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Eminent Domain and the Commerce Clause Defense: *City of Oakland v. Oakland Raiders*

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Eminent Domain and the Commerce Clause Defense: *City of Oakland v. Oakland Raiders*

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I. INTRODUCTION

America's romance with professional football suffers every time an off-the-field dispute finds its way into the headlines, especially if the dispute finds its way into a courtroom. Professional football is now big business, generating many millions of dollars for teams, communities, and the National Football League (NFL). Nurtured by fan support and enthusiasm, the football industry has grown into an economic giant with power enough to forsake those responsible for its success. Teams sometimes move in search of greener economic pastures. When they move, they leave in their wake economically battered cities and emotionally disenchanted citizens. A city has a significant but largely unrecognized interest in ensuring a return on money invested to house and support a professional football team and in furthering the public interest in recreation and social welfare. Cities now seek a means to legally protect these economic and welfare interests.

Oakland, California, through its eminent domain power, asserted its right to protect public investment and its citizens' psychological bond with the team by attempting to prevent the Oakland Raiders (Raiders) from relocating to Los Angeles in 1980.¹ This novel exer-

1. *City of Oakland v. Oakland Raiders*, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646 (1981),

cise of the eminent domain power—to condemn an NFL franchise as intangible property—forced the courts to examine the interrelationship between the state's eminent domain power and the federal Constitution's commerce clause. In their attempt to categorize and solve the problems presented by the condemnation of this unique type of property, the California courts entangled themselves in a conceptual and methodological muddle, producing obscure decisions, but perhaps a correct result.

The competing interests involved in professional football are unique to the business of sports. The structure of the NFL can be viewed from two quite distinct perspectives. It may be seen as a single entity that produces a single product, league football (fourteen football games in a given week of the season). It may also be seen as an arrangement bringing together pairs of separate business organizations (teams) whose competition is not only athletic but, potentially at least, economic. These twenty-eight separate entities produce a different product (local football). The interests of these two structurally separate groups—the league (i.e., the teams collectively) and the teams individually—do not always coincide. Rather, they serve to complicate the process of identifying competing interests. The symbolic bond between a team and its community further confuses matters. In its attempt to sort through this confusion, the court held that because the NFL requires nationally uniform regulation, the controlling perspective is the league as an entity. Viewed from this perspective, condemnation of any one football franchise would impermissibly burden interstate commerce.²

This Note first examines the dual structure of the NFL in the context of the court's national uniformity rationale. It then explores the competing economic and cultural interests generated by the nature of NFL national and local professional football in the context of both a balancing test and a local embargo analysis. After concluding that none of these methodologies pose a limitation to the condemnation, this Note finally suggests an ideological rationale behind the court's decision.

II. FACTS AND PROCEDURE

In 1980, after nearly fifteen years in the Oakland-Alameda

rev'd and remanded, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982), *appeal after remand*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 106 S. Ct. 3300 (1986).

2. *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (*Raiders II*), *cert. denied*, 106 S. Ct. 3300 (1986).

County Coliseum,³ the Oakland Raiders management,⁴ dissatisfied with stadium facilities and the local television market, decided to move the team to Los Angeles.⁵ Upon learning of the Raiders' plans, the city of Oakland brought a condemnation action to prevent the move.⁶

The trial court granted the Raiders summary judgment and the appellate court affirmed, holding that businesses and intangibles unconnected to realty were not within the city's statutory condemnation power.⁷ In *City of Oakland v. Oakland Raiders, (Raiders I)*⁸ the Supreme Court of California reversed, holding that California eminent domain law authorized the taking of such intangible property, and concluding that the only limits on the city's power are those imposed by the federal Constitution. The court then explored the issue of recreation as a valid public use, and stated that providing access to spectator sports by acquiring, and even by operating, a sports franchise, may be an appropriate function of city government.⁹

3. In 1966, the Raiders entered into a rental agreement with Oakland-Alameda County Coliseum, Inc., a California nonprofit corporation. The agreement was for a five-year term with five three-year renewal options. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

4. The Raiders football team belongs to a partnership managed by Al Davis. *Id.* at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

5. *Id.* The Raiders were dissatisfied with the capacity and condition of the stadium facilities and a stadium rule prohibiting a football game within 36 hours of any other athletic event. Owner Al Davis admits that his decision to relocate was, at least in part, prompted by a desire for increased unshared revenues. See Wong, *Of Franchise Relocation, Expansion and Competition in Professional Team Sports: The Ultimate Political Football?*, 9 SETON HALL LEGIS. J. 7 (1985); Note, *Anticipating an Instant Replay: City of Oakland v. Oakland Raiders*, 17 U.C. DAVIS L. REV. 963, 967 n.20 (1984). The Raiders moved to the Los Angeles Memorial Coliseum, despite the City of Oakland's willingness to make both concessions and improvements, including the construction of luxury box seats. *Id.* at 967 n.21. The Los Angeles Memorial Coliseum had lost the Los Angeles Rams as a major tenant in 1978 when the Rams moved to Anaheim, California. *Id.* at 967-68.

6. *City of Oakland v. Oakland Raiders*, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646 (1981), *rev'd and remanded*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (*Raiders I*). The NFL team owners voted to disapprove the Raiders' move to Los Angeles. The Los Angeles Memorial Coliseum Commission responded by bringing an antitrust action against the NFL, alleging that the league's constitution and bylaws—which required that 75% of team owners approve a club's move to another city—violated the Sherman Act. 15 U.S.C. § 1 (1982). The court agreed. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1384-85 (9th Cir.), *cert. denied*, 496 U.S. 990 (1984). See *infra* notes 71-77 and accompanying text.

7. *City of Oakland v. Oakland Raiders*, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646 (1981) (construing California's eminent domain statutes and case law).

8. *Raiders I*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673.

9. *Id.* at 71, 646 P.2d at 841, 183 Cal. Rptr. at 680. Several cases holding the construction and maintenance of stadiums to be a valid public use led the court to question whether "the obvious difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility, [is] legally substantial." *Id.* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680. Based on the record before it,

The court remanded the case to give the city the opportunity to prove a valid public use.¹⁰

On remand,¹¹ the trial court again found for the Raiders,¹² holding that the taking would violate the commerce clause.¹³ In its argument, the city sought to utilize the market participant exception to the dormant commerce clause.¹⁴ On appeal, the *Raiders II* court rejected

the court concluded that the difference was *not* legally substantial. *Id.* (emphasis added). For a discussion of the differences between owning a team and owning a stadium, see Note, *Eminent Domain Exercised—Stare Decisis or a Warning: City of Oakland v. Oakland Raiders*, 4 PACE L. REV. 169, 182-84 (1983).

10. *Raiders I*, 32 Cal. 3d at 74, 646 P.2d at 845, 183 Cal. Rptr. at 682. The court stated that "[i]f such valid public use can be demonstrated, the statutes . . . afford City the power to acquire by eminent domain any property necessary to accomplish that use." *Id.* at 71, 646 P.2d at 843, 183 Cal. Rptr. at 681.

The court rejected the Raiders' argument that, should the city condemn the franchise and then transfer it to a private party, the transfer would invalidate an otherwise valid public use. The court stated that a transfer with adequate controls could preserve the public use, but the adequacy of such controls would have to be evaluated in light of a specific retransfer agreement. *Id.* at 72, 646 P.2d at 843-44, 183 Cal. Rptr. at 682.

Commentators have questioned the propriety of a retransfer agreement because a "[t]aking for a direct private use . . . is considered to be implicitly prohibited by the fifth amendment." Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of Public Use and Just Compensation*, 32 EMORY L. J. 857, 859 n.15 (1983). See *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (There is no public use where the use is the same as the original owner's use.). But see *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (Alleviating unemployment and retaining local industry is a valid public purpose; therefore, the city may condemn residential property for retransfer to a private corporation.). California law explicitly allows retransfer. See CAL. CIV. PROC. CODE § 1240.120(b) (West 1982).

Chief Justice Bird, although forced to agree with the *Raiders I* result under the current law, was troubled by the majority's approval of arguably limitless condemnation power without considering the possible consequences of such expansiveness. *Raiders I*, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring in part, dissenting in part). Although the Chief Justice referred to such expansion of eminent domain law as "creeping statism," she felt compelled to call upon the legislature to provide restrictions, because "there is no constitutional or statutory ground for barring the City's action." *Id.* at 79, 646 P.2d at 847, 183 Cal. Rptr. at 685.

11. This was the second remand. Earlier, the appellate court held that the grounds on which the trial court based its decision after remand had been foreclosed by the supreme court's decision in *Raiders I*. The trial court, however, had not reached the critical question of whether the taking would be for a valid public use. Therefore, the appellate court issued a peremptory writ and remanded for a determination of this question without further evidentiary hearings. *City of Oakland v. Superior Court*, 150 Cal. App. 3d 267, 280, 197 Cal. Rptr. 729, 736 (1983).

12. See *Raiders II*, 174 Cal. App. 3d at 417, 220 Cal. Rptr. at 155.

13. *Id.* at 421, 220 Cal. Rptr. at 158.

14. The market participant exception permits a state to take proprietary action that burdens interstate commerce when such action is not taken by the state as a regulator in its sovereign capacity. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (state may choose its customers but may not regulate subsequent actions of a private party, and therefore, regulation requiring private buyers to process timber from state lands within the state held invalid); *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204 (1983)

the market participant argument because the city had not attempted to enter the market as a private purchaser would, but had asserted its governmental power to take the property.¹⁵ The court then affirmed, holding that this taking of intangible property would violate the commerce clause.¹⁶

The *Raiders II* court acknowledged that imposing a burden on interstate commerce that outweighs the benefit to the public violates the commerce clause.¹⁷ The court relied on the arguably inapposite case of *Partee v. San Diego Chargers Football Co.*¹⁸ to support the holding that professional football is so completely involved in interstate commerce that condemnation of the franchise would create an impermissible burden. In *Partee*, the Supreme Court of California had held that the application of state antitrust laws to professional football would impermissibly burden interstate commerce because the NFL's business requires nationally uniform antitrust regulation.¹⁹ After adopting the NFL's asserted need for nationally uniform regulation, the *Raiders II* court concluded that the city's purposes of promoting recreation, social welfare, and associated economic benefits would not outweigh the burden that condemnation would impose on interstate commerce.²⁰

III. BACKGROUND

A. *The Power of Eminent Domain*

Eminent domain is the inherent power of a sovereign state to take private property.²¹ This power is provided for in the United

(city permitted to require that a certain percentage of city residents be employed on all city funded or administered projects); *Reeves v. Stake*, 447 U.S. 429 (1980) (South Dakota could restrict sale of cement from state-owned plant to in-state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (despite burden on interstate commerce, Maryland could favor its own citizens in a junk recycling program because it was a market participant rather than a regulator). In none of these cases, however, has the Court scrutinized the way the state entered the market. Once the city is a participant in the market (through, for example, condemnation) it is not at all clear that it cannot take advantage of the market participant doctrine simply because of the means by which it entered the market.

15. "Here the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's 'most awesome grant of power'—eminent domain." *Raiders II*, 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 156 (citation omitted).

16. *Id.*

17. *Id.*

18. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983).

19. *Id.*

20. *Raiders II*, 174 Cal. App. 3d at 421-22, 220 Cal. Rptr. at 158.

