Eminent Domain, Municipalization, and the Dormant Commerce Clause

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INTRODUCTION

What do Southern California Edison and the Oakland Raiders have in common? Is it that they were both in Los Angeles, but the wrong one left? Perhaps, but they also have both been the unsuccessful targets of government attempts to take over private enterprise in order to serve the public good through municipalization.[1] Recent problems with public utility deregulation have led some communities to consider municipalizing power or water utilities to provide supply stability and lower rates to their citizens.[2]

Municipalization is the process by which a local government unit becomes the owner and operator of a public service previously provided by a private entity.[3] For example, in the wake of California's problems with electrical power supplies in 2001, several cities in California's Inland Empire moved to set up municipal electric utilities to provide power to new development and businesses.[4] This municipalization effort has sometimes involved the government's use of its eminent domain power to acquire ongoing enterprises by paying just compensation for privately owned utility companies. For example, the City of Corona initially asserted eminent domain over Southern California Edison Company in an attempt to acquire portions of this privately owned power company, but eventually settled with the utility company after legal challenges and potential legislative obstacles arose.[5]

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[1] *See* City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (involving City of Oakland's attempted use of eminent domain power to prevent Oakland Raiders football team from moving to Los Angeles).

[2] *See generally* Shelley Ross Saxer, *Government Power Unleashed: Using Eminent Domain to Acquire a Public Utility or Other Ongoing Enterprise*, 38 IND. L. REV. 55 (2005).

[3] *See* Alan I. Robbins & Stacy D. Gould, *Traditional Municipalization and Duplication of Facilities Cases: Background, Facts, and Status*, 37 NAT. RESOURCES J. 155, 155 (1997) (discussing municipalization of electric distribution systems).

[4] Seema Mehta, *California: Power as a Lure for Business*, L.A. TIMES, Sept. 15, 2003, at B1.

[5] *See id.*

Regardless of whether the citizens in our states choose to municipalize or to deregulate public goods or services, legislators and courts should understand how doctrines such as the dormant Commerce Clause, federal preemption, and other federal constraints will operate to limit these state actions.[6] As an illustration, while the dormant Commerce Clause may appropriately constrain state political processes from working "to thwart operation of competitive markets in electric power,"[7] it should not function to prevent municipalities from efficiently providing vital public goods to its citizens. Instead, federal doctrines should be used to limit or temper local efforts to control national interests or subvert individual rights while allowing sufficient state power to regulate and experiment with solutions to local problems, such as providing a stable supply of electrical power at reasonable rates.[8]

There are two distinct concerns with a local government's decision to municipalize. First, when the government decides to municipalize an industry, citizens should rightfully be concerned about how this government "takeover" will impact the free market and private property rights. Second, when the government uses its eminent domain power to accomplish this municipalization, citizens should be wary of the involuntary nature of the transaction between the government and the private property or business owner. When municipalities use the coercive power of eminent domain to nationalize a private industry, it should cause our capitalistic society to shudder, at least slightly. This Article distinguishes between the ends to be achieved (i.e., municipalization) and the means by which such ends are achieved (i.e., eminent domain), and offers an analytical framework to approach these actions.

Part I of this Article discusses efforts to municipalize privately held public utility companies and other ongoing enterprises through the use of eminent domain. While state legislative and constitutional constraints

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[6] *See* Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1785 (2002) (noting that "[i]n fashioning limits on state regulatory power, courts must balance the advantages of state power, including its promotion of experimentation and the lower cost political participation it offers home-turf stakeholders, with its costs . . . .").

[7] *See id.* at 1786.

[8] *See* Mark P. Gerger, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1142-43 (1988) (observing that "United States scholars, reared in our pervasively private market, too easily discount the possibility that publicly owned enterprises may displace private ones and that allowing a state to favor its citizens in its commercial operations could balkanize the national market").

on this power have been addressed in another article,[9] Part II of this Article explores the federal constraints on using the eminent domain power to acquire an ongoing business based on the Fifth Amendment and the dormant Commerce Clause. Other federal constraints such as the Commerce Clause, the Tenth Amendment, the Supremacy Clause, the Contract Clause, and antitrust laws are also briefly discussed.[10] Part III concludes that existing federal restraints on government power are not sufficiently protective of private property rights and suggests that we consider strengthening these limits through congressional action[11] and by closely scrutinizing government motivation when the eminent domain power is used.[12]

I. THE MUNICIPALIZATION OF ONGOING ENTERPRISES

A. Public Utility Companies

Municipalization has occurred with electric distribution systems as municipalities have pursued lower electric rates and improved service reliability.[13] There are three separate components of the electric utility industry: generation, transmission, and distribution.[14] The generation component produces the bulk power through various methods, including hydropower and steam generators fueled by nuclear, petroleum, or fossil fuel energy.[15] The transmission component delivers this bulk power in large quantities, at high voltages. The distribution component is composed of the poles, wires, and transformers that

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[9] *See generally* Saxer, *supra* note 2.

[10] *See* Rossi, *supra* note 6, at 1785 (observing that "[i]f markets in electric power are to flourish, courts will be asked to clarify the role of additional doctrines, such as federal preemption doctrine, the dormant commerce clause, and state action doctrine in limiting state regulators").

[11] *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 418 (1989) (noting that even with existence "of the market-participant rule, the commerce clause should prove equal to the challenge of countering extreme isolationism in individual states" and if courts are not willing to stop state from collectivizing its economy, "Congress unquestionably would be alerted to, and equipped to respond to, the task").

[12] *See generally* Nicole S. Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003).

[13] *See* Robbins & Gould, *supra* note 3, at 155.

[14] *See* Town of Massena v. Niagara Mohawk Power Corp., No. 79-CV-163, 1980 WL 1889, at *8 (N.D.N.Y. 1980).

[15] *See id.* at *8.

deliver the electric energy directly to the consumers at lower voltages.[16] These three components comprise an integrated system, but are sufficiently independent to allow competition among multiple providers of each of these essential services.[17] One company could own all three components, or, perhaps, just one component.

Because utilities are considered to be natural monopolies,[18] they have historically been subject to heavy regulation at both the state and federal levels.[19] However, technological advances in the 1970s and 1980s have allowed smaller power plants to operate efficiently. These alternative power generators have challenged the generation costs of the traditional utilities by offering lower prices.[20] Obtaining access to these lower cost, alternative generators required using the transmission component still owned and operated by the traditional utilities. To encourage competition, the Energy Policy Act, enacted in 1992, which amended the Federal Power Act of 1935, allows the Federal Energy Regulatory Commission ("FERC") to require utilities to "wheel" power, that is, to "transmit power for wholesale sellers of power over the utilities' transmission lines."[21] FERC exercised this authority in 1996, when it issued Orders 888 and 889, which mandated that utilities provide nondiscriminatory open access to transmission components.[22]

The open access requirement critically impacted traditional utility companies in terms of the "sunk" or "stranded" costs that utilities had incurred under the prior regulatory scheme, a scheme undergoing dramatic change. Stranded costs are primarily those costs incurred by traditional utilities to build generation capacity to serve existing customers. These costs fail to yield an appropriate return when this expanded capacity becomes underutilized as customers are lured away by new competitors.[23] Therefore, FERC Order 888 provided that utilities be able "to recover stranded costs from their wholesale requirements

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[16] *See id.* at *8-9.

[17] *See id.* at *9-10.

[18] *See* HENRY C. ADAMS & JOSEPH DORFMAN, TWO ESSAYS: RELATION OF THE STATE TO INDUSTRIAL ACTION AND ECONOMICS AND JURISPRUDENCE 57-133 (1954).

[19] *See* Transmission Access Policy Study Group v. Fed. Energy Regulatory Comm'n, 225 F.3d 667, 681 (D.C. Cir. 2000).

[20] *Id.*

[21] *Id.* at 682.

[22] *Id.* (citing *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 60 Fed.Reg. 17,662 (1995)).

[23] *See* City of Toledo v. Toledo Edison Co., 770 N.E.2d 132, 137 (Ohio C.P. Sept. 19, 2000).

customers, but only from those customers who use their utility's transmission service to purchase power from new suppliers, and only if the utility can prove that it had a reasonable expectation of continued service to that customer."[24] In other words, the new power producers had to pay for siphoning customers away from the traditional private utilities.

FERC provided for the recovery of these stranded costs to offer a smoother transition from "a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced."[25] However, this transition has been anything but smooth. Following a major electrical blackout in August 2003, which affected fifty million people in eight states and two Canadian provinces, FERC is struggling to establish more supervision over the market design and management of the interstate transmission networks to avoid future problems.[26]

Wrangling between pro- and anti-competition forces, jurisdictional disputes between federal and state policy makers, and plenty of ignorance have led our electric-power system to become stuck somewhere between the old system of regulated monopoly and a new system that relies more on competitive power markets . . . This is a very bad place to get stuck.[27]

A municipality's decision to municipalize will usually be preceded by a feasibility study to determine: whether the city has the authority to proceed under state and local law; whether the city should build, purchase, or acquire the distribution system through eminent domain; how to arrange for power supply and transmission service; and whether stranded costs must be paid to the investor-owned utility.[28] Historically, municipal ownership of electric systems peaked in 1923 and then declined, until recently. But, "[s]ome commentators believe that municipalization efforts will boom again in the immediate future" due to FERC's mandate for open access and recent difficulties with increased electric costs and unstable supplies.[29]

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[24] *See Transmission Access Policy Study Group*, 225 F.3d at 683.

[25] *City of Toledo*, 770 N.E.2d at 138 (quoting Order 888, ¶ 31,036, at 31,635).

[26] David Wessel, *Visible Hands, A Lesson from the Blackout: Free Markets Often Need Rules*, WALL ST. J., Aug. 28, 2003, at A1.

[27] *Id.* (quoting Paul Joskow, Massachusetts Institute of Technology energy economist).

[28] Robbins & Gould, *supra* note 3, at 158.

[29] *Id.* at 158 (citing DAVID SCHAPP, MUNICIPAL OWNERSHIP IN THE ELECTRIC UTILITY INDUSTRY 9, 26 (1986)).

Cities deciding to proceed with municipalization may find that litigation costs and political resistance from the investor-owned utilities overwhelm their efforts, resulting in settlement and abandonment of the process. For example, the City of Corona abandoned its efforts to acquire Southern California Edison's power lines after Edison refused to sell. The condemnation proceedings resulted in costly litigation, and proposed state energy legislation threatened to create new obstacles to starting municipal electric companies.[30] In Oregon, Portland General Electric and PacifiCorp invested almost two million dollars in a political campaign (with an additional one million for in-kind services, including legal advice) to successfully defeat two measures on the November 2003 ballot in Multnomah County, Oregon. These measures would have created a public utility with condemnation authority against the investor-owned utilities.[31] The City of Portland attempted to buy Portland General Electric from Enron in 2003 and public utility supporters sought similar initiatives in several other Oregon counties to establish municipal public utilities with the power to condemn Portland General Electric's assets.[32] However, in mid-2004, Enron agreed to sell this asset to a newly formed private company, Oregon Electric Utility Company, which was backed financially by the investment firm Texas Pacific Group.[33] Thus, any eminent domain attempts by local municipalities were precluded, at least for the time being.

Water utilities have also been subject to municipalization as cities attempt to purchase these ongoing enterprises or seize them using eminent domain if the offer to purchase is refused.[34] In *City of Sunland Park v. Santa Teresa Services Co.*,[35] a New Mexico city exercised its power of eminent domain over an investor-owned water and sewer company pursuant to state legislation granting municipalities this power.[36]

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[30] Mehta, *supra* note 4, at B1 (noting that "[a]cross Southern California Edison's territory, Corona, Chino, Chino Hills, Fontana, Indian Wells, Irvine, Moreno Valley, Ontario, Palm Desert, Rancho Cucamonga, Rancho Mirage, San Marcos, Temecula, Upland and Victorville have all considered starting up their own municipal utilities").

[31] Jonathan Brinckman, *PUD Opponents Use Almost $3 Million*, PORTLAND OREGONIAN, Dec. 5, 2003, at E01 (noting that utility companies outspent grass-roots groups supporting ballot measures by 75-to-1 during campaign).

[32] *See* Sarah Hunsberger, *Public Utility Petitions Turned In*, PORTLAND OREGONIAN, Dec. 2, 2003, at C02; Scott Learn & Jonathan Brinckman, *Voters Trounce Utility Takeover Tax*, PORTLAND OREGONIAN, Nov. 5, 2003, at A01.

[33] *See In-depth Records Enron*, HOOVER'S CO. PROFILES (July, 8, 2004).

[34] *See* Bloomberg News, *Nashua May Buy Utility*, BOSTON GLOBE, Nov. 22, 2003, at D1 (discussing sale of Pennichick Corp. in Nashua, New Hampshire).

[35] 75 P.3d 843 (N.M. Ct. App. 2003).

[36] *Id.* at 853.

Similarly, the city of Lexington, Kentucky, and the Kentucky American Water Company have been embroiled in litigation over the city's attempt to condemn the utility in order to municipalize the public water service.[37] One citizen-opponent to the condemnation expressed his concern ". . . that my local government which I'm supposed to own is condemning a local business and taking it over."[38] He complained that the city's action "is 'a form of socialism, almost communism.'"[39]

B. *Municipalizing Companies Other than Public Utilities*

Most municipalization activity has involved the creation or acquisition of investor-owned public utilities. However, there are some cases involving sports teams where a city has attempted to use its eminent domain power to purchase a team in order to keep it from moving to another city. Such efforts have proven controversial. While courts have recognized a municipality's right to assert eminent domain over national sports teams, these efforts have been thwarted by challenges based on federal law, such as the dormant Commerce Clause, or as being untimely asserted.

In *City of Oakland v. Oakland Raiders*,[40] the California Supreme Court held that California's eminent domain legislation allowed the condemnation of an ongoing enterprise for the public good.[41] The Court noted that although "some statutes do explicitly prohibit the acquisition of an ongoing enterprise, there is no provision in present law which would preclude the taking contemplated by [sic] City."[42] Nevertheless, on remand, a California appellate court prohibited the City from condemning the football franchise, holding that such a condemnation violated the dormant Commerce Clause.[43]

In addition to the City of Oakland's unsuccessful attempt to use eminent domain to keep the Raiders in Oakland, other cities have similarly tried to use eminent domain to keep sports franchises from

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[37] Andy Mead, *Suit Tries to Stop Loan in Takeover Bid*, LEXINGTON HERALD LEADER, Oct. 31, 2003, at B1.

[38] *Id.*

[39] *Id.*

[40] 32 Cal. 3d 60 (Cal. 1982).

[41] *Id.* at 72.

[42] *Id.* at 73.

