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Raiders: $72 Million, City of Oakland: 0...Was That the Final Gun - A Story of Intrigue, Suspense and Questionable Reasoning

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RAIDERS: $7.2 MILLION, CITY OF OAKLAND: 0 . . . WAS THAT THE FINAL GUN? A STORY OF INTRIGUE, SUSPENSE AND QUESTIONABLE REASONING

I. INTRODUCTION

In 1980, the City of Oakland, California ("Oakland"), began litigation which was both novel and thought provoking: the attempted condemnation of the Oakland Raiders professional football team ("Raiders"). With the October 1988 settlement of the Raiders' damage claims, precipitated by Oakland's abortive condemnation, the fall-out from this litigation has apparently come to a close,[1] nearly nine years after it began. The enormity of the settlement amount raises questions about the propriety of the unsuccessful condemnation and the reliability of the dormant commerce clause defense.

This casenote provides an overview of "this seemingly endless cycle of litigation,"[2] focusing on the court of appeal's convoluted legal theory. The court's theory arose from a failure to focus on the case's legitimate challenges under California condemnation law, and the finding of a tenuous "conflict" between the dormant commerce clause and the eminent domain power.[3] Moreover, this casenote supports the proposition that, in the context of this eminent domain action, the commerce clause is not a legitimate limitation on a municipality's power of condemnation.

II. BACKGROUND

This case's foundation was laid upon the creation of the Oakland Raiders' American Football League ("AFL") franchise in 1959.[4] At that time, no football stadium existed in Oakland so the earliest games were

1. Los Angeles Times, Oct. 13, 1988, Part I, at 24, col. 1 (reporting a settlement agreement between the City of Oakland and the Los Angeles Raiders for 4 million dollars, plus 3.2 million dollars paid to Raider attorneys for their services); *see also* JUST COMPENSATION, Vol. 32, No. 12, Dec. 1988, at 3.

2. City of Oakland v. Los Angeles Raiders, 203 Cal. App. 3d 78, 81, 249 Cal. Rptr. 606, 608 (1988).

3. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 478 U.S. 1007 (1986).

4. The facts surrounding the case are summarized from the Intended Decision of Superior Court Judge Nat A. Agliano, City of Oakland v. Oakland Raiders, No. 76044 at 2-11 (Cal. Super. Ct. filed July 22, 1983) (hereinafter *"Intended Decision,"* unless otherwise noted).

played in San Francisco's Candlestick Park. Wins were few and far between and the spectator turn-out was low.

Oakland constructed Frank Youell Field in response to the Raiders' owners' announcement that they intended to move or sell the franchise unless Oakland provided a suitable playing field on San Francisco Bay's east shore.[5] This 20,000 seat stadium became the site of Raiders' home games until 1966. In 1963, Al Davis ("Davis") joined the club as head coach. As a result, the Raiders experienced one of the most successful eras known in professional sports.[6]

The Raiders' success provided the impetus for construction of a major sports and civic complex in Oakland, including the Oakland-Alameda Coliseum ("Coliseum"), which was home for both a major league baseball team and the Raiders.[7] The coliseum complex included an indoor arena and an exhibition hall.

Oakland and Alameda County ("County") formed the non-profit, Oakland-Alameda County Coliseum Commission ("OACC") to oversee the Coliseum construction and operation, which was built on land owned by both Oakland and the County.[8] The Raiders insisted that the OACC change the original two-tiered stadium plan to a three-tiered plan.[9] This new design proved to be costly, time-consuming and created conflicts during seasonal overlaps for the football and baseball games.[10]

Raiders' home games were sold out every year to season ticket holders from 1968 through 1979.[11] The team's success and the expense of player salaries sent ticket prices soaring. Nevertheless, due to the Coliseum's seating limitations, the demand for tickets could not be met. A waiting list of 8,000 to 10,000 potential buyers developed.[12] The Coliseum remained the Raiders' home from 1966 until the club moved to Los Angeles in 1982.

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5. *Id.* at 2.

6. *Id.*

7. *Id.* at 3.

8. In 1964, funding for the complex was acquired through the proceeds of a $25,500,000 (4.125%) bond issue, fully maturing in 2004, with an annual pay down rate of $1,350,000. Cost of the complex construction was $27,000,000. *Intended Decision, supra* note 4, at 3-4.

9. *Id.* at 4.

10. *Id.* Because of special contractual rules in the lease agreements between the Raiders and the OACC and the Oakland Athletics baseball franchise and the OACC, football games could not be played within 36 hours of baseball games. This created scheduling conflicts between the two sports. For example, when the Athletics finished a game on Saturday, the Raiders could not play a game on Sunday without violating their contract with the OACC. Thus, many of the Raiders' home games were played in the stadium at University of California at Berkeley. *Id.* at 6.

11. *Id.* at 5.

12. *Intended Decision, supra* note 4, at 5-6.

In 1966, the Raiders and the OACC entered into a five-year percentage lease agreement[13] with five three-year renewal options. The OACC agreed to these lease terms because of the AFL's strength and the Raiders' owners' desire to keep the club in Oakland, provided it was successful.[14] The Raiders also negotiated a release agreement from the first five-year term, exercisable only if the National Football League ("NFL") required the club to relocate after the AFL/NFL merger in 1966. The Raiders, however, were not required to move.[15]

In subsequent years, the relationship between the Raiders and the OACC became strained. First, the lease terms gave baseball priority over football.[16] Second, the Coliseum's locker rooms, scoreboards, sound systems and inadequate seating became additional sources of dispute. The Raiders and the OACC offered various settlement proposals.[17] However, no agreement was reached.[18] Finally, the Raiders demanded construction of luxury seating boxes.[19]

Although the OACC agreed to the luxury boxes in principle, it would not underwrite the project unless the Raiders guaranteed the project construction loans and signed a long-term lease.[20] However, the Raiders refused to guarantee a loan on property owned by Oakland and shared with other sport clubs.[21] Unable to reach an agreement, the Raiders allowed the original lease to expire.[22]

In 1978, the Los Angeles Rams decided to move from the Los Angeles Memorial Coliseum to Anaheim Stadium in Orange County. The Los Angeles Coliseum Commission ("LACC") solicited other NFL teams with expiring leases to play in the Los Angeles Memorial Coliseum beginning in 1980.[23] The LACC negotiated with the Raiders through 1979 and into 1980.[24] However, the Raiders' prospective move was ham-

13. As part of the lease agreement between the OACC and the Raiders, rent of the Coliseum was in part calculated on a percentage of the gross ticket sales to the Raiders' home games. *Id.* at 4.

14. *Id.*

15. The NFL allowed the Raiders to remain in Oakland upon the express condition that they pay substantial consideration to the San Francisco 49'ers. Only two teams were required to pay such consideration for territorial infringement after the AFL/NFL merger, the other being the New York Jets to the New York Giants. *Id.* at 5.