21. See *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 P. 78, 79 (1900) (Federal and state governments have the inherent power of eminent domain.); 1 NICHOLS ON EMINENT

States Constitution, and its exercise requires only the satisfaction of procedural due process, public use, and just compensation requirements.²² The power of eminent domain generally allows a governmental entity to take any private property necessary to carry out its functions.²³ States may delegate this power²⁴ to governmental sub-units, such as municipalities, giving them the ability to satisfy their local public needs.²⁵

Eminent domain results in a tension and compromise between competing private property interests and public needs.²⁶ Some commentators and courts argue that the power of eminent domain should be broadly construed to facilitate public use of property.²⁷ Others argue that the power should be narrowly construed to prevent poten-

DOMAIN § 1.14 (3d ed. 1985) [hereinafter NICHOLS]; Stoeback, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 575-98 (1972).

22. See U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *Chicago R.R. v. Chicago*, 166 U.S. 226, 233-41 (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. Toledo*, 36 F. 385, 396 (C.C.N.D. Ohio 1888))). For an interpretive history of "taking for public use" and "just compensation," see Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940). For a general discussion of the just compensation requirement, see Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 284-86 (1982). See also Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980) (uses and consequences of eminent domain in the United States).

23. See *Raiders I*, 32 Cal. 3d at 65, 646 P.2d at 838, 183 Cal. Rptr. at 676 (citing CAL. GOV'T CODE § 37350.5 (West Supp. 1983)). "Through eminent domain, nations have been able to acquire the property necessary to expand industry, develop the economy by constructing roads and dams, satisfy aesthetic purposes by establishing parks and preserves, redevelop worn urban areas, and provide 'private ways of necessity.'" Note, *supra* note 9, at 173 (citing Meidinger, *supra* note 22).

24. See *Nash v. Clark*, 27 Utah 158, 75 P. 371 (1904), *aff'd*, 198 U.S. 361 (1905).

25. The California eminent domain statute includes a city within the public entities that possess the power of eminent domain. See CAL. CIV. PROC. CODE § 1235.190 (West 1985); see also *Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 675 ("[A] municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law.").

26. *Raiders I*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676 ("When properly exercised, [the power of eminent domain] affords an orderly compromise between the public good and the protection and indemnification of private citizens whose property is taken to advance that good.").

27. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 315 (1859); see Note, *City of Oakland v. Oakland Raiders: Defining the Parameters of Limitless Power*, 1983 UTAH L. REV. 397, 399 ("To facilitate the taking of property when it is for the public good, the concept should be broadly construed.").

tial abuse by governmental entities.²⁸

1. PROPERTY SUBJECT TO CONDEMNATION

A state may use its eminent domain power to condemn tangible property,²⁹ as well as various types of intangible property.³⁰ Some state courts have allowed condemnation of intangible property only when it is incidental to tangible property that is the subject of the action,³¹ because just compensation can often be determined accu-

28. See Note, *supra* note 27, at 399-400 ("[S]ociety's interest in protecting a private property owner from the potential abuse of eminent domain power dictates a narrower definition of property." (citing *Raiders I*, 32 Cal. 3d at 65, 646 P.2d at 838, 183 Cal. Rptr. at 676)).

29. See, e.g., *City of Cincinnati v. Louisville & N.R.R.*, 223 U.S. 390, 400 (1912) (state has power to put land to common use and benefit); *Chicago R.R. v. Chicago*, 166 U.S. 226, 235-40 (1897) (indemnification of private citizens whose property is taken to advance public good is constitutionally ordained by the fifth amendment applicable to the states through the fourteenth amendment); *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 385-86 (1893) (full and fair trial provided due process of law under fifth and fourteenth amendments in deprivation of property case); *Lent v. Tillson*, 140 U.S. 316 (1891) (statute authorizing widening of street held to provide due process of law for taking the property necessary for that purpose); *Sutfin v. California*, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (1968) (real or personal private property taken or damaged for a public use must be compensated); *Less v. City of Butte*, 28 Mont. 27, 33, 72 P. 140, 142 (1903).

30. See *Raiders I*, 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678 ("numerous . . . decisions both federal and state have expressly acknowledged that intangible assets are subject to condemnation"); *City of N. Sacramento v. Citizens Utility Co.*, 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (1961) (city condemned water supply system).

Courts have found various types of intangible property subject to condemnation. The more common case involves intangible property rights related to real estate. See *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien); *Stratford Irrigation Dist. v. Empire Water Co.*, 58 Cal. App. 2d 616, 623-24, 137 P.2d 867, 874 (1943) (lien); *Canyon View Irrigation v. Twin Falls Canal*, 101 Idaho 604, 605-06, 619 P.2d 122, 125-26 (1980), *cert. denied*, 451 U.S. 912 (1981) (easements); *Peters v. Buckner*, 288 Mo. 618, 620, 232 S.W. 1024, 1027 (1921); *Meredith v. Washoe County School Dist.*, 84 Nev. 15, 16, 435 P.2d 750, 752 (1968) (restrictive covenants); see also *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (choses in action, patent rights, charters, and other forms of contractual rights are subject to condemnation); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (trade routes taken during wartime); *Liggett & Myers Tobacco Co. v. United States*, 274 U.S. 215 (1927) (contract value); *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 44 (1909) (government-granted franchises); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1892) (franchise rights destroyed by government are compensable); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 534 (1848) (franchise rights were held compensable and nothing more than "incorporeal property"); Note, *supra* note 27, at 400 n.23 (distinguishing from government-granted franchises those granted by the NFL to team owners, which are "agreement[s] to undertake a business or sell for a profit in accordance with the franchising body's rules").

31. See *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 690 (1897) ("[I]mpairment . . . is a mere consequence of the appropriation of the tangible property" and is incidental to other property taken.); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 536 (1848) (McLean, J., concurring) (condemnation "acts upon the property and not on the contract"); Note, *supra* note 9, at 186 (Condemnation of intangible property is appropriate only when taken as an incident to tangible property that is the target of the action; therefore,

rately only by adding the value of associated intangible interests.³² Other courts have defined property more narrowly to exclude intangible property, however, because of the undesirability of compensating parties for overly contingent interests.³³

2. PUBLIC USE

The public use requirement has been the subject of much debate, for there is no generally accepted definition of what is a valid public use.³⁴ In *Raiders I*, the Supreme Court of California stated that "[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, [and] changing conceptions of the scope and functions of government."³⁵

There are two general interpretations of the meaning of public use, one narrow and the other broad.³⁶ The narrow view dictates that

"since the Raiders' franchise is comprised primarily of contracts, it cannot properly be the target of condemnation," although a sports facility can.).

32. See 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 (1984).

33. See *United States v. Certain Parcels of Land*, 44 F. Supp. 936, 938-39 (S.D. Cal. 1942) (liens); *People v. Kipley*, 171 Ill. 44, 51, 49 N.E. 229, 238 (1897) (labor required by appointee to public office not property); *Bennett v. Kroth*, 37 Kan. 235, 237, 15 P. 221, 223 (1887) (witness can be compelled to testify without compensation); *Shelton v. Shelton*, 225 S.C. 502, 83 S.E.2d 176 (1954) (inchoate dower rights); Comment, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717, 718 (1964) (goodwill of ongoing business not compensable); see also 2 NICHOLS, *supra* note 21, § 5.24 (goodwill not compensable).

34. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (the Court created no clear test for determining when private property has been taken for public use); *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 340, 1 N.E.2d 153, 155 (1936); *Miller v. City of Tacoma*, 61 Wash. 2d 374, 384, 378 P.2d 464, 470 (1963); *Berger, The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); see also 2A NICHOLS, *supra* note 21, § 7.02. At least five factors have been recognized in determining whether a taking is for a public use, including "the court's interpretation of the need for economic and industrial progress in the area; the possible improvement of otherwise worthless unoccupied land by taking and subjecting the land to improvement; the necessity of using eminent domain power to successfully undertake a project; any commercial or other benefit; and amusement and recreation or possible aesthetic enjoyment." 2A NICHOLS, *supra* note 21, §§ 7.21, 7.211. Courts also balance the potential harm to the individual and the potential benefit to society. See *Chicago R.R. v. Chicago*, 166 U.S. 226 (1897); *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 306, 92 P. 849, 852 (1907).

To determine whether there is a public use, the court will look at "the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 160 (1896). Under the same circumstances, therefore, courts in different jurisdictions may come to different conclusions on similar facts as to whether a taking is for a public use. See *Clark v. Nash*, 198 U.S. 361, 368-69 (1905) (public use determination depends on the facts of each case). See generally *Berger, supra*.

35. *Raiders I*, 32 Cal. 3d at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680 (citing *Barnes v. City of New Haven*, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953)).

36. See *Berger, supra* note 34, at 205.

public use means actual use by the public entity or by the general public.³⁷ The broad view which is followed in most states,³⁸ however, defines public use as public benefit or advantage,³⁹ and does not require either use by a public entity or that a large number of persons participate in or directly enjoy the use.⁴⁰

California cases have held that recreation is a valid public use.⁴¹ This is not a new or unpopular position. In 1923, the Supreme Court of the United States stated that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."⁴² The expansiveness of this broad definition has led some courts and commentators to suggest that the public use requirement no longer acts as an effective limit on the eminent domain power except, perhaps, where the taking does not benefit the public

37. *Id.* at 205-06; 2A NICHOLS, *supra* note 21, § 7.02(1)-(2); Nichols, *supra* note 22, at 617, 626 ("To take property rights from A for transfer to B for B's private enjoyment is not a public use, regardless of what ultimate public purpose the transaction is intended to further.").

38. See Nichols, *supra* note 22, at 626-33.

39. See *Berman v. Parker*, 348 U.S. 26 (1954) (The Court implied that the public use requirement might be satisfied by an aesthetic purpose.); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (condemnation benefitting even a single individual may be a public use); *Raiders I*, 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679 ("a use which concerns the whole community or promotes the general interest"); *Montana Power Co. v. Bokma*, 153 Mont. 390, 457 P.2d 769, 772-73 (1969) (public use merely means public benefit or advantage).

40. See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-62 (1896); *Stockdale v. Rio Grande Western Ry.*, 28 Utah 201, 214, 77 P. 849, 851 (1904).

To solve some of the problems caused by differing definitions of public use, some states have enumerated valid public uses in eminent domain statutes. See Comment, *The Public Use Doctrine: "Advance Requiem" Revisited*, 1969 LAW & SOC. ORD. 688 (discussion of trend toward legislatures comprehensively listing authorized public uses). But see CAL. CIV. PROC. CODE § 1235.170 (West 1982) (eliminates pre-1975 listings of property and interests subject to condemnation). Further, where the legislature has spoken, "[s]ubject to specific constitutional limitations . . . the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954) (upholding District of Columbia's use of eminent domain for redevelopment purposes).

41. Examples of California's recognition of recreation as a public use include: *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 434, 333 P.2d 745, 751 (1959) (baseball field); *Egan v. City of San Francisco*, 165 Cal. 576, 582, 133 P. 294, 296 (1913) (opera house); *City of Anaheim v. Michel*, 259 Cal. App. 2d 835, 839, 66 Cal. Rptr. 543, 546 (1968) (parking facilities at a stadium); *County of Alameda v. Meadowlark Dairy Corp.*, 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1964) (county fair).

42. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923). See *Raiders I*, 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679 (Public use is "'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'") (quoting *Bauer v. County of Ventura*, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955)); *Egan v. City of San Francisco*, 165 Cal. 576, 582, 133 P. 294, 296 (1913) (a public purpose is anything promoting the education, recreation or pleasure of the public); see also *New Jersey Sports & Exposition Auth. v. McCrane*, 119 N.J. Super. 457, 292 A.2d 580 (App. Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972) (Condemning land for a sports complex is a valid public use because the purpose is to promote recreation for the people.).

whatsoever.⁴³

B. *The Commerce Clause*

Pursuant to the commerce clause of the United States Constitution, Congress has the power to regulate commerce among the states.⁴⁴ The commerce power was intended to give to the federal government affirmative power adequate to secure to the people of the United States the benefits of a single national economy. Beyond this, the commerce clause has been a source of federal power to deal effectively with national problems. As a consequence, where Congress has acted, a state may not enact conflicting legislation.⁴⁵

Where Congress has not exercised its power to regulate interstate commerce in a specific area, the states may regulate, but the "dormant"⁴⁶ commerce clause prohibits state regulation that is aimed at, or has the effect of, constructing barriers or burdens that might inhibit the development of a single national economy.⁴⁷ Accordingly, a state

43. See *Berman v. Parker*, 348 U.S. 26 (1954) (housing development); *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975) (industrial park); *Courtesy Sandwich Shop v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) (trade center). But see *In re Seattle*, 96 Wash. 2d 616, 638 P.2d 549 (1981) ("Public interest" or "public advantage" held not the same as public use; therefore, condemnation for commercial redevelopment of the inner city held unconstitutional.). See generally *Berger*, *supra* note 34 (discussing when a taking is proper); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) (discussing the death of the public use requirement).

44. "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cls. 1 & 3. Commerce has been defined as "[t]he exchange of goods, productions, or property of any kind . . . [and] [t]he transportation of persons and property." BLACK'S LAW DICTIONARY 244 (5th ed. 1979). See Note, *supra* note 9, at 191 ("[C]ommerce includes the transportation of property of any kind, including a business.").

45. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) ("[I]t is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and . . . the States may legislate in the absence of congressional regulations."); Comment, *Eminent Domain: Condemnation of Professional Football Franchises and the Commerce Clause Defense*, 28 HOW. L.J. 773, 783 (1985) ("Cooley also affirmed that if Congress chose to act in the local area through regulation, then the Congressional regulations would prevail in any conflict between state and federal regulations because of the Supremacy Clause.").

46. The "dormant" commerce clause describes those areas that Congress has failed to regulate although it possesses the power. 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."); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

47. *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185-86 (1938); *Robbins v. Taxing Dist. of Shelby County*, 120 U.S. 489, 498 (1887) ("[I]f a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own

may not regulate matters of national interstate commerce, except where incident to regulating matters of local concern.⁴⁸ The dormant commerce clause, in effect, abolishes economic provincialism and prevents states from fractionalizing the economy in recognition of the theory that "the peoples of the several states must sink or swim together."⁴⁹ Thus, for example, a state may neither hoard its resources or products for its own use by preventing their export,⁵⁰ nor force its citizens to buy locally-produced goods by closing its borders to similar goods from another state.⁵¹ In short, it cannot discriminate against others in favor of its own citizens or construct barriers that will fractionalize economic activity. Such "economic provincialism" violates the commerce clause.

The Supreme Court has stated that where a state's regulatory statute incidentally affects interstate commerce, and "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁵²

citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."). Incidental regulation of interstate commerce is permitted, but direct regulation is prohibited. *Edgar v. Mite Corp.*, 457 U.S. 624, 640-43 (1982).

48. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978) (dormant commerce clause precludes state regulation only where lack of national uniformity impedes interstate commerce); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 774-75 (1945) ("[W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (state has authority to regulate matters of local concern as long as the impact on interstate commerce does not seriously impede the flow of commerce, and therefore, the incentive to regulate on a national level is slight); see also *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (Railroads and other forms of interstate transportation need national uniformity of regulation. A court must balance the state's interest in regulating local affairs against the national interest in uniform regulation to determine whether there is a need for national uniformity.).

49. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (Prohibiting importation of low-cost milk from another state violates the commerce clause because it amounts to a custom duty).

50. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949) (Production of goods will be encouraged by the certainty of free access to markets in every state.). Using this rationale, the Supreme Court of the United States struck down a statute requiring local natural gas needs to be met before the gas could be exported to other states. *Pennsylvania v. West Virginia*, 262 U.S. 658 (1923).

51. See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (Requiring a reciprocity agreement with another state before the other state's milk could be imported violates the commerce clause.); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935).

52. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding state statute that

Thus, a state *may* impose costs or other burdens on participants in interstate commerce that might tend to discourage that commerce without violating the commerce clause. A court that applies this balancing test first must find a legitimate local interest. If there is such an interest, the next step is to assess the burden imposed upon interstate commerce, and then to decide whether the state has alternatives that would not cause as great a burden.⁵³ For a state statute to be struck down requires a showing that "the state is acting in an area of interstate commerce requiring uniformity if regulated, or that the state's act discriminates against other states, or that the state's act places an undue burden upon interstate commerce."⁵⁴

C. *Eminent Domain and the Commerce Clause Defense*

As the taking power has expanded to include ever more contingent intangible property interests, the realm of valid public uses has broadened to encompass almost any public benefit. Concurrently, the traditional conception of sovereign condemnation power has been incorporated as a legitimized means to accomplish modern police power purposes that typically result in ever more intrusive and intuitively offensive takings.⁵⁵ Consequently, intangible property interests that are not confined to one place, but rather are involved in interstate commerce are liable to be taken, and the probability of a commerce clause defense to a taking is increased. If the commerce clause is not

required state fruit to be packed in-state invalid). In the case of legislation that is nondiscriminatory, but somewhat burdensome on interstate commerce, the state regulation is accorded a presumption of constitutionality. This presumption can be overcome by a clear showing that the national interest in uniformity or in free commerce outweighs the state benefit.

53. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (articulating this three-part test); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (statute struck down where reasonable nondiscriminatory alternatives existed).

54. Comment, *supra* note 45, at 785. See J. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUT SHELL 203 (1979) ("The states are prohibited from regulating commerce in ways which are unduly burdensome or where national uniformity is required or where the effect is discriminatory, unless Congress consents.").

55. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (Condemnation to resolve the social and economic evils of land oligopoly is a valid means of exercising the police power.). *Poletown Neighborhood Council v. City of Detroit* lends further support to the proposition that the historic disapproval of the use of the eminent domain power for economic purposes as opposed to its use for "pure" health, welfare, and safety purposes is disappearing. 410 Mich. 616, 632, 304 N.W.2d 455, 458 (1981) (Alleviating unemployment and retaining local industry is a valid public purpose and the city may therefore condemn residential property for retransfer to a private corporation.).

violated because there is a legitimate public interest, then by necessary inference there must be a valid public use, because the definition of a public use is broader than the range of acceptable public purposes under the commerce clause.⁵⁶ The expansion of the condemnation power to encompass purposes traditionally only permissibly served by police power regulation provokes a greater need to examine the inter-relationship and conflict between the condemnation power and the commerce clause.⁵⁷

The unusual nature of this conflict is complicated by the uniqueness of the NFL and professional football. The problems of attempting to define the structure of the NFL for all purposes, and translating into legal terms the varying interests that professional football fosters, defy a simple solution to this conflict.

Although there are cases in which a commerce clause defense has been presented in an eminent domain action, such cases are distinguishable from *Raiders II*.⁵⁸ These cases involved takings that implicated a clearly recognized interest in national uniformity with respect to interstate roads and highways.⁵⁹ This distinction is noted not to

56. Of course, this discussion assumes that the court has already decided the threshold issue of whether the type of property in question is subject to condemnation under the particular state's eminent domain statute.

57. See Bixby, *Condemnation of Private Property in Order to Construct General Motors Plant is for "Public Use"*: Poletown Neighborhood Council v. City of Detroit, 13 URB. LAW. 694 (1981) (discussing factual background of Poletown); 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, 581 (1985) [hereinafter Comment, *Taking a Sports Franchise*] (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984)) ("[S]ince the Supreme Court recently held that the power of eminent domain is coterminous with the state's police power, it appears that eminent domain proceedings will be treated in the same manner as regulatory action."); Note, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown?*, 20 CAL. W.L. REV. 82 (1983) (discussion of Poletown and Raiders I decisions); see also Comment, *Eminent Domain: The Ability of a Community to Retain an Industry in the Face of an Attempted Shut Down or Relocation*, 12 OHIO N.U.L. REV. 231, 231 (1985) (Impediments to the use of eminent domain to retain an industry in the face of an attempted shutdown or relocation appear to be more economic and political than legal in nature.).

Reversing the equation, one commentator has argued that an even more compelling argument in support of the city's taking power may be made when the taking seeks to solve sovereign concerns. A city's self-image and identity can undeniably be enhanced by having a professional football team in town. "[A] state decision that implicates concerns close to the core of the sovereignty concept should at least arguably be entitled to greater deference than one that does not implicate such concerns." Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 61 (1981).

58. 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), cert. denied, 106 S. Ct. 3300 (1986).

59. See Elbertson S. Ry. v. State Highway Dep't, 211 Ga. 838, 89 S.E.2d 645 (1955) (The State Highway Department's condemnation of railway property does not interfere with interstate commerce.); 1 NICHOLS, *supra* note 21, § 2.222 ("[T]he right of the states to exercise the power of eminent domain in such a way as to interfere with interstate commerce upon the

imply that an exercise of the eminent domain power is exempt from a commerce clause defense, but only to highlight the unique nature of *Raiders II*, a point the *Raiders II* court appeared to recognize. The *Raiders II* court noted that such a lack of relevant precedent meant that this was a case of first impression, and that "eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce."⁶⁰

IV. ANALYSIS

This section first examines the *Raiders II* court's decision in light of its national uniformity rationale. After concluding that the national uniformity rationale is inappropriate, this section presents other possible rationales for analyzing the case and examines why condemnation was necessary to secure the public interest. Finally, in the following section, this Note suggests a possible theoretical meaning behind the decision.

A. *The Structure of the NFL*

The *Raiders II* court concluded that the NFL requires nationally uniform regulation because "[p]rofessional football is such a nationwide business and so completely involved in interstate commerce that acquisition of a franchise by an individual state through eminent domain would impermissibly burden interstate commerce."⁶¹ If any regulation is permissible, it must be nationally uniform regulation. For this point, the court relied almost exclusively on *Partee v. San Diego Chargers Football Co.*⁶²

In *Partee*, a former NFL football player brought an antitrust action against the San Diego Chargers, alleging that several of the NFL's operating rules involving players⁶³ violated California antitrust

highways and railroads within their respective limits may be at any time cut off by Congress.").

60. *Raiders II*, 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 156.

61. *Id.* at 419, 220 Cal. Rptr. at 157. One commentator has suggested that the very existence of the NFL exemplifies the need for national uniformity, because NFL teams voluntarily submit to NFL rules. Comment, *supra* note 45, at 786. A need for regulatory uniformity in some situations, however, does not necessarily compel a need in others. See *infra* notes 79-86.

62. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983).

63. The rules challenged include: 1) the draft, which grants NFL teams exclusive rights to negotiate with eligible players that they select; 2) the option clause, which grants the team a one year contract renewal right should player and team fail to reach agreement; 3) the "Rozelle Rule," which requires a team signing a free agent to compensate the player's former team; 4) the tampering rule, which prohibits negotiation with a player already under contract to another NFL team; and 5) the one-man rule, under which the commissioner has authority

law.⁶⁴ The Supreme Court of California held that state antitrust laws are not applicable to the interstate activities of professional football.⁶⁵ Drawing support from Supreme Court opinions dealing with professional baseball,⁶⁶ the court concluded that “[f]ragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.”⁶⁷ Thus, because of the need for nationally uniform regulation, the burden on interstate commerce imposed by applying California antitrust law outweighed the state’s interest in applying those laws.⁶⁸

To support its reliance on *Partee*, the *Raiders II* court stated that “[p]rofessional 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

to compel players to adhere to collective bargaining agreements between players and NFL teams. *Id.* at 381 n.2, 668 P.2d at 676 n.2, 194 Cal. Rptr. at 369 n.2.