[43] *See* City of Oakland v. Oakland Raiders, 220 Cal. Rptr. 153, 158 (Cal. Ct. App. 1985) (determining on remand that city's eminent domain action violated dormant Commerce Clause).

relocating.[44] In *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*,[45] the court recognized the Baltimore Colts NFL franchise as an "intangible property [that] is properly the subject of condemnation proceedings."[46] Although the city had the right to use its condemnation power against the franchise, the court decided the case against the city based on a jurisdictional timing issue.[47]

A state legislature may authorize the acquisition of an ongoing business enterprise, including an investor-owned public utility, by delegating the eminent domain power to a municipality or other organization. The state may grant this power in order to provide public housing[48] or to prevent local sports teams or industrial plants from closing or relocating.[49] Nevertheless, private industry and citizens alike continue to struggle with the concept of using government power to force the involuntary sale of private property, particularly when it involves the condemnation of an ongoing private business. Part II will discuss federal constitutional constraints on eminent domain to determine whether these limitations sufficiently address the concern that

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[44] *See, e.g.*, Mayor and City Council of Balt. v. Balt. Football Club, Inc., 624 F. Supp. 278 (D. Md. 1986); *see also* Charles Gray, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329 (1986); Katherine C. Leone, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473 (1997).

[45] *Balt. Football Club*, 624 F. Supp. at 282.

[46] *Id.*

[47] *Id.* at 287 (resolving dispute in favor of football franchise as to timing of condemnation action and location of intangible property outside Maryland's jurisdiction at time power was exercised by city).

[48] 2A JULIUS SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.06[25], at 7-168, (3d ed. 2004) [hereinafter NICHOLS] (explaining that eminent domain may be used if legislature has determined that "[providing housing] was necessary to protect the health, safety, welfare, and comfort of the people" and that in some cases "courts have even upheld the power of the United States to take the title of existing mortgages to provide for emergency housing, so long as there is statutory authorization and just compensation is paid").

[49] *See id.* (As part of providing this emergency housing, "[c]ourts have even upheld the power of the United States to take title of existing mortgages . . . so long as there is statutory authorization and just compensation is paid."); 8A PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 22.02 (1992) (discussing "Expansion of the 'Public Use' Doctrine in Eminent Domain to Prevent Plant Closings or Relocations"); Michael H. Abbey, *State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause as a Bulwark of National Free Trade*, 75 VA. L. REV. 845 (1989); Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocation*, 96 YALE L.J. 1343 (1987); Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 138-39 (1995) (noting that if company refuses to repay subsidies granted by city as incentive to prevent relocation, "it could be subject to takeover proceedings using the theory of eminent domain"); David Schultz & David Jann, *The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings*, 16 WM. MITCHELL L. REV. 383, 387-410 (1990).

such government action "is 'a form of socialism, almost communism.'"[50]

II. FEDERAL CONSTITUTIONAL CONSTRAINTS ON EMINENT DOMAIN AND MUNICIPALIZATION

A. The Fifth Amendment Constraint on Eminent Domain

The Fifth Amendment to the United States Constitution limits the use of eminent domain seizures by providing, in part, "nor shall private property be taken for public use without just compensation."[51] Accordingly, one of the major constraints on the eminent domain power is that property condemnations must further a public use or purpose.[52] The government, in its judicial or legislative capacity, determines what constitutes a public use and has interpreted this requirement quite broadly[53] to be "coterminous with the scope of a sovereign's police powers."[54]

The state or federal legislature may initially determine what constitutes a public use, but the courts have the final authority to decide whether this legislative determination is correct. Courts exercise their authority with great deference to the legislature, resulting in extensive legislative power to condemn private property for a variety of purposes.[55] The United States Supreme Court has broadly interpreted

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[50] *See* Mead, *supra* note 37, at B1.

[51] U.S. CONST. amend. V.

[52] Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1255 (2002) (quoting Senator Tracy's concurring opinion in *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 56-62 (N.Y. 1837), that "the use of the phrase 'public use' in the Fifth Amendment was 'designed to be as well a limitation as a definition of the right of the [federal government] as sovereign . . . to interfere with the otherwise absolute right of the citizen to the undisturbed possession and enjoyment of his own property'"). *But see id.* at 1300 (concluding that "the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not").

[53] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); Berman v. Parker, 348 U.S. 26 (1954).

[54] 2A NICHOLS, *supra* note 48, §§ 7.01[2], at 7-16 (quoting *Haw. Hous. Auth.*, 467 U.S. at 240).

[55] *Id.* § 7.05[2][b], at 7-89 to 7-90; *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 52 (1998) (expressing concern that special interest groups will not be constrained by constitutional doctrine because "[t]he judiciary has failed to take a guardianship role in relation to the Public Use Clause [and] [a] public use is now whatever the legislature says is public"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 63 (1986) (observing that "cases suggest that modern courts are exceedingly deferential to legislative definitions of a permissible public use"); Ellen Z. Mufson, *Jurisdictional Limitations on*

what constitutes a public use in *Berman v. Parker*[56] and *Hawaii Housing Authority v. Midkiff*[57] to include any action that is "rationally related to a conceivable purpose."[58] Many state court decisions have followed this broad interpretation and have allowed the use of eminent domain "to support many types of urban renewal activities, including acquisition of private businesses and financial assets, as valid public uses."[59] Because the courts will not typically interfere with the government's determination of public use, "the Fifth Amendment's public use clause provides little or no protection to property owners."[60] This broad interpretation of public use encourages abuse by the government and may benefit the politically powerful at the expense of the politically underprivileged.[61]

In 2004, two state supreme court cases refocused attention on this broad interpretation of public use and the potential for government abuse. In *County of Wayne v. Hathcock*,[62] the Michigan Supreme Court overruled its landmark *Poletown* decision,[63] holding in *Hathcock* that the public use concept cannot constitutionally encompass using eminent domain to revitalize a community's economy.[64] In contrast, the Connecticut Supreme Court, in *Kelo v. City of New London*,[65] upheld an eminent domain action which took private residences to promote the city's economic development.[66] The *Kelo* case is currently awaiting a decision from the United States Supreme Court, which granted certiorari to determine the protection provided by the Fifth Amendment's public use requirement "for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic

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Intangible Property in Eminent Domain: Focus on the Indianapolis Colts, 60 IND. L.J. 389, 389 (1985) (noting that "[t]he Supreme Court has effectively eliminated public use as a check against condemnation by directing the judiciary to defer to the legislature on this issue").

[56] 348 U.S. 26 (1954).

[57] 467 U.S. 229 (1984).

[58] *Id.* at 241.

[59] 8A NICHOLS, *supra* note 48, § 22.02[3], at 22-25 to 22-26.

[60] Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U.L. REV. 569, 595 (2003).

[61] *See id.* at 570.

[62] 684 N.W. 2d 765 (Mich. 2004).

[63] Poletown Neighborhood Council v. Detroit, 304 N.W. 2d 455 (Mich. 1981).

[64] *Hathcock*, 684 N.W.2d at 787.

[65] *See* Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004).

[66] *See id.* at 528 (concluding "that an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions").

development' that will perhaps increase tax revenues and improve the local economy."[67]

In *County of Wayne v. Hathcock*, the Michigan Supreme Court determined that Wayne County could not use its eminent domain power to facilitate the private development of a business and technology park in order to revitalize the community's economy.[68] The court concluded that Wayne County's intention to convey condemned property to private parties was not considered a "public use" at the time the Michigan constitution was ratified and was, therefore, an impermissible exercise of government power.[69] The court expressed concern about allowing such a broad interpretation of public use, stating that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."[70]

In *Kelo v. City of New London*,[71] the city of New London formed a development corporation to assist in planning economic development, and the state authorized bonds to support development projects.[72] The development corporation proposed a ninety-acre project for a section of the New London waterfront near the Thames river and stated that:

> its goals were to create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.[73]

As part of this project, the development corporation used eminent domain to condemn residential parcels owned by individuals who, for a variety of personal reasons, had refused to sell their property.[74] These landowners sued the city of New London and the New London development corporation to enjoin their assertion of eminent domain.[75] After losing at trial and in the Connecticut Supreme Court, the

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[67] *See* 2004 WL 1659558 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari and Appendix Volume I, Pages 1 to 190 (Jul. 19, 2004).

[68] *Hathcock*, 684 N.W.2d at 770.

[69] *Id.*

[70] *Id.* at 786.

[71] 843 A.2d 500 (Conn. 2004).

[72] *Id.* at 508-09.

[73] *Id.*

[74] *Id.* at 511.

[75] *Id.* at 507-08.

landowners are, at the time of this writing, awaiting a decision from the United States Supreme Court.[76]

Condemning private property for urban development, which benefits private interests, requires a broad interpretation of public use.[77] Even if a narrow interpretation of public use limits the government's power to transfer condemned property to private developers, local governments may be able to avoid this restriction by simply retaining ownership of the condemned property, rather than turning it over to private developers.[78] However, the public use requirement does not prevent the government from condemning private property in order to municipalize what are traditional government functions, such as providing water, electricity, or waste management.[79] Condemning private property for municipalization of such public services satisfies even a narrow interpretation of public use because the government owns and operates the property for a traditional public purpose. Therefore, if the municipality can show a traditional governmental function, it can use eminent domain to acquire investor-owned utilities or other businesses.

While narrowing the public use definition would not limit the government's use of the eminent domain power to municipalize privately owned utilities or businesses, at some point such municipalization will not serve a public purpose if it results in a government-run monopoly that forecloses competition and leads to inefficiency. Arguably, then, a municipalization action which converts a private competitive enterprise into an inefficient government monopoly might be assailable as a violation of the Fifth Amendment because it does not achieve a valid public purpose. In addition, federal constraints such as antitrust legislation or the dormant Commerce Clause may also operate to preclude certain municipalization actions, even if undertaken without using condemnation as the means to achieve this goal.

Citizens should be concerned about the potential for governmental abuse of the eminent domain power when it is used to achieve

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[76] *Id.* at 520, *cert. granted*, 125 S.Ct. 27 (2004) (concluding that "economic development projects created and implemented pursuant to chapter 132 that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions").

[77] *Id.*

[78] *See* Sam Staley, *Wrecking Property Rights*, COPYRIGHT REASON MAG., Feb. 1, 2003.

[79] *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) ("Public utility facilities such as power plants [and] water treatment facilities also have the traditional public use character, as does the construction of government buildings.").

municipalization. In *Berman v. Parker*,[80] the United States Supreme Court made it clear that "the power of eminent domain is merely the means to the end."[81] Thus, it judged the constitutionality of the District of Columbia's project to condemn blighted territory based on the asserted legislative goal, to make the community "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled," rather than the means being used to achieve that end.[82] *Berman* emphasized that it is the legislature, not the judiciary, that decides "the public needs to be served by social legislation . . . [and that] [t]his principle admits of no exception merely because the power of eminent domain is involved."[83] The Court explained that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."[84] Because the goal was valid, so were the means by which it was achieved.

The United States Supreme Court, in *Hawaii Housing Authority v. Midkiff*,[85] was also confronted with a challenge to a state legislative program using eminent domain to redistribute residential property ownership.[86] Citing *Berman v. Parker*, the *Midkiff* Court emphasized that while courts could review the legislature's determination of what constitutes a public use, "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[87] The Court equated the eminent domain power with the police power and concluded that the Hawaii Act was constitutional because "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[88]

Some commentators have advocated a more searching inquiry into the government's use of eminent domain.[89] Indeed, several of the amicus briefs submitted in support of the petitioners in the *Kelo* case advocate heightened scrutiny, particularly when private property is condemned

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[80] 348 U.S. 26 (1954).

[81] *Id.* at 33.

[82] *Id.*

[83] *Id.* at 32.

[84] *Id.* at 33.

[85] 467 U.S. 229 (1984).

[86] *Id.* at 233-34.

[87] *Id.* at 240.

[88] *Id.* at 241.

[89] *See, e.g.*, Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 227 n.145 (2004) (suggesting that "consideration of feasible alternatives would simply be germane to whether exercise of eminent domain is justified" but not advocating that government be required "to undertake a particular means to achieve its end").

for economic development by private entities.[90] Professor Nicole Stelle Garnett has proposed applying a means-end scrutiny, like that used for exactions, to the condemnation process.[91] She argues that such scrutiny is justified because "monetary compensation does not necessarily zero out what Frank Michelman famously termed the 'demoralization costs' associated with a taking"[92] and the compensation requirement does not deter government abuse of this power.[93] While Garnett observes that some courts have tried to avoid the broad definition of public use by scrutinizing the means used (condemnation) to achieve the public purpose,[94] she also recognizes that "*Midkiff* makes clear that 'public use' challenges are subject to rational-basis review"[95] and will be upheld "so long as a taking can be justified by some conceivable public purpose."[96]

If the United States Supreme Court decides, in *Kelo*, to retain the broad interpretation of public use, and if municipalization efforts remain justifiable even under a restricted public use definition, property owners must look to other constitutional limitations to curb unwanted government municipalization and the use of eminent domain to achieve such goals. Within the Fifth Amendment itself, the definition of "property" can operate as a restraint on government power, depending

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[90] *See, e.g.*, Brief Amicus Curiae of Professors David L. Callies, James T. Ely, Paula A. Franzese, Nicole Stelle Garnett, James E. Krier, Daniel R. Mandelker, John Copeland Nagle, John Nolon, J.B. Ruhl, Shelley Ross Saxer, A. Dan Tarlock, Laura Underkuffler, and Edward F. Ziegler in Support of Petitioners at 26, Kelo v. City of New London, 843 A.2d 500 (Conn.), *cert. granted*, 125 S.Ct. 27 (2004) (suggesting an intermediate level of scrutiny similar to that used for exactions); Brief of Amici Curiae New London Landmarks, Inc., the Coalition to Save the Fort Trumbull Neighborhood, and New England Legal Foundation in Support of Petitioners on the Merits at 7, Kelo v. City of New London, 843 A.2d 500 (Conn.), *cert. granted*, 125 S.Ct. 27 (2004) ("Courts should apply heightened scrutiny to takings for a private benefit, for general, undefined economic benefits, or for an uncertain or unduly vague intended use.").

[91] *See* Garnett, *supra* note 12, at 981; *see also* Brief Amicus Curiae of Professors David L. Callies, James T. Ely, Paula A. Franzese, Nicole Stelle Garnett, James E. Krier, Daniel R. Mandelker, John Copeland Nagle, John Nolon, J.B. Ruhl, Shelley Ross Saxer, A. Dan Tarlock, Laura Underkuffler, and Edward F. Ziegler in Support of Petitioners at 26, Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004).

[92] *See* Garnett, *supra* note 12, at 938 (citing Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967)).

[93] *Id.*

[94] *Id.* at 934 (discussing Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10 (Ill. 2002), which reasoned that using condemnation to achieve public goal of promoting economic development exceeded limits of government's eminent domain power).

[95] *Id.* at 935-36.

