cardinals and the New Orleans Saints notified Commissioner Rozelle that they would not recognize league restrictions on franchise relocation. Both clubs have openly negotiated with other cities. Eskenazi, *City Reportedly Seeking N.F.L. Cardinals for Shea*, N.Y. Times, Feb. 9, 1985, § I, at 29, col. 4. Despite the Cardinals' 30-year lease running through the 1996 season, the team filed an antitrust suit against the league in the Southern District of New York charging that the league's procedures governing franchise relocation are illegal. Although the NFL has retained the three-quarter majority requirement for approving relocations, which the Ninth Circuit found invalid in the *Los Angeles Coliseum* case, it has added specific guidelines governing franchise moves. Janofsky, *Cards Sue N.F.L. on Right to Move*, N.Y. Times, Feb. 12, 1986, at 51, col. 5.

In the National Hockey League (NHL), the Ralston Purina Company, owner of the St. Louis Blues, filed a multimillion dollar antitrust suit against the NHL for vetoing a proposed sale of the team to a Canadian group that wanted to move the team to Saskatoon, Saskatchewan. *Ralston Purina v. National Hockey League*, No. 83-1264 (E.D. Mo. filed May 23, 1983); *see also* Taylor, *Legislators Study Defenses to Keep Teams in Place*, N.Y. Times, Jan. 20, 1985, § V, at 12, col. 4.

The National Basketball Association (NBA) has taken the San Diego Clippers franchise to court in an attempt to overturn the team's move from San Diego to Los Angeles. *National Basketball Association v. San Diego Clippers Basketball Club*, No. 84-1430-N(CN) (S.D. Cal. filed June 15, 1984). The Kansas City Kings headed west to Sacramento with the NBA's approval due to the possibility that a refusal might constitute an antitrust violation. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 3 (1985) [hereinafter cited as *Professional Sports Community Protection Act*].

Finally, the City of Pittsburgh, Pennsylvania has approved the use of public funds to aid private

cation so widespread and controversial that both Houses of Congress have entered the debate.¹⁶

This Comment will approach the problem of the taking of sports franchises from a different angle than that taken by the courts and other commentators. It will argue that the problem of franchise movement arises primarily from the inability of sports leagues to pursue traditional policies of franchise stability under current interpretations of federal antitrust law.¹⁷ Neither the Raiders nor the Colts case would have been necessary had the federal courts not taken a key element of the control of professional football out of the hands of the National Football League in the *Los Angeles Coliseum* antitrust decision.¹⁸ Oakland did not desire the uncertainty or expense of litigation.¹⁹ Yet, with no practical alternative,

parties in purchasing the Pittsburgh Pirate baseball franchise. *Pirates Sale Completed—\$21.8 Million*, San Francisco Chron., Mar. 22, 1986, at 45, col. 1. The City of Pittsburgh first attempted to sell Three Rivers Stadium in order to loan \$25 million to private investors, who offered to put up \$26 million to buy and operate the Pirates for five seasons. *Pirate Sale on Hold*, San Francisco Chron., Mar. 4, 1986, at 47, col. 3. The city then voted to sell \$20 million in municipal bonds and loan the proceeds to a coalition of purchasers of the franchise. *Bond Proceeds to Aid Pirates*, San Francisco Chron., Mar. 18, 1986, at 29, col. 6.

The history of sports franchise relocations has been fraught with controversy and conflict. "[E]ach sport has experienced at least one period of franchise instability since 1950. Only baseball has demonstrated stability during the last decade. Sixty-eight franchise moves have occurred since 1950, with 37 of those taking place after 1970." Johnson, *Municipal Administration and the Sports Franchise Relocation Issue*, 43 PUB. ADMIN. REV. 519, 520 (1983). This does not include the teams which have moved from the central city to the suburbs. The Los Angeles Rams recently jumped to Anaheim, the New York Jets and Giants have both moved to New Jersey, and the Buffalo Bills have commuted to suburban Orchard Park.

16. See *infra* Part VI, Section A.

17. Judge Williams, concurring in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984), commented on the NFL's inability to effectuate league stability:

A ruling that the N.F.L. cannot enforce Rule 4.3 [as held by the majority] is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise.

Id. at 1407 (Williams, J., concurring in part and dissenting in part).

18. No "city should have to go to such lengths to protect its economic and social interests in a professional sports team." *Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 355 (1982) (statement of Lionel Wilson, Mayor, Oakland, California) [hereinafter cited as *Professional Sports Antitrust Immunity Hearings*].

19. 726 F.2d 1381 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984). The Ninth Circuit took much of the bite out of the Raiders \$36.4 million damages award against the NFL in a recent decision arising from a second set of appeals by the NFL. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356 (9th Cir. 1986). In an extremely complex decision, the court held that the antitrust award should be reduced by the benefits the Raiders realized by expanding to Los Angeles. According to the court, the NFL owned the right to expand into the Los Angeles area. The court found that by moving to Los Angeles, the Raiders took from the NFL the opportunity to establish an expansion franchise in Los Angeles. At the same time, however, the Raiders returned the opportunity to establish an expansion franchise in Oakland by moving out of that city. Therefore, the court concluded, the NFL lost the difference between the value of the expansion opportunity in Los Angeles and the value of the expansion opportunity in Oakland. Accordingly, the Raiders'

the city decided to fight to keep its home team at home.

Although the sports franchise relocation issue is worthy of attention in its own right, it potentially implicates broader concerns. In the *Raiders I* decision, California Supreme Court Chief Justice Rose Bird, writing a separate opinion, expressed her fears of "the far-reaching potential" 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."²⁰ Although this Comment focuses on the problem of sports franchise relocation, one must resolve this specific problem with its broader implications in mind.²¹

antitrust award should be offset by the value of the expansion opportunity in Los Angeles, which the Raiders took from the NFL by moving to Los Angeles, less the value of the expansion opportunity in Oakland, which the Raiders returned to the NFL by moving out of Oakland. *Los Angeles Coliseum*, 791 F.2d at 1371-73. The effect of this ruling is to mitigate the potential threat of enormous antitrust damages against the sports leagues. Yet, the ruling does not return the control of franchise relocation to the sports leagues, which this Comment advocates. As Patrick Lynch, the attorney for the NFL, has observed, "The decision doesn't undo the wrong of the original decision [allowing the Raiders to move]. In the long run, it is unhealthy for a league to franchise a city, ask people to ante up money to help them put on a show and then allow the franchise to move anytime someone dangles a better offer." Lancaster, *Court Decision May Keep Owners of Sports Franchises From Moving*, Wall St. J., July 9, 1986, at 25, col. 4.

20. *Raiders I*, 32 Cal. 3d at 79, 646 P.2d at 846-47, 183 Cal. Rptr. at 685 (Bird, C.J., concurring and dissenting).

21. Perhaps the most interesting example of the potential implications of the Raiders litigation occurred in the small New England port of New Bedford, Massachusetts. The Morse Cutting Tool plant in New Bedford was up for sale and the owner, Gulf & Western Industries, was planning to close the factory if it could not find a buyer. Facing serious unemployment problems in his city, New Bedford Mayor Brian Lawler threatened to use the city's power of eminent domain to buy the plant and save its 45 jobs. *Saving Jobs*, N.Y. Times, Feb. 24, 1985, § I, at 37, col. 3. Working with state officials, the local congressman and the United States Electrical Workers' Union, the Mayor succeeded in applying sufficient pressure to Gulf & Western to sell the plant to a buyer who would keep the plant in operation. *Id.* Despite the radical threat of exercising the city's condemnation power, the mayor concluded, "It's not whether eminent domain is a good or bad way. It may just be the only way to keep the plant open." Greenhouse, *New Bedford May Step In So Jobs Won't Move Out*, N.Y. Times, June 10, 1984, § IV, at 2, col. 3. If the threat had failed and condemnation became necessary, the mayor and his staff had intended to run the company as a municipal corporation, much like a bus company or utility, until an acceptable buyer was found. *Id.*

More recently, the City of Boston, through its Economic and Development Industrial Corporation, considered the possibility of acquiring by eminent domain the "label and business of the Colonial Provisions Co." Opinion of the Corporation Counsel to the Councillors of the City of Boston 5 (Feb. 12, 1986). The city's goal was to transfer the property to another private entity, which would agree to maintain the business in Boston. *Id.* at 6. The stated purpose of the taking was preventing the loss of jobs, avoiding economic disruption, and maintaining the city's tax base. Memorandum from Mercedes Marquez and Douglas L. Parker of the Georgetown University Law Center Institute for Public Representation to George O'Brien, Attorney for UFCW, Local 616 (Feb. 19, 1986) (regarding authority of municipal corporation in Massachusetts to exercise powers of eminent domain) (unpublished memorandum on file with authors).

This taking concept has also appeared attractive to groups interested in maintaining the Pittsburgh area steel mills. "When a company decides to move a plant, the federal labor laws don't provide much help. . . . Communities can try public pressures and financial incentives, but they often don't work either. That's where eminent domain can help." Lewin, *Factory Takeover Weighed by a City*, N.Y. Times, June 5, 1984, § I, at 1, col. 6.

This Comment will first introduce the law of eminent domain and argue that the California Supreme Court properly found that Oakland's condemnation of the Raiders constituted a legitimate exercise of eminent domain. The Comment will then discuss the three legal theories used by the courts and suggested by legal commentators as potential limitations on a city's ability to condemn a sports franchise. Part III will analyze the impact of the commerce clause of the Federal Constitution on the exercise of eminent domain. Part IV will briefly confront the potential restriction of the right to travel which might result from a sports franchise taking. Part V will discuss the antitrust implications of a municipality's exercise of eminent domain. The Comment will conclude that none of the theories should invalidate a city's condemnation of a professional sports team, but that legislation is the best means to control a city's eminent domain power. Part VI, Section A will discuss proposed federal legislation and support an antitrust exemption for professional sports leagues. Part VI, Section B will look at state legislation in reaction to the threat of franchise relocation and conclude that states should remain free to govern local uses of eminent domain as long as the legislation comports with the Federal Constitution.

II

PUBLIC USE

A. *General Eminent Domain Law*

Eminent domain is the power of a sovereign government to take property for a public use, without the owner's consent, upon payment of just compensation.²² The United States Constitution limits a government's eminent domain power through the fifth²³ and fourteenth²⁴ amendments.

In addition to these Federal Constitutional limitations, state constitutions may restrict the use of eminent domain. California, for example, adds procedural requirements to the basic fifth amendment commands.²⁵

22. 1 J. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 1.11, at 1-7 (3d ed. 1980).

23. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

24. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The primary due process limit in eminent domain actions is that the sovereign must provide the property owner with a judicial forum in which to litigate the issues of public use and just compensation. 1A J. SACKMAN, *supra* note 22, § 4.10, at 4-54.

25. CAL. CONST. art. I, § 19 states:

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Although the California Constitution is independent of the Federal Constitution, California court

Beyond these constitutional requirements, most states have enacted comprehensive legislative schemes governing the uses, procedures, and limits on a state or local government's exercise of eminent domain.²⁶ The constitutional requirement of "public use" represents the minimum justification necessary for a government to take private property without the owner's consent.²⁷ A state may impose stricter standards, but may not permit a taking that does not serve as a "public use."

This Part addresses the "public use" limitation imposed on all state and local governments by the fifth amendment.²⁸ "Public use" is a slip-

decisions have not distinguished the two with respect to takings. See, e.g., *Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676. Many states have adopted provisions similar to the fifth amendment in their own constitutions. 2A J. SACKMAN, *supra* note 22, § 7.01[2]-.01[3], at 7-18 to 7-21 (3d ed. 1983).

26. 1A J. SACKMAN, *supra* note 22, § 3.2, at 3-31 to 3-32 (discussing state legislative schemes); see also, e.g., CAL. CIV. PROC. CODE §§ 1230.010 - 1273.070 (West 1982) (California's legislative scheme).

27. 2A J. SACKMAN, *supra* note 22, § 7.01, at 7-22 (3d ed. 1983).

28. Although this Comment limits its discussion to "public use," the *Raiders I* case also involved three other issues relevant to the taking of a sports franchise or ongoing business. For a discussion of the first issue, statutory construction of California eminent domain law, see Note, *Anticipating an Instant Replay*, *supra* note 11, at 993-1002. Concerning the second issue, acquisition of intangible property, the California Supreme Court found that neither the Federal nor the California Constitution distinguished between property as real or personal, tangible or intangible. *Raiders I*, 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678. A court in a state that has less liberal eminent domain laws may determine that "property" within its statutory scheme does not include intangible property. Nonetheless, the California Supreme Court made arguments supporting a broad definition of property, *id.* at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678, which may influence other courts faced with a similar task of interpreting "property."

