

Fall 1997

We'll Take the Yankees: Assessing the Feasibility of State Condemnation of Baseball's Greatest Franchise

Rafael A. Deplet Jr.

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Rafael A. Deplet Jr., *We'll Take the Yankees: Assessing the Feasibility of State Condemnation of Baseball's Greatest Franchise*, 8 Marq. Sports L. J. 53 (1997)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol8/iss1/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

WE'LL TAKE THE YANKEES: ASSESSING THE FEASIBILITY OF A STATE CONDEMNATION OF BASEBALL'S GREATEST FRANCHISE

RAFAEL A. DECLET, JR.*

I. INTRODUCTION

On October 26, 1996, before 57,000 ecstatic fans at Yankee Stadium and millions more across the country on television, the New York Yankees defeated the Atlanta Braves 3-2 to win their 23rd World Series, four games to two.¹ The win marked the end of an 18-year World Series drought for the Yankees, and three days later 3.5 million New Yorkers flocked to lower Broadway's Canyon of Heroes to fête their team with ticker tape.² New Yorkers were even ebullient enough to cheer the usually misprized Yankee owner, George M. Steinbrenner III, as he was awarded a proclamation from Mayor Rudolph W. Giuliani declaring the day New York Yankee Day.³

But under the din of New York's celebrations, tensions over the Yankees's future in the Bronx remained high.⁴ Citing concerns about the profitability of the outmoded Yankee Stadium and fan perceptions of crime in the surrounding Bronx neighborhoods, Steinbrenner continues to hint that he will seek a new, more favorable locale for the

* J.D., *cum laude*, St. John's University School of Law, 1997; B.A., Lehman College of the City University of New York, 1994. Law Clerk to the Honorable Carmen Beauchamp Ciparick, Associate Judge of the New York Court of Appeals. Thanks are due to Dr. Patrick J. Rohan, Dean Emeritus and Professor of Law at St. John's Law School, for his instructive suggestions while this article was in its formative stages. Love and thanks to my wife, Jessica S. Declet, for her help and support in writing this article.

1. Michael Hirsley, *Low Series Ratings Are Plenty High for Fox*, CHI. TRIB., Nov. 1, 1996, at 6; N.R. Kleinfeld, *Comeback is Complete: Yanks Win the Series*, N.Y. TIMES, Oct. 27, 1996, § 1, at 1.

2. N.R. Kleinfeld, *A Parade of Pride in Yankee Triumph*, N.Y. TIMES, Oct. 30, 1996, at A1.

3. *Id.*

4. See Michael O. Allen, *Mayor Sez No to Yank Grab*, N.Y. DAILY NEWS, Nov. 11, 1996, at 10; *New York's Baseball Mania: Out of Bounds?*, THE ECONOMIST, Nov. 2, 1996, at 28 (hereinafter "*Out of Bounds*"); Phil Plentz, *Series Propels Yanks' Record Financial Year: Revenues Top \$100 Million Mark; Stadium, TV Deal Limit Future Gains*, CRAIN'S N.Y. BUS., Oct. 21, 1996, at 1; Tim Sullivan, *World Series Right at Home in New York*, CINCINNATI ENQUIRER, Oct. 20, 1996, at C1.

Yankees, in New York or elsewhere, upon the expiration of the Yankees's current stadium lease in 2002.⁵ In response, some commentators and local elected officials have proposed that if Steinbrenner cannot be persuaded through negotiations to keep the Yankees in New York, then New York City or New York State should force the issue by exercising their powers of eminent domain to condemn the franchise.⁶

This paper examines the feasibility of a state condemnation of the Yankees. Part I provides an introduction to the issues, and sketches out a history of New York City's relationships with baseball and the Yankees. Part II discusses relevant aspects of the law of eminent domain. Part III addresses some of the legal difficulties associated with the taking of a franchise, including antitrust law, the commerce clause, and the potential problem of an "anticipatory flight" by the Yankees. Part IV concludes that the State Legislature should quickly pass the New York State Sports Fan Protection Act, and should not hesitate to condemn the team if it seems prudent or necessary.

A. *Baseball and New York*

Despite the enormous and continuing changes to the face of American culture since Casey struck out in Mudville, baseball retains its pride of place as the national pastime.⁷ In 1996, some sixty million fans attended major league baseball (hereinafter "MLB") games, more than twice as many as patronized any other professional sport.⁸ Many millions more enjoyed baseball on television or cable, comprising a wide and extremely valuable audience.⁹

5. See *Out of Bounds*, *supra* note 4, at 28; Plentz, *supra* note 4, at 1.

6. Allen, *supra* note 4, at 10; Richard L. Brodsky, *To Keep Yankees, Eminent Domain Makes Sense*, N.Y. TIMES, Apr. 28, 1996, § 4, at 12; Karen Freifeld, *Safe at Home: Bill Would Keep Yanks in Bronx*, NEWSDAY (Queens Ed.), Apr. 10, 1996, at A4; *Out of Bounds*, *supra* note 4, at 28. See proposed New York State Sports Fan Protection Act, A.B. 684, 220th Gen'l Assembly, 1997-1998 Reg. Sess. (1997) (providing for creation of a New York Sports Facilities Authority with power to condemn state-supported sports facilities and/or franchises).

7. On the history of baseball, see generally CHARLES C. ALEXANDER, OUR GAME: AN AMERICAN BASEBALL HISTORY (1991); BENJAMIN G. RADER, BASEBALL: A HISTORY OF AMERICA'S GAME (1992); DAVID VOIGT, BASEBALL: AN ILLUSTRATED HISTORY (1987).

8. David Leonhardt, *Baseball's Slump Is Far from Over*, BUS. WK., Nov. 4, 1996, at 82. Another 33 million fans patronized the 171 minor league teams. Notwithstanding baseball's continuing lead in attendance over other professional sports, MLB's attendance is down some 15% from its level before the 1994-95 players' strike.

9. The networks shelled out \$1.7 billion for five years of broadcast rights beginning in 1995. Stephen Baker & David Greising, *The Home Run Baseball Badly Needs?*, BUS. WK., Oct. 28, 1996, at 55.

New Yorkers pride themselves on living in the world's greatest city, and being on the cutting edge of American life and culture. At least as far as baseball is concerned, New York City's claim to trend-setting greatness is based amply in fact, for America's national game has long been closely linked to its premier city. In the early nineteenth century, numerous bat-and-ball variants were played throughout the United States, with no uniformity or written rules.¹⁰ In 1845, the Knickerbocker Base Ball Club, a social organization for gentlemanly New Yorkers, laid down the first comprehensive written rules for the game.¹¹ Ironically, the Knickerbockers played their games on the Elysian Fields in Hoboken, New Jersey.¹² In the first recorded modern game of baseball, on June 19, 1846, despite their status as path-breakers, the Knickerbockers were crushed 23-1 by the New York Nine.¹³

Baseball, under the Knickerbocker rules, was a considerable improvement over the old ad-hoc variants, and through the 1850s, baseball in the New York area exploded in popularity.¹⁴ The Civil War gave bored soldiers ample opportunity to play baseball, and the Knickerbocker rules quickly became the national standard.¹⁵ By the end of the war, baseball was played across the country, often referred to as the "New York Game."¹⁶

Since New York was, then as now, the nation's money-making capital, it was not long before the New York Game progressed from social pastime to commercial enterprise. In 1862, at the corner of Lee Avenue and Rutledge Street in Brooklyn, Union Grounds, the first for-profit ballpark opened with wooden benches and a saloon for 1500 fans.¹⁷ In 1869, the Cincinnati Red Stockings, the first all-professional team, toured the country and racked up a record of fifty-six wins, no losses, and one tie, including six wins against leading New York teams.¹⁸

10. RADER, *supra* note 7, at 2.

11. *Id.* at 3-4.

