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Notice and Consent: A Healthy Balance Between Privacy and Innovation for Wearables

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City of Oakland v. Oakland Raiders[1] (*Raiders IV*): Commerce Clause Scrutiny as an End-Run Around Traditional Public Use Analysis

I. INTRODUCTION

After years of litigation and appeals, the attempt to keep the Oakland Raiders football franchise (Franchise) in the City of Oakland (City) by eminent domain may finally be over. In the most recent of the several Raiders cases, *Raiders IV,* the California Court of Appeal (appeals court) concluded that the City's use of eminent domain to "take" the Franchise was a violation of the commerce clause of the United States Constitution.

In contrast, the California Supreme Court had held in *Raiders I* that the City's ability to demonstrate the fifth amendment requirement of valid public use should necessarily determine the validity of the contemplated taking.[2] Following this direction issued by the supreme court in *Raiders I,* the trial court addressed the public use issue on the final remand of the case. On review of that decision, however, the appeals court sidestepped the public use issue entirely, electing to resolve the case on dormant commerce clause grounds.[3]

Because the California Supreme Court refused to review *Raiders IV,*[4] and because the United States Supreme Court denied certiorari,[5] the appeals court decision stands at present as the seminal decision on the use of eminent domain to take a professional sports franchise.[6] For

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1. 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (Cal. Ct. App. 1985) [hereinafter cited as *Raiders IV*].

2. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982) [hereinafter cited as *Raiders I*].

3. The dormant commerce clause has been invoked by courts to invalidate state regulations that discriminate against or unduly interfere with interstate commerce. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425, 426 (1982). For a discussion of the various analytical approaches considered by the Supreme Court for reviewing state regulations challenged on dormant commerce clause grounds, *see* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

4. The Supreme Court of California denied a petition for review of the Court of Appeal decision on February 27, 1986. The summary decision not to review is not reported.

5. City of Oakland v. Oakland Raiders, cert. denied, ___ U.S. ___, 106 S.Ct. 3300 (1986).

6. There is, however, a case involving the move of the Baltimore Colts to Indianapolis, Indiana. Baltimore has instituted an eminent domain action to stop the move. A decision has not yet been reached on the merits. *See* Indianapolis Colts v. Mayor of Baltimore, 733 F.2d 484 (7th Cir. 1984) and Indianapolis Colts v. Mayor of Baltimore, 741 F.2d 954 (7th Cir. 1984).

this reason, and because of the novelty of the commerce clause scrutiny involved in *Raiders IV,* the case deserves a careful and searching evaluation to determine its precedential value.

This note chronicles the development of the Raiders litigation, replicating the substantive issues as well as the procedural manuevers employed by both the City and Franchise in *Raiders I* through *Raiders IV.*[7] The note then scrutinizes the commerce clause analysis of the appeals court in *Raiders IV,* concludes that the analysis was flawed in several respects, and recommends that *Raiders IV* be given little precedential weight.

II. History of the Raiders Litigation

A. *City of Oakland v. Oakland Raiders*[8] (*Raiders I*)

The Franchise originated as a charter member of the old American Football League which merged in 1970 with the larger and more established National Football League (NFL). As a result of the merger, the Franchise became a full-fledged member of the NFL.

In 1966 the Franchise entered into a licensing agreement with Oakland-Alameda County Coliseum, Inc. for use of the coliseum as a playing facility. The agreement specified that the Franchise would play home games in the coliseum for a period of three years.[9] The agreement also included five renewal options.[10]In 1980, having previously exercised three of the renewal options, the Franchise failed to negotiate a fourth renewal,[11] and began looking elsewhere for a suitable facility in which to play its home games. The Los Angeles Memorial Coliseum represented an ideal location, and the Franchise subsequently announced it intended to move its entire operation to Los Angeles.[12] Shortly after this announcement, the City instituted an eminent domain action to acquire the property rights associated with ownership of the Franchise, thereby blocking the move.[13]

The action was originally filed in Alameda County Superior Court (Alameda Court) which issued a preliminary injunction on April 17, 1980, prohibiting the Franchise from moving to Los Angeles. The

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7. The scholarly commentary dealing with the Raiders line of cases has failed to distill these complicated cases into a comprehensible form. One of this note's major objectives, therefore, is to provide a useful recitation of these four cases.

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

9. 32 Cal. 3d at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

10. *Id.*

11. *Id.*

12. *Id.*

13. City of Oakland v. The Superior Court of Monterey County, 136 Cal. App. 3d 565, 568, 186 Cal. Rptr. 326, 328 (Cal. Ct. App. 1982).

case was later transferred to Monterey County Superior Court (hereinafter either Monterey Court or trial court) pursuant to California Code of Civil Procedure section 394.[14] The Franchise quickly moved for summary judgment.

