

## **FOREWORD:**

### **Title**

The Constitutional Dimensions of Sports Franchise Takings: Lessons Learned from the Baltimore Colts

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### **Abstract**

*This paper chronicles the history of the Baltimore Colts up to and during that franchises' relocation from Baltimore City to Indianapolis. Although Baltimore City attempted to prevent the relocation by taking the franchise through eminent domain, the Colts were no longer subject to Maryland's, and therefore the city's, jurisdiction. By moving, the Colts exposed an important limitation on State eminent domain authority; that condemned property must be located within a state's territory in order to be subject to eminent domain. Further, the commerce clause would likely have prevented the city from condemning the Colts.*

### **Disciplines**

constitutional law, sports history

## **I. Introduction**

When the Baltimore Colts left town under the cover of darkness during the morning hours of March 29, 1984, the move left a void in a city that took great pride in their storied franchise.<sup>1</sup> Although shocking, the move was foreseeable. By considering a law which would authorize Baltimore City to take the Colts franchise through eminent domain, the State of Maryland considered taking the penultimate action it is authorized to take against its property owning citizens. By leaving the state before it could take that step, the Colts exposed a fundamental limitation on State eminent domain authority.<sup>2</sup> However, there is a constitutional consideration associated with sports franchise takings and there are lessons to be learned from the Baltimore Colts episode.<sup>3</sup>

## **II. History of the Baltimore Colts**

### **a. Football Comes to Baltimore**

In 1953, in what can be considered one of the “most spectacular buys in the history of sports,” Carroll Rosenbloom purchased the Baltimore Colts franchise for \$13,000.<sup>4</sup> The franchise had previously become available after a Texas based team called the Texans ceased operations and sold their franchise back to the NFL. Rosenbloom, a Baltimore native and a former football player for the University of Pennsylvania,<sup>5</sup> worked as a salesman in his father’s shirt manufacturing business called the Marlboro Shirt Company.<sup>6</sup>

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<sup>1</sup> *See infra*, Part II.A—E.

<sup>2</sup> *See infra*, Part III.B.

<sup>3</sup> *See infra*, Part IV.

<sup>4</sup> JOHN STEADMAN, FROM COLTS TO RAVENS: A BEHIND THE SCENES LOOK AT BALTIMORE PROFESSIONAL FOOTBALL 120 (1997).

<sup>5</sup> *Id.* at 119.

<sup>6</sup> *Id.*

Rosenbloom was an exceedingly successful salesman, retiring at the age of 33.<sup>7</sup> After a short stint as a farmer on Maryland's Eastern Shore, he returned to Baltimore, the business world, and in 1953 became the majority owner of the Baltimore Colts.

**b. The Glory Years and the "Greatest Game Ever Played"**

From 1953 through 1957 the Baltimore Colts were an average team at best. Posting an overall record of 23-36-1, the Colts recorded their first winning season in 1957.

Although they were not winning on the field, the Colt faithful were filling Memorial Stadium. In the three year span of 1955 through 1957, the Colts' average attendance for their home games exceeded the average attendance at all NFL games.<sup>8</sup> It was the next year, however, that would put Baltimore on the map.

In 1958, the Baltimore Colts posted a 9-3 record, winning the NFL Championship Game against the New York Giants. Led by future hall of fame quarterback Johnny Unitas and other household names like Alan Ameche, Raymond Berry, and Gino Marchetti, the Colts were the winning side in the game now known as "The Greatest Game Ever Played."<sup>9</sup> After a 14-3 Colts lead at halftime, the Giants rumbled back, scoring two unanswered touchdowns to make the score 17-14. With a little more than two-minutes remaining in the game Unitas drove his team down the field within scoring distance, completing 50% of his passes. Using modern terminology, that Unitas employed a two-minute drill offense, which ultimately set up a successful field goal to tie the game. With the score tied and the

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<sup>7</sup> *Id.*

<sup>8</sup> CRAIG RICHARD COENEN, *LITTLE CITIES THAT LED THEM: CIVIC RESPONSES TO NATIONAL FOOTBALL FRANCHISES 1920-1966* 344 (2001). *See* Table 5-3. *Id.*

<sup>9</sup> Highlights from the game are made available on the NFL's official YouTube page. 'The Greatest Game Ever Played' 1958 NFL Championship: Colts vs. Giants (NFL Films), <https://www.youtube.com/watch?v=WADr8cZTz2M>.

game clock at zero, the 1958 NFL Championship game would be the first NFL Championship game to be decided by sudden-death overtime.<sup>10</sup>

Although the Giants won the ensuing coin-toss and elected to receive, the Colts defense stood tall, forcing the Giants to turn the ball over on downs. When the Colts took over, the offense drove 80 yards, capping the drive with a 1 yard touchdown run by Ameche.<sup>11</sup> The touchdown made the score 23-17; the Baltimore Colts had won their first NFL Championship.

The 1958 NFL Championship game was also broadcast to a national audience by NBC. Many speculate that the game's drama is what helped to catapult the NFL's particular brand of football into national prominence. For Baltimoreans, "pro football had made their city more prominent and prosperous."<sup>12</sup> The following year, the Colts repeated as NFL Champions, also posting a 9-3 record.<sup>13</sup> The Colts' on field success was reflected in their attendance records, almost averaging a sold-out stadium for the 1959 season.<sup>14</sup> High home game attendance is evidence of a common known fact: Baltimore loved their Colts.

Over the next twelve seasons, the Colts continued to enjoy success, including winning Super Bowl V in the 1970 season.<sup>15</sup> Despite sustained success on the field and financial success in terms of stadium attendance, rumors that Rosenbloom was soliciting

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<sup>10</sup> JOHN F. STEADMAN, FROM COLTS TO RAVENS: A BEHIND-THE-SCENES LOOK AT BALTIMORE PROFESSIONAL FOOTBALL 148 (1997).