12. Flood v. Kuhn, 407 U.S. 258, 260-61 (1972).

13. *Id.*

14. RADER, *supra* note 7, at 5. An 1857 song, *The Baseball Fever*, reported: Our merchants have to close their stores Their clerks away are staying, Contractors, too, can do no work, Their hands are all out playing.

15. *Id.* at 12-13.

16. *Id.* at 10.

17. *Id.* at 15.

18. Flood, 407 U.S. at 261; RADER, *supra* note 7, at 25-26. The 1869 Red Stockings' payroll was \$9,300, and for their winning record of 56-0-1, their owner reported an end-of-year profit of \$1.25. *See Id.*

The first professional league, the National Association of Professional Base Ball Players (hereinafter "National Association"), was founded in New York in 1871 with eleven teams.¹⁹ The National Association was loosely organized and was open to any professional team which paid a modest entry fee.²⁰ The National Association was replaced in 1876 by the National League of Professional Base Ball Clubs (hereinafter "National League" or "NL").²¹ Where the National Association had been an open, loosely-organized, player-oriented association, the National League employed the monopolistic business practices of the day to create an exclusive owners' cartel and eliminate competition from other leagues. NL teams could only play other NL teams; clubs could be based only in cities with populations of at least 75,000 (sizable for the 1870s); and player rosters of member clubs were protected from poaching by other NL teams through the infamous "reserve clause."²² Joined only by the American League (hereinafter "AL"), which the National League was compelled to recognize as a fellow major league in 1903,²³ the MLB owners' cartel has succeeded in maintaining its monopoly over major league baseball for the past 120 years.²⁴

19. RADER, *supra* note 7, at 37.

20. *Id.* at 41. The entry fee was \$10 per team. *Id.* During the five seasons it existed, the National Association was dominated by Boston, which, led by the star pitcher Albert Spalding, compiled a record of 207-56 from 1872-75. *Id.* at 38.

21. *Flood*, 407 U.S. at 261; RADER, *supra* note 7, at 36-43. The NL's original teams were located in Boston, Chicago, Cincinnati, Hartford, Louisville, New York, Philadelphia, and St. Louis. *Id.* at 42.

22. RADER, *supra* note 7, at 45. First instituted in 1887 with the consent of the players, who believed it in the best interests of baseball, the reserve clause system "[c]enter[ed] on the uniformity of player contracts; the confinement of the player to the club that ha[d] him under contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum." *Flood*, 457 U.S. at 260 n. 1. By binding each player to the first organization which hired him at the beginning of his career, the reserve system effectively reduced players to a serf-life existence from which they could escape only by quitting baseball. GERALD W. SCULLY, *THE BUSINESS OF MAJOR LEAGUE BASEBALL* 29 (1989). Of course, even under the reserve system, MLB players were always rather well-paid serfs. See RADER *supra* note 7, at 60.

Agreements between players and owners led to the abolition of the reserve system in 1976. SCULLY at 192-94.

23. From its birth in 1894 as the Western League, the American League sparked the Great Baseball War in 1901 when it declared itself a major league and raided the National League for players. RADER, *supra* note 7, at 81. The following year, 1902, the young AL outdrew the established NL, 2.2 million fans to 1.7 million. *Id.* In 1903, the AL invaded New York with a new franchise, the Highlanders, and the NL made peace soon thereafter. *Id.*

24. On the MLB monopoly, see generally KENNETH M. JENNINGS, *BALLS AND STRIKES: THE MONEY GAME IN PROFESSIONAL BASEBALL* (1990); DON KOWET, *THE RICH WHO OWN SPORTS* (1977); SCULLY, *supra* note 22.

B. *The Yankees*

The New York Yankees are rightly regarded as both the epitome of baseball and a symbol of the Bronx, linked to Yankee Stadium as by an umbilical cord,²⁵ but Yankee Stadium is actually the fourth home of the franchise we now call the Yankees.

The birth of the New York Yankees was in part a by-product of the Great Baseball War between the National and American Leagues.²⁶ Ban Johnson, the head of the American League, lacked a team in New York, and needed a Big Apple affiliate to help legitimize the AL as a major league.²⁷ Considering New Yorkers' current outrage at the prospect of another city luring the Yankees away from New York, it is ironic that the Yankees themselves started as a relocation team, when Johnson sold his own Baltimore franchise to two wealthy and politically astute New Yorkers, Bill Devery and Frank Farrel.²⁸ The purchase price for the whole franchise was \$18,000.²⁹

Devery and Farrel's political connections were important, because the owners of the already-established NL New York Giants, John T. Brush and Andrew Freedman, threatened to use their own real estate and Tammany Hall connections to prevent the AL from securing the needed site for a new stadium.³⁰ Because of Devery's political clout in northern Manhattan, he and Farrel were able to acquire a plot of land atop a hill in Washington Heights, at Broadway and 162nd Street.³¹ There they erected a small wooden stadium with seats for 15,000 fans called simply "Hilltop Park."³² They named the team which played on top of the hill the "Highlanders," but early on they were nicknamed the "Yankees," which was adopted as the team's official name during World War I.³³

25. See Sullivan, *supra* note 4, at C1.

26. JOHN TULLIUS, I'D RATHER BE A YANKEE 3-5 (1986). On the New York Yankees see generally, TOM MEANY, THE YANKEE STORY (1960); LAWRENCE S. RITTER, THE GLORY OF THEIR TIMES (1966).

27. RADER, *supra* note 7, at 80-81; TULLIUS, *supra* note 26, at 4.

28. See TULLIUS, *supra* note 26, at 4-5. Devery was a former Commissioner of the New York City Police Department, and Farrel was a successful gambler. *Id.*

29. *Id.* at 5.

30. RADER, *supra* note 7, at 80-81. Interestingly, Brush threatened to have New York City use its power of eminent domain to prevent the AL from building a stadium in New York by condemning any suitable tracts of land they acquired. *Id.*; See also, TULLIUS, *supra* note 26, at 4. "No matter where you go, the city will decide to run a streetcar over second base," quipped Brush."

31. TULLIUS, *supra* note 26, at 5.

32. *Id.*

33. *Id.*

The Highlanders made a run for the pennant in 1904, finishing the season one half game behind the Boston Pilgrims, but they were a weak team during their early years, and did not win a single pennant until 1921.³⁴ By then the Yankees were under new ownership³⁵ and were led by a pitcher-turned-sluggger named Babe Ruth.³⁶ Under Ruth, the Yankees began an unparalleled tradition of greatness which would span the next forty years, during which time they would win twenty World Series and twenty-nine AL pennants.

