Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts

INTRODUCTION

The sovereign power of eminent domain has troubled courts and commentators because of its sweeping application and potential for abuse.[1] The fifth amendment, which states, "nor shall private property be taken for public use, without just compensation,"[2] implicitly recognizes this power[3] and purports to curtail its exercise, but the language of the amendment fails to define precisely the bounds of the sovereign's reach.[4] Attempts to restrain the condemnation power through stricter interpretation of the fifth amendment's public use requirement have failed. The Supreme Court has effectively eliminatcd public use as a check against condemnation by directing the judiciary to defer to the legislature on this issue.[5] The effect of these decisions

---

1. "[T]he doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse." West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 545 (1848) (Woodbury, J., concurring and dissenting). "The power of eminent domain claimed by the City [of Oakland] in this case is not only novel but virtually without limit. This is troubling because the potential for abuse of such a great power is boundless." City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982) (Bird, C.J., concurring and dissenting). "[S]o far as the federal courts are concerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications." Comment, *The Public Use Limitation On Eminent Domain: An Advance Requiem,* 58 YALE L.J. 599, 613-14 (1949).

2. U.S. CONST. amend. V.

3. "[T]here is no express delegation of [eminent domain] by the Constitution; and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self-preservation." *West River Bridge Co.,* 47 U.S. (6 How.) at 532. "Neither the United States Constitution nor, as far as is known, any state constitution contains any express grant of this authority. That explains why the courts have spoken of an 'inherent power.' " Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 560 (1972).

4. "[T]he term 'public use' defies definition." Note, *Public Use, Private Use, and Judicial Review in Eminent Domain,* 58 N.Y.U. L. REV. 409, 410 (1983). The same is true for the term "just compensation," as the Constitution does not supply a definition for what is just or how compensation is to be measured.

5. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, if a legislature, state or federal, determines there are substantial reasons for [condemnation], courts must defer to its determination that the taking will serve a public use.

Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321, 2331 (1984) (State of Hawaii used condemnation to facilitate the redistribution of land ownership).

may well vest the sovereign with a truly limitless power,[6] unless some boundary can be discovered which the sovereign may not cross.

One limitation on the power of eminent domain which has been implicitly understood is that property must be within the sovereign's territorial jurisdiction before a taking can occur.[7] This premise identifies perhaps the only means by which the sovereign is prevented from overreaching. Few problems are encountered in applying this rule to realty and tangible property. These forms of property are either within or outside the sovereign's jurisdiction, and such determinations are easily made. Property which is intangible, however, creates great difficulty in applying a territorial rule because of the inability to ascertain the property's exact location. At the present time no clear guidelines exist to provide rules for the exercise of eminent domain over intangibles.[8] While of minimal consequence in the past, the lack of precedent in this area is causing conflicts in the present and may do so in the future if a clear rule is not established.

The following discussion will explore the special problems of establishing territorial limits of eminent domain over intangible property, using a current controversy from the sports world as an illustration. Although the present facts are specific to sports teams, the unsettled state of eminent domain law may affect any business enterprise with intangible components.[9] Attempts by Congress to pass legislation for a sports problem[10] will thus affect only

---

6. "[P]ublic use has expanded to such a degree that it has become a meaningless restraint upon the application of eminent domain." Note, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown?*, 20 CAL. W.L. REV. 82, 103 (1983).

7. "There is one limitation upon the power of eminent domain which depends upon no express constitutional provision. The powers of a sovereign state, however vast in their character and searching in their extent, are inherently limited to the subjects within the jurisdiction of the state . . . ." 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 2.12 (J. Sackman ed. rev. 3d ed. 1981) [hereinafter cited as NICHOLS]. This implicit requirement is in contrast to the explicit limitations of public use and just compensation.

8. *Id.* at § 2.1[2], states that intangible property is within the scope of eminent domain but does not address the jurisdictional issues.

9. In *Oakland Raiders,* Chief Justice Bird, concurring and dissenting, posed the following questions:

> [I]f a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his productions to another city, may the city condemn his business, including his contracts with the rock stars, in order to keep the concerts at the stadium? If a small business that rents a storefront on land originally taken by the city for a redevelopment project decides to move to another city in order to expand, may the city take the business and force it to stay at its original location? May a city condemn *any* business that decides to seek greener pastures elsewhere under the unlimited interpretation of eminent domain law that the majority appear to approve?

32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683-84 (emphasis in the original).

10. S. 287, 99th Cong., 1st Sess. (1985), also known as the Professional Sports Team Community Protection Act. This bill, introduced by Senator Slade Gorton, represents a recent attempt to solve the problem by setting forth conditions under which sports teams may relocate. The purpose of the bill is to provide stability and predictability in the loeation of professional sports teams and to safeguard the equitable interests of communities which have supported such teams. *Id.* at § 102. Senator Gorton previously had introduced a similar bill with the same title. S. 2505, 98th Cong., 2d Sess. (1984). S. REP. No. 592, 98th Cong., 2d Sess. (1984) [hereinafter cited as SENATE REPORT]. After the SENATE REPORT, however, no further action was taken.

one type of intangible and will fail to solve the underlying infirmity. A better approach would be to develop a general rule of condemnation with a focus on intangible property. Toward that end, this Note will first discuss the extent to which intangible property is subject to condemnation. This Note will then examine the jurisdictional rules for taxation, adjudication and escheat, in search of precepts and practices which can be applied to the condemnation of intangibles. This Note contends that the rule of *mobilia sequuntur personam,*[11] which locates intangible property at the domicile of the owner, is the most logical and most practical rule for application in eminent domain.

I. BACKGROUND AND FACTUAL SITUATION

The relocation of a sports franchise can be a disconcerting event for a municipality. Sports teams, many valued in the millions of dollars,[12] furnish revenue and employment for their host cities. Cities often make financial commitments in constructing, upgrading and maintaining stadiums through long-term bond obligations.[13] The loss of a sports franchise, especially one which the fans have supported, is a blow to both the municipal pride and pocketbook. A city faced with such a situation will attempt to preserve its investment and future benefits. If negotiations fail, condemnation is a possible alternative.[14]

The particular difficulties in defining the jurisdictional limits of a sovereign's condemnation power are illustrated through the actual relocation of a sports franchise: that of the Baltimore, now Indianapolis, Colts.[15] In February, 1984, the Baltimore Colts, a Delaware corporation[16] and holder of a National Football League franchise in Baltimore, Maryland, failed to secure a new lease agreement with the managers of Baltimore Memorial Stadium. The Colts' owner then began negotiations with the operators of the Indianapolis Hoosier Dome. The Maryland legislature swiftly drafted a bill enabling the Mayor and the City Council of Baltimore to acquire the

---

11. "Movables follow the [law of the] person." BLACK'S LAW DICTIONARY 905 (5th ed. 1979).

12. *See Football: Hit Behind the Line,* Newsweek, Jan. 21, 1985, at 54-55.

13. SENATE REPORT, *supra* note 10, at 2.

14. *See id.* at 3.