[96] *Id.* at 936.

upon the jurisdictional approach.[97] While some state statutory provisions require that the property subject to eminent domain be real property,[98] many states interpret the term broadly to include all types of real and personal interests.[99] Thus, with a broad interpretation of the terms "property" and "public use" in the Fifth Amendment and the Supreme Court's pronouncement that eminent domain is "merely the means to the end,"[100] citizens wishing to avoid municipalization or property owners concerned about condemnation against ongoing enterprises must rely on other constitutional constraints.

B. The Dormant Commerce Clause Constraint on Municipalization and Eminent Domain

Article I, Section 8 of the United States Constitution provides, in part, that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."[101] Many interpret this clause as establishing a fundamental right to federal protection of free trade and a national market. The late Professor Julian Eule, however, compared such an interpretation to the nontextual judicial creation of the liberty of contract in *Lochner v. New York*[102] or the right of privacy in *Roe v. Wade*.[103] Professor Eule suggested, instead, that the clause be viewed from a process orientation as "a prohibition against discriminatory or disproportional state legislative treatment of interstate commerce."[104]

State politics will likely favor interest groups with local concerns rather than national ones and this potential process defect, of not having national concerns represented in the state political process, may lead to inefficient, ineffective, and discriminatory results. For example, in his essay addressing "what went wrong in the turn toward deregulation of electric power,"[105] Professor Jim Rossi notes that a recent study indicates that "in electric power restructuring many of the interest groups favoring competitive markets are out-of-state stakeholders, prone to

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[97] *See* Saxer, *supra* note 2, at 89-94.

[98] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 33391 (West 2005) (redevelopment agency authorized to "acquire *real property* by eminent domain") (emphasis added).

[99] *See* Saxer, *supra* note 2, at 89-94.

[100] Berman v. Parker, 348 U.S. 26, 33 (1954).

[101] U.S. CONST. art. I, § 8.

[102] 198 U.S. 45 (1905).

[103] Roe v. Wade, 410 U.S. 113 (1973).

[104] Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 438-39 (1982).

[105] Rossi, *supra* note 6, at 1769.

clash with the interests of in-state rivals who have held monopolies for more than a half century."[106] The dormant Commerce Clause thus helps to control process defects in our political system by guarding against local decisions which obstruct national concerns.

Viewed as either a fundamental value of free trade or as protection against process defects, the Commerce Clause "is both an authorization to Congress and, more controversially, a self-executing prohibition on certain state actions burdening interstate commerce — the so-called "dormant" commerce clause."[107] Dormant Commerce Clause challenges against state legislation typically arise in four situations: (1) where Congress has the exclusive authority to regulate because the subject is national in nature; (2) where states attempt to impose a burden on interstate commerce; (3) where state legislation discriminates against out-of-state interests in favor of local ones; and (4) where the burden on interstate commerce outweighs the local benefits of the legislation.[108] Factually, these situations occur when a state: tries to protect citizens from competition outside the state;[109] attempts to preserve state resources for its own citizens by isolating itself from the national economy;[110]

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[106] *Id.* at 1782 (citing academic historian Richard F. Hirsh's study of electric power deregulation in *Power Loss: The Origins of Deregulation and Restructuring in the American Electric Utility System*, at 406 (MIT Press. 1999).

[107] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705 (1984).

[108] BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01[B], at 6-14 (1999).

[109] *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437 (1992) (holding unconstitutional as violating Commerce Clause Oklahoma statute requiring plants producing electric power for sale in Oklahoma to use percentage of Oklahoma-mined coal); Hughes v. Oklahoma, 441 U.S. 322 (1979) (holding unconstitutional as violating Commerce Clause Oklahoma statute prohibiting transport or shipping outside state of minnows obtained within state); Great Atl. Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (holding unconstitutional as violating Commerce Clause Mississippi regulation providing that milk products from another state may only be sold in Mississippi if other state reciprocates by allowing milk products from Mississippi to be sold); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) (holding unconstitutional as violating Commerce Clause New York's denial for additional facilities for out-of-state distributor of milk based on intent to "protect and advance local economic interests"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (holding unconstitutional as violating Commerce Clause New York statute prohibiting sale of milk within state which was bought from out-of-state producer for less than minimum price fixed for similar milk produced within state of New York).

[110] *See, e.g.*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992) (holding unconstitutional as violating Commerce Clause Alabama statute imposing additional fees on all waste collected outside of Alabama and disposed of at facilities located within Alabama); Sporhase v. Nebraska, 458 U.S. 941 (1982) (holding unconstitutional as violating Commerce Clause Nebraska statute requiring any person who intends to transport groundwater from Nebraska for use in another state to obtain permit); Philadelphia v. New

discriminates against out-of-state interests through taxation, tax subsidy,[111] or burdensome regulation;[112] or restricts the flow of goods from outside the state by quarantine to protect against contagion.[113]

A city or state's efforts to municipalize an investor-owned public utility or other ongoing enterprise, with or without the use of eminent domain, will likely be categorized as the government's attempt to preserve state resources for its citizens. Such efforts may burden interstate commerce and be challenged as a situation where the burden on interstate commerce outweighs the local benefits of the legislation. However, as Professor Jonathan Varat concluded in his influential article on "the proper scope of state authority to favor state residents in the distribution of public resources,"[114] a state should be allowed to use a government-created program to provide for the public welfare of its citizens so long as it does not favor its "own in ways that will shut out nonresidents from in-state benefits only the state can provide."[115] As

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Jersey, 437 U.S. 617 (1978) (holding unconstitutional as violating Commerce Clause New Jersey statute prohibiting importation of waste generated outside of state).

[111] *See, e.g.*, Oklahoma v. Jefferson Lines, 514 U.S. 175 (1995) (holding that Oklahoma state sales tax on bus tickets sold in Oklahoma for interstate travel originating in state does not violate Dormant Commerce Clause); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (holding unconstitutional as violating Commerce Clause Massachusetts pricing order placing assessment on all milk sold by dealers to Massachusetts retailers because it discriminates against interstate commerce since most of that milk is produced out of state); Goldberg v. Sweet, 488 U.S. 252 (1989) (holding that Illinois statute imposing "5% tax on the gross charges of interstate telecommunications originated or terminated in the State and charged to an Illinois service address" does not violate Commerce Clause); New Energy Co. v. Limbach, 486 U.S. 269 (1988) (holding unconstitutional as violating Commerce Clause Ohio statute providing tax credit for ethanol producers from Ohio or from other states that provide reciprocal tax credit).

[112] *See, e.g.*, United States v. Locke, 529 U.S. 89 (2000) (holding that Washington's regulations regarding maritime transports are preempted by federal law); CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) (holding that Indiana Control Share Acquisitions Act does not violate Commerce Clause); Kassel v. Consol. Freight Line, 450 U.S. 662 (1981) (holding unconstitutional as violating Commerce Clause Iowa statute prohibiting use of trucks longer than 60 feet on interstate highways); Bibb v. Navajo Trucking Freight Lines, Inc., 359 U.S. 520 (1959) (holding unconstitutional as violation of Commerce Clause Illinois statute requiring special modifications on trucks); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (holding unconstitutional as violating Commerce Clause Arizona Train Limit Law); South Carolina v. Barnwell Bros., 303 U.S. 177 (1938) (holding unconstitutional as violating Commerce Clause South Carolina law prohibiting certain types of trucks on interstate commerce roadways).

[113] Maine v. Taylor, 477 U.S. 143 (1986) (holding that Maine statute prohibiting importation of baitfish constitutional as legitimate protection of local interest in health and safety).

[114] Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 493 (1981).

[115] *Id.* at 572.

discussed later in this Article, the market participant exception developed by the Court attempts to protect such government-created programs from dormant Commerce Clause scrutiny.[116]

It is unclear whether the municipalization of a privately owned enterprise by condemnation should be scrutinized under the Commerce Clause based on the public purpose achieved by having the local government run the private enterprise, or on the means (i.e., eminent domain), used to accomplish this purpose. If the focus is similar to the determination of whether the government action violates the Fifth Amendment,[117] then a municipality's use of eminent domain to acquire an ongoing enterprise, whether it is a sports franchise, an industrial plant, or a public utility, should be examined under the dormant Commerce Clause based on the ends to be achieved, not the means by which the business is acquired. If, on the other hand, the focus is on the means used (i.e., the eminent domain power), then the condemnation power must be evaluated to determine whether it impermissibly burdens interstate commerce.

A dormant Commerce Clause challenge to a city's use of eminent domain to municipalize a private enterprise may be analyzed similar to a Fifth Amendment challenge. Under this approach, eminent domain will be viewed as "merely the means to the end"[118] and courts would focus on whether the end, protecting state interests by municipalization, violates the dormant Commerce Clause. Arguably, using such a potent form of the police power would justify greater scrutiny of eminent domain actions, which serve as the "means" to achieving valid and beneficial public "ends."[119] However, the *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* decisions make clear that the focus for a Fifth Amendment constitutional challenge is on the state goal, not the means by which that goal is achieved.[120] Similarly, when property is being condemned for a public use or purpose, it may not be appropriate to subject the action to a dormant Commerce Clause challenge based on the

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[116] *See infra* notes 162-205 and accompanying text (discussing market participant exception).

[117] *See supra* notes 56-61, 80-96 and accompanying text discussing *Berman* and *Midkiff* decisions.

[118] Berman v. Parker, 348 U.S. 26, 33 (1954).

[119] *See generally* Garnett, *supra* note 12.

[120] *See also* Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 407 (N.D.N.Y. 1987) (noting that "New York's interest in assuring that dependable and affordable sources of energy exist for its residents and industry is particularly strong" and that court "cannot second guess the means chosen to secure these legitimate ends" so long as there is rational basis).

eminent domain process itself, but, instead, on how the state or municipal ownership of the property will impact interstate commerce.

Concerns about municipalization, on the one hand, and the use of eminent domain to force an involuntary sale of property to the government, on the other, give rise to a justified wariness on the part of citizens when the government combines these powers to condemn ongoing private enterprises. The coercive nature of eminent domain and the socialist aspect of a government-run business demand heightened scrutiny and constitutional constraints. Therefore, it is appropriate to analyze both the means and ends when eminent domain is used to municipalize. The remainder of this Part will examine the validity of public utility municipalization using the backdrop of relevant eminent domain cases, utility cases, and dormant Commerce Clause cases to determine whether the Commerce Clause can be used as an "ideological barrier" to decide which enterprises should be subject to public ownership[121] and how this ownership should be accomplished.

1. Does Municipalization Violate the Dormant Commerce Clause?

Courts limit the power of state and local governments to regulate by using the dormant Commerce Clause to strike down state and local legislation or action that impermissibly burdens interstate commerce. This doctrine is principally used to prevent protectionism by the states.[122] Justice Cardozo, in *Baldwin v. G.A.F. Seelig, Inc.*,[123] eloquently justified the doctrine as being "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[124] The doctrinal framework seeks to address this aim by establishing:

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[121] Lisa J. Tobin-Rubio, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185, 1221 (1987).

[122] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (stating that "the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism. Not only is this what the Court has been doing, it is just what the Court should do. This and no more."); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 578 (1997) ("By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent."); Maine v. Taylor, 477 U.S. 131, 148 (1986) ("Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to simple economic protectionism consequently have been subject to a virtually per se rule of invalidity.").

[123] Baldwin v. Seelig, 294 U.S. 511 (1935).

[124] *Id.* at 523.

> a per se rule or strong presumption of invalidity applied to measures that discriminate on their face against interstate commerce; heightened scrutiny, in the form of examination of less restrictive alternatives and means-ends review, when the burdens fall disproportionately on interstate commerce, the benefits accrue mostly to intrastate commerce, or both; and deferential review when there is no discrimination at all.[125]

Therefore, when a municipality's efforts to establish or aid a government-run program are challenged as a dormant Commerce Clause violation, the potential impact of the program on interstate commerce must be examined to determine if there is discrimination and/or a burden on interstate commerce. For example, a local government's decision to run a public electric utility company to supply cheaper electricity to its citizens might discriminate against out-of-state citizens or otherwise unduly burden interstate commerce. However, as we will see in a later section, if the municipality is merely functioning as a market participant by operating a fundamentally "public" enterprise in the form of a "public utility" company, it will likely be considered a market participant and be exempt from further review.[126]

a. Article of Commerce

A threshold question under the dormant Commerce Clause is whether a local government's decision to municipalize its public utilities affects interstate commerce.[127] To affect interstate commerce, there must first be an article in the stream of commerce. Because even waste products are considered articles of commerce that are subject to Congress' right to regulate their interstate movement,[128] public utility products such as water, gas, and electricity will likely be considered articles of commerce subject to dormant Commerce Clause constraints on state regulation.

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[125] Sunstein, *supra* note 107, at 1708.

[126] *See* Moss, *supra* note 49, at 139 n.212 (noting local governments, when acting as party to contract, "operate in a 'private proprietary role' and should thus fit into the 'market participation exception' to the commerce clause"). *But see* Lazarus, *supra* note 49, at 1358-59 (stating without much explanation that "[p]rotectionist condemnations not only fail to qualify for the market participation exception, they draw little if any constitutional sustenance from the exception's existence").

[127] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 5.3.4, at 317 (1997).

[128] Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978) (noting that "[a]ll objects of interstate trade merit Commerce Clause protection").

In *Sporhase v. Nebraska*,[129] the United States Supreme Court determined that Nebraska's ground water was an article of commerce and rejected the state's claim that its rules were not subject to dormant Commerce Clause review.[130] However, the Court upheld the state's water conservation restrictions, noting that "the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."[131] In *New York v. Federal Energy Regulatory Commission*,[132] the United States Supreme Court stated that "we agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce."[133] Thus, the publicly produced goods of water, gas, and electricity will be considered articles of commerce, subject to dormant Commerce Clause review.

b. Dormant Commerce Clause Review

If a state or municipal utility operation is challenged under the dormant Commerce Clause, it will be necessary to determine whether the operation is discriminatory on its face and per se invalid or if the operation only incidentally burdens interstate commerce. If the government action is neutral and aims to achieve a legitimate public interest, any incidental burden on interstate commerce must be evaluated under the less stringent *Pike* balancing test. This balancing test requires the municipalization activity to be invalidated only if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[134]

It is now settled that electric energy "transmissions on the interconnected national grids constitute transmissions in interstate commerce."[135] Therefore, "that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" is subject to federal regulation so long as such regulation does not intrude on areas subject to state regulation.[136] Even if a municipality's operation of such a facility is

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[129] Sporhase v. Nebraska, 458 U.S. 941 (1982).

[130] *Id.* at 954; *see also* BITTKER, *supra* note 108, § 6.06[C][2] (citing Sporhase v. Nebraska, 458 U.S. 941, 954 (1982)).

[131] *Sporhase*, 458 U.S. at 957.

[132] New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1 (2002).

[133] *Id.* at 16 (citing FPC v. Fla. Power & Light Co., 404 U.S. 453, 466-67 (1972)).

[134] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[135] *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. at 16.

