July 2015

Preventing Franchise Flight: Could Cleveland Have Kept the Browns by Exercising its Eminent Domain Power?

Steven R. Hobson II

Preventing Franchise Flight: Could Cleveland Have Kept the Browns by Exercising its Eminent Domain Power?

I. Introduction

The sports fans of Northeast Ohio experienced the ultimate high and low point in sports enthusiasm during one week in the Fall of 1995. On Saturday evening, October 28th, 1995, Cleveland sports-fans enjoyed the thrill of watching their beloved Cleveland Indians play in Game Six of the 1995 World Series. It was the Indians' first trip to the World Series in over forty years, and the fans were simply in love with the city and its team.1 However, by the middle of the following weekend,2 the euphoria felt by the fans and the City of Cleveland would come to an abrupt, and seemingly impossible, halt.3 On Monday, November 6, 1995, Arthur B. Modell, the owner of the Cleveland Browns professional football team, stood alongside Governor Parris N. Glendening of Maryland, during a press conference in Baltimore, and announced the relocation of the Cleveland Browns to Baltimore.4

Shortly after the announcement from Baltimore, the City of Cleveland commenced a serious campaign against Modell and the National Football League ("NFL") to keep the Browns in Cleveland. Although the negotiations eventually led to a settlement agreement between Cleveland and the NFL,5 many questions surrounding the problem of sports franchise relocation problem still remain unanswered. For example, although Cleveland has apparently found a solution to the problem, the issue remains as to how many more communities will have to go through the same struggle that Cleveland faced before a final solution was reached.6 Also, because the agreement between Cleveland and the NFL only promises that a team will be located in Cleveland by 1999,7 there is no guarantee that this "new" team will be created through league expansion.8 Ironically, Cleveland may find itself in the awkward position of receiving its "new" team from another, unwilling city which simply may not be able to meet the demands of its current team owner.9 For these reasons, the issues surrounding the relocation of the Browns warrant further discussion.

The Browns leaving Cleveland is by no means a unique situation in today's world of professional sports.10 Yet despite the impact that franchise relocation has on a city,11 no professional sports league or politician has been able to provide stability to the cities and fans, who appear subject to the whims and demands of the team owners.12 Although cities have tried to find creative ways to keep these teams from jumping from place to place,13 it would appear the only way for this sort of stability to enter into professional sports is through congressional legislation.14

One method that is occasionally advanced to provide this desired stability is the power of eminent domain.15 It has been argued that because a sports franchise is actually nothing

more than one form of property, it should be subject to a taking through the power of eminent domain by the "home" town, or state.16 If these takings were upheld by the courts, it would appear on the surface that the power of eminent domain would be a simple legal solution to the relocation puzzle in professional sports.

The purpose of this Comment is to analyze whether Ohio law would allow for such a taking, and to determine if such action would have solved the problem of keeping the Browns in Cleveland. In analyzing this issue and focusing on the difficulties that such a taking would create, it will be demonstrated that this taking probably cannot be achieved successfully, and that some congressional intervention is needed to rectify the franchise relocation problem.

II. Eminent Domain

The power of eminent domain is the inherent power of every sovereign government to take private property for its own use.17 Eminent domain is recognized in both the United States Constitution18 and the Ohio Constitution.19 The only limitations placed on a government exercising this power is that the owner is entitled to procedural due process,20 which means the property is to be taken for a "public use,"21 and the owner is entitled to "just compensation."22 Because these limitations are generally interpreted very loosely, eminent domain is arguably one of the most intrusive powers held by a government.23 Furthermore, the power of eminent domain can be delegated by any state to a sub-unit of the state, such as a municipalities, counties, and townships.24

In examining the power of eminent domain, the first question that arises is how to construe such a seemingly limitless power. A debate has emerged as to whether this power should be construed liberally, so that the public purpose can always be carried out,25 or whether the power should be viewed restrictively to counter the vast potential for governmental abuse.26 However, a uniform answer is difficult to reach because there is no agreed upon definition of what constitutes "public use" and "just compensation."27 As these restrictions often have varying meanings, each of these limitations will be individually examined to determine what affect they will have on the initial inquiry of whether the State of Ohio, or the City of Cleveland, could theoretically have taken the Cleveland Browns through an exercise of the eminent domain power.

A. Public Use

The first restriction on the power of eminent domain is that the property must be taken for a public use.28 Just as the debate surrounding the full power of eminent domain centers around whether to interpret the power broadly or strictly, there are also two divergent ideologies about how to interpret the public use limitation.29 One line of reasoning advocates construing the restriction narrowly, defining public use as an "actual use by the public entity or by the general public."30 The more widely accepted method, however, is to define the limitation broadly to include public benefits and advantages as public uses and to not require direct participation by a great majority of the public.31 This method of broad interpretation has been adopted by the courts of Ohio.32

The rationale behind supporting a broad definition of public use is twofold. First, because the power is an inherent power of the state,33 which the federal and state constitutions merely recognize rather than attempt to grant,34 it would appear by its very nature that the state should be able to wield the power with few restrictions.35 Secondly, because public use has been defined broadly by many courts,36 and specifically by the United States Supreme Court,37 it would only seem logical that every state would want its government to have as much power as it may need to carry out its goals and objectives. In light of several cases giving deference to the legislature's determination of public use, it is accurate to say that the public use limitation is really no limitation at all.38

In *Breman v. Parker*,39 a parcel of commercial real estate in Washington D.C. had been condemned by a local statute, which provided for the redevelopment of substandard housing in run-down areas.40 The owner argued that his property was being taken wrongly for a non-public use because the District of Columbia planned to re-convey the property to a private owner who would use the land for commercial purposes.41 The United States Supreme Court, however, held that such a use of the eminent domain power did not violate the Fifth Amendment of the Constitution.42 The unanimous Court stated that Congress had discretion to determine whether the taking was for a public use.43 Here the Court adopted an extremely broad view of the public use requirement, implying that even a mere aesthetic purpose may constitute a public use.44

The Supreme Court recently revisited the issue in *Hawaii Housing Authority v. Midkiff.*45 Here, the dispute revolved around the Hawaii Land Reform Act of 1967, which allowed for persons renting homes in development tracts of five or more acres to condemn their landlord's interest and acquire their own fee simple interest in the land.46 Although the Court justified its decision on the fact that a great majority of Hawaiian land was owned by a small group of private individuals,47 the Court reaffirmed the *Breman* Court's decision in recognizing a legislature's power to declare the public use.48

Two other state court decisions that have made a great impact in broadening the public use definition in eminent domain proceedings are *Poletown Neighborhood Council v. City of Detroit,*49 and *City of Oakland v. Oakland Raiders.*50 In *Poletown,* the General Motors Corporation ("GM") informed the City of Detroit that it planned to relocate many of its Detroit-based manufacturing plants if the City could not provide new plant sites for the corporation.51 In response to GM's intentions, the City of Detroit planned to condemn a 465-acre tract of land so that it could sell it to GM on very favorable terms.52 Several residents whose shops, homes, and churches were located in the area to be condemned formed the Poletown Neighborhood Council and challenged the taking via the public use limitation.53 The Michigan Supreme Court upheld the condemnation proceedings by finding the taking to be a legitimate public use, based on the proposed benefits that it preserved jobs and tax revenues, and helped prevent the social deterioration that accompanies industrial shutdown.54

In *City of Oakland v. Oakland Raiders,*55 an eminent domain action was brought against the Oakland Raiders professional football team.56 The Raiders had been playing in the

Oakland-Alameda County Coliseum pursuant to a lease agreement that was entered into in 1966.57 When the Raiders failed to exercise a renewal option on the lease for the upcoming 1980 season, and announced their intentions of moving to Los Angeles, the City of Oakland commenced an eminent domain proceeding against all the rights associated with the professional football franchise.58 Although the California Supreme Court did not decide whether such a taking met the public use requirement, the court held that it was possible for the City to demonstrate that there was a public use in taking the football team.59 The court reached this conclusion by first recognizing that the public use limitation had been defined in a variety of ways,60 then by pointing to other decisions that expressly recognize recreational purposes as legitimate areas of public interest for condemnation proceedings.61

All of these cases point to the conclusion that the public use requirement is broadly interpreted, with the courts giving much deference to legislative decisions regarding these matters. As stated before, Ohio is no exception to the majority rule of broad interpretation62 and legislative discretion.63 Furthermore, as discussed in *City of Oakland*, Ohio also recognizes that recreation is a legitimate goal in meeting the public use requirement in eminent domain.64 Thus, it appears that the taking of the Cleveland Browns professional organization would have met the public use limitation of eminent domain. If the Ohio legislature had decided to use the power of eminent domain to take the Cleveland Browns football organization, the public use limitation could have easily been met by an express declaration of what public purpose the taking would serve. As long as it was demonstrated that some public purpose was being carried out, such as maintaining jobs or the other economic benefits the team brings to Cleveland,65 the eminent domain proceeding would not fail for lack of public purpose.66 Regarding whether the City of Cleveland, itself, could meet the public use limitation and use the power of eminent domain against the Cleveland Browns organization, further discussion is required.

Absent any express legislation by the Ohio legislature giving the City of Cleveland the power to take the Browns through eminent domain, the City could have only succeeded in such a taking by relying on its own authority, recognized by the Ohio Constitution.67 The Ohio Constitution, however, has been interpreted as granting the power of eminent domain to municipalities through the clause that gives municipal corporations "all powers of . . . self government."68 This grant includes the right to exercise the power of eminent domain for the purpose of parks and recreation centers.69 Therefore, the City of Cleveland should have been able to use its own power of eminent domain to take the Browns, and through an expressed recreational purpose,70 the City would have been able to meet the public use requirement of such a proceeding.

B. Just Compensation

Although it has been demonstrated that a taking of the Cleveland Browns by the State of Ohio or the City of Cleveland could meet the public use requirement of the state's eminent domain power, the just compensation issue must also be discussed. Both the federal71 and state72 constitutions require that just compensation be provided to any

individual whose property is taken through the power of eminent domain in order for the taking to be legal.73 Therefore, it must be noted that, despite any legitimate purpose that can be used to rationalize a taking of the Browns football organization, the current owners of the organization must be justly compensated to validate the proceedings.