<sup>11</sup> See Appendix II.

<sup>12</sup> COENEN, *supra* note 8, at 344. "When the Colts returned home [from New York], over 30,000 residents greeted the team at the airport, and tens of thousands more joined in spontaneous expressions of civic pride." *Id.* (citations omitted).

<sup>13</sup> 2015 NFL Records and Fact Book at 324.

<sup>14</sup> COENEN *supra* note 8, at 344. See Table 5-3. *Id.*

<sup>15</sup> 2015 NFL Records and Fact Book at s-64. The game was played on January 17, 1971, as the final game of the 1970 season.

offers to sell the Colts abounded.<sup>16</sup> The truth, however, was that Rosenbloom was looking for greener pastures, because in his view Baltimore was “a dead end.”<sup>17</sup> His attempts to either get Baltimore City to build a new stadium, or to build a new stadium in Baltimore County himself were both rebuffed.<sup>18</sup> Running out of options, Rosenbloom began orchestrating a deal that would get him out of Baltimore, and start the Colts on the road out of town as well.

**c. From Rosenbloom to Irsay**

On June 22, 1972, despite earlier denials, the Washington Post, Times Herald reported a potential deal involving sale of the Colts.<sup>19</sup> Even then the press noted that the potential sale would be “the most fascinating franchise deal in sports history.”<sup>20</sup> The deal, which required a little known Illinois businessman named Robert Irsay to purchase the Los Angeles Rams only to exchange that franchise for Rosenbloom’s Colts, was indeed fascinating. Historians look back on the terms of the deal, and most agree that it took a peculiar form because Rosenbloom wanted to avoid a hefty capital gains tax<sup>21</sup> No matter

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<sup>16</sup> *Rosenbloom Denies Talking About Possible Sale of Colts*, Wash. Post, Jan. 4, 1972, at D2. The paper reported that the Colts had enjoyed 51 consecutive stadium sellouts through the 1971 regular season.

<sup>17</sup> TED PATTERSON, FOOTBALL IN BALTIMORE: HISTORY AND MEMORABILIA FROM COLTS TO RAVENS 202 (2d ed. 2013).

<sup>18</sup> *Id.*

<sup>19</sup> *Rams Discuss Sale*, WASH. POST. TIMES HERALD, June 23, 1942, at E3.

<sup>20</sup> *Id.*

<sup>21</sup> PATTERSON, *supra* note 17, at 202. Irsay purchased the Rams for \$19 million and then traded the team to Rosenbloom for the Colts. If we hypothetically assume that Rosenbloom had sold the Colts, rather than traded them away, and assuming the Colts were worth \$19 million in cash, then the sale would have realized \$18.9 million as taxable income for Rosenbloom.

the novelty of the deal, or their ultimate consequences, on July 13, 1973 Robert Irsay “officially took over as owner and president of the Baltimore Colts.”<sup>22</sup>

Almost immediately, Irsay was on defensive about whether he would move the team out of town. In a press conference, however, he pledged not to do so.<sup>23</sup> Arguably, the Colts were well on their way out of town the moment Irsay took control.

#### **d. The Downfall**

The Colts’ win-loss record between the years of 1958 and 1971 was an impressive 136-54-5, the best in the NFL.<sup>24</sup> One of the players who played a integral role in that success, Gino Marchetti, was inducted into the Hall of Fame on July 29, 1972.<sup>25</sup> The 1973 season, however, was a reversal of fortunes for the Colts. They posted a 4-10 record including losing 4 games at home.<sup>26</sup> The 1974 season fared no better for the Colts, who finished with an abysmal 2-12 record.<sup>27</sup> While personnel is sometimes cited as the reason for the Colts’ downfall, the new owner was certainly not improving the situation. One particular scene makes the point.

The 1974 season began with losses to the Pittsburgh Steelers and the Green Bay Packers by a combined score of 50-13.<sup>28</sup> The Colts’ next game against the Philadelphia Eagles was headed toward the same result when “all hell broke loose.”<sup>29</sup> At some point before halftime, Irsay stormed down to the field and ordered his head coach, Howard

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<sup>22</sup> *Id.*

<sup>23</sup> Cooper Rollow, *Irsay Gets Rams, Trades for Colts*, CHI. TRIB., July 14, 1972, at s-3.

<sup>24</sup> PATTERSON, *supra* note 17, at 203.

<sup>25</sup> *Id.*

<sup>26</sup> 2015 NFL Records and Fact Book at 324.

<sup>27</sup> *Id.*

<sup>28</sup> PATTERSON, *supra* note 17, at 206.

<sup>29</sup> *Id.*

Shellenberger, to put in their untested backup quarterback.<sup>30</sup> Shellenberger, however, refused to put the backup in. After the Eagles trounced the Colts 30-10, Irsay fell upon the Colts' locker room and erupted. He fired Shellenberger just 1 year into Shellenberger stint as head coach, 3 games into the 1974 season.<sup>31</sup> Perhaps this turmoil is what contributed to the Colts' 2-12 record for the 1974 season.

After a brief return to success in the 1975 through the 1977 seasons, the Colts again suffered through disappointing campaigns. During the Irsay years, from 1971 through 1983, the Colts posted a uninspiring 63-91-1 record.<sup>32</sup> Unsuccessful seasons, an aging stadium, and a City unwilling to meet Irsay's demands led Irsay to solicit other cities for offers to relocate the Colts.