Arguing that it was simply condemning private "property" for a public use, the City stressed that property in any form has traditionally been subject to condemnation and that this case was not exceptional. The City conceded that it had the burden of proving the proposed condemnation was for a valid "public use," but added that resolution of the public use question would require "a full trial at which all relevant facts may be adduced."[15]

In response, the Franchise argued that the City's proposed condemnation was impossible because the law of eminent domain did not recognize the legitimacy of taking intangible contractual rights.[16] Addressing the City's public use argument, the Franchise countered by claiming that as a matter of law the proposed taking could not be for a public use within the City's authority.[17]

After evaluating the pleadings, the trial court granted summary judgment for the Franchise and dismissed the action with prejudice.[18] The court concluded that "no 'public use' essential to an eminent domain action could be found, and [that the City] lacked the authority to exercise eminent domain for the purpose of retaining the Raiders' franchise in Oakland."[19] The appeals court affirmed, holding that the City lacked statutory authorization to condemn "the diverse contract rights necessary to operation of the Raiders' business enterprise."[20]

The matter was appealed to the California Supreme Court (supreme court) which, on June 21, 1982, found that the City was entitled to a trial on the merits and, therefore, reversed and remanded.[21] In reaching its decision to remand, the court addressed two major issues: first, whether intangible property rights could be taken by eminent domain; and second, whether the public use requirement was sufficiently broad to encompass the taking of a privately owned sports franchise.[22]

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14. *Id.*

15. 32 Cal. 3d at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

16. 32 Cal. 3d at 64, 646 P.2d at 837, 183 Cal. Rptr. at 675.

17. *Id.*

18. 32 Cal. 3d at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.

19. Note, *Eminent Domain Exercised—Stare Decisis or a Warning:* City of Oakland v. Oakland Raiders, 4 PACE L. REV. 169, 171 (1983), (*see* n.12, quoting the lower court decision which is unreported), [hereinafter cited as *Eminent Domain Exercised*].

20. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422 (deleted), 176 Cal. Rptr. 646, 650 (Cal. Ct. App. 1981).

21. 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.

22. 32 Cal. 3d at 64, 646 P.2d at 837, 183 Cal. Rptr. at 675.

Following a lengthy consideration of these issues, the supreme court concluded that neither the revised state eminent domain statute nor the federal and state constitutions "[distinguish] between property which is real or personal, tangible or intangible," and consequently, that intangible property was properly subject to condemnation.[23] With respect to the second issue, the court "conclude[d] only that the acquisition and, indeed, the operation of a sports franchise *may* be an appropriate municipal function."[24] Because such a determination required a sensitive factual analysis, the court remanded the case to the trial court for further evaluation of the proposed use.[25]

B. City of Oakland v. The Superior Court of Monterey County[26] *(Raiders II)*

Upon remand the City moved for reinstatement of the April 17, 1980 injunction issued originally by the Alameda Court.[27] This motion was calculated to prevent the Franchise from moving to Los Angeles during the ensuing proceedings. Furthermore, reinstatement of the injunction was necessary because the original injunction issued by the Alameda Court was dissolved when the Monterey Court granted summary judgment in favor of the Franchise.[28]

After considering the support offered by the City and the Franchise,[29] the Monterey Court, on August 5, 1982, denied the City's motion for reinstatment of the preliminary injunction. Less than two weeks later on August 16, 1982, the City filed a petition for a writ of mandate with the appeals court.[30]

On October 15, 1982, the appeals court issued a peremptory writ ordering the Monterey Court to vacate its August 5, 1982 order and hold an evidentiary hearing on the City's motion for reinstatement of

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23. 32 Cal. 3d at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.

24. 32 Cal. 3d at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681 (emphasis added).

25. 32 Cal. 3d at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.

26. City of Oakland v. Superior Court, 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (Cal. Ct. App. 1982) [hereinafter cited as *Raiders II*].

27. 136 Cal. App. 3d at 568, 186 Cal. Rptr. at 328.

28. 136 Cal. App. 3d at 569, 186 Cal. Rptr. at 328.

29. In support of its motion the City argued that reinstatement would be proper because the judgment dismissing its action had been reversed and injunctive relief was necessary to prevent irreparable harm to itself. On the other hand, the Franchise relied upon a declaration by William R. Robertson, a member of the Los Angeles Memorial Coliseum Commission, to oppose reinstatement of the injunction. Mr. Robertson explained in his declaration that plans had already gone forward for the Franchise to begin playing home games in the Coliseum by the 1982 football season. 136 Cal. App. 3d at 568-69, 186 Cal. Rptr. at 328.