15. The facts of the relocation are set forth in Indianapolis Colts v. Mayor of Baltimore, 741 F.2d 954 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1753 (1985), an interpleader action initiated by the Colts. The Seventh Circuit held that the federal district court in Indiana did not have interpleader jurisdiction and vacated the orders of the district court which had restrained the City of Baltimore from pursuing its condemnation action against the Colts. 741 F.2d at 955. The Seventh Circuit had decided earlier that the interpleader action was brought by the Colts for the sole purpose of obtaining jurisdiction over Baltimore in Indiana. Indianapolis Colts v. Mayor of Baltimore, 733 F.2d 484, 487 (7th Cir. 1984).

16. Opposition to Motion to Remand at 1, Baltimore Football Club, Inc. v. Mayor of Baltimore, No. B84-1294 (D. Md. filed June 7, 1984).

Colts by eminent domain.[17] Before the city could exercise its new authority,[18] however, the Colts, "under the cloak of darkness," removed themselves and their belongings beyond the Maryland state line,[19] leaving behind a multi-million dollar training facility in Owings Mills, Maryland, title to which was held by a subsidiary of the corporation.[20] Undaunted by the relocation, the City filed a condemnation suit to compel the Colts' return.[21]

The issue presented by this action is whether a municipality, as an agent of the sovereign, may exercise its power of eminent domain to condemn a sports franchise which, while still owning real property within the sovereign's jurisdiction, has transported all of its tangible personalty beyond the sovereign's territorial limits. Since the franchise, as an entity, is an intangible, the main difficulty lies in determining just where the franchise was located at the time of the suit. A related issue is whether the location of some part of the franchise, in this case the real property, within a particular jurisdiction is sufficient to subject the entire franchise to condemnation by that jurisdiction, or whether some part of the franchise is severable for condemnation purposes.

The outcome of the case has broader implications than those which would typically result from a dispute between a state and a property owner. Although Indiana is not a party to the proceedings, the understanding is that whatever property is not within the jurisdiction of Maryland is theoretically condemnable by Indiana. As such, the instant case involves a potential struggle between two states over their respective condemnation powers. Since a basic premise of eminent domain law is that "[a] state . . . cannot take or authorize the taking of property or rights in property situated in another state, and, conversely, each state holds all the property within its limits free from the eminent domain of any other state,"[22] the power to condemn is exclusive. Only one state can prevail.

Resolution of the case is possible through one of three alternatives: either the entire franchise is reachable and condemnable by Baltimore (the result prayed for by the City); no part of the franchise may be taken by Baltimore; or, only the real property within Maryland at the time of the suit may be

---

17. *Indianapolis Colts,* 741 F.2d at 955.

18. On March 30, 1984, the Mayor and City Countil of Baltimore approved a bill authorizing the City to acquire all the rights of the franchise by purchase or condemnation. Baltimore, Md., Ordinance 32 (Mar. 30, 1984). The City immediately filed a Petition for Condemnation and for Injunctive Relief in the Circuit Court for Baltimore City (Case No. 84090060-L18657, Mar. 30, 1984).

19. *Indianapolis Colts,* 741 F.2d at 955.

20. Supplemental Memorandum in Opposition to Motion to Remand at 9, Baltimore Football Club, Inc. v. Mayor of Baltimore, No. B84-1294 (D. Md. filed June 21, 1984) [hereinafter cited as Supplemental Memorandum].

21. The suit was removed to the United States District Court for the District of Maryland as described in *Indianapolis Colts,* 741 F.2d at 954. The condemnation suit was subsequently consolidated with two other related suits by an Order dated November 13, 1984, and bears the Civil Action Numbers of B-84-1294, B-84-2026 and B-84-2560.

22. 1 NICHOLS, *supra,* note 7.

condemned by that jurisdiction.[23] In advancing its argument, the City of Baltimore has assumed that an intangible entity such as a sports franchise is a proper subject for condemnation. Despite the bold assertion of the sovereign's power, case law supporting the taking of this particular type of property is not as clear as it is for the condemnation of realty and tangible property. Before deciding how much of the property Baltimore may take, a determination is necessary as to whether this intangible property is capable of being taken.

II. THE SPORTS FRANCHISE AS INTANGIBLE PROPERTY: SUBJECT TO CONDEMNATION BUT UNCERTAIN IN LOCATION

The conflict between the Colts and the City of Baltimore was preceded by another sports franchise condemnation case—*City of Oakland v. Oakland Raiders,*[24] which involved an intrastate, not an interstate, move by a professional football team. Although the case has not reached final adjudication,[25] the California Supreme Court did determine that, subject to requirements of public use,[26] a sports franchise, as intangible property, is condemnable. Justice Richardson agreed with one treatise writer that " '[i]ntangible property such as choses in action, patent rights, franchises, charters or any other form of contract, are within the scope of' " a taking.[27] The court also noted that neither the federal nor state constitution distinguished between tangibles

---

23. For the purpose of argument, this Note will not distinguish between the power of the sovereign to condemn and the power of condemnation that the sovereign may confer upon a city. The interests of the State of Maryland and the City of Baltimore will be considered sufficiently merged as against the interests of the Colts and the State of Indiana.

24. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

25. The history of *Oakland Raiders* is set forth in the opinion of the California Court of Appeals, City of Oakland v. Superior Court, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983). The controversy in the courts began when the City of Oakland filed a condemnation suit against the Oakland Raiders to prevent the team from moving to Los Angeles. A summary judgment by the trial court dismissed the City's suit with prejudice. The California Supreme Court reversed the summary judgment in *Oakland Raiders,* 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). That court held that the Raiders were subject to the power of eminent domain, provided that the City of Oakland could show a public use for the taking. The California Supreme Court then remanded the case to the trial court for a full evidentiary trial on the merits in order to give the City the opportunity of showing a public use. When the case was retried by the trial court, the trial was bifurcated to consider the Raiders' objections to the taking separately from the issue of compensation. The trial court sustained five of the Raiders' objections. The City then asked the California Court of Appeals to issue a peremptory writ of mandate to the trial court, vacating the trial court's judgment on the ground that the holding was contrary to the law of the case as established by the California Supreme Court in *Oakland Raiders.* The California Court of Appeals granted the relief requested by the City, ruling that the trial court had incorrectly sustained the Raiders' objections. The trial court was then ordered to determine, without the taking of additional evidence, the remaining objections submitted to it but not previously ruled upon.

26. *See supra* notes 5-6 and accompanying text. As noted earlier, the public use limitation provides little protection against condemnation.

27. *Oakland Raiders,* 32 Cal. 3d at 67, 646 P.2d at 839, 183 Cal. Rptr. at 677, (citing 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 2.1[2] (J. Sackman ed. rev. 3d ed. 1981)).

and intangibles,[28] and that lack of precedent alone would not shield an intangible from eminent domain.[29]

The United States Supreme Court described the attempted distinctions between tangible and intangible property as having "no foundation in reason."[30] The Court held further that there was "nothing peculiar to a franchise which can class it higher . . . or render it more sacred, than other property," and that although a franchise may be incorporeal, it "is property, and nothing more."[31] The inescapable conclusion is that intangible property in general, as well as sports franchises in particular, are proper subjects for the sovereign's taking power. Despite the Supreme Court's language, however, a difference does exist between the condemnation of tangible and intangible property. The distinction is of enough significance to affect the practical, if not the theoretical, aspects of eminent domain.