Irsay at least began shopping around in 1979. By 1979, Irsay was also courting Los Angeles, California; Phoenix, Arizona; Indianapolis, Indiana; and Memphis, Tennessee.<sup>33</sup> After visiting Jacksonville, Florida, the city offered Irsay a \$14.3 million renovation of the Gator Bowl stadium for the Colts' to play in, in exchange for relocating the franchise to that city.<sup>34</sup> Jacksonville's offer, however, did not meet Irsay's demands. Irsay was looking for a guaranteed sale of 65,000 season tickets for 10 years, 40 acres near the Gator Bowl to construct a training site and offices, a percentage of the revenue generated from concessions and parking, and a profitable radio network.<sup>35</sup> Described as Irsay's attempt to take "a king-sized bite out of [Jacksonville's] town treasury," Irsay never accepted the offer.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 2015 NFL Records and Fact Book at 324.

<sup>33</sup> *Id.*

<sup>34</sup> *Irsay Says Offer from Jacksonville for Colts 'Best Yet'*, WASH. POST, Sept. 26, 1979, at F7.

<sup>35</sup> *Id.*

It is speculated that Irsay's threats to relocate were merely his attempt to coerce the city into agreeing to his demands. That speculation is very likely fact. In 1979 Irsay submitted a proposal for several improvements to Memorial Stadium. These improvements included an estimated \$36 million in enhanced seating; to create luxury sky-boxes and a members only restaurant.<sup>36</sup> Baltimore, however, attempted to work with Irsay. Maryland Governor Harry Hughes and Baltimore City Mayor William Donald Schaefer reached an agreement to attempt to offer \$21.5 million to upgrade Memorial Stadium's seating.<sup>37</sup> The plan offered to give Irsay essentially what he wanted, specifically improved seating options, but disbursement of the funds was contingent on Irsay signing a 15 year lease, with a very stringent breach clause.<sup>38</sup>

If Irsay had accepted the terms of the bond bill, the landscape for Baltimore sports would have been drastically altered. Ever since the Colts came to town, they shared their home stadium with another iconic Baltimore sports franchise, the Baltimore Orioles. By 1980, the owner of the Orioles was also interested in the city providing a new stadium. Plans for a new sports complex to be placed at the old Camden Rail Yards, however, did not get off the ground. The bond bill would have granted Irsay many of the improvements that he sought, but it would have bound the Colts to a long term lease agreement, leaving the

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<sup>36</sup> Timothy Phelps, *Cost of stadium upgrading put at \$36 million*, BALT. SUN, Oct. 23, 1979, at C1.

<sup>37</sup> Jefferson Price III & Cameron Snyder, *City-state stadium effort set*, BALT. SUN, Oct. 26, 1979, at A1.

<sup>38</sup> Susan Reimer & Cameron Snyder, *Irsay calls on Orioles to sign pact*, BALT. SUN, Apr. 10, 1980. The breach clause held Irsay responsible for any outstanding interest and principal on the loan, less the \$800,000 yearly debt service that Baltimore City agreed to contribute, if Irsay moved the Colts before the 15 year lease expired. *Id.*



Orioles free to solicit a new stadium. That is likely why Irsay was reluctant to accept the loan offer without the Orioles also agreeing to a long term lease deal.<sup>39</sup>

That calculation is slightly unfounded. It was unlikely that the city would build a new stadium for either Williams or Irsay. That is because in 1974, a little more than a year after Irsay purchased the Colts, Baltimore City passed a charter amendment that “[barred] any use of public funds or credit to build any other stadium within Baltimore for professional football, soccer, and-or Baseball.”<sup>40</sup> Although it was still possible to finance a new stadium with purely private funds, political reality made movement on a new stadium unlikely.<sup>41</sup>

In any event, by June 4, 1981, Irsay did reach an agreement with the city, but not to a 15 year lease agreement as required to make the funds from the bond bill available. Instead, they reached a 2 year lease agreement which included some new terms beneficial to both sides.<sup>42</sup> This lease agreement did not alter the previously passed bond bill, it merely extended the timeframe under which the offer could be accepted. The 2 year agreement was set to terminate on June 30, 1983. That season, the Colts went 2-14, averaging only 35,807 home game attendees. The storied franchise was in dire straits.

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<sup>39</sup> *Id.*

<sup>40</sup> *Charter Questions for City Voters*, BALT. SUN, Oct. 22, 1974, at A18. The Baltimore Sun warned that the charter amendment would “clutter the city’s basic legal document with an extraneous piece of nonsense that would tie the city’s hands while practically assuring that if the state put money into a new stadium it would be one outside the city. *Id.* The paper suggested to “Vote AGAINST.” *Id.* (emphasis in original).

<sup>41</sup> Richard Cramer & James Dilts, *Stadium backers unfazed*, BALT. SUN, Nov. 7, 1974, at C1. (quoting one proponent of the new stadium as saying, “[i]t would be political suicide for anyone to go against the decision of the voters [by seeking to fund stadium construction with private funds]).

<sup>42</sup> Ron Davis, *2-year Colt stadium rental accord is approved*, BALT. SUN, June 4, 1981, at C1.

Perhaps that is why, in April of 1982, Irsay rejected the bond bill offer. Although the bill would have allowed Irsay to complete the remodeling that he desired, the breach clause would have made leaving Baltimore a very expensive venture, and the Orioles absence from the agreement was at least suspicious.<sup>43</sup> Further straining the Irsay's relationship with Baltimore was his inability to move the game start time from 2:00 p.m. to 1:00 p.m., to accommodate the television networks.<sup>44</sup> Mayor Schaefer withdrew his support for a city council bill that would have changed the start time amid concerns from church leaders that the resultant traffic would suppress church turnout.<sup>45</sup> Irsay and the Colts were striking out at every turn.