30. *Id.*

the preliminary injunction.[31] At the conclusion of the hearing, the Monterey Court reinstated the preliminary injunction and ordered the Franchise to play all " '1983 preseason, regular season and post 1983 season home games' in Oakland 'unless and until judgment after trial is entered in favor of [d]efendants before the beginning of the 1983 season.' "[32]

The Monterey Court commenced trial on the eminent domain action on June 30, 1983.[33] Nearly a month later on July 22, 1983, the court rendered a tentative decision, which ultimately served as the final decision, stating that it intended to find in favor of the Franchise, dismiss the action, and discharge the preliminary injunction.[34]

On August 1, 1983, the City filed a petition for writ of prohibition or mandate and an application for a stay with the supreme court.[35] This cause was then transferred to the appeals court.[36]

C. *City of Oakland v. The Superior Court of Monterey County*[37] (*Raiders III*)

Upon receiving the transferred cause, the appeals court denied the petition for writ of prohibition or mandate and the request for a stay.[38] The City thereupon repetitioned the supreme court for a hearing and for injunctive relief. On August 18, 1983, the supreme court granted the requested hearing and once again transferred the cause to the appeals court with instructions to issue a writ of mandate.[39]

The supreme court directed the appeals court to review the Monterey Court's action in light of the supreme court's edicts in *Raiders I* and determine if there was a basis for issuing a peremptory writ of mandate compelling the trial court to vacate its earlier judgment.[40] The appeals court determined that there was such a basis[41] and on Decem-

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31. 136 Cal. App. 3d at 571, 186 Cal. Rptr. at 329.

32. City of Oakland v. Superior Court, 150 Cal. App. 3d 267, 271, 197 Cal. Rptr. 729, 731 (Cal. Ct. App. 1983) [hereinafter cited as *Raiders III*].

33. *Id.*

34. *Id.*

35. 150 Cal. App. 3d at 272, 197 Cal. Rptr. at 731.

36. *Id.*

37. *Raiders III*, 150 Cal. App. 3d 267, 197 Cal. Rptr. 729 (Cal. Ct. App. 1983).

38. 150 Cal. App. 3d at 272, 197 Cal. Rptr. at 731.

39. *Id.*

40. 150 Cal. App. 3d at 272, 197 Cal. Rptr. at 732.

41. Initially, the appeals court analyzed the five grounds advanced by the Monterey Court as support for latter's conclusion that the City could not condemn the Raiders. First, the appeals court rejected the Monterey Court's finding that the intangible property in question existed outside of the municipality as well as within, and as a result, a taking of such property would violate the territorial limitation on condemnation power. 150 Cal. App. 3d at 273, 197 Cal. Rptr. at 732. The appeals court seriously questioned the applicability of the territorial limitation to

ber 29, 1983, issued the peremptory writ of mandate as instructed by the supreme court.[42] In issuing the peremptory writ, the appeals court instructed the Monterey Court to vacate its previous judgment and proceed to determine the objections not previously addressed.[43] The only major objection remaining, the objection which the appeals court was referring to, was whether the proposed taking was for a legitimate public use.

D. The Trial Court Reconsiders—The Beginning of Raiders IV

After receiving the case on remand, the Monterey Court focused on the troublesome public use issue. On July 16, 1984, the Monterey Court rendered its decision on public use, and in addition, provided two

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intangible property which has no situs and eventually held "that as a matter of law that [sic] Raiders did not rebut the prima facie showing that the property was located within the City of Oakland." 150 Cal. App. 3d at 274, 197 Cal. Rptr. at 733.

Second, the appeals court analyzed the Monterey Court's conclusion that the City could not condemn the Raiders because the City would be unable to devote the property to a public use within seven years of the taking—a statutory requirement in California. CAL. [Code of Civil Procedure] CODE § 1240.220.(a)(West 1982). As support for this conclusion, the Monterey Court found that " 'it is distinctly probable that permitting this condemnation would lead to a quagmire of disputes and legal entanglements . . .' which would preclude the utilization of the property within seven years." 150 Cal. App. 3d at 275, 197 Cal. Rptr. at 733, (quoting the trial court decision). The appeals court rejected this conclusion stating that "the Legislature has made it clear that in calculating the probability of use within seven years, one *does not include* 'delay caused by extraordinary litigation.' " *Id.* (emphasis added).