[136] *Id.* at 20.

facially discriminatory by favoring in-state residents, the state or municipality has jurisdiction over local generation and distribution facilities[137] with a legitimate interest in limiting the benefits of its own operation to bona fide residents. Nevertheless, it is doubtful that such a discriminatory preference would allow the state or municipality to refuse to supply power to a business located within the state but owned by a nonresident entity.[138]

A state or municipality that owns and operates its own public utility to produce energy may initially sell to nonresidents, but later offer service to residents only. This is precisely what happened in South Dakota when a state-run cement plant initially sold cement to out-of-staters and then determined during a cement shortage that it needed to preserve the benefits of its cement production for its own citizens.[139] The initial operation of the cement plant, which did not discriminate between in-staters and out-of-staters, was not subject to constitutional scrutiny under the dormant Commerce Clause.[140] However, when the state decided to limit its sales to in-staters, scrutiny was triggered because the state's discrimination allegedly disrupted the national marketplace.[141] Nevertheless, even though the state's hoarding of cement was facially discriminatory, it was not per se invalid because the market participant doctrine allows a state to reserve for its citizens those resources created by state funds.[142]

It may be difficult to distinguish between natural resources refined by a public energy utility and those resources produced by a public utility. However, because the United States Supreme Court, in *Reeves, Inc. v. Stake*,[143] drew a distinction between natural resources and commercial products, it may be necessary to view energy sources, such as natural gas, differently than finished products, such as cement.[144] Such a distinction may apply to the production of electric energy by a state or

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[137] *See id.* at 22 (noting that "legislative history [of the Federal Power Act] is replete with statements describing Congress' intent to preserve state jurisdiction over local facilities").

[138] *See* Coenen, *supra* note 11, at 484-87 (noting that there is not much authority addressing these issues but "that physical presence may justify commerce clause protection of some nonresidents under some circumstances notwithstanding the market-participant rule").

[139] *See* Reeves, Inc. v. Stake, 447 U.S. 429, 441-42 (1980).

[140] *See id.* at 440-41.

[141] Coenen, *supra* note 11, at 447-48 (discussing "Problem of the Turncoat Seller").

[142] *See id.* at 450 (citing *Reeves*, 447 U.S. at 445; Varat, *supra* note 114, at 549); Part II.B.1.c.

[143] *Reeves*, 447 U.S. at 429.

[144] *See* Coenen, *supra* note 11, at 460 (suggesting that "hoarding of natural gas thus differs fundamentally from South Dakota's 'hoarding' of a finished product made with raw materials widely available both inside and outside the state").

municipality, making it analogous to a finished product because energy production is now such a varied and deregulated process.

The dormant Commerce Clause does not prohibit states from facially discriminating against nonresidents when performing traditional governmental functions. For example, a state may lawfully limit its provision of social services, such as public schooling[145] or libraries, to its own residents. It may not have to rely on a "market participant"[146] or "public utility"[147] exception in order to provide for these "traditional governmental functions, far removed from commercial activity and utterly unconnected to any genuine private market."[148] Providing essential services such as gas and electricity production may qualify as traditional governmental functions, regardless of whether the government acts as a market participant. However, if these services are viewed as a state's or municipality's natural resources, rather than as products from a government-run utility, then giving residents a preferred right to these resources may be considered protectionism, which is per se invalid under the Commerce Clause.[149]

Even some traditional government functions may run afoul of the dormant Commerce Clause if the court views the article of commerce as a natural resource. In *C & A Carbone, Inc. v. Clarkstown*,[150] the United States Supreme Court struck down an ordinance requiring that all local waste be processed at a municipally owned waste processor.[151] The city ordinance was designed to ensure that the processing plant produced sufficient revenue to support the capital investment used to build it.[152] Even though the city was performing the traditional government function of waste removal and processing,[153] the Court found that the

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[145] *See* Buchwald v. Univ. of N.M. Sch. of Medicine, 159 F.3d 487, 496 n.9 (10th Cir. 1998) (noting plaintiff's rejection from state medical school did not violate dormant Commerce Clause since "University of New Mexico's educational activities constitute participation in the market for educational services, not regulation of that market. Thus the policies in question fall under the 'market participant' exception to the dormant Commerce Clause").

[146] *See infra* Part II.B.1.c.

[147] *See infra* Part II.B.1.d.

[148] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 604 (1997).

[149] *See* BITTKER, *supra* note 108, §§ 6.06[A], at 6-40 to 6-41 (discussing Philadelphia v. New Jersey, 437 U.S. 617 (1978), where Court held that New Jersey could not prohibit importation of waste from out-of-state in order to preserve its landfills for use by residents).

[150] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

[151] *Id.* at 386.

[152] *Id.* at 390.

[153] *Id.* at 410 (Souter, J., dissenting); *see also* A.G.G. Enters., Inc. v. Washington Co., 145

local processing requirement facially discriminated against out-of-state interests because it hoarded a local resource.[154] The ordinance was, therefore, per se invalid. The Court determined that revenue generation was not a sufficient justification for allowing such discrimination because "Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question."[155]

Even if the state or municipality does not facially discriminate against out-of-state interests in its operation of a public utility, it may nonetheless violate the dormant Commerce Clause if it burdens interstate commerce. In *Pike v. Bruce Church, Inc.*,[156] the United States Supreme Court explained the general rule used to decide whether a nondiscriminatory action violates the clause as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[157]

Thus, the so-called *Pike* balancing test will be applied to any municipal operation which burdens interstate commerce without facially discriminating against out-of-state interests.

It is difficult to predict in the abstract how a municipally-run utility which allegedly burdens interstate commerce will fare under the *Pike* balancing test. The Court's dormant Commerce Clause "cases have eschewed formality for a sensitive, case-by-case analysis of purpose and effects;"[158] therefore, small details of a municipal operation may shift the balance between a legitimate local purpose and an excessive burden on interstate commerce. Depending upon how a municipally owned public

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F. Supp. 2d 1215, 1225 (D. Or. 2001) (noting that "collection and disposal of solid waste is considered primarily a function of state and local governments") (citing Kleenwell v. Biohazard Waste v. Nelson, 48 F.3d 391, 398 (9th Cir.), *cert. denied*, 515 U.S. 1143 (1995)).

[154] *C & A Carbone, Inc.*, 511 U.S. at 392.

[155] *Id.* at 393.

[156] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[157] BITTKER, *supra* note 108, §§ 6.05, at 6-33 (quoting *Pike*, 397 U.S. at 142).

[158] *See id.* §§ 6.06[A], at 6-48 (quoting W. Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 205 (1994)).

utility plant is operated, it may or may not be found to violate the dormant Commerce Clause, even if it is serving its citizens by performing traditional governmental functions.

Although resolving dormant Commerce Clause issues on a case-by-case basis makes it difficult to predict outcomes under the *Pike* balancing test, it may still be appropriate under the existing jurisprudence. The structure of the public utility market[159] requires a dual system of both federal and state regulation to properly address concerns of monopoly behavior, competition, reliability, service to all residents, and other issues specific to public utilities.[160] Congress is better suited to address this mix than are courts: courts are "ill qualified to develop Commerce Clause doctrine dependent on any such predictive judgments" as to "whether the overall economic benefits and burdens of a regulation favor local inhabitants against outsiders."[161] Therefore, federal legislation is appropriate to authorize or prohibit state and local government municipalization of public utilities consonant with the Commerce Clause and other federal constraints.

c. The "Market Participant" Exception

Assuming that the municipalization of public utilities will be subject to dormant Commerce Clause review because the goods produced are articles of commerce, a municipality can, nevertheless, avoid review of its actions if it can claim exemption as a market participant. "The market participant exception provides that a state may favor its own citizens in

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[159] *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1354-55 (1998) (noting differences in type of utility at issue in that "FERC's power over electricity markets is much more limited than its power over natural gas" due to interstate nature of natural gas transportation).

[160] *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 293-310 (1997) (refusing to invalidate state regulatory system since "[p]rudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress despite its noncompetitive, monopolistic character"); *see also* Kelley A. Karn, *State Electric Restructuring: Are Retail Wheeling and Reciprocity Provisions Constitutional?*, 33 IND. L. REV. 631, 656-61 (2000) (arguing that traditional Commerce Clause does not apply to electric utility industry because of its unique nature and suggesting that Congress clarify "what states can and cannot do to open their electric retail markets").

[161] *Tracy*, 519 U.S. at 308-09 (quoting Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1211 (1986)). *But see* Rossi, *supra* note 6, at 1785 (recognizing courts' power and responsibility to help electric power markets succeed by clarifying "the role of additional doctrines, such as federal preemption doctrine, the dormant commerce clause, and state action doctrine in limiting state regulators" and stating that "courts must balance the advantages of state power, including its promotion of experimentation and the lower cost of political participation it offers home-turf stakeholders, with its costs").

dealing with government owned business and in receiving benefits from government programs."[162] If the government operates the property as a market participant, its actions will not be subject to Commerce Clause review.[163] However, if it operates or regulates the property without being a part of the actual market, its actions will be scrutinized under the appropriate dormant Commerce Clause framework.[164]

In his dissenting opinion in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*,[165] Justice Scalia[166] succinctly stated the modern test for validity under the dormant Commerce Clause[167] and restated the market participant exemption as follows:

> In addition to laws that employ suspect means as a necessary expedient to the advancement of legitimate State ends, we have also

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[162] CHEMERINSKY, *supra* note 127, §§ 5.3.7.2, at 336.

[163] *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 592 (1997) (discussing market participant doctrine as exception to dormant Commerce Clause).

[164] *See* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 206-07 (1983) (discussing importance of distinguishing between states as market participants and states as market regulators) (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), and Reeves, Inc. v. Stake, 447 U.S. 429 (1980)).

[165] *Camps Newfound/Owatonna, Inc.*, 520 U.S. 564 (1997).

[166] It should be noted that Justice Scalia, in his concurring opinion in *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997), stated "I write separately to note my continuing adherence to the view that the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain."

[167] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 595 (Scalia, J., dissenting). Justice Scalia said that:

> The rules that we currently use can be simply stated, if not simply applied: Where a state law facially discriminates against interstate commerce, we observe what has sometimes been referred to as a "virtually *per se* rule of invalidity;" where, on the other hand, a state law is nondiscriminatory, but nonetheless adversely affects interstate commerce, we employ a deferential "balancing test," under which the law will be sustained unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

Id.; *see Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). While the "virtually *per se* rule of invalidity" entails application of the "strictest scrutiny," Hughes v. Oklahoma, 441 U.S. 322, 337 (1979), it does not necessarily result in the invalidation of facially discriminatory state legislation. *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986) (upholding absolute ban on importation of baitfish into Maine). For "what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense — that is, a protectionist enactment — may on closer analysis not be so." New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988). Thus, even a statute that erects an absolute barrier to the movement of goods across state lines will be upheld if "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 274. To put a finer point on it, if the state law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278.

> preserved from judicial invalidation laws that confer advantages upon the "State's residents but do so without *regulating* interstate commerce. We have therefore excepted the State from scrutiny when it participates in markets rather than regulates them — by selling cement, for example, see *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), or purchasing auto hulks, see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), or hiring contractors, see *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). Likewise, we have said that direct subsidies to domestic industry do not run afoul of the Commerce Clause. *See New Energy Co.*, 486 U.S. at 278. In sum, we have declared that "the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*"[168]

Thus, the United States Supreme Court has considered the government to be a market participant where it paid a "bounty" to purchase state-licensed junk cars;[169] where it restricted the sale of cement from a state-run plant to its own residents;[170] and where it expended "only its own funds in entering into construction contracts for public projects,"[171] requiring that the work "be performed by a work force consisting of at least half *bona fide* residents of Boston."[172] In these situations, the government was acting like any other commercial entity. However, the government was not a market participant where it required timber purchasers to process timber purchased from the state at an in-state processing plant prior to exportation[173] or where it provided a discriminatory tax exemption, not a subsidy, "benefiting only those nonprofits serving principally Maine residents."[174] In those situations, the government had gone beyond the power of a normal commercial enterprise, using its regulatory powers as a governmental entity to change how the market operated.

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[168] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 595 (Scalia, J., dissenting).

[169] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

[170] Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980).

[171] White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 214-15 (1983).

[172] *Id.* at 206.

[173] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 96-97 (1984) (noting that "[u]nless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry").

[174] *See* Camps Newfound/Owatonna, Inc., v. Town of Harrison, 520 U.S. 564, 589-93 (1997) (noting that "[a] tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine").

Although it is difficult to draw the line between regulation and market participation under the Commerce Clause,[175] it:

> should be drawn with reference to constitutional values giving rise to the market participant exemption itself . . . [and] thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.[176]

Whenever a local government decides to municipalize, a determination is made that it is in the best interests of its citizens to govern the operation of a particular service, such as a utility. Additionally, the government decides, as a market participant, how to maintain that service at the most competitive price. In most cases, a state's or city's decision to acquire an ongoing enterprise via eminent domain will likely support a finding that the government is behaving like a private merchant or operator.

Municipalization has been suggested as a mechanism to allow a state to protect its residents against hazardous waste produced outside the state and to constitutionally avoid a dormant Commerce Clause challenge. In his dissent in *Chemical Waste Management, Inc. v. Hunt*,[177] Chief Justice Rehnquist suggested that Alabama could municipalize its landfills as a way to "sidestep the majority decision,"[178] by using the market participation doctrine. However, using municipalization to avoid dormant Commerce Clause scrutiny under a market participant theory has not yet been successful. For example, Clarkstown, New York municipalized a waste disposal plant, but instead of restricting the import of waste as suggested by the *Hunt* dissent, the municipal ordinance restricted the export of solid waste. The ordinance at issue in *C & A Carbone, Inc. v. Clarkstown*[179] required all locally produced solid

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[175] *See* Big Country Foods, Inc. v. Bd. of Educ., 952 F.2d 1173, 1178 (9th Cir. 1992) ("The line between state market participation and state regulation is a fuzzy one that has perplexed courts and commentators alike."); *see also* Coenen, *supra* note 11, at 405 (1989) (discussing Supreme Court's voting pattern and noting that "this erratic pattern suggests an ad hoc approach to the cases, directed by no overarching theory of the market-participant rule").

[176] *Constr. Employers*, 460 U.S. at 218 (Blackmun, J., concurring in part and dissenting in part).

[177] Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 350 (1992) (Rehnquist, C.J., dissenting).

[178] BITTKER, *supra* note 108, §§ 6.06[B], at 6-53.