The following year, Mayor Schaefer renewed his efforts to get Irsay to agree to a long term deal. This effort, again, took the form of a state bond bill, but the terms were slightly different. The bill would make up to \$15 million available for the purpose of improving Memorial Stadium to create new offices, locker rooms, luxury sky-boxes, a restaurant, and press box renovations.<sup>46</sup> If both the Colts and the Orioles accepted the terms of the deal, then the full \$15 million would be made available in exchange for each team agreeing to play their home games at Memorial Stadium. However, the bill also provided a \$7.5 million loan for renovations if only the Orioles agreed. Under either scenario, a breach clause made it expensive for either team to violate the lease agreement.<sup>47</sup>

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<sup>43</sup> John Feinstein, *Irsay Rejects Final Offer On Long-Term Lease*, WASH. POST, Apr. 3, 1982, at D1.

<sup>44</sup> Will Englund, *Colts lose backing on early start*, BALT. SUN, Aug. 5, 1982, at D1.

<sup>45</sup> *Id.*

<sup>46</sup> Tom Linthicum, *Mayor makes new pitch for stadium funds*, BALT. SUN, Feb. 10, 1983, at A1.

<sup>47</sup> *Id.*

The Mayor's efforts, however, may have been too little, too late. The 1983 NFL draft was, in many ways a spectacle. A winless 1982 season meant that the Colts were given the first pick. With the first pick, the Colts selected standout Stanford quarterback, John Elway. However, Elway had no intention on playing for Irsay or the Colts. Lucky for Elway, he was also a top baseball prospect, and he was drafted by the New York Yankees. At the suggestion of his agent, Marvin Demoff, Elway gave the Colts an ultimatum: either trade him to another team or he would go play baseball, causing the Colts to effectively waste their top pick.<sup>48</sup> Elway was eventually traded to the Denver Broncos, where he would subsequently win two Super Bowls and become inducted into the NFL Hall of Fame.<sup>49</sup> Elway, however, was not interested in playing for the toxic Baltimore Colts, and his instincts proved correct. In 1983, the Colts posted a 7-9 record with an average of 37,411 fans attending their home games.<sup>50</sup>

By December of 1983, Mayor Schaefer was hopeful that Irsay would agree to the terms of the deal, but by January of 1984, all hope seemed lost. Amidst rumors that Irsay was in Phoenix soliciting offers to relocate the Colts there, he flew back to Baltimore to address the media's concerns.<sup>51</sup> In what was described as a "10 minute stream-of-consciousness dialogue between the Colts owner and the Baltimore media," Irsay delivered one of his most memorable lines. Irsay said "I haven't any intention of moving the goddamn team."<sup>52</sup> Whatever his subjective intent was, the sum total of his actions seemed

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<sup>48</sup> ESPN Films: 30 for 30, *Elway to Marino* (Ken Rodgers 2013).

<sup>49</sup> 2015 NFL Record and Fact Book at 341.

<sup>50</sup> Susan Reimer, *NFL crowds down slightly; Colts up a little, still last*, BALT. SUN, Feb. 12, 1984, at C2.

<sup>51</sup> Bill Glauber, *Airport press conference is vintage Irsay: Owner befuddles, berates media*, BALT. SUN, Jan. 21, 1984, at A1.

<sup>52</sup> *Id.*

to indicate otherwise. Earlier that day, Irsay was in fact meeting with a representative from Phoenix who was working to bring the Colts to that city.<sup>53</sup> Needless to say, Phoenix's effort to get the Colts to move to Arizona were seriously curtailed by the episode.

Indianapolis's effort, on the other hand, was becoming more attractive. By January 21, 1984, the City Solicitor investigated the possibility of using eminent domain to condemn the Colts in order to keep them from leaving.<sup>54</sup> The idea was not novel. In 1980, the City of Oakland condemned the Oakland Raiders after their owner, Al Davis, made good on his threat to move the team to Los Angeles. But Mayor Schaefer "[didn't] want to get into talks of threats" when he was hopeful that Irsay would voluntarily strike a deal to keep the Colts in Baltimore.<sup>55</sup> Threats aside, seizing the Colts through eminent domain became a possibility when, on February 24, 1984, the Maryland Senate introduced a bill authorizing the city to condemn sports franchises.<sup>56</sup> Days later, the Baltimore Sun reported that Indianapolis offered Irsay an enticing package to bring the Colts to Indianapolis. Particularly enticing was the fact that Indianapolis had already built a state-of-the-art domed stadium.<sup>57</sup>

On March 27, 1984, the Maryland Senate passed the bill that authorized the city to condemn sports franchises.<sup>58</sup> The next day, when Irsay learned of the measure, he decided to move the Colts to Indianapolis.<sup>59</sup>

#### **e. The "Dirtiest Trick Ever Played"**

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<sup>53</sup> Bill Glauber, *Colts sale was believed just a handshake away*, BALTIMORE SUN, Jan. 22, 1984, at A1.

<sup>54</sup> Susan Reimer, *Irsay denies plan to shift or sell Colts*, BALTIMORE SUN, Jan. 21, 1984, at A1.

<sup>55</sup> *Id.*

<sup>56</sup> *M. & C. Council of Baltimore v. B. Football C.*, 624 F. Supp. 278, 279 (D. Md. 1985).

<sup>57</sup> Shane Scott, *Indianapolis makes offer to Irsay for Colts*, BALTIMORE SUN, Feb. 27, 1984, at A1.

<sup>58</sup> *M. & C. Council of Baltimore v. B. Football C.*, 624 F. Supp. 278, 280 (D. Md. 1985).