It is generally agreed that the standard measure for just compensation is the "fair market value" of the taken property.74 However, problems tend to surface in determining the fair market value of certain property, depending on the type of property being taken.75 The United States Supreme Court recently addressed the problems associated with making this determination in *United States v. 564.54 Acres of Land.*76 In this case involving the taking of certain land owned by a non-profit organization, a unanimous Court stated that the goal of the Fifth Amendment's Just Compensation Clause is to "put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.'"77 The Court determined that this value would be the fair market value of the property.78 By accepting this standard as the appropriate measure of compensation, the Court rejected a method of determination that would have been more sensitive to the property's value to the private owner or the government taker.79

This objective market value is not only accepted by the federal courts, but it is generally the measure of compensation required by the courts of Ohio as well.80 Specifically, Ohio defines the fair market value as the price that would be agreed upon at a voluntary sale by a willing buyer and willing seller.81 Ohio also focuses on an objective standard and rejects a subjective value placed on the property, such as the willingness or non-willingness to part with the property,82 or any sentimental value placed on the property by the owner.83 Finally, it should be noted that according to the Ohio Constitution, the determination of what is just compensation is left to a jury.84 With these specifics in mind, we can re-focus on our inquiry regarding the prospect of an eminent domain taking of the Cleveland Browns.

Because the nature of the just compensation aspect of an eminent domain proceeding is more of a precondition to the validity of the act, rather than a serious limitation to the power, this element would have presented no legal obstacle to a taking of the Browns organization by the State or City.85 The feasibility of such a taking would simply come down to whether it would have made good economic sense for either government to spend the amount of money that it would have taken to "purchase" the organization. The price would have been determined by what was objectively found to be the fair market value of the Cleveland Browns professional football team franchise.86 It is the position of this Comment that such a taking could have been justified in a number of ways. First, if the value of the team's presence, in terms of jobs and other revenue, was worth more to the City and State than the cost of just compensation, the money would have been well spent. Secondly, if the City spent the money to take the team, only to operate it for as long as it took to find local buyers, much or all of the money used to compensate the old owners could have been recovered in the resale to the new owners.

Having determined that a theoretical taking of the Cleveland Browns by the City of Cleveland or the State of Ohio would not have violated the public use requirement of

eminent domain, and that the just compensation element could have been met by paying the fair market value of the team to the current owners, it seems our initial inquiry is resolved. However, there are two other areas of concern that require discussion before it can be said that there were no insurmountable roadblocks to such a taking. First, the nature of the property must be examined to determine whether such property is the proper subject of an eminent domain proceeding. Secondly, we must examine whether such property is located within the jurisdiction of the State of Ohio or City of Cleveland to render it available for an eminent domain taking.

C. Property Subject to Eminent Domain Proceedings

Whether the Cleveland Browns football organization could have been the proper subject of an eminent domain proceeding depends on whether the power applies to both tangible and intangible property.87 Because an effective taking of the organization would have included not only the physical possessions owned by the team, but also all of the teams contractual rights, such as players' contracts and the right to participate in the National Football League ("NFL"), such action could only have succeeded if the power of eminent domain applies to intangible property, as well as the tangible property of the franchise.

As a general proposition, the power of eminent domain applies equally to both tangible and intangible property.88 In
*West River Bridge Co. v. Dix,*89 the United States Supreme Court addressed this particular issue.90 The case arose when the State of Vermont attempted to condemn a toll bridge built over the West River for the purpose of creating a better road.91 The problem was that forty-four years earlier, the Vermont legislature had given the bridge company an exclusive right to build and control the bridge for the next one hundred years.92 Although the bridge company argued that its franchise rights were not real property and therefore not subject to eminent domain, the Court disregarded the argument and held that there was no distinction between intangible and tangible property rights in eminent domain proceedings.93 This rule of law was reaffirmed some one hundred years later by the Court in *Kimball Laundry Co. v. United States.*94

The Supreme Court of California also tackled this very issue in a case that is strikingly similar to the issue under examination in this Comment. In *City of Oakland v. Oakland Raiders,*95 the California Supreme Court was called on to determine whether the City of Oakland could use the power of eminent domain to take the Oakland Raiders professional football franchise and all the intangible rights associated with the team under the law of California.96 Just as the possibility of the Brown's relocation to Baltimore faced Cleveland in 1995-96, the City of Oakland was faced with the same situation in 1980, when the Raiders announced their intention to relocate to Los Angeles.97 In addressing the issue of whether it was proper to bring an eminent domain proceeding against a professional football team and all the intangible rights associated with such an organization, the court held that a football team could be the proper subject of an eminent domain proceeding.98 Although the court did not decide the merits of the case before it, the court did decide that the eminent domain proceedings by the City were not precluded by the laws of California.99 This case is important because of the strong correlation

between the facts facing the California court, the facts at the center of our discussion, and the decision that directly addressed the issue that is the subject of this Comment. It is this decision that would directly support the proposition that there are no constitutional limitations that would render a professional football team beyond the power of a taking by eminent domain.100

These decisions indicate that the power of eminent domain will not be defeated by the nature of the property that is the subject of the condemnation proceedings. This rule is also recognized in Ohio, where intangible property has been held the proper subject of eminent domain proceedings.101 For example, the Ohio Supreme Court has defined property broadly stating that it is "any valuable interest which can be enjoyed as property and recognized as such."102 Because the Ohio Constitution does not limit the type of property that can be taken through the power of eminent domain, it would seem that the Cleveland Browns football organization could have been the proper subject of an eminent domain proceeding under both the state and federal constitutions.103

D. Jurisdiction

Therefore, the only remaining question is whether the tangible and intangible property that makes up the football organization is located within the jurisdiction of the City or State, so as to subject it to the power of these entities to bring such an action.104 By its very nature, the power of one state to condemn property through an exercise of eminent domain is exclusive of the power of another state being able to condemn the same property.105 Otherwise, conflicting judgments would certainly create numerous problems as to who has the superior power and ability to take certain property. Because this discussion centers on the use of the eminent domain power on certain intangible property, which by definition has no physical substance or form,106 it is important to review the rules of location for intangible property to determine whether the Browns organization was subject to the eminent domain jurisdiction within the State of Ohio.

Although it has been said that "no clear guidelines exist to provide rules for the exercise of eminent domain over intangibles,"107 a few rules have been advanced, either directly on point108 or by close comparison,109 which provide some guidance in making such a determination. One such case in this area is *Mayor and City Council of Baltimore v. Baltimore Football Club Inc.*,110 which is factually very similar to our case.

In *Mayor and City Council of Baltimore,* the court was faced with determining a number of issues associated with the power of eminent domain, and the jurisdiction over the intangible property of a professional football organization.111 The case centered on the attempts of the City of Baltimore to take the Baltimore Colts football team after the team decided to relocate to Indianapolis, Indiana.112 On February 1, 1984, Robert Irsay, the infamous owner of the Colts, began to consider moving his team to Indianapolis after his attempts to reach a new leasing agreement with Memorial Stadium in Baltimore failed.113 When Maryland officials learned of the possible relocation, the state legislature introduced a bill that would give Baltimore the authority to seize the Colts' organization through the power of eminent domain.114 On March 28, 1984, Irsay found

out about the legislation authorizing the City to condemn his team, and immediately decided to accept the deal with Indianapolis and move his team out of Baltimore.115 During the night of March 28th, the team's physical possessions were loaded onto Mayflower moving vans, and by the morning of March 29, the equipment was headed for Indianapolis.116 These facts are important because the legislation authorizing the Baltimore eminent domain action was not officially enacted until March 30, 1984.117 Quickly thereafter, the battle commenced as to when the City had the power to condemn the Colts and whether the Colts' organization was within the State's jurisdiction at the time the City had the power to bring such a proceeding.118

The court began its inquiry by determining that, as a general rule, the proper time for determining the location, or *situs*,
of the intangible property was at the time compensation was made to the owner for the property, and not at the time when the condemnation proceedings began.119 Next, the court reviewed a number of standards used for determining whether the *situs* of the property was within the state's jurisdiction so as to render it subject to taking. The court rejected using a "minimum contacts" test because of the exclusive nature of eminent domain jurisdiction, which is completely ignored under a minimum contacts analysis.120 Instead, the court looked to two other sources for reaching a determination of the issue before it.

First, the court looked at factors recited in *City of Oakland v. Oakland Raiders*,121 in order to determine the *situs* of a professional football organization.122 These factors included the "principal place of business" of the team, the "designated NFL-authorized site for the team's 'home games,'" and the "primary locale of the team's tangible personalty."123 In applying these factors to the case before it, the court found it extremely important that on March 30, 1984, most all of the Colts' physical possessions were out of Maryland and the team was no longer conducting any business from within the state.124 The court also pointed to the fact that on March 2, 1984, the NFL, although aware of the possible move by the Colts to Indianapolis, officially decided not to get involved with trying to stop the move.125 For these reasons, the court felt that under the guidelines listed in *City of Oakland*, the Colts were beyond the jurisdiction of Maryland on March 30, 1984.126

The court did not stop its analysis with the application of the above mentioned factors, but went on to analyze the situation under the rules applied to escheat intangible property.127 Because of the similarity between escheat proceedings and condemnation proceedings, the court felt it was appropriate to review the guidelines produced by the U.S. Supreme Court for determining the *situs* of intangible property in escheat proceedings.128 First, the district court recognized the exclusive nature of escheat proceedings and analogized it to the situation in condemnation proceedings.129 Then the court focused on the bright-line test created by the Supreme Court, which states that "the power to escheat intangible property could be exercised only by the state of the owner's last known address."130 The court concluded that the analogy between escheat and eminent domain proceedings was only beneficial in recognizing the exclusivity of the proceedings.131 However, the analogy lost its usefulness before the Supreme Court's

bright line test for determining *situs* could be used because here, unlike escheat proceedings, the owner's location could be determined at all times.132 Therefore, it was primarily the factors cited by the *City of Oakland* court, which the court used to reach the conclusion that the Colts' franchise was beyond the jurisdiction of Maryland, even at the commencement of the eminent domain action on March 30, 1984.133

Although other tests have been advocated for determining the *situs* of intangible property for the purpose of eminent domain,134 it appears the factors used by both the California court and the Maryland district court, are the most appropriate advanced thus far, and upon which this Comment will analyze the Browns situation.135 First, regarding the principal place of business for the organization, Cleveland was the NFL designated home of the Browns since 1950136 and the team's headquarters were located in Cleveland.137 Moreover, all of the team's physical possessions, such as training equipment and other belongings, were kept and located at the Brown's new training facility in Berea, Ohio.138 Because these factors would be used to determine the *situs* of the team for purposes of eminent domain jurisdiction,139 it appears that the Browns would have been well within the jurisdiction of the State of Ohio, provided that the State or City acted before the team physically left the jurisdiction.140