In 1923, the Yankees moved into their new stadium. It was located in the Bronx across the Harlem River from the Polo Grounds where they had played for a few years as tenants of the Giants.³⁷ The Colosseum-like stadium seated as many as 74,000 fans, and took one year to build at a cost of \$2.5 million.³⁸ There the Yankees have played for more than seventy years, building legends in the "Cathedral of Baseball."³⁹

But by the early 1970s, the Yankees's aura of greatness was dimmed and their "Cathedral" was decaying and outmoded. Moreover, the club's new owner, George Steinbrenner, was already talking about taking the team out of the Bronx. In response, during 1974-76, elected officials arranged for a modernization of the old stadium, removing most of its colossal exterior facade, clearing view-obstructing columns inside, and reducing general seating to 57,000, while adding nineteen luxury suites.⁴⁰

However, Yankee Stadium's renovation had little effect on the decline of the area around the stadium. From 1970 to 1980, the population of the Bronx fell from 1.5 million to 1.2 million as crime and poverty skyrocketed throughout much of the borough, as they did in New York City as a whole.⁴¹ Through the 1980s and into the 1990s, Steinbrenner was not alone in maintaining that the decline of the Bronx neighborhoods around the stadium was keeping fans away from home games and

34. *Id.* at 9-24.

35. In 1915, Farrel and Devery sold the losing Yankees to Jacob Ruppert and Tillinghast Huston for \$460,000. *Id.* at 15.

36. Ruppert acquired Ruth from the Boston Red Sox in 1919 for \$100,000 cash plus a \$300,000 loan to the owner of the Red Sox. *Id.* at 37.

37. TULLIUS, *supra* note 26, at 63. The Yankees embarrassed the Giants by outdrawing them while they shared the Polo Grounds from 1920-22. *Id.*

38. *Id.* at 63; Richard Sandomir, *A 3d Pitch on Ruth's House*, N.Y. TIMES, Dec. 5, 1993, § 1, at 51.

39. Sullivan, *supra* note 4, at C1.

40. Sandomir, *supra* note 38, at 51. Estimates of the cost of the 1974-76 renovations range from \$78 million to over \$100 million. Jim Dwyer, *We're All Simian to Uncle George*, NEWS-DAY (City Ed.), July 22, 1994, at A2.

41. See EDWARD F. BERGMAN & THOMAS W. POHL, *A GEOGRAPHY OF THE NEW YORK METROPOLITAN REGION* 77-106 (1975).

contributing to low profitability for the team.⁴² Moreover, despite the stadium's extensive renovation during the early 1970s, today Yankee Stadium is once again considered outmoded: it lacks the luxury suites nowadays considered indispensable to maximizing a sports facility's profitability;⁴³ it lacks adequate parking and other regional transportation links; and its postmodern, functional appearance is considered unattractive now that the old-time look of stadiums like Boston's Fenway Park and Baltimore's retro Camden Yards are fashionable. The Yankees have indicated that they are considering a move to New Jersey's Meadowlands sports complex when their Yankee Stadium lease expires in 2002.⁴⁴

Concerned about the blow to the city's economy and prestige a Yankee departure would entail, civic leaders have begun planning to ensure New York City's continued desirability as a home for the Yankees.⁴⁵ Attention has centered on two options: another renovation of Yankee Stadium⁴⁶; or constructing a new stadium over rail yards in midtown

42. See Matthew Purdy, *Alternative Sites for Yankee Stadium Are Studied*, N.Y. TIMES, June 8, 1994, at B1; Sandomir, *supra* note 38. But see Dwyer, *supra* note 40, at A2:

. . . [N]ot a scrap of evidence shows that crime has kept the public away from Yankee Stadium. . . . For instance, . . . [the years] between 1959 and 1966 includ[ed] five pennant-winning teams and two World Series Championships. The average home attendance for Yankee Stadium during those years was 1.4 million. . . . [In 1993], when there were more murders in the city than all those years [combined], the attendance was 2.4 million

43. Expensive premium seating and enhanced concession marketing mean that a new stadium can increase a sports team's annual revenues by up to 40%, or \$15 million to \$25 million. John Riley, *Where the Grass Is Always . . . Greener: An \$8.1B Building Boom in Pro-Team Stadiums: How Public Money Is Fueling Private Fortunes*, NEWSDAY, Aug. 18, 1996, at A4. On average, the team's market value can also be expected to grow by \$30 million to \$50 million. *Id.*

44. Purdy, *supra* note 42.

45. A recent study by City Comptroller Alan Hevesi indicates that the Yankees's direct and indirect contributions to New York City's economy will total \$365.5 million in 1996, including an estimated \$58.4 million from the playoffs and World Series alone. Beth Holland, *World Series to Generate Financial Windfall for City*, NEWSDAY (Queens Ed.), Oct. 17, 1996, at A3. Direct benefits, totalling an estimated \$197.4 million, include ticket sales and stadium concession monies, broadcast fees, and money spent by fans at city bars, hotels, and restaurants. Indirect benefits, totalling an estimated \$168.1 million, include money spent by businesses which benefit directly from the Yankee presence. *Id.* Some experts question the value of such estimates, however, maintaining that they ignore the fact that residents and tourists would spend those same dollars on other local attractions if the Yankees were not in town. See Riley, *supra* note 43, at A4 ("If all I'm doing is taking money I spend to buy a ticket at Lincoln Center and spending it at Yankee Stadium, that's not new spending.")

46. The renovation would entail: eliminating 6,000 mezzanine seats to make room for 92 luxury suites; improving stadium access by upgrading nearby highways; expanding indoor parking spaces to fit 12,000 to 15,000 cars; building a new Metro-North commuter railroad

Manhattan near the Hudson River.⁴⁷ The renovation option possesses the advantages of being cheaper and more expedient; it would also be a continuing boon to the Bronx's recovering image and local economy. The West Side option, while considerably more expensive, would be more likely to convince the Yankees to stay and would also generate more additional economic activity for the city than the current site. Largely because of the much smaller costs, local elected officials tend to favor renovating the stadium over building the West Side complex.⁴⁸ Bronx, and Manhattan representatives, in particular, favor the renovation plan, the Bronxites because they want to keep the Bombers in the Bronx, and the Manhattanites, interestingly, because they do not want another huge facility added to an already extremely crowded area.⁴⁹ Mayor Giuliani, however, seems to favor the West Side plan, apparently because it is preferred by the Yankees themselves and so it is more likely to keep them from leaving New York City altogether.⁵⁰

II. EMINENT DOMAIN

The third major alternative is eminent domain: let the city or state take over the Yankees franchise, either to run as a public corporation or to resell to a private investor who would agree to keep the Yankees in the Bronx.⁵¹ Considering the tremendous expense, even of simply renovating the existing stadium, eminent domain could be a relatively cheap

station nearby; and reconstituting the Colosseum-like facade to give the stadium the desired retro look. Purdy, *supra* note 42, at B1; Sandomir, *supra* note 38, at 51. It would cost an estimated \$250 million.

47. The most recent version of the West Side stadium provides for a state-of-the-art, 70,000-seat multi-purpose facility. *Out of Bounds*, *supra* note 4, at 28. Cost estimates have ballooned to immense recent estimates as high as \$1.1 billion. Of that sum, the city and state would probably have to raise around \$650 million, with the remainder coming from private investors. Supporters of the West Side facility add that the complex would ultimately cost taxpayers little, because the city could recoup its costs through a share of the facility's estimated \$200 million annual revenue stream. *Id.*

48. See Freifeld, *supra* note 6, at A4.

49. Borough Presidents Fernando Ferrer of the Bronx and Ruth Messinger of Manhattan are vocal proponents of keeping the Yankees in the Bronx. *Id.* The fact that the West Side stadium would be near the Javits Convention Center, Madison Square Garden, Penn Station, and Times Square is thus both a plus and a minus.