The *Raiders I* court largely sidestepped the third issue, a city's territorial jurisdiction over intangible property for eminent domain purposes. First, the court held that intangible, unlike tangible property, had no permanent situs for purposes of jurisdiction. *Id.* at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682. Second, it decided that Oakland would satisfy any test devised for determining the situs of the Raiders. *Id.* at 74-75, 646 P.2d at 844, 183 Cal. Rptr. at 682. The court failed, however, to elaborate on possible tests for territorial jurisdiction of intangible property.

Jurisdiction did present an insurmountable obstacle in Baltimore's attempt to condemn the Baltimore Colts franchise. In dismissing Baltimore's eminent domain action, the federal district court held that the Colts' franchise was outside of Maryland at the time the franchise's situs was determined. *Mayor and City Council of Baltimore v. Baltimore Football Club Inc.*, 624 F. Supp. 278, 289 (1985). First, the court decided that the date of compensation, not the date of the filing of the condemnation proceeding, determines the situs of intangible property. *Id.* at 283. Since Maryland would not have paid compensation until the Colts were well established in Indianapolis, the Colts would have been outside Maryland's eminent domain jurisdiction. Second, the court found that even if the date of filing determined the situs, the Colts were still not within Maryland's jurisdiction. *Id.* at 284. The court rejected Baltimore's contention that the power of eminent domain is coextensive with the personal jurisdiction based on "minimum contacts." *Id.* The court also declined to adopt the rule of *mobilia sequuntur personam* ("movables follow the person") for determining the jurisdiction of intangible property. *Id.* at 287. Instead the court articulated three factors in concluding that the Colts were outside the jurisdiction of Maryland's eminent domain power. These three factors were: (1) the principal place of business of the team; (2) the location of the team's tangible property; and (3) the intent of the team's owner to relocate the franchise. *Id.* Under the court's holding, a franchise owner could move his team out of a city and establish a new principal place of business before the action of condemnation commences. Note, *Jurisdictional*

pery term. As the Supreme Court stated almost a century ago, "what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned."²⁹ No quick definition or simplistic test can suffice in applying the term "public use" to a particular set of facts.

Historically, courts have defined "public use" in two ways. The Supreme Court and most state courts have defined "public use" to mean "public benefit" or "public advantage."³⁰ Some state courts, however, still apply a narrow "use-by-the-public" test.³¹ The latter view requires actual use by the public in order to meet the "public use" standard, whereas the broader "public advantage" view merely requires that the public derive a benefit from the taking.³²

Despite controversy over the meaning of the term, the Supreme Court has greatly expanded the scope of "public use" during this century. Early in the century, the Court stated that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."³³ Three modern cases reveal the consistent expansion of "public use" which now encompasses virtually any public benefit.

In *Puerto Rico v. Eastern Sugar Associates*,³⁴ the First Circuit Court of Appeals held that an agrarian reform law that allowed the condemnation of large estates for the purpose of transferring the land to small farmers was a public use. The court largely deferred to the Puerto Rican legislature's finding that this agrarian reform was essential to the economic survival of Puerto Rico.³⁵ Despite incidental private benefit, the

Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts, 60 IND. L.J. 389, 410 (1985).

29. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896).

30. See Note, *Taking a Sports Franchise*, *supra* note 11, at 566-67.

31. See *Karesh v. City Council*, 271 S.C. 339, 247 S.E.2d 342 (1978) (no "public use" where condemned land to be leased to private corporation for construction of parking facility and convention center containing retail commercial space); *City of Seattle v. Westlake Project*, 96 Wash. 2d 616, 638 P.2d 549 (1981) (en banc) (no "public use" where condemned land to be used in part for central retailing area designed to forestall inner city decay); 2A J. SACKMAN, *supra* note 22, § 7.02[1], at 7-26 to 7-43 (3d ed. 1983).

32. Note, *Taking a Sports Franchise*, *supra* note 11, at 566-67.

33. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923).

34. 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

35. The court argued:

'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result . . . are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'

Id. at 323 (quoting *Chicago, B. & Q.R.R. v. McGuire*, 219 U.S. 549, 569 (1911)) (emphasis in original).

court found that the reform served the public interest.³⁶

In *Hawaii Housing Authority v. Midkiff*,³⁷ the Supreme Court upheld the condemnation of property owned by eighteen wealthy landowners in order to break up a land oligopoly in the state of Hawaii. The Court expanded the already broad view of "public use." Justice O'Connor, writing for a unanimous Court, concluded that "public use" required only a "conceivable public purpose."³⁸ The Court expressly rejected a more narrow reading of "public use." "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."³⁹ The Court also stated that "[t]he 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."⁴⁰

The Court added that it would disturb the legislative determination of "public use" only if it were without reasonable foundation.⁴¹ The Court concluded that Hawaii's efforts to control the state's land oligopoly through the exercise of eminent domain constituted a rational means for achieving a legitimate public purpose.⁴² The Court declined to review the wisdom of the taking, but deferred to the stated legislative purpose for the taking.⁴³

In *Poletown Neighborhood Council v. City of Detroit*,⁴⁴ the Michigan legislature had empowered its cities to use eminent domain to obtain land for industrial purposes. The city of Detroit, acting under this legislation, condemned a large tract of land to provide General Motors with a site for its new facility.⁴⁵

In reviewing the city's action, the Michigan Supreme Court defined "public use" under the fifth amendment as the "'right of the public to receive and enjoy the benefit of the use.'"⁴⁶ According to the court, the

36. *Eastern Sugar Associates*, 156 F.2d at 323-25.

37. 467 U.S. 229 (1984).

38. *Id.* at 241.

39. *Id.* at 244 (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923)).

40. The Court, however, did state that a "purely private taking could not withstand the scrutiny of the public use requirement." *Hawaii Hous. Auth.*, 467 U.S. at 245.

41. *Id.* at 241. The Court concluded, "[t]hus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Id.* at 244.

42. *Id.* at 241-42.

43. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Id.* at 242-43.

44. 410 Mich. 616, 304 N.W.2d 455 (1981).

45. *Id.* at 628, 304 N.W.2d at 457.

46. *Id.* at 630, 304 N.W.2d at 457 (quoting *Hays v. Kalamazoo*, 316 Mich. 443, 453-54, 25 N.W.2d 787 (1947) (quoting 37 AM. JUR. *Municipal Corporations*, § 210, at 734-35 (1941))).

conveyance of the land to General Motors did not defeat the "predominant public purpose" of the taking.⁴⁷ Despite the intended private use the public benefit was served by retaining General Motors and its 6,000 jobs.⁴⁸

Two legal trends concerning the "public use" limitation on eminent domain power may be gleaned from these three cases. First, the Supreme Court, as well as other federal and state courts, has expanded the scope of "public use." Some commentators argue that "public use" no longer provides an effective restraint on a government's use of eminent domain.⁴⁹ In fact, the "public use" limitation poses a no more stringent restraint than the public purpose limitation for ordinary legislation. Second, courts tend to defer to a legislature's determination of "public use." In short, as long as the legislature acts reasonably, the taking probably will comport with the "public use" requirement.

B. *The Raiders Decision*

Oakland's eminent domain action against the Raiders represented the first case in which a public agency attempted to acquire a sports franchise by eminent domain.⁵⁰ In *Raiders I*, the California Supreme Court determined that the taking could conceivably constitute a valid "public use" under the fifth amendment.⁵¹ The court remanded the case to the trial court for factual findings concerning the "public use" of the taking.⁵²

The concept of taking a team by eminent domain may initially appear absurd. Yet, condemnation of a sports team fits comfortably within the present, expansive scope of "public use." This Section will examine some of the problems with the California Supreme Court's decision concerning the taking of the Raiders in *Raiders I*. It will offer additional support for the court's conclusion that the taking of a sports franchise may constitute a valid "public use."

The Oakland City Council's resolution to acquire the Raiders through the exercise of eminent domain identified two "public uses:"

47. *Poletown Neighborhood Council*, 410 Mich. at 634, 304 N.W.2d at 459. "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental." *Id.*

48. "Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature." *Id.* at 635, 304 N.W.2d at 460.

49. See Note, *Defining the Parameters*, *supra* note 11, at 414; Note, *Public Use in Eminent Domain*, *supra* note 11, at 108.

50. See Sullivan, *supra* note 11, at 22.

51. *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.

52. *Id.* at 75-76, 646 P.2d at 844-45, 183 Cal. Rptr. at 683.

(1) to promote recreational, social, and economic activity within the city; and

(2) to make effective the principal purpose of the Oakland Coliseum.⁵³

On its face, this statement of intended purposes appears to satisfy the "public use" requirement. The city's goal of promoting economic activity within the city of Oakland is a legitimate end. In addition, promoting recreation itself may constitute sufficient public benefit to meet the "public use" requirement.⁵⁴

In the Raiders' litigation, the parties have hotly disputed the amount and scope of public benefit that would be attained if the city acquired the Raiders.⁵⁵ Precedent indicates, however, that courts should defer to a legislative finding of "public use."⁵⁶ Courts are not in a position to second-guess a state or city concerning the benefit it will receive if it exercises its power of eminent domain. As long as a state or city's determination of public benefit is not wholly irrational or unreasonable, judicial review is limited. The city of Oakland's finding of public benefit was not irrational or unreasonable. Recreational, social, and economic goals traditionally constitute valid "public uses" and the taking of the Raiders could reasonably further these goals. Accordingly, the courts should give effect to the city's findings of "public use."⁵⁷

Prior to the *Raiders I* decision, no case law addressed a city's power to acquire a sports franchise by eminent domain. Thus, discussing Oakland's action, the *Raiders I* court had to analogize to more conventional uses of eminent domain.⁵⁸ The court considered a handful of cases

53. *City of Oakland v. Oakland Raiders*, No. 76044 at 11 (Cal. Super. Ct., Monterey County, July 22, 1983).

54. *See Raiders I*, 32 Cal. 3d at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679-80.

55. For a thorough discussion of the city's arguments and the trial court's responses, see Note, *Anticipating an Instant Replay*, *supra* note 11, at 982-86 & nn. 106-08.

56. *See supra* text accompanying notes 41-49.

57. One noted commentator has disagreed with this Comment's conclusion that the taking of a sports franchise constitutes a valid "public use." Julius Sackman, editor of *Nichols on Eminent Domain*, states that "public use" is judged by a constitutional criterion and must be "one based on historical conditions predicated on the basis of variations in local conditions, or one in which the interest of the state is of such profound or fundamental interest as to be essential to its very existence." Sackman, *supra* note 11, at 232. Sackman compares the taking of a football franchise to the acquisitions in *Midkiff v. Tom*, 471 F. Supp. 871 (D. Haw. 1979) and *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946). He concludes that "agrarian reform, as in *Eastern Sugar Associates*, to avert a civil war, and land reform, as in *Midkiff*, to revive a stagnant and dying community, cannot be rationally compared with the comparatively petty problem faced by the City of Oakland." Sackman, *supra* note 11, at 234.

Professor Sackman underestimates the public benefit of the Raiders to Oakland. More importantly, the standard that Sackman applies is not the law. The test is not whether the taking of a sports team compares with a potential civil war, but rather is whether Oakland had a rational public purpose when it decided to exercise its power of eminent domain. In both law and logic, the economic, social and recreational uses meet the "public use" requirement. Thus, Sackman's view of the proper standard would be more appropriately addressed in the legislative arena.

58. *See Raiders I*, 32 Cal. 3d at 69-71, 646 P.2d at 841-42, 183 Cal. Rptr. at 679-80.

involving a city's acquisition of real property for use as a sports stadium. The city of Anaheim had condemned land for parking facilities at Anaheim Stadium and a California court of appeal upheld the taking.⁵⁹ Similarly, the city of Los Angeles had supplied land for Dodger Stadium and the action was held to be proper public conduct.⁶⁰ In addition, a New Jersey court recently upheld the potential use of eminent domain for building a sports complex.⁶¹ In affirming this lower court decision, the New Jersey Supreme Court concluded that anything reasonably calculated to promote recreation constitutes a valid public purpose.⁶² Finally, the Pennsylvania Supreme Court has twice approved the use of municipal funds to aid the construction of a sports stadium,⁶³ and other state courts have also sanctioned public expenditures to construct or operate sports stadiums.⁶⁴

Although none of these cases directly addresses the taking of a team by eminent domain, each supports the *Raiders I* conclusion that "providing access to recreation to its residents in the form of spectator sports is an appropriate function of city government."⁶⁵ As a municipal tool to promote public welfare, eminent domain is one way to provide access to professional sports.