64. *Id.* at 381, 668 P.2d at 676, 194 Cal. Rptr. at 369 (The court found that all but the option clause violated California antitrust law.).

65. *Id.* at 380, 668 P.2d at 676, 194 Cal. Rptr. at 369. The court accepted the Chargers’ contention that “professional football is a unique activity which requires nationally uniform governance . . . [and] that interstate commerce would be unreasonably burdened if state antitrust laws were applied to professional football’s interstate activities.” *Id.* at 382, 668 P.2d at 677, 194 Cal. Rptr. at 370.

66. For this reason, the *Partee* decision itself is subject to question. In his dissent, Justice Reynoso questioned the majority’s reliance upon, and the applicability of, *Flood v. Kuhn*, 407 U.S. 258 (1972) (state antitrust laws held inapplicable to professional baseball). *Partee*, 34 Cal. 3d at 386, 668 P.2d at 681, 194 Cal. Rptr. at 373 (Reynoso, J., dissenting). *Flood* was decided on the basis of the inevitable conflict that would result if state antitrust regulations were applied to baseball, given baseball’s historical exemption from federal antitrust laws. See *Toolson v. New York Yankees*, 346 U.S. 356 (1953) (baseball exemption upheld based on thirty years of Congressional inaction, baseball’s consequent reliance on the exemption, and deference to Congress for any remedy); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (baseball is not involved in interstate commerce). The *Partee* dissent argued that because football does not enjoy an antitrust exemption, it would be wrong to apply baseball precedent to football cases. *Partee*, 34 Cal. 3d at 388, 668 P.2d at 681, 194 Cal. Rptr. at 374 (Reynoso, J., dissenting) (citing *Radovich v. National Football League*, 352 U.S. 445 (1957)). Further, prior to *Partee*, federal courts had already held that the rules challenged in *Partee* violated federal antitrust law. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1976); *Kapp v. National Football League*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *petition for cert. withdrawn*, 434 U.S. 801 (1977). Justice Reynoso noted that because federal courts had already held these practices violative of federal antitrust laws, it was difficult to see how a harmonious state court decision could possibly result in practices that would burden interstate commerce. See *Partee*, 34 Cal. 3d at 409, 668 P.2d at 696, 194 Cal. Rptr. at 389.

67. *Partee*, 34 Cal. 3d at 384-85, 668 P.2d at 678, 194 Cal. Rptr. at 371-72.

68. *Id.* at 385, 668 P.2d at 679, 194 Cal. Rptr. at 372.

rules governing the league structure.”⁶⁹ Although it may be true in some situations that the NFL requires nationally uniform regulation, and although such may have been the case in *Partee*,⁷⁰ courts have not found a need for national uniformity in all circumstances.

In another case that arose from the Raiders’ move to Los Angeles, *Los Angeles Memorial Coliseum Commission v. National Football League*,⁷¹ the court specifically rejected the argument that the NFL is a single entity exempt from federal antitrust laws.⁷² The NFL’s owners had voted to deny Al Davis permission to move the Raiders to the Los Angeles Memorial Coliseum. The Coliseum challenged that denial as a violation of the Sherman Act.⁷³ The court held that “[w]hile the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual

69. *Raiders II*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157 (quoting *Partee*, 34 Cal. 3d at 384-85, 668 P.2d at 678, 194 Cal. Rptr. at 371).

70. *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983).

71. 726 F.2d 1381 (9th Cir. 1979), *cert. denied*, 496 U.S. 990 (1984). In 1978, the Los Angeles Rams relocated to Anaheim, California. The Los Angeles Memorial Coliseum (Coliseum), left without a major tenant, asked the NFL to locate an expansion franchise in the stadium. After the NFL declined, the Coliseum negotiated with the Raiders to move to Los Angeles. The NFL Constitution, however, requires approval by 75% of the twenty-eight member teams’ owners before a team can move. See NFL CONST. art. IV, rule 4.3. In 1980, the NFL’s team owners voted 22-0 against relocation. The Coliseum then sued the NFL for violating federal antitrust laws. The Oakland-Alameda County Coliseum, Inc. intervened, and the Raiders cross-claimed against the NFL. *Coliseum*, 726 F.2d at 1385.

72. Because the Sherman Act, 15 U.S.C. § 1 (1982), prevents “only contracts, combinations or conspiracies in restraint of trade,” a business that can prove it is a single entity will not have violated the Act because a business cannot conspire against itself. See *Coliseum*, 726 F.2d at 1387. In analyzing restraint of trade claims under the Sherman Act, courts have defined two categories of cases. There is first a *per se* category, in which a restraint is held to be inherently unreasonable regardless of any procompetitive effects from the restraint. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (advocating a *per se* rule). The second category is examined under a rule of reason analysis “[s]ince Congress could not have intended that courts invalidate ‘every’ such agreement.” *Coliseum*, 726 F.2d at 1386; see *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”); *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (Sherman Act is concerned only with unreasonable restraints). The rule of reason requires the court or jury to look at all the circumstances and determine whether there is an unreasonable restraint on competition. In *Coliseum*, the court found that the unique nature of the NFL precluded a *per se* rule. The court held that the cooperative nature of the NFL would be considered under the rule of reason analysis which takes all circumstances into account. *Coliseum*, 726 F.2d at 1390. Considering all circumstances, the court held that the NFL violated section 1 of the Sherman Act by restricting team movement. *Id.* at 1401. For an overview of antitrust law and professional sports leagues, see Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987).

73. See *supra* note 72.

or parent corporation, but by the separate teams acting jointly.”⁷⁴ The court also noted that the purpose of the NFL, as set forth in the NFL Constitution, is to “promote and foster the primary business of League members,”⁷⁵ as opposed to promoting the business of the NFL itself. The court found that the teams are separate business entities that produce independently valued products.⁷⁶ In addition, all profits and losses are not shared by the teams as they would be if the NFL were a single entity.⁷⁷ Accordingly, the court held that the NFL’s relocation restrictions violated the antitrust laws, and that the league could not prevent the Raiders from moving to Los Angeles.⁷⁸

74. *Coliseum*, 726 F.2d at 1388-89.

75. *Id.* at 1389 (quoting from article I of the NFL Constitution).

76. *Id.* at 1388.

77. *Id.* at 1390. Although all NFL teams share national television revenues and competing teams share gate receipts from individual games, they do not share expenses, capital expenditures, or profits. See Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 172 (1984); Comment, *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 *U. CHI. L. REV.* 999 (1985) (discussion of organizational and financial structure of NFL).

78. *Coliseum*, 726 F.2d at 1401. The *Coliseum* court implied that a rule restricting relocation might be acceptable if it imposed procedural safeguards and provided objective standards. *Id.* at 1397.

Other NFL rules had previously been held to violate section 1 of the Sherman Act. See *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (Although it characterized the NFL as a joint venture and recognized the need for cooperation among teams, the court held that restrictions preventing NFL owners from owning teams in other professional sports leagues violated section 1.); see also *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (violation of section 1 found even though organization was characterized as a joint venture); *Associated Press v. United States*, 326 U.S. 1 (1945) (no immunity from section 1 simply because the cooperation allowed production that individual members could not produce alone). In *San Francisco Seals, Ltd. v. National Hockey League*, however, the court held that the National Hockey League is a single entity and that it can therefore restrict team movement without violating the Sherman Act. 379 F. Supp. 966 (C.D. Cal. 1974). The court in *Coliseum* found this case unpersuasive, stating that Congress was best able to determine whether the NFL deserved antitrust immunity. *Coliseum*, 726 F.2d at 1390 n.4; see Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 *MICH. L. REV.* 1 (1983) (Leagues must act jointly to be efficient and, therefore, should be viewed as a single entity for some purposes.).

Indeed, the *Coliseum* court’s determination that the NFL is not a single entity has been subject to much criticism. See *Coliseum*, 726 F.2d at 1401 (Williams, J., concurring in part, dissenting in part). But see Blecher & Daniels, *Professional Sports and the “Single Entity” Defense Under Section One of the Sherman Act*, 4 *WHITTIER L. REV.* 191 (1982) (concluding that the single entity defense is inappropriate because sports leagues compete economically at some levels); Lazaroff, *supra* note 77, at 169 (teams are separately owned, independent legal entities that may violate section 1).

Even if the *Coliseum* court is incorrect in its determination that the NFL is not a single entity, this holding merely demonstrates the difficulty courts have had in analyzing the structure of the NFL, and suggests that the *Raiders II* court’s blind reliance on *Partee* is misplaced. The *Coliseum* dissent recognized that the NFL is a single entity only for certain purposes. The dissent argued that “[t]he purposes for which the NFL should be viewed as a

In *Coliseum*, the Coliseum argued that the NFL is not a single entity requiring nationally uniform regulation, and the Coliseum won.⁷⁹ In *Partee*, the player argued that the NFL does not require nationally uniform regulation, and the player lost.⁸⁰ In *Raiders II*, the city argued that the NFL does not require nationally uniform regulation, and the city lost, based on *Partee*.⁸¹ Antitrust issues, however, were not even before the *Raiders II* court. The *Raiders II* court's reliance on a single antitrust case without discussion of other relevant antitrust cases and without examination of the underlying issues is deceptively simplistic.⁸²

If the NFL's dual nature precludes application of a single structural definition in all contexts, even—as *Partee* and *Coliseum* demonstrate⁸³—in the antitrust context, a similar discriminating analysis is also likely to be necessary in dealing with the interrelation between the eminent domain power and the dormant commerce clause. The league rules that were the subject of challenge in *Partee* were rules governing player negotiations and contracts. These rules were directly concerned with promoting athletic rather than economic

single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result." *Coliseum*, 726 F.2d at 1409 (Williams, J., concurring in part, dissenting in part); see also Grauer, *supra*, at 2 (criticizing the *Coliseum* and *Northern American Soccer League* courts for viewing the NFL teams as separate entities in all situations simply because they were so viewed in some situations).

79. At this point, the relationship between the single entity and national uniformity rationales should be clarified. In *Partee*, the court determined that the NFL requires national uniformity insofar as choice of antitrust law was concerned. 32 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367. Once federal law applies, however, the structure of the NFL must be defined within Sherman Act jurisprudence. An organization that meets the definition of a single entity necessarily has a structure that requires uniform regulation because regulation of any part affects the whole. Although the same conclusion can be reached with organizations that do not meet the single entity definition, the relationship between regulation of a part and an effect on the whole is much more attenuated. A structural organization that is not a complete whole—so as to meet the single entity definition—cannot be said to require nationally uniform regulation for all purposes.

80. See *supra* notes 62-68 and accompanying text.

81. See *supra* notes 61-62 and accompanying text.

82. An intriguing twist is Al Davis's ability to argue both views and win. In *Coliseum*, he sided with the Coliseum, arguing that the NFL is not a single entity, and therefore, that his team should be allowed to move. 726 F.2d at 1389-90. In *Raiders II*, however, he argued that the NFL is a single entity requiring nationally uniform regulation, and therefore, a taking by eminent domain would burden interstate commerce. 174 Cal. App. 3d at 419-20, 220 Cal. Rptr. at 156-57. It is also ironic that a team owner and member of the NFL is yelling "antitrust" at the other owners.