"[T]he consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found."[32] The singular difficulty with intangible property is that it "has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it."[33] "[T]here is a tendency both to confuse the legal relations comprising the franchise with the physical properties and to leave unclear what and how many legal relations have actually been considered."[34] The confusion in locating and defining intangible property impedes the resolution of interstate condemnation conflicts. The *Oakland Raiders* Court was able to dispose of the location issue because the team's movement was contained within a single sovereign's territory.[35] With regard to the Colts, however, the federal district court must face the issue squarely.

The Supreme Court, though it spoke of intangibles as being no different from tangibles, did not reach the jurisdictional issue of the present action. The Court did not consider situations where the intangible is severable from other property and movable from one jurisdiction to another, or where the intangible is associated with several jurisdictions at once. The intangibles

28. *Oakland Raiders,* 32 Cal. 3d at 67, 646 P.2d at 839, 183 Cal. Rptr. at 677.

29. *Id.* at 66, 646 P.2d at 839, 183 Cal. Rptr. at 677.

30. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 534 (1848).

31. *Id. See also* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (holding that, in the temporary taking of a laundry business by the federal government, the owner must be compensated for the going-concern value as well as for the value of the business); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (holding that, in the condemnation of a lock and dam by the federal government, the company was entitled to recover for the taking of the franchise to collect tolls as well as for the value of the tangible property taken).

32. Curry v. McCanless, 307 U.S. 357, 364 (1939).

33. *Oakland Raiders,* 32 Cal. 3d at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682 (quoting *In re* Waits' Estate, 23 Cal. 2d 676, 680, 146 P.2d 5, 8 (1944)).

34. United States v. Brooklyn Union Gas Co., 168 F.2d 391, 394 (2d Cir. 1948).

35. *See Oakland Raiders,* 32 Cal. 3d at 74-75, 646 P.2d at 844, 183 Cal. Rptr. at 682.

under consideration were so closely associated with the fixed, tangible targets of condemnation, that the Court had no need to ponder whether, for example, the franchise to collect tolls on the West River Bridge would have been condemnable by Vermont if the bridge had remained in Vermont, but the toll-collecting franchise had somehow moved to Massachusetts.[36] The situs of a bridge or building is easily determined, but the location of an enterprise which is incorporated in one state, has its headquarters in another state, and does business in several states, is more difficult to divine.

The Supreme Court would seem to sanction the condemnation of a sports franchise, but the Court's opinions are based on situations where an intangible is the object of what might be referred to as a secondary taking; the intangible is merely associated with the tangible property sought by the condemnor. In the condemnation of a sports franchise, the intangible itself is the target of a primary taking.[37] If such a taking were permissible, a jurisdictional test would be necessary to determine the location of the intangible in relation to the powers of the condemnor. The Court's decisions in eminent domain do not assist in this task. The Court's decisions in taxation, however, are considerably more helpful. Intangibles have long been subject to taxation and, as a result, have required a designated location.

III. TAXATION: RULES AND RATIONALES FOR THE EXERCISE OF JURISDICTION OVER INTANGIBLE PROPERTY

The exercise of a state's taxing power over property within its jurisdiction is based on a belief that the owner of property secures the benefit and protection of the laws within a jurisdiction which enable him to enjoy the fruits of his ownership.[38] The state is not acting unreasonably in exacting a mandatory contribution, because "taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws . . . ."[39] The state may justify the tax by showing a minimum nexus between itself and the targeted source of revenue,[40] but "no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment."[41] The rule for jurisdiction is clear: "[t]he power

36. *See, e.g., Kimball Laundry Co.*, 338 U.S. 1; *Monongahela Navigation Co.*, 148 U.S. 312; *West River Bridge Co.*, 47 U.S. (6 How.) 507.

37. For example, some of the intangible rights targeted by Baltimore are, in addition to the National Football League franchise rights: all contract rights, including those for personal services; all licenses, easements, grants and negotiating rights; all indicia of ownership, including shares of stock and general and limited partnership interests; and, "[a]ll other rights and interests of any kind or nature whatsoever necessary and appropriate to the ownership and operation of a National Football League professional football club . . . ." Baltimore, Md., Ordinance 32, § 1 (Mar. 30, 1984).

38. Curry v. McCanless, 307 U.S. 357, 364 (1939).

39. *Id.* at 370.

40. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 436-37 (1980) (describing one requirement for a state's taxation of income generated by a corporation in interstate commerce).

41. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 210 (1930).

of taxation . . . is necessarily limited to subjects within the jurisdiction of the State."[42] "[P]roperty lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition."[43] What is not obvious, however, is how the limits of that jurisdiction are to be determined.

The rule for the jurisdiction to tax is most easily applied to real or tangible property permanently located within a state. For these types of property the power of taxation rests exclusively with the state in which the property is located, regardless of the domicile of the owner.[44] "Tangibles with permanent situs therein . . . may be taxed only by the State where they are found."[45] The rationale for this rule is that " 'such property is visible, easily found and difficult to conceal, and the tax readily collectible . . . .' "[46] The Court speaks of such property as receiving its entire protection within the taxing state. That state is then justified in exacting a cost in return for the benefits incurred " 'irrespective of the domicile of the owner.' "[47]

A jurisdictional rule for intangibles is more difficult to construct due to the impossibility "of attributing a single location to that which has no physical characteristics and which is associated" with more than one jurisdiction.[48] Intangibles "have no situs in the physical sense, but have the situs attributable to them in legal conception."[49] In dealing with the jurisdictional problems of incorporeal property the Supreme Court initially resisted the idea of inheritance or property taxation by more than one state, and applied the general rule of *mobilia sequuntur personam* to intangibles, permitting a tax to be levied only by the state of the domicile of the owner.[50] The theory

---

42. State Tax on Foreign-Held Bonds (R.R. Co. v. Pennsylvania), 82 U.S. (15 Wall.) 300, 319 (1872).

43. *Id.*

44. Frick v. Pennsylvania, 268 U.S. 473, 489 (1925); *accord,* Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 93 (1929); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905).

45. *Farmers Loan & Trust Co.,* 280 U.S. at 211; *accord,* Greenough v. Tax Assessors, 331 U.S. 486, 491 (1947).

46. Blodgett v. Silberman, 277 U.S. 1, 16 (1928) (quoting *Union Refrigerator Transit Co.,* 199 U.S. at 206).

47. *Blodgett,* 277 U.S. at 16 (quoting *Union Refrigerator Transit Co.,* 199 U.S. at 206).

48. *Curry,* 307 U.S. at 362-63 (regarding the imposition of transfer (inheritance) taxes on a trust where decedent who created the trust was domiciled in one state and the trustees resided in another).

49. Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209 (1936). The Court sanctioned a West Virginia *ad valorem* property tax on the corporation's accounts receivable and bank accounts in other states. The Court reasoned that these intangibles had become localized in West Virginia because all the corporate moneys and expenditures were directed by the corporation's office in Wheeling, West Virginia.

50. *See* Baldwin v. Missouri, 281 U.S. 586, 593-94 (1930) (referring to bonds which were physically located in a state other than that of the owner's domicile); *see also Farmers Loan & Trust Co.,* 280 U.S. at 211 (regarding a testamentary transfer tax); *Safe Deposit & Trust Co.,* 280 U.S. at 92 (holding that the owner of the trust was the trustee, as opposed to the creator of the trust, and that the trust was domiciled only in the state of the trustee).

behind the rule was that "[n]ormally the intangibles are subject to the immediate control of the owner," and that "[s]ince the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation" to their location.[51] Further, if the situs of documents representing intangibles, (for example, bonds or promissory notes), were to be the controlling factor in establishing jurisdiction, "their transfer to another jurisdiction would defeat the tax of the domiciliary state,"[52] and provide a possible means for avoiding taxation entirely.

The rule of *mobilia sequuntur personam* provides a handy fiction for establishing the location of intangible property for individuals, but it falls short of a satisfactory solution for intangibles associated with business enterprises. To remedy this problem, the Court created an exception to the general rule and acknowledged that intangibles " 'may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' "[53] Despite its efforts to avoid taxation of intangibles by more than one jurisdiction, the Court eventually recognized that intangibles associated with several states often create more than one set of legal relationships. The Court was reluctant to say that the intangible interests were linked more to one state than to another.[54] In such circumstances the Court finally decided that it could not justify the withdrawal from one state of its power to tax,[55] and held that due process of the fifth amendment does not require the fixation of a single exclusive place of taxation of intangibles.[56]

To summarize the foregoing discussion, the location of property for jurisdictional purposes of taxation is controlled by several precepts. The general rule of *mobilia sequuntur personam* identifies intangible property at the domicile of the owner and permits taxation of the property at that location. An exception to this rule allows a jurisdiction to tax intangibles which have acquired a business situs therein. A corollary would permit multiple taxation of an intangible when it had established legal relationships with more than one jurisdiction. Realty and tangible property remain taxable only by the jurisdiction of their situs. Whether or not these principles, which are reasonable for taxation, may properly be applied to condemnation depends upon the extent to which the theories and practices of taxation are consistent with those of eminent domain.

The greatest difference in existing rules between taxation and condemnation is that taxation by more than one jurisdiction is permissible, whereas condemnation by more than one state is prohibited due to the exclusive

51. *Greenough,* 331 U.S. at 493; *see Curry,* 307 U.S. at 365-68.
52. *Greenough,* 331 U.S. at 492-93.
53. *Wheeling Steel Corp.,* 298 U.S. at 210 (quoting *Farmers Loan & Trust Co.,* 280 U.S. at 213, referring specifically to choses in action).
54. *Curry,* 307 U.S. at 369.
55. *Id.*
56. *Id.*

nature of the taking power. As long as a minimum nexus exists between the jurisdiction and the object of taxation, a tax on the object is permitted even if several jurisdictions exercise this power at once. On the other hand, multiple condemnations of the same property, if permitted, would result in chaos. Such a rule would needlessly encourage states to over-exercise their power, as each state might condemn solely to prevent another from taking an asset of potential value. The practice of multiple taxation would thus seem to prescribe a less stringent and less mechanical rule in locating the object of the tax than a rule of jurisdiction for condemnation.

Another difference between taxation and condemnation is that a taxpayer's liability is predictable, whereas a condemnee's is not. The taxpayer associates himself with a jurisdiction and theoretically obtains the benefits and protections of its laws. In return, the taxpayer contributes to the government of the jurisdiction.[57] A taxpayer can thus ascertain his tax liability in advance and can choose to move elsewhere if he deems the liability too high. By contrast, in the operation of eminent domain, the condemnee can never predict if or when he will be forced to surrender his property. Once a condemnation action is adjudicated against him, a condemnee has no choice but to accept monetary compensation, even though the property may have a personal value in excess of that measured by the marketplace.[58]

In taxation, the taxpayer retains the use, enjoyment and benefit of the taxed property, although he does relinquish control of other property (money) as a condition for use within a particular jurisdiction. In eminent domain, however, the property owner is forced to transfer title to specific property to the jurisdiction in which it is located. He is therefore deprived of the enjoyment of property which may be unique and which may have special value to him.[59] Finally, because the burden of taxation falls on nearly everyone, taxpayers constitute a voting majority which can directly influence their liability.[60] Condemnees, however, are neither a majority nor a readily identifiable entity.[61] Even when they do unite, their number is often too

57. *See* cases cited *supra* notes 38-40 and accompanying text.

58. *But see* Stoebuck, *supra* note 3, at 597. Stoebuck asks if, in fact, owners do "attach a unique, non-monetary satisfaction to the holding of specific property interests." He is not certain. If this proposition were true, a "disfavored citizen could be punished and tyrannized" by the power of eminent domain. Stoebuck concludes that "[a]ny potential for harm is more theoretical than real."

59. *But see id.* at 571-72. Stoebuck treats the money exacted by taxation in the same way as the property taken through eminent domain, believing that taxation and condemnation are merely different ways of exercising the same power. His view downplays the unique qualities that some property possesses.

A sports franchise is a good example of property that may be unique, since a franchise may contain athletes whose combined talents are so extraordinary that they produce a winning team. Although, in theory, each team has an equivalent monetary value, at the time of a condemnation, such a group of individuals may be irreplaceable.

60. Note, *supra* note 4, at 435.

61. *Id.* at 436.

insignificant to have much influence on the government;[62] they are usually too scattered by distance and time to affect the sovereign's choice of condemnable property.[63]

The above differences between taxpayers and condemnees show that condemnees are at a distinct disadvantage in their relationship with the sovereign. They suffer from uncertainty in knowing whether their property will be taken, they have no choice but to surrender to a condemnation, and they have little influence with the sovereign as a voting block. In the interest of fairness, any rule formulated with respect to the condemnation of intangibles should strive to achieve at least the same meager predictability which is already associated with the condemnation of tangible property.[64] In addition, since only one jurisdiction can prevail in a contest over the condemnation of a particular intangible, the victor should be required to assert not merely a sufficient nexus between itself and the property, but a superior one.

The rule of *mobilia sequuntur personam* seems suitable for use as a jurisdictional guideline in eminent domain. That rule permits predictability because it locates an intangible at the domicile of the owner. In addition, it theoretically relies on a superior nexus between the condemnor and the property. As noted earlier,[65] the rule would assume that, since the owner of an intangible exerts immediate control over it, the domicile of the owner is the closest maintainable connection between the property and the condemnor. The common law rule that an owner may have only one domicile would satisfy the exclusive nature of eminent domain.[66] Alternatively, where intangible property is inextricably associated with a business, the commercial domicile exception would apply. As in taxation, realty and tangible property would be severable from the owner and condemnable only where located.[67]

The rule locating intangibles at the domicile of the owner, while useful for taxation and adaptable to condemnation, is not the only way to determine a sovereign's jurisdictional power. The City of Baltimore would borrow, not from taxation, but from judicial jurisdiction and apply a mimimum-contacts test to eminent domain. An examination of this standard reveals its deficiencies when used for condemnation, and demonstrates that what is reasonable for one purpose may not be so for another.[68]

---

62. *Id.* at 436-37.