<sup>59</sup> *Id.*

In the middle of the night of March 28 and into the 29th, a number of Mayflower moving vans were ordered to the Baltimore Colts training facility in Owings Mills, Maryland.<sup>60</sup> Laborers, including University of Maryland, College Park students in the Sigma Chi chapter, worked to load the Colts' physical assets onto the trucks.<sup>61</sup> After the work was finished, the trucks left the facility, taking different routes, each with Indianapolis as their destination. Also on the March 29, Irsay informed the NFL that he had relocated the Colts to Indianapolis, and Irsay did not accept an offer from Baltimore City to purchase the Colts for \$40 million.<sup>62</sup>

On Friday, March 30, 1984, the Baltimore Sun's front page was emblazoned with the title "Baltimore's Colts are gone."<sup>63</sup> Mayor Schaefer criticized the move because "the Colts had to sneak out in the middle of the night" and that "degrade[ed] a great football tradition."<sup>64</sup> The move has been called the dirtiest trick ever played. Regardless of the name calling or the general anger, one thing was clear. The Colts were gone from Baltimore.

The Maryland General Assembly, however, was still interested in condemning the franchise. On March 29, 1984, the lower chamber finally approved the bill allowing Baltimore City to condemn the Colts. Passed as Chapter Law 6, the next day, Governor

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<sup>60</sup> *Id.*

<sup>61</sup> Dave McKenna, *The Frat Boys who Moved the Colts out of Baltimore*, DEADSPIN, May 5, 2014, available at, <http://deadspin.com/the-frat-boys-who-moved-the-colts-out-of-baltimore-1571994488>.

<sup>62</sup> M. & C. Council of Baltimore, 624 F. Supp. at 280 (D. Md. 1985).

<sup>63</sup> *Baltimore's Colts are Gone*, BALT. SUN, Mar. 30, 1984.

<sup>64</sup> Paul Valentine, *Too Late to Lock the Barn – The Colts Have Gone*, Wash. Post, Mar. 30, 1984, at A1.

Hughes signed the emergency measure, which went into effect immediately.<sup>65</sup> Mayor Schaefer and the Baltimore City Council responded by passing a corresponding emergency measure authorizing condemnation of sports franchises.<sup>66</sup> The same day, March 30, 1984, the city filed a petition to condemn the Colts franchise, and seeking to enjoin the Colts from taking further action to remove the Colts from Maryland.<sup>67</sup>

### III. Eminent Domain and Intangible Property

#### a. In General

Generally, eminent domain is an inherent power exercised by sovereign states over property owning citizens to seize privately owned property.<sup>68</sup> The United States Constitution, limits that authority in two important ways. First, the taken property must be for a “public use.”<sup>69</sup> Second, the deprived property owner must be provided “just compensation.”<sup>70</sup> The several states can also exercise eminent domain, but they are limited both by the federal constitution and their particular state constitution and state statutes.

States typically use eminent domain to acquire real property to build things like “schools, roads, bridges, airports, and access for airports.”<sup>71</sup> However, intangible property is included within the definition of property and may also be condemned.<sup>72</sup> Condemning intangible property, however, raises other constitutional concerns including commerce

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<sup>65</sup> M. & C. Council of Baltimore, 624 F. Supp. at 280 (D. Md. 1985); *see also* Act of March 29, 1984, ch. 6, 1984 Md. Laws 18-20 (appended as appendix I).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See* U.S. CONST. art. I, § 8, cl. 8.

<sup>69</sup> U.S. CONST. amend. V.

<sup>70</sup> *Id.*

<sup>71</sup> Matthew Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA Q. J. 81, 82 (2004).

<sup>72</sup> *See* Kimball Laundry Co v. United States, 338 U.S. 1 (1949).

clause concerns.<sup>73</sup> Those concerns notwithstanding, on March 30, 1984, the Mayor and City Council of Baltimore City unsuccessfully sued to condemn the Baltimore Colts franchise.

#### **b. The Colts' Unsuccessful Condemnation**

After Mayor Schaefer and the City Council of Baltimore City filed a petition to condemn the Baltimore Colts in the Circuit Court for Baltimore City, the court issued a preliminary injunction preventing “the Colts from leaving Baltimore – or – [preventing] anyone with formal ties to the team not to help transfer the franchise from the city.”<sup>74</sup> The order came one day after the same newspaper wrote that the Colts were “gone”<sup>75</sup> The discrepancy, which gave rise to the question of whether Maryland could condemn the Colts, was litigated in the case *Mayor and City Council of Baltimore v. Baltimore Football Club Inc.*

In response to the injunction issued by the Circuit Court for Baltimore City, the Colts filed a motion in federal district court to remove the cause to the United States District Court for the District of Maryland.<sup>76</sup> In an opinion issued on June 22, 1984, that court granted the Colts' motion, finding that it had jurisdiction based on the parties' diversity.<sup>77</sup>

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<sup>73</sup> See *infra* Part III.C.

<sup>74</sup> J. S. Bainbridge & Sandy Banisky, *City judge bars Colts transfer in broad order*, BALT. SUN, March 31, 1984, at A1.

<sup>75</sup> See *supra* note 60 and accompanying text.