83. Compare *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983) (federal antitrust law applied because national uniformity needed) with *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1979), *cert. denied*, 496 U.S. 990 (1984) (NFL single entity argument rejected in the surprising context of league control of individual team relocation).

competition between teams in the league and in preserving the quality and competitive balance of the league's games. As such, these rules necessarily had to be followed by all teams.⁸⁴ The *Coliseum* court, on the other hand, did not find a need for national uniformity where relocation decisions were involved. Apparently, relocation decisions and player negotiations do not have the same affect on the welfare of the NFL as a whole.

Because *Raiders II*, like *Coliseum*, involves the ability of teams to relocate rather than their ability to compete for players, *Coliseum* would seem, on the face of it, the more nearly apposite case. As a first approximation, one may question whether the NFL requires uniformity of rules governing relocation decisions if the NFL itself cannot control those decisions.⁸⁵ Unless it can be demonstrated that a city, by controlling team movement, is seriously prejudicing the economic health of the NFL, and hence, is impeding national uniformity, the taking should not be invalidated on a national uniformity basis.⁸⁶ By the same token, even if there may be some adverse economic effects on the league if cities control team movement, that effect presumably should be balanced against the public purpose served by the city's exercise of its eminent domain power. It is not enough simply to use the label "national uniformity" without examining the underlying rationale for applying such a label. National uniformity seeks to define when the economic structure is so unitary that there can only be one regulatory authority, a federal one. Such indiscriminate labeling ultimately undermines the court's conclusion that the taking violates the dormant commerce clause because it leaves the underlying issues unanswered.

B. National Uniformity and the NFL

Victories and team success foster sentimental loyalties, which

84. By equalizing teams' negotiating positions, the league fosters the teams' athletic competition and business success on the theory that games between two relatively equal teams are more interesting and profitable than games between a strong team and a weak team. *Partee*, 34 Cal. 3d at 381, 668 P.2d at 676, 194 Cal. Rptr. at 369. Thus, if the rules at issue in *Partee* are to be challenged, they should be challenged on the basis of federal law, which is uniform and applicable to all teams, not on the basis of differing states' laws.

85. See Comment, *supra* note 45, at 787-88 (To meet the argument that the NFL requires national uniformity, the city might argue that diversity of regulation would not impermissibly burden interstate commerce because team locations do not require uniformity, although other aspects of the NFL might.).

86. Because the NFL is engaged in interstate commerce, what burdens the NFL burdens interstate commerce. See *Partee*, 34 Cal. 3d at 383, 194 Cal. Rptr. at 370, 668 P.2d at 677 ("It is settled that the NFL is engaged in interstate commerce . . .") (citing *Radovich v. National Football League*, 352 U.S. 445, 452 (1957)).

benefit the NFL in the form of increased fan support and increased revenues. What distinguishes team relocations from normal business moves is precisely this juxtaposition of economic and psychological factors. Here, the NFL's economic health is intimately tied to these psychological factors.

This psychological nexus yields high economic returns to the NFL. The convergence of the NFL's quest for economic gain and the city's psychological interest is what allows for these returns. The city's and the NFL's interests are coterminous as long as there is a successful team, such as the Raiders. Perhaps then, the NFL is only harmed to the extent that the court has allowed a single team owner to relocate contrary to the NFL's (and the city's) best interests. Of course, the NFL is also harmed insofar as the city, by attempting to condemn a football franchise, is defeating the private interest of the individual owners who comprise the NFL. If condemnation is permitted, every franchise owner will be, at least arguably, threatened by the possibility of relocation.

Divergence of interests occurs to the extent that the private owners do not share in the common interests of the NFL and the city. The individual owner's pure private property interest then must be compared to both the city's interests and the NFL's interest in the integrity of the league. This divergence turns on how private team owners use their unshared economic returns. The NFL is interested in long-term gains in shared revenues, which requires that sufficient profits be put back into the teams so as to increase competition, and ultimately, shared revenues. Private owners, in contrast, may prefer short-term pull-out of their individual profits to a long-term gain in shared profits. If an owner relocates to enhance unshared revenues, the NFL will be economically indifferent to the relocation only if the move does not decrease shared revenues. The NFL is in conflict with the owner only insofar as it believes the owner will not use the increased private revenues to strengthen the team. Thus, where relocation is prompted by the promise of increased unshared revenues, the NFL is either indifferent or at odds with the private owner. Further, the NFL is concerned with the overall harm to the integrity of the NFL and with how much the enhanced revenues can compensate for the damaged psychological relationship with the city when a successful team relocates.

Where a franchise is financially unsuccessful, however, the city's interest is greatly reduced, and the harm to the NFL from condemnation is more pronounced. When a team is losing money, the NFL does suffer indirectly because of the drain on shared revenues. Yet,

because a city's interest in condemning a weak team is far less than its interest in a financially stable team with substantial community support, the city's interest may be outweighed by the burden—the potential drain on league revenues—on the NFL as an national economic entity. This problem is readily answerable by not permitting the city to prevent a financially weak team from moving. Such a case is quite different from *Raiders II*.

In discussing the burdens on interstate commerce, the *Raiders II* court equated the interests of the team with those of the NFL.⁸⁷ As has been stated, the two interests do not always coincide. This is demonstrated by the NFL owners' desire to block the Raiders' move, and by Al Davis's refusal to yield to the owners' vote against his team's relocation.⁸⁸ Indeed, the real burden on the NFL is caused by the team that wishes to move when the league wishes it to stay. Even these burdens must, however, be quantified and measured within the national uniformity methodology.

There is no product, no individual games, no NFL season, until team A plays team B. Thus, the NFL is interested in controlling the constituent parts in order to maintain the quality of the product. The *Raiders II* court noted the "interdependent character of the NFL," in that teams share television contract proceeds and gate receipts nearly equally.⁸⁹ NFL teams share network television revenues from regular season and playoff telecasts, gate receipts, and marketing income.⁹⁰ Each team, however, keeps all local radio, preseason television, and luxury box seat revenues.⁹¹ The NFL has a significant interest in the team revenues because approximately 90% of these revenues are shared.⁹² As a result, "each League franchise owner has an important interest in the identity, personality, financial stability, commitment,

87. See *Raiders II*, 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 157.

88. This strange twist underscores the complicated nature of the case. It's all very well to talk about the "NFL," but the NFL is made up of 28 member teams. Therefore, where a team relocates contrary to the expressed will of the other 27 teams, that team imposes a burden by relocating. If the NFL is harmed at all, it is harmed, in this instance, by a member team. If, however, the other owners support the move, the burden that the condemnation imposes on interstate commerce would be clearer. It should also be noted that the burden imposed by the move is different from the burden imposed by condemnation.

89. *Raiders II*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157.

90. Network television revenues are shared equally; gate receipts are split, 60% for the home team and 40% for the visiting team. Wong, *supra* note 5, at 16 n.44 (1985) (citing *Professional Sports Antitrust Immunity: Hearings on S. 2784 & S. 2821 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 43-44 (1982) (statement of Pete Rozelle, NFL Commissioner)).

91. See Wong, *supra* note 5, at 16.

92. *Coliseum*, 726 F.2d at 1390.

and good faith of each other owner.”⁹³ This being the case, it immediately suggests that the NFL should have the right to select the market in which a team plays because of the need to maximize regional rivalries and revenues, thereby maximizing league effectiveness. Given the importance of shared revenues, if a team’s move could cause a substantial increase in sharable revenues, franchise condemnation conceivably could have a great influence on the NFL as a national business entity.

This argument—that the NFL’s interest in shared revenues and league interdependency is harmed by condemnation—all but disappears when, as here, the NFL itself denies the team permission to move. The NFL’s interest in team location is even more questionable in light of the importance of national television: “Subject to the caveat that television revenues in part reflect local fan identification with local teams, the importance of team location may be sharply limited by the role of television.”⁹⁴

The *Raiders II* court emphasized the interests that team owners have in the quality and economic stability of other league teams,⁹⁵ but obscured the real problem by failing to consider the teams’ common interests in preserving overall fan support for NFL teams. A move for financial gain by an already successful, avidly supported team, damages fan support. The court also failed to credit the city’s interest in maintaining the financial viability of the team. This interest enhances the team’s value to the community. For example, a successful NFL team may enhance the city’s attractiveness to business investors. To the extent that the city has an interest in preserving the public use of the team after condemnation, the court’s suggestion that the team would become permanently “indentured to the local com-

93. *Raiders II*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157. The *Coliseum* court recognized the legitimate interest that the NFL has in ensuring league integrity and the cooperation therefore necessary to establish schedules and playing rules. Such cooperation would produce “the most marketable product attainable.” *Coliseum*, 726 F.2d at 1391-92. One commentator has argued:

A sports league brings together several legally distinct and independently owned firms (the individual clubs) to create a single product: sporting events. In an obvious sense, the individual clubs are on-field rivals and have divergent interests. But because the clubs must cooperate to produce the league product, they have a common interest in collective decisions about the way to make the product. Clubs are also economically interdependent because they agree to share certain revenues.

Comment, *supra* note 77, at 1000.

94. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws*: Los Angeles Memorial Coliseum Commission v. National Football League, 15 CONN. L. REV. 183, 200 (1983).

95. *Raiders II*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157.

munity" belies the true interest the city has in maintaining the team's efficiency and success.⁹⁶

Condemnation of a football team empowers the city to compel a change in ownership by taking the team away from one private owner and subsequently transferring it to another private owner.⁹⁷ If giving the city the power to choose franchise owners is considered to be harmful to the national structure of the NFL, because of the financial interdependency of the teams and their collective interest in assuring competent ownership, then that problem could be solved by subjecting the city's choice of owners to NFL approval. If the NFL has the right to approve new owners, then its ability to control ownership arguably is not harmed by the city's action.⁹⁸ Another solution would be to retransfer the team to the original owner with the added provision that he keep the team in the city.⁹⁹

Even if the eminent domain power can force a team to remain in the city, a city can only force the team to remain as long as market forces allow. The city (and any private owner to whom the city transfers the team) has an interest in keeping the team economically efficient, perhaps even to the extent of subsidizing the franchise during hard times. Otherwise, market forces will ultimately force the team out of business. Thus, the city has a considerable interest in maintaining the viability of the team, which ultimately benefits the NFL. The *Raiders II* court arguably overstated the harm to the NFL by predicting that all cities will condemn football teams that seek to relocate.¹⁰⁰ One impediment to this possibility is financial. Condemnation of a successful football franchise comes at a high price because of this success. Cities may be forced to placate a team by offering stadium improvements or other concessions, which conceivably cost less than condemnation and its attendant litigation when the local team threatens to move.¹⁰¹

96. *Id.*

97. See CAL. CIV. PROC. CODE § 1240.120(b) (West 1982) (allows the retransfer of condemned property if reservations and restrictions are imposed to preserve the public use); see also *City of San Francisco v. Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955) (stringent controls must be maintained). Although a specific retransfer provision was not before the *Raiders II* court, such an agreement could either: 1) require the new owner to keep the Raiders in Oakland, or 2) provide for the team's transfer to another owner if the new owner ever wanted to relocate.

98. If the other team owners want the team to relocate, however, then the NFL would be harmed by the action. The only question would then be the extent of the harm.

99. Although this seems a strange result, retransfer to the original owner would be the fairest solution if the owner prefers to keep the team, even if he is forced to keep it in Oakland.