Though a novel application of condemnation, the taking of the Raiders proves defensible upon consideration of typical uses of eminent domain. For example, as the *Raiders I* court noted, a California city may acquire land for a baseball field⁶⁶ or for parking at a county fairground.⁶⁷ Other states allow even more liberal uses of eminent domain. For example, in Maryland, a state with a history of reading the "public use" requirement broadly, a city may take commercial real estate to develop an industrial park⁶⁸ or may condemn property used by an industrial firm and then turn it over to another industrial user for purposes of expan-

59. See *City of Anaheim v. Michel*, 259 Cal. App. 2d 835, 66 Cal. Rptr. 543 (1968).

60. See *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 333 P.2d 745 (1959).

61. *New Jersey Sports & Exposition Auth. v. McCrane*, 61 N.J. 1, 292 A.2d 545 (construction, operation, and maintenance of a sports complex serves a public purpose), *appeal dismissed*, 409 U.S. 943 (1972).

62. See *id.* at 16, 292 A.2d at 552.

63. See *Conrad v. City of Pittsburgh*, 421 Pa. 492, 218 A.2d 906 (1966); *Martin v. City of Philadelphia*, 420 Pa. 14, 215 A.2d 894 (1966).

64. *Ginsberg v. City & County of Denver*, 164 Colo. 572, 436 P.2d 685 (1968); *Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864, *appeal dismissed sub nom. Fosdick v. Hamilton County*, 391 U.S. 601 (1968).

65. *Raiders I*, 32 Cal. 3d at 71, 646 P.2d at 841, 183 Cal. Rptr. at 680.

66. See *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 333 P.2d 745 (1959).

67. See *County of Alameda v. Meadowlark Dairy Corp.*, 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1964).

68. See *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975).

sion.⁶⁹ If these takings constitute a "public use," the taking of a sports franchise which affects a community's economy and civic pride must also constitute a "public use."

After engaging in the above analysis, the *Raiders I* court asked what many commentators have found to be the key question concerning "public use": "Is 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, legally substantial?"⁷⁰

Although the court failed to answer its own question, the response under the court's analysis in *Raiders I* would have to be, "yes and no." Yes, the difference may be legally substantial for certain purposes,⁷¹ but no, the difference should not affect a finding of "public use." For example, the difference between owning a facility and owning a team may determine whether a city has power to take the property interests of a sports franchise.⁷² A "public use" finding, however, should be unaffected by the type of property taken. If intangible property interests fall within a statutory definition of property, then these interests may be treated like any other property for purposes of the "public use" requirement. Since the *Raiders I* court held that a sports franchise falls within the definition of property for purposes of California eminent domain law, the taking of an ongoing business which brings millions of dollars to Oakland must satisfy the "public use" requirement.⁷³ It should make no difference if a city takes a business rather than real or personal property.

Arguably, retransferring a sports franchise to a private party could render a taking unconstitutional. After *Midkiff*⁷⁴ and *Poletown*,⁷⁵ however, a court would have difficulty finding a reason to disfavor a private-transferee taking. Over thirty years ago, a California court of appeal presaged the current Supreme Court attitude towards takings involving transfers to private parties. The court stated that "[o]nce it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the char-

69. *Mayor & City Council of Baltimore v. Chertkof*, 293 Md. 32, 441 A.2d 1044 (1982).

70. *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680.

71. The difference between taking land for a stadium and taking a team might affect commerce clause issues, potential antitrust liability, and right to travel challenges. Condemning the intangible franchise interest might also have jurisdictional implications. *See supra* note 28.

72. *See supra* note 28.

73. *Cf.*, *Professional Sports Antitrust Immunity Hearings*, *supra* note 19, at 137 (statement of Diane Feinstein, Mayor, San Francisco, California, discussing the benefits provided by professional sports teams).

74. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243-44 (1984) ("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.")

75. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981) (legislatures may take for valid public purpose despite incidental benefit to private party).

acteristics of a public purpose."⁷⁶ Furthermore, after a retransfer, the new owner would likely remain accountable to the public. A city could impose controls upon a retransfer to protect the public purpose of the taking.⁷⁷ The city need only condition the transfer on the prospective new owner's guarantee to prevent the team from relocating.

In a separate opinion in *Raiders I*, Chief Justice Rose Bird warned of the potential abuse of a sovereign's eminent domain power,⁷⁸ but even she recognized that the Constitution should not limit Oakland's ability to acquire the Raiders by eminent domain.⁷⁹ Bird concluded that the best means for limiting possible abuses lies not with a narrow construction of "public use" but instead with legislation.⁸⁰ This Comment adopts Bird's conclusion and expands upon the use of legislation designed to limit possible abuses by cities in exercising the power of eminent domain.⁸¹

Thus, a court would have difficulty invalidating the acquisition of a sports franchise on "public use" grounds. First, the Constitution presents no barrier to this type of acquisition, and modern decisional law, which

76. *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 804, 266 P.2d 105, 122, *cert. denied*, 348 U.S. 897 (1954).

77. *See Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 843-44, 183 Cal. Rptr. at 682. Such controls might be subject to antitrust or commerce clause challenges. Although this issue may trigger subsequent legal debate, it is beyond the scope of this Comment.

78. *See Raiders I*, 32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683-84 (Bird, C.J., concurring and dissenting).

For example, if a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his productions to another city, may the city condemn his business, including his contracts with rock stars, in order to keep the concerts at the stadium? If a small business that rents a storefront on land originally taken by the city for a redevelopment project decides to move to another city in order to expand, may the city take the business and force it to stay at its original location?

Id.

Commentators have echoed Bird's fears about the potential for abuse of a city's power of eminent domain. One worries that "any business which has a contract with a governmental entity may be subject to governmental condemnation and eventual governmental ownership if the business does not re-negotiate its contract(s) on terms agreeable to the government." Smolker, *supra* note 11, at 175. Another posits that, after *Raiders I*, "not only could Disneyland be taken because it provides public recreation, but a city also could take an oil company because a city-owned busline used the fuel the oil company sold." Note, *Defining the Parameters*, *supra* note 11, at 412. These fears suggest two responses. First, how realistic is each of these dangers? The expense, risk, and delay of litigation will deter many cities from commencing such condemnations. Second, the democratic system should be trusted to protect private property interests. Both municipal and state governments will confront extensive public pressure if they attempt to abuse eminent domain power. Furthermore, legislatures, not courts, have the responsibility of limiting state and local government's powers, if necessary. The volume of United States congressional debate and activity in the California legislature indicates that government is keenly aware of potential dangers. *See infra* Part VI.

79. *Raiders I*, 32 Cal. 3d at 79, 646 P.2d at 846-47, 183 Cal. Rptr. at 685 (Bird, C.J., concurring and dissenting).

80. "Therefore, in the absence of a legislative bar to the use of eminent domain in this manner, there appears to be no ground for judicial intervention." *Id.* at 78, 646 P.2d at 846, 183 Cal. Rptr. at 684 (Bird, C.J., concurring and dissenting).

81. *See infra* Part VI, Section B.

has expanded the scope of "public use," provides only support for such action. Promoting public recreation is an appropriate purpose for exercising eminent domain. In addition, the economic and social benefits the Raiders represent to Oakland certainly place the city's acquisition within the scope of "public use."⁸²

Second, as precedent indicates, courts should defer to legislative determinations of "public use." Unless a taking is clearly irrational or beyond the power of a state or municipality, a court should refrain from second-guessing the governmental entity. If *Raiders*-type cases become a frequent and accepted practice, the blame will lie not with the courts, but with the political process in permitting such takings.⁸³

III

COMMERCE CLAUSE

An attempt to acquire a sports franchise or other ongoing business may have commerce clause⁸⁴ ramifications. No case before *Raiders II* had held that an exercise of eminent domain was precluded by the commerce clause.⁸⁵ Therefore, the California courts in the Raiders litigation had a clean slate on which to determine the effect of the commerce clause on a state's power to acquire property through eminent domain.⁸⁶

82. If Oakland prevails on the taking issue, the trial court will then face what is perhaps the more difficult issue of just compensation. Generally, just compensation is the fair market value of the property or the price a willing buyer would pay a willing seller. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-12 (1979). The time of assessment of the fair market value varies among jurisdictions. See 3 J. SACKMAN, *supra* note 22, § 8.5, at 95-119 (3d ed. 1978). Under California law, the "date of valuation is the date of the commencement of the proceeding," CAL CIV. PROC. CODE § 1263.120 (West 1982), unless certain exceptions apply. CAL CIV. PROC. CODE §§ 1263.110, 1263.130-150 (West 1982). As none of the statutory exceptions applies to the Raiders, and, thus, the valuation trial in the Raiders case could only occur after the taking is upheld, the value would be determined at the franchise's present Los Angeles location. See Sullivan, *supra* note 11, at 23. The valuation would then include the Raiders' television contract, the players' contracts, the lease with the Los Angeles Coliseum, the team's intangible property interest as an NFL franchise as well as all tangible property.

Reported prices for 1984 franchise sales include \$70 million for the Denver Broncos and approximately \$60 million for the Dallas Cowboys. Other team values have been estimated from \$40 to \$60 million. See Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1014 n.2.

One commentator suggests a liberal attitude towards compensation in cases such as this in order to "prevent the usurpation of power by legislative bodies and to curtail the use of eminent domain in areas beyond the realms intended by the drafters of the fifth amendment." Note, *Taking a Sports Franchise*, *supra* note 11, at 577-78.

83. See Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 380 (1983).

84. U.S. CONST. art. I, § 8, cl. 3.

85. *Raiders II*, 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 156.

86. Initially, the commerce clause issue was secondary in the litigation. Even in the opening briefs to the court of appeal in 1984, the parties devoted only a few pages to the issue. See Appellant's Opening Brief at 33-37, *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031); Joint Brief of Respondents Los Angeles Raiders (formerly

In the *Raiders II* decision, the court of appeal invoked the commerce clause to strike down Oakland's acquisition of the Raiders.⁸⁷ Avoiding the "public use" issue, the three-judge panel concluded that "[t]his is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit."⁸⁸

Without question the National Football League is engaged in interstate commerce.⁸⁹ Therefore, the commerce clause stands as a potential restraint against a city or state which attempts to regulate the National Football League. This Part will analyze the *Raiders II* decision and will demonstrate that the commerce clause should not present an obstacle to an otherwise valid acquisition of a franchise by eminent domain. A three-pronged inquiry for a court to follow in approaching a commerce clause challenge to a municipal act will be suggested. Under this inquiry, the commerce clause should not invalidate a city's taking of a sports franchise.

In evaluating a commerce clause claim, a court's first inquiry is whether a challenged governmental action constitutes direct market participation or indirect regulation. If "a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause."⁹⁰ If, however, a government acts as a regulator, then the act is subject to commerce clause review.⁹¹ Once commerce clause analysis has been triggered, a court should consider any discriminatory impact an act may have on interstate commerce.⁹² The court should then balance the act's effect on interstate commerce against the local government's interest in regulating the interstate activity.⁹³

A. Market Participation

The United States Supreme Court has confronted the market participation issue in only four cases to date. These cases indicate "that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."⁹⁴

Oakland Raiders) and Its Partners and of Respondent Los Angeles Memorial Coliseum Commission at 33-38, *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031).

87. See *Raiders II*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 154.

88. *Id.* at 421, 220 Cal. Rptr. at 157.

89. See *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 383, 668 P.2d 674, 677, 194 Cal. Rptr. 367, 370 (1983), *cert. denied*, 466 U.S. 904 (1984); see also *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972).

90. *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 208 (1983).

91. See *id.* at 206-08.

92. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

93. *Id.*

94. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 93 (1984).

A brief discussion of these cases will provide a framework in which to apply the commerce clause to a city's exercise of eminent domain.

In *Hughes v. Alexandria Scrap Corp.*,⁹⁵ the state of Maryland designed a junk-car recycling program that favored its own residents over out-of-state residents. The Supreme Court held that despite the burden on interstate commerce, Maryland was free to participate in the market and favor its own citizens over nonresidents.⁹⁶

In *Reeves, Inc. v. Stake*,⁹⁷ South Dakota restricted the sale of cement from a state-owned plant to state residents. The Supreme Court upheld the restriction by applying the *Hughes* rule that the commerce clause does not limit a state when it participates directly in an interstate market.⁹⁸

In *White v. Massachusetts Council of Construction Employers, Inc.*,⁹⁹ the Mayor of Boston required private firms to hire a certain percentage of city residents on all projects which the city funded or administered. Again, the Supreme Court upheld the act stating that as a market-participant, Boston "is not subject to the restraints of the Commerce Clause."¹⁰⁰

In *South-Central Timber Development v. Wunnicke*,¹⁰¹ the Court limited the market-participant doctrine. The State of Alaska required that private buyers process timber taken from state lands within the state prior to export.¹⁰² The Court determined that while participating in the timber selling market, the state was also attempting to regulate the timber processing market. Whereas the market participant doctrine allows the state to choose its timber customers, the Court held that it does not allow the state to regulate the subsequent actions of a private party.¹⁰³ Thus, the Court concluded, "the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant."¹⁰⁴

These cases reveal that the Supreme Court generally defers to a state that uses its powers to get directly into an interstate market. *White* is the most extreme case because the city of Boston used its unique position as distributor of government contracts to regulate the market indirectly. *South-Central Timber* represents a slight retreat from the Court's defer-

95. 426 U.S. 794 (1976).