<sup>76</sup> M. & C. Council of Baltimore, 624 F. Supp. at 281 (D. Md. 1985). The Colts also filed a lawsuit in the United States District Court for the Southern District of Indiana requesting an order from that court to end the condemnation action in Maryland, using interpleader as the jurisdictional hook. *Indianapolis Colts v. Mayor and City Council of Baltimore*, 741 F.2d 954 (7th Cir. 1984). The district court granted the order, but that decision was reversed on appeal when the 7th Circuit ruled that the Colts lacked interpleader jurisdiction. *Id.*

<sup>77</sup> *Id.* Generally, diversity jurisdiction is granted when the opposing parties to a lawsuit are domiciled in different states. For the purpose of determining whether diversity jurisdiction existed, the court examined where the Colts' “principal place of business” was, as of March 30, 1984. *Id.* Concluding that it was not in Maryland, the court granted the Colts' motion to remove.

At trial, the city argued that on March 30, 1984, the day the condemnation petition was filed, the Colts had maintained “minimum contacts” with the city; and such contacts were sufficient to authorize condemnation of the Colts franchise. A significant aspect of the city’s argument was that the physical assets that Irsay moved from the state were not the subject of the condemnation. Instead, the Colts’ “[f]ranchise right to compete in an organized league or association” and “any and all other property rights...located in the State of Maryland...” were targeted.<sup>78</sup>

In response, the Colts argued that the city could not condemn the Colts because when Irsay moved the teams physical assets and gave notice to the NFL that, on March 29, 1984, the franchise had ceased operation in Baltimore as of that date, that the franchise was no longer subject to Maryland’s jurisdiction.<sup>79</sup> In a 12 page memorandum opinion, Judge Walter E. Black, Jr.<sup>80</sup> agreed with the Colts, granting the motion for summary judgment.

In the January 8, 1986 amended opinion, the court identified three distinct issues. First, the court set out to determine the relevant date on which the location of the franchise must be determined.<sup>81</sup> The city argued that the date the condemnation suit was filed, but the Colts argued that the city could not exercise the restrict the rights of ownership until

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<sup>78</sup> Act of March 29, 1984, ch. 6, 1984 Md. Laws 18-20 (Appended as appendix I).

<sup>79</sup> M. & C. Council of Baltimore, 624 F. Supp. at 281 (D. Md. 1985).

<sup>80</sup> Judge Black was born in Baltimore and after graduating from Harvard Law School, practiced law in Maryland until his appointment to the federal bench in 1982. An article written shortly after his death wrote, “[f]riends described him as an ardent fan of the...Baltimore Colts...” Jacques Kelly, *Walter E. Black Jr., chief judge of U.S. District Court for Md.*, Balt. Sun, Oct. 1, 2014, [http://articles.baltimoresun.com/2014-10-01/news/bs-md-ob-walter-black-20141001\\_1\\_maryland-bar-judge-rozel-c-kirby-fowler](http://articles.baltimoresun.com/2014-10-01/news/bs-md-ob-walter-black-20141001_1_maryland-bar-judge-rozel-c-kirby-fowler).

<sup>81</sup> M. & C. Council of Baltimore, 624 F. Supp. at 281 (D. Md. 1985).



compensation was paid.<sup>82</sup> Second, the court determined which test was appropriate to determine the location of the franchise.<sup>83</sup> Finally, the court examined whether the franchise was “in Maryland” at the time when the city could exercise its condemnation authority.<sup>84</sup>

The court agreed with the Colts that the relevant date on which the court must determine where the Colts were located was on the date compensation was paid. Although the city offered Irsay \$40 million for his franchise on March 29, 1984, Irsay never accepted thus payment was never effected.<sup>85</sup> The court, further, was troubled by the city’s contention that “the mere filing of a piece of paper in a court—with no compensation being paid—can restrict the owner’s use of the property.”<sup>86</sup> In addition, the statute under which the city was authorized to condemn the franchise did expressly allow the city to “assert control over property it seeks to condemn by means of an *ex parte* injunction.”<sup>87</sup> Therefore, because the city was restricted to “the normal rules of eminent domain” the court concluded that there was never a time at which Irsay lacked the ability to move his franchise.<sup>88</sup>

Without citing case law or analyzing the historical underpinnings of the claim, the court explained that “[i]t is, of course, axiomatic that a sovereign state’s power to condemn

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Whether the city could condemn the Colts’ franchise, which was considered “intangible property” was not an issue in contention in this lawsuit. Relying on a Supreme Court case, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11—3 (1949), and the Oakland Raiders case, *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 183 (1982) the court concluded that “it is now beyond dispute that intangible property is properly the subject of condemnation proceedings.” *Id.* at 282.

<sup>85</sup> See *supra* note 59 and accompanying text.

<sup>86</sup> M. & C. Council of Baltimore, 624 F. Supp. at 283 (D. Md. 1985).

<sup>87</sup> *Id.* (emphasis in original).

<sup>88</sup> *Id.* at 284.

property extends only as far as its borders and that the property to be taken must be within the state's jurisdictional boundaries." Therefore, the court held, because payment was never effected, and the Colts would no longer be in Maryland at the end of a future condemnation trial, "the [Colts'] franchise is beyond the jurisdictional reach of Baltimore City."<sup>89</sup>

Although that holding was enough to determine the outcome of the case, the court addressed the city's alternative arguments. The court assumed, *arguendo*, that the Colts left Baltimore by March 30, 1983, the date that the city argued it took control the franchise.<sup>90</sup> Even under that assumption, the court wrote, the city could not condemn the Colts for lack of eminent domain jurisdiction because the Colts franchise was not situated within the State of Maryland as of that date.<sup>91</sup>

The city argued that the Colts were still located in Maryland and could therefore be condemned. The city's theory was that its eminent domain authority was "coextensive with [the] court's personal jurisdiction over the Colts." The city relied on the "minimum contacts" analysis from *International Shoe Co. v. Washington*,<sup>92</sup> analogizing the authority that federal courts have to compel a defendant to come to court with the authority that states have to condemn property.<sup>93</sup> The court disagreed because "such a rule would eviscerate the established rule that only one sovereign may property condiment property."<sup>94</sup> The analogy was improper because while personal jurisdiction is non-exclusive, that is, different states may have jurisdiction over a given party, the power of

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 284–87.