50. *Id.* at A4; Purdy, *supra* note 42, at B1.

51. See Brodsky, *supra* note 6, at 12; Freifeld, *supra* note 6; Bob Katz, *Seize the Teams — That's the Ticket for Baseball!*, *NEWSDAY* (Nassau & Suffolk Ed.), Sept. 1, 1994, at A45; Geoffrey Samuels & Tim Cone, *End Sports Blackmail: Cities Should Take Over Pro Teams, Not Let Them Flee Town*, *USA TODAY*, May 2, 1996, at 13A. The idea of a city takeover of the Yankees is not new. See Herbert J. Gans, *Stop Letting George Do It*, *N.Y. TIMES*, June 4, 1984, at A19 (urging city takeover of Yankees as response to Steinbrenner's overbearing and demoralizing management of team).

option.⁵² Furthermore, if successful, it will be failproof: there would be no risk of spending hundreds of millions of dollars to keep the Yankees only to lose them anyway to some other municipality with a more attractive arrangement.⁵³

Eminent domain may be defined as "the power of the sovereign to take property for public use without the owner's consent upon making just compensation."⁵⁴ Along with the police power and the power of

52. A recent estimate valued the Yankees franchise at \$209 million, making it the most valuable baseball franchise, and the third-most valuable team in any sport, behind football's Dallas Cowboys and Miami Dolphins. Plentz, *supra* note 4, at 1. Compare the \$250 million to \$1.1 billion price tags for renovating Yankee Stadium or building a new one. See *supra* notes 46-47 and accompanying text. Moreover, the Yankees are one of baseball's most profitable teams, with 1995 profits of about \$24 million and 1996 profits well in excess of that figure. *Id.*

53. Probably no city is more familiar with the pains of franchise relocation than New York, which within the past 40 years has lost baseball's Dodgers to Los Angeles and Giants to San Francisco; football's Giants and Jets to New Jersey; and basketball's Nets to New Jersey. See Freifeld, *supra* note 6. But relocation has by no means been unique to New York. From 1979-89, basketball's New Orleans Jazz moved to Utah, Kansas City's Kings moved to Sacramento, and San Diego's Clippers moved to Los Angeles. Robert M. Jarvis, Book Review, *When The Lawyers Slept: The Unmaking of the Brooklyn Dodgers*, 74 CORNELL L. REV. 347 n.2 (1989). In football, Oakland's Raiders moved to Los Angeles, Baltimore's Colts moved to Indianapolis, and St. Louis Cardinals moved to Phoenix. *Id.* In hockey, Atlanta's Flames moved to Calgary and the Colorado Rockies became the New Jersey Devils. *Id.* Numerous other teams have wrested concessions from their host cities by threatening to move elsewhere. *Id.*; See also Riley, *supra* note 43 (noting "St. Louis' successful wooing of the Los Angeles Rams to a 100-percent subsidized \$258 million stadium a little over a year ago, Maryland's deal late in 1995 to build a \$200 million stadium that turned Cleveland's Browns into the Baltimore Ravens, and Nashville's \$290 million stadium deal that persuaded the Houston Oilers to bang helmets in Music City"); Samuels & Cone, *supra* note 51 (noting that Dade County, Florida, has agreed to build a new arena for basketball's Miami Heat to prevent them from leaving only eight years after the county built the Heat its current arena).

Litigation over franchise relocation has not been uncommon. See, e.g., Nat'l Basketball Ass'n v. San Diego Clippers Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987), *cert. dismissed sub nom.*; Los Angeles Memorial Coliseum Comm'n v. Nat'l Basketball Ass'n, 484 U.S. 960 (1987) (holding that the Sherman Antitrust Act prevented the NBA from barring the Clippers's move from San Diego to Los Angeles); Mayor and City Council of Baltimore v. Baltimore Football Club, Inc., 624 F. Supp. 278 (D. Md. 1985) (holding that the City of Baltimore was unable to condemn the Colts to prevent the team's move to Indianapolis because the Colts had already moved and were no longer within the City's jurisdiction); San Francisco Seals, Ltd. v. Nat'l Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974) (holding that the Sherman Antitrust Act, while applicable to hockey, did not prevent the NHL from barring the Seals's move from San Francisco, Cal., to Vancouver, B.C.); City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982), *on remand*, 220 Cal. Rptr. 153 (Cal. App. 1985) (California Supreme Court holding that the City of Oakland could condemn the Oakland Raiders to prevent them from moving to Los Angeles; on remand, California Court of Appeals holding Oakland's exercise of eminent domain in violation of U.S. Constitution's Commerce Clause).

54. NICHOLS ON EMINENT DOMAIN § 1.11 (3d ed. rev. 1971 & Supp. 1996). See also People v. Adirondack Ry. Co., 160 N.Y. 225, 237, 54 N.E. 689, 692 (1899); Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9, 13 (N.Y. 1837); Beekman v. Saratoga & Schenectady R.R.

taxation, the power of eminent domain is one of the fundamental attributes of sovereignty, essential to the functioning of the state.⁵⁵

A glance at the definition of eminent domain reveals that the power entails four distinct factors: (1) a taking (2) of property (3) for public use (4) with just compensation.⁵⁶ Of course, the Fifth and Fourteenth Amendments to the United States Constitution mandate that any exercise of the power, by the Federal government or by any of the states, comport with the requirements of due process.⁵⁷

Exercise of the eminent domain power in New York is governed by the Eminent Domain Procedure Law (hereinafter "EDPL").⁵⁸ While the EDPL focuses chiefly on condemnations of real property,⁵⁹ condemnations of other types of property must also conform to the procedures and standards set out within it.⁶⁰

A condemnation of the Yankees would obviously entail a taking,⁶¹ but the applicability of the property, public use, and just compensation elements merit some attention.

Co., 3 Paige Ch. 45, 72 (N.Y. Ch. 1831). See also *Terrace Hotel, Inc. v. State*, 19 N.Y.2d 526, 528, 227 N.E.2d 846, 849 (1967); *Fifth Avenue Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342, 347, 183 N.E.2d 684, 687 (1962).

The most universal definition of eminent domain would actually dispense with the requirement for just compensation, but the stricture against uncompensated takings found in the Fifth Amendment to the U.S. Constitution, applicable to the states via the Fourteenth Amendment, makes just compensation a mandatory element of American eminent domain. The term "eminent domain" was apparently coined by the Dutch jurist, Grotius, who stated that "property . . . is under the eminent domain of the state, so that the state . . . may use and even alienate and destroy such property . . . for ends of public utility. . . ." JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* § 1.1, at 3 (1982).

55. *Adirondack*, 160 N.Y. at 236-37.

56. Julius L. Sackman, *The Right to Condemn*, 29 ALB. L. REV. 177 (1965).

57. U.S. Const. amends. V, XIV; N.Y. Const. art. I, § 7. Thus the state may not take property without granting the condemnee a fair hearing; nor may it take property for a private use, no matter how fair the hearing. *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). See WILLIAM B. LOCKHART, ET AL., *THE AMERICAN CONSTITUTION: CASES — COMMENTS — QUESTIONS* 231 (7th Ed. 1991 & Supp. 1995).

58. N.Y. EM. DOM. PROC. LAW §§ 101-709 (Consol. 1996) (hereinafter "EDPL"). "It is the purpose of [the EDPL] to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state[.]" *Id.* § 101.