[179] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

waste to be processed locally in order to "insure that the plant would produce enough revenue to service the cost of construction."[180] The ordinance was struck down as discriminating against out-of-state processors who did not have the opportunity to process the waste.[181] The dissenters in *C & A Carbone* unsuccessfully argued that Clarkstown's attempt to satisfy "a traditional governmental responsibility"[182] should not be subject to Commerce Clause review because it "conveys a privilege on the municipal government alone, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents."[183]

Municipalization alone does not ensure a market participant exception for government actions discriminating against or burdening interstate commerce. A court must scrutinize the underlying municipal operation to determine whether the market participant theory exempts such municipalization from Commerce Clause review. The major Supreme Court cases involving the market participant theory have focused on the substantive programs carried on by the various state actions, not on the procedural methodology used to accomplish these public purposes.[184] For example, in *Reeves v. Stake*,[185] the United States Supreme Court exempted South Dakota's state-run cement plant from Commerce Clause constraints, finding that the state was a market participant because it established a cement plant to help its residents.[186] Although the state's policy of preferring South Dakota buyers in a time of "serious cement shortage" was challenged as protectionist, the Court did not examine *how* the program obtained benefits for its residents. Instead, the Court focused only on whether the program itself was a state proprietary activity.[187]

Similarly, in the earlier *Hughes v. Alexandria Scrap Corp.*[188] case, the United States Supreme Court upheld Maryland's right to participate in

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[180] BITTKER, *supra* note 108, §§ 6.06[B], at 6-56 (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)).

[181] *C & A Carbone*, 511 U.S. at 391.

[182] *Id.* at 410 (Souter, J., dissenting).

[183] *Id.* at 430 (Souter, J., dissenting).

[184] *See* New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988); White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

[185] *Reeves*, 447 U.S. at 429.

[186] *Id.* at 446-47.

[187] *Id.* at 433-34 (citing United States Court of Appeals for Eighth Circuit conclusion "that the State had 'simply acted in a proprietary capacity,' as permitted by Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)").

[188] *Hughes*, 426 U.S. at 794.

the automobile hulks market and to favor its own citizens in the exercise of this right.[189] The means to accomplish this purpose, using state funds to pay bounties to in-state processors only, was challenged as a violation of the Commerce Clause.[190] Nevertheless, the Court's emphasis was on Maryland's right to run a state program benefiting its citizens, not on whether the means used, the bounty scheme, was impermissible.[191]

A dormant Commerce Clause challenge must first focus on how the government's regulation or operation of the property affects interstate commerce.[192] In *New England Power Co. v. New Hampshire*,[193] the United States Supreme Court reviewed a New Hampshire statute prohibiting hydroelectric utilities from exporting electrical energy without getting authorization from a New Hampshire commission. The statute allowed the commission to deny permission to export electricity if the commission determined "that the energy 'is reasonably required for use within this state and that the public good requires that it be delivered for such use.'"[194] The state was not operating the hydroelectric utility; therefore, the Court focused on the state's attempt to regulate the privately owned utilities to protect in-state interests. Because the state was not acting as a market participant, but was instead regulating the interstate trade in hydroelectric power, the Court concluded that the state restriction violated the Commerce Clause.[195]

Under a market participant analysis, some cases recognize a "sovereign capacity" concept, which is similar to the traditional government functions examination. The doctrine provides that when a state "acts in its distinctive governmental capacity as a provider of public [services], . . . [it] is not entitled to the market participant exception."[196]

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[189] *Id.* at 809-10.

[190] *Id.*

[191] *Id.*

[192] *See, e.g.*, White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 205-06 (1983) (concluding that Boston mayor's executive order did not violate Commerce Clause by requiring "that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston").

[193] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).

[194] *Id.* at 335.

[195] *Id.* at 338-39.

[196] *See, e.g.*, Big Country Foods, Inc. v. Bd. of Educ., 952 F.2d 1173, 1180-81 (9th Cir. 1992) (distinguishing New Energy Co. v. Limbach, 486 U.S. 269 (1988), W. Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984), and Shell Oil v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987) from its facts where "state, through its school districts, is simply making a decision as to what it will pay for a product bought on the open market," not acting "in its distinctive governmental capacity as a provider of public education").

In *New Energy Co. v. Limbach*,[197] the United States Supreme Court found that the market participant doctrine did not apply where the challenged state action was "neither its purchase nor its sale of ethanol, but its assessment and computation of taxes — a primeval governmental activity."[198] Instead, it held that the "favorable tax treatment for *Ohio*-produced ethanol" was unjustified "discrimination against products of out-of-state manufacture."[199] Similarly, in *Shell Oil Co. v. City of Santa Monica*,[200] the Ninth Circuit held that the City of Santa Monica was "not a market participant in the setting of franchise fees for easements under public streets" because franchising is a traditional governmental function.[201] Because the city did not act as a market participant, it could not "burden interstate commerce in a manner that violates the dormant commerce clause" by its franchise decisions regarding the use of public streets.[202] Most recently, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[203] the United States Supreme Court refused to apply the market participant exception to a case involving a state discriminatory tax exemption. Instead, the Court viewed the tax "as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function."[204]

"Public" utilities have historically been operated for the public's benefit and, in many cases, are owned by the government. Therefore, if the government is acting in its "sovereign capacity" as the provider of energy or other services, it may not be able to escape Commerce Clause review under the market participant exception. However, unlike providing tax exemptions or favorable tax treatment and charging fees for use of public property, a city's operation of a utility company would directly compete with privately owned public utilities. The city's ability to compete should not be hampered by federal constraints, which are not applicable to private company operation.[205] In a deregulated and

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[197] *Limbach*, 486 U.S. at 269.

[198] *Id.* at 277-78 (stating "[w]e think it clear that Ohio's assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser").

[199] *Id.* at 279-80.

[200] Shell Oil v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987).

[201] *Id.* at 1057-58 & n.5 (discussing finding in W. Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984) that California was not market participant because it owned land by virtue of its sovereign capacity and had monopoly over sale of easements for crude oil transportation from offshore oil rigs).

[202] *Id.* at 1058.

[203] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

[204] *Id.* at 593-94.

[205] *See* Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) (noting that "state proprietary

competitive utility environment, like California's electricity situation, a government-owned utility should qualify as a market participant and enjoy the protections that such a status provides.

d. The "Public Utility" Exception

In addition to using the market participant exception to escape scrutiny, the government can argue that providing utilities such as gas, electricity, and water are legitimate state interests under a "public utility" exception, which will allow it to avoid review. In *General Motors Corp. v. Tracy*,[206] the United States Supreme Court upheld a state's preferential tax treatment for sales of gas by domestic gas utilities[207] using what Justice Scalia later called a "public utility" exception (in addition to the "market participant" and "subsidy" exceptions) to avoid scrutiny under the dormant Commerce Clause.[208] The so-called "public utility" exception was justified in *Tracy* as necessary to protect small captive users of gas service "from the effects of competition for the largest consumers."[209] This is significant because "[s]tate regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months."[210] As states and municipalities take over privately-owned public utilities to ensure reliability and lower prices for essential services, such actions may be viewed by courts as necessary to protect the health and safety interests of its citizens.

A state's or municipality's operation of a public utility may be exempted from dormant Commerce Clause scrutiny based on either the market participant or the public utility exception. Nevertheless, the public utility exception would seem to collapse the Commerce Clause inquiry into the public use or purpose analysis, thereby threatening any

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activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.").

[206] Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997).

[207] *Id.* at 289.

[208] *Camps Newfound/Owatonna*, 520 U.S. at 607 (Scalia, J., dissenting) (noting that other state actions such as providing "free public schooling, public assistance, and other forms of social welfare to only (or principally) its own residents" does not implicate negative Commerce Clause).

[209] *Tracy*, 519 U.S. at 306.

[210] *Id.* at 306.

continuing use of dormant Commerce Clause jurisprudence to limit state action that impacts out-of-state commerce. Indeed, the Supreme Court has continually recognized a state's right to use its police power, even when it incidentally impacts interstate commerce.[211] However, any conclusion concerning dormant Commerce Clause jurisprudence must be made with trepidation, as this is an area of some uncertainty. For example, two factually similar dormant Commerce Clause cases, *Tracy* and *Camps Newfound/Owatonna*, were decided only three months apart. Justice Stevens dissented from the Court's validation of the natural gas utility tax exemption in *Tracy*, but wrote the majority opinion in *Camps Newfound/Owatonna*, which invalidated the Maine tax exemption for charitable institutions.

2. Does Eminent Domain Violate the Dormant Commerce Clause?

Government entities at all levels — federal, state, and local — have long enjoyed using their condemnation power to acquire the property necessary to further community goals of public health, safety, and welfare. Whenever the government exercises its eminent domain power against property within the state, interstate commerce is arguably affected because the condemnation interferes with potential out-of-state buyers by precluding market competition for the property purchase.[212] Therefore, the court must decide whether a condemnation action is being exercised in a manner which impermissibly and unduly burdens interstate commerce.

a. Condemnation of Real Property

There is little precedent involving a dormant Commerce Clause challenge against a real property condemnation.[213] The North Carolina

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[211] *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 596 (Scalia, J., dissenting) ("Our cases have struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation.") (citing Okla.Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180-83 (1995)).

[212] *See id.*

[213] *See* Piedmont Triad Airport Auth. v. Urbine, 554 S.E.2d 331, 335 (N.C. 2001) (concluding that "[w]e find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property"). *But see* Iowa RCO Assoc. v. Ill. Commerce Comm'n, 409 N.E.2d 77, 81 (Ill. App. 1980) (noting that "[t]he Commerce Clause (U.S. CONST. art. I, § 8, cl. 3) does not of itself prevent some reasonable regulation by a state of interstate commerce within its borders" and stating that "exercise of the power of eminent domain by a pipeline carrier is governed only by State law").

Supreme Court, in *Piedmont Triad Airport Authority v. Urbine*,[214] rejected a dormant Commerce Clause challenge to an airport authority's real property condemnation, concluding that "[w]e find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property."[215] However, in *Kern River Gas Transmission Co. v. Clark Co., Nevada*,[216] the district court reviewed a challenge to a state statute restricting a gas company's use of eminent domain under the federal Natural Gas Act to acquire interstate natural gas pipelines.[217] The court determined that the state statute violated the Commerce Clause because it required "the exercise of eminent domain over public lands to be dependent on whether it is 'necessary' to local concerns, rather than the concerns of interstate commerce."[218] In this case, the eminent domain power was being regulated to discriminate in favor of in-state interests and, thus, the *regulation* of the condemnation power, not the general condemnation power itself, violated the Commerce Clause.

A similar challenge was made to state eminent domain statutes in *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*.[219] In *Dakota*, two state eminent domain statutes were challenged as discriminating against interstate commerce. These statutes established criteria applicable to railroads seeking to acquire eminent domain authority.[220] The district court held that the first subsection of one eminent domain statute at issue discriminated against out-of-state commerce because it required "that the purpose of the exercise of eminent domain 'only' has as its purpose to benefit South Dakota interests."[221] Thus, the statute was protectionist in nature and "forbidden by the dormant Commerce Clause."[222] Some of the remaining subsections were also invalidated as unduly restricting interstate commerce.[223] The court held that state regulations implementing the second statute violated the dormant

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[214] *Urbine*, 554 S.E.2d 331 (N.C. 2001).

[215] *Id.* at 335.

[216] Kern River Gas Transmission Co. v. Nevada, 757 F. Supp. 1110 (D. Nev. 1990).

[217] *Id.* at 1118.

[218] *Id.*

[219] Dakota, Minn. & E. R.R. Corp. v. S.D., 236 F. Supp. 2d 989 (D.S.D. 2002).

[220] *Id.* at 1016.

[221] *Id.* at 998 (noting statute at issue states that "exercise of the right of eminent domain is a public use consistent with public necessity only if the use of eminent domain has as its purpose providing railroad transportation to shippers in South Dakota, for commodities produced, manufactured, mined, grown, used, or consumed in South Dakota").

[222] *Id.* at 1016.

[223] *Id.* at 1020-24.

Commerce Clause by requiring a detailed application and a parcel-by-parcel determination for the exercise of eminent domain by the railroad. Because of their particularity, such regulations were found to "pose[ ] significant burdens on interstate commerce" and "[t]he State can ensure that its eminent domain power is used for the public and consistent with public necessity by less burdensome means."[224] Here, again, the eminent domain power was being regulated in such a way that the regulation interfered with interstate commerce while the power itself escaped examination.

In both *Kern River Gas Transmission* and *Dakota*, state eminent domain statutes restricting utility or railroad condemnation authority were challenged as unduly burdening interstate commerce. These challenges focused on the state's attempt to regulate the eminent domain power to favor state interests over interstate interests. In contrast, in *Elberton Southern Ry. Co. v. State Highway Department*,[225] the Georgia Supreme Court analyzed the issue of whether the Commerce Clause precluded the state's use of eminent domain to acquire a railroad right of way for use as a public road. The court made a conclusory determination that the use of eminent domain was valid under the Commerce Clause.[226] The Georgia court found that the State Highway Department's condemnation was valid under the Commerce Clause because "[u]nder the foregoing authorities, the special plea and the plea and answer of the railway company were insufficient to show any undue interference with or burden upon interstate commerce."[227]

Like the government powers to tax or to grant subsidies, the condemnation power must be closely scrutinized to prevent government abuse. The United States Supreme Court has not yet addressed the constitutionality of state and local subsidies under the dormant Commerce Clause,[228] but for many years it was assumed that state subsidization of local industry was unassailable.[229] Recent commentary

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[224] *Id.* at 1017-19 (finding that although regulations violate dormant Commerce Clause, statute under challenge is constitutionally valid).

[225] Elberton S. Ry. Co. v. State Highway Dept , 211 Ga. 838, 841 (1955).

[226] *Id.* at 840-41; *see also* City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 419 (1985) ("It is well established that a state may exercise eminent domain power even though by so doing it indirectly or incidentally burdens interstate commerce.") (citing *Elberton*, 211 Ga. at 841).

[227] *Elberton*, 211 Ga. at 841.

[228] *See* BITTKER, *supra* note 108, § 6.06[G][1] ("We have never squarely confronted the constitutionality of subsidies, and we need not do so here." (quoting W. Lynn Creamery Co. v. Healy, 512 U.S. 186, 199 n.15 (1994)).

[229] *Id.* §§ 6.06[G][1], at 6-76 ("Direct subsidization of domestic industry does not ordinarily run afoul of the dormant Commerce Clause." (quoting New Energy Co., 486 U.S.

on this issue has speculated that state subsidies are just another type of economic protectionism, in violation of the dormant Commerce Clause, because these incentives encourage businesses to either stay in the state or to relocate from another state.[230] On the other hand, it has been argued that subsidies should be distinguished from the tax breaks invalidated by the Court because subsidies are more visible than discriminatory tax relief and are less likely "to distort the geography of production in favor of local operations."[231]

The payment of just compensation pursuant to government's condemnation power is similar to a subsidy and should be less vulnerable to constitutional attack because it is visible and, unlike open-ended discriminatory tax breaks, it will not be used when money runs out or budgets get tight.[232] By exercising eminent domain, the government pays to make sure an ongoing enterprise continues to benefit local public concerns. Similarly, subsidies:

> are arguably not "regulations" of commerce, but parts of an arm's length bargain, in which the state pays (in cash, tax abatements, and other concessions) in exchange for the firm's agreement to create jobs, preserve existing jobs for a specified period, or accept some other obligation as consideration for the state's subsidy.[233]

The major difference between a government subsidy and the exercise of eminent domain is that a business enterprise may refuse to accept a subsidy, while condemnation forces the enterprise to involuntarily sell its property. In this regard, tax benefits may also be refused and are voluntary in nature, unlike the exercise of eminent domain. Therefore, due to the involuntariness of eminent domain, the analogy to subsidies and tax breaks is not helpful in deciding whether government's use of the condemnation power should be valid under the dormant Commerce Clause.