<sup>92</sup> 326 U.S. 310 (1945).

<sup>93</sup> M. & C. Council of Baltimore, 624 F. Supp. at 284 (D. Md. 1985).

<sup>94</sup> *Id.* at 285.

eminent domain is exclusive, only one state can have the authority to condemn a single piece of property.<sup>95</sup>

The court also considered two alternative tests to determine where the Colts franchise was located as of March 30, 1983. The factors that the *City of Oakland* court used included the location of the team’s principal place of business, the designated “home” site as authorized by the NFL, and the location of the team’s tangible property.<sup>96</sup> Applying those factors to the Colts franchise, the court concluded that the team was not in Maryland. Also, the court wrote, the “last known address” test used in the law of escheat was not appropriate because unlike escheat proceedings, the owner of the Colts is “known and the movement of the property over time can be traced.”<sup>97</sup> But even if the test were applied here, the Colts franchise could be located in either Maryland, Indiana, or Illinois—where Irsay located the Colts’ headquarters.<sup>98</sup>

Ultimately, three factors lead the court to conclude that the Colts left Maryland by March 30, 1984. First, the Colts’ principle place of business was “not in Maryland.”<sup>99</sup> Second, the team’s “essential tangible property” including its “certificate of membership in the NFL” were not in Maryland by March 30.<sup>100</sup> Finally, Irsay’s intent as the owner of the franchise was to leave Maryland by that date.<sup>101</sup>

The court granted the Colts’ motion for summary judgment because the court could not discern any issues of material fact. Although the city raised a substantial number of

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<sup>95</sup> *Id.* at 284 (citing Phillip Nichols, *THE LAW OF EMINENT DOMAIN* 2—9 (3d ed. 1980).

<sup>96</sup> *Id.* at 285 (citing *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 74 (1982)).

<sup>97</sup> *Id.* at 287.

<sup>98</sup> *M. & C. Council of Baltimore*, 624 F. Supp. at 287 (D. Md. 1985).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

issues, the court noted that those issues pertained to legal conclusions, rather than disagreement about the facts.<sup>102</sup>

By December 9, 1985, when the original decision was entered by the district court, the Indianapolis Colts had already played a full season; playing their home games in Indianapolis. The decision served as the exclamation point on what Baltimoreans already knew. The Colts were gone.

### **c. Constitutional Dimension**

By focusing on where the Colts franchise was located, and when, the court avoided addressing the merits of the city's condemnation effort and the legal issues attendant to that inquiry. One of the unanswered questions is whether the commerce clause in the United States Constitution would have barred the city from condemning the Colts.

The federal constitution grants Congress the sole authority to regulate interstate commerce.<sup>103</sup> The commerce clause, therefore, may prevent states from regulating interstate commerce.<sup>104</sup> The dormant commerce clause, also called the negative commerce clause, is implicated if a state or local regulation places "an undue burden on interstate commerce."<sup>105</sup> State or local laws that substantially burden interstate commerce or that seek to regulate national interests, will be invalidated under the commerce clause.<sup>106</sup>

The commerce clause does not restrict all state or local interference in interstate commerce. One exception to commerce clause scrutiny is the "market participation"

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<sup>102</sup> *Id.* at 288.

<sup>103</sup> U.S. CONST. art. I, § 8, cl. 3 ("[T]o regulate commerce...among the several States...").

<sup>104</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 455 (4th ed. 2013).

<sup>105</sup> *Id.* at 457.

<sup>106</sup> *See* *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

exception. If the regulating entity is acting as a “market participant” rather than as a market regulator, then the commerce clause would not restrict the action.<sup>107</sup>

In California, the City of Oakland attempted to prevent the Oakland Raiders football team from relocating to Los Angeles.<sup>108</sup> After years of litigation, the Court of Appeals for California invalidated the condemnation because of its effect on interstate commerce. The court explained that although “[i]t is well established that a state may exercise eminent domain power even though by doing so it indirectly or incidentally burdens interstate commerce,” the “nationwide” nature of professional football “so completely involved in interstate commerce” that taking a franchise is impermissible.<sup>109</sup> Citing a prior case, the court confirmed that each franchise was connected and interested in each other franchise, essentially making the NFL a “joint venture of its members organized for the purpose of providing entertainment nationwide.”<sup>110</sup> The court concluded that indefinitely barring the Raiders franchise from moving out of Oakland would “more than indirectly or incidentally regulate interstate commerce.”<sup>111</sup> Finally, the court weighed the local interest of preventing the Raiders from moving against the burden imposed on interstate commerce.<sup>112</sup> Finding that the burden imposed outweighs the local interest, the court affirmed the lower court decision invalidating the condemnation.

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<sup>107</sup> See *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 418–19 (1985) [Hereinafter *City of Oakland II*].

<sup>108</sup> See *City of Oakland v. Oakland Raiders*, 31 Cal. 3d 656 (1982). Interesting to note, the Raiders only moved to Los Angeles to participate in that market after the Los Angeles Rams, owned by Carroll Rosenbloom, left that city.

<sup>109</sup> *Oakland II*, 174 Cal. App. 3d at 420 (1985).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 422.

#### IV. Lessons Learned from the Baltimore Colts

It is likely that the commerce clause would have prevented the city from taking the Colts. The Maryland suit left open the possibility for the Colts to challenge the constitutionality of the condemnation.<sup>113</sup> Even the court had found that the city could condemn the Colts franchise, condemning the franchise would have had a substantial effect on interstate commerce in violation of the federal constitution.