59. EDPL § 104 ("The [EDPL] shall be uniformly applied to any and all acquisitions by eminent domain of real property within the state of New York.").

60. EDPL § 708 ("[acquisition of] title to property other than real property . . . shall be in the manner and procedure prescribed for the acquisition of real property under this chapter").

61. A "taking" may be said to occur where there has been "such an interference with the rights of an owner as to deprive him of control of his property." Sackman, *supra* note 56, at 183, cited in, *Cushman v. Smith*, 34 Me. 247 (1852). See also *Livermore v. Town of Jamaica*, 23 Vt. 361 (1851).

A. Are the Yankees "Property"?

While eminent domain has traditionally been associated with the taking of realty; personalty, including intangible property, is not exempt from the state's power.⁶² A franchise, though it may be nothing more than a bundle of privileges and contractual rights,⁶³ is thus condemnable, along with any tangible property which the franchise may own.⁶⁴ Thus, a professional sports franchise is merely another category of condemnable property.⁶⁵

B. Would the Taking Be for the Public Use?

An important question in a taking of the Yankees would be whether the taking was being effected for a "public use." Traditionally, the word "use" was narrowly interpreted to mean employment, so that a property was only said to have been taken for a public use if the state itself was going to use or enjoy the property.⁶⁶ But the contemporary understanding of "public use" is "public advantage."⁶⁷ Thus, a condemnation which promotes the state's economic well-being may serve the public use, as may a condemnation effected merely for aesthetic purposes.⁶⁸ In particular, exercise of the eminent domain power for the purpose of construct-

62. *Adirondack Ry.*, 160 N.Y. at 238 ("[a]ll private property, both tangible and intangible, is subject to [eminent domain]"); *People ex rel. Griffin v. Mayor and Common Council of the City of Brooklyn*, 9 Barb. 535, 545-46 (N.Y. Sup. Ct. 1850), *aff'd*, 4 N.Y. 419 (1851) ("The word property must therefore be taken to comprehend money, as well as every thing of which man may legally have the absolute and exclusive dominion."). See also NICHOLS, *supra* note 54, § 2.1[2]; Sackman, *supra* note 56, at 188; EDPL § 708 (providing for condemnation of property "other than real property"); *Griffin*, 4 N.Y. at 422 (money is property which may be condemned by state); *Morris Canal & Banking Co. v. Townsend*, 24 Barb. 658, 665 (N.Y. Sup. Ct. 1857) (chase-in-action is property condemnable by state).

63. BLACK'S LAW DICTIONARY 658 (6th Ed. 1990).

64. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 534 (1848) ("A franchise is property, and nothing more; it is incorporeal property . . ."); *Fifth Avenue Coach Lines, Inc. v. City of New York*, 11 N.Y.2d 342, 183 N.E.2d 684, (1962) (condemnation by city of private bus company, including employee contracts and all related tangible property). See N.Y. GEN. CITY LAW § 20 (Consol. 1996) (authorizing New York City to condemn property and franchises of any omnibus company operating wholly within city lines).

65. *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278, 282 (D. Md. 1985) (referring to Baltimore's attempted condemnation of football Colts, court stated that "it is now beyond dispute that intangible property is properly the subject of condemnation proceedings").

66. Sackman, *supra* note 56, at 182.

67. *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 388-90, 190 N.E.2d 402, 404-406, *appeal dismissed*, 375 U.S. 78 (1963); *Cannata v. City of New York*, 11 N.Y.2d 210, 214-15, 182 N.E.2d 395, 396-97, *appeal dismissed*, 371 U.S. 4 (1962).

68. *Courtesy Sandwich Shop*, 190 N.E.2d at 405.

ing or operating a sports facility may be a public use.⁶⁹ In fact, the promotion of professional sports as a public purpose is expressly recognized in the proposed New York State Sports Fan Protection Act, because of sports' importance to the "economic health and social welfare of the state."⁷⁰

C. "Just Compensation"

The issue of just compensation is central to a condemnation of the Yankees, although a detailed treatment of valuation standards and techniques is beyond the scope of this paper.⁷¹ While not inherent in the concept of eminent domain, just compensation from the condemnor to the condemnee, is mandated by the Federal and New York Constitutions.⁷²

The idea that the compensation for condemned property must be "just," "evokes ideas of 'fairness' and 'equity'";⁷³ as a practical matter, "just compensation" is generally equivalent to "market value."⁷⁴ "Market value" may itself be loosely defined as what a willing buyer would pay a willing seller.⁷⁵ The compensation must be "just" to the public as well as the property owner; thus, the fact that the property is being taken by condemnation may not be factored into the appraisal to inflate the

69. *Murphy v. Erie County*, 28 N.Y.2d 80, 87-88, 268 N.E.2d 771, 774 (1971); *City of New York v. New York Jets Football Club, Inc.*, 90 Misc.2d 311, 315, 394 N.Y.S.2d 799, 803 (Sup. Ct. N.Y. County 1977); *New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 545, 552 (N.J. 1972), *appeal dismissed*; *Martin v. City of Philadelphia*, 215 A.2d 894, 896 (Pa. 1966).

70. A.B. 684, 220th Gen. Assembly, 1997-1998 Reg. Sess. (1997). In defining the preservation, maintenance, and expansion of professional sports in New York State as public purposes, the Act would have the legislature find and declare:

that sporting events and public sports facilities, including, but not limited to, professional sports franchises are a significant and important part of the economic health and social welfare of the state and of communities within the state, and contribute financially and socially to the creation of stable communities across New York state.

Id. § 2. In addition to the entertainment they provide for millions of New Yorkers, the Yankees are directly responsible for 1160 jobs and hundreds of millions of dollars of economic benefits. Riley, *supra* note 43, at A4.

71. On just compensation criteria and appraisal techniques, see generally GELIN & MILLER, *supra* note 54, §§ 3.1-4.3, at 101-381; NICHOLS, *supra* note 54.

72. U.S. CONST. amend. V; N.Y. CONST. art. I, § 7.

73. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

74. *Sparkill Realty Corp. v. State*, 268 N.Y. 192, 197 N.E. 192 (1935); *In re Brookfield*, 176 N.Y. 138 (1903).

75. *United States v. Miller*, 317 U.S. 369, 373-75 (1943); *In re Board of Water Supply*, 277 N.Y. 452, 14 N.E.2d 789 (1938).

valuation.⁷⁶ The compensation must be assessed as of the date the property is taken.⁷⁷

The Yankees's status as the most famous team in sports history has helped to make them the most valuable franchise in baseball.⁷⁸ Estimates uniformly place their worth at "well over" \$200 million, with Financial World magazine placing the team's value at \$209 million.⁷⁹ Ironically, the same great fame which makes the Yankees such a valuable team also makes it unlikely that 1996's well-publicized World Series victory will elevate their worth much above its current level.⁸⁰ Moreover, the Yankees's profitability is also unlikely to increase next year, because any increases in attendance and concession revenues, probably will be offset by increased outlays for salaries as players seek to cash in on their own success. Finally, the cornerstone of the Yankees's \$100 million-plus annual revenues, their \$43 million per-year contract with the Madison Square Garden cable network (hereinafter "MSG"), will expire in 2000, and media analysts doubt that that figure will be matched by MSG or any other network.⁸¹

Therefore, given the offsetting of the Yankees' recently enhanced profile by projections for increased outlays and stagnant revenue, the net worth of the franchise is unlikely to increase in the next few years much beyond its current level of approximately \$209 million — certainly not beyond \$250 million.⁸² Even adding a few million dollars for the costs of the legal battle that would likely result from a state takeover, it would

76. See *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910); *Bauman v. Ross*, 167 U.S. 548, 574-75 (1897).

77. *United States v. Miller*, 317 U.S. 369, 374 (1943); *In re Board of Water Supply*, 277 N.Y. 452, 14 N.E.2d 789 (1938). If payment is made at some point after the taking, then the compensation must also include interest. *In re City of New York (Bronx River Parkway)*, 284 N.Y. 48, 29 N.E.2d 465 (1940), *aff'd*, 313 U.S. 540 (1941).