100. *Raiders II*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 106 S. Ct. 3300 (1986).

101. See *id.* at 420, 220 Cal. Rptr. at 157.

The *Raiders II* court also stated that the NFL would be harmed by the teams' loss of bargaining power should cities be able to threaten condemnation.¹⁰² The court's argument, however, obscured the true nature of the bargaining power inequalities that now exist. A football team is an important tenant for a stadium, because a stadium operator can obtain relatively higher rent from an NFL tenant than from other stadium users.¹⁰³ Further, because the demand for professional football teams far exceeds the supply, cities do not have much bargaining power over the terms of stadium leases.¹⁰⁴ By upholding the teams' unilateral right to relocate without considering the city's interest, the *Raiders II* court virtually eliminated what little bargaining power the city may have had. The antitrust exemptions given to the NFL¹⁰⁵ have worked to extinguish market forces that otherwise would have caused an increase in franchises. Cities have become "victims of [this] manipulation"¹⁰⁶ and are at the mercy of teams enticed to relocate by other cities. The concessions a city must make to retain its team ultimately harm the taxpayers.¹⁰⁷ Thus, although the court was legitimately concerned about unequal bargaining power, it focused its concern on the wrong party.

Because the court misconstrued the NFL's structure, and overstated both the financial harm to the NFL and a team's potential loss of bargaining power, there is no compelling need for national uniformity. National uniformity—when it is a recognized interest—is, however, implicit in a test that balances burdens on interstate commerce and benefits to the local public. In other words, if the need for national uniformity is strong in a given case, it will prevail in the balancing analysis. Because the various methodologies used to examine commerce clause cases are not neat and separate tests, but collapse into each other, and because the NFL's structure defies clear defini-

102. *Id.*

103. *See Coliseum*, 726 F.2d at 1394.

104. *See Gorton, Professional Sports Franchise Relocation, Introductory Views From the Hill*, 9 SETON HALL LEGIS. J. 1, 2 (1985) ("Due to the enormous discrepancy between the demand for professional sports teams and the supply, particularly in football and baseball, it is extremely difficult for any local officials to make meaningful demands on a team negotiating a lease.").

105. *See* 15 U.S.C. § 1291 (1982). Professional sports are exempt from antitrust laws with respect to radio and television contracts and league mergers. Because of the NFL's limited antitrust exemption, it can sell television rights to the league's entire schedule of games and then divide the revenues equally among the teams.

106. Gorton, *supra* note 104, at 3.

107. *See id.* Because of congressional intervention permitting the NFL to set the number of franchises, Senator Gorton recommends either a return to the free market system—that is, removal of the limited antitrust immunity—or regulation to correct the market imperfections. *Id.* at 6.

tion, the *Raiders II* court's attempt to use a single definitional category is myopic and misleading. Although the city's use of the eminent domain power to restrict team movement may burden interstate commerce, the resultant burdens are not so compelling as to be conclusive on the commerce clause issue. Absent an overriding need for national uniformity, another line of analysis—namely a balancing test—becomes the relevant commerce clause methodology.

C. *Balancing the Burdens and Benefits of Condemnation*

Under a balancing test,¹⁰⁸ a city's interest in condemnation may outweigh any burden imposed on the NFL when the taking involves a financially stable team, like the Raiders, and where the city is simply preserving the status quo.¹⁰⁹ After condemnation, the team could continue making profits even if those profits are less than conceivably could be made elsewhere. Moreover, Al Davis's decision to move was not prompted by his desire to increase shared NFL revenues, but by a desire to increase unshared revenues (luxury boxes and cable television).¹¹⁰ Depriving the Raiders of these unshared revenues negligibly burdens the NFL, because the extent of revenue sharing greatly decreases the importance of local revenues. Indeed, in the *Coliseum* case, the NFL argued that its interest was to preserve confidence in the league by recognizing the city's investment in the team and retaining this important asset in the city.¹¹¹ Requiring the Raiders to play in Oakland, therefore, may not have as much an effect on the NFL and on interstate commerce as the *Raiders II* court suggested.¹¹²

Once it is recognized that the city and its fans have greatly contributed to the success of the team, their interests in the financially

108. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). See Maltz, *supra* note 57 (critique of commerce clause balancing analysis).

109. Although Oakland's interest in retaining the Raiders might have prevailed in this case, it should be remembered that this test is a balancing test. Results would vary depending on the circumstances of each case. See Note, *supra* note 5, at 966 (arguing that acquisition of the Raiders is a proper exercise of the city's eminent domain power).

A caveat is also in order. This discussion assumes that the team is not violating a lease agreement with the stadium when it seeks relocation. If a lease agreement is still in effect at the time the team relocates, the franchisee may be liable for contract damages.

110. See *supra* note 5.

111. In the case of the Raiders move, perhaps the NFL would have benefitted from the city's action because the NFL itself tried (and failed) to prevent relocation. The NFL, however, is burdened insofar as it wants control of relocation decisions. A more extensive analysis of the burdens and benefits of preventing relocation is warranted, because the NFL has not opposed relocation in other cases.

112. One commentator has argued that "if a team is forced to stay in an unprofitable or less profitable location, the overall economic well-being of the league will be affected because of the economic interdependency of the teams." Comment, *supra* note 45, at 790. Unrestrained relocation, however, could conceivably cause greater damage to this well-being, because fan

stable team should not be disregarded. Just as the NFL's interests are both pecuniary (shared revenues generated by the individual franchises) and nonpecuniary (fan support and league integrity), the city's interests are both pecuniary and nonpecuniary.¹¹³ The city's economic interests include its enhanced ability to attract industry and outside investors because of the presence of a football team.¹¹⁴ Economic analysis as applied to football, however, is both one-dimensional and deceptive. A fan's emotional attachment to his team defies pure economic analysis, which assumes rationality. Indeed, this case is a result of fans being fanatical about their team.

In addition to providing jobs and revenue for cities and citizens, professional sports teams foster a sense of civic pride.¹¹⁵ The nexus

support and identification would diminish and thereby reduce the potential drawing power of all the teams.

If the city is given the right to control ownership of a team contemplating relocation, then the question arises whether this right could, or should, extend to controlling ownership to preserve the quality of the team. If the city has an interest in the economic viability of the team for eminent domain purposes, does not the city have an interest in ensuring that the team owners preserve the quality of the team and keep it economically efficient? The city could get rid of "bad" owners and replace them with owners who would work harder to make the team financially sound and promote public support. See Wong, *supra* note 5, at 12 n.26 (owners have been called "28 successful, hard driving individualists," "28 kings," "28 egomaniacs," and "28 idiots") (citations omitted). Ultimately, this system could help the NFL. An interest in economic efficiency, however, is not necessarily a recognized interest under the commerce clause. The city cannot force a market to be efficient. See Maltz, *supra* note 57, at 80-81.

113. See Gorton, *supra* note 104, at 1 ("[P]rofessional sports teams are important community assets economically and psychologically."); Comment, *supra* note 45, at 791 (discussing both economic and general welfare interests, noting that recreation is a valid public interest for both eminent domain and police power purposes); see also *Berman v. Parker*, 348 U.S. 26 (1954) (city may be beautiful as well as clean); *Martin v. Philadelphia*, 420 Pa. 14, 17, 215 A.2d 894, 896 (1966) (The court upheld a construction loan for a stadium noting that "public projects are not confined to providing only the bare bones of municipal life, such as police protection, streets, sewers, light, and water; they may provide gardens, parks, monuments, fountains, [and] museums.").

114. See Gorton, *supra* note 104, at 1 (A professional sports team can attract both business and trade to a city.).

115. See *id.*; Wong, *supra* note 5, at 11. Franchise relocation restrictions also promote fan loyalty and financial stability. A proposed, but unpassed Senate bill, precipitated by the *Coliseum* court's decision identified these psychological interests:

Senator Gorton's "Professional Sports Team Community Protection Act" [S. 287, 99th Cong., 1st Sess., 131 Cong. Rec. S663 (1985)] is designed to provide a right of first refusal to a metropolitan area before a professional sports franchise is moved. Interestingly, the findings and policy section of the bill indicates that sports franchises "achieve a strong local identity with the people of the community in which they play, and provide a source of pride and entertainment to their supporters." The bill also refers to the "strong public interest" in teams and recognizes that owners will often seek relocation solely for their own benefit and financial gain [T]he bill recognizes the broader social significance of sports teams and integrates values that go well beyond the limits of permissible antitrust inquiry.

between fans and “their” teams is a utility derived from an exercise of community, not simply a private utility. It is a celebration of identity, touching upon the deep roots that make up a civic entity. It is the coming together of loyalties—an emotional catharsis—that makes football so special. There are some functions in society that cannot be disaggregated into private utilities. Rather, their intrinsic utility flows from the aggregate. Each individual’s utility can only be satisfied in conjunction with others who are also attempting to exercise their individual utility at the same time. The team then becomes a spiritual and emotional surrogate for its fans. “Professional sports are set up for the enjoyment of the paying customers and not solely for the benefit of the owners or the benefit of the players. Without public support any professional sport would soon become unprofitable to the owners and the participants.”¹¹⁶ Public support, evidenced by both fan loyalty and traditional rivalries, is hurt every time a team relocates. Fans will be less likely to support a team, especially a new one, if the team can relocate on a whim.¹¹⁷ One commentator has stated that capricious relocation

could be detrimental to the team’s city, which may have invested money in building a stadium, and to the fans who have become emotionally attached to their team. Additionally, the league may be harmed; cities would be less likely to invest in the league if its teams moved too often. Without such investment, the league would be unable to place teams in certain markets, thus preventing valuable economic competition, and community service.¹¹⁸

Moreover, without at least some guarantee of exclusivity, the expense and risk of beginning a franchise may be prohibitive.¹¹⁹ Therefore, although it is in the city’s interest to prevent relocation to preserve fan support, it is also ultimately in the NFL’s interest to do the same.

Restraints on relocation promote “cooperative scheduling . . . league legitimacy, community support and public service, and league profitability.”¹²⁰ In addition, the NFL’s goodwill is protected because fans may view frequent relocations as evidence of indifference to fan

Lazaroff, *supra* note 77, at 219.

116. *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978); *Conrad v. City of Pittsburgh*, 421 Pa. 492, 218 A.2d 906 (1966) (loss of team is tragedy for community).

117. See Kurlantzick, *supra* note 94, at 196; Riga, *Professional Sports and the Public Interest: A Kick in the Grass*, 7 WHITTIER L. REV. 551, 573 (1985); see also *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 730-31, 144 N.W. 2d 1, 18 (1966).

118. Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should Be Able to Move*, 23 SANTA CLARA L. REV. 55, 84 (1983).

119. See Kurlantzick, *supra* note 94, at 197. Exclusivity describes the team’s interest in keeping its territory free of another football team that may compete with it.

120. Glick, *supra* note 118, at 80.

loyalty. Protection of goodwill in turn ensures continued economic viability.¹²¹ In *Coliseum*, the NFL urged the court to recognize its interest in preventing relocation before a city has recouped its investment in a stadium and other facilities in order to prevent the erosion of local confidence in the NFL.¹²²

Although frequent relocation is a deterrent to city investment, one commentator has suggested that restricting relocation would make private investments more risky because market decision-making would be replaced by political decision-making. Politicians may not be interested in pure efficiency and profit.¹²³ This argument, however, assumes that fans are as interested in football qua football as they are in specific teams with which they have come to identify. It is the unity of identification that helps foster rivalries and team support. Allowing relocation to the detriment of fan support is risky insofar as the NFL is concerned.