E. Summary

The power of eminent domain is a broad and sweeping power that is subject to few limitations.141 The power is expressly limited by the ability of the government taker to show that the taking has been conducted for a public purpose, and that just compensation has been made to the private owner.142 While the public purpose limitation has been interpreted loosely by the courts, who often defer to the judgment of the legislature for the purpose of the taking,143 the just compensation requirement can be met when the government actor pays whatever value the property is determined to be worth.144 Since neither of these limitations would have seemed to bar a proposed taking of the Cleveland Browns' football team, the only other real limit on the power of such a taking would have been based on a challenge to the jurisdiction of the State over the intangible property at issue.145 However, despite the seemingly unstoppable ability of a government to take such property as a professional football team, the inquiry does not end with a discussion of the limits of the eminent domain power. Other considerations are lingering in the background that need to be addressed before the feasibility of such a plan can truly be evaluated.146

III. The Commerce Clause

The Constitution of the United States grants Congress the power to regulate commerce among the states.147 Because Congress was given the power to maintain a uniform economy throughout the nation, the Commerce Clause has been interpreted to mean that state interference with interstate commerce can be restricted expressly or by implication.148 First, Congress can expressly set regulations in an area of interstate commerce, whereas no state can enact legislation that conflicts with the federal law.149 Furthermore, if a state law conflicts with a federal law,150 or if a federal regulation "so

thoroughly occupies a legislative field" that there can be no doubt that Congress alone means to control that area,151 any state law will be pre-empted by the federal law.152 Finally, the courts have interpreted the Constitution as implying that individual states cannot enact legislation that burdens interstate commerce, even when there is no specific federal legislation in a specific area.153 This is know as the "dormant commerce clause" theory.154

Through the dormant commerce clause, the United States Supreme Court has found that any state legislation which has economic protectionism as its goal to be invalid *per se*.155 However, when the state has a legitimate goal behind such protectionism and the legislation only incidentally burdens interstate commerce, the Court has formulated a balancing test to determine the constitutionality of the legislation.156 In *Pike v. Bruce Church, Inc.,*157 the Court stated that "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."158 Therefore, a state may be able to enact legislation that does in fact affect interstate commerce in certain circumstances without violating the Commerce Clause of the U.S. Constitution. However, such legislation will only be upheld if the state can demonstrate it has a legitimate purpose for its actions, and if it is determined that the burden on interstate commerce does not outweigh the local benefit to be realized.159

The evenhanded balancing test was used to analyze Oakland's attempt to take the Raiders through eminent domain.160 In *City of Oakland v. Oakland Raiders,*161 a California court was called on to determine whether such an action would violate the Commerce Clause.162 The court eventually determined that the benefits which the City would derive from the taking did not outweigh the burden that it would place on interstate commerce.163 This conclusion was reached through an examination of the unique nature of the National Football League.164 Relying on the decision reached in *Partee v. San Diego Chargers Football Co.,*165 the court concluded that the NFL's need for "national uniform regulation" outweighed the burden that such a taking would have on interstate commerce.166

In making this determination, the court examined several important factors about the NFL to support the conclusion that the attempt to take the Raiders would substantially interfere with interstate commerce. First, the court relied on the findings of the *Partee* court to determine that the NFL was a nationwide entity.167 Then the court pointed out several findings of its own, such as the dependency of each NFL team on the income of every other team,168 the sharing of revenue generated by television contracts and ticket receipts between the teams,169 and the other important interests that each team owner has in every other team in the league.170 These factors demonstrated that any state regulation on a particular franchise would, in effect, burden the entire nationwide league. They also showed that "a single precedent of eminent domain acquisition [c]ould pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation."171 The court ended by balancing the major impact such a use of eminent domain would have on

interstate commerce against the "less [than] compelling" reasons that the city had presented to support the taking.172

It seems that a straight-forward analysis of the issue under the eminent domain power, may not completely answer the question of whether the Browns' organization could have been taken through a use of eminent domain by the City of Cleveland or State of Ohio.173 As demonstrated in *City of Oakland v. Oakland Raiders*,174 an attempt to seize an NFL franchise would invoke Commerce Clause considerations.175 Because the dormant commerce clause restricts the ability of a state to take any action that affects interstate commerce,176 an attempt to take the Browns through the power of eminent domain must be judged according to the guidelines of the evenhanded balancing test.177 For such an action to be upheld, it must be demonstrated that the local benefit of such a taking would outweigh the burden placed on interstate commerce.178 Although it would appear from *City of Oakland* that the burden on interstate commerce is clearly excessive and the local benefit is only trivial,179 it has been argued that the court focused on too many of the wrong factors to provide a fair analysis of the issues in that case.180

For example, although the California court determined that the NFL was composed of a nationwide league structure that required nationwide regulation, a federal court held in *Los Angeles Memorial Coliseum Commission v. National Football League*181 that the NFL was not a "single entity" for federal antitrust purposes.182 Also, there seems to be significant problems with using the national uniformity analysis to protect an owner of an NFL franchise when relocation is involved.183 First, relocation by an individual owner does not necessarily coincide with the NFL goal of economic and league stability.184 The individual owner's goal in relocating is often to increase the amount of revenue he does not have to share with the rest of the league.185 This is often in conflict with the prosperity of the league, especially when an owner moves away from a city that has financially supported and became very loyal to a specific team.186 Second, this rationale seems to create a paradox where the individual owner is relocating against the express wishes of the rest of the league.187 This is demonstrated in the situation involving the Raiders, where their owner sued the rest of the league when they voted not to approve the relocation move.188

For the reasons stated above, it appears the application of the evenhanded balancing test may lead to a variety of results when applied to the situation presented to Cleveland in the Fall of 1995.189 It may initially appear that any use of the eminent domain power to condemn the Browns' professional football organization would have been an impermissible burden on interstate commerce.190 However, it has been demonstrated that it may be possible, although less certain, to argue that the local benefit does substantially outweigh the burden on interstate commerce,191 especially in this situation in which the
NFL has been so enthusiastically supported by a city.192 Ultimately however, it is the position of this Comment that any actual analysis of this situation would probably be decided in favor of allowing the move. Because other jurisdictions have held that such a use of the eminent domain power violates the dormant commerce clause,193 Ohio courts would also want to see that the provisions of the Commerce Clause are not violated.194

IV. Congressional Response

Because the problem of sports franchise relocation is facing many cities across our nation today, this Comment has focused on the situation which faced the people of Cleveland, Ohio in an attempt to make a determination as to whether the problem can be remedied through the sovereign power of eminent domain. Because it has been demonstrated that such use of the eminent domain power would probably prove to be unsuccessful,195 this Comment advocates congressional legislation to address this situation. In looking at the problems associated with attempting to reach a non-legislative solution, it appears even stronger that congressional legislation is necessary to combat this ever growing phenomena.

In the absence of congressional legislation, it appears that the two entities most likely to be able to solve this problem are either the cities who enter into these leasing agreements,196 or the leagues themselves, which one would hope to have some amount of control over the individual team owners.197 However, the problem in assuming that either of these entities can solve the situation is that neither assumption takes into account the factual realities of today's big business sports world. First, regarding a city's bargaining power in negotiating with an entity such as an NFL franchise, it would only seem natural to assume that the city should protect itself in the event that the team wants to relocate.198 This assumption is based on the erroneous belief that the city and the franchise have equal bargaining power.199 In reality, this assertion is far from the truth, due to the fact that the demand for team franchises completely out number the limited number of teams that belong to professional sport leagues.200 This creates a situation where teams are able to use offers from other cities to extract the most favorable terms out of whichever city with which they are negotiating a lease.201 Cities are forced to spend millions in order to build and improve stadiums so they can compete with one another for the few teams that move or enter the league as new franchises.202 Currently, this lack of product supply works a great disadvantage against the cities, who have nothing else to offer except what can be spent from public funds.203

Today's second misperception is the belief that the NFL can solve this problem internally.204 Although the league does have mechanisms in place to control team relocation, these provisions were found to be illegal.205 In *Los Angeles Memorial Coliseum Commissioner*, a federal court held that Article IV, Rule 4.3 of the NFL Constitution, which provided that an owner needed approval from 3/4 of the other team owners before he could relocate, violated federal antitrust laws.206 This decision virtually rendered useless any power the league has in solving this problem itself.207 Although the NFL still has rules regarding relocation restrictions, the rules seem unenforceable, and the threat of another law suit appears to keep the other owners from even trying to block such a move.208

It is for the reasons stated above that this Comment advocates federal legislation to solve this problem. Such legislation could prove successful in a number of ways. For example, Congress could give communities more power by allowing them to have some influence on league decision's regarding team relocation.209 Because Congress, and not the states,

has the power to govern this unique aspect of interstate commerce, it is Congress that is best able to deal with the situation in this manner.210 Also, congressional legislation can be effective by simply providing more antitrust exemptions to professional sports, and particularly the NFL, to give the leagues some power to deal with this situation as they see fit.211 The real difficulty, however, is finding legislation that would be responsive to the situation, but not so overly burdensome that the management of the NFL would be taken out of the individual owners' "hands" who have built the league to be what it is today.