78. See *Out of Bounds*, *supra* note 4, at 28. Key to the Yankees's financial success is their 12-year, \$486 million cable television contract with the Madison Square Garden Network. Plentz, *supra* note 4, at 1. "The biggest thing that separates the value of the Yankees from any other team is their media revenue. They do more than twice what the average team does in all media." *Id.* (quoting Michael Ozanian, deputy editor of Financial World magazine).

79. *Out of Bounds*, *supra* note 4, at 28; Plentz, *supra* note 4, at 1.

80. "If you're talking about the Milwaukee Brewers, for example, and they made the World Series, that could possibly raise the intangible values and you would pay for that. But the Yankees have such a storied history, they're famous as it is already." Plentz, *supra* note 4, at 1 (quoting Michael Ozanian, deputy editor of Financial World magazine).

81. *Id.*

82. *Id.*

still be a bargain compared to the renovation or new stadium estimates.⁸³

In sum, under the applicable New York and Federal eminent domain law, a condemnation of the Yankees would meet all of the requirements for a valid taking.

III. BEYOND EMINENT DOMAIN: OTHER LEGAL QUESTIONS

A. Antitrust Law

Apart from a forced taking of the team by eminent domain, it is conceivable that major league baseball itself might intervene to prevent a Yankees move out of New York. Professional sports leagues are essentially monopolistic owners' cartels, with each team cooperating with other teams to ensure league success and minimize friction among teams.⁸⁴ Among other monopolistic practices, the leagues conspire to limit competition in the form of new teams; they also cooperate in regulating competition by requiring league approval of relocation of existing teams.⁸⁵ The ability of sports leagues to maintain their monopolies is limited, because all professional sports, apart from baseball,⁸⁶ have been held subject to the provisions of the Sherman Antitrust Act.⁸⁷ Because

83. See notes 46-47 and accompanying text. The takeover could be financed by the selling of shares to the public. See Freifeld, *supra* note 6, at A4 ("What we're proposing is that New Yorkers be the stockholders and keep the team in New York, and whatever money needs to be raised, be raised by the sale of stock, not taxpayers.") (quoting Assemblyman Richard Gottfried, Democrat of Manhattan, one of the sponsors of the New York State Sports Fan Protection Act). Municipal ownership of professional sports teams is not uncommon. See Charles Mahtesian, *Memo to Cities: If You Can't Bribe the Owner, Maybe You Can Buy the Team*, GOVERNING MAGAZINE, March, 1996, at 42 (cities owning professional sports teams include Harrisburg, Pa. and Scranton, Pa.).

84. See notes 21-24, *supra*, and accompanying text.

85. *Id.*

86. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). In *Federal Baseball*, the Court held that baseball could not be held subject to the provisions of the Sherman Act because baseball was a sport and not commerce. In *Toolson*, the Court summarily upheld *Federal Baseball* on its *stare decisis* effect, noting that Congress had approved of baseball's exemption from the antitrust laws by its positive inaction. Finally, in *Flood*, the Court recognized that professional baseball was commerce and not sport, and acknowledged that its judicial exemption from the Sherman Act was anomalous and anachronistic, but held that the problem was for Congress to resolve through legislation, not the Court.

87. Section 1 of the Sherman Antitrust Act provides that:

Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

of the Sherman Act's proscriptions, the courts have generally frowned upon league actions barring franchise movement.⁸⁸

However, it is not clear whether major league baseball would be permitted to interfere with franchise relocation, because recent cases have questioned the scope of baseball's antitrust exemption following the decision in *Flood*. These cases maintain that baseball's exemption remains in force, but is limited strictly to the areas raised on the facts of *Flood* and its predecessors, that is, to "league structure and player relations."⁸⁹ If the recent trend is correct in holding that the exemption is limited to player relations, then major league baseball would probably be unable to prevent the Yankees from leaving New York.

B. *The Commerce Clause Defense*

An interesting argument against the condemning of the Yankees would be that it violates the United States Constitution's Commerce Clause, as enumerated in Article I, section 8, clause 3.⁹⁰ Under the com-

15 U.S.C.S. § 1 (1996). To one degree or another, practically every major professional sport has been held subject to the Sherman Act's provisions. See *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957), *rehearing denied* 77 S.Ct. 716, (professional football is subject to provisions of Sherman Antitrust Act); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955) (interstate promotion of professional fights constitutes "commerce" within the meaning of the Sherman Act); *Nat'l Basketball Ass'n v. San Diego Clippers Basketball Club*, 815 F.2d 562 (9th Cir.), *cert. dismissed*, 484 U.S. 960 (1987); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981); *Deesen v. Prof. Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Philadelphia World Hockey Ass'n v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972).

88. See *Nat'l Basketball Ass'n v. San Diego Clippers Basketball Club, Inc.*, 815 F.2d 562 (holding that Sherman Antitrust Act prevented NBA from barring Clippers's move from San Diego to Los Angeles); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (Sherman Act prevented NFL from barring Raiders's move from Oakland to Los Angeles). *But see* *San Francisco Seals, Ltd. v. Nat'l Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974) (holding that Sherman Antitrust Act, while applicable to hockey, did not prevent NHL from barring Seals's move from San Francisco, Cal., to Vancouver, B.C.).

89. *Postema v. Nat'l League of Prof. Baseball Clubs*, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992). See *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 985 F.2d 27, 30 (1st Cir. 1993) ("[B]aseball's judicial 'exemption' from the antitrust laws . . . persists but is not extended."); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 n. 21 (E.D. Pa. 1993) (baseball's antitrust exemption is limited to the reserve clause); *Butterworth v. Nat'l League of Prof. Baseball Clubs*, 644 So.2d 1021, 1025 (Fla. 1994) ("[B]aseball's antitrust exemption extends only to the reserve system."). *But see* *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1995) ("the great weight of authority recognizes that the scope of the antitrust exemption covers the business of baseball"); *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 699 F. Supp. 152, 156 (N.D. Ill. 1988) (baseball enjoys a "blanket exemption").