63. *Id.* at 436.

64. Owners of tangible property at least know which jurisdiction may assert its taking power.

65. *See supra* notes 51-52 and accompanying text.

66. Texas v. Florida, 306 U.S. 398, 428-29 (1939) (Frankfurter, J., dissenting). Justice Frankfurter went on to say that the common law rule often represents a fiction. *Id.* at 429. For the purposes of eminent domain, however, the common law rule should be a reality. A rule that permitted more than one domicile would violate the exclusivity requirement of eminent domain jurisdiction.

67. In a case dealing with trust property, such as *Curry,* a court would need to decide between the legal and the equitable owner for condemnation purposes. The formulation of such a rule is outside the scope of the present discussion.

68. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 149 (2d ed. 1970). Rules governing jurisdiction tend to be based on "whether a state's contacts with a person, thing, or occurrence are sufficient to make the state's action reasonable," *id.,* but different states may have differing standards of reasonableness for taxation, regulation or litigation purposes. *See id.*

IV. THE MINIMUM-CONTACTS TEST FOR JUDICIAL JURISDICTION: INSUFFICIENT CONTACTS FOR EMINENT DOMAIN

Baltimore advances two arguments for the assertion of eminent domain jurisdiction over the Colts. Both arguments are based on the contacts between the franchise and the State of Maryland.[69] First, the City asserts that the team was present within Maryland for many years, pursuing the business of the franchise;[70] second, the City points to the Colts' continued ownership of a multi-million dollar training facility which is located within the state.[71] Baltimore claims that, notwithstanding the relocation of the franchise and the purported establishment of a new principal place of business prior to the condemnation suit, the team's past and present contacts with the condemning jurisdiction provide a sufficient basis to enable the City to force the Colts to return.

The minimum-contacts test for judicial jurisdiction was established by the Supreme Court as a way to determine whether a state could compel nonresident parties to participate in court actions within its territory. The Court, in *International Shoe Co. v. Washington,*[72] held that for a party to be subject to a state's judicial jurisdiction, the party must have either actual presence within the forum territory, or "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[73] The Court, in *Shaffer v. Heitner,*[74] reemphasized the importance of minimum contacts: "[A] State . . . seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum State."[75] Referring specifically to corporate presence within a state, the Court recognized that since the corporate personality was a fiction, its "presence" could only be manifested by the activities carried out on its behalf.[76] A court would need to evaluate the "quality and nature"

---

69. This Note does not address the contention of the Colts that the City of Baltimore cannot effect a taking outside its municipal limits, which would preclude the condemnation of the training facility in Owings Mills, Maryland. Supplemental Memorandum in Opposition to Motion to Remand, at 20-21, Baltimore Football Club, Inc. v. Mayor of Baltimore, No. B84-1294 (D. Md. filed June 21, 1984). This discussion presumes that the City possesses the power to condemn the franchise through the act of the Maryland legislature.

70. Memorandum in Support of Motion to Remand at 1-2, Baltimore Football Club, Inc. v. Mayor of Baltimore, No. JH 84-1294 (D. Md. filed Apr. 4, 1984).

71. *Id.* at 2. The corporation might successfully maintain that it is a separate entity from the subsidiary that actually owns the facility. This discussion will presume, however, that the corporation itself owns the real property within Maryland.

72. 326 U.S. 310 (1945).

73. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

74. 433 U.S. 186 (1977).

75. *Id.* at 220 (Brennan, J., concurring in Parts I-III and summarizing the essence of the majority opinion).

76. *International Shoe,* 326 U.S. at 316.

of these activities to determine whether the assertion of a state's judicial jurisdiction would be contrary to the guarantees of due process.[77]

The justification for the minimum-contacts standard of judicial jurisdiction is similar to that for the jurisdiction to tax.[78] "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations," one being the duty to respond to a suit in a state where corporate contacts were made.[79] Despite the possibility that a minimum-contacts test might compel the Colts to respond to a suit in Maryland, the question remains as to whether such a standard for judicial jurisdiction is proper for jurisdiction in eminent domain.

If a minimum-contacts test were applied to the taking of the Colts, a court would inquire into the quality and nature of the contacts between the property and the condemnor. The court would ask whether prior activities in Baltimore and continued ownership of realty would supply a sufficient connection for eminent domain. State long-arm statutes typically enumerate specific types of contacts which subject an actor to judicial jurisdiction;[80] property ownership is a common example.[81] In addition, the courts have a long history of basing judicial jurisdiction on property within their territories.[82] Despite these factors, the Court in *Shaffer* held that ownership of property, although satisfying due process requirements, was not decisive in establishing judicial jurisdiction.[83] If the outcome for this type of jurisdiction is uncertain, the result in eminent domain must be doubtful as well.

One reason that the minimum-contacts standard for judicial jurisdiction is unsuitable for eminent domain is that judicial jurisdiction is a non-exclusive power. If individual or corporate activities span several states, those states may assert their judicial jurisdiction simultaneously without offending due process. Such is not the case in condemnation, as its power is exclusive. The non-exclusivity of judicial jurisdiction, however, does not fully explain why this standard is unsuitable. Jurisdiction for property and inheritance taxation, as noted earlier,[84] is also non-exclusive, yet its rationale is adaptable to eminent domain. The distinctive characteristic, and the difference between the powers, is one of timing.

A significant reason why the test for judicial jurisdiction will not work in eminent domain is that the times during which these two powers may be asserted are not the same. The standard of minimum-contacts is specifically

77. *Id.* at 319.

78. "The activities which establish [a corporation's] 'presence' subject it alike to taxation by the state and to a suit to recover the tax." *Id.* at 321.

79. *Id.* at 319.

80. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.14, 632 (2d ed. 1977).

81. *Id.*

82. *See Shaffer,* 433 U.S. at 211.

83. *Id.* at 212.

84. *See supra* text accompanying notes 54-56.

designed as a test for judicial jurisdiction when parties to an action are non-residents of a state. The test does not require that subjects of a state's jurisdiction be within the state's territory at the time a suit is filed. Since the focus of the minimum-contacts standard is on the quality, nature and extent of the contacts, alleged contacts may be in the past, the present or both. The only time-barrier to bringing suit is a statute of limitations.