Several pieces of legislation have been introduced in the past to address the relocation problem, particularly in the mid-1980s when there seemed to be a flurry of professional sports team relocations.212 None of the legislation introduced ever became law, because there was no consensus as to the goals of the legislation or the amount of government regulation that should be involved.213 For example, the Professional Football Stabilization Act of 1985214 would not have allowed a team that resided in a stadium for more than six years to move unless one party materially breached a provision of the lease, the stadium was "inadequate for the purposes of profitabl[e] operation," or the team had suffered losses for three straight years.215 On the other hand, the Professional Sports Community Act of 1985216 provided for a limited antitrust exemption for certain professional sports leagues to allow the leagues to enforce their own relocation guidelines if they complied with an objective twelve factor list of considerations in making the relocation determination.217 Yet another bill, The Sports Team Community Protection Act,218 called for a very comprehensive system of regulation for all the major sports, including the creation of a Professional Sports Franchise Arbitration Board to oversee the relocation decisions made by the different leagues' management systems.219

These examples illustrate that numerous attempts have been made in the past to solve the relocation problem, but for one reason or another, all have failed.220 However, because this has proven to be a problem that will not resolve itself, Congress has once again began to explore the possibility of enacting federal legislation to address this matter.221 For sev
eral reasons, Congress should adopt the Fans Rights Act of 1995, which was introduced in the Senate on November 30, 1995222

First, the bill advocates a workable solution for the relocation problem in professional sports, while trying to take into account all of the interests of the affected parties. The bill would "provid[e] sports leagues with a very narrow, limited exemption to antitrust laws if the league has voted to block a move."223 This provision would give the leagues the control needed to handle the problem themselves without the fear of being sued by their own members for antitrust law violations, and without government exhibiting too much control over league operations.224

Secondly, the bill would "require that teams give communities at least 6 months' notice before a relocation can occur."225 This provision does not restrict the teams from getting the benefits of better deals that they may be able to find in the open market, but it does

give the current "home" cities of these teams some leverage in that they have the ability to decide whether they want to make a counter-proposal or let the team go.226

Finally, the bill includes a "fair play clause," which restricts the leagues from collecting relocation fees from cities before they even make an objective vote as to whether it would be in the leagues' best interests for a certain team to move from one city to another.227 Currently, it is this ability that allows the leagues and teams to have such a distinct economic advantage over the cities that must compete with one another to be considered a team's "home."228 This legislation would take away this unfair advantage between the two competing interests.229

It appears that congressional legislation is the most appropriate source for dealing with the sports franchise relocation problem.230 Because the Fans Rights Act of 1995 seems to do an effective job of balancing the competing interests involved with the situation, its appears this bill provides the most workable solution to deal with this situation. The bill would not only give the cities increased power in the league decisions that have such tremendous impacts on them, but it would also give the leagues themselves the power to deal with the problems, without calling for substantial government involvement.231

V. Conclusion

The sports relocation problem remains prevalent in today's society. This Comment has explored the possibility of the City of Cleveland or the State of Ohio using the power of eminent domain to prevent the Cleveland Browns franchise from moving to Baltimore. Although it appears, in looking purely at the eminent domain power, that such a 'taking' could be achieved successfully, such an action would probably fail because of the dormant commerce clause considerations.

Because the eminent domain power cannot be used to solve the relocation problem, federal legislation is needed to intervene. Currently, the cities are being taken advantage of because of the lack of bargaining power they have in the process, and the leagues themselves are powerless to solve the problem because of the antitrust restrictions against preventing such business moves. For these reasons, the Fans' Rights Act of 1995 should be adopted to resolve this situation, because it currently provides the best opportunity for the individual actors to reach fair and workable solutions to address the relocation problem.

Steven R. Hobson II

1. The Cleveland Indians lost to the Atlanta Braves in Game Six of the 1995 World Series. Nevertheless, an enthusiastic crowd of over 50,000 fans turned out for a city-organized rally on Public Square on Monday, October 30, 1995 to show their support and appreciation for the effort put forth by the team during the 1995 season. Brian E. Albrecht & Michael O'Malley, *City Pours Out Its Love For Tribe,* The Plain Dealer (Cleveland), Oct. 31, 1995, at A1.

2. On Saturday, Nov. 4, 1995, television news-stations in Cleveland began to interrupt their regularly scheduled programming with the late-breaking story that there were strong rumors coming out of Baltimore, Maryland that the Cleveland Browns had negotiated a deal to relocate to Baltimore at some unspecified time in the future. *Eight is News* (FOX television broadcast, Nov. 4, 1995).

3. The Cleveland Browns owner, Art Modell, had previously made several statements to assure the City of Cleveland that the Browns would continue to play in Cleveland Municipal Stadium through the remainder of their lease, which did not expire until the end of the 1998 football season. *From Modell's Mouth*, The Plain Dealer (Cleveland), Nov. 7, 1995, at D7 (". . . You can't have clubs jumping for the big bucks and deserting a marketplace at a whim.") ("I'm not making any demands on the city. Under my lease, I pay the city $2 million a year. And I'm not threatening to move the franchise.") ("`I love Cleveland. I want to stay in Cleveland.' on not making threats to move the Browns to another city if his wishes were not fulfilled.").

4. Tom Feran & Roger Brown, *A Graceless Gov. Glendening Drops Browns Bomb at Infamous Gathering*, The Plain Dealer (Cleveland), Nov. 7, 1995, at 5A.

5. A tentative settlement was reached by Cleveland Mayor Michael White and the NFL at an owners' meeting in Chicago on February 9, 1996. David Adams, *White Drives A Hard Bargain; Cleveland Mayor Gambles in Talks with the NFL, but Leaves the Table with Some Valuable Chips*, Akron Beacon J., Feb. 11, 1996, at A1. The agreement contained the following terms: Cleveland will get an NFL team by 1999; Cleveland gets to keep the Browns name and colors; Cleveland dropped all lawsuits against Modell; Cleveland will build a new stadium by 1999; Modell agreed to pay $12 million in damages to the City; and, the NFL will loan the City up to $48 million to build the new stadium, which the future owner will have to repay. *Id.*

This deal was approved by the Cleveland City Council on March 8, 1996. Stephen Koff & Robert J. Vickers, *Council Approves Deal for Stadium*, The Plain Dealer (Cleveland), Mar. 9, 1996, at A1.

6. The Houston Oilers' franchise also announced early in the 1995 football season that they would be relocating to Nashville, Tennessee, provided certain conditions are met by that city regarding the stadium into which the Oilers would move. John Williams, *We Didn't Have a Ball in Year of 'Great Divide'/Political Hardball Became Houston's Most Brutal Game*, Houston Chron., Dec. 31, 1995, at 1 (detailing a look back on the negotiations and problems between Houston's politicians and its three sports franchises,

the Oilers, Rockets (basketball), and Astros (baseball)). Also, the Seattle Seahawks recently announced their plans to move out of Seattle so they can begin playing in Los Angeles by the start of the 1996 season. Jarrett Bell, *Seahawks Set to Fly South,* USA Today, Feb. 2, 1996, at C1.

Likewise, the 1995 pro-football season began with two teams that had relocated to new cities in the previous off-season. John Thomas, *Finally, Football! St. Louis Lands Rams; Now Its in the Fan's Hands,* St. Louis Post Dispatch, Jan. 18, 1995, at 1A (announcing the move of the Rams from Anaheim, California to St. Louis, Missouri); Bill Plaschke & Steve Springer, *Raider's Move to Oakland All but a Done Deal*, L.A. Times, June 23, 1995, at 1 (explaining the storied past of the Raiders move from Oakland to Los Angeles and back to Oakland again).

Furthermore, the talk of relocation has surrounded numerous other professional football franchises during the 1995 season. For example, the City of Cincinnati was informed early in the season that the Bengals would be relocating if the voters did not approve a 1/2% sales tax needed to generate funds so that two new stadiums could be built for both the Bengals and the Reds. *See* Barry M. Hortsman, *Stadium Battle Sharpens: Browns' Move Sends 'Signal,'* Cincinnati Post, Nov. 7, 1995, at A1 (explaining that the team would be moved if the tax referendum was not passed by the voters). Fortunately for Cincinnati, the tax referendum received an overwhelming 61% approval during the vote. Barry M. Hortsman, *Opponents Turned Tax into Winner,* Cincinnati Post, Mar. 20, 1996, at 8A. For other examples of relocation rumors that surrounded teams during the 1995 season, see Sue Ellen Christian & Robert Becker, *Hoosier Heavies Hunt Bear; All-Pro Connections Bolster Stadium Group*, Chi. Trib., Nov. 25, 1995, at 1 (explaining the plans of owner Michael McCaskey to move the Chicago Bears to Gary, Indiana); *Official: 'Door Is Not Shut' on Cardinal Move to L.A.,* Arizona Daily Star, June 23, 1995, at 4C (quoting Bud Bidwell, owner of the Phoenix Cardinals); Jeff Testerman, *Tampa Bay and State: Tampa Today; A Squeeze Play on NFL's Head Honcho,* St. Petersburg, Fla. Times, Dec. 13, 1995, at 4B (addressing the rumors that the Tampa Bay Buccaneers would be moving to Cleveland, OH).

7. Adams, *supra* note 5, at A1.

8. *Id. See also* Bart Hubbuch, *Bigger Is Not Better; Rooney Against NFL Expanding to Cleveland*, Akron Beacon J., Mar. 13, 1996, at C1 (Pittsburg Steeler owner, Dan Rooney, stated that he believes the league is likely to place an existing team in Cleveland in 1999, rather than create an expansion team to fill the spot because there are already too many teams in the league that are experiencing stadium and financial problems where they currently exist).

9. *See supra* note 6 and accompanying text.

10. *Id.*

11. S. Rep. No. 592, 98th Cong., 2d Sess. 2 (1984). *See also* Slade Gorton, *Professional Sports Franchise Relocation, Introductory Views from the Hill,* 9 Seton Hall Leg. J. 1, 1 (1985) ("[P]rofessional sports teams are important community assets economically and psychologically. Cities with sport teams are considered 'major league,' not an unimportant characterization in attracting business and trade.").

12. *See* John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues, and Congress*, 5 Marq. Sports L.J. 83 (1994) (discussing the effects of team relocation); Pamela Edwards, Note, *How Much Does that $8.00 Yankee Ticket Really Cost? An Analysis of Local Governments' Expenditure of Public Funds to Maintain, Improve or Acquire an Athletic Stadium for the Use of Professional Sports Teams*, 18 Fordham Urb. L.J. 695, 703-704 (1991) (giving examples of the amount of public funds spent in recent years to attract and keep teams that have threatened to move).

13. Indianapolis Colts v. Mayor and City Council of Baltimore, 741 F.2d 954 (7th Cir. 1984), *cert. denied*, 407 U.S. 1052 (1985) (Baltimore also tried to keep the Colts from playing in Indianapolis through the power of eminent domain); City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422 (1981), *vacated and remanded*, 646 P.2d 835 (1982) (City of Oakland attempted to use the power of eminent domain to condemn the Oakland Raiders' football team so they could manage the team and keep it playing in Oakland-Alameda County Coliseum).