16. *Id.*

17. *Intended Decision, supra* note 4, at 6.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Intended Decision, supra* note 4, at 6-7.

22. *Id.* at 7.

23. *Id.*

24. *Id.*

pered when the NFL announced plans to block the move under Rule 4.3 of the NFL constitution.[25] Rule 4.3 requires that two-thirds of the NFL membership must approve of any franchise move.[26] This announcement prompted the LACC to challenge rule 4.3's validity in federal court.[27] However, the challenge was dismissed due to the LACC's lack of standing.[28]

On January 9, 1980, the Raiders rejected the OACC's new licensing and lease agreement for unspecified reasons.[29] Thereafter, a task force consisting of members of the Oakland City Council, the County, the OACC and private industry was created to negotiate a new lease with the Raiders.[30] On January 19, 1980, the task force presented Davis with a new proposal, including a $4,000,000 loan for construction of luxury boxes.[31] Although Davis characterized this offer as "the first reasonable one he had seen," he turned it down as insufficient.[32]

On January 22, 1980, Davis received a revised proposal from the task force.[33] However, Davis made the additional demand that the OACC, Oakland and the County pay the Raiders' territorial infringement indemnity to the San Francisco 49'ers,[34] amounting to a $1,000,000 rent credit spread over the lease term.[35] Davis also demanded an additional $1,000,000 in construction loan financing.[36] The parties agreed in principle.[37] The Mayor of Oakland was satisfied that the new terms were necessary "considering the importance of keeping the Raiders in Oakland."[38] During these negotiations, the NFL Commissioner's office informed a member of the task force that the NFL would oppose the Raiders' move to Los Angeles.[39]

On January 28, 1980, the Raiders and the task force met again to finalize the revised proposal, but a meeting of the minds did not occur for

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25. *Id.*
26. *Intended Decision, supra* note 4, at 7.
27. *Id.*
28. Los Angeles Memorial Coliseum v. National Football League, 468 F. Supp. 154 (C.D. Cal. 1979).
29. *Intended Decision, supra* note 4, at 7.
30. *Id.* at 8.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See supra* note 15.
35. *Intended Decision, supra* note 4, at 8.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 8-9.

disputed reasons.[40] Oakland argued that the Raiders had again submitted new and additional demands which were unacceptable.[41] The Raiders argued the task force reneged on the agreed terms.[42]

On February 1, 1980, the County's Board of Supervisors revoked the negotiation authority of the task force without explanation.[43] On February 4, 1980, the OACC presented another proposal to the Raiders.[44] The Raiders refused the proposal because it reiterated certain demands which the Raiders previously found unacceptable.[45] Each side charged the other with bad faith in the negotiations.[46] The Raiders, concluding that no other alternative existed, resolved to move to Los Angeles.[47]

Oakland moved quickly. On February 22, 1980, Oakland filed an eminent domain action to acquire all of the Raiders' franchise rights related to the NFL Franchise Certificate of Membership.[48] This certificate signified the right to operate a professional NFL football club in Oakland.[49] Additionally, Oakland alleged that the property condemned consisted of all the Raiders' rights in football player contracts which were associated with the operation of the Raiders' franchise.[50]

Concurrently with filing the condemnation action, Oakland acquired a temporary restraining order prohibiting the Raiders from leaving Oakland.[51] On April 17, 1980, the trial court granted a preliminary injunction prohibiting the Raiders' move to Los Angeles, based upon a

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40. *Intended Decision, supra* note 4, at 9.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Intended Decision, supra* note 4, at 9.

46. *Id.*

47. *Id.*

48. *Id.* at 10-11.

49. *Id.* at 11.

50. The actual resolution of necessity described the property to be condemned as:

> All of those rights associated with, incidental to, deriving from, or related to the Franchise Certificate of Membership issued by the National Football League and signifying the rights associated with permission to operate a National Football League professional football club franchise in Oakland, California; in addition thereto, said property consists of all rights and privileges of Oakland Raiders, Ltd., relating to football player contracts, agreements, options or other contractual or quasi-contractual matters associated with the operation of said football club franchise.

Trial Brief of Plaintiff at 3, City of Oakland v. Oakland Raiders, No. 76044 (Cal. Super. Ct.), *aff'd*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 478 U.S. 1007 (1986).

51. Appellant's Opening Brief at 1, City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031), *cert. denied*, 478 U.S. 1007 (1986).

showing of irreparable harm to Oakland if the franchise relocated.[52] Oakland then proposed and passed a resolution of public necessity,[53] formally condemning the Raiders' franchise rights. On June 16, 1980, the trial court granted summary judgment against Oakland.[54] The trial court ruled that the franchise could not be condemned because intangible property could not be condemned as a matter of law.[55] In 1982, this judgment was reversed by the California Supreme Court (*"Raiders I"*).[56] The *Raiders I* court found, among other things, that intangible property was subject to condemnation like any other property, and remanded the case for trial.[57] The California Supreme Court vacated a court of appeal's decision affirming the trial court's decision.[58]

Upon remand, the trial court denied Oakland's application for an order reinstating the preliminary injunction.[59] Oakland then sought a writ of mandate from the court of appeal.[60] The court of appeal issued a peremptory writ of mandate, directing the trial court to conduct a hearing on Oakland's application to reinstate the preliminary injunction (*"Raiders II"*).[61] Nevertheless, the Raiders moved to Los Angeles and began playing their home games at the Los Angeles Memorial Coliseum.[62]

Following the regular 1982 football season, the trial court reinstated the injunction against the franchise's relocation.[63] The trial court then held a hearing to determine Oakland's right to condemn the Raiders.[64] On July 22, 1983, the trial court ruled that Oakland was not entitled to condemn intangible franchise rights.[65] Oakland petitioned the California Supreme Court for a writ of mandate and/or prohibition to compel vaca-

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52. *Id.*

53. *See infra* text accompanying notes 182-196.

54. Appellant's Opening Brief, *supra* note 51, at 2.

55. *Id.*

56. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (*"Raiders I"*).

57. *Id.*

58. City of Oakland v. Oakland Raiders, Ltd., 123 Cal. App. 3d 422, 176 Cal. Rptr. 646, *superseded by Raiders I,* 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

59. Appellant's Opening Brief, *supra* note 51, at 2.

60. *Id.*

61. City of Oakland v. Superior Court, 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (1982) (*"Raiders II"*). This ruling was an astonishing disposition because the trial court had only declined to reinstate the injunction in a summary, *ex parte* proceeding. Further, the trial court invited Oakland to present its request again in a proper application, determined in a properly noticed hearing.

62. Appellant's Opening Brief, *supra* note 51, at 2.

63. *Id.* at 2-3.

64. *Id.* at 3.