269, 278 (1988)).

[230] *Id.* §§ 6.06[G][1], at 6-77 (noting that these commentators argue that by encouraging businesses to stay local or to relocate from out-of-state by use of incentives, this government action is harmful to national economy) (citing Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 433 (1996)).

[231] *Id.* § 6.06[G], at 6-79 (quoting Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 996 (1998)).

[232] *Id.* § 6.06[G][1], at 6-78 to 6-79 (discussing distinction between tax breaks and subsidies).

[233] *See id.* § 6.06[G][1], at 6-80.

While the tax and subsidy cases may not be helpful in deciding whether the mere use of eminent domain violates the dormant Commerce Clause, Fifth Amendment challenges to this power have equated condemnations to the police power to regulate for the health, safety, and welfare of the community.[234] Therefore, similar to Fifth Amendment challenges, dormant Commerce Clause challenges to eminent domain may arguably be analyzed as would any other state or local government regulation of private activity to promote the public health, safety, and welfare. Eminent domain is unique because the government may force a sale to enter the market, but it is, nevertheless, a legitimate means by which a city may choose to acquire a public program.

Viewed as a legitimate use of police power, an eminent domain action will be invalidated as per se invalid only if it is exercised in a manner which discriminates against out-of-state interests.[235] However, if the state or local government uses eminent domain in a neutral manner and burdens interstate commerce, the *Pike* balancing test should be used to determine whether the local benefits achieved through condemnation, instead of through voluntary purchase, outweigh the burden on commerce. Because the government could purchase an ongoing enterprise offered for sale without using its regulatory powers, just as private actors could, the involuntary nature of an eminent domain purchase must be what makes it susceptible to a dormant Commerce Clause challenge.

Eminent domain is unlike any other form of police power used by the government because it cannot be questioned so long as just compensation is paid and a public purpose is being served. However, without some type of discriminatory purpose or impact, using the condemnation power to acquire private property cannot violate the dormant Commerce Clause based only on its involuntary nature. Instead, this power must be evaluated by examining each situation to determine how and to what degree the state or local government is interfering with the national commerce system to achieve parochial interests.

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[234] Berman v. Parker, 348 U.S. 26 (1954).

[235] *See supra* notes 192-202 and accompanying text (discussing *Kern River* and *Dakota* cases).

b. Condemnation of an Ongoing Enterprise

Judicial decisions resolving dormant Commerce Clause challenges to real property eminent domain actions have not provided guidance to determine when a condemnation action is unconstitutional,[236] and there are very few reported cases where the government's use of eminent domain to municipalize has resulted in a Commerce Clause challenge. The *Oakland Raiders* case is the only published case holding that the acquisition of an ongoing enterprise (as opposed to real property) using eminent domain is a violation of the dormant Commerce Clause.[237] Law review articles examined the impact of the *Oakland Raiders* case on a city's efforts to keep businesses from relocating by either threatening eminent domain or actually using the power to acquire an ongoing enterprise.[238] Before analyzing whether acquiring a utility through eminent domain will violate the dormant Commerce Clause, this part will critique both the *Oakland Raiders* decision's Commerce Clause analysis and the literature discussing how the Clause applies to using eminent domain to prevent business relocations.[239]

Once the California Supreme Court decided that the City of Oakland could proceed with an eminent domain action against the Raiders and remanded the case for a full trial on the merits,[240] the trial court, and then the appellate court, determined that the action was invalid under the Commerce Clause.[241] The California appellate court's analysis began with the plaintiff's claims that: (1) the action was not subject to

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[236] *See, e.g.*, Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1014-24 (D.S.D. 2002) (analyzing several South Dakota eminent domain statutes and regulations under dormant Commerce Clause using more lenient *Pike* balancing test, finding some valid and some not); Piedmont Triad Airport Auth. v. Urbine, 554 S.E.2d 331, 335 (N.C. 2001) ("We find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property."); City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 419 (1985) (noting that "eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce").

[237] *City of Oakland*, 174 Cal. App. 3d at 419 (1985) (noting that "[w]hether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case").

[238] *See, e.g.*, Abbey, *supra* note 49; Gray, *supra* note 44; Lazarus, *supra* note 49; Moss, *supra* note 49; Schultz & Jann, *supra* note 49; Tobin-Rubio, *supra* note 121.

[239] *See* 8A NICHOLS, *supra* note 48, § 22.06, at 22-54 to 22-87 (discussing use of eminent domain to prevent plant closings or relocations and the *Oakland Raiders* litigation.

[240] City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (remanding to trial court for full trial on merits of eminent domain action).

[241] *City of Oakland*, 174 Cal. App. 3d at 422 (finding it unnecessary to reach Raiders other arguments that purpose stated for eminent domain was not public use and that action was invalid under federal antitrust law).

Commerce Clause review because the issue was not raised until the petition for rehearing; (2) the action was exempt from scrutiny because the City was a market participant, not a regulator; and (3) eminent domain actions "can never violate the commerce clause."[242] Finding that the "law of the case did not preclude commerce clause review in the trial court,"[243] the court proceeded to address the two Commerce Clause defenses.

The California appellate court approached the Commerce Clause challenges by first determining whether the City was a market participant because "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*"[244] It decided that the City could not escape Commerce Clause review as a market participant[245] and briefly concluded that the City had not "attempted to enter the football market on an equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to sell."[246] Instead, the City had used its sovereign power of eminent domain. The court focused on the means the City used to enter the market — eminent domain — rather than the purpose achieved by retaining the team — promoting the public good. According to the court, a municipality, or state for that matter, can only qualify as a market participant if it either builds the business from nothing or purchases an ongoing enterprise through voluntary sale, not by using eminent domain.[247]

After determining that the City of Oakland's action was not exempt from Commerce Clause review under the market participant theory, the California appellate court proceeded to a Commerce Clause analysis based on an earlier California Supreme Court case applying state antitrust laws to another NFL franchise, the San Diego Chargers.[248] In

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[242] *Id.* at 418-20.

[243] *Id.* at 418.

[244] Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 595 (1997) (Scalia, J., dissenting).

[245] *City of Oakland*, 174 Cal. App. 3d at 419.

[246] *Id.*

[247] *But see* Gray, *supra* note 44, at 1347 (noting that "the means by which a city enters the market should not affect" city's status as market participant and concluding that "[t]he crucial point is not that Oakland could have used other means to keep the Raiders from relocating, but that Oakland participated in the sports franchise market through the exercise of its eminent domain power.").

[248] *City of Oakland*, 174 Cal. App. 3d at 420-21 (relying on Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378 (1983) to support court's determination that City of Oakland's eminent domain action "would more than indirectly or incidentally regulate interstate

Partee v. San Diego Chargers Football Co.,[249] the court found professional football to be similar in nature to professional baseball such that the "national uniformity required in regulation of baseball and its reserve system is likewise required in the player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships."[250]

The *Oakland Raiders* appellate court determined that, similar to the interstate commerce burdens found in *Partee*, the City of Oakland's use of its eminent domain power to prevent an individual team franchise from relocating "would implicate the welfare not only of the individual team franchise, but of the entire League."[251] The court found that such action "is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit."[252] Thus, without using any particular Commerce Clause framework, other than the *Partee* decision, the court concluded, "as did *Partee* in a similar context, that the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise."[253]

Commentators have both supported and rejected the *Oakland Raiders* case reasoning, which invalidated the City's eminent domain action on Commerce Clause grounds.[254] One law review Note concluded that "the commerce clause does not provide a legally justifiable basis for

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commerce").

[249] *Partree*, 34 Cal. 3d 378 (Cal. 1983).

[250] *Id.* at 385 (discussing United States Supreme Court decision in Flood v. Kuhn, 407 U.S. 258, 269-84 (1971), which affirmed lower court decisions finding that baseball's reserve system was unreasonable burden on interstate commerce, and finding that "[b]ecause in all relevant respects the burden on interstate commerce and the state interest resulting from the player-team-league relationship in professional football attacked by *Partee* is substantially the equivalent of that resulting from the reserve clause in professional baseball, the statements are applicable to professional football.").

[251] *City of Oakland*, 174 Cal. App. 3d at 421.

[252] *Id.*

[253] *Id.* at 422. For an in depth analysis of the Raiders decision and its use of the *Partee* case, see Tobin-Rubio, *supra* note 121, at 1198-213 (1987) (noting that "[u]nder a balancing test, a city's interest in condemnation may outweigh any burden imposed on the NFL when the taking involves a financially stable team, like the Raiders, and where the city is simply preserving the status quo"); *see also* Gray, *supra* note 44, at 1350 (concluding that under facts in Raiders case, "the city's interest in keeping the franchise from relocating would justify the indirect and incidental effects of the taking on interstate commerce").

[254] *See, e.g.*, Tobin-Rubio, *supra* note 121, at 1202 (noting that "[t]he Raiders II court's reliance on a single antitrust case without discussion of other relevant antitrust cases and without examination of the underlying issues is deceptively simplistic.").

invalidating the condemnation" and surmised that "[t]he Raiders II court attempted to use the commerce clause issue to act as an implicit limit on the doctrine of public use."[255] Another Note, which focused on the validity of condemning relocating industrial plants under the Commerce Clause, described the *Oakland Raiders* case as "an opinion virtually devoid of analysis,"[256] but nonetheless agreed with the court's determination that "[p]rotectionist condemnations not only fail to qualify for the market participation exception, they draw little if any constitutional sustenance from the exception's existence."[257] One commentator, rejecting the court's market participant conclusion, noted that the Raiders II decision, which balanced the city's interest against any impact on interstate commerce, "appears to misapply the facts involved in the litigation" and the "Raiders II court seems to have substituted its own views for the city's as to the importance of local interest in keeping the team."[258]

The reasoning in the *Oakland Raiders* case cannot be viewed as a bar to eminent domain actions against ongoing business enterprises under the dormant Commerce Clause. As discussed above,[259] the proposed state or municipal program, as well as the means by which the public program is accomplished (i.e., eminent domain) should be subject to Commerce Clause review unless exempted from review under the market participant theory.[260] Preventing plant relocations by using eminent domain must also be reviewed under the Commerce Clause, both as to the municipalization purpose and as to whether the condemnation power is being used appropriately to accomplish this purpose.

After the start of the Oakland Raiders litigation in the early 1980s, much was written about a municipality using its power of eminent domain to acquire a sports franchise to "keep it at home" or to prevent a local plant from relocating to another city or state.[261] An action to keep an industry in the community at the expense of other communities, in or outside the state, is protectionist in purpose, which is precisely the unjustified discrimination and economic protectionism that the

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[255] *Id.* at 1218-19.

[256] Lazarus, *supra* note 49, at 1345 n.6 (1987) (noting that "[a]lthough sports teams may provide considerable psychic benefits to a city, condemnations of industrial plants will generally involve far weightier local concerns than sports team relocations").

[257] *See id.* at 1358-59.

[258] Gray, *supra* note 44, at 1349.

[259] *See supra* note 101 and accompanying text.

[260] *See also* Gray, *supra* note 44 at 1346-50 (arguing "that the taking of a sports franchise by eminent domain fits into the market-participation exception").

[261] *See, e.g., id.*; Lazarus, *supra* note 49; Tobin-Rubio, *supra* note 121.

Commerce Clause was intended to prohibit.[262]

The United States Supreme Court has invariably struck down such protectionist actions. The Court applied a "per se rule [of invalidity] in two analogous situations: first, to state capture statutes which pressure out-of-state industries to relocate within the regulating state; and second, to state embargo statutes which prevented the exportation of natural resources."[263] While just compensation reduces the burden of these protectionist condemnations, they "will still affect the free movement of business to the exclusive detriment of out-of-state interests, and will still serve to isolate individual states from the national economic community."[264] Thus, using eminent domain power, local governments are free to make decisions that have impacts external to the local community and which affect "the welfare of the state's citizens beyond the borders of the particular municipality" being served.[265]

The dormant Commerce Clause may function to prohibit local government from making decisions with impacts outside of the state. However, local governments often make decisions that adversely impact surrounding in-state communities,[266] and it is not within the courts' jurisdiction to limit the government's eminent domain power whenever it results in such an external impact.[267] Although it seems sensible to limit local government eminent domain power when it is used to condemn an ongoing enterprise, it is doubtful that such limits would be applied to real property condemnations adversely affecting surrounding communities. Nevertheless, if either Congress or a state legislature

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[262] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979); *see also* New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988).

[263] Lazarus, *supra* note 49, at 1349 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)).

[264] *Id.* at 1355 (observing that with relocation condemnations "[t]he special nature of the assets subject to condemnation and the type of business likely to be condemned, make the payment of compensation particularly inadequate to remedy the constitutional defects of protectionist condemnations").

[265] *Id.* at 1360-61 (arguing also that language of Constitution protects against takings that are not for public use and such "protectionist condemnations involve more than one public" and thus are prohibited when they adversely impact communities outside condemning municipality).

[266] *See* Shelley Ross Saxer, *Local Autonomy or Regionalism? Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997), (suggesting that dispute resolution techniques in conjunction with regional impact report requirement be used to resolve problems with local government's failure to internalize externalities of their land use decisions).

[267] *But see* Lazarus, *supra* note 49, at 1362 (proposing that "[w]hen local legislatures usurp Congress' power to shape the national economy, the courts should strike their actions down.").

determines that eminent domain actions will not be allowed to adversely impact interests external to the local community, then courts can accordingly limit this power.[268]

Municipalities, when faced with the economically-disabling prospect of a major plant or business either shutting down completely or relocating to another town or state, have been advised to use, or threaten to use,[269] their eminent domain power to acquire an ongoing enterprise and prevent the closure.[270] Most likely, these local entities will be able to show a valid public purpose in wanting to keep jobs in the community. This is similar to the infamous *Poletown* case,[271] now overruled by *Wayne v. Hathcock*,[272] where the city was allowed to use its eminent domain power to condemn several neighborhoods in order to allow General Motors to expand their plant facility and allegedly create more jobs.[273] A municipality's decision to acquire an ongoing enterprise to keep it from relocating is certainly motivated by a protectionist desire to prevent the loss of jobs and other benefits for its citizens. Using the "threat" of eminent domain to prevent relocation is more akin to a regulation because it directly or indirectly affects the operation and decision-making of a private company, which may be interstate in nature.[274]

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[268] *But see* Abbey, *supra* note 49, at 849 (discussing typical plant closing statutes requiring such things as mandatory severance payments and concluding that when these regulations are reviewed, "regardless of which tests or rules are used, a court faced with the typical plant closing statute should strike it down as invalid under the dormant commerce clause").