Eminent domain jurisdiction, by implication, focuses on current contacts at the time of a condemnation suit. The mandate that property be within the jurisdiction of the condemnor carries with it the understanding that the property is located there at the time the taking occurs. This is also true of taxation, which is why the location of property is so important to ascertain. If the targeted property were in another jurisdiction at the time of a taking, the condemning state would be attempting to exercise its taking power in another state. States could not engage in such extraterritorial action, because, "any attempt to exercise governmental powers in another state is necessarily void."[85]

Using a minimum-contacts standard for eminent domain jurisdiction will serve only to cause confusion and conflict. For example, suppose that a corporation incorporated in one state maintains its principal place of business in another state and operates assembly and manufacturing plants in still other states. If a minimum-contacts standard controlled jurisdiction for eminent domain, each state containing a plant theoretically would be able to compel the entire corporation to locate within its borders, just as each state can force a corporation to appear for suits involving injuries at a plant within its territory. The manufacturing plant in each state would supply the minimum contact necessary for condemnation of the whole. The entire corporation could thus be subject to several condemnation actions, each state having a valid claim. A race to the courthouse might prove decisive, since the jurisdiction of the first to file would determine not merely the forum, but the outcome as well. A rule that fostered this result might encourage states to condemn unnecessarily and in haste as a strategic measure to prevent other states from doing the same.

The minimum-contacts standard could disrupt organized sports competition if the standard were applied to eminent domain. For example, if a sports franchise owned training facilities in several states, each state might claim the franchise, based on the ownership of the real property. This is

85. 1 NICHOLS, *supra* note 7, § 2.12. In addition to strictures on their taking and taxing powers, states have been restrained under the commerce clause from the extraterritorial exercise of their regulatory powers. In Sporhase v. Nebraska, 458 U.S. 941 (1982), the Supreme Court struck down a Nebraska statute which restricted the export of Nebraska groundwater, holding that groundwater was an article of commerce. In Edgar v. MITE Corp., 457 U.S. 624 (1982), the Court found that the Illinois Business Takeover Act imposed a burden on interstate commerce. The message from the Court is clear: extraterritorial exercise of governmental powers is not permitted. The law of eminent domain requires clear rules for locating property which will determine whether the condemnor is exercising its power within its jurisdiction.

the argument advanced by the City of Baltimore. Carrying the hypothetical a bit further, if a team merely appeared in another jurisdiction to play a game, those minimum contacts might give that state a claim to the whole franchise. Once the minimum-contacts standard is adopted for condemnation jurisdiction, very few contacts would be excluded from the reach of the condemnor.

A minimum-contacts test for eminent domain would result in multiple claims to the same property based on past or present ownership. The condemnee, distressed at the thought of one condemnor, would now face the prospect of defending against many. The claim of the City of Baltimore is defective in that it relies on contacts made by the franchise before the City filed suit. If such an argument could prevail in eminent domain, any property owner who moved from one state to another would continue to risk condemnation by the original jurisdiction because of the past location of his property within the former state. Such a result is inconsistent with cases holding that a new domicile is established the moment an individual arrives at another place with the intention of making it his home.[86] As soon as a new domicile is established, a time-line must be drawn as a barrier against condemnation by the previous sovereign. The standard for judicial jurisdiction does not provide for such a barrier and thus is not appropriate for eminent domain. Since the power to condemn rests on a "best contacts" theory, a minimum-contacts test cannot apply.[87]

V. ESCHEAT: JURISDICTIONAL MODEL FOR EMINENT DOMAIN

Of all the powers of a sovereign state, the power to escheat[88] may bear the closest resemblance to the power of eminent domain. Like the power to condemn, the power to escheat is exclusive. Since "the same property cannot constitutionally be escheated by more than one State," the contacts of the victorious state must be "superior to all others."[89] Escheat also resembles eminent domain because the property must be within the jurisdiction at the time the action is filed. In escheat location within the jurisdiction is presumed since a number of years must pass before the sovereign can act to acquire unclaimed property within its territory.[90] The problem encountered by the Supreme Court in dealing with the escheat of intangible property is

86. *See, e.g.*, Texas v. Florida, 306 U.S. 398 (1939); Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973); Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962).

87. *Cf.* Justice Brennan's concurring and dissenting opinion in *Shaffer v. Heitner*. Justice Brennan did not think it unfair for appellants to make themselves available for suit in Delaware, because, for judicial jurisdiction the Court was concerned with " 'minimum' contacts, not the 'best' contacts." 433 U.S. at 228.

88. Escheat is "a procedure . . . whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." Texas v. New Jersey, 379 U.S. 674, 675 (1965).

89. *Id.* at 678-79.

90. *See id.* at 675.

similar to the current uncertainty regarding intangibles in eminent domain. In resolving the escheat controversy, the Court sought a "clear rule" for "all types of intangible obligations . . . to which all States may refer with confidence."[91] Escheat offers guidance for intangibles in eminent domain.

In *Western Union Telegraph Co. v. Pennsylvania,*[92] the Supreme Court prepared the way for a definitive rule in escheat but refrained from developing one. *Western Union* held only that a state court lacked the jurisdiction to adjudicate escheat controversies when more than one state had potential claims against intangible property.[93] In its decision regarding the proper forum for such disputes, the Court emphasized the magnitude of the escheat problem, noting that state escheat laws had originally applied to real and tangible property but were being drafted with greater frequency to target "the elusive and wide-ranging field of intangible transactions."[94] Such applications presented problems of great importance to the states as well as to those persons whose rights would be adversely affected through escheat procedures.[95]

The Court's description in *Western Union* of the increasing problems with intangibles mirrors the current trend in eminent domain. Condemnation has been aimed primarily at real and tangible property. Owners received compensation for intangible property because it was usually a secondary asset destroyed in the primary taking.[96] As between states, real and tangible property are rarely problematical: "[n]o case of a state openly attempting to condemn land within another state against the will of the latter has arisen or is likely to arise . . . ."[97] When a state such as Maryland, however, viewing with disfavor the movement of a valuable business from its territory, enacts legislation aimed directly at intangible property, uncertainty in the law prevails. Since the capacity of intangibles to associate with several states at once is unlike the stationary qualitiy of real and tangible property, enabling legislation poses the same problem for condemnation as it did for escheat. In both cases, more than one state may possess valid claims to the same property.

In *Western Union,* the Court left for a future time "the difficult legal questions presented when many different States claim power to escheat intangibles . . . ."[98] Despite its avoidance of substantive escheat issues, the Court revealed, through its jurisdictional analysis, why the power to escheat

---

91. *Id.* at 678.
92. 368 U.S. 71 (1961).
93. *See id.* at 79.
94. *Id.*
95. *Id.*
96. *See* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848); *see also supra* note 31.
97. 1 NICHOLS, *supra* note 7, § 2.12. However, "the courts have had to construe statutes, authorizing in general terms the condemnation of interstate bridges, as giving no power to take that part of the bridge lying beyond the boundary of the state in which the statute was enacted." *Id.*
98. *Western Union,* 368 U.S. at 80.

was exclusive and why a definitive rule for intangibles was necessary. "[W]hen a state court's jurisdiction purports to be based . . . on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction . . . ."[99] If a second state, not a party to the first suit, escheated the same property, the owner would be subject to multiple liabilities since the second state is not bound by the first state's decision.[100] In the absence of a predictable rule, intangible property having connections with more than one state, carries with it the risk of conflicting judgments.