96. *See id.* at 810.

97. 447 U.S. 429 (1980).

98. *See id.* at 446-47.

99. 460 U.S. 204 (1983).

100. *Id.* at 208.

101. 467 U.S. 82 (1984).

102. *See id.* at 84.

103. *See id.* at 97-98.

104. *Id.* at 99.

ence to the states, requiring a state to draw its legislation narrowly in order to come within the market-participant exception to the commerce clause.¹⁰⁵ In each of the above cases, the Supreme Court scrupulously analyzed the state action; thus, a court confronted with an act conceivably within the market-participant exception should look to the nature of the challenged act. Although no clear market-participation doctrine emerges from these cases, the Supreme Court has provided a precedential background for courts to test the fit of specific factual circumstances into the market-participation exception. This Section argues that the taking of a sports franchise by eminent domain fits into the market-participation exception.

The nature of eminent domain precludes simple classification as regulation or participation. Eminent domain is neither pure regulation nor pure market participation.¹⁰⁶ If the government purchases a sports franchise on the open market, then it would enter the market directly and avoid commerce clause review. On the other hand, if a city passed an ordinance restricting the movement of sports franchises, the city would be regulating and thus would be subject to commerce clause scrutiny. Condemnation of a franchise lies somewhere between these two extremes.¹⁰⁷ A close analysis of eminent domain, however, reveals that a franchise taking for "public use" more properly fits the classification of market participation.

A governmental taking is the purchase of a property interest for fair market value. The fact that a city retransfers the interest to a third party should not affect the nature of the initial taking.¹⁰⁸ By acquiring an NFL franchise, a city has entered the professional football franchise market. Subsequent action should not invalidate the entry into the market. The city does not seek to regulate the sports league, but seeks only to acquire a franchise.¹⁰⁹ At the time of the taking, the city becomes an NFL

105. Justice Rehnquist, dissenting in *South-Central Timber*, accused the majority of drawing artificial lines. See *id.* at 101 (Rehnquist, J., dissenting). He argued that under the majority's holding, the state could have chosen to sell its timber to only those companies that maintained processing plants in Alaska or that hired only Alaska residents. Rehnquist could find no reason to distinguish these valid means from the means chosen by the state and held invalid by the majority. See *id.* at 102-03.

106. Cf. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980) ("[W]hen a State buys or sells, it has the attributes of both a political entity and a private business.").

107. See Note, *Taking a Sports Franchise*, *supra* note 11, at 581.

108. A public use may exist despite a retransfer to a private party. See *supra* text accompanying notes 47-48.

109. Under NFL bylaws a city government could not hold an NFL franchise. NFL CONST. AND BY-LAWS art. III, § 3.2 (1976). The inability of a city government to hold an NFL franchise under NFL bylaws would seem irrelevant. The mere existence of such a bylaw has no legal effect on a city's ability to condemn a franchise and then hold it at least temporarily before transferring ownership to a third party. An NFL bylaw could not invalidate an otherwise valid exercise of a state's sovereign power.

franchise owner and should be treated like all other private owners, that is, free from commerce clause scrutiny. Just as the subsequent transfer of a franchise should not affect a city's status as a market-participant, the means by which a city enters the market should not affect that status.

The court of appeal in *Raiders II* stated that the city "would escape commerce clause review . . . if it had attempted to enter the football market on an equal footing, bidding with other potential [buyers]."¹¹⁰ The court held that Oakland could not escape review since its entry into the market was grounded on the power of eminent domain.¹¹¹ In none of the preceding market-participation cases did the Supreme Court distinguish the means a city used to enter the market.¹¹² Each of the means used by the states in those cases arose from the sovereign power of the state.¹¹³ The *Raiders II* court's attempt to distinguish the use of eminent domain from other means of market participation does not alter the conclusion that by taking a franchise, a city becomes a participating member in the professional sports franchise market. The crucial point is not that Oakland could have used other means to keep the Raiders from relocating, but that Oakland participated in the sports franchise market through the exercise of its eminent domain power.

B. Balancing Test

Even if a taking does constitute regulation rather than market participation, the taking will not offend the commerce clause unless it also impermissibly burdens interstate commerce.¹¹⁴ The commerce clause does not invalidate every exercise of state power that has an impact on interstate commerce. A local regulation will be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."¹¹⁵ A regulation that substantially impedes the free flow of commerce, however, is unconstitutional.¹¹⁶

In reviewing commerce clause challenges, courts traditionally consider whether the challenged act has a discriminatory impact on out-of-

110. *Raiders II*, 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 156.

111. *See id.*

112. Even in *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 95 (1984), the majority criticized only the conditions attached to the sale, not the means of selling timber in order to participate in the market.

113. *Id.* (timber sales from state-owned land); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (government contracts); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state-owned plant); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (state subsidy).

114. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983), *cert. denied*, 466 U.S. 904 (1984).

115. *Pike*, 397 U.S. at 142.

116. *Id.*

state commerce.¹¹⁷ On its face, an eminent domain action does not discriminate against interstate commerce. One might argue, however, that a city's taking of a sports franchise protects local interests against out-of-state parties competing for the franchise. The proper response would be that such a taking treats residents the same as nonresidents in protecting against competition for the franchise. By taking the team, a city effectively ends any possible relocation either within the state or to any other state. Thus, eminent domain actions such as those attempted by Oakland and Baltimore do not discriminate against out-of-state interests.

Since a city's eminent domain action would apply evenhandedly, a court would then attempt a traditional commerce clause balancing test. In *Pike v. Bruce Church, Inc.*,¹¹⁸ the Supreme Court formulated a balancing test that weighed the local interests in a given act against the act's burden on interstate commerce. The Court stated that the "extent of burden that will be tolerated will . . . 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."¹¹⁹

In *Partee v. San Diego Chargers Football Co.*,¹²⁰ the California Supreme Court applied the *Pike* balancing test in concluding that the application of state antitrust law to professional football would impermissibly burden interstate commerce. The substantial burden on interstate commerce, the court found, outweighed the state's interest in enforcing its antitrust laws.¹²¹

The court of appeal in the *Raiders II* decision applied the logic of *Partee* to Oakland's acquisition of the Raiders by eminent domain.¹²² The court agreed with the trial court that the impact of the taking on interstate commerce would outweigh any interest the city might have in keeping the Raiders in Oakland.¹²³ This view, however, appears to misapply the facts involved in the litigation. First, the burden imposed on interstate commerce by the taking would be slight. Second, the city of Oakland has a substantial interest in keeping the franchise in Oakland, which would overcome the incidental burdens the taking might impose on interstate commerce.

It is well established that a state may exercise eminent domain

117. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767-68 (1945).

118. 397 U.S. 137 (1970).

119. *Id.* at 142.

120. 34 Cal. 3d 378, 664 P.2d 674, 194 Cal. Rptr. 367 (1983), *cert. denied*, 466 U.S. 904 (1984).

121. *Id.* at 385, 664 P.2d at 679, 194 Cal. Rptr. at 371-72. The court cited *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1960), in which the Wisconsin Supreme Court denied the state's attempt to use its antitrust laws to enjoin the Milwaukee Braves from moving to Atlanta.

122. "The same situation [as in *Partee*] is presented here. Indeed, the trial court's findings track and amplify on *Partee*." *Raiders II*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157.

123. *Id.*

power even though by so doing it indirectly or incidentally burdens interstate commerce.¹²⁴ In the case of an acquisition of a sports franchise by eminent domain, the taking would certainly have an impact on the National Football League and thus on interstate commerce,¹²⁵ but the harm to the NFL would be superficial. In fact, in the Raiders and Colts cases, in which the league opposed the relocations, the league presumably would have benefitted from the taking.¹²⁶ It was the Raiders move, not Oakland's taking, that burdened the NFL's control over franchise relocation.¹²⁷ The league desired to keep the Raiders in Oakland, indicating that the team's relocation, which contravened league policy, would burden the league's control of franchise location. The restraint of team movement, thus, would not burden interstate commerce but, on the contrary, would advance the NFL's freedom to regulate team movement in interstate commerce.

On the other side of the balance, the *Raiders II* court seems to have substituted its own views for the city's as to the importance of local interest in keeping the team. Though contested by the parties,¹²⁸ the importance of the Raiders to Oakland's city pride, recreational interests and economic well-being is properly a decision for the city of Oakland. As stated by the city, this interest surpasses a state's rather abstract interest in enforcing its antitrust laws against a sports franchise as in *Partee*.

In *Partee*, the federal antitrust laws protected the state's interest in promoting competition even though California could not apply its own antitrust laws.¹²⁹ Cities, on the other hand, have no legal protection

124. *Elberton Southern Ry. Co. v. State Highway Dept.*, 211 Ga. 838, 841, 89 S.E.2d 645, 649 (1955) (interference with railway's interstate business resulting from condemnation of part of railway did not constitute undue burden on interstate commerce); see also *Chicago R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1*, 76 S.W.2d 147, 148 (Tex. Civ. App. 1934) ("[T]he right of the state to exercise its power of eminent domain has not been surrendered to the federal government, even though interstate commerce may be indirectly or incidentally involved . . .").

125. The *Raiders II* court listed the burdens on interstate commerce as including the disruption of league balance, interference with lease practices, ticket pricing and scheduling, and holding a team to a permanent location. *Raiders II*, 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 157.

126. Admittedly, the magnitude of burdens on the NFL would differ if the NFL approved a move and the interested city still went forward with an eminent domain proceeding. Under such facts, with the city opposing the team's decision to relocate and the league's approval, the burden might be too great. Thus, the commerce clause might prohibit a sports franchise condemnation in certain circumstances.

127. See Appellant's Petition for Review and Motion for Summary Reversal at 26 n.2, *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031). If the NFL bylaw that controls the location of teams violates antitrust law under *Los Angeles Coliseum*, then any government intrusion on the NFL logically cannot burden interstate commerce. Government intrusion actually keeps the NFL from illegally restraining free commerce. In other words, there can be no burden to a league's control over franchise location, if that control has been found invalid under antitrust law.

128. See *supra* note 55.

129. *Partee*, 34 Cal. 3d at 383, 668 P.2d at 677, 194 Cal. Rptr. at 370.

from a sports franchise's threats to relocate. Due to the current absence of federal legislation concerning sports franchise relocations,¹³⁰ the cities are left with no alternative but to commence eminent domain proceedings when confronted with such a threat. If Congress enacted legislation, perhaps the balance would lean more towards finding an improper burden on interstate commerce. However, under the facts of the Raiders and Colts cases, the city's interest in keeping the franchise from relocating would justify the indirect and incidental effects of the taking on interstate commerce.

C. Public Policy

Although the Supreme Court has not confronted potential commerce clause restraints on a city's eminent domain power, it "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."¹³¹ According to the Court, "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States."¹³² Protectionist measures which tend to isolate a state from interstate commerce obstruct free trade.¹³³ Under this free-trade policy of the commerce clause, the taking of an ongoing business that restricts the business from moving in interstate commerce would appear suspect.

A simple economic analysis of eminent domain, however, reveals that a city's acquisition of a franchise or business places only a slight burden on the free movement of interstate commerce. This Section will argue that taking a sports franchise does not conflict with the free-trade policies of the commerce clause. A brief discussion of some basic economic concepts will facilitate this analysis. In the simplest terms, an "externality" is an uncompensated pecuniary or social cost imposed on society by a business.¹³⁴ Externalities arise when a market is unable to internalize all of the costs associated with its doing business. Externalities result in economic inefficiency. To further economic efficiency, the acting business must internalize the external costs it creates.¹³⁵

When a business relocates, it creates externalities such as unemployment, economic dislocation, disruption of the labor market, and a

130. See *infra*, Part VI, Section A.

131. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

132. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

133. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

134. Note, *A Legal, Economic, and Normative Analysis of National Plant Closing Legislation*, 11 J. LEGIS. 348, 364 (1984); see also, R. TRESCH, PUBLIC FINANCE: A NORMATIVE THEORY 90-177 (1981).