Many leagues themselves have rules that require individual team owners to get league approval before they relocate to a new city, but it is argued that these restrictions are also illegal. Daniel E. Lazaroff, *The Antitrust Implications of the Franchise Relocation Restrictions in Professional Sports*, 53 Fordham L. Rev. 157, 210-11 (1984); Daniel S. York, *The Professional Sports Community Protection Act: Congress' Best Response to Raiders?*, 38 Hastings L.J. 345, 351-54 (1987) (explaining that many leagues are afraid to try to enforce their own rules against relocation after the Oakland Raiders case).

14. York, *supra* note 13, at 373 (arguing that federal legislation is necessary to resolve the relocation problem).

15. *See* Jonathan Neal Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. Balt. L. Rev. 542, 551-54 (1988) (showing that the current trend is to allow condemnation for virtually any reason); Stephen C. Stewart, Note, *California Eminent Domain Statute Allows the Taking of Any Type of Property Interests*City of Oakland v. Oakland Raiders, 6 Whittier L. Rev. 135, 149 (1984) (stating that the practice of condemning any property is well founded). *But see* Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocating Business*, 96 Yale L.J. 1343, 1343 (1987) (stating that "[n]either the payment of just compensation nor any inherent attribute of the taking power can insulate these condemnations from the commerce clause"); Steven M. Crafton, Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 Emory L.J. 857, 898 (1983) (arguing that the expansive view of "public use" is too broad).

16. *See supra* note 15.

17. Cooper v. Williams, 4 Ohio 253, 287 (Ohio 1831), *aff'd*, 5 Ohio 391 (1832) (the power of eminent domain is an inherent power); 1 Nichols on Eminent Domain, § 1.11, at 1-7
(3d ed. 1981); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 560 (1972) ("Neither the United States Constitution nor, as far as is known, any state constitution contains any express grant of this authority. That explains why the courts have spoken of an `inherent power.'").

18. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

19. Ohio Const. art. 1, § 19.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation in money shall be made to the owner, in money, and in all other cases, where private property shall be taken for private use, a compensation therefore shall first be made in money, or first secured by deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Id.

20. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

21. U.S. Const. amend. V (". . . private property taken for a public use"); City of East Cleveland v. Nau, 179 N.E. 187, 188-189 (Ohio 1931); Cincinnati v. Louisville & N.R. Co., 102 N.E. 951, 953-54 (Ohio 1913); Dayton v. Bauman, 64 N.E. 433, 433-34 (Ohio 1902). *See also* Ohio Const. art. I, § 19 ("Private property shall ever be held inviolate, but subservient to the public welfare").

22. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 239 (1897) ("[S]ince the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and without such compensation the appropriation of private property to public uses . . . would violate the provisions of the Federal Constitution." (quoting Scott v. City of Toledo, 36 F. 385, 396 (C.C.N.D. Ohio 1888))); Ohio Const. art. I, § 19 ("a compensation therefor shall first be made in money, or first secured by a deposit of money").

23. *See infra* notes 28-38 and accompanying text.

24. *See* Nash v. Clark, 75 P. 371 (Utah 1904), *aff'd,* 198 U.S. 361 (1905); 38 O. Jur. 3d, *Eminent Domain* § 15 (state departments, commissions, boards, authorities, and officers), § 16 (counties), § 17 (townships), § 18 (districts, local commissions, boards, and authorities), § 19 (municipal corporations), and § 20 (private and public corporations) (1982).

25 *See* Crafton, *supra* note 15, at 859-60 ("One could argue that the term 'public use' imposes no limitation on the use of the eminent domain power of a state."). *See also* Scott R. Carpenter, Note, City of Oakland v. Oakland Raiders: *Defining the Parameters of Limitless Power,* 1983 Utah L. Rev. 397, 399 (1983) ("To facilitate the taking of property when it is for the public good, the concept should be broadly construed.").

26. *See* City of Oakland v. Oakland Raiders, 646 P.2d 835, 838 (Cal. 1982) (stating "society's interest in protecting a private property owner from the potential abuse of eminent domain power dictates a narrower definition of property").

27. *See, e.g.,* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that there is no set formula for determining when private property has been taken for a public use); Miller v. City of Tacoma, 378 P.2d 464, 470 (Wash. 1963); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain,* 58 N.Y.U. L. Rev. 409, 410 (1983) (explaining that the terms 'public use' and 'just compensation' defy precise definition because it is the judicial branch rather than the constitutions that define these terms). *See also infra* notes 28-61 and accompanying text (discussing the definition of 'public use'); notes 71-84 and accompanying text (discussing the definition of 'just compensation').

28. Pontiac Improvement Co. v. Board of Comm'rs, 135 N.E. 635, 638-40 (Ohio 1922); Doan v. Cleveland Short Line Ry. Co., 112 N.E. 505, 506-07 (Ohio 1915).

29. *See Penn. Cent. Transp. Co.,* 438 U.S. at 124 (1978) (the Court passed on a chance to create a definitive test to determine when a taking was executed for a public use); New York City Hous. Auth. v. Muller, 1 N.E.2d 153, 155 (N.Y. 1936). *See also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978).

30. *See* Richard A. Epstien, Takings: Private Property and the Power of Eminent Domain (1985) (arguing for strict limitations on the legislature's power to seize a private individual's property rights); Lisa Tobin-Rubio, Note, *Eminent Domain and the Commerce Clause Defense:* City of Oakland v. Oakland Raiders, 41 U. Miami L. Rev. 1185, 1192-93 (1987).

31. *See* Berman v. Parker*,* 348 U.S. 26 (1954) (an aesthetic purpose is implied by the Court as satisfying the public use requirement); Clark v. Nash*,* 198 U.S. 361, 369-70 (1905) (stating that a condemnation that would benefit even a single person could be a public use); Tobin-Rubio, *supra* note 30, at 1193.

32. Malone v. City of Toledo, 34 Ohio St. 541, 545-46 (1878) (public interest satisfies public use); Sessions v. Crunkilton, 20 Ohio St. 349, 356 (1870) (public convenience constitutes public use); Shaffer v. Starrett, 4 Ohio St. 494, 498-99 (1855) (taking allowed for interest of public health); Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 687 (1853) (allows taking for public safety). *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. Rev. 615, 626-33 (1940) (discussing the majority view of public use in eminent domain).

33. *See supra* note 17.

34. Stoebuck, *supra* note 17, at 560.

35. Nichols, *supra* note 17, § 1.14[1] at 1-21, 1-22 (stating that the government's right to the property is viewed as superior to the individual's right to the property).

36. City of Oakland v. Oakland Raiders, 646 P.2d 835, 841 (Cal. 1982) (public use can concern the entire community and promote a general interest, but it is not essential that a large portion of the community directly benefit from it); Poletown Neighborhood Council v. City of Detroit*,* 304 N.W.2d 455, 459-60 (Mich. 1981) (stating that public use is a public benefit and should be left to the legislature to decide when something is being taken for a public use); Thomas W. Merrill, *The Economics of Public Use,* 72 Cornell L. Rev. 61 (1986); Nichols, *supra* note 32, at 626-33.

37. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984) (upholding a Hawaii land reform statute that allowed private estates to divided for the benefit of non-land owning public); Breman v. Parker, 348 U.S. 26, 33 (1954) (upholding a taking for housing development purposes). *See also* Ruckelshaus v. Monsanto Co.*,* 467 U.S. 986, 1014-16 (1984) (upholding a broad legislative discretion in determining public use).

38. Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 Yale L.J. 599 (1949) (discussing the powerless public use requirement).

39. 348 U.S. 26 (1954).

40. *Id.* at 28-30.

41. *Id.* at 31.

42. *Id.* at 36.

43. *Id.* at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms will-nigh conclusive.").

44. *Id.* at 33.

45. 467 U.S. 229 (1984).

46. Haw. Rev. Stat. § 516-22 (1976).

47. 467 U.S. at 232. The state and federal government owned 49% of all land in Hawaii. Forty-seven percent of the remaining land was owned by 72 private individuals, while 18 of those individuals controlled 40% of this land. *Id.*

48. *Id.* at 239 ("[W]hen the legislature has spoken, the public interest has been determined in terms well-nigh conclusive") (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)). However, the Court did suggest that the legislative decision is not wholly determinative and the courts do have some oversight in the process. *Midkiff*, 467 U.S. at 240 ("[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." (quoting Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1930))).

49. 304 N.W.2d 455 (Mich. 1981).

50. 646 P.2d 835 (Cal. 1982).

51. *Poletown Neighborhood Council*, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).

52. *Id.* at 469 (Ryan, J., dissenting) (although the condemnation proceedings cost Detroit in excess of $200 million, they subsequently re-conveyed the land to GM for only $8 million).

53. *Id.* at 461 (Fitzgerald, J., dissenting).

54. *Id.* at 467 (Ryan, J., dissenting).

55. 646 P.2d 835 (Cal. 1982).

56. *Id.* at 837.

57. *Id.* These rights would include the right to participate as a member of the NFL, the right to operate and manage the team, and the right to players' contracts. *See id.* (describing the rights as a 'network of intangible contractual rights').

58. *Id.*

59. *Id.* at 843 ("[T]he operation of a sports franchise may be an appropriate municipal function. If such valid public use can be demonstrated, the statutes discussed herein afford City the power to acquire by eminent domain any property necessary to accomplish that use.").

60. *Id.* at 839-41 ("[W]hat 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." (quoting Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159-60 (1896))).

61. City of Oakland v. Oakland Raiders, 646 P.2d at 841-43 ("Public 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." (quoting Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923))). The California Supreme Court went on to cite the following decisions in this and other jurisdictions to support the proposition that recreation meets the public use limitation: City of Los Angeles v. Superior Court, 333 P.2d 745, 750 (Cal. 1959) (finding acquisition of baseball field and facilities appropriate); County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 84 (Cal. Ct. App. 1964) (taking of land for purpose of having county fairgrounds was upheld); New Jersey Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 635-36, 641 (N.J. 1971) (New Jersey court upheld a special public entity to build a sports complex, through eminent domain proceedings if necessary); Martin v. City of Philadelphia, 215 A.2d 894, 896 (Pa. 1966) (the Pennsylvania Supreme Court held that a sports stadium is for the public purpose).

62. *See* Kramer v. Cleveland & P. Ry., 5 Ohio St. 140 (Ohio 1855), *rev'g*, 1 Ohio Dec. Reprint 474 (1852) (explaining that the judiciary should only restrain the legislative power of eminent domain when it has abused or perverted its authority). *See also* Pontiac Improvement Co. v. Board of Comm'rs, 135 N.E. 635, 638 (Ohio 1922) (citing Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 308 (1854)).

63. Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 308, 326 (Ohio 1854) (public use should primarily be a legislative decision in eminent domain); Little Miami L. Heat & P. Co. v. White, 5 Ohio N.P. (n.s.) 201, 204 (Ohio Ct. Com. Pl. 1906), *aff'd,* 84 N.E. 1134 (Ohio 1908); State *ex rel.* McElroy v. Baron, 160 N.E.2d 10, 13 (Ohio 1959).

64. Ohio Rev. Code Ann. §§ 715.21 & 755.12 (Page 1995) (granting municipalities the power of eminent domain for the purpose of parks and recreation centers).

65. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). *See also supra* notes 62-64 and accompanying text.

66. *Giesy*, 4 Ohio St. at 326 (legislature's determination should be upheld by courts absent an abuse of authority).

67. Blackman v. City of Cincinnati, 42 N.E.2d 158, 159 (Ohio 1942) (stating a subordinate political division does not have eminent domain power unless it has been granted by the sovereign state); Pifer v. Board of Educ., 159 N.E. 99, 99 (Ohio Ct. App. 1927); Harrison v. Village of Sabina, 1 Ohio C.C. 49, 52 (Ohio Ct. App. 1885).

68. Ohio Const. art. XVIII § 3. *See also* Britt v. Columbus, 309 N.E.2d 412, 415 (Ohio 1974) (holding that the power pertains to matters within the municipality); State *ex rel.*

Bruestle v. Rich, 110 N.E.2d 778, 789 (Ohio 1953); Simmons v. City of Cleveland Heights, 160 N.E.2d 677, 679 (Ohio Ct. Com. Pl. 1959).

69. Ohio Rev. Code Ann. §§ 715.21 & 755.12 (Page 1995).

70. *See, e.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835, 841-43 (Cal. 1982) (discussing the public use limitation being met with recreational purposes); New Jersey Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 635-36, 641 (N.J. 1971); Martin v. City of Philadelphia, 215 A.2d 894, 896 (Pa. 1966).

71. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property without due process of law.").

The just compensation requirement of the Fifth Amendment has been incorporated into the Fourteenth Amendment by the U.S. Supreme Court. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 236 (1897).

72. Ohio Const. art. I, § 19 ("[W]hen private property is taken for public use, a compensation shall be made to the owner in money.").

73. City of Cincinnati v. Louisville & N. R. Co., 223 U.S. 390, 400 (1912), *aff'g,* 92 N.E. 1111 (Ohio 1910); Village of Norwood v. Baker, 172 U.S. 269, 277 (1898); Masheter v. Brewer, 318 N.E.2d 849, 851 (Ohio 1974); 26 Am. Jur. 2d, *Eminent Domain* § 150 (1966); 38 O. Jur. 3d, *Eminent Domain* § 101 (1982).

74. United States v. 564.54 Acres of Land, 441 U.S. 506, 509 (1979); Masheter v. C. H. Hooker Trucking Co., 250 N.E.2d 621, 623 (Ohio Ct. App. 1969); In Re Appropriation of Easements for Highway Purposes, 193 N.E.2d 702, 707 (Ohio Ct. App. 1962) (fair market value is primary factor in determining just compensation). *But see* City of Cleveland v. Langenau Mfg. Co., 128 N.E.2d 130, 131 (Ohio Ct. App. 1954) (fair market value is just one means, and not exclusive criterion, in determining just compensation); Crafton, *supra* note 15, at 889-93 (arguing for a more definitive test for just compensation than standard fair market value).

75. *See* Edwin M. Rams, Valuation for Eminent Domain (1973) (presenting a compiling of the problems involved in determining the fair market value of different types of property subject to condemnation proceedings).

76. 441 U.S. 506 (1979).

77. *Id.* at 510 (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

78. *Id.* at 511-12.

79. *Id.* The Court also recognized that occasionally the fair market value could also be adjusted downward under certain conditions. *Id.* at 512-13 (citing United States v. Cors, 337 U.S. 325 (1949)). The *Cors* case revolved around determining the value for a tug boat confiscated by the United States government for a war related use in 1942. *Cors,* 337 U.S. at 327. Here the market price was inflated at the time due to the short supply of tugs and the high need for them by the government. *Id.* The Court held that higher costs represented by increased demand of tugs by the government, and the short supply of product, would not be calculated into the otherwise objective fair market value. *Id.* at 333.

80. *See, e.g.,* Masheter v. Brewer, 318 N.E.2d 849, 851 (Ohio 1974); *In Re* Appropriation for Highway Purposes, 234 N.E.2d 514, 520 (Ohio Ct. App. 1968); Masheter v. Yake, 224 N.E. 2d 540, 541-42 (Ohio Ct. App. 1967).

81. Masheter v. Ohio Holding Co*.,* 313 N.E.2d 413, 416 (Ohio Ct. App. 1973), *cert. denied,* 419 U.S. 835 (1974) (voluntary sale); Naftzger v. State, 156 N.E. 614, 615 (Ohio Ct. App. 1927) (willing buyer and purchaser); Ohio S. R. Co. v. Snyder, 5 Ohio Dec. 480, 482 (Ohio P. Ct. 1899).

82. Trustees of Cincinnati, Ohio S. R. Co. v. Garrard, 8 Ohio Dec. Reprint 389, 390 (Ohio Ct. Com. Pl. 1882).

83. *Ohio S.R. Co.*, 5 Ohio Dec. at 483.

84. Ohio Const. art. I, § 19 ("and such compensation shall be assessed by a jury").

85. *See supra* notes 71-82 and accompanying text.

86. *See* Masheter v. Brewer*,* 318 N.E.2d 849, 851 (Ohio 1974); United States v. 564.54 Acres of Land, 441 U.S. 506, 511-12 (1979).

As for what that amount might be, it has been stated that the Cleveland Browns organization has an estimated value of $160-$190 million. Greg Brinda, *Sports Talk* (WKNR radio broadcast, Jan. 12, 1995) (AM 1220) (tape on file with author).

87. *See infra* notes 88-99 and accompanying text (explaining that eminent domain applies to both tangible and intangible property equally).

88. *See* Armstrong v. United States*,* 364 U.S. 40 (1960) (materialmen's lien on boats was taking); Kimball Laundry Co. v. United States*,* 338 U.S. 1, 10-11 (1949) (loss of trade routes due to business seizure during wartime); Liggett & Myers Tobacco Co. v. United States*,* 274 U.S. 215, 220 (1927) (value of contract to provide tobacco); Monongahela Navigation Co. v. United States*,* 148 U.S. 312, 319 (1893) (franchise rights); West River Bridge Co. v. Dix, 47 U.S. 507, 534 (1848) (also franchise rights); Porter v. United States*,* 473 F.2d 1329, 1333-35 (5th Cir. 1973) (right to exploit Lee Harvey Oswald items); City of Oakland v. Oakland Raiders, 646 P.2d 835, 840 (Cal. 1982) (holding it

could be proper to condemn a professional football organization); Canyon View Irrigation v. Twin Falls Canal, 619 P.2d 122, 125-26 (Idaho 1980), *cert. denied,* 451 U.S. 912 (1981) (easements); Meredith v. Washoe County Sch. Dist., 435 P.2d 750, 752 (Nev. 1968) (taking was proper for restrictive covenants); Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 622 (1853) (corporate franchise taking). Nichols, *supra* note 17, § 2.1 [2] at 2-8 ("Intangible property, such as choses in action, patent rights, franchises, charters, or any other form of contract, are within the scope of this sovereign authority . . . .").

89. 47 U.S. 507 (1848).

90. *Id.* at 533-34.

91. *Id.* at 530-31.

92. *Id.*

93. *Id.* at 533-34.

A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal . . . and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property . . . . We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property.
. . .

Id.

94. 338 U.S. 1, 11 (1949) ("[T]he intangible acquires a value to a potential purchaser no different from the value of the business' physical property.").

95. 646 P.2d 835 (Cal. 1982).

96. *Id.* at 837.

97. *Id.*

98. *Id.* at 843 ("[W]e conclude only that the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function. If such valid public use can be demonstrated, the statutes . . . afford the City the power to acquire by eminent domain any property necessary to accomplish that use.").

99. *Id.*

100. *Id.* at 838 ("No constitutional restriction, federal or state, purports to limit the nature of the property that may be taken.").

101. City of Cincinnati v. Louisville & N. R. Co., 223 U.S. 390, 400 (1912), *aff'g,* 92 N.E. 1111 (Ohio 1910) (contractual rights); Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 622 (1853) (franchise rights); Covington & C. Bridge Co. v. Magruder, 59 N.E. 216, 217 (Ohio 1900) ("[W]hatever property is required for the public use, whether real or personal . . . whether tangible or intangible, may be appropriated. These are settled principles of the law.").

102. Callen v. Columbus Edison Elec. Light Co., 64 N.E. 141, 143 (Ohio 1902).

103. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); West River Bridge Co. v. Dix, 47 U.S. 507 (1848). *See also* City of Cincinnati v. Louisville & N. R. Co., 223 U.S. 390 (1912), *aff'g,* 92 N.E. 1111 (Ohio 1910).

104. Mayor and City Council of Baltimore v. Baltimore Football Club, Inc., 624 F. Supp. 278, 284 (D. Md. 1985); 1 Nichols, *supra* note 17, § 2.12 at 2-32; Ellen Z. Mufson, Note, *Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts,* 60 Ind. L.J. 389, 390 (1985).

105. *Mayor and City Council of Baltimore,* 624 F. Supp. at 284 (citing Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (holding only one state may escheat intangible property)).

106. Intangibles are defined as "[p]roperty that is a 'right' such as a patent, copyright, trademark, etc., or one which is lacking physical existence." Black's Law Dictionary 809 (6th ed. 1990).

107. Mufson, *supra* note 104, at 390.

108. *See Mayor and City Council of Baltimore,* 624 F. Supp. at 289 (stating reasons for the holding that the Colts were not within Baltimore's jurisdiction).

109. *See* Mufson, *supra* note 104, at 395-407 (suggesting rules for determining taxation and laws of escheat should provide guidance for determining jurisdictional limitations over intangible property and eminent domain).

110. 624 F. Supp 278 (D. Md. 1985).