Recognizing these psychological interests, cities invest substantial amounts of money to attract teams and build stadiums,¹²⁴ thereafter viewing their teams as community assets serving significant community interests.¹²⁵ The economic impact of having a team leave the city is substantial, as is exemplified by New York's \$33 million loss when the Jets moved to New Jersey.¹²⁶ Team relocations may leave taxpayers burdened with the costs of an expensive stadium originally built to house a team or to attract one that has left another city.¹²⁷ One commentator has stated:

[S]ports leagues may be concerned about the impact of relocations on the financing arrangements in stadium leases. It is common practice for public agencies to finance the construction of sports stadia. If a team moves or fails, taxpayers are left supporting a limited-use facility that may be incapable of generating other revenues. Avoidance of resentment and ill will, at a minimum, therefore, counsels limitations on transfer and entry.¹²⁸

Professor Riga has suggested that, in order to preserve the public interest in fan loyalty and stability, a team should give an assurance to the city that the team will not move without the city's consent unless it can prove financial loss.¹²⁹ This proposal recognizes the

121. *Id.* at 84.

122. *Coliseum*, 726 F.2d at 1396.

123. Comment, *supra* note 10, at 898.

124. See Gorton, *supra* note 104, at 2.

125. See Wong, *supra* note 5, at 12.

126. See *id.* at 11 n.18.

127. See Riga, *supra* note 117, at 573; Kurlantzick, *supra* note 94, at 196.

128. Kurlantzick, *supra* note 94, at 196.

129. See Riga, *supra* note 117, at 578.

noneconomic forces at work in team relocation controversies. Indianapolis, for example, invested millions of dollars to attract the Baltimore Colts. Tomorrow, if another, more "attractive" community builds a better stadium and offers better lease terms, or greater cable television or luxury-box revenues, Indianapolis might lose its team to the same fate as did Baltimore. The taxpayers will then foot the bill for an empty stadium. Oakland Mayor Lionel Wilson articulated this interest:

After 22 years in Oakland, and 12 years of sold-out attendance in the 54,000 seat Oakland-Alameda County Coliseum stadium with ticket prices among the highest in the NFL, the Oakland Raiders threatened to move to Los Angeles in 1980 [T]he taxpayers of Oakland and Alameda County provided a facility now worth more than \$75 million. The City and County are now \$30 million "in the hole" as a result of Coliseum operations, and will continue to pay \$1,500,000 per year until the year 2004 in order to retire the construction bond obligation.¹³⁰

In the end, if teams are allowed to relocate, cities may be less willing to build stadiums and compete for franchises, possibly causing a shortage of adequate facilities. Such a shortage would hurt the NFL as well as the public.¹³¹

D. Other Possible Rationales

Other approaches that must be considered in evaluating *Raiders II* are the local embargo and prohibition on outgoing commerce rationales, which have at times been used to identify violations of the dormant commerce clause.¹³² Because the commerce clause is intended to facilitate interstate movement, the nature of the interstate product in question must be defined before the burden can be evaluated. Here, the product produced—football games—must be distinguished from the business itself. The *Coliseum* court characterized the product as

130. Wong, *supra* note 5, at 31 (quoting testimony from *Professional Sports Team Protection Act: Hearings on S. 2505 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 6, 40 (1984)).

131. Although there has not been a shortage to date, once cities realize that teams can relocate on a whim, they may be less willing to improve old stadiums.

132. See *Raiders II*, 174 Cal. App. 3d at 421 n.3, 220 Cal. Rptr. at 157 n.3; Comment, *Taking a Sports Franchise*, *supra* note 57, at 582-83 (A state cannot act to satisfy local demands first, at the expense of other states.); Comment, *supra* note 45, at 788 ("State actions which discriminate economically against other states are violative of the Commerce Clause."); see also *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (state statute requiring a reciprocity agreement with another state before the other state's milk could be imported violated commerce clause); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (price regulation prohibiting sale of milk below certain price violated commerce clause).

"the NFL season culminating in the Super Bowl."¹³³ Preventing a team's relocation would not restrict interstate commerce in that product. Oakland was not preventing the Raiders from playing outside the state. It was not restricting telecasts of Raiders games or prohibiting Oakland residents from watching telecasts of other games. Nor did the city propose to limit the importation of other types of entertainment that might detract from the public's interest in football. Because the product's movement would not be restricted, any burden on interstate commerce would be the indirect financial burden to the NFL should teams be forced to remain in unprofitable locations. The condemnation itself, however, is not a local embargo because it does not restrict importation or exportation of the product (football games).

Under the second theory, prohibition on outgoing commerce, the restraint in question is that imposed on the franchise and its home games. The taking, it can be argued, discriminates against other states by preventing their acquisition of the team; Oakland is, in effect, hoarding its football team or the home games of the team. If team A plays team B in A's stadium, is team A's city importing or exporting the product, football games? The answer is difficult because these are not typical goods being produced for sale elsewhere. Team B, the visiting team, is an import. It is a necessary ingredient to the product. Team B is free to travel to another team's home games. The output, the game, is consumed in city A and is also exported to the rest of the country by television. The city is hoarding home games because another city is prevented from having team A play its home games there. Home games, however, are only a component of a greater football product. Therefore, even if the city is hoarding home games, the product (football) can still be consumed by out-of-staters. Thus, the impact on interstate commerce of hoarding home games is slight.¹³⁴

133. *Coliseum*, 726 F.2d at 1389. By characterizing the product as the total package of football games, yet rejecting the NFL owners' single-entity argument with respect to league restrictions on team relocation, the *Coliseum* decision implicitly supports the idea that uniformity is not a compelling interest in every case. The *Coliseum* court stated that:

[T]he exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product?

Id. at 1394.

134. [A] team can be likened to a manufacturer which produces a product: in this case the product is games. Keeping a team in a given state does not prevent the

Insofar as the restraint is seen as the restriction of the right of a business to move to a more profitable location, right to travel concerns are raised.¹³⁵ Although there is some question as to whether the right to travel applies to corporations, some courts have argued that the right is, at least in part, bottomed in the commerce clause.¹³⁶ Although the Raiders' move was in-state, courts have acknowledged that the right to *intrastate* travel is implied by the right to interstate travel.¹³⁷ Plainly, if there is such a right to relocate in order to use assets more profitably, this is not a right to be taken lightly. But any such right is ancillary to the need to assure a free interstate flow of the product itself. The question then is whether prohibiting the underlying organization from moving would impair this flow because the business could not compete as vigorously in the national market. Such a determination requires a balancing of burdens and benefits as discussed in the previous section. It is important once again to recog-

movement of the product, the games, between the states. National viewers can view the Colts as readily whether the team is located in Indianapolis or Baltimore.

Comment, *supra* note 45, at 789.

135. Several commentators have suggested that condemnation of a football franchise restricts that franchise's movement throughout the United States and therefore violates its right to travel. One author has suggested that interstate commerce is burdened by the reduction of "the number of businesses that pass through interstate commerce." Note, *supra* note 9, at 191. The right to travel (more precisely, the right of individual interstate migration) is a recognized constitutional right, although not explicitly required by the constitution. See *Shapiro v. Thompson*, 394 U.S. 618, 670-71 (1969) (Harlan, J., dissenting); *United States v. Guest*, 383 U.S. 745, 758 (1966); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958). For a general discussion of the right to travel, see Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117 (1975); Note, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129 (1975).

136. See *Guest*, 383 U.S. at 758-59; *Edwards v. California*, 314 U.S. 160, 174 (1941); Comment, *Taking a Sports Franchise*, *supra* note 57, at 578; Note, *supra* note 9, at 189 ("It is difficult to imagine an interest compelling enough to justify restraining the movement and, necessarily, the expansion of business in interstate commerce."). But see *supra* notes 113-30 and accompanying text (description of the city's interests).

137. See *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); *In re White*, 97 Cal. App. 3d 141, 148, 158 Cal. Rptr. 562, 567 (1979). The Supreme Court has not decided the extent of this right. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1261-62 (M.D. Pa.) (Under California law, an infringement of the right to travel intrastate is evaluated by a balancing test.), *aff'd without opinion*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976); *In re White*, 97 Cal. App. 3d at 148 n.3, 158 Cal. Rptr. at 567 n.3. The *Raiders I* trial court reasoned that even if the right to travel applied to franchises, it was not a valid defense to the taking. See Comment, *Taking a Sports Franchise*, *supra* note 57, at 579 (citing *City of Oakland v. Oakland Raiders*, No. 76044, slip op. at 24 (Cal. Super. Ct. Monterey County filed July 16, 1984) (Tentative Decision) ("[T]he fact that such acquisition of property prevents its relocation, or interferes with the desire of its owner to move to another location, would not be a valid objection to the taking." Otherwise, the owner of intangible property could "insulate it from acquisition by merely asserting a desire to relocate it.")).

nize the curious fact that in *Raiders II* allowing movement in the face of NFL opposition actually undermines collective action in the national market.

E. *Securing the Public Interest*

Evaluating the public interest requires two steps.¹³⁸ First, the court must identify *what* is the public interest. Here, the interest is in recreation, symbolic value, city spirit, and pride.¹³⁹ Once the court has identified this interest, it should examine *why* the public interest requires the city's intervention. There must be some reason why the city's intervention is needed to secure this public interest as opposed to other, less burdensome, alternatives. For example, if a city wished to condemn land to build a needed stadium, and the city were the only entity that could afford to build the stadium, then the second step would be met, and the city could condemn the land. Here, the only way for the city to secure the public interest is to change team ownership in order to keep the team in the city. Public ownership is not required. Only the city's use of its eminent domain power to compel a change in ownership is needed, because the present owner cannot be induced to stay. If the real burden is examined, and the city's real goal is analyzed, then it is evident that the city is not abusing its power.¹⁴⁰

V. A CLOSER LOOK AT THE COURT'S DECISION

The eminent domain power undeniably is a traditional power of state sovereignty that commands great importance in the balancing process. The question has become whether and when condemnation is a valid means to an acceptable police power end. The conflict between the city's exercise of the eminent domain power and the constitutional limitation of state regulation imposed by the commerce clause is a result of the federalist system upon which the nation was founded. The city asserts authority to protect the welfare of its citi-

138. This analysis is analogous to the *Pike* test, which requires a showing that the local action is the least restrictive alternative. The least restrictive alternative test was developed in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Commentators have suggested various alternatives, presumably less intrusive than the eminent domain power. See Comment, *supra* note 45, at 790 (contract concessions and reimbursement provisions if team moves); Comment, *Taking a Sports Franchise*, *supra* note 57, at 583 (purchasing or aiding a private party to purchase the team on the open market). These suggestions only work if the team wishes to cooperate. Without such cooperation, the city's only option to secure the public's interest in recreation and to protect its economic investment—from which the team and the NFL have benefited—is a condemnation action.

139. Recreation is a valid public use. See *supra* note 41.

140. See *supra* note 138.

zens: such welfare has frequently been held to include recreation. Because such an interest would be recognized under the city's eminent domain power, and because the city is not seeking to prevent out-of-state competition or restricting the flow of the goods into interstate commerce, the condemnation should be evaluated with a balancing test.