135. See Note, *supra* note 134, at 364-65.

decreased tax-base in the community from which it intends to move.¹³⁶ Generally, a business entity that decides to relocate need not account for these externalities, thus producing economic inefficiency.

A policy that forces a business to internalize these costs of relocation in its decision-making process would eliminate the externalities and thus lead to greater economic efficiency. For example, a regulation that requires a business to make severance payments to workers or restitution payments to a community would force the business to internalize partially the social and economic costs of business relocation.¹³⁷ Such regulation, however, would impose substantial burdens on interstate commerce. These burdens would in turn create new externalities, costs that a community need not account for in deciding to regulate the business.¹³⁸ In short, economic inefficiency would again result.

An eminent domain taking would be more economically efficient than conventional regulation. By paying fair market value for a business, a city would largely offset any burden on interstate commerce and thus would avoid creating new externalities. A taking would both capture the externalities such as unemployment created by the business's relocation and avoid creating additional externalities such as a business's ability to operate more efficiently elsewhere. Although fair market value may not account for the potential profit of a business at another location, the purchase does minimize the effect on interstate commerce.¹³⁹ An eminent domain taking acts much like a government subsidy.¹⁴⁰ The community benefits by having the business, but pays for the benefit through the just compensation requirement.

Additional public policy concerns support the freeing of eminent domain from commerce clause restraint; the restrictions on a city's power of eminent domain that *Raiders II* would allow are unprecedented and unwarranted. Under the *Raiders II* holding, many common condemnations could be subjected to a commerce clause challenge.¹⁴¹ In

136. See *id.* at 364-67.

137. See H.R. 2847, 98th Cong., 1st Sess., 129 CONG. REC. H2526-27 (daily ed. May 2, 1983) (recommending federal legislation to offset harmful effects of plant closings).

138. For a thorough criticism of plant relocation legislation, see R. MCKENZIE, *FUGITIVE INDUSTRY: THE ECONOMICS AND POLITICS OF DEINDUSTRIALIZATION* (1984). For arguments in support of plant relocation legislation, see B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT AND THE DISMANTLING OF BASIC INDUSTRY* (1982).

139. Just compensation often does not perfectly reflect fair market value. See *United States v. Miller*, 317 U.S. 369, 375-76 (1942). Nonetheless, payment of just compensation will tend to minimize externalities created by a taking. In states such as California, because just compensation is determined at the time of trial, it may more closely approximate fair market value. See *supra* note 82.

140. See B. BLUESTONE & B. HARRISON, *supra* note 138, at 163-65.

141. For common condemnations that might be challenged under the commerce clause, see *Citizens Utilities Co. v. Superior Court*, 59 Cal. 2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963)

order to avoid invalidating these common condemnations of property, courts following *Raiders II* will have to distinguish these condemnations from the taking of a football franchise. Any such distinction will have to rest on a factual determination of the burden the taking would have on interstate commerce.¹⁴² Such determinations could needlessly complicate many eminent domain proceedings currently considered commonplace.

IV RIGHT TO TRAVEL

The right to travel from state to state has been recognized as a fundamental constitutional right.¹⁴³ Because the acquisition of an ongoing business such as a sports franchise prevents the business from relocating, such a taking might conflict with the business's purported constitutional right to travel. In effect, a government's use of eminent domain imprisons a business in one geographical location.

While the application of the right to travel to the acquisition of a sports franchise may appear attractive, upon close inspection, it becomes clear that the right does not limit a municipality's eminent domain power. This Part will discuss three problems with using the right to travel as a means to prevent a city's acquisition of a sports franchise.

First, the Supreme Court has never explicitly extended the right to travel to movement entirely within a state.¹⁴⁴ While this fact would have no impact on cases involving interstate relocation, it would affect invoca-

(private utility companies); *In re Fifth Ave. Coach Lines*, 18 N.Y.2d 212, 219 N.E.2d 410, 273 N.Y.S.2d 52 (1966); *Milwaukee & Suburban Transp. Corp. v. Milwaukee County*, 82 Wis. 2d 420, 263 N.W.2d 503 (1978) (bus systems).

142. Since a taking of any ongoing business involved in interstate commerce must be classified as either market participation or direct regulation as a matter of law, *see supra* Part III, Section A, a court would have difficulty distinguishing some takings as participation and others as regulation. Therefore, a court will be able to distinguish most condemnations challenged under the commerce clause only by analyzing the burden produced by each taking on interstate commerce. For example, a city's taking of real property owned by an ongoing business in order to retransfer the land to another business would be difficult to distinguish from a taking of the ongoing business itself as market participation or regulation. In order to so distinguish, a court would have to analyze the burdens on interstate commerce produced by each of the two takings.

143. "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966).

[The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (citing *United States v. Guest*, 383 U.S. at 757-58).

144. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974) (state statute requiring one year's residency in county as a condition to receiving nonemergency hospital services at county's expense).

tion of the right to travel in cases of purely intrastate movement. Although the Supreme Court has not decided the issue, the Second Circuit has opined that the right to travel implicitly includes intrastate travel.¹⁴⁵ The Supreme Court would likely agree with the Second Circuit were it to consider the issue. Nonetheless, any argument using the right to travel to challenge an exercise of eminent domain would have to address this issue.

Second, the right to travel has never been applied to business entities. Though some commentators suggest that the right should so apply,¹⁴⁶ neither history nor logic supports extending the right to travel to corporations or business entities. It has been settled for a century that corporations are persons within the meaning of certain constitutional guarantees.¹⁴⁷ In the last 100 years, the Supreme Court has created a "patchwork of holdings defining corporate Constitutional rights"¹⁴⁸ which includes equal protection,¹⁴⁹ due process,¹⁵⁰ double jeopardy,¹⁵¹ and unreasonable search and seizure.¹⁵² In *First National Bank of Boston v. Bellotti*,¹⁵³ the Court thoroughly discussed the constitutional status of corporations and extended first amendment protection to corporate speech. The Court, in a plurality opinion, could find no reason to deny a corporation the right to engage in speech that would clearly be protected if made by a natural person.¹⁵⁴ The Court recognized, however, that certain constitutional protections do not extend to corporations.

Certain "purely personal" guarantees . . . are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. . . . Whether

145. See, e.g., *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.), cert. denied 404 U.S. 863 (1971); see also *Krzewinski v. Kugler*, 338 F. Supp. 492, 498 (D.N.J. 1972) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.") (quoting *King*, 442 F.2d at 648).

146. See Note, *Stare Decisis*, supra note 11, at 188-91 (since corporations are generally considered "artificial persons," they often enjoy the rights of natural persons); Note, *Taking a Sports Franchise*, supra note 11, at 579 (the right to travel applies to business entities).

147. See *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.").

148. See Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1644 (1982).

149. See *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

150. See *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26 (1889) (the Court, although holding that statute allowing recovery against railroad of double the value of animals killed by train comported with due process clause, conceded that a state may not deprive a corporation of property without due process of law).

151. Cf. *United States v. Martin Linen Supply*, 430 U.S. 564 (1977) (company could not be retried after successfully moving for acquittal).

152. *Hale v. Henkel*, 201 U.S. 43 (1906).

153. 435 U.S. 765 (1978) (plurality opinion).

154. *Id.* at 777.

or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.¹⁵⁵

The Court's language in *Bellotti* indicates that some "personal guarantees" do not apply to corporations. Under the Court's "historical purpose" standard, the right to travel should not apply to corporations. Although the right to travel has been recognized in one form or another since the Articles of Confederation, the Supreme Court has not identified the specific source of the right.¹⁵⁶ At various times, the privileges and immunities clauses of article IV and of the fourteenth amendment, the due process clause, the commerce clause, and the equal protection clause have all been considered potential sources of the right to travel.¹⁵⁷ Recently, it appears that the Court has abandoned any attempt to identify a single source of the right to travel in favor of a recognition that the right necessarily arises from the structure of the Constitution and the federal system of government which the Constitution created.¹⁵⁸ Though not directly stated, the Court's recent pronouncements suggest that the right should be limited to natural persons. For example, the Court has stated that the right protects "individuals" from civil rights violations that interfere with their free movement in interstate commerce.¹⁵⁹ Logically, the right to travel is a purely personal privilege like the right to privacy¹⁶⁰ or the privilege against self-incrimination.¹⁶¹ The mischief that the right was intended to protect against, interference with individuals' free movement, does not apply to corporations.¹⁶²

Third, even if the right to travel were extended to cover corporations involved in purely intrastate travel, a court would still have to determine whether the acquisition of a sports franchise unjustifiably infringes upon that right. Courts have consistently required a compelling state interest to justify any interference with a person's right to travel.¹⁶³

155. *Id.* at 778 n.14 (citation omitted).

156. *See Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). The *Shapiro* court stated: "We have no occasion to ascribe the source of this right . . . to a particular constitutional provision." *Id.* (footnote omitted).

157. Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117, 117-18 (1975) [hereinafter Comment, *The Right to Travel*]; *see also* Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1140-41 (1975) [hereinafter Comment, *Strict Scrutiny*].

158. "Although there have been recurring differences in emphasis within the Court as to the source. . . [a]ll have agreed that the right [to travel] exists." *United States v. Guest*, 383 U.S. 745, 759 (1966) (footnote omitted).

159. *Id.* at 759. "The Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel . . ." *Shapiro*, 394 U.S. at 629.

160. *See Wilson v. United States*, 221 U.S. 361 (1911).

161. *See California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

162. *Hale v. Henkel*, 201 U.S. 43, 58 (1906).

163. *See Jones v. Helms*, 452 U.S. 412, 419, 423 (1981); *Maher v. Roe*, 432 U.S. 464, 488 (1977);

In effect, a right to travel challenge would involve a stricter balancing determination than that made in a "public use" or commerce clause challenge.¹⁶⁴ In applying this balancing test, it would be a close question whether a municipality had such a compelling interest in condemning a sports team. Although the condemnation would promote the economic, social, and recreational interests of the city, thereby satisfying a "public use" or a commerce clause challenge, Oakland would have to prove more. In order to meet the strict scrutiny test of a right to travel challenge, Oakland would have to submit substantial evidence of the Raiders' importance to the city.

Despite the impact a taking would have on an ongoing business's desire to relocate, it would not be sound policy to strike down an attempted eminent domain action on right to travel grounds. As with a commerce clause attack, the implications of such a decision could drastically deter otherwise acceptable condemnations. While an eminent domain action should not be free from constitutional examination, the right to travel constraint appears tenuous. The right has generally been used to strike down residency schemes and unjustified infringements on individual freedom to travel.¹⁶⁵ Courts have been reluctant to extend the right beyond these traditional uses. No policy justifies an extension to cases of eminent domain.

V

ANTITRUST

A municipality may be subject to antitrust liability under section 1 of the Sherman Act.¹⁶⁶ The municipal condemnation of a sports franchise or ongoing business appears to trigger antitrust liability. By acquiring a franchise, a municipality may violate section 1's prohibition of anticompetitive conduct. Taking a franchise might have a variety of anticompetitive effects on the free market. For example, such a taking might inhibit competition between the team a city wishes to acquire and

Cole v. Housing Auth., 435 F.2d 807, 809 (1st Cir. 1970). Two commentators, however, have suggested that the strict scrutiny or compelling state interest test should apply only under certain circumstances. See Comment, *The Right to Travel*, *supra* note 157, at 128-29; Comment, *Strict Scrutiny*, *supra* note 157, at 1137-40. One commentator even suggests that interstate travel should trigger not strict scrutiny, but the more liberal "rational relation" test. Comment, *The Right to Travel*, *supra* note 157, at 128-29. Under such a test, a city's taking of a sports franchise certainly would satisfy the "rational means to a legitimate end" standard.

164. See *supra* text accompanying notes 53-57 and 114-17.

165. See Comment, *The Right to Travel*, *supra* note 157, at 122-27; Comment, *Strict Scrutiny*, *supra* note 157, at 1153-59.

166. Fisher v. City of Berkeley, 106 S. Ct. 1045, 1048 (1986). Section 1 prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1982).

other league franchises¹⁶⁷ or prevent competition between sports stadiums and other businesses hoping to attract a sports franchise to a certain city.¹⁶⁸ In order to make out a prima facie case of antitrust liability, a franchise owner need only allege that a city's action had an adverse impact on competition in such a market.¹⁶⁹ While a federal antitrust violation under the Sherman Act would not constitute a basis for a suit for damages in a state court, it could be a defense to an eminent domain action.¹⁷⁰

This Part will analyze the availability of an antitrust defense to a city's attempted taking of a sports franchise. First, the "concerted action" requirement for a section 1 challenge announced by the Supreme Court in *Fisher v. City of Berkeley*¹⁷¹ will be discussed. Next, the "state action" exemption for antitrust liability will be applied to a city's use of eminent domain to acquire a franchise. Finally, the actual adverse impact such an acquisition might have on competition will be examined.