90. See Julie Dorst, *Franchise Relocation: Reconsidering Major League Baseball's Carte Blanche Control*, 4 SETON HALL J. SPORT L. 553 (1994); Charles Gray, *Keeping the Home*

merce clause, Congress has the power to regulate commerce among the states.⁹¹ The intent of the clause is to promote an efficient national economy by limiting state economic protectionism.⁹² Accordingly, state legislation may not conflict with Congressional legislation addressing commerce.⁹³ Moreover, even where Congress chooses not to exercise its power to regulate a specific portion of interstate commerce, the states' power to regulate is limited by the "dormant" commerce power, which bars state regulation which would unduly burden interstate commerce.⁹⁴ In evaluating a state's regulation of interstate commerce, the Supreme Court has articulated a three-part balancing test, wherein the court assessing the state regulation must: (1) determine whether there is a legitimate local interest in restricting commerce; (2) measure the burden which the regulation places on interstate commerce; and (3) decide whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁹⁵

Since professional baseball collectively is engaged in interstate commerce, the Yankees might respond to an attempted state takeover by invoking the dormant commerce power and arguing that New York's exercise of eminent domain would impermissibly burden interstate commerce. In fact, that was the argument relied upon by the Oakland Raiders in their successful defense against an attempted takeover by the City of Oakland.⁹⁶ In *Raiders I*, Oakland successfully argued that the Raiders franchise was susceptible to the city's eminent domain power.⁹⁷ In *Raiders II*, on remand for consideration of whether the condemnation met the public use requirement, the Raiders won by raising the dormant commerce power as a bar to the city action; the question of public use

Team at Home, 74 CALIF. L. REV. 1329 (1986); Lisa J. Tobin-Rubio, Casenote, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185 (1987); Daniel S. York, Note, *The Professional Sports Community Protection Act: Congress' Best Response to Raiders?*, 38 HASTINGS L.J. 345 (1987).

91. U.S. CONST. art. I, § 8, cls. 1, 3.

92. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935).

93. See *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 319 (1851).

94. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 774-75 (1945).

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

96. *City of Oakland v. Oakland Raiders*, 176 Cal. Rptr. 646 (Ct. App. 1981), *rev'd* 646 P.2d 835 (Cal. 1982) (hereinafter *Raiders I*), *on remand* 220 Cal. Rptr. 153 (Ct. App. 1985) (hereinafter *Raiders II*).

97. *Raiders I*, 646 P.2d at 843.

was not reached.⁹⁸ The court reasoned that the National Football League was engaged in interstate commerce, and that the city's interest in promoting social welfare and economic benefits was handily outweighed by the threat of "serious . . . disrupt[ion of] the balance of economic bargaining on stadium leases throughout the nation" posed by permitting the city to "permanently indenture . . ." the Raiders to Oakland.⁹⁹ The court correctly rejected Oakland's argument that the commerce clause did not apply to the taking, because it was acting as a market participant rather than as a regulator.¹⁰⁰

Condemnations of sports franchises are rare. *Raiders II* is probably the only instance of a condemnee's use of the commerce clause as a defense to a taking.¹⁰¹ Nonetheless, its conclusion that the condemning of a professional sports franchise constitutes an impermissible burden to interstate commerce is far from inescapable.¹⁰² In fact, in what is probably the only other case involving an attempted condemnation of a professional sports franchise, *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.* (hereinafter *Baltimore Football Club*),¹⁰³ the court recognized that a sports franchise can be a proper subject of eminent domain, but never mentioned the commerce clause, although the court was aware of, and had cited to *Raiders*.¹⁰⁴

98. *Raiders II*, 220 Cal. Rptr. at 156-58.

99. *Id.* As an alternative holding, the court suggested that Oakland's condemnation would be equivalent to a prohibition on outgoing commerce and thus a per se violation of the commerce clause. *Id.* at 157 n. 3. This view is probably incorrect, however, since the city taking over the franchise would not be prohibiting outgoing commerce, merely taking over the business and supplying the commerce itself — the city-owned team would continue to play its scheduled games, receiving visiting teams and travelling regularly to other states when playing road games.

100. *Id.* at 156. Oakland was seeking to use its sovereign power to acquire the franchise, not making a fair offer and hoping it would be accepted. *Id.*

101. A rare example of the commerce clause defense may be found in *Elberton v. State Highway Dep't*, 89 S.E.2d 645 (Ga. 1955), where the Georgia Supreme Court held that the State Highway Department's condemnation of railway property did not interfere with interstate commerce.

102. See Gray, *supra* note 90, at 1343-50 & Tobin-Rubio, *supra* note 90, at 1198-1221. A threshold counter argument against the commerce clause defense would be that the Supreme Court in *Federal Baseball* held that baseball is not commerce, and *Federal Baseball* has never been overruled. See Part III.A., *supra*. This counter argument is unlikely to succeed, however, since the Court in *Flood* expressly acknowledged that professional baseball is commerce. *Id.* Moreover, recent cases indicate that baseball's antitrust exemption is highly truncated and possibly limited only to the reserve clause. *Id.*

103. 624 F. Supp. 278 (D. Md. 1985).

104. In *Baltimore Football Club*, Baltimore sought to condemn the Colts in order to prevent them from moving to Indianapolis, but the owner of the Colts physically moved the franchise to Indianapolis on the very eve of the condemnation proceedings. 624 F. Supp. at

It seems fair to say that the taking of a sports franchise will usually not impermissibly burden interstate commerce. The Yankees, for instance, can be fairly characterized as an integral part of New York State's cultural heritage, as evidenced by the turnout of 3.5 million New Yorkers at the recent ticker tape parade. More concretely, the Yankees contribute hundreds of millions of dollars annually to the state's economy and are directly responsible for 1160 jobs. Thus, keeping the Yankees in New York is clearly a legitimate local interest. In contrast, the burden on interstate commerce — the burden on major league baseball — posed by the taking would be small. The taking would scarcely affect the flow of interstate commerce — the playing of baseball games — at all; all that would change would be the ownership of the franchise. In sum, the burden placed on baseball by the taking of the Yankees, would decidedly not seem "clearly excessive" to the corresponding benefits to the state.

C. Which Way Did They Go? The Anticipatory Flight Defense

Strong as the state with its power of eminent domain might be, it may have an Achilles heel: what if the Yankees simply pack up and leave once they learn that condemnation proceedings are imminent?

It is axiomatic that a state may only condemn property within its own borders, and not property or rights in property located in another state.¹⁰⁵ In *Baltimore Football Club*,¹⁰⁶ the owner of the Colts used this principle to successfully evade the eminent domain power of the city of Baltimore. The outcome of the case turned on a fact-sensitive analysis of whether the Colts were "present," for eminent domain purposes, in Maryland when Baltimore filed its condemnation petition.

In *Baltimore Football Club*, Baltimore sought to condemn the football Colts to prevent them from moving to Indianapolis.¹⁰⁷ Negotiations between Baltimore and the Colts had begun in late 1983, but by early 1984 were at an impasse.¹⁰⁸ On February 1, 1984, the City of Indianapo-

280-81. At issue was whether the Colts were "present" in Baltimore when the city sought to condemn them. *Id.* at 279. Although *Raiders II*, decided two months earlier, would have given the court a solid alternative for holding, as it did, in favor of the Colts, it is mentioned nowhere in the opinion.

105. NICHOLS, *supra* note 54, § 2.12 ("The powers of a sovereign state, however vast in their character and searching in their extent, are inherently limited to subjects within the jurisdiction of the state, and any attempt to exercise governmental powers in another state is necessarily void.")

106. 624 F. Supp. 278 (D. Md. 1985)

107. *Id.* at 279.