Although the local benefits test under the commerce clause is fuzzy, the public use test of the eminent domain power is broad enough to encompass that test. As with public use, public purpose under the commerce clause lacks a clearly articulable definition. Further, the question of whether a public purpose is sufficient to justify a burden on interstate commerce will not be reached if the regulation is discriminatory on its face or its intent is to protect local interests from interstate competition.¹⁴¹ The question that remains to be answered is how the court could have decided the case and avoided the conceptual muddle created by the amorphous structure of the NFL, the competing interests at stake, and the interrelationship between the commerce clause and eminent domain analysis.¹⁴²

There are at least two conceivable reasons why the court avoided balancing the interests: (1) the unique, amorphous structure and competitive/cooperative nature of the NFL; and (2) the inextricably related economic and welfare interests that football fosters. The interests involved in the case extend beyond normal, rational economic interests. They are subjective in nature and difficult to define.¹⁴³ When combined, interests that are clearly recognizable in a typical eminent domain or commerce clause case become painfully obscured. For this reason, some commentators have suggested that Congress is the body best able to resolve the competing interests at stake.¹⁴⁴

Even if balancing the relevant interests is difficult, courts should

141. Maltz, *supra* note 57, at 61.

142. See Berger, *supra* note 34. Professor Berger suggests that courts must weigh the benefit to the condemnor against the harm to the condemnee to determine whether a taking is appropriate. *Id.* at 241. Although both eminent domain and commerce clause analyses involve a balancing test, the eminent domain analysis would not come into conflict with the commerce clause analysis unless the burden on the condemnee also burdened interstate commerce. When an NFL team is condemned, it is the burden on the NFL that creates potential burdens upon interstate commerce rather than the burden on the team.

143. Indeed it is difficult to define precisely what the NFL is.

144. One author recommends legislative action because "[t]he arguments supporting the proposition that any property or interest therein can be condemned are well founded in established eminent domain practice and theory." Note, *supra* note 32, at 149; see Comment, *Taking a Sports Franchise*, *supra* note 57, at 584 (Congress is the only body able to balance the competing interests involved); Note, *The Professional Sports Community Protection Act: Congress' Best Response to Raiders*, 38 HASTINGS L.J. 345 (1987) (discussing legislative alternatives).

not abdicate their responsibility to do so. In trying to avoid the tough questions, the courts in the *Raiders* cases applied inappropriate tests. The courts continuously appealed to the legislature for regulation.¹⁴⁵ The judges mistakenly viewed a difficulty in identifying and analyzing competing interests as bespeaking a need for federal control.

The *Raiders II* court fumbled in a last effort to achieve a result it considered fair. The court may have acted on an instinctive notion that there is something not quite right about allowing a city to condemn a football team. Notwithstanding recognition of the city's interests in retaining the team, there is an inherent difficulty in accepting municipal power that enters into an area seemingly as private as the ownership of a football team. Although there are intrinsic conceptual, and perhaps, social difficulties in the condemnation of a professional football team, the present methodologies used by the courts allow condemnation. If the courts are troubled by the results these methodologies compel, they should limit the reach of the tests rather than refusing to apply them.

If the commerce clause does not provide a legally justifiable basis for invalidating the condemnation, how then can the *Raiders II* court's decision be explained? There must be some deeper, perhaps subconscious, ideological considerations at work in the court's opinion.¹⁴⁶ Perhaps the court found itself intellectually troubled by the same incredulity that most people experience when they consider the possibility that a city could condemn a football team. That a city could *take* a football team is a concept offensive even to scholars highly educated in the law of eminent domain.¹⁴⁷ It is not enough,

145. See *Raiders I*, 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring in part, dissenting in part); *Raiders II*, 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 158.

146. See Bender, *The Takings Clause: Principles or Politics*, 34 BUFFALO L. REV. 735 (1985). Professor Bender states:

The requirement of reference to constitutional precedent serves only to put rhetorical reins on total judicial abandon. Constitutional decisionmaking has become political decisionmaking—political results translated into legal rationalizations. Justices ask themselves how they want their society structured; what theory they believe would promote the dominant ideology of the day; what they think the rules ought to be; and what they want the result in a particular case to be.

Id. at 812.

147. See, e.g., Sackman, *Public Use—Updated* (City of Oakland v. Oakland Raiders), 1983 INST. ON PLAN. ZONING & EMINENT DOMAIN 203. Professor Sackman states that a public use must be "one based on historical conditions predicated on the basis of variations in local conditions, or one in which the interest of the state is of such profound or fundamental interest as to be essential to its very existence." *Id.* at 232. Professor Sackman refuses to recognize Oakland's social, economic, and recreational interests as substantial. Accordingly, he finds Oakland's interest "petty" and not one that meets constitutional criterion for a public use. *Id.*

however, simply to note this ideological abhorrence to the taking—be it conscious or subconscious—which arguably underlies the court's decision. The interesting question is why the court was forced to rely on incorrect legal theory to support a decision it found ideologically more acceptable. What is it about eminent domain, and in particular, public use, that forced this theoretically practical—if legally questionable—decision?

Conspicuously, the *Raiders II* court did not decide the public use issue, preferring instead, to invalidate the attempted taking on commerce clause grounds.¹⁴⁸ Because the City of Oakland did not dispute the fact that it was attempting to take property within the meaning of the eminent domain clause, the only issue for the *Raiders II* court to decide was the public use issue, not whether there in fact had been a taking. The *Raiders II* court attempted to use the commerce clause issue to act as an implicit limit on the doctrine of public use.¹⁴⁹

Many commentators have also attempted to find some kind of limit on the public use doctrine.¹⁵⁰ These attempts, however, have only prompted vigorous discussion between scholars while falling on deaf ears in the courts.¹⁵¹ These debates parallel the discussions surrounding the broader issue of compensable takings. A perfunctory analysis suggests that the same theoretical debates over when there is

at 234. The examples he uses to support this proposition, however, undercut his conclusion. He relies on *Midkiff v. Tom*, 471 F. Supp. 871 (D. Haw. 1979) (land reform to revive a dying community), and *Puerto Rico v. Eastern Sugar Assocs.*, 156 F.2d 316 (1st Cir.) (agrarian reform to avert a civil war), *cert. denied*, 329 U.S. 772 (1946). Surely the government is not forced to wait until its community is dying or on the verge of civil war before it can use its eminent domain power to solve social and economic problems. The courts are far from this conclusion. See *supra* notes 38-40 and accompanying text; see also Bender, *supra* note 146 (suggesting that political solutions to economic and social problems involve value judgments that should not be part of the takings clause). Professor Bender, in her discussion of takings and public use, suggests that judicial decisionmaking has in reality become political decisionmaking, hidden by legal rationalizations. Decisions turn on judges' views of how they want their society structured, and how they can preserve the dominant ideology of the time or their own value structures. *Id.* at 812. Public use expands to further economic development or business interests of politically powerful groups and is "wholly dependent upon the immediate social, economic, or political visions of legislatures or judges." *Id.* at 829.

148. 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 106 S. Ct. 3300 (1986).

149. See *supra* note 43 and accompanying text; see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 119, 141 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

150. See, e.g., Bender, *supra* note 146 (public use should not encompass political and social concerns); Berger, *supra* note 34 (advocating various economic criteria to determine whether there is a public use); Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3 (1986) (public use limited by an optimal division of the social surplus as defined by the existing distribution of resources); Meidinger, *supra* note 22 (discussing sociological and political limits on the doctrine of public use).

151. See *supra* note 43 and accompanying text.

a compensable taking¹⁵² would embrace with equal force the issue of public use. More rigorous analysis, however, suggests that these particular debates are unsuited for public use analysis. In determining whether governmental action is a taking which requires just compensation, theoretical debates are appropriate because they attempt to determine *when* the government must pay for its action. Public use, however, determines *whether* the government can take the property. Thus, if an action is not a taking, the result is that the government does not have to pay. If an action is not for a public use, the result is that the government cannot engage in the action at all.

The courts are, at the very least, reluctant to tread in this area, because once an action is held to be outside the public use, the government cannot exercise its eminent domain power in that area. The determination of whether a taking has occurred is a decision "close to the basic economic and political values of our society."¹⁵³ It is submerged in philosophical debate over the scope of legitimate govern-

152. See generally *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986) (proceedings and critiques of Richard Epstein's *Takings*).

The determination of whether a taking has occurred rests largely on underlying conceptions of property because one must have a property right before the government can "take" it. Any such determination is necessarily related to a discussion of the proper scope of government. Commentators have espoused various theories to deal with these concepts. For example, Richard Epstein embraces a "bundle of rights" view of property (rights to possess, use, and dispose of property) and bases his political theory on natural rights in his search for a defensible limit to governmental action. See Paul, *Searching for the Status Quo* (Book Review), 7 CARDOZO L. REV. 743, 743 (1986) (discussing Epstein's theory that the fifth amendment should "prohibit all explicitly redistributive government activity"). Professor Radin distinguishes between property held for purely economic reasons and property held as something personal and important to the owner. Thus, Radin takes condemnation theory outside the realm of pure economic theory by allowing for personal attachments to property. See Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). The courts, however, apply a multi-factor test, including (1) the severity of the economic impact, see, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); (2) the character of the governmental action, see, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); and (3) the damage to investment-backed expectations, see, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

153. Paul, *supra* note 152, at 780. Indeed, at least one commentator has suggested that the development of eminent domain can be explained by reference to economic strength and political power. In her discussion of *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), Professor Bender states:

Why weren't other options taken? Why did economic power equate perfectly with political power? *Poletown* represented a survival of the fittest story, where the fittest was a megacorporation that could wield political clout in the face of a desperate community. It illustrated a brutal social Darwinism, retreating from advancements we have made as a civilized people; it was utilitarianism where utility was defined in terms of corporate, economic prosperity instead of social cohesion and mutual advancement.

Bender, *supra* note 146, at 806-07.

mental action, extending back to such philosophers as Locke and Hobbes. Political visions are explored and abandoned, reexplored and resurrected. Such discussion is best left to defining the limits on governmental action without compensation, rather than analyzing whether the government can act at all. Judges are reluctant to determine as a matter of judicial discretion that the government can never act in a particular area.¹⁵⁴

Further, there is the question of whether the public use at issue is the kind of public use that should be turned over to public enterprise. While some would find in such a concept hints of socialism, it is not a concept invidious to either the American legal system or traditional constitutional principles.¹⁵⁵ Of course, this condemnation would meet the broad public use definition, but ideologically, perhaps this kind of enterprise should not be in public hands. Perhaps there should be some ideological barrier across the eminent domain power. The commerce clause, however, which is aimed at securing a national market free from state imposed barriers, should not be used to circumvent a legal doctrine aimed at wholly distinct concerns.¹⁵⁶ If football is one of the consummate expressions of a community, the question becomes whether we, as a society, should draw lines and say that this form of expression can only be fulfilled subject to the whim of the franchise owner, or whether we should recognize that this expression is a uniquely civic function, subject to traditional governmental powers such as eminent domain. The *Raiders II* opinion simply did not meet the intellectual challenge the case posed to the court.

LISA J. TOBIN-RUBIO*

154. A broad interpretation of public use "removes determinations about governmentally required private property transfers from judicial consideration." *Bender*, *supra* note 146, at 811.

155. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory . . ."). Justice Holmes's dissent and subsequent cases stand for the proposition that the Constitution is not necessarily structured upon any one view of society or economic theory. See *United States v. Carolene Prod.*, 304 U.S. 144 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

156. Indeed, the Court's whole concept of a market participant exception to the commerce clause supports the proposition that the Court will not intrude, by means of the commerce clause, into the philosophical issues involved in governmental action. The Court has indicated an intention, at least insofar as commerce clause jurisprudence is concerned, to let the political process determine the mix of public and private use in society.

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