In *Texas v. New Jersey,*[101] four states asserted actual, competing claims to the same intangible property, forcing the Court to resolve the troublesome issues it had encountered in *Western Union.*[102] Each state based its jurisdiction to escheat on a particular type of contact with the targeted property. The Court began its analysis, as it had in the taxation cases, with the rule for tangibles. For this type of property, real or personal, "only the State in which the property is located may escheat."[103] The Court then proceeded to the issue of jurisdiction over intangibles, with the familiar observation that such property caused difficulties because it was "not physical matter which [could] be located on a map."[104] In considering the arguments of all four contenders, the Court observed that since the states were separately without constitutional power to settle the controversy, and no federal statute existed to provide a remedy, the Court would adopt a rule which would finally settle the issue.[105]

The Court readily disposed of the minimum-contacts argument as unsuitable, stating that "[t]he 'contacts' test as applied in this field is not really any workable test at all—it is simply a phrase suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property . . . ."[106] Such a test would not be appropriate for a jurisdictional power which requires exclusivity.[107] After weighing the remaining arguments, the Court chose one based on "a variation of the old

---

99. *Id.* at 75.
100. *Id.*
101. 379 U.S. 674 (1965).
102. The property in *Texas v. New Jersey* consisted of:
> various small debts totaling $26,461.65 which the Sun Oil Company for periods of approximately seven to 40 years prior to the bringing of this action has owed to approximately 1,730 small creditors who have never appeared to collect them. The amounts owed, most of them resulting from failure of creditors to claim or cash checks, are either evidenced on the books of Sun's two Texas offices or are owing to persons whose last known address was in Texas, or both.

Id. at 675.
103. *Id.* at 677.
104. *Id.*
105. *Id.*
106. *Id.* at 679.
107. *See id.* at 678-79.

concept of *mobilia sequuntur personam,*"[108] holding that the intangibles in question were "subject to escheat only by the State of the last known address of the creditor . . . ."[109] The Court agreed that for escheat, "[s]uch a solution would be in line with one group of cases dealing with intangible property for other purposes in other areas of the law."[110] The elimination of a minimum-contacts standard for escheat comports with the reasoning in the preceding section regarding the unsuitability of such a test for condemnation.[111] The Court's adoption of an escheat rule relying on the address of the creditor also supports the conclusion reached earlier in this Note that the same rule should apply to eminent domain.[112]

In conferring the power to escheat intangibles on the jurisdiction of the last known address of the creditor, the Court presumes, as it did in taxation, that the owner is capable of exerting immediate control over the property. In taxation, the domicile of the owner supplies the closest approximation of the location of intangible property. In escheat, not only is the situs of the property unknown, but the location of the owner (creditor) is undeterminable as well. The Court extended its reasoning one step further. For lack of a closer connection between the state, the owner and his property, the Court resorted to the last known address of the owner as the next best thing to the owner himself.

The Court acknowledged that the case for escheat could have been resolved otherwise, as neither constitutional nor statutory provisions were controlling.[113] Nor was the decision "entirely one of logic."[114] Ease of administration and fairness are the principal benefits of the rule.[115] The rule "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided."[116] The Court believed that in the long run the rule would be the one most generally acceptable to all the states.[117]

The decisions of the Supreme Court suggest that the rule of *mobilia sequuntur personam* is suitable for intangible property in tax and escheat law. This Note suggests that the same rule should apply to intangibles in eminent domain. The rule locating an intangible at the domicile of the owner is predictable, involves simple issues of fact, is in line with previous reasoning, and is considered to be equitable. It is not fraught with the confusion of a minimum-contacts test. It offers a solution, with few administrative difficulties, in an area which is devoid of precedent. In conjunction with the

---

108. *Id.* at 680-81 & n.10. This was how the Court characterized the solution advanced by the State of Florida.
109. *Id.* at 681-82.
110. *Id.* at 681 & n.12.
111. *See supra* text accompanying notes 84-87.
112. *See supra* text accompanying notes 65-66.
113. *Texas v. New Jersey,* 379 U.S. 683.
114. *Id.*
115. *Id.*
116. *Id.* at 681.
117. *Id.* at 683.

rule for realty and tangibles, which confers jurisdiction where such property is found, the proposed rule for intangibles will provide a measure of certainty in eminent domain.

In the case of an individual, only one designated domicile is permitted.[118] Once the property owner's domicile is established through a factual determination, the issue of condemnation jurisdiction can be promptly settled. In the case of many corporations, however, no similar domiciliary rule exists. Additional steps are thus required before the domicile of the owner can be identified.

VI. CORPORATE DOMICILE FOR EMINENT DOMAIN: PRINCIPAL PLACE OF BUSINESS

The ease of applying the proposed rule of *mobilia sequuntur personam* to individuals belies the greater difficulty in administering it to corporations. Two additional determinations are necessary to tailor the rule to these business enterprises. First, the issue of corporate ownership needs clarification. Second, the issue of domicile must be resolved. Unlike an individual, a corporation can be in several places at once. A proposed rule must designate the most appropriate place as the corporate domicile for eminent domain.

A corporation has a dual identity with regard to corporate ownership. In one sense, the corporation owns the corporate property; yet in another sense, the corporation *is* the corporate property. The general rule applicable to creditors of a corporation is that the corporation itself, as opposed to the shareholders, is the owner of all corporate property.[119] Because a condemnor is in a position similar to that of a corporate creditor,[120] the general rule should control. The corporation itself should be considered the "owner" of the intangible corporate entity. Once the corporation is deemed to be the owner, the only remaining question is where that owner is domiciled for the purposes of eminent domain.

The corporate penchant for associating with more than one jurisdiction causes trouble in designating a corporate domicile. One source has suggested that no useful purpose is served by attributing a single domicile to a corporation.[121] Normally, this suggestion is correct. The jurisdictional powers most often exercised over corporations are not exclusive and are unimpaired by multiple corporate contacts.[122] Eminent domain demands otherwise. The exclusive nature of its jurisdiction requires that a corporation, like an individual, have only one domicile.[123]

---

118. *See supra* note 66 and accompanying text.

119. H. HENN, *supra* note 68, at 254.

120. "Corporate creditors may enforce their claims against corporate property." *Id.* at 254. This is similar to what a condemnor attempts to do through eminent domain.

121. RESTATEMENT (SECOND) CONFLICT OF LAWS § 11 comment *l* (1971).

122. *E.g.*, taxation, judicial jurisdiction and regulation.

123. Allowing the establishment of more than one corporate domicile would be tantamount to permitting more than one state to condemn the same intangible property. The exclusive jurisdiction of eminent domain precludes both situations.

One choice for the designated corporate domicile is the jurisdiction of incorporation. This alternative does not always result in the assignment of a single domicile, since a business may incorporate in more than one state. It is an impractical choice because, as between two states of incorporation, no good criteria can be advanced for favoring one state as a domicile over the other. In taxation and in escheat, the Supreme Court has suggested the state of incorporation is too minor a factor.[124] The jurisdiction of incorporation does not manifest as strong a nexus with the corporation as some other location might provide.