A. Concerted Action

In *Fisher*, the Supreme Court narrowed the potential liability of local governments for anticompetitive activities. In that case, the Court read section 1 of the Sherman Act to require "concerted action" between the government and a private party before the government could become liable for an antitrust violation.¹⁷² The Court found that the City of Berkeley's rent control scheme involved only unilateral government action and thus fell outside the scope of section 1.¹⁷³

Under the *Fisher* holding, a franchise would have difficulty proving concerted action in a city's attempted acquisition. In the Raiders litigation, the Raiders alleged a conspiracy between Oakland and the NFL.¹⁷⁴ A party might also allege a conspiracy between a city and the municipal

167. See *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1392 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984).

168. See *id.* at 1392-93.

169. See *id.* at 1392. In the Baltimore Colts situation, there would be no threat of liability because the Colts moved to a city not already occupied by another NFL franchise. The Raiders, on the other hand, moved to Los Angeles, in part to compete with the Los Angeles Rams. In fact, one of the Raiders' defenses to Oakland's eminent domain suit has been the city's alleged conspiracy with the NFL in violating the Sherman Act. See Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Its Partners and of Respondent Los Angeles Memorial Coliseum Commission at 39-47, *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985).

170. *Fisher v. City of Berkeley*, 106 S. Ct. 1045, 1048 (1986).

171. *Id.*

172. *Id.* at 1048-49, 1051.

173. *Id.* at 1051.

174. Joint Brief of Respondents Los Angeles Raiders (formerly Oakland Raiders) and Its Partners and of Respondent Los Angeles Memorial Coliseum Commission at 39-47, *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985).

stadium or a potential third-party purchaser of the franchise. If the facts of a case support a finding of conspiracy, either of these options would satisfy the *Fisher* requirement of concerted action.¹⁷⁵ After the *Fisher* decision, however, a city would be on notice to avoid situations that might later be construed as concerted action. A city need only act unilaterally in exercising its eminent domain powers in order to remain free from section 1 scrutiny.

B. "State Action" Immunity

In 1943, the Supreme Court granted the states a "state action" exemption from antitrust liability.¹⁷⁶ Under the exemption, certain sovereign state acts became immune from antitrust liability. In 1978, the Court refused to extend state antitrust immunity automatically to local units of government such as cities.¹⁷⁷ In recent cases, the Court has limited a municipality's immunity to circumstances in which the city acts pursuant to a "clearly articulated and affirmatively expressed . . . state policy."¹⁷⁸ In short, although a city has no automatic exemption from liability, a state may immunize the city from liability by sanctioning anticompetitive municipal activities.

The inquiry facing a court in an antitrust action against a city thus involves giving substance to the words "clearly articulated and affirmatively expressed state policy" which will immunize the municipal act. In *Community Communications Co. v. City of Boulder*,¹⁷⁹ a moratorium ordinance on cable television business expansion did not fall within the *Parker* "state action" exemption. The Court found only a general police power without explicit state support: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."¹⁸⁰

In *Town of Hallie v. City of Eau Claire*,¹⁸¹ the Court retreated from its strong stance in *City of Boulder* and allowed municipal regulation of sewer services despite the regulation's anticompetitive effects. After ana-

175. *Fisher*, 106 S. Ct. at 1051.

176. *Parker v. Brown*, 317 U.S. 341 (1943).

177. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion). The plurality stated the reasons for not extending the exemption to municipalities: "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Id.* at 412-13.

178. See, e.g., *id.* at 410; *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1717 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982).

179. 455 U.S. 40 (1982).

180. *Id.* at 55.

181. 105 S. Ct. 1713 (1985).

lyzing the history of the state legislation, the Court found that the statutes authorizing municipal regulation of sewer services contemplated anticompetitive conduct.¹⁸² To pass the "clear articulation" test, the city did not have to be compelled to act anticompetitively,¹⁸³ nor did the state have to expressly and specifically approve of the city's anticompetitive activity.¹⁸⁴ The Court concluded that broad state authorization will suffice for a city to claim the "state action" exemption.¹⁸⁵

Since *Fisher* was decided on concerted action grounds, the majority did not consider a possible "state action" exemption.¹⁸⁶ In his concurring opinion, however, Justice Powell would have decided the case on "state action" grounds.¹⁸⁷ Powell analyzed the history of Berkeley's rent control scheme to determine whether the state authorized the city's action. He concluded that the state's ratification of Berkeley's charter amendment, which included a rent control provision, authorized Berkeley to enact its rent control ordinance.¹⁸⁸ This concurrence and the above precedent suggest that a court confronting the "state action" exemption should analyze the history of the challenged municipal action and the state legislation purportedly authorizing the action. In considering the history, the Court would determine if the state legislation authorized and contemplated the city's anticompetitive activity.

Although it could be a close question, the peculiar nature of eminent domain law should trigger the "state action" exemption. A state's eminent domain law generally governs all state or municipal acquisitions. Since a municipality has no inherent power of eminent domain, it can only exercise the power pursuant to express statutory authority.¹⁸⁹ In 1975, California extensively revised its eminent domain laws.¹⁹⁰ The new statutes were intended "to cover, in a comprehensive manner, all aspects of condemnation law and procedure."¹⁹¹ The state granted broad eminent domain power to its subdivisions, but explicitly restricted certain uses of that power.¹⁹² It follows that if the state desired to place any limits on a city's anticompetitive use of eminent domain, it would simply have legislated against such uses.¹⁹³ It would be impractical for a state to

182. *Id.* at 1721.

183. *Id.* at 1717-18.

184. *Id.* at 1720.

185. *Id.* at 1719.

186. *Fisher v. City of Berkeley*, 106 S. Ct. 1045, 1051 (1986).

187. *Id.* at 1051 (Powell, J., concurring).

188. *Id.* at 1053 (Powell, J., concurring).

189. *See City of Menlo Park v. Artino*, 151 Cal. App. 2d 261, 266, 311 P.2d 135, 139 (1957).

190. *See supra* note 26.

191. CAL. LAW REVISION COMM'N, THE EMINENT DOMAIN LAW 1011 (1975).

192. *See* CAL. CIV. PROC. CODE §§ 1235.180, 1240.010-.030 (West 1982); CAL. GOV'T CODE § 37350.5 (West Supp. 1986).

193. The Legislature knows how to be specific on the point. California Government Code

specifically provide for all of the possible uses of eminent domain that might run into antitrust difficulties.¹⁹⁴

Furthermore, subservience to federal antitrust law would displace the role of state and local governments in acquiring land for "public use." Eminent domain power arises uniquely from state sovereignty, and the municipalities share in the state's exercise of sovereignty by acquiring property for "public use." Unless a state statutory scheme is so general as not to permit the conclusion that the state intended the local government to exercise its power free from antitrust concerns, or a state statute expressly disallows a particular exercise of condemnation, a city should be immune from potential antitrust claims arising from eminent domain actions.¹⁹⁵

C. *Adverse Impact on Competition*

Even if a city's action does not fall within the "state action" exemption, a court would still have to determine whether the city's anticompetitive activity violated the Sherman Act.¹⁹⁶ Since the municipal antitrust cases that have reached the Supreme Court have turned on the issue of immunity, the question of liability is largely unsettled.

The two traditional methods of determining section 1 liability are the per se rule and the rule of reason. Under the per se rule, a city's anticompetitive activity would be presumed illegal without further inquiry.¹⁹⁷ Under the rule of reason, the anticompetitive effects of a

section 37353, subdivision (c), for example, provides that while a municipality may condemn land for use as a golf course, an existing golf course may not be acquired by eminent domain. See CAL. GOV'T CODE § 37353(c) (West 1968). That the California Legislature has proposed bills expressly removing a city's power to acquire a sports franchise by eminent domain, see *infra* notes 262-67, suggests that such a power is included in the broad grant of power to the local governments. By implication, section 37353 suggests that the Legislature has recognized a municipality's broad eminent domain power to acquire an existing business unless expressly forbidden to do so. *Raiders I*, 32 Cal. 3d at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

194. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1719 (1985).

The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

Id.

195. See *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434-35 (9th Cir. 1984) (California Constitution and statutes support a city's act to displace competition with regulation in the taxicab industry); *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984) (legislation supports city's grant of exclusive trash collecting contract under state statute), *cert. denied*, 105 S. Ct. 3503 (1985).

196. See *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

197. See Comment, *Municipal Antitrust Liability: Beyond Immunity*, 73 CALIF. L. REV. 1829, 1837-38 (1985).

city's activity are balanced against its procompetitive effects.¹⁹⁸ The per se rule generally applies only to activities with which the Supreme Court has had sufficient experience, such as price control.¹⁹⁹ Municipal eminent domain actions are thus inappropriate for per se rule analysis due to the novel antitrust issues which arise from such actions.²⁰⁰

The rule of reason is also inappropriate to analyze municipal activities within the marketplace. As one commentator has argued: "The rule of reason's narrow inquiry would be heavily weighted against municipalities. The purpose of most municipal activity is to promote safety, health, and public welfare; this often requires market manipulation. Interferences with the market are inherently anticompetitive, and few such activities will have counterbalancing procompetitive effects."²⁰¹ The Supreme Court suggested the inapplicability of the per se rule and the rule of reason to municipal activities in *City of Lafayette*: "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."²⁰² In *Fisher*, however, the Court avoided formulating an alternative rule for municipal activities.²⁰³

Unlike the United States Supreme Court, the California Supreme Court, in upholding Berkeley's rent control ordinance against antitrust challenge, devised its own standard for reviewing section 1 liability of a municipality.²⁰⁴ The court, borrowing from commerce clause analysis, established a standard that balances the anticompetitive effect of an act against the public welfare benefits of the act.²⁰⁵ According to the court, this standard accommodates legitimate government objectives resulting in anticompetitive effects, unlike the per se rule and rule of reason which were "developed exclusively in the context of determining private business antitrust liability."²⁰⁶

There is little doubt that a city's acquisition of a sports franchise would not survive per se rule or rule of reason analysis. Since the purpose of such a taking is to promote public welfare, however, and not to promote competition in the market, the *Fisher* "public welfare" standard formulated by the California Supreme Court should apply to the city's action. Under this standard, a court's antitrust inquiry would resemble a

198. See *id.* at 1837.

199. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 349 n.19 (1982).

200. Comment, *supra* note 197, at 1838.

201. *Id.* at 1839 (footnotes omitted).

202. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978) (plurality opinion).

203. *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986).

204. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 675, 693 P.2d 261, 286-87, 209 Cal. Rptr. 682, 707-08 (1984), *aff'd*, 106 S. Ct. 1045 (1986).

205. *Id.* at 674, 693 P.2d at 286, 209 Cal. Rptr. at 707.

206. *Id.* at 672, 693 P.2d at 284, 209 Cal. Rptr. at 705.

commerce clause balancing test. As this Comment has argued above, the balance should favor the city and the taking of a sports franchise should survive such a challenge.²⁰⁷

VI STATUTES

As argued above, neither the Constitution nor current federal law effectively restrains a municipality's acquisition of a sports franchise by eminent domain. Yet, it remains clear that unrestrained municipal power creates the potential for abuse. The problem of franchise relocation can be reduced to two simple propositions:

- (1) A city must have some protection against a sports franchise's relocation; and
- (2) A government's use of eminent domain must be limited in some meaningful way to prevent abuses that will threaten private property interests.

Given these two propositions, the solution is not to distort existing legal concepts to reach a desired outcome. If the threat to property is so great, then state and federal legislatures should act.

A. *Federal Statutes*

The solution to the first proposition lies with Congress. By providing a federal statutory scheme, Congress could protect cities while not unduly restricting the property rights of sports franchise owners.²⁰⁸ In evaluating proposed legislation, Congress should consider several fundamental factors:

- (1) Legislation should deal directly with the source of the problem—the status of sports leagues under the antitrust laws,²⁰⁹ and the inability of professional sports leagues to prevent team movement under the current application of antitrust concepts;²¹⁰
- (2) Legislation should recognize that sports leagues are best suited to manage the operations of their sports under their voluntary joint venture agreements;²¹¹ and
- (3) Legislation should minimize the confusion surrounding team movement created by recent litigation.²¹²

207. See *supra* Part III, Section B.

208. For arguments against congressional intervention to restrict franchise relocations, see Johnson, *supra* note 15, at 524-25.