Third, relying on a statutory provision which excludes condemnation for particular stated purposes, CAL. [Code of Civil Procedure] CODE § 1250.360.(e)(1982), the Monterey Court had held that the Franchise was not subject to condemnation for the purpose stated by the City. 150 Cal. App. 3d at 276, 197 Cal. Rptr. at 734. The appeals court noted that in *Raiders I* the supreme court held that 'the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function . . . [provided a valid public use can be demonstrated].' *Id.* (citing *Raiders I,* citation omitted). Because this objection had been resolved by the supreme court in *Raiders I,* the appeals court held that the Monterey Court had exceeded its jurisdiction in finding that the proposed taking could not be realized under the City's stated purpose. *Id.*

Fourth, the Monterey Court had sustained the Franchise's argument that the City had adopted a procedurally defective resolution of necessity—California law mandates such a resolution in order to effect a taking. *Id.* In addition, the Monterey Court found that the City had failed to conclusively establish in the resolution the statutory matters necessary for a taking. 150 Cal. App. 3d at 277, 197 Cal. Rptr. at 735. Relying on *Raiders I* and the "law of the case," (discussed *infra; see* notes 60-62 and accompanying text) the appeals court concluded that these objections, although not expressly resolved by the supreme court, had been addressed by necessary implication in *Raiders I* and resolved adverse to the Raiders. Consequently, the Monterey Court on remand was precluded from reevaluating these points. 150 Cal. App. 3d at 278, 197 Cal. Rptr. at 735.

The final objection, one which is closely associated with the fourth, was that the 'public interest and necessity do not require the . . . acquisition of the Raiders.' *Id.* (citations omitted). In somewhat the same manner as it disposed of the fourth objection, the appeals court held that the Monterey Court was again precluded from considering this issue. 150 Cal. App. 3d at 279, 197 Cal. Rptr. at 736.

42. 150 Cal. App. 3d at 280, 197 Cal. Rptr. at 736.

43. *Id.*

other grounds for deciding the case.[44] The court first held that the proposed taking could not be for a valid public use. To support this holding the Monterey Court cited the constitution and by-laws of the NFL which prohibit a city from owning and operating an NFL franchise. The Monterey Court stated the principle clearly: "acquistion of the [Raiders] team, without a reasonable probability of its having the right to participate in the league, would not satisfy the public use requirement."[45] Thus, in the opinion of the Monterey Court, the impossibility of the City successfully entering the NFL as owner and operator of the Franchise effectively destroyed the possibility of demonstrating a public use.[46]

The first of the two additional grounds for judgment given by the Monterey Court was that the City had violated statutory procedural requirements in commencing the eminent domain action, and that the City's action constituted a violation of due process of law.[47] The second of the two additional grounds for judgment dealt with whether the commerce clause of the United States Constitution serves as a prohibition on eminent domain takings.[48] The trial court found that the City's proposed taking would impermissibly burden interstate commerce in two respects. First, imposing a permanent location and introducing exclusively local control would frustrate the Franchise's operations and thereby unduly burden interstate commerce.[49] Second, "the taking of a [single] franchise would unduly burden other NFL members who depend on income from every team's gate receipts and who share equally the proceeds from the league's television contracts."[50]

These dual burdens, the trial court believed, would have obvious and far-reaching ramifications on interstate commerce. Consequently, the Monterey Court dismissed the City's eminent domain action with prejudice.[51] The City promptly appealed,[52] but the appeals court af-

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44. Note, *The Constitutionality of Taking a Sports Franchise By Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation,* 13 FORDHAM URB. L. J. 553, 558 (1985) (this Note [hereinafter cited as Note, *Sports Franchise Relocation*] contains excerpts from the trial court's unreported decision).

45. *Id.* n.38.

46. In conjunction with the prohibition established by the NFL on public ownership of a member franchise, the Monterey Court also found that the City would be statutorily prohibited from retransferring the team even if it were able to acquire it through eminent domain. The court obviously feared that the City might consider transferring ownership to a private interest subsequent to the taking to ensure that ownership and operation were consonant with NFL regulations. *Id.*

47. *Id.* at 559.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 558 n.36 (citing City of Oakland v. Oakland Raiders, No. 76044, Judgment at 1-2

firmed the Monterey Court's holding, electing to address only the commerce clause issue.[53] The appeals court stated that its decision on the commerce clause issue obviated the need to consider any of the other grounds relied upon by the Monterey Court in adjudicating the matter.[54]

The City appealed to both the California Supreme Court and the United States Supreme Court, but as noted earlier, both courts declined review.[55] The appeals court decision, having evaded review by ultimate state and federal authority, stands as essentially the only precedent dealing with the condemnation of a sports franchise.[56] The decision's precedential value, therefore, depends primarily on the persuasiveness of its rationale rather than the authority of the court from which it issues.

III. The Appeals Court and *Raiders IV*—Review of the Commerce Clause Analysis

In initiating its commerce clause review, the appeals court noted that "state or local regulation of interstate commerce will be upheld if it 'regulates evenhandedly to effectuate a legitimate local public interest, and if its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.' "[57] The appeals court also emphasized that "burdens [on interstate commerce] will be voided if the regulation governs 'those phases of the national economy which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority.' "[58] In this case, the appeals court found that Congress had not acted to proscribe governmental conduct. However, the absence of this pervasive congressional action was of no consequence to the appeals court. Reciting familiar dormant commerce clause language, the appeals court noted that "the commerce clause limits state power by its own force."[59]

(Cal. Super. Ct. Monterey County, Aug. 10, 1984)).