65. *See Intended Decision, supra* note 4.

tion of the trial court's decision.[66] Oakland's petition was transferred to the court of appeal.[67] On December 29, 1983, the court of appeal ordered the trial court to vacate its judgment because it had not acted in conformity with prior appellate opinions in the case (*"Raiders III"*).[68] The trial court then conducted additional proceedings in accordance with the appellate court's mandate and again entered judgment in favor of the Raiders on August 10, 1984.[69] On appeal, the trial court's order was affirmed (*"Raiders IV"*).[70] The court of appeals' decision is the subject of this note.

III. THE PROPRIETY OF THE CONDEMNATION ACTION

The trial court originally dismissed Oakland's condemnation action because it concluded that intangible property rights were not "property" which a municipality could acquire through eminent domain.[71] The California Court of Appeal initially upheld the trial court's judgment.[72] The California Supreme Court eventually overturned the judgment in *Raiders I*.[73]

Before examining the *Raiders IV* court's application of the dormant commerce clause, it is important to note that the power of eminent domain does extend to intangible property rights, such as franchise rights. Accordingly, the following is offered to underscore the ability of the government to condemn intangible property.

A. Over a Century of Intangible Property Condemnations

As early as 1848, the United States Supreme Court considered whether intangible property rights could be taken through the power of eminent domain. In *West River Bridge Co. v. Dix*,[74] the Court upheld a Vermont Supreme Court decision that a toll bridge, along with the real estate and franchise/contractual rights of the West River Bridge Corporation, could be taken for public use.[75]

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66. Appellant's Opening Brief, *supra* note 51, at 3.

67. *Id.*

68. City of Oakland v. Superior Court, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (1983) (*"Raiders III"*).

69. Appellant's Opening Brief, *supra* note 51, at 4.

70. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 478 U.S. 1007 (1986) (*"Raiders IV"*).

71. *Raiders I*, 32 Cal. 3d at 63, 646 P.2d at 836, 183 Cal. Rptr. at 674 (1982).

72. City of Oakland v. Oakland Raiders Ltd., 123 Cal. App. 3d 422, 176 Cal. Rptr. 646, *superseded by Raiders I*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

73. *Raiders I*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

74. 47 U.S. (6 How.) 507 (1848).

75. *Id.* at 530, 536.

The Court found that every contract is subject to certain natural laws that are superior to the contract itself. The parties' communal social expectations make these natural laws conditions upon every contract's terms.[76] The government's power to take property for public use, through the natural law of eminent domain, is one of those superimposed conditions to which all other laws and contracts are subject.[77] The Court also found that a franchise was a type of property which had no inherent characteristics to differentiate it from other types of property subject to eminent domain.[78]

Allowing the condemnation of intangible property has remained valid law ever since *West River Bridge*.[79] The government's ability to take intangible property exists as readily as its ability to condemn land or other tangible property.[80] For example, in *Kimball Laundry Co. v. United States*,[81] a laundry was condemned for the United States military's use during World War II. The laundry had to suspend service to its regular customers during this period, losing considerable business goodwill.[82] In the compensation proceedings, the district court disallowed any evidence showing diminution of the value of the ongoing business due to the loss of business goodwill.[83] The Eighth Circuit Court of

76. *Id.* at 532.

77. *Id.*

78. *Id.* at 534.

79. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); *Raiders I*, 32 Cal. 3d at 63, 646 P.2d at 836, 183 Cal. Rptr. at 674 (1982). In actions for inverse condemnation, supporting the principle that franchise or contractual rights are subject to condemnation, and therefore are compensable when taken by the government or its authorized agents, *see* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) (franchise rights to collect tolls from a dam and lock network are protected by just compensation); Armstrong v. United States, 364 U.S. 40 (1960) (Mechanic's liens on materials used in ships sold to the United States government were not subject to the principle of sovereign immunity since the United States did not have title to the vessels when the liens became effective. Therefore, the liens were compensible when they were extinguished following the United States' final acquisition of the ships.); Sutfin v. State of California, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (1968) (action in inverse condemnation is allowable for personal as well as real property).

80. *See, e.g.*, 1 NICHOLS ON EMINENT DOMAIN, § 2.1[2], at 2-8 to 2-9 (3d ed. 1980) ("Intangible property, such as . . . *franchises,* charters or any other form of contract . . . [is] within the scope of [the eminent domain power] as fully as land . . . .") (emphasis added); 29A C.J.S. *Eminent Domain* § 108 (1965) (compensation required for personal property taken, including contract and contractual rights); *see generally,* Kanner, *When is "Property" not "Property Itself,"* 6 CAL. W.L. REV. 60, 64-70 (1970) (arguing that "in California, the goodwill of a business meets each and every one of [the] criteria of 'property,'" and therefore, should be compensated for when the government condemns the existing business).

81. 338 U.S. 1 (1949).

82. *Id.* at 8.

83. The United States Supreme Court defined business goodwill in that case as the laundry's continued hold on its customer's patronage. *Id.*

Appeals affirmed the district court's ruling,[84] finding that because the government "did not . . . intend to take" the company's business goodwill, its subsequent loss did not require just compensation.[85]

The United States Supreme Court reversed.[86] Labeling the intangible business goodwill as a "going-concern value,"[87] the Court reasoned that because the Fifth Amendment to the United States Constitution requires compensation for tangible property, intangible going-concerns should also be compensable, if shown to be present and to have been diminished by a taking of tangible property.[88] The Court distinguished those cases where the condemnor only takes the tangible property of the business, but leaves the owner free to move his business enterprise to a new location.[89] Under such circumstances, the owner is not entitled to compensation for loss of business goodwill because the government has not taken the business for proprietorship purposes.[90] The Court's reasoning necessitates the conclusion that, if intangible property is compensable, then intangible property rights are condemnable.

B. The Raiders' Franchise is Also Property Subject to Condemnation

The Raiders' NFL franchise and contractual benefits cannot be meaningfully distinguished from those rights deemed subject to the power of eminent domain. Like the laundry's goodwill and West River Bridge's contractual right to collect tolls, the Raiders' franchise rights are a species of "property."[91] A franchise is capable of being owned, bought, sold, or condemned just as any other form of property.[92] Franchises and contractual rights are included in California's broad definition of property as well.[93] So long as California eminent domain law requirements are adhered to, no reasonable basis exists for preventing the condemnation of intangible property. The *Raiders I* court, in noting that all real or personal property is primarily valued in relation to an intangi-

84. Kimball Laundry Co. v. United States, 166 F.2d 856 (8th Cir. 1948), *rev'd* 338 U.S. 1 (1949).

85. *Id.* at 860.

86. *Kimball Laundry,* 338 U.S. 1 (1949).

87. *Id.* at 9.

88. *Id.* at 11.

89. *Id.*

90. *Id.*

91. *See supra* note 80.

92. *See* CAL. CIV. PROC. CODE § 1240.110 (Deering 1988), which provides that any property or interest in property may be condemned "including, but not limited to . . . *franchises* to collect tolls . . . ." (emphasis added); *see also supra* note 80.