[269] Shultz & Jann, *supra* note 49, at 404 (noting that "even the threat of using eminent domain can be an effective tool in keeping a plant where it is currently located").

[270] *See, e.g.*, Lazarus, *supra* note 49, at 1343 (observing that "local governments are with increasing frequency threatening to condemn businesses that are on the verge of relocation" and arguing that such actions violate the Commerce Clause because they burden interstate commerce); Moss, *supra* note 49, at 138-39 (observing that when corporations receiving public grants and tax subsidies decide to relocate, they may be required to repay such grants or face "takeover proceedings using the theory of eminent domain"); Schultz & Jann, *supra* note 49, at 400 (observing that broad interpretation of public use in cases such as *Poletown*, *Oakland Raiders*, and *Midkiff* "have led legal commentators and community activists to conclude that eminent domain could be used by municipalities as a tool, bargaining chip, or strategy to prevent a plant closing").

[271] Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004).

[272] *Hathcock*, 684 N.W. 2d at 787.

[273] *Poletown*, 304 N.W. 2d 455.

[274] *See, e.g.*, Nader & Hirsch, *supra* note 89, at 222 & n.105 (discussing how mere threat of condemnation will impact property value, induce land owners "to accept a dubious agreement," and "sometimes exacts costs even greater than would the actual exercise of the power").

The impact of a business decision to close a major company in an area "has been well documented and includes widespread social problems such as chronic unemployment, an increase in the demand for public services occurring while tax bases are shrinking, an out-migration of population, a decrease in real estate values, a loss of secondary businesses, and a general blow to community pride."[275] Thus, municipalizing the business to prevent it from closing may be viewed as permissible under the dormant Commerce Clause either because the market participant exception applies or because any incidental burdens on interstate commerce are not excessive in comparison to the local benefits achieved under the *Pike* balancing test.[276]

However, using eminent domain to accomplish protectionist municipalization may run afoul of the dormant Commerce Clause.[277] As discussed previously, the *Oakland Raiders* appellate court determined that the City of Oakland was not acting as a market participant because it used its governmental power of eminent domain instead of "enter[ing] the football market on an equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to sell."[278] Thus, the California court focused on the means, the act of acquisition itself, and found that the action was not entitled to the market participant exemption because it resulted in a forced, not voluntary, purchase. In addition, the court recognized the novel question of "[w]hether the commerce clause precludes taking by eminent domain of intangible property."[279] Unfortunately, the court's analysis of this issue was weak and does not lend much direction on this issue.[280]

If an eminent domain action is instituted to acquire an ongoing enterprise, the municipality must first show that its proposed purpose is public in nature and that it is operating as a market participant. If not exempt as a market participant, the city will need to pass judicial scrutiny under the dormant Commerce Clause based on the nature of its program as well as the means by which it is acquiring the program.

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[275] Schultz & Jann, *supra* note 49, at 384.

[276] *See id.* at 398 (noting that "it is more appropriate that maintaining a community's economic and social fabric receive a higher priority than a recreational public purpose").

[277] *See* Comment, *The Constitution and State Control of Natural Resources*, 64 HARV. L. REV. 642, 649 (1951) (suggesting state ownership of resource as possible device for retaining it for benefit of residents using eminent domain to acquire business, such as dairy, unless proceedings "occurred at a sufficiently advanced stage in the exploitation process" to cause Commerce Clause difficulties).

[278] City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 419 (Cal. Ct. App. 1985).

[279] *Id.*

[280] *See supra* notes 254-58 and accompanying text.

Municipalization may violate the dormant Commerce Clause, as might the city's use of eminent domain.

Both the end (i.e., municipalization), and the means (i.e., eminent domain), should be analyzed separately to determine whether the municipality's acts violate the dormant Commerce Clause. If either the municipalized program achieved or the condemnation power itself impermissibly burdens interstate commerce, local or state government will be constrained from using eminent domain to acquire an ongoing enterprise, such as a public utility, even if it is for a valid public use. Because Congress has the ultimate control over interstate commerce, it can legislatively either preempt or permit state or local eminent domain action to acquire an ongoing enterprise in order to municipalize.[281] Judicial review under the dormant Commerce Clause and legislative controls over eminent domain should pose a strong deterrent to government abuse of the eminent domain power.[282]

C. *The Privileges and Immunities Clauses*

Although it may initially seem applicable, the Privileges and Immunities Clause of Article IV of the Constitution does not apply to municipalization efforts. The clause protects citizens only — corporations are not considered citizens under this clause.[283] Thus, although the state must justify discriminatory legislation under both the Privileges and Immunities Clause and the dormant Commerce Clause, if eminent domain is exercised to acquire an ongoing corporate enterprise, it will not be subject to scrutiny under the Article IV Privileges and Immunities Clause. Similarly, the Privileges and Immunities Clause of the Fourteenth Amendment reaches to protect "only the rights of national citizenship, such as the right to travel, freedom of assembly and of petition, and access to the writ of habeas corpus."[284] Therefore, it is

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[281] BITTKER, *supra* note 108, § 6.01[B], at 6-6 to 6-7 ("Since Congress has the last word in either situation, the judicial decisions in effect allocate the burden of congressional inertia; if a regulation is stricken down, the state can restore it to constitutional health only by persuading Congress to act affirmatively; if, on the other hand, a state regulation is upheld, it remains in force unless and until Congress takes the initiative and supersedes it.").

[282] *See id.* § 6.01[C], at 6-7 to 6-8 ("It is familiar ground that the Commerce Clause does not itself preclude a state from regulating those matters which, not being themselves interstate commerce, nevertheless affect the commerce . . . and that the state's authority is curtailed only as Congress may by law prescribe in the exercise of the Commerce Clause." (quoting Hill v. Florida, 325 U.S. 538, 544 (1945) (Stone, C.J., concurring)).

[283] *Id.* § 6.06[H][2], at 6-89 (citing cases holding that term "citizen" does not include corporation).

[284] *Id.* § 6.06[H][3], at 6-91.

unlikely that any effort to municipalize will impact these national citizenship rights and be subject to a Fourteenth Amendment challenge of this type.

D. Commerce Clause and Tenth Amendment Constraints on Federal Power

Congress' regulatory power can be constrained by the Commerce Clause and by the Tenth Amendment's protection of reserved state sovereignty. Congress' authority to regulate "commerce" has been applied broadly over the years to allow federal legislation to impact economic activities previously regulated at the state level.[285] However, this broad power has been curtailed with the Court's recent invalidation of the Gun-Free School Zones Act[286] and the Violence Against Women Act,[287] prompting political and academic debate over the proper limits of Congressional power.[288] Indeed, for over a decade, Professor Richard Epstein has expressed concern about the broad scope of the Commerce Clause. He has argued that its scope "should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them," leaving all else to the states.[289] Nevertheless, even when the Commerce Clause is viewed as an authorization for federal control over commercial activities, if Congress acts beyond its power under the Commerce Clause, invading state sovereignty, the Tenth Amendment may be used to restrain such congressional power.[290]

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[285] Robert J. Pushaw, *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1204 (2003) (discussing how Court broadened Commerce Clause framework to allow increased federal control).

[286] *See generally* United States v. Lopez, 514 U.S. 615 (1995).

[287] *See generally* United States v. Morrison, 529 U.S. 598 (2000).

[288] *See* Pushaw, *supra* note 285, at 1209-11 (suggesting a "Neo-Federalist" approach to this interpretation, which would allow Congress to "regulate all market-oriented activities that affect more than one state," but would "give the Court a legally principled basis for invalidating acts of Congress that attempt to reach noncommercial matters of purely moral, cultural, or social import"); Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795, 836 (2003) ("[E]ven the dissent [in *Lopez*] acknowledged that the Commerce Clause has limits: it is still an enumerated power; not everything is commerce."). For an earlier discussion of the scope of the commerce power, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1408 (1987) (noting that "[t]here is a long road from Gibbons to modern doctrine of the broad reach of congressional power under the commerce clause").

[289] Epstein, *supra* note 288, at 1454; *see also* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190-91 (1996); Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209, 216-17 (1998).

[290] Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 769-70 (1982) (upholding Titles I and II of Public Utility Regulatory Policies Act (PURPA) against Tenth

The contours of Tenth Amendment jurisprudence, thus, help establish areas in which states and municipalities have the power to act. For example, in *Federal Energy Regulatory Commission v. Mississippi*,[291] the United States Supreme Court held that FERC had the power under the Commerce Clause to regulate intrastate public utilities and did not violate the Tenth Amendment by using the Public Utility Regulatory Policies Act of 1978 ("PURPA")[292] to "direct state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."[293] While this holding required states to consider certain standards, the legislation also preserved state authority by providing that "[n]othing in this subsection prohibits any State regulatory authority or nonregulated . . . utility from making any determination that it is not appropriate to implement [or adopt] any such standard pursuant to its authority under otherwise applicable State law."[294] Thus, the Court determined state sovereignty was preserved under the Tenth Amendment[295] and that Congress acted within its power under the Commerce Clause because "federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power."[296]

In *New York v. Federal Energy Regulatory Commission*,[297] the United States Supreme Court addressed a challenge to FERC's jurisdiction "to order unbundling of wholesale transactions . . . as well as to regulate the unbundled transmissions of electricity retailers," holding that the text of the Federal Power Act supported such federal jurisdiction.[298] The Court upheld the challenged decision of the D.C. Circuit in *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*,[299] which

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Amendment challenge to congressional activity).

[291] 456 U.S. 742 (1982).

[292] Pub. L. No. 95-617, 92 Stat. 3117 (1978).

[293] *Fed. Energy Regulatory Comm'n*, 456 U.S. at 745-46.

[294] *Id.* at 750 (discussing 16 U.S.C. §§ 2621(a), 2623(a) and 15 U.S.C. § 3203(a)).

[295] *Id.* at 766 n.29 ("PURPA, of course, *permits* the States to play a continued role in the utilities field, and gives full force to the States' ultimate policy choices."). *But see id.* at 781 (O'Connor, J., concurring and dissenting in part) ("By taxing the limited resources of these [state] commissions, and decreasing their ability to address local regulatory ills, PURPA directly impairs the power of state utility commissions to discharge their traditional functions efficiently and effectively.").

[296] *Id.* at 755.

[297] New York v. Federal Energy Regulatory Comm'n, 535 U.S. 1 (2002).

[298] *Id.* at 23-24. The term "bundled" means "that consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery." *Id.* at 5.

[299] 225 F.3d 667 (D.C. Cir. 2000).

described the division of federal and state power in the electric energy industry. It stated that "FERC has regulated wholesale power sales and interstate transmissions, and state agencies have retained jurisdiction over bundled retail transactions, including service issues and the intrastate sale and distribution of electricity through local distribution facilities."[300] Despite the dissent's observation in *New York v. Federal Energy Regulatory Commission* that "it is impossible for either a utility or FERC to isolate or distinguish between the transmission used for bundled or unbundled wholesale or retail sales,"[301] the majority upheld "FERC's choice not to assert jurisdiction over bundled retail transmissions" because of the "complicated nature of the jurisdictional issues."[302]

The jurisdictional balance between state and federal authority in various utility industries, such as natural gas, electricity, and water, is a complicated one that must be carefully maintained by legislative, administrative, and judicial processes.[303] Federal power is expansive under the Commerce Clause, but it must also be constrained by Tenth Amendment considerations. Courts will examine federal legislation and regulations to make sure that they do not "intrude impermissibly into state sovereign functions."[304] "Utility regulation is a traditional function of state government, and the regulatory commission is the most integral part of that function."[305] Particularly in the utilities industry, Congress and the courts must allow states to "serve as laboratories for the development of new social, economic, and political ideas"[306] and not be required to "surrender this state legislative power"[307] to federal

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[300] *Transmission Access Policy Study Group*, 225 F.3d at 691.

[301] *New York*, 535 U.S. at 33 (Scalia, J., dissenting).

[302] *Id.* at 28; *see also id.* at 12 ("When a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation" (quoting FERC analysis of jurisdictional issues distinguishing between transmissions and sales)).

[303] Note, for instance, the problem of the so-called "Attleboro gap," which was created when "the U.S. Supreme Court invalidated [Rhode Island's rate regulation for electricity sold to a Massachusetts company] because it imposed a 'direct burden upon interstate commerce'. . . [leaving] an area in which neither federal nor state regulators had jurisdiction." Rossi, *supra* note 6, at 1781-82; *see also New York*, 535 U.S. at 6 (discussing "Attleboro gap" and Congress' response by enacting Federal Power Act).

[304] *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 777 (1982) (O'Connor, J., dissenting).

[305] *Id.* at 781.

[306] *Id.* at 788.

[307] *Id.* at 791.

regulatory agencies.[308] Therefore, any federal legislation designed to constrain states in using eminent domain to municipalize public utilities will be closely scrutinized under the Tenth Amendment.

E. Other Constraints on Eminent Domain Power

In addition to the constraints already mentioned, there are other possible theories for limiting the use of eminent domain power to acquire an ongoing enterprise or utility. These other theories include, but are not limited to, federal preemption under the Supremacy Clause, antitrust, and the Contract Clause.[309] Although each of these theories might warrant extended discussion in the context of using eminent domain to acquire an ongoing enterprise, this Article will close with only a brief introduction to the issues involved in applying these other theories.[310]

1. The Supremacy Clause and Federal Preemption

Federal preemption and Supremacy Clause issues relate to the discussion above about the Commerce Clause and the Tenth Amendment because they are theories that define the limits of federal power. Because the Constitution provides that federal law is supreme over state law,[311] states are restricted from enacting laws contrary to

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[308] *See* Rossi, *supra* note 6, at 1785 ("In fashioning limits on state regulatory power, courts must balance the advantages of state power, including its promotion of experimentation and the lower cost political participation it offers home-turf stakeholders, with its costs, many of which are related to the nondemocratic implications of adverse interest group behavior in the regulatory process.").

[309] J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 887, 897 (1996) (discussing "regulatory contract" concept, which is based on the idea that there exists "a bargain in which the state conferred special benefits on the regulated firm in return for its acceptance of rate regulation and public-services obligations"). Other theories may be applicable to the municipalization process, but will not be discussed in this Article. *See, e.g.*, Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002) (concluding that tort and property claims involving transmission and sale of wholesale electric power were preempted by Federal Power Act); Pac. Gas & Elec. Co. v. Cal. Pub. Util. Comm'n, 263 B.R. 306, 317 (N.D. Cal. 2001) (holding that California Public Utilities Commission "accounting adjustment" actions against public utility in bankruptcy "fall within the 'police and regulatory' exception to the automatic stay").