52. *Id.* at 560 n.48 (citing City of Oakland v. Oakland Raiders, No. 76044, Judgment (filed Aug. 10, 1984), *appeal docketed*, (Cal. Super. Ct. Monterey County, Sept. 14, 1984), *aff'd*, City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (Cal. Ct. App. 1985)).

53. *Raiders IV*, 174 Cal. App. 3d at 416, 220 Cal. Rptr. at 154.

54. 174 Cal. App. 3d at 422, 220 Cal. Rptr. at 158.

55. *See supra* notes 4 and 5 and accompanying text.

56. *See supra* note 6 and accompanying text.

57. *Raiders IV*, 174 Cal. App. 3d 414, 417-18, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985) (quoting, in part, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

58. 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 155 (quoting, in part, Southern Pacific Co. v. Arizona 325 U.S. 761, 767 (1945)).

59. *Id.*

After providing the foregoing relevant bits of commerce clause law, the court turned to the City's objections to the introduction of the commerce clause as a limitation on the exercise of its eminent domain powers.

A. *The Doctrine of "The Law of The Case" Should Preclude Commerce Clause Review*

The City first maintained that commerce clause review could not be introduced at retrial in *Raiders IV* because, while the Franchise raised the commerce clause issue in its petition for rehearing in *Raiders I,* the issue was dropped without resolution. The City argued that the Monterey Court was barred from reevaluating the commerce clause issue by the doctrine of "the law of the case."[60] This doctrine "binds all subsequent proceedings, trial or appellate, to prior appellate determinations in the same action . . . ."[61] However, reasoning that the "[l]aw of the case doctrine . . . does not extend to points of law that might have been but were not presented *and determined* on a prior appeal," the appeals court held that the Monterey Court was not precluded from engaging in commerce clause review.[62]

B. *The City is Exempt From Commerce Clause Prohibitions Because it is a Market Participant*

In a second attempt to avoid commerce clause review, the City argued that it was a market participant, not a regulator.[63] The City cited a wealth of cases for the well-accepted proposition that if a governmental entity enters the marketplace as a participant, it is immune from traditional commerce clause prohibitions which would otherwise restrict governmental activity in the marketplace.[64]

The appeals court dealt succinctly with this contention. Noting that but for the City's exercise of the eminent domain power, the City could not even enter the marketplace,[65] the appeals court held that the City was not a market participant, and therefore not entitled to the market participant exemption from commerce clause scrutiny. In order to qualify for the exemption, the City would have had to attempt "to enter the football market on an equal footing, bidding with other potential market participants and seeking to purchase from someone willing

60. 174 Cal. App. 3d at 418, 220 Cal. Rptr. at 156.
61. *Id.*
62. *Id.*
63. *Id.*
64. 174 Cal. App. 3d at 419, 220 Cal. Rptr. at 156.
65. *Id.*

and able to sell . . . ."[66] Since the City did not engage in competitive bidding to enter the football market, but relied on eminent domain power to take the Franchise, the appeals court reasoned that the participant exemption was not appropriate in this instance.

C. *The Commerce Clause Should Never be Invoked to Restrict a Taking by Eminent Domain*

To buttress its argument that the commerce clause should not be invoked as a limitation on eminent domain power, the City pointed to the absence of judicial precedent invoking the commerce clause as a limitation in this context. The City maintained that the absence of such supporting precedent should deter the appeals court from engaging in dormant commerce clause review. The appeals court was unimpressed by the absence of such precedent, however. The court simply stated that this was a novel issue, never before considered, and consequently, the absence of judicial precedent was understandable.[67] Reasoning that it should attach no significance to the absence of supporting precedent, the appeals court brushed aside the City's contention and proceeded to determine the magnitude of the interstate commerce burdens engendered by the City's proposed taking.

V. ANALYSIS

A careful examination of the *Raiders IV* opinion reveals several analytical gaps. First, while properly holding that the City should not be entitled to the market participant exeception, the appeals court, in addition to providing only scant market participant analysis, overlooked a salient argument posed by the City which is deserving of treatment. Second, in its zeal to analyze the anticipated burdens on interstate commerce created by the proposed taking, the appeals court neglected to deal with a body of case law which, both explicitly and implicitly, counsels against the use of dormant commerce clause review in this setting. Finally, it appears that the appeals court's determination that the proposed taking would more than incidentally burden interstate commerce is flawed in several respects.