Another, more suitable choice, is the corporation's principal place of business. Difficulties do exist in applying this alternative; but, as none of the choices for corporate domicile can guarantee a single location, the principal place of business is the best choice under the circumstances. The Supreme Court has said that the state where a corporation's principal place of business is located "is probably foremost in giving the benefits of its economy and laws to the company . . . ."[125] For this reason, a corporation's principal place of business may be the most equitable designation for corporate domicile. Since a principal place of business connotes a site which is the center of corporate activity, that location would seem to be the closest approximation of a corporation's true essence. The problem with such a designation is that deciding where a company's principal place of business is located may require additional inquiry,[126] which the Court believed might be burdensome.[127] If a court must inquire further, as it might in the current case, a test to decide the domicile may be helpful.

The same factors used in determining an individual's domicile can, with slight modification, be used to ascertain the corporate domicile for eminent domain. In *Texas v. Florida,*[128] the Supreme Court listed criteria for determining whether a dwelling place was a person's domicile:

1. Its physical characteristics;
2. The time he spends therein;
3. The things he does therin;
4. The persons and things therein;
5. His mental attitude towards the place;

---

124. "[I]t would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Texas v. New Jersey,* 379 U.S. at 680. "To attribute to . . . the chartering State, the credits arising in the course of the business established in another State, and to deny the latter the power to tax such credits . . . is to make a legal fiction dominate realities . . . ." Wheeling Steel Corp. v. Fox, 298 U.S. 193, 211 (1936).

125. *Texas v. New Jersey,* 379 U.S. at 680.

126. *Id.* In escheat, the Court rejected the alternative of principal place of business due to the fact that the corporation was the debtor, not the creditor.

127. *Id.*

128. Texas v. Florida, 306 U.S. 398 (1939). Texas sued Florida, New York and Massachusetts to determine the domicile of the decedent as a basis for levying an inheritance tax.

6. His intention when absent to return to the place;
7. Elements of other dwelling-places of the person concerned.[129]

A determination as to whether a location serves as the principal place of business, and thus, as the domicile, can be reached by adapting the above factors to corporations. The case of the Colts illustrates the use of these criteria. The corporation claims that at the time of the condemnation suit, it had established offices within Indiana and had moved all of the equipment necessary for the transaction of franchise business to the new location.[130] The time spent at the new situs was brief; yet the telephones, office equipment, clerical and administrative help, and front-office personnel were in place in Indianapolis before the condemnation suit was filed in Maryland.[131] The Colts also maintain that the legal and financial business, as well as the football business of the franchise, was being transacted from Indianapolis.[132] These facts tend to show that, as regarding the "physical characteristics," "the things [done] therein," and the "persons and things therein," the Colts had made Indianapolis their new home.

The corporation's "mental attitude" toward Indianapolis, as evidenced by the speed and purposefulness of the move, clearly shows the intent to relocate there. Intent is also supported by the claim that on March 29, 1984, the corporation attempted to withdraw its qualification to do business in Maryland, but was met by a refusal from the Maryland Department of Assessments to file the withdrawal.[133] The "intention when absent to return," would seem to refer to temporary absences. Regarding the length of time spent at a domicile, the Court has held that, "[t]he fact that a stay in a state is not for long is not necessarily fatal to the existence of a domicil[e]."[134] "The essential fact that raises a change of abode to a change of domicil[e] is the absence of any intention to live elsewhere."[135] Relocation at some future date would not be precluded as long as an intention existed to remain in the state at the present time. If the current sellout for home games is any evidence of intent to remain in Indiana, the Colts seem to possess the present intent to stay within the state.

The last criterion, that of "elements of other dwelling places," is not as difficult to determine for the Colts as it might be for another corporation, because at the time of the move the team had ceased using the real property in Maryland as a training facility.[136] Since then, the Colts' ownership of the realty has been passive and does not involve the type of daily executive

129. *Id.* at 413-14.
130. Supplemental Memorandum, *supra* note 20, at 8-9.
131. Declaration of Michael Chernoff at 4, Baltimore Football Club, Inc. v. Mayor of Baltimore, No. B84-1294 (D. Md. filed June 21, 1984).
132. Supplemental Memorandum, *supra* note 20, at 10.
133. *Id.* at 10 & n.5.
134. Williams v. North Carolina, 317 U.S. 287, 298 n.9 (1942).
135. Williamson v. Osenton, 232 U.S. 619, 624 (1914).
136. Supplemental Memorandum, *supra* note 20, at 9.

activity that is being performed in Indianapolis.[137] In comparing two sites for a choice of domicile, an active location should prevail over a passive one. Because of the active nature of the business organization at the Colts' new site, the designation of the corporation's domicile should be the Indiana location.

As noted earlier, a new domicile is established as soon as the intent to dwell at the new place coincides with the physical presence.[138] The party asserting the relocation "carries the burden of showing that the earlier domicile was abandoned in favor of a later one."[139] Since corporate presence within a state is evidenced by the activities of those that act on its behalf, those in charge of the Colts would seem to have met their burden of proof. The domicile test for individuals, as applied to this corporation, indicates that the Colts established their principal place of business in Indianapolis before the action of condemnation.

The foregoing analysis works against the City of Baltimore. Through the rule of *mobilia sequuntur personam,* intangible property is located at the domicile of the owner. For the purposes of eminent domain, the corporation is the owner of the intangible corporate entity. By a test to determine domicile, the corporation-owner is deemed outside the City's jurisdiction at the time the suit was filed. The City is thus powerless to compel the Colts' return. It may, through the rule for realty and tangible property, condemn the sports facility still within its jurisdiction. The realty alone, however, cannot serve as the basis for the condemnation of the intangible whole.

CONCLUSION

At the present time, the treatment of intangibles in the law of eminent domain is uncertain. Since this type of property has no physical situs, the issue of whether it is within a specific sovereign's jurisdiction is difficult to resolve. As more states exercise their powers of condemnation to prevent valuable business enterprises from leaving their jurisdictions, clear guidelines are needed upon which all parties can depend.

The application of a minimum-contacts test to intangibles in eminent domain is not a practical solution to the problem. Such a standard merely adds to the current confusion without supplying any corresponding benefits. The use of escheat as a model, however, coupled with principles of taxation, affords substantial guidance for a rule in eminent domain.

The rule of *mobilia sequuntur personam,* which locates intangible property at the domicile of the owner, should be applied to intangibles in eminent domain. The rule recognizes that the owner may exert immediate control over this property by taking it with him when he leaves the jurisdiction.

---

137. *See id.*
138. *See supra* text accompanying note 86.
139. Texas v. Florida, 306 U.S. 398, 427 (1939).

Together with the rule for realty and tangibles, which subjects those types of property to the jurisdiction of the situs, the rule of *mobilia sequuntur personam* for intangible property provides a workable standard for eminent domain.

ELLEN Z. MUFSON