209. See *Professional Sports Community Protection Act*, *supra* note 15, at 64 (statement of Pete Rozelle).

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

211. See *Professional Sports Community Protection Act*, *supra* note 15, at 64 (statement of Pete Rozelle).

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

In the past five years, Congress has considered numerous proposals to restrict the ability of professional sports franchises to relocate. Despite the proliferation of proposals in both the House and the Senate, each bill has followed either one or a combination of two basic approaches: antitrust immunity or judicial review. This Section will analyze the most recent bills proposed in the Senate, and suggest the proper legislative approach to the problems presented by sports franchise relocation, based on the above three criteria.

Senator Slade Gorton of Washington has proposed a community protection statute²¹³ which provides a "complex procedural obstacle course"²¹⁴ which a franchise would have to negotiate in order to relocate. The bill provides a three-tiered scheme for evaluating proposed franchise relocations. First, the league must approve the proposed relocation according to certain statutory guidelines.²¹⁵ If the interested city or community opposes the move, a Federal Arbitration Board must decide that "the proposed relocation is necessary and appropriate."²¹⁶ Finally, the federal courts retain limited judicial review of the arbitration decision.²¹⁷

Gorton maintains that his scheme will protect the public against unwarranted relocations. He claims that government interference through an Arbitration Board is the only effective way to protect the public interest without unduly intruding on the private property interests

213. S. 287, 99th Cong., 1st Sess., 131 CONG. REC. S663 (daily ed. Jan. 24, 1985). Similar legislative proposals in earlier years have included: S. 2505, 98th Cong., 2d Sess. (1984); H.R. 5388 and H.R. 5430, 98th Cong., 2d Sess. (1984).

214. Taylor, *Legislators Study Defenses to Keep Teams in Place*, N.Y. Times, Jan. 20, 1985, § V, at 12, col. 3.

215. S. 287, 99th Cong., 1st Sess., 131 CONG. REC. S663 (daily ed. Jan. 24, 1985). The enumerated factors for a league's evaluation of a proposed relocation under Gorton's bill include:

- (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.

216. *Id.*

217. *Id.* at S667.

of franchise owners, as only a neutral party can fairly balance the interests of the league, the franchise, and the cities.²¹⁸ Proponents of Gorton's proposal further contend that the combination of specific guidelines and neutral review by the Arbitration Board provides a scheme that can best "protect all interested groups when franchise relocation issues arise."²¹⁹

Senator Dennis DeConcini of Arizona has proposed a bill exempting sports leagues from antitrust liability.²²⁰ The bill would grant a narrow exemption to leagues concerning relocation agreements, but would not extend to other league activities.²²¹ Under the exemption, sports leagues would be completely unfettered by federal antitrust law in regulating franchise relocations.

DeConcini's proposal would effectively overrule the *Los Angeles Coliseum* decision.²²² Although this Comment does not argue that *Los Angeles Coliseum* was incorrectly decided,²²³ it does suggest that the holding is not in the best interest of professional sports or the public at large. As one commentator has noted, "[A]lthough competition may be the only goal of antitrust law, unrestricted competition may not always

218. 131 CONG. REC. S664 (daily ed. Jan. 24, 1985) (statement of Sen. Gorton).

219. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 220 (1984); see also Note, *Taking a Sports Franchise*, *supra* note 11, at 592-96.

220. S. 298, 99th Cong., 1st Sess., 131 CONG. REC. S682-83 (daily ed. Jan. 24, 1985). Similar legislative offerings in earlier years have included: S. 1036 and S. 1078, 98th Cong., 1st Sess. (1983); S. 2784, 97th Cong., 2d Sess. (1982); H.R. 823, H.R. 3287, and H.R. 6467, 97th Cong., 1st Sess. (1982).

221. See S. 298, 99th Cong., 1st Sess., 131 CONG. REC. S683 (daily ed. Jan. 24, 1985).

222. 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); see *supra* notes 167-69 and accompanying text.

223. This Comment does not attempt to analyze the issue of potential antitrust liability of a sports league. It is worth noting, however, that the state of the law is unsettled. Cases and commentary disagree on the applicability of section 1 of the Sherman Act to professional sports leagues as well as the proper standard for reviewing anticompetitive league activities. For good discussions of these issues, see Lazaroff, *supra* note 219 (supporting league antitrust liability); Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984) (league members not economic competitors when acting jointly to manage the league and thus exempt from section 1 scrutiny); Weistart, *supra* note 82 (criticizing *Los Angeles Coliseum* and suggesting slim prospects for sports league immunity); Comment, *A Substantive Test for Sherman Act Plurality: Applications for Sports Leagues*, 52 U. CHI. L. REV. 999 (1985) (unity of interest among league franchises should create league immunity from antitrust liability for certain league activities).

Professor Roberts makes the most thorough attack on judicial intervention into league decisions concerning franchise relocations. He argues that the courts should avoid determining "what restraints should be adopted" and should let the league make these decisions because the league "knows its business far better than courts and juries hearing antitrust cases." Roberts, *supra*, at 301. Further, he states that "sports league decisions reflect either result-oriented or merely purposeless jurisprudence, which in either event has damaged consumer welfare, furthered no other conceivable antitrust objective, and left sports leagues in a hopelessly confused and unguided state." *Id.* at 222 n.4. He claims that sports leagues are "fundamentally different from any other form of business enterprise" and that league members have a right to control franchise movement. *Id.* at 224, 301.

yield the desired result."²²⁴ Despite the strong policy of competition, congressional departures from the economic norm—such as Senator DeConcini's limited antitrust exemption proposal—are occasionally required to achieve socially as well as economically sound results.²²⁵

Senator Arlen Specter of Pennsylvania has proposed a bill²²⁶ which combines the approaches of Senators Gorton and DeConcini. Specter's bill, like DeConcini's, provides limited antitrust immunity to sports leagues.²²⁷ In contrast to DeConcini's proposal, however, to avoid antitrust liability under Specter's bill a league must follow certain objective standards in deciding whether the franchise may relocate.²²⁸ Specter's bill, like Gorton's, provides cities with a cause of action to prevent the relocation of a franchise when a league's decision fails to comply with the set criteria.²²⁹ Under Specter's proposal, a league would have the power to decide on a team's proposed relocation based on standards provided by Congress, and a league's decision would be subject to judicial review.

Finally, Senators Thomas Eagleton and John Danforth, both of Missouri, have proposed a bill²³⁰ which largely resembles Senator Specter's. The Eagleton/Danforth bill implicitly exempts league decisions from antitrust scrutiny if the league abides by specifically enumerated relocation rules.²³¹ This bill would give the league slightly more freedom in voting upon a relocation request than it would have under Specter's bill. While Specter's proposal requires the league to adhere strictly to set criteria, the Eagleton/Danforth bill merely suggests the procedures and criteria the league should apply in assessing proposed relocations. The Eagleton/Danforth bill then provides for judicial review of the league's decision.²³²

224. Lazaroff, *supra* note 219, at 220.

225. *See id.* "More than once the Supreme Court has invited Congress to alter antitrust principles legislatively when the Court's attempts to preserve consistency and certainty have yielded arguably undesirable results. In some cases, Congress has responded by creating exemptions to certain industries . . ." *Id.* at 216-17 (footnotes omitted). Professor Lazaroff provides numerous examples of cases in which Congress has created limited antitrust exemptions for certain industries. *See id.* at 217 n.381 (and cases cited therein).

226. S. 172, 99th Cong., 1st Sess., 131 CONG. REC. S282, S285 (daily ed. Jan. 3, 1985). For an analogous legislative proposal, see S. 282, 97th Cong., 2d Sess. (1982).

227. S. 171, 99th Cong., 1st Sess., 131 CONG. REC. S285 (daily ed. Jan. 3, 1985).

228. Under Specter's proposal, a league could only permit a team to relocate if one or more of the following criteria were met: (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; (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; (3) the team either has incurred losses for the three immediately preceding years or has suffered losses over a shorter term that "endanger the continued profitability of the team." *Id.*

229. *Id.*

230. S. 259, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985).

231. *Professional Sports Community Protection Act*, *supra* note 15, at 14-16.

232. *Id.* at 16-18.

The theory behind both the Specter and Eagleton/Danforth proposals is to refrain from granting the sports leagues a complete antitrust exemption. Instead, the bills provide reasonable criteria to govern the league's relocation decisions, and judicial review to ensure that the criteria are adequately considered.

Based on the three propositions for judging a legislative response to franchise relocation,²³³ Senator DeConcini's approach best confronts the sports franchise relocation problem. Senator Gorton's bill overreacts to the problem of relocation. First, contrary to the federal government's history of allowing sports leagues the freedom to govern themselves, Gorton's bill would create unnecessary government interference.²³⁴ Although professional sports leagues have problems that require government interference,²³⁵ the control of sports franchise location is best handled by the sports leagues themselves. Government interference would only produce more litigation, expense, and delay.

Gorton also overreacts in view of the strong evidence that sports leagues have acted responsibly concerning team relocation.²³⁶ Generally, the leagues' interests have matched the public's interests. Because franchise stability is essential to a successful professional sports league, league decisions concerning potential relocations will usually favor keeping the home team at home.²³⁷

While Gorton's bill needlessly injects the federal government into league policy,²³⁸ DeConcini's approach removes governmental interference from professional sports without distorting antitrust law.²³⁹ Federal

233. See *supra* text accompanying notes 209-12.

234. See *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

235. For example, much of the litigation involving professional sports leagues has involved labor disputes. See, e.g., *id.* Other litigation has involved antitrust challenges from competing sports leagues. See, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

236. *Professional Sports Community Protection Act*, *supra* note 15, at 64-65 (statement of Pete Rozelle). For arguments challenging professional sports league protection of fan and local interests, see *Professional Sports Antitrust Immunity Hearings*, *supra* note 19, at 390 (statement of Donald M. Fehr, General Counsel, Major League Baseball Players Association).

237. Roberts, *supra* note 223, at 298-99.

238. But see Note, *Taking a Sports Franchise*, *supra* note 11, at 592-96; and Lazaroff, *supra* note 219, at 216-20, which favor the Gorton approach for reasons similar to Gorton's own defense of the proposal.

239. Baseball has long held a sweeping exemption from federal antitrust law. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 536 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978). Despite baseball's antitrust immunity, the league has experienced a large amount of franchise movement over the years; from the Brooklyn Dodgers and New York Giants moving to the west coast to the Seattle Pilots becoming the Milwaukee Brewers. Still, baseball's experience with antitrust immunity indicates that a narrow exemption for sports leagues would not prove disastrous. This Comment suggests that federal legislation should supercede decisions granting baseball a broad antitrust immunity, and treat all major sports leagues

judges should not make decisions properly reserved for the collective judgment of the sports franchise owners. As Senator DeConcini argued, "[i]nstead of trying to formulate a Government solution to sports problems, we should step back and let the businessmen involved solve them. Instead of Government regulating sports, we should create a legal climate in which sports can regulate itself."²⁴⁰ Moreover, DeConcini's proposed antitrust exemption is hardly unfair to the franchise property owners. A franchise owner voluntarily agrees to abide by the league by-laws, which generally include franchise relocation restrictions as one of the terms of franchise ownership.²⁴¹ Holding an owner to that agreement does not seem unfair.

While allowing leagues to control team location virtually unchecked, DeConcini's scheme would still protect cities such as Oakland and Baltimore from unnecessary team movement. Admittedly, the league's interests will not always coincide with a city's interests, but cities will not be at the mercy of league decisions. A city will retain various means to keep its team from relocating.²⁴² Federal law need not provide a city with other means to keep a team tied to an area when the team and the league both favor relocation. Furthermore, public opinion and the media will influence any actions taken by the NFL or the other professional sports leagues.²⁴³

The DeConcini bill would also achieve uniformity and avoid protracted litigation. League decisions would be final and unreviewable. Each of the other proposals, on the other hand, provides for judicial review of league decisions, which could lead to extensive litigation and conflicting results.²⁴⁴ Judicial review would take the teeth out of the

in the same fashion. A bill proposed in 1979 would have repealed baseball's immunity. See H.R. 2129, 96th Cong., 1st Sess., 125 CONG. REC. H2520-21 (daily ed. Feb. 13, 1979).

240. 131 CONG. REC. S682 (daily ed. Jan. 24, 1985) (statement of Sen. DeConcini).

241. NFL CONST. & BY-LAWS art. IV, § 4.3 (1982), provides:

No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the league.

Prior to the current rule, the NFL had required a unanimous vote. After the Ninth Circuit declared the provision invalid, NFL Commissioner Pete Rozelle established criteria to govern the vote on relocation. See *Professional Sports Community Protection Act*, *supra* note 15, at 69-71 (statement of Pete Rozelle).

The other professional sports leagues have rules similar to the NFL's. See Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League*, 15 CONN. L. REV. 183, 184 n.4 (1983) (National Hockey League requires unanimous vote, while National Basketball Association requires three-quarters vote).