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66. *Id.*
67. *Id.*

A. *The Appeals Court Failed to Address the City's Incompatibility Argument and to Adequately Support Rejection of the Market Participant Argument*

In arguing for entitlement to the market participant exception, the City raised a simple and compelling point: the burdens on interstate commerce which were being attributed to the City's taking could only occur if it was "participating" in commerce.[68] In essence, the City argued that the denial of participant status was *incompatible* with the Franchise's assertion that the City would burden interstate commerce—the burdens could only arise if the City were participating in commerce. Taken to its logical extreme, the argument dictates that if a court determines that a city has burdened commerce by taking an ongoing business through eminent domain, ipso facto the City must be entitled to market participant status.[69]

The appeals court did not address the City's "incompatibility" argument in *Raiders IV*. However, an evaluation of the market participant cases demonstrates that the City's reliance on the participant exception to commerce clause review was misplaced. An evaluation of the market participant case law yields a set of principles which are instructive in determining whether the City's proposed taking falls within the sphere of activity encompassed by the exception. Also, a determination of the true nature of the City's proposed action facilitates the disposition of the City's incompatibility argument.

1. *The Market Participant Cases*

First in the line of significant market participant cases is *Hughes v. Alexandria Scrap Corp.*[70] This case dealt with a Maryland statute which provided for the removal of abandoned or "junked" automobiles from the State's highways by turning them into scrap. The statutory scheme provided for the payment of "bounties" to processors who could provide ownership documentation on the abandoned cars turned in for conversion to scrap.[71] The statute was specifically concerned with abandoned cars having Maryland title certificates. To encourage the processing of abandoned cars within Maryland, the statute imposed more stringent documentation requirements on out-of-state than in-

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68. Petition for Writ of Certiorari at 14, City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr.153 (Cal. Ct. App. 1985) *cert. denied*, ____ U.S. ____, 106 S.Ct. 3300 (1986) [hereinafter cited as Petition for Writ of Certiorari].

69. *Id.*

70. 426 U.S. 794 (1976).

71. *Id.* at 797.

state processors.[72] As a result, the number of cars being delivered to Alexandria Scrap (a Virginia processing plant) was substantially reduced. Alexandria Scrap sued alleging that the Maryland statute created a substantial burden on interstate commerce.[73]

After reviewing the commerce clause arguments, a federal district court struck down the legislation, finding that the Maryland statute was discriminatory in that it favored in-state processors over out-of-state processors. The United States Supreme Court reversed.[74]

Characterization of the State's activities emerged as the pivotal point in the Court's decision. The Court found that the State was simply acting as a market participant, seeking merely to restrict "its trade to its own citizens or business within the State."[75] The Court rejected the appellee's assertion that the discriminatory action was barred by the commerce clause: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[76]

Alexandria Scrap was followed several years later by *Reeves, Inc. v. Stake.*[77] *Reeves* concerned a cement production program operated by the State of South Dakota. In the early years of operation the State's cement plant produced more cement than the State's citizens could use. As a result, the State began selling to numerous out-of-state buyers.[78] In 1978, however, the State's production slowed. With the onset of a booming construction industry and the production decline, the State found itself unable to satisfy all of its buyers' orders.[79] The State resolved to fill all orders placed by South Dakota buyers first, then honor other out-of-state buyer contracts with the remaining inventory. Reeves, Inc. was informed that the State's plant would be unable to fill its orders. Reeves filed suit challenging the State's policy of favoring South Dakota buyers.[80]

The federal district court found in favor of Reeves and enjoined the State from continuing its preferential policy. The United States Court of Appeals for the Eighth Circuit reversed, finding that the State

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72. *Id.* at 799.
73. *Id.* at 801.
74. *Id.* at 805.
75. *Id.* at 808.
76. *Id.* at 810.
77. 447 U.S. 429 (1980).
78. *Id.* at 432.
79. *Id.*
80. *Id.* at 433.

had acted in a manner harmonious with *Alexandria Scrap.*[81] Reeves sought a writ of certiorari.

The United States Supreme Court granted the writ and affirmed the court of appeals' decision.[82] The Court first found that the State was a market participant and that the State's action was simply proprietary.[83] The Court then recognized the applicability of *Alexandria Scrap,* noting that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[84] Furthermore, the Court stated that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."[85]

Most recent in the line of market participant cases is *White v. Massachusetts Council of Construction Employers, Inc.*[86] The Mayor of Boston had issued an executive order which required all construction projects within Boston, funded in whole or in part by the City of Boston, to be completed by a work force consisting of at least half bona fide Boston residents.[87]

Finding a violation of the commerce clause, the Massachusetts Supreme Judicial Court struck down the Mayor's order. On appeal, the United States Supreme Court reversed, holding that the commerce clause did not prevent the city from giving effect to the Mayor's order.[88] The Court further found that because the city had expended its own funds on the public projects, it was a true market participant. The Court added a significant element to the analysis: "Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause."[89]