Although the *City of Oakland II* court's reasoning has been criticized<sup>114</sup>, the facts in that case are indistinguishable from the facts in the Colts relocation. In both cases, a franchise owner moved their team from their former city. Further complicating the Colts case, however, was the fact that Irsay moved the Colts to a different state, whereas in *City of Oakland II*, the team move was intrastate, approximately 400 miles southeast. In both cases, the former city attempted to condemn the sports franchise; both ultimately unsuccessful. So even if the city had condemned the Colts, it is unlikely that the condemnation would have withstood constitutional scrutiny. At minimum, if the city had condemned the Colts before the franchise left the city, the city would have had more time to negotiate an agreement with Irsay, an unlikely result.

#### V. Conclusion

The City of Baltimore loved their Baltimore Colts. But after a controversial ownership change and a several bad seasons, the franchise's relationship with the city was strained.<sup>115</sup> When negotiations to keep the team in town broke down, the city employed its

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<sup>113</sup> M. & C. Council of Baltimore, 624 F. Supp. at 281 (D. Md. 1985).

<sup>114</sup> Shelly Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. Davis L. Rev. 1505, 1545–56 (2005).

<sup>115</sup> See *supra*, Part II.A–C.

last resort— eminent domain—to take ownership of the team to prevent it from leaving.<sup>116</sup> The city, however, was a few days too late.<sup>117</sup> The team left the city and was beyond the city's eminent domain jurisdiction.<sup>118</sup> Even if the city had condemned the team while it was in Maryland, the condemnation would have been invalid under the commerce clause.<sup>119</sup>

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<sup>116</sup> *See supra*, Part II.D.

<sup>117</sup> *See supra*, Part II.E.

<sup>118</sup> *See supra*, Part III.B.

<sup>119</sup> *See supra*, Part IV.

**Appendix I:**

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CHAPTER 6

(Senate Bill 1042)

AN ACT concerning

Baltimore City - Eminent Domain - Sports Franchises

FOR the purpose of clarifying a class of property rights which Baltimore City may acquire by negotiation or condemnation, by specifically designating professional sports franchises within such class of property rights; stating certain legislative findings; and making this Act an emergency measure.

BY renumbering



The Charter of Baltimore City  
Article II - General Powers  
Section (2)  
to be Section (2)(a)  
(1964 Revision, as amended)

BY adding to

The Charter of Baltimore City  
Article II - General Powers  
Section (2)(b)  
(1964 Revision, as amended)

Preamble

It is hereby found and declared by the General Assembly of Maryland that:

WHEREAS, The Mayor and City Council of Baltimore have engaged in an extensive program of economic and urban development and redevelopment; and

WHEREAS, An integral part of this program has been the establishment of tourist attractions and facilities, including the construction of the Convention Center and the granting of financial assistance and other aid for development of new hotel accommodations and for the renovation of existing hotel accommodations; and

WHEREAS, The existence of a number of teams engaged in professional sports within Baltimore City has had a salutary effect on the welfare of the inhabitants of this City and contributed substantially both directly and indirectly to the economic development and general welfare of Baltimore City; and

WHEREAS, It is in the furtherance of the public interest and promotes the common good that such teams continue to operate in Baltimore City and represent the City in the several leagues or associations devoted to professional sports; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Section(s) (2) of Article II - General Powers of the Charter of Baltimore City be renumbered to be Section(s) (2)(a).

SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:

The Charter of Baltimore City

Article II - General Powers

(2) (B) TO ACQUIRE BY PURCHASE OR CONDEMNATION ANY PROFESSIONAL SPORTS FRANCHISE WHICH HAS OR HAD THE TERRITORIAL RIGHTS TO REPRESENT BALTIMORE CITY ON OR AFTER JANUARY 1, 1983, INCLUDING, WITHOUT LIMITATION, (1) THE FRANCHISE RIGHT TO COMPETE IN AN ORGANIZED LEAGUE OR ASSOCIATION; (2) THE BUSINESS ENTITY OWNING OR OPERATING SUCH FRANCHISE; (3) ALL CONTRACTUAL RIGHTS OWNED BY THE BUSINESS ENTITY WHICH ARE NECESSARY, INCIDENT, AND APPROPRIATE TO OWNERSHIP AND OPERATION OF SUCH FRANCHISE; (4) ALL INTERESTS IN AND RIGHTS TO REAL PROPERTY OWNED BY THE BUSINESS ENTITY WHICH ARE NECESSARY, INCIDENT, AND APPROPRIATE TO OWNERSHIP AND OPERATION OF SUCH FRANCHISE; AND (5) ANY AND ALL OTHER PROPERTY RIGHTS; WHERESOEVER THE SAME MAY BE LOCATED IN THE STATE OF MARYLAND, WHETHER TANGIBLE, INTANGIBLE, REAL, PERSONAL, OR MIXED OWNED BY THE BUSINESS ENTITY, OR TO WHICH THE BUSINESS ENTITY HAS A CLAIM, WHICH ARE NECESSARY, INCIDENT TO AND APPROPRIATE TO THE OPERATION OF A PROFESSIONAL SPORTS FRANCHISE IN BALTIMORE CITY; AND TO SELL OR OTHERWISE DISPOSE OF SUCH FRANCHISE AND COLLATERAL RIGHTS, IN WHOLE OR IN PART, SUBJECT TO SUCH RESTRICTIONS AND RESERVATIONS AS MAY BE NECESSARY OR APPROPRIATE.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved March 29, 1984.

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**Appendix II:**