93. CAL. CIV. PROC. CODE § 1235.170 (Deering 1988), in pertinent part, defines 'property' [as including] real and personal property and any *interest* therein." (emphasis added).

ble property right, expressly found that California eminent domain law allowed condemnation of the Raiders' franchise.[94]

IV. THE COMMERCE CLAUSE DEFENSE

Because *Raiders I* conclusively established that Oakland's proposed condemnation of the Raiders' franchise was a legitimate "public use" under California's eminent domain law, the Raiders had to rely on other arguments to prevent the condemnation. The argument that eventually proved successful was that the condemnation violated the dormant commerce clause of the United States Constitution. This section summarizes the dormant commerce clause and the *Raiders IV* court's treatment of three Oakland defenses. It then comments on the propriety of these arguments.

A. Overview of the "Dormant" Commerce Clause and the Limitations on Trade and Commerce Between the States

The commerce clause of the United States Constitution gives Congress the power to regulate commerce among the several states.[95] However, the Constitution does not expressly limit the extent to which the states may regulate interstate commerce.[96] Therefore, the Supreme Court has taken upon itself determination of the extent to which a state may regulate interstate commerce when Congress has remained silent in the regulated area.[97] This body of law has come to be known as the dormant commerce clause.

The earliest commerce clause interpretations revealed the dormant commerce clause's primary purpose: the abolition of trade wars among the several states and establishment of cohesive national trade markets.[98] Congress' failure to regulate a given market forced the United States Supreme Court to keep interstate commerce as free from state impediment as possible.

In the early dormant commerce clause cases, a distinction arose between state commerce regulations and the exercise of state police power.[99] The Court invalidated or upheld most state regulations based

94. *Raiders I*, 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.

95. U.S. CONST. art. I, § 8.

96. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 535 (1949).

97. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-2, at 403-04 (2d ed. 1988); Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935).

98. L. TRIBE, *supra* note 97, at § 6-3.

99. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

upon the categorization.[100] Although these labels did not precisely describe the Court's dormant commerce clause analysis,[101] the ability of a state to pass valid regulations incidentally affecting interstate commerce was impliedly established. A state regulation was upheld so long as its effect upon interstate commerce was not the result of discrimination against out-of-state commerce.[102]

More recently, the Court established a balancing test, in which the state regulation's achievement of a legitimate state interest is balanced against its affect upon the unimpeded flow of interstate commerce.[103] Although some decisions have focused on "direct" or "indirect" effects, the Court has settled on the principle that a state regulation affecting interstate commerce will be upheld if the regulation is "rationally related" to a legitimate state interest and that interest outweighs any burden on interstate commerce.[104] Moreover, the Court has upheld state actions which incidentally burden interstate commerce, provided the burden results from state participation in the effected market.

B. The Market Participant Doctrine

The market participant doctrine operates as an exception to the dormant commerce clause, allowing states to enter various trade markets as participants even though such participation affects interstate commerce.[105] In *Hughes v. Alexandria Scrap Corp.*,[106] the State of Maryland offered a "bounty" to anyone who removed an abandoned vehicle from Maryland highways.[107] A citizen of Virginia challenged the program, alleging that Maryland violated the dormant commerce clause by refusing to pay for junk cars removed from Virginia highways.[108] The United States Supreme Court upheld the practice, holding that Maryland had a right to favor its own citizens over other states' citizens as a participant in the junk car market.[109] Further, the market participant doctrine has been used to uphold state restrictions on exclusive sales of state manufac-

100. L. TRIBE, *supra* note 97, at § 6-3.

101. *Id.*

102. *See Willson*, 27 U.S. (2 Pet.) at 257.

103. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

104. *Id.* at 770-71; L. TRIBE, *supra* note 97, at 408.

105. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983).

106. 426 U.S. 794 (1976).

107. *Id.* at 797.

108. *Id.* at 803.

109. *Id.* at 810.

tured cement to that state's own citizens,[110] and a city ordinance restricting awards of municipal construction contracts to companies which employ a minimum percentage of that city's residents.[111]

C. *Raiders IV Court's Commerce Clause Reasoning*

The *Raiders IV* court relied heavily on the trial court's characterization of the NFL as a "joint venture, organized for the purpose of providing entertainment nationwide."[112] This characterization was important to the *Raiders IV* court's opinion because the national structure of the league made the interstate commerce analysis applicable.[113]

The court briefly reviewed the purpose of the dormant commerce clause[114] and then relied on the approach[115] established in *Southern Pacific Co. v. Arizona*.[116] Under *Southern Pacific,* a regulation will be voided if it governs aspects of the national economy which require nationally uniform regulation by a single authority.[117] Although sparingly used,[118] *Southern Pacific* served the *Raiders IV* court well, providing an analogy to another NFL case decided on commerce clause grounds, *Partee v. San Diego Chargers Football Co.*[119] The court briefly reviewed and dismissed three Oakland arguments raised to preclude dormant commerce clause review, reaching *Partee* in the third argument.

1. Law of the Case Doctrine Dismissed

Oakland argued for an exemption from dormant commerce clause review on three principles. The first was that *Raiders I* had bound all subsequent proceedings in the case. Therefore, the law of the case doctrine precluded further review.[120] In Oakland's view, the Raiders had raised the dormant commerce clause defense in their unsuccessful peti-

110. *Reeves,* 447 U.S. 429.

111. *White,* 460 U.S. 204.

112. *Raiders IV,* 174 Cal. App. 3d 414, 420, 220 Cal. Rptr. 153, 157 (1985).

113. *Id.*

114. *Id.* at 417, 220 Cal. Rptr. at 154-55.

115. "[S]tate or local regulation of interstate commerce will be upheld if it 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.' " *Id.* at 417-18, 220 Cal. Rptr. at 155, *quoting* Edger v. MITE Corp., 457 U.S. 624, 640 (1982).

116. 325 U.S. 761 (1945).

117. *Id.* at 767.

118. *Raiders IV,* 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 155.

119. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983).