108. *Id.*

lis suggested that the Colts might move to the Hoosier Dome, and negotiations began shortly thereafter.¹⁰⁹ On February 24, 1984, a bill was introduced in the Maryland Senate which authorized Baltimore to condemn professional sports franchises.¹¹⁰ The Colts meanwhile made rapid progress in negotiations with Indianapolis on lease terms and financing provisions, while continuing discussions with Baltimore.¹¹¹

On March 27, 1984, the Maryland Senate passed the bill which would allow Baltimore to condemn the Colts.¹¹² The next day, March 28, 1984, Bob Irsay, the Colts owner, decided to move the team immediately to Indianapolis, before Baltimore could begin condemnation proceedings. Irsay instructed his agent in Indianapolis to immediately execute a twenty-year lease for the Hoosier Dome, and to enter into a related loan financing deal.¹¹³ Meanwhile, all through the 28th and into the morning of the 29th, the Colts organization scrambled frantically to load the bulk of the franchises tangible possessions, both office and athletic equipment, from the team's Maryland training center into moving vans.¹¹⁴ On the morning of March 29, 1984, the vans, loaded with most of the Colts's physical property, left Baltimore for Indianapolis.¹¹⁵ Irsay then notified then-NFL Commissioner Pete Rozelle that he had, "relocated the Colts franchise to Indianapolis as of the close of business March 28, 1984."¹¹⁶ Later on March 29, Baltimore extended a 24-hour, written offer to the Colts, at the team's corporate headquarters in Skokie, Illinois, to purchase the franchise for \$40 million; the offer was not accepted.¹¹⁷ On March 30, 1984, the Maryland legislature and Baltimore City Council enacted the Colts condemnation legislation and ordinance, and immediately filed a condemnation petition in the Circuit Court for Baltimore City.¹¹⁸ The Circuit Court then issued a writ of *ne exeat* against the Colts, purporting to bar them from moving the franchise out of the state of Maryland.¹¹⁹

109. *Id.*

110. *Id.* Unlike states, which are sovereign, some cities have no inherent power to condemn. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 838 (Cal. 1982).

111. *Baltimore Football Club*, 624 F. Supp. at 279-280.

112. *Id.* at 280.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Baltimore Football Club*, 624 F.Supp. at 280.

117. *Id.*

118. *Id.* at 280-81.

119. *Id.*

On March 31, 1984, the Capital Improvements Board of Marion County, owner of the Hoosier Dome, approved the twenty-year lease agreement with the Colts.¹²⁰ On April 5, 1984, the Colts obtained a license to do business in Indiana. On May 11, 1984, the Colts notified Baltimore that they were terminating their lease at Memorial Stadium, and on September 17, 1984, the Colts closed their Maryland checking accounts.¹²¹

On these facts, the United States District Court for the District of Maryland found that, as of March 30, 1984, the day that Baltimore filed its condemnation petition against the Colts and the Baltimore Circuit Court issued its writ of *ne exeat* against them, the Colts were no longer "present" in Maryland for purposes of eminent domain: they were "gone from Maryland."¹²² In reaching that holding, the court correctly rejected as unworkable Baltimore's suggestion that it apply *International Shoe*-type "minimum contacts" analysis to determine whether an exercise of eminent domain was proper.¹²³ While "traditional notions of fair play and substantial justice" may mandate a court's use of "minimum contacts" in assessing whether it may properly assert personal jurisdiction over a foreign corporation,¹²⁴ to allow a state to condemn a legal person because it is, for instance, merely "doing business" on some minimal level within the state might not comport with due process.¹²⁵ Rather, since eminent domain is a right of the sovereign over property located within its borders, all property should be condemnable only in the one state where it is situated.¹²⁶

120. *Id.* at 279, 281.

121. *Baltimore Football Club*, 624 F. Supp. at 281.

122. *Id.* at 289. On that day, the Colts's remaining contacts with Maryland consisted of a lease on Memorial Stadium, a lease on the team's Owings Mills training facility, a lease of certain facilities in Westminster, Maryland, broadcasting contracts in Maryland through April, 1984, and four commercial checking accounts. *Id.*

123. *Id.* at 284-85. The court also rejected as inapposite an application of the law of escheat's "last known address" rule, since "in escheat proceedings, . . . the location of the owner of the property is usually unknown, [whereas] condemnation proceedings simply require the court to determine where . . . the property was located on a given date." *Id.*, 624 F. Supp. at 287.

124. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 64 (1994).

125. *Baltimore Football Club*, 624 F. Supp. at 284-85.

126. See NICHOLS, *supra* note 54, § 2.12[4]. Accordingly, a giant multi-state corporation, chartered in one state but with multiple headquarters and operations in other states, might only be properly condemnable by the Federal government, or perhaps by two or more states acting in concert. Compare the eminent domain power of the Port Authority of New York and New Jersey. *Id.* § 2.12[5].

D. *Anticipatory Flight: Possible Countermeasures*

Baltimore lost its chance to prevent the Colts from leaving town in large part because the state legislature dithered for a full month between introduction and passage of the condemnation-enabling legislation.¹²⁷ Resolute action is needed to minimize the possibility of a "midnight run" by Steinbrenner and the Yankees to another locale. Legislation enabling a condemnation of the Yankees must be passed by the state legislature as soon as possible. This could be in the form of the New York State Sports Fan Protection Act, which was introduced to the Assembly in January, 1995, and is currently in committee.¹²⁸ If there is any perceived danger of a "midnight run," then the Sports Facilities Authority or other appropriate state or city agency should initiate condemnation proceedings without hesitating. If necessary, the Authority should consider accelerating the condemnation by bypassing the EDPL's hearing provisions in accordance with the "emergency situation" provisions of Article 2 of the EDPL.¹²⁹

IV. CONCLUSION

The 1996 Yankees's win in the World Series is only the latest chapter in New York City's ninety-three-year love affair with the Bronx Bombers. The Yankees are one of New York's most prominent cultural icons, important to the city's economy, and elected officials have a duty to take resolute steps to prevent their loss.

Approaching \$1.1 billion, new stadium and stadium renovation plans are too expensive and politically intractable to be viable options, and, even if executed, they offer no guarantees of keeping the team in-state. In contrast, paying about \$209 million, and simply taking the team through the state's power of eminent domain would be relatively cheap,

127. See Gray, *supra* note 90, at 1330-32.

128. New York State Sports Fan Protection Act, A.B. 684, 220th Gen. Assembly, 1997-1998 Reg. Sess. (1997). The Sports Fan Protection Act would establish a New York State Sports Facilities Authority responsible for "preserving and expanding opportunities across New York state for sports events, facilities, and franchises," *Id.* § 2, and authorized to condemn franchises in order to prevent them from leaving the state. *Id.* §§ 4(6), (16), 8(2).

129. EDPL § 206(D). "The condemnor shall be exempt from compliance with the [notice and public hearing] provisions of this article when . . . because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article." *Id.* §§ 206, 206(D). See *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir.), *cert. denied*, 109 S.Ct. 1527 (1988) (when under court order to desegregate federally-subsidized low-income housing, Yonkers was faced with an "emergency situation" which justified invoking Section 206(D)'s exemption, even though Yonkers had created the emergency itself by violating civil rights laws and prompting court order).

especially if financed through a sale of shares to baseball-loving New Yorkers. Eminent domain is a venerable legal doctrine, and such a taking should be upheld if challenged in court. Once condemned, there would be no question of the Yankees leaving the state.

The State Legislature should immediately pass the proposed New York State Sports Fan Protection Act, currently sitting in committee, and establish the New York State Sports Facilities Authority, with the power to condemn franchises to keep them in state. Authority officials should then carefully monitor negotiations with the Yankees and should not hesitate to condemn the team if there is any danger of their leaving, expediting condemnation through the "emergency situation" provisions of Article 2 of the Eminent Domain Procedure Law if necessary.