111. *Id.* at 279 (explaining the court had to determine whether the Colts franchise was subject to or outside of the city's power of eminent domain).

112. *Id.*

113. *Id.*

114. *Id.*

115. Mayor and City of Council of Baltimore v. Baltimore Football Club Inc., 624 F. Supp. 278, 280 (D. Md. 1985).

116. *Id.*

117. *Id.*

118. *Id.* at 281.

119. *Id.* at 283 ("The general rule is that until the condemning authority pays compensation, no right to possession is obtained." (citing King v. State Roads Comm'n, 467 A.2d 1032, 1034 (Md. 1983))).

120. *Id.* at 284-85 ("Such a rule would eviscerate the established rule that only one sovereign may properly condemn property, and would lead to the exercise by a foreign state of extraordinary powers over property located in another state.").

121. 646 P. 2d 835 (Cal. 1982).

122 Mayor and City Council of Baltimore v. Baltimore Football Club Inc., 624 F. Supp. 278, 285 (D. Md. 1985).

123. *Id.*

124. *Id.*

125. *Id.* at 285-86. Article 4.3 of the NFL Constitution and By-Laws gives the other owners in the league the right to approve or disapprove the transfer of a team from one city to another. *Id.* at 288. However, the court agreed that "the League's decision to express neither approval nor disapproval of Irsay's possible move constituted a waiver or suspension of Article 4.3." *Id.*

126. *Id.* at 285-86.

127. Mayor and City Council of Baltimore v. Baltimore Football Club Inc., 624 F. Supp. 278, 286-87 (D. Md. 1985).

128. *Id.* at 286 ("In escheat proceedings, the state takes title to property abandoned by its owner; they are in some senses highly analogous to condemnation proceedings.").

129. *Id.* ("In short, the Court was recognizing the exclusive nature of escheatand by analogy, condemnationproceedings." (citing Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 74 (1961))).

130. *Id.* at 287 (citing Texas v. New Jersey, 379 U.S. 674 (1965)). This rule has recently been reaffirmed in *Delaware v. New York,* 507 U.S. 490, 495-96 (1993).

131. *Mayor and City Council of Baltimore,* 624 F. Supp. at 287.

132. *Id.* ("Unlike escheat proceedings, where the location of the owner of property is usually unknown, condemnation proceedings simply require the court to determine where, among two or more possible choices, the property was located on a given date.").

133. *Id.* The court determined that Maryland was not the principal place of business for the Colts on March 30, 1984. *Id.* The court also found the fact that the team's physical possessions and NFL membership were unquestionably in Indianapolis by the 30th to be very persuasive. *Id.* And finally, the court added another factor into the determination and concluded that it was clear from Irsay's intent as the owner that his property was out of Maryland by March 30. *Id.*

134. *See* Mufson, *supra* note 104, at 389. Mufson reviews the rule of adjudication, taxation and escheat to find which rules can provide the fairest determination of the situs of intangible property for eminent domain purposes. *Id.* at 391. Mufson concludes by advocating a rule known as *mobilia sequuntur personam*, which would place the situs of the intangible property at the domicile of the owner. *Id.* at 410-11. She believes that a determination of a corporation's domicile would be based on the same factors used to determine a person's domicile. *Id.* at 408. These factors include physical characteristics of the place, time spent there, mental attitude toward the place, intentions to return to the place, etc. *Id.* at 408-409 (citing Texas v. Florida, 306 U.S. 398 (1939)).

135. This Comment will focus on the guidelines advanced in the two court decisions that have addressed this question as it related to NFL football franchises, rather than any other test, because of the similarity between the facts of those cases and the issue at hand.

136. The Browns began playing in Cleveland as a professional football team in 1946, however, the organization did not join the NFL until 1950. Lou Mio, *The Battle for the Browns*, The Plain Dealer (Cleveland), Jan. 14, 1996, at 1A.

137. The teams headquarters are actually located in Berea, Ohio, which is a suburb of Cleveland, but this city is also within the jurisdiction of the State of Ohio. V. David Sartin, *Berea's Contract Cushions Team Loss*, The Plain Dealer (Cleveland), Nov. 7, 1995, at 7A.

138. *Id.*

139. *See supra* notes 133-35 and accompanying text.

140. *See supra* notes 136-38 and accompanying text.

141. *See supra* notes 17-24 and accompanying text.

142. *See supra* notes 21-22 and accompanying text.

143. *See supra* notes 38-63 and accompanying text.

144. *See supra* notes 72-84 and accompanying text.

145. *See supra* notes 104-40 and accompanying text.

146. *See* City of Oakland v. Oakland Raiders, Ltd., 174 Cal. App. 3d 414 (Cal. Ct. App. 1985), *cert. denied,* 478 U.S. 1007 (1986) (holding that the proposed taking of a NFL team franchise violated the Commerce Clause of the U.S. Constitution). *See also* Los Angeles Memorial Coliseum
Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied sub nom.* National Football League v. Oakland Raiders, Ltd., 469 U.S. 990 (1984) (proposed ban on movement of team found to be in violation of antitrust laws).

147. "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 1 & 3.

148. *See* Lazarus, *supra* note 15, at 1347-48. *See also* James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 Or. L. Rev. 395 (1982); Tobin-Rubio, *supra* note 30, at 1194-95.

149. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (Congressional intent can be "explicitly stated in the statute's language"); Cooley v. Board of Wardens, 53 U.S. 299, 319 (1851) (stating when Congress acts, a state cannot act with the same power).

150. *See* Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983).

151. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982)).

152. *Cipollone*, 505 U.S. at 516.

153. City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978) (striking down a plan to keep out-of-state waste from being brought into New Jersey); H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949) (finding a New York licensing plan for milk unconstitutional).

154. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945) ("[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern, which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."); Lazarus, *supra* note 15, at 1347.

155. *City of Philadelphia,* 437 U.S. at 627; *H. P. Hood & Sons,* 336 U.S. at 532. *See* Earl M. Maltz, *How Much Regulation is Too MuchAn Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 48 (1981); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1209-33 (1986) (explaining that the Court will search for a "protectionist purpose").

156. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (creating a balancing test for the Court to use to determine constitutionality).

157. 397 U.S. 137 (1970).

158. *Id.* at 142.

159. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The Court stated that a three-part test would be used to make the determination. First, a court should determine whether there is a legitimate local interest for the legislation. Second, the court must weigh the burden on interstate commerce against the local benefit. Lastly, the court must determine whether the state has a less restrictive alternative for accomplishing the same result. *Id.*

160. City of Oakland v. Oakland Raiders, Ltd., 174 Cal. App. 3d 414 (Cal. Ct. App. 1985), *cert. denied,* 478 U.S. 1007 (1986). A complete history of this case can be summarized as follows: The City of Oakland brought suit against the Raiders to condemn the team through the power of eminent domain. City of Oakland v. Oakland Raiders, Ltd., 123 Cal. App. 3d 422 (Cal. Ct. App. 1981), *rev'd and remanded,* 646 P.2d 835 (Cal. 1982). The trial court granted summary judgment for the Raiders, and the appellate court affirmed. *Id.* The California Supreme Court reversed this decision, holding that the intangible property associated with a professional football team was not beyond the City's power of eminent domain. City of Oakland v. Oakland Raiders, 646 P.2d 835, 841-42 (Cal. 1982). The Supreme Court remanded the case for a determination to be made as to whether the City could meet the public use limitation of the eminent domain power. *Id.* at 845.

On remand, the trial court again found in favor of the Raiders. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 417 (Cal. Ct. App. 1985), *cert. denied,* 478 U.S. 1007 (1986). The trial court found that such a use of the eminent domain power would violate the Commerce Clause. *Id.* at 421. This decision was eventually affirmed upon appeal. *Id.* at 418.

161. 174 Cal. App. 3d 414 (Cal. Ct. App. 1985), *cert. denied,* 478 U.S. 1007 (1986).

162. *Id.* at 418.

163. *Id.* at 421-22.

164. *Id.* at 420.

165. 668 P.2d 674 (Cal. 1983), *cert. denied*, 466 U.S. 904 (1984). In this case, a former player for the San Diego Chargers professional football team sued the NFL for violating California's antitrust laws. *Id.* at 675. The player's suit was based on the claim that NFL restrictions regarding players' contracts was in violation of these laws. *Id.* The court focused on the issue of whether the state antitrust laws were an unreasonable burden on interstate commerce. *Id.* at 677-78. To decide this case, the court looked at the structure of the NFL and found that the need for nationally uniform regulation outweighed the burden on interstate commerce that the state antitrust laws placed on the NFL. *Id.* 678-79. In reaching this conclusion, the court focused on the "nationwide league structure" of the NFL and compared it to the business structure of Major League Baseball. *Id.* Through this analogy, the court was able to support the proposition that the state antitrust laws overburdened interstate commerce when applied to a professional sports league because it had recently been ruled in *Flood v Kuhn*, 407 U.S. 258 (1972), that state antitrust laws, which supposedly affected baseball, were an unreasonable burden on interstate commerce. *Partee*, 668 P. 2d at 677-79.

166. *City of Oakland*, 174 Cal. App. 3d at 420-22.

167. *Id.* at 420 (citing Partee v. San Diego Chargers Football Co., 668 P. 2d 674 (Cal. 1983).

Professional football's teams are dependent upon the league playing schedule for competitive play. . . . The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise . . . .

Id.

168. *City of Oakland*, 174 Cal. App. 3d at 420.

169. *Id.*

170. *Id.* ("[E]ach league owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner.").

171. *Id.*

172. *Id.* at 421-22.

Plaintiff here does not seek to promote the health or safety of its citizens, or even, . . . promote fair economic competition. Instead it seeks to act for what may be presumed . . . to be legitimate, but less than compelling reasons: to promote public recreation, social

welfare, and to secure related economic benefits, as well as best utilize the stadium in which the Raiders played.

Id.

173. *See supra* notes 147-72 and accompanying text.

174. 174 Cal. App. 3d 414 (Cal. Ct. App. 1985), *cert. denied*, 478 U.S. 1007 (1986).

175. *See id.*; Lazarus, *supra* note 15, at 1347 (stating that the use of eminent domain power to prevent relocation of businesses violates the Constitution); Thomas W. E. Joyce III, Comment, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation*, 13 Fordham Urb. L.J. 553, 579 (1985) (also declaring that the Commerce Clause constitutionally restricts the use of eminent domain to interfere with interstate commerce).