242. Johnson, *supra* note 15, at 526-27 (recommending tactics a city may use in negotiating with sports franchises).

243. *Professional Sports Antitrust Immunity Hearings*, *supra* note 17, at 65 (statement of Pete Rozelle).

244. The Raiders succeeded in removing their antitrust trial against the NFL to federal court in Los Angeles where lawyers for the Raiders made blatant appeals to the jury's regional pride and

antitrust exemptions proposed in the Specter and Eagleton/Danforth bills. Furthermore, the NFL has already adopted what it believes to be proper criteria for judging a proposed team relocation.²⁴⁵ Subjecting the NFL's decision to review under different criteria would create confusion and undue delay. By second-guessing league decisions, the courts would become involved in analyzing economic and social policy choices better left to the collective body of franchise owners.

Both the Specter and Eagleton/Danforth proposals fall short because they attempt to compromise between complete antitrust exemption and government oversight of a league's relocation decisions. By compromising, both bills weaken the advantages of the Gorton and DeConcini approaches without contributing any productive innovations. Both bills allow severe government intrusion into private business, yet fail to provide the flexibility or guidance of Gorton's criteria.²⁴⁶

An express and carefully tailored antitrust exemption for sports leagues would best stabilize professional sports. While leagues may abuse this exemption at the expense of certain cities, the alternative proposals raise many more problems. Subjecting leagues to strict antitrust scrutiny is likely to create further chaos. Government intervention and review of league relocation decisions could aggravate league instability, as well as produce delay, expense, and inhibit league competition. While Senator DeConcini's bill would not resolve all sports franchise relocation problems, it would deliver these problems into the hands of the sports leagues.

B. State Statutes

A federal antitrust exemption would protect cities against the threat of losing their home teams. However, the problem of restraining a local

economic self-interest. L.A. Daily J., Mar. 1, 1982, at 4, col. 1. The Colts' attempt to get into an Indiana federal court was denied by the Seventh Circuit Court of Appeals. See *supra* note 14.

245. See Janofsky, *N.F.L. In New Policy*, N.Y. Times, Dec. 30, 1984, § 5, at 6, col. 1. The new NFL rule might survive antitrust scrutiny under the rule of reason. The Ninth Circuit, in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1397 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984), suggested that "[a]n express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised." (citation omitted). Professor Kurlantzick argues that the NFL's three-quarters approval rule violates antitrust laws due to the absence of explicit criteria to assure that the decision would not be arbitrary. Kurlantzick, *supra* note 241, at 205-07. He recommends guidelines which would include objective criteria and would be administered by an independent entity and suggests that such an approval rule might survive antitrust scrutiny. *Id.* at 207.

246. See *supra* note 215. Specter's bill, for example, only provides profitability-based factors for analyzing a requested relocation, while Gorton's bill recognizes important social and other noneconomic factors which a league should also consider. See *supra* note 228. The Eagleton/Danforth bill, meanwhile, includes 12 criteria which would provide little guidance to a league's relocation decision. See *supra* note 231.

government from abusing its eminent domain power would remain unaffected by such legislation. The best means of limiting a local government's power of eminent domain to prevent such abuse lies not in the courts or in Congress, but in state legislatures.

One commentator has suggested that federal law should include an express preemption provision that would prevent the improper exercise of eminent domain by either a state or a city.²⁴⁷ Such a provision would prevent a community from instituting an eminent domain action after it had failed to prevent a team from relocating under federal law.²⁴⁸ However, the wisdom of such a provision is highly suspect. Eminent domain is an inherent attribute of state sovereignty.²⁴⁹ Except for the "public use" and "just compensation" requirements, the fifth and fourteenth amendments of the United States Constitution do not limit a state's or city's power of eminent domain. Recognizing the potential for abuse, however, several states, including California and Maryland, have established their own extensive legislative schemes to regulate the exercise of eminent domain in the state.²⁵⁰

The federal government should not interfere with these state legislative schemes for several reasons. First, with a statutory antitrust exemption for sports leagues in place, the leagues themselves should adequately restrict unwarranted relocations.²⁵¹ It is unlikely that a city would find an action under the state's eminent domain laws necessary or welcome. Oakland, for example, had no practical alternative but to commence condemnation proceedings.²⁵² The expense and time of litigation, as well as the massive just compensation requirement,²⁵³ will tend to discourage other cities from following in its path.

Second, even if a state or city did decide to acquire a franchise, each state's legislative scheme should govern its own eminent domain actions. Eminent domain is a uniquely local concern which properly reflects the diversity of state policies towards private property. In many states the laws could be more conservative than in states such as Maryland or California.²⁵⁴ For instance, a state might not allow the taking of intangible property.²⁵⁵ Another state might enact statutes that specifically

247. See Note, *Taking a Sports Franchise*, *supra* note 11, at 595-96.

248. *Id.* at 595 n.256.

249. See *supra* text accompanying note 22.

250. See *supra* notes 14 & 192.

251. See *supra* Part VI, Section A.

252. See *Professional Sports Antitrust Immunity Hearings*, *supra* note 17, at 365 (statement of Lionel Wilson, Mayor, Oakland, California).

253. See *supra* note 82.

254. See Note, *Taking a Sports Franchise*, *supra* note 11, at 562-63; see generally 26 AM. JUR. 2D *Eminent Domain* §§ 73-101 (1966).

255. Prior to the 1975 revisions of its eminent domain laws, California would not have permitted the taking of intangible property. See *supra* note 28.

define the uses for which a city may take property by eminent domain.²⁵⁶ The federal government's imposition of uniform regulation on eminent domain would unnecessarily interfere with state decisions and policies concerning private property.

Both California and Maryland have proposed legislation to deal with the sports franchise relocation litigation. A quick sketch of each state's proposals demonstrates the states' opposite reactions to the potential threat to private property of a city's eminent domain power, and emphasizes the importance of leaving restraints on eminent domain power to the states.

Faced with the prospect of losing the Baltimore Colts, both houses of the Maryland legislature introduced bills to amend the Charter of Baltimore City to empower the city to take sports franchises under the power of eminent domain.²⁵⁷ The Maryland legislature promptly enacted an emergency ordinance,²⁵⁸ which the governor signed into law. The speed with which the legislature acted revealed the strong support for the bill as well as the importance of the Colts to the city of Baltimore and the state of Maryland.

California has also addressed eminent domain concerns through legislation. Before 1975, California's eminent domain laws listed the specific types of property subject to eminent domain, and enumerated the public purposes to which the property could be put. In 1975, California substantially revised its laws.²⁵⁹ The revisions granted cities broad eminent domain power to acquire both "real and personal property" for public use.²⁶⁰ A California appellate court interpreted the statutory grant as "intended to provide the broadest possible definition of property and to

256. Prior to the 1975 revisions of its eminent domain laws, California specifically listed the permissible uses of property taken by eminent domain. *See supra* note 28.

257. H. Delegates Emergency Bill 1716, Md. Leg., 1984 Sess. (1984); S. Emergency Bill 1042, Md. Leg., 1984 Sess. (1984).

258. Emergency Ordinance No. 32, ch. 6, 1984 Md. Laws 18. The ordinance empowers Baltimore,

[t]o acquire by purchase or condemnation any professional sports franchise which has or had the territorial rights to represent Baltimore City on or after January 1, 1983, including, without limitation, (1) the franchise right to compete in an organized league or association; (2) the business entity owning or operating such franchise; (3) all contractual rights owned by the business entity which are necessary, incident, and appropriate to ownership and operation of such franchise; (4) all interests in and rights to real property owned by the business entity which are necessary, incident, and appropriate to ownership and operation of such franchise; and (5) any and all other property rights; wheresoever the same may be located in the state of Maryland, whether tangible, intangible, real, personal, or mixed owned by the business entity, or to which the business entity has a claim, which are necessary, incident to and appropriate to the operation of a professional sports franchise in Baltimore City; and to sell or otherwise dispose of such franchise and collateral rights, in whole or in part, subject to such restrictions and reservations as may be necessary or appropriate.

259. *See supra* note 192.

260. *See* CAL. CIV. PROC. CODE § 1235.170 (West 1982).

include any type of right, title or interest in property that may be required for public use."²⁶¹

With the advent of the Raiders litigation, several California legislators have proposed that sports franchises and other ongoing businesses be exempted from public condemnation. The proposals have taken several different forms. Senator Campbell proposed a bill in 1983 which expressly excluded professional sports franchises from the statutory definition of "property" under California eminent domain law.²⁶² Campbell's bill also provided that acquisition of a professional sports franchise was not a "public use."²⁶³

Senator Montoya proposed a similar bill in 1984.²⁶⁴ Montoya's proposal, however, was thoughtfully amended to produce a more comprehensive and practical approach for protecting against a city's potential abuse of its eminent domain power. The first amended version would have prevented cities, counties or other local agencies from acquiring a "going business or its assets . . . by eminent domain in order to . . . continue the business in operation . . . [or] to prevent the movement of the business from the general area."²⁶⁵ Instead of altering the definition of property, this proposal excluded the taking of a going business under particular circumstances.

The Montoya bill, while more limited than Campbell's, still appeared troublesome and thus was amended. In its final version,²⁶⁶ the bill specifically set forth which types of privately owned businesses were to be excluded from public condemnation. These included "an amusement park, cable television company, hospital, marina, professional sports franchise, taxicab company, or theater." A 1984-85 bill, also proposed by Senator Montoya, largely resembles this version.²⁶⁷

This Comment does not attempt to criticize or analyze either California's or Maryland's eminent domain laws. This cursory review of the two states' responses merely indicates that legislatures have acted and that judicial intervention is not needed. In Maryland, the state authorized Baltimore's taking of the Colts. As long as the two basic constitutional requirements of "public use" and "just compensation" are satisfied, courts should not strike down attempts to acquire a sports franchise through condemnation. In California, the legislature declined

261. *Baldwin Park Redevelopment Agency v. Irving*, 156 Cal. App. 3d 428, 435, 202 Cal. Rptr. 742, 796 (1984) (quoting Cal. Law Revision Comm'n Comment Notes accompanying CAL. CIV. PROC. CODE § 1235.170 (West 1982)).

262. S. 564, Cal. Leg., 1983-84 Sess. (1983).

263. *Id.*

264. S. 1585, Cal. Leg., 1983-84 Sess. (1984).

265. S. 1585, Cal. Leg., 1983-84 Sess. (1984) (amended Mar. 29, 1984).

266. S. 1585, Cal. Leg., 1983-84 Sess. (1984) (amended May 2, 1984).

267. S. 717, Cal. Leg., 1985-86 Sess. (1985).

to enact any of the proposals, perhaps suggesting that it might not believe that Oakland's attempted taking of the Raiders posed a sufficient threat to personal property interests to justify legislative action.²⁶⁸ In addition, the state legislative responses indicate that federal government preemption of state eminent domain law would be unwise. A state should have the ability to expand the eminent domain power of its subdivisions to the limits imposed by the United States Constitution.

CONCLUSION

The Oakland Raiders and Baltimore Colts litigation has presented courts and commentators with a unique legal challenge. Generally, the taking of an ongoing business has been viewed with suspicion. Courts and commentators have scrambled to find a legal theory with which to strike down the attempted taking of a sports franchise. This Comment argues that none of the suggested legal doctrines should prevent a city from acquiring a sports franchise by eminent domain. First, such a taking satisfies the broad definition of "public use." Second, municipal eminent domain action should be free from commerce clause and right to travel review. Finally, federal antitrust laws do not apply to municipal action undertaken in furtherance of state policy. This Comment suggests that using any of these principles to invalidate a city's taking avoids the real problem concerning franchise relocation, which arises from the application of antitrust law to professional sports leagues.²⁶⁹

The solution to the franchise relocation problem lies not in developing creative legal theories, but in federal and state legislation. Granting professional sports leagues a narrow antitrust exemption will free the leagues "to pursue traditional policies of franchise stability."²⁷⁰ Meanwhile, each state will have the opportunity to react to the potential abuses that result from a municipality's virtually unchecked eminent domain power. Such legislation would both protect cities from unwar-

268. The difference in the two states' legislative reactions may be attributable to the political climate in each state. Since the Colts were the only football team in Maryland, the legislature acted promptly and virtually without opposition. The Raiders, on the other hand, moved from northern to southern California. The result has been a north-south split which may have hampered the passage of legislation proposed by southern legislators.

269. See *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S. Ct. 397 (1984).

270. *Professional Sports Antitrust Immunity Hearings*, supra note 17, at 64 (statement of Pete Rozelle).

ranted franchise relocation and avoid judicial manipulation of established legal doctrine.

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