120. *Raiders IV,* 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 155.

tion for rehearing after *Raiders I*.[121] However, the *Raiders IV* court rejected the law of the case argument because the briefs in *Raiders I* did not contain dormant commerce clause discussion.[122] Furthermore, the *Raiders IV* court ruled that denial of rehearing would not dispose of new and unlitigated arguments.[123]

2. Market Participant Argument Dismissed

Second, Oakland argued that it was exempt from dormant commerce clause review because Oakland was attempting to penetrate the NFL market as a participant, not as a regulator.[124] The court conceded that if Oakland did enter the market as a participant, the commerce clause would not be applicable.[125] However, the court found that Oakland did not attempt to participate as an equal bidding competitor with other potential market participants.[126] Instead, Oakland used its governmental status to take an NFL franchise.[127] Therefore, the court held that the market participant doctrine would not shield Oakland from dormant commerce clause review when participation is obtained through condemnation.[128]

3. Lack of Precedent Barring Condemnations is Irrelevant

Finally, Oakland argued that a condemnation cannot violate the dormant commerce clause because no other court had so ruled.[129] The court found this argument unpersuasive. The *Raiders IV* court dismissed the apparent lack of case law as a "mere indication" of the traditional limitation of eminent domain to real property, which does not implicate commerce clause issues.[130] Accordingly, the court found that condemnation of intangible property, the Raiders' franchise, was essentially a question of first impression.[131]

The Raiders argued that since the NFL is a nationwide business, any attempted condemnation of an NFL franchise would impermissibly

121. *Id.*
122. *Id.*
123. *Id.*
124. *Raiders IV*, 174 Cal. App. 3d at 418-19, 220 Cal. Rptr. at 155.
125. *Id.* at 419, 220 Cal. Rptr. at 155.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Raiders IV*, 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 156-57.
130. *Id.* The court's conclusion here was simply inaccurate. *See Raiders I*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
131. *Id.*

burden interstate commerce.[132] The *Raiders IV* court, accepting the trial court's findings that the NFL was a nation-wide joint venture,[133] found that condemnation of the Raiders' franchise could force the team to remain in Oakland indefinitely.[134] Thus, the court reasoned that the NFL's interest would become subordinate to Oakland's.[135] Analogizing to *Partee v. San Diego Chargers Football Co.*,[136] the *Raiders IV* court flatly stated that this condemnation was the "precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit."[137]

The court found that Oakland did not seek to promote the health or safety of its citizenry, but instead sought to promote the City's public recreation, social relations and economic benefits.[138] Thus, the burden placed on interstate commerce by the condemnation greatly outweighed any local benefit inuring to Oakland.[139] Therefore, the *Raiders IV* court disallowed Oakland's attempted condemnation of the Raiders' franchise on dormant commerce clause grounds alone.[140]

D. Criticism of the Raiders IV Court's Analysis

In its briefs, Oakland gave only cursory coverage to the Raiders' dormant commerce clause defense.[141] Oakland recognized that several other types of businesses had been previously condemned and operated by the government without violating the dormant commerce clause.[142] For example, no dormant commerce clause violation exists when a municipality condemns and operates a subway running between two

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132. *Raiders IV,* 174 Cal. App. 3d at 419-20, 220 Cal. Rptr. at 156-57.

133. *Id.* at 420, 220 Cal. Rptr. at 157.

134. *Id.*

135. *Id.*

136. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983), in which the California Supreme Court held that California's antitrust laws would impermissibly burden interstate commerce if they were applied to an NFL franchise.

137. *Raiders IV,* 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 157-58.

138. Trial Brief of Plaintiff at 13, *supra* note 50.

139. *Raiders IV,* 174 Cal. App. 3d at 422, 220 Cal. Rptr. at 158.

140. *Id.*

141. *See* Trial Brief for Plaintiff at 28, *supra* note 50 and *compare* Trial Brief for Defendant at 28-31, City of Oakland v. Oakland Raiders, No. 76044 (Cal. Super. Ct.), *aff'd,* 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031), *cert. denied,* 478 U.S. 1007 (1986). *See also* Appellant's Opening Brief at 33-37, *supra* note 51; Appellant's Reply Brief at 33-35, City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031), *cert. denied,* 478 U.S. 1007 (1986) *and compare* Respondent's Brief at 33-38, City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985) (No. A029031), *cert. denied,* 478 U.S. 1007 (1986).

142. 1 NICHOLS, *supra* note 80, § 2.222, at 2-145.

states,[143] or condemns an easement for public use across a railroad line as authorized by Congress.[144] Therefore, it would seem logical that the condemnation of franchise rights in an active football team would not run afoul of the dormant commerce clause. However, *Raiders IV,* if nothing else, teaches one not to regard seemingly meritless defenses too lightly.[145]

Perhaps Oakland should not be judged too harshly. The California Supreme Court did rule in *Raiders I* that the state eminent domain law allows the condemnation of a sports franchise.[146] Moreover, *Raiders I* expressly held that neither the state nor federal constitution prohibits such a condemnation.[147] Upon remand from *Raiders I,* it would be logical to assume that no state trial court would find constitutional reasons to block the condemnation.

It is difficult to understand how this condemnation would substantially burden interstate commerce, simply because the Raiders' football team could not afterward permanently play its home games in a location other than Oakland. The NFL's regular game schedule would continue unaltered. The *Raiders IV* court does not indicate how a change in the Raiders' ownership would affect the NFL's "commerce" (football games).

More particularly, it is unrealistic for the *Raiders IV* court to conclude that one condemnation of a sports franchise would lead to widespread condemnations of sports franchises.[148] In most cases, the financial impact of paying the required just compensation for a professional sports franchise would be astronomic. Moreover, such "protectionist condemnations"[149] are more appropriately prevented by state legislatures. The state legislature could preclude business franchise condemnations altogether, or limit such condemnations to those businesses, such as professional sports franchises, which provide unique benefits to their communities but have relatively minor effects upon interstate commerce.[150] However, the *Raiders IV* court was not content with deferring

143. Port Auth. Trans-Hudson Corp. v. Hudson R.T. Corp., 285 N.Y.S.2d 24, 231 N.E.2d 736 (1967).

144. 1 NICHOLS, *supra* note 80, § 2.222, at 2-145.

145. *Raiders IV,* 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 157-58.

146. *Raiders I,* 32 Cal. 3d at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

147. *Id.*

148. *Raiders IV,* 174 Cal. App. 3d at 421, 220 Cal. Rptr. at 157-58.

149. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocating Business,* 96 YALE L.J. 1343, 1352 (1987).

150. One of the concerns expressed by Mr. Lazarus in his article (*see supra* note 149) is that just compensation will not adequately "remedy the defects of protectionist condemnations. Contracts, franchise rights and licenses, necessary elements of protectionist takings, are unique

to just compensation or legislative determination to hinder renegade municipalities from condemning sports franchises *en masse.*

The *Raiders IV* court briefly dismissed all of Oakland's arguments with rather perfunctory analysis. The court first dismissed Oakland's contention that the entire suit was precluded by the "law of the case" as decided in *Raiders I.*[151] Second, Oakland argued that it was exempt from commerce clause preclusion because "it has merely attempted to enter the market as a participant, not as a regulator."[152] The court dismissed this issue on the grounds that the attempt was made by eminent domain and not as an "equal participant."[153] Whether a state needs to enter into a market as an equal participant is open to dispute. Thus, the *Raiders IV* court's analysis warrants brief comment.

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commodities—not fungible with cash or replaceable at will." *Id.* at 1354. The quick answer is that all property is in some aspect unique, and carried to its logical extreme, even routine condemnations in some respects always impose dislocations and losses that are not "replaceable at will" or "fungible with cash." *See* Molho and Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich,* 8 PAC. L.J. 627 (1977).