2. *Applying Market Participant Principles to* Raiders IV

Principles relevant to an evaluation of *Raiders IV* can be gleaned from the three market participant cases: 1) the market participant exception protects a state, generally operating in a market it created, that acts to disadvantage out-of-state interests; 2) the commerce clause does

81. Reeves, Inc. v. Kelley, 603 F.2d 736 (8th Cir. 1979).
82. Reeves, Inc. v. Stake, 444 U.S. 1031 (1980).
83. Reeves, Inc. v. Stake 447 U.S. 429, 440 (1980).
84. *Id.* at 437.
85. *Id.* at 439.
86. 460 U.S. 204 (1983).
87. *Id.* at 205.
88. *Id.* at 214.
89. *Id.* at 210.

not prohibit a state from entering the market and thereafter favoring its own citizens; 3) impact on interstate commerce should not be addressed until it is determined whether the state is regulating the market or participating in it; 4) the market participant exception applies only to state proprietary action.

Application of the first principle to the facts in *Raiders IV* reveals that the City did not seek to enter a market of its own creation. Essentially, the City's action was a forced entry into an already existing market—the NFL and its numerous commercial activities. It is an established proposition that if a governmental organization does not create its own market, then it must enter the existing market as any other participant would, bidding for a right to participate therein, if it expects to be granted participant status.[90] A rejoinder to this proposition would likely be that states frequently take commercially significant interests without engaging in any competitive bidding,[91] precisely as the City attempted to do in *Raiders I.* This response is unavailing for two reasons.

First, the response ignores the reality that the majority of these commercial interests are not used by the condemning authority as an ongoing business concern. More often the taking seeks to accomplish such ends as abating a nuisance, or attracting a more desireable economic interest to an area. Consequently, reconveyancing of the condemned property is not uncommon.[92] As a result, there is no need for a court to engage in an involved market participant analysis simply because entry into a market is achieved. Rather, a court should look to see if the market was created by the state, and if not, whether the entry was gained on equal footing with other desiring participants. Until one of these two criteria is satisfied, no participant analysis is needed.

Second, when a government plans to take and operate an ongoing business concern, as the City did in *Raiders I,* a court should consider the nature of the business in question. Because the nature of the business in *Raiders I,* and for that matter in any professional sports franchise, is distinct from the business activity[93] considered in the market participant cases, a strong argument can be made that the participant exception as presently constituted cannot adequately address the action taken by the City in *Raiders I* without additional justification.

Application of the second market-participant principle to *Raiders*

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90. *See generally* Note, *Sports Franchise Relocation,* 13 FORDHAM URB. L. J. 553, 581 (1985).

91. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

92. *See, e.g., id.*

93. Note, *Sports Franchise Relocation,* 13 FORDHAM URB. L. J. 553, 574 (1985).

IV, reveals that the City's avowed objectives fail to square with the type of governmental objectives common to the three market-participant cases. Whatever identifiable rule of law issued from the three cases resulted because the states were acting to discriminate directly against out-of-state interests. Particularly in the cases of *Alexandria Scrap* and *Reeves,* these interests were tangible and immediately recognizable. *Raiders IV,* however, does not deal with a situation where the City sought to take action to protect its own vis-a-vis outsiders. The City's action was not intended to necessarily disadvantage outside commercial interests. Additionally, the action contemplated by the City in *Raiders IV* was not intended to result in a benefit to a distinct economic group residing within the City, as in the three market cases, e.g., scrap processors, cement users and construction workers.

Because the City must demonstrate a valid public use in order to take the Franchise, it would be incongruous to then allow the City to identify other benefits, benefits which do not coincide with those involved in establishing public use, in order to claim market participant status. To show public use, the City argued that the Franchise was essential to provide recreational and other aesthetic opportunities for its citizens.[94] Nothing in the three market cases indicates that non-economic benefits should entitle a city to the market participant exception.[95] The market participant cases contain a common theme that a governmental entity should be able to act to the economic benefit of its citizens.[96]

The City may certainly argue that it intended to economically benefit its citizens, but the economic benifits would be one step removed from the benefits advanced to show a valid public use. The market participant cases are only helpful in this regard if they indicate that the exception is available if the government attempts primarily to secure non-economic benefits and that the economic benefits may be secondary. This line of cases expresses no such intention, and stretching the cases to extend the immunity where non-economic interests are primary does harm to the cases' objective of allowing states in the market the same freedom from constitutional constraints enjoyed by private entities.[97]

The third principle taken from the market participant cases re-

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94. *See Raiders I,* 32 Cal. 3d 60, 70, 646 P.2d 835, 841, 183 Cal. Rptr. 673, 679(1982).

95. In fact, in Reeves, Inc. v. Stake, the Court noted that the commerce clause has traditionally responded to state taxes and regulatory measures affecting free trade. To the extent that states seek economic advantages by participating in the market, they are entitled to operate freely. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980).