[310] For more information about some of these theories, see Rossi, *supra* note 6, at 1785-89 (discussing "regulatory federalism doctrines" such as federal preemption, Supremacy Clause, dormant Commerce Clause, and antitrust laws).

[311] U.S. CONST. art. VI, cl. 2 (also called "Supremacy Clause" and stating "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ., any Thing in the Constitution or Laws

federal law. This "Supremacy Clause" allows the federal government to preempt state regulation in certain areas, either because the state regulation conflicts with federal law or because it attempts to regulate in an area over which Congress has asserted complete authority. For example, in *Hayfield Northern Railroad Co., Inc. v. Chicago & North Western Transportation Co.*,[312] the United States Supreme Court held that the Interstate Commerce Act did not preempt a state eminent domain statute used to condemn abandoned railroad property.[313] The Court determined that the state condemnation process did not frustrate the federal abandonment legislation, which had an overall purpose "to make the railroad industry more efficient and productive," even though the state legislation may not have provided for the "economically optimal use of rail assets."[314]

Some have viewed California's refusal to allow utilities the right to pass through to consumers the costs of purchasing wholesale power from the California Power Exchange to be preempted by federal law under the Supremacy Clause.[315] The balance between state and federal regulatory jurisdiction is complex and current preemption doctrine may be difficult to apply to the complicated jurisdictional issues found in energy regulatory schemes.[316] However, as Professor Jim Rossi points out, "[i]f invoked by courts with the idea of limiting states' ability to thwart the goals of federal policies, doctrines such as federal preemption and the dormant commerce clause hold promise to limit, or at least temper, the use of state political processes to thwart operation of competitive markets in electric power."[317]

2. Antitrust

State action can be restricted by federal antitrust laws, but only when the state or municipality is acting as a market participant.[318] If the state

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of any State to the Contrary notwithstanding").

[312] 467 U.S. 622 (1984).

[313] *Id.* at 625.

[314] *Id.* at 635-36.

[315] Rossi, *supra* note 6, at 1786 (quoting Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse:" Jurisdiction Over Electric Utilities*, 22 ENERGY L.J. 1, 19 (2001)).

[316] *See* Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1306 (1990) (arguing "that prevailing preemption doctrine gives courts insufficient guidance in complex cases involving energy regulation" and proposing "that courts use economic analysis to supplement standard tools of statutory interpretation").

[317] Rossi, *supra* note 6, at 1786.

[318] S. Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 102 (1984) (Rehnquist, J., dissenting).

"acts as a market regulator, it is immune from antitrust scrutiny" under the state action immunity doctrine.[319] The United States Supreme Court, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[320] established a "two-step test for determining whether an alleged state-sponsored restraint of competition is immune from federal antitrust scrutiny. The *Midcal* Court held that the challenged restraint must be (1) clearly articulated, and (2) actively supervised by the state."[321] This test was applied in *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.*,[322] where the Tenth Circuit held that Oklahoma Gas & Electric Co. ("OG & E"), as a privately owned public utility company, was shielded from federal antitrust laws under the state action doctrine because it was "acting in accordance with a clearly-articulated state regulatory program and because it is actively supervised by the OCC [Oklahoma Corporation Commission]. . . ."[323]

In *Snake River Valley Electric Ass'n v. PacifiCorp*,[324] the Ninth Circuit, applying the same *Midcal* test for state action immunity, held that the first prong was satisfied because the Idaho statute "clearly expresses a policy to displace competition among electrical suppliers,"[325] but the second prong was not because there was not active state supervision "of private agreements to divide customers."[326] The court determined that the utility's anticompetitive actions in refusing to consent to another supplier's request to provide power to some of the utility's existing customers were not shielded from antitrust laws by the state action immunity doctrine.[327] Thus, a brief analysis suggests that so long as a municipality or state is functioning pursuant to a clearly articulated and actively supervised regulatory scheme, any anticompetitive actions of the municipality will be shielded from federal antitrust law.[328] However,

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[319] *Id.* at 102 (citing Parker v. Brown, 317 U.S. 341, 350-52 (1943)).

[320] 445 U.S. 97 (1980).

[321] Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1192 (9th Cir. 2001) (citing *Midcal*, 445 U.S. at 105); *see also* Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1243-54 (1995) (discussing *Midcal* test and review of state and local legislation under Sherman Act).

[322] 244 F.3d 1220 (10th Cir. 2001).

[323] *Id.* at 1228.

[324] 238 F.3d 1189 (9th Cir. 2001).

[325] *Id.* at 1193.

[326] *Id.* at 1195.

[327] *Id.*

[328] *See* Gifford, *supra* note 321, at 1258-66 (suggesting reform of the Sherman Act's state-action doctrine which would exempt most state legislation from judicial challenge under the *Midcal* test and "most local legislation enacted under a state wide mandate"); *see also*

if the municipality is acting as a market participant, exempt from dormant Commerce Clause restraints, it may be subject to antitrust scrutiny for any anticompetitive actions.

Inverse to a private company bringing an antitrust claim against a municipality, a municipality may assert an antitrust claim against a privately-held utility which refuses to cooperate with municipal systems by selling power or "wheeling" power to such systems.[329] In *Otter Tail Power Co. v. United States*,[330] the United States Supreme Court upheld a finding that a private electric utility company violated antitrust law by attempting "to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system."[331] Thus, when a city decides to municipalize one or more of its public utilities, anticompetitive resistance by privately owned utilities may be subject to an antitrust suit.[332]

3. The Contracts Clause

When a state or municipality uses its eminent domain power to acquire an ongoing enterprise, existing contracts between the enterprise and other entities may be substantially impaired. Such an interference

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Gray *supra* note 44, at 1358-59 (noting that "[a]lthough it could be a close question, the peculiar nature of eminent domain law should trigger the 'state action' exemption" and be immune from antitrust claims); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715 (1986) (proposing and justifying "a new test for preempting state and local regulation under the antitrust laws").

[329] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973) (explaining that to "wheel" power is "to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility").

[330] *Id.*

[331] *Id.* at 368.

[332] *See also* Transmission Access Policy Study Group v. Fed. Energy Regulatory Comm'n, 225 F.3d 667, 685 (D.C. Cir. 2000) (discussing *Otter Tail* decision as antitrust case where Supreme Court concluded that "the district court could require Otter Tail Power Company to wheel power for its competitors as a remedy for monopolistic practices" but concluding that "*Otter Tail* does not govern the disposition of this case"); City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 645, 656 (10th Cir. 1992), *overruled on other grounds by* Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137 (10th Cir. 1997) (upholding dismissal of antitrust claims against natural gas company asserted by eight cities protesting company's "decision to terminate a temporary program whereby the Cities could purchase gas from third party suppliers which [company] would transport over its pipeline" and finding *Otter Tail* inapplicable to facts); Cal. Wholesale Elec. Antitrust Litig. v. Dynegy Power Mktg., Inc., 244 F. Supp. 2d 1072, 1085 (S.D. Cal. 2003) (finding *Otter Tail* decision inapplicable because "while as a general proposition it may be true that electric utilities subject to FERC jurisdiction may not enjoy antitrust immunity, it does not imply that Plaintiff may nonetheless invade FERC's jurisdiction by employing a private, state-law antitrust remedy that changes FERC-regulated interstate wholesale electricity rates").

with private interests could potentially violate the Contracts Clause,[333] which prohibits state or local laws from interfering with existing contracts.[334] The Contracts Clause has rarely been used in modern times to invalidate a state or local law and "[u]nder current law, a government interference with private contracts will be struck down only if there is a 'substantial impairment' of the contract and only if the law fails to reasonably serve a 'significant and legitimate public purpose.'"[335] Nevertheless, a local group of private companies challenged a municipality's attempt to municipalize waste collection and disposal as substantially interfering with existing contracts with the citizens in violation of the Contracts Clause in *Waste Connections of Kansas, Inc. v. City of Bel Aire, Kansas*.[336] In *Waste Connections of Kansas, Inc.*, a city sought to provide its citizens with a single service solid waste disposal and recycling program that would allow them to dispose of this material for a fee substantially lower than that charged by other private waste collection companies.[337] In response to this action, a group of waste collection companies, not selected to participate in this exclusive contract, sued the city, alleging that the city's ordinance substantially impaired existing contracts between the waste collection companies and the city's residents.[338]

First, the Kansas district court determined that the city's action did not substantially impair existing contracts because "the Ordinance in no way prohibits the City's residents from continuing their existing contracts."[339] The waste collection companies should have no expectation that the government will not regulate their contracts or that customers will renew their existing contracts in perpetuity, particularly in an industry which is heavily regulated.[340] Second, the court held that even assuming existing contracts were substantially impaired, "the City's exercise of its inherent authority to create conditions beneficial to its residents is

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[333] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

[334] CHEMERINSKY, *supra* note 127, § 8.3, at 494.

[335] *Id.* § 8.3, 495 (citing Energy Reserves Group v. Kan. Power & Light, 459 U.S. 400, 411-12 (1983)).

[336] 191 F. Supp. 2d 1238 (D. Kan. 2002).

[337] *Id.* at 1242-43.

[338] *Id.*

[339] *Id.*

[340] *Id.* at 1250-51; *see also Energy Reserves Group, Inc.* 459 U.S. at 413 (noting that in determining whether contractual rights have been substantially impaired by state regulation, it is significant "that the parties are operating in a heavily regulated industry").

justifiable."[341] When a state or municipality uses its eminent domain power to acquire a public utility, it is generally doing so "to safeguard the vital interests of its people"[342] by providing lower cost utility services. Therefore, under *Waste Connections of Kansas, Inc.*, a municipalization effort will likely be favorably balanced against any impairment of existing contractual relationships.[343]

CONCLUSION

The overt manipulation and exploitation of the electric utilities market by a private corporation in the Enron scandal helped spur some local governments to municipalize public utilities to provide cheaper and more stable services to their citizens. The municipalization process, whereby a local or state government unit becomes the owner and operator of a public service previously provided by a private entity, is an attractive but potentially dangerous response to market deficiencies in privately provided public services. This protectionist response to external threats from within and without the state may violate the dormant Commerce Clause and other federal constraints under certain circumstances.

A government's decision to municipalize will, hopefully, be a carefully considered one that is beneficial to the general public welfare.[344] As such, the government's use of eminent domain to achieve a public purpose will be valid under the Fifth Amendment so long as just compensation accompanies the conversion of private enterprise property into public ownership. Professors Kearney and Merrill predict that regulated industries law will evolve in one of three ways or blend at least two of these three actions. The three possibilities are: (1) revert to an original regulatory model with, perhaps, state ownership of public utilities; (2) continue to place "critical reliance on the concept of natural monopoly;"[345] (3) abandon the concepts of natural monopoly and active

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[341] *Waste Connections of Kansas, Inc.*, 191 F. Supp. 2d at 1251.

[342] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934) (approving state statute providing for moratorium on mortgage foreclosures, even though it impaired preexisting contract rights).

[343] *See Energy Reserves Group, Inc.*, 459 U.S. at 411 ("If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. . . .").

[344] *But see* Lazarus, *supra* note 49, at 1354 n.62 (noting that protectionist condemnations may act as disincentive to private development since "[p]rivate owners, fearing public takeovers, might be reluctant to make large investments, given the risk of receiving inadequate compensation after condemnation").

[345] Kearney & Merrill, *supra* note 159, at 1404.

regulation of public utilities, instead relying on the constraints of "technological innovation, market forces, and antitrust and common-law actions."[346] If the first path toward state or local ownership is taken, legislative and judicial oversight must be available to guard against public monopolies, parochialism, and governmental abuse of power.

Although "the power of eminent domain is merely the means to the end"[347] for purposes of Fifth Amendment scrutiny, the use of this extraordinary power for purposes of municipalization may be subject to dormant Commerce Clause review. The actual operation of a private enterprise by local government for a public purpose may also be subject to dormant Commerce Clause review, even if eminent domain is not used to municipalize. Both the ends to be achieved by municipalization and the means by which it may be accomplished, including eminent domain, should be subject to scrutiny because public utilities produce articles of commerce such as water, gas, and electricity.

If the state or local government facially discriminates against out-of-state interests either through municipalization or by using eminent domain to achieve this end, the action must be invalidated as per se invalid, regardless of the public benefits achieved. However, if the state or local government burdens interstate commerce through neutral action, the court must use the *Pike* balancing test to determine whether the local benefits achieved outweigh the burden on commerce. Finally, state and local governments may be able to successfully avoid a dormant Commerce Clause challenge altogether by asserting the market participant exception. As the owner and operator of a public utility, the state or local government will be "burdened with the same restrictions imposed on private market participants . . . . [and] should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."[348]

To curb the potential for government abuse of power, both federal and state constitutional and legislative constraints must be applied. The major federal constraints against improper municipalization and eminent domain usage include the Fifth Amendment public use doctrine, the dormant Commerce Clause, the Commerce Clause, the Tenth Amendment, the Supremacy Clause, the Contract Clause, and antitrust legislation.

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[346] Kearney & Merrill, *supra* note 159, at 1403-05 (seeing that "the real choice to be made in the future is between a world of regulatory transformation and a world of deregulation").

[347] Berman v. Parker, 348 U.S. 26, 33 (1954).

[348] Coenen, *supra* note 11, at 421 (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 429 (1980)).

Professor Coenen, in his seminal article on the market participant exemption, addressed the concern about "state-managed economies," noting that Congress would have the power to respond to "a massive governmental effort to absorb the private sector, coupled with the widespread exclusion of nonresident traders," regardless of the Court's reaction based on the market participant rule of the dormant Commerce Clause.[349] However, Coenen also pointed out that "the pro-national values of the commerce clause do not stand alone"[350] and that our system of federalism encourages state freedom to experiment with "state choices about distributing state resources."[351]

The structure of public utility regulatory law is complex and requires a careful balancing of legislative and judicial action, at both the federal and state levels, to control governmental and private abuses. As we alternately deregulate to combat government inefficiencies, and then municipalize to combat private enterprise greed, the federal Constitution and Congress will serve as safeguards against the abuse of government power. Attempts to municipalize other private enterprises in "sweeping protectionist incursions by states into historically private enterprises"[352] will eventually get the attention of Congress and "Congress remains capable of protecting national interests in this area even if the Court holds back."[353] Although we do "live in a 'pervasively private market' precisely because American sensibilities eschew state-managed economies,"[354] we should be wary of government efforts to municipalize private markets and we must understand how current federal and state constraints may respond to monitor these efforts.

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[349] *Id.* at 418.

[350] *Id.*

[351] *Id.* at 418-19.

[352] *Id.* at 418.

[353] *Id.* at 438.

[354] *Id.* at 417-18 (addressing Professor Gerger's concerns as stated in Gerger, *supra* note 8, at 1142-43).

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