But more importantly, the concept of just compensation is *not* concerned with the condemnee's ability to replace the taken property. Rather, just compensation is intended to compensate the owner for the property taken. However, what often passes for just compensation may lead one to the reasonable conclusion that it is neither "just" nor "compensation." *See* J. GELIN AND D. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 3.1, at 101-14 (1982) and cited authorities; *see generally* Kanner, *Condemnation Blight: Just How Just is Just Compensation?,* 48 NOTRE DAME LAWYER 765 (1976); *Monongahela,* 148 U.S. 312 (1892). This "compensation" concept is consistent with the view that condemnation actions are against property and not against the owner. 1 NICHOLS, *supra* note 80, § 1.142[1]; ("[J]ust compensation, it will be noticed, is for the property, and not to the owner.") *Monongahela,* 148 U.S. at 326; *accord* United States v. Dunnington, 146 U.S. 338 (1892); Duckett & Co. v. United States, 266 U.S. 149 (1924); West River Bridge Co. v. Dix, 47 U.S. (5 How.) 507 (1848); Ossining Urban Renewal Agency v. Lord, 39 N.Y.2d 628, 350 N.E.2d 405 (1976); San Bernardino Valley Mun. Water Dist. v. Gage Canal Co., 226 Cal. App. 2d 206, 37 Cal. Rptr. 856 (1964). It is an unfortunate reality that the business owner, who becomes the victim of what amounts to a governmental theft of his or her property, will not be fully compensated for resulting business losses, but will probably be driven out of business entirely by the taking, all with the courts' willing approval. While this rule is of dubious origins (*see* Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned,* 15 SETON HALL L. REV. 483 (1985)) and quite unjust (*see* Kanner, *When is "Property" Not "Property Itself,"* 6 CAL. W.L. REV. 60 (1970)), it is difficult to see why owners of football franchises should be singled out as the only persons placed above the existing—albeit controversial—rules of eminent domain law.

151. *Raiders IV,* 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 155-56. The law of the case doctrine was not strongly contested by Oakland, and therefore need not be discussed here.

152. *Id.* at 418-19, 220 Cal. Rptr. at 155-56.

153. *Id.* at 419, 220 Cal. Rptr. at 156.

1. The Raiders IV Court's Market Participant Analysis is Questionable

The court stated that Oakland "would escape commerce clause review if it had in fact acted as a mere market participant . . . ."[154] However, the court indicated that entrance into the market does not escape commerce clause review when entrance is achieved through the sovereign power of eminent domain.[155] As authority for this proposition, the court, quoting from *Reeves, Inc. v. Stake*,[156] stated that the "commerce clause applies to 'actions taken by states in their sovereign capacity' but does not limit proprietary activity."[157] Unfortunately, this quotation was taken out of context.

The *Reeves* Court actually stated: "[t]he commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity."[158] The immediate context of the entire quotation reveals the *Raiders IV* court's inappropriate use of this language.

In *Reeves,* the state of South Dakota owned and operated a cement manufacturing plant.[159] A policy of the plant was to restrict sales of cement to South Dakota citizens only.[160] The United States Supreme Court upheld the state policy, finding that because the State was acting as a cement market participant and not as a regulator, it could restrict sales of cement to South Dakota residents without violating the dormant commerce clause.[161]

Oakland's condemnation could not be termed a regulation in the same sense as South Dakota's policy to confine cement sales to state citizens because the market for Raiders' NFL football games was not restricted to Oakland residents alone. Whether Davis or Oakland owns the team, the Raiders would still play their regular schedule of games according to NFL procedures. In addition, any correlative rights which the remaining NFL franchise owners might have in the Raiders' franchise would not be diminished by the transfer of ownership from Davis to Oakland. Such correlative rights should continue in full effect, just

154. *Id.*
155. *Id.*
156. 447 U.S. 429 (1980).
157. *Raiders IV,* 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 156.
158. *Reeves,* 447 U.S. 429.
159. *Id.* at 430-31.
160. *Id.* at 432-33.
161. *Id.* at 437.

as if Davis had sold the Raiders' franchise to Oakland by negotiated agreement.

Moreover, the *Reeves* Court upheld the state cement sales policy, noting the general rule that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market to favor its own citizens over others."[162] In no sense can *Reeves* be said to support the proposition that Oakland may not enter the NFL franchise market through the power of eminent domain, notwithstanding the fact that *Reeves* did not address the issue of eminent domain.

Thus, the *Raiders IV* court had no reason to dismiss the market participant argument. Oakland properly exercised its right to acquire the Raiders' franchise by eminent domain. By the *Raiders IV* court's own admission, Oakland was entitled to escape judicial review of the commerce clause regulation since it did enter the market as a participant and not as a regulator.[163] The court made no allegation that Oakland planned to regulate the NFL in terms of ticket prices, or in any other tangible manner. The court failed to indicate how or why the condemnation of the Raiders' franchise would in anyway regulate interstate commerce. The court was merely concerned with maintaining the *status quo.*[164]

2. The *Raiders IV* Court's Reliance on *Partee* is Misplaced

Finally, in determining the case on commerce clause grounds, the *Raiders IV* court relied on the trial court's findings in conjunction with *Partee v. San Diego Chargers Football Co.*[165] In *Partee,* a field-goal kicker challenged the NFL's rules regarding free agency under California antitrust laws.[166] The California Supreme Court ruled that state antitrust laws did not apply to the NFL because of the need for national uniformity in league structure.[167] Finding the NFL to be organized on a national scale, the court found that if each state's antitrust legislation applied, the internal NFL structure would require compliance with the most restrictive state's standard.[168] The resulting fragmentation of

162. *Id.* at 436, quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).
163. *Raiders IV,* 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 155.
164. *Id.* at 420, 220 Cal. Rptr. at 157.
165. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983).
166. *Id.* at 380-81, 668 P.2d at 676, 194 Cal. Rptr. at 369.
167. *Id.* at 385, 668 P.2d at 679, 194 Cal. Rptr. at 372.
168. *Id.* at 383-84, 668 P.2d at 677-78, 194 Cal. Rptr. at 370-71.

league structure would adversely affect the NFL's competitive nature.[169] Therefore, the court held that applying state antitrust legislation to the NFL would impermissibly burden interstate commerce, since structural league cohesiveness substantially outweighed the state's interest in regulating the league.[170]

Partee affected the entire league structure. Applying state antitrust laws to the NFL would have led to a different way of doing business for all of the league's teams. Such is not the case with the Oakland condemnation. Oakland's condemnation would only result in a forced change in the Raiders' ownership. A forced change in ownership would not change the way the league did business nationally. In fact, NFL games would continue without interruption and the NFL's internal structure would not be seriously affected.