176. *See supra* notes 153-59 and accompanying text.

177. *See City of Oakland*, 174 Cal. App. 3d at 417-18 (finding this to be the appropriate test to use in judging a similar move by Oakland to condemn the Raiders).

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

179. *City of Oakland*, 174 Cal. App. 3d at 421-22 (holding the burden on interstate commerce is not outweighed by the public interest in keeping the Raiders).

180. Tobin-Rubio, *supra* note 30, at 1202-13 (arguing that the court incorrectly relied on the decision in *Partee,* and that a different conclusion could have been reached under a correct analysis of the situation).

181. 726 F.2d 1381 (9th Cir. 1984), *cert. denied sub nom.* National Football League v. Oakland Raiders, Ltd.*,* 496 U.S. 990 (1984).

182. *Id.* at 1388-89. This controversy arose when the other NFL team owners attempted to block the move of Al Davis' Raiders to the Los Angeles Coliseum. *Id.* at 1385. According to Rule 4.3 in Article IV of the NFL Constitution, an owner needed 3/4 of the other 28 team owners to approve of the relocation before he could move his team. *Id.* When the other owners unanimously voted to disallow the move of the Raiders from Oakland to Los Angeles, the L.A. stadium commission and Davis sued the NFL for violating § 1 or the Sherman Act, 15 U.S.C. § 1. *Id*. at 1386. They alleged that this provision of the NFL Constitution amounted to an illegal agreement to restrict trade. *Id.*

The court rejected a claim by the NFL that the league should be treated as a single entity, or partnership, for the purposes of making this determination. *Id.* at 1390. If such a label would have applied to the NFL, the league would have been precluded from being able to violate the statute. *Id.* at 1387. Instead, the court found that the NFL teams were separate

entities which do not share profits or loses, compete with one another for the same players and coaches, and work together to create league policy and rules. *Id.* at 1387-90. In doing so, the court ultimately affirmed the finding that this league restriction on relocation violated federal antitrust laws. *Id.* at 1401.

183. *See* Tobin-Rubio, *supra* note 30, at 1202-13 (arguing that the national uniformity analysis was incorrectly applied to the facts of the *City of Oakland* case).

184. *Id.* at 1203-04. The presence of an NFL team in a city generates a tremendous amount of fan loyalty and economic support to the league. *Id.* It is argued that the short-term benefits of relocation to an individual team do not compare to the long-term detriment that the entire league suffers when this support is lost due to team movement. *Id.* at 1204.

185. *Id.* at 1204.

186. *Id.* At a minimum, the NFL would be indifferent to a situation where an owner moves to increase his own unshared revenues, while his amount of shared revenues stays the same. *Id.* However, the NFL would likely not approve of such a move where the shared revenues are decreased, or if the integrity of the league is damaged for a gain only realized by the individual owner. *Id.*

187. *Id.* at 1205.

188. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1384-85 (9th Cir. 1984), *cert. denied sub nom*. National Football League v. Oakland Raiders, Ltd., 496 U.S. 990 (1984).

189. *See City of Oakland*, 174 Ct. App. 3d at 422 (holding that a city's attempt to take an NFL franchise through eminent domain violated the Commerce Clause); Lazarus, *supra* note 15, at 1343 (arguing that the condemnation of businesses to prevent relocation violates the Constitution). *See also* David Schultz & David Jann, *The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings,* 16 Wm. Mitchell L. Rev. 383, 400-19 (1990) (reviewing a number of decisions that have applied the test to a variety of attempts to stop business plant relocations via eminent domain). *But see* Tubin-Rubio, *supra* note 30, at 1209-13 (reaching a different conclusion than the *City of Oakland* court in balancing the local benefit with the burden on interstate commerce).

190. *See supra* notes 174-79 and accompanying text.

191. *See supra* notes 178-88 and accompanying text.

192. The people of Cleveland have consistently supported the Browns throughout the organizations fifty years of existence. For example, the average attendance for Cleveland

is 70,000 per home game, which ranks among the top teams in the NFL. 141 Cong. Rec. S17,866-01 (Nov. 30, 1995) (statements made by Sen. DeWine).

193. *See* City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414 (Cal. App. Ct. 1985), *cert. denied*, 478 U.S. 1007 (1986).

194. *See* Lazarus, *supra* note 15, at 1346-47 (stating that the eminent domain power must give way to the superior considerations of the Commerce Clause).

195. *See supra* notes 145-94 and accompanying text.

196. *See City of Oakland*, 174 Cal. App. 3d at 420 (implying that there currently is a "balance of economic bargaining" power on stadium leases). *But see infra* notes 198-202 and accompanying text (demonstrating the lack of bargaining power that cities have in the leasing process).

197. This is a natural assumption that arises from the fact that Rule 4.3 of the NFL Constitution requires an owner to receive approval from 3/4 of the other owners before he can move his team out of the city that is currently the teams home. *See also* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1385 n.1 (9th Cir. 1984), *cert. denied sub nom.* National Football League v. Oakland Raiders, Ltd., 469 U.S. 990 (1984) (providing the complete text of the Rule). *But see Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1397 (upholding a jury verdict that this Rule violates the antitrust laws).

198. *See supra* notes 195-96 and accompanying text.

199. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1397 ("The local governments ought to be able to protect their investments through the leases they negotiate with the teams for the use of their stadia."). *But see* Tobin-Rubio, *supra* note 30, at 1208 (pointing out the true nature of the unequal bargaining power that the city has in these negotiations).

200. *See* Gorton, *supra* note 11, at 2 ("Due to the enormous discrepancy between the demand for professional sports teams and the supply, . . . it is extremely difficult for any local officials to make meaningful demand on a team negotiating a lease.").

201. *See* 141 Cong. Rec. S17,866-01 (Nov. 30, 1995) (statements of Sen. Glenn).

202. *See id.* (describing the whole process as a "bidding war").

203. *Id.* ("The new economics of sports is a zero sum game in which teams seem to bounce around the country and taxpayers too often are left holding the bag.").

204. *See infra* notes 204-07 and accompanying text.

205. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1398 (9th Cir. 1984), *cert. denied sub nom*. National Football League v. Oakland Raiders, Ltd., 469 U.S. 990 (1984).

206. *Id.*

207. Paul Tagliabue, the present commissioner of the NFL, has recently stated that a federal exemption likely is necessary to solve the relocation problems facing the National Football League. Paul Tagliabue, *NFL: State of the League Address* (ESPN television broadcast, Jan. 26, 1995) ("I think it is critical that [an exemption is created] by Congress or the courts because, right now, we are operating under antitrust principles that are tearing leagues apart, rather than keeping them together."). *But see* Richard Amaroso, Note, *Controlling Professional Sports Team Relocation: The Oakland Raiders' Antitrust Case and Beyond*, 17 Rutgers L.J. 283, 309 (1986) (stating that leagues would obviously adopt new rules to withstand antitrust attacks); Mark Adam Wesker, *Franchise Flight and the Forgotten Fan: An Analysis of the Application of Antitrust Laws to the Relocation of Professional Football Franchises,* 15 U. Balt. L. Rev. 567, 583-84 (1986) (stating that the revised relocation guidelines that the NFL adopted would survive antitrust scrutiny).

208. Although the NFL did modify its relocation rules in the wake of the *Los Angeles Memorial Coliseum Comm'n* case, Pete Rozell, the commissioner of the NFL at that time, testified before Congress that the league still feared the possibility of being sued if they attempted to block an individual owner's attempts to relocate. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287, Before the Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 66 (1985) (statement of Pete Rozelle).

209. *See infra* notes 224-28 and accompanying text.

210. *See supra* notes 147-54 and accompanying text.

211. *See infra* notes 220-21 and accompanying text.

212. *See, e.g.,* S. 259, 99th Cong., 1st Sess. (1985); S. 287, 99th Cong., 1st Sess. (1985); S. 298, 99th Cong., 1st Sess. (1985); S. 172, 99th Cong., 1st Sess. (1985); H.R. 885, 99th Cong., 1st Sess. (1985); H.R. 510, 99th Cong., 1st Sess. (1985); H.R. 785, 99th Cong. 1st Sess. (1985); H.R. 956, 99th Cong. 1st Sess. (1985).

213. *See* York*, supra* note 13 (reviewing the good aspects, as well as the problems, with much of the relocation related legislation that was introduced by the 99th Congress in 1985).

214. S. 172, 99th Cong., 1st Sess. (1985).

215. *Id.*; 131 Cong. Rec. S285 (daily ed. Jan. 3, 1985) (statements of Sen. Specter).

216. S. 259, 99th Cong., 1st Sess. (1985).

217. S. 259, 99th Cong., 1st Sess. §§ 4(a)(1), 6(b) (1985).

218. S. 287, 99th Cong., 1st Sess. (1985).

219. S. 287, 99th Cong., 1st Sess. § 104(a) (1985).

220. *See* York, *supra* note 13.

221. Gabrielle Williamson, *DeWine, Hoke to Seek Congressional Action*, The Plain Dealer (Cleveland), Nov. 7, 1995, at 5A ("Sen. Mike DeWine said Congress 'should examine whether federal legislation regarding franchise relocation is necessary.'").

222. S. 1439, 104th Cong., 1st Sess. (1995). The actual text of the bill is not in print or available on the electronic databases at this moment because, after having been introduced, it has been passed on to a congressional committee for further discussion. However, an explanation of the bill and what is included within the provisions of the bill is available from the Congressional Record. 141 Cong. Rec. S17,866-01 (1995) (statement of Sen. Glenn). *See infra* notes 222-28 and accompanying text (for a discussion of the individual provisions of the bill). The bill was introduced by Senators John Glenn and Mike DeWine of Ohio and Senator Slade Gorton of Washington.

223. 141 Cong. Rec. S17,866-01 (1995) (statement of Sen. Glenn).

224. *Id.* at S17,866-67.

225. *Id*. at S17,867.

226. *Id.*

227. *Id.*

228. *Id*. at S17,868. "The last time there was a move in the NFL, $46 million, they spread it among the other NFL teams. These are the same owners, same teams that have to judge whether or not it is in the best interest of football and the fans for a team to be able to move." *Id*. (statements of Sen. DeWine).

229. *See supra* notes 224-27 and accompanying text.

230. *See supra* notes 195-207 and accompanying text.

231. *See supra* notes 222-23 and accompanying text.