Moreover, the *Raiders IV* court's fear of interference with interstate commerce is based on the speculation that allowing Oakland to condemn the Raiders' franchise would set off rampant sport franchise condemnations across the nation.[171] This proposition cannot reasonably be compared to subjecting the NFL, as a whole, to the requirements of individual state antitrust legislation which would have an immediate impact upon league contracts and structure.

Nevertheless, the *Raiders IV* court relied on the trial court's finding that a nationwide league ownership structure was necessary to the NFL.[172] The potential that Oakland could permanently indenture the Raiders in the city was somehow so significant that it "would adverse[ly] affect the League enterprise."[173] This conclusion is purely speculative. The court's conclusion that the permanent indenture of a sports franchise to a particular city would have adverse impact on the financial success of the NFL as a whole is unsupported. Since Oakland's reasons for condemning the Raiders are arguably legitimate,[174] the condemnation should not have been denied on dormant commerce clause grounds. Condemnation was a rational method to protect Oakland's interest in providing recreation to its citizens.[175]

What may have motivated the court was the possible impact upon the bargaining strength of the NFL franchises with stadium owners if

169. *Id.* at 384-85, 668 P.2d at 678-79, 194 Cal. Rptr. at 371-72, quoting Flood v. Kuhn, 316 F. Supp. 271, *aff'd*, 443 F.2d 264, *aff'd*, 352 U.S. 445 (1972).

170. *Id.* at 385, 668 P.2d at 678-79, 194 Cal. Rptr. at 372.

171. *Raiders IV*, 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157.

172. *Id.*

173. *Id.*

174. Trial Brief of Plaintiff at 13, *supra* note 50.

175. *Id.; see also supra* text accompanying notes 103-04.

precedent allowed a city to condemn that franchise.[176] However, it is not necessarily true that all cities with sports franchises would suddenly condemn them. Many unmentioned factors, such as the potentially high cost of paying the fifth amendment's required just compensation, are likely to prevent most cities from condemning teams. All the *Raiders IV* court accomplished by this decision was the creation of bad law. As unsavory as the idea of condemning a NFL franchise may seem to some people, condemnation is not a violation of the commerce clause.

E. An Alternative to the Dormant Commerce Clause Defense

Most significant to the present case is the structure of the California statutes regarding eminent domain. California's eminent domain law is intentionally broad to encompass all types of property. California Government Code section 37350.5 provides that "[a] city may acquire by eminent domain *any* property necessary to carry out any of its powers and functions."[177] Property, in turn, is defined as "real and personal property and any interest therein."[178] This definition purposely encompasses the "broadest possible definition of property and includes any type of right, title, or interest in property that may be required for public use."[179] Certainly, the broad scope of these provisions could include the Raiders' NFL franchise. Moreover, any contractual right or obligation could likewise be considered property under these same provisions.[180] It may also be argued that Oakland had the power to condemn the Raiders' franchise as property under California Government Code section 37350.5 to carry out its municipal powers and functions.

Assuming these arguments are correct, two questions are then raised: (1) is owning and operating a professional football team, specifically the Raiders, a public use, and (2) assuming that owning the Raiders is a public use, is owning and operating a football team necessary for Oakland to carry out its powers and functions?

1. Is Team Ownership a Public Use?

In California, the power of eminent domain may only be used to acquire property for public use.[181] However, few California courts, and

176. Trial Brief of Plaintiff at 13, *supra* note 50.

177. CAL. GOV. CODE § 37350.5 (Deering 1988) (emphasis added).

178. CAL. CIV. PROC. CODE § 1235.170 (Deering 1988).

179. CALIFORNIA LAW REVISION COMMISSION, EMINENT DOMAIN LAW, official comment to CAL. CIV. PROC. CODE § 1235.170, at 1076 (C.E.B. 1975).

180. *See* Lynch v. United States, 292 U.S. 571 (1934).

181. *Raiders I*, 32 Cal. 3d at 69, 646 P.2d at 840-41, 183 Cal. Rptr. at 678-79; *Cf.* CAL. CIV. PROC. CODE § 1240.010 (Deering 1988).

even fewer federal courts, have overruled a legislative determination of "public use."[182] For example, in *Hawaii Housing Authority v. Midkiff*,[183] the United States Supreme Court, after articulating nearly one hundred years of judicial restraint in reviewing the various state and federal legislative determinations of public use, effectively read the "public use" clause out of the United States Constitution.[184] It is hard to imagine any legislative action which could not be of "conceivable" public utility. The condemnation of a football team arguably would benefit Oakland "recreationally, socially, economically and psychologically."[185] These benefits accruing to Oakland's citizens support the condemnation as a conceivably legitimate public use.

Like public use, the necessity of a particular condemnation project is subject to great legislative deference,[186] so long as the condemnor is in compliance with proper procedures.[187] However, Oakland did not com-

182. CAL. CIV. PROC. CODE § 1240.010 ("Where the Legislature provides by statute that a use . . . is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration . . . that such use . . . is a public use."); *Raiders I*, 32 Cal. 3d at 78, 646 P.2d at 846, 183 Cal. Rptr. at 684-85 (Bird, C.J., concurring), quoting Consolidated Channel Co. v. C.P.R.R. Co., 51 Cal. 269, 273 (1876) ("Without doubt it is the general rule that where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the Legislature [sic] and the courts will not undertake to disturb its judgment in this regard."); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) ("The legislature may determine what private property is needed for public purposes—that is a question of a politicial and legislative character . . . ."); Berman v. Parker, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether the power [of eminent domain] is being exercised for a public purpose is an extremely narrow one.").

183. 467 U.S. 229 (1984).

184. *Id.* at 241. "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.*

185. Trial Brief of Plaintiff at 13, *supra* note 50.

186. *See, e.g.*, Rindge Co. v. Los Angeles, 262 U.S. 700 (1922) (United States Supreme Court deferring to the resolution of the Los Angeles County Board of Supervisors, as a matter of state law, that condemnation of a highway through Rindge's property was necessary for public use); *but see* Huntington Park Redevelopment Agency v. Norm's Slauson, 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (1985) (Resolution of necessity, although usually conclusive on issue of existence of three requirements that 1) the property is necessary for public use, 2) the project is necessary for public purpose and 3) taking the particular property is compatible with the greatest public good at the least private injury, nevertheless is reviewable if influenced by an abuse of legislative discretion.); *Cf.* CAL. CIV. PROC. CODE § 1240.030 (Deering 1988).

187. Cal. Civ. Proc. Code § 1240.040 provides that a resolution of necessity, complying with the requirements of Cal. Civ. Proc. Code § 1245.210 must be adopted by a public entity *before* an action in eminent domain is instituted. This resolution cannot be adopted without prior notification and a "reasonable opportunity to appear and be heard before the governing body considering the resolution at a public hearing." CAL. CIV. PROC. CODE § 1245.235(a) (Deering 1988). Subsection (b)(3) of § 1245.235 implies that a 15 day period must be allowed for the condemnee to give written notice of its intention to appear at the public hearing. After

ply with proper condemnation procedures.[188] Oakland filed its condemnation action before adopting a resolution of necessity.[189] Concurrently, Oakland applied for and received a temporary restraining order enjoining the Raiders from moving to Los Angeles.[190] A resolution of necessity was adopted by the Oakland City Council four days later.[191] Finally, on March 11, 1980, the Oakland City Council afforded the Raiders an opportunity to be heard on the "proposed" condemnation.[192] However, by that time, the condemnation action was pending. Not surprisingly, the resolution of necessity was reaffirmed.[193] The procedural defect outlined above was brought to the court's attention five times in this litigation as a bar to the condemnation action.[194] Each time the argument was summarily rejected.[195] This determination rendered *Raiders I* the law of the case, ending all discussion of the Raiders' defenses that the Oakland City

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this public hearing is held, the resolution of necessity may be adopted by a two-thirds vote of the governing body. CAL. CIV. PROC. CODE § 1245.240 (Deering 1988). Once adopted, the resolution "conclusively establishes the matters referred to in Section 1240.030." Cal. Civ. Proc. Code § 1245.250(a); "A valid resolution precludes judicial review . . . of the matters specified in Section 1240.030. . . ." CALIFORNIA LAW REVISION COMMISSION, EMINENT DOMAIN LAW, comment to § 1245.250, at 1129 (C.E.B. 1975); *Norm's Slauson,* 173 Cal. App. 3d 1121, 219 Cal. Rptr. 365 (1985).

188. *Raiders III,* 150 Cal. App. 3d 267, 276-78, 197 Cal. Rptr. 729, 734-36.

189. Cal. Civ. Proc. Code § 1240.030 requires that the legislature adopt a resolution that particular property is required to promote the legitimate goals of a particular project for public use. Thus, before an eminent domain action may be filed, a resolution of necessity must be adopted by the authorized condemning authority.

190. *Raiders III,* 150 Cal. App. 3d at 276-77, 197 Cal. Rptr. at 735. This premature filing was apparently motivated by the city fathers' fears that the Raiders would move beyond the territorial limits of Oakland's eminent domain power before a resolution of necessity could be obtained. Oakland filed the condemnation action on February 11, 1980, the day after a United States District Court restrained the NFL from preventing the Raiders' move to Los Angeles. Trial Brief for Plaintiff at 15, *supra* note 50. After that order, Oakland had no guarantee that the Raiders would remain in Oakland. Thus, the premature condemnation action was necessary.

191. *Raiders III,* 150 Cal. App. 3d at 277, 197 Cal. Rptr. at 735.

192. *Id.*

193. *Id.*

194. "This challenge was twice made . . . before summary judgment was entered." *Id.* The summary judgment was reversed in *Raiders I.* In that proceeding, the Raiders again brought up the procedural defects. Despite the argument's legitimacy, the California Supreme Court ignored the issue. Moreover, the issue was raised again in the Raiders' petition for the rehearing of *Raiders I,* which was denied. *Raiders I,* 32 Cal. 3d at 79, 646 P.2d at 846-47, 183 Cal. Rptr. at 685. Thus, the court of appeal in *Raiders III* determined the issue was essentially moot. *Raiders III,* 150 Cal. App. 3d at 278, 197 Cal. Rptr. at 735.

195. The *Raiders III* court summarized the issue succinctly by stating that "the procedural bar was necessarily determined adversely to the Raiders in *Raiders I;* otherwise the Supreme Court could not have reversed the judgment and remanded for trial." *Raiders III,* 150 Cal. App. 3d at 278, 197 Cal. Rptr. at 735. Since the procedural defect would have been an absolute bar to the taking, the court necessarily decided the point in favor of Oakland, albeit the decision was implied. *Id.* at 277-78, 197 Cal. Rptr. at 735.

Council abused its discretion in finding that condemning the franchise constituted a legitimate public use, and that the resolution of necessity required to condemn was defective.

2. Is Team Ownership Necessary for Oakland to Carry Out its Powers and Functions as a Municipality?

The law establishing the general principle that if the legislature finds a condemnation project is a public use, then no court may question that determination, does not answer the obvious question of whether a football team is necessary for a city to carry out its powers and functions.[196] Of the myriad of cities and municipalities throughout the United States, only twenty eight have professional football teams. Further, the cities with the NFL franchises have experienced the greatest economic trouble in recent years.[197] Oakland remains a functioning municipality, nearly eight years after the Raiders left the city, despite the continuing financial burden of the Coliseum, built primarily on the expectation of the Raiders' continued presence in the city. Obviously, all of a city's economic problems cannot be blamed on a football team's presence, or the lack thereof; a football team alone probably cannot generate enough revenue to keep a city thriving. Many cities have no local football team, yet they are able to carry out their powers and functions without condemning one.[198] Therefore, a professional football team is not necessary for a municipal corporation or public entity to function.

V. CONCLUSION

The result of this endless cycle of litigation is not crystal clear. For

196. CAL. GOV. CODE § 37350.5 (Deering 1988).

197. Cities such as New York (Jets and Giants), Cleveland (Browns), Detroit (Lions), Pittsburgh (Steelers), Green Bay (Packers), Baltimore (Colts) and Dallas (Cowboys) have all suffered financial setbacks, including bankruptcy for some, in recent years.

198. Although this discussion is to some degree conjecture, it is not without merit. Rhetorically, has any one heard of a city collapsing for the very reason that it did not have a football team? *Or* more specifically, has Oakland been unable to exercise its powers and functions since the Raiders moved to Los Angeles? *Or,* has Baltimore failed in its civic powers and functions since the Colts made their exit? The answer to all these questions is, of course, "No." It may be unfair to make such a literal reading of CAL. GOV. CODE § 37350.5, but it is no less accurate than justifying condemnation of a football franchise by analogy to a city's right to condemn real property for use as a sports stadium. *See Raiders I,* 32 Cal. 3d at 70-73, 646 P.2d at 841-43, 183 Cal. Rptr. at 679-82 and cited authorities. Although this discussion leads well beyond the scope of this article, suffice it to say that for reasons such as contractual negotiability, manageability of personnel acquisition, personnel trading, player incentive, bureaucratic red-tape, and municipal regulations on issues of fund expenditures, a public policy should be established that a professional sports franchise should not be owned and operated by a municipal corporation.

the reasons stated above, the dormant commerce clause is not likely to be a successful defense to any future condemnation, unless the subject property is a professional sports franchise. Therefore, such condemnations are unlikely to occur in the future. *Raiders IV* offers no insight indicating how a sports franchise may be condemned. The case says that condemning a sports franchise violates the Constitution. *Raiders IV,* therefore, leads only to one legally unsupportable conclusion: the power of eminent domain is subject to another limitation in addition to the requirement of just compensation—the dormant commerce clause.

Leon F. Mead, II