96. *See generally* 447 U.S. at 438 - 39.

97. *Id.*

quires that the analysis should begin with a determination of whether the state was regulating the market or participating in it. Until this determination is made, the market participant cases indicate that the perceived burdens need not be addressed. Obviously, if a state is participating, the inquiry is over because the state would be entitled to the exception. Conversely, it is only after a court determines that the state is regulating that the burdens on interstate commerce are evaluated under traditional dormant commerce clause analysis.[98]

Taking by eminent domain cannot be classified as pure regulation—although the taking may create regulatory effects. But neither is it participation in the market in the sense contemplated by *Alexandria Scrap, Reeves* and *White.* The City's participation in the market would be subsequent to the taking action challenged by the Franchise. The three market cases leave unresolved this classification problem and give little guidance on how to resolve it. Indeed, Justice Rehnquist, in delivering the majority opinion in *White,* intimated that defining the breakdown between participation and regulation was not an easy proposition.[99]

One writer has indicated that a solution to this dilemma could be aided by asking the question whether the activity undertaken by the state in the market was a traditional or non-traditional state function.[100] This model is derived from *National League of Cities v. Usery,*[101] and that case's reliance on the notion of inherent attributes of state sovereignty. The analogy is that the market participant exemption likewise turns on notions of state sovereignty. However, in light of the fact that the Court has overruled *National League of Cities,*[102] there no longer appears to be any viable model for distinguishing participation from regulation.[103] Clearly, this problem defies easy resolution. Eminent domain actions may only be fairly categorized as occupying some middle ground between regulation and participation.[104]Being unable to

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98. Note, South-Central Timber Development, Inc. v. Wunnicke: *The Dormant Commerce Clause Fells Alaska's Primary Manufacture Requirement for the Sale of State-Owned Timber,* 5 N. ILL. U. L. REV. 155, 159 (1984) [hereinafter cited as Note, *The Dormant Commerce Clause*].

99. White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 211 n.7 (1983).

100. Note, *The Dormant Commerce Clause,* 5 N. ILL. U. L. REV. 155, 179 (1984).

101. 426 U.S. 833 (1976).

102. Overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531 (1985).

103. A close analogue to the model suggested in Note, *The Dormant Commerce Clause, supra* note 100, is provided by Note, *A Proposed Model of the Sovereign/Proprietary Distinction,* 133 U. PENN. L. REV. 661 (1985). A close evaluation of the criteria provided by this model indicates that the City's action in *Raiders IV* does not conveniently lend itself to classification under this model either.

104. Note, *Sports Franchise Relocation,* 13 FORDHAM URB. L. J. 553, 581 (1985).

resolve *Raiders IV* on a participation versus regulation basis, the only alternatives which remain are to determine, first, if there is any support for engaging in a commerce clause review in *Raiders IV,* and second, if the commerce clause was rightfully invoked, what was the extent of the burdens on interstate commerce.

B. The Appeals Court Precipitously Determined That Commerce Clause Review Was Appropriate in This Case

Traditionally, the fifth amendment of the United States Constitution has been viewed as the only constitutional limitation on taking by eminent domain. This amendment has been construed over decades of interpretation to require only that the condemning authority show a valid public use, pay just compensation for the property taken and comport with basic due process requirements.[105] This traditional construct, however, is the evolutionary product of cases dealing almost exclusively with real property interests.

The property interests involved in *Raiders IV* were intangible contract rights. A condemning authority might well find a public use for the intangible property but nevertheless thereby simultaneously create significant burdens on interstate commerce. This poses the obvious analytical question whether traditional taking analysis can adequately address the taking of intangible property rights. Unlike real property, intangible interests by their very nature are likely to be intimately related with interstate commerce. The appeals court in *Raiders IV* noted the consequences of this analytical question.[106]

In attempting to resolve its uneasiness with relying solely on traditional taking analysis, the appeals court, with little discussion, concluded that the City's proposed taking could be rightfully subjected to commerce clause review. In reaching this conclusion, however, the appeals court failed to distinguish two cases which had concluded commerce clause review was inappropriate in the eminent domain context. While these cases both involved takings of real property, the interstate commerce implications were just as pronounced as those in *Raiders IV.* The appeals court also failed to explain why its decision was not affected by a significant body of authority which recognizes that intangible property takings have never been decided under commerce clause review.

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105. People v. Adirondack Railway Co., 160 N.Y. 225, 238, 54 N.E. 689, 692 (1899), *aff'd,* 176 U.S. 335 (1900); Cuglar v. Power Authority of the State of New York, 4 Misc. 2d 879, 907, 163 N.Y.S.2d 902, 931 (N.Y. Sup. Ct. 1957).

106. *Raiders IV,* 174 Cal. App. 3d 414, 419, 220 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985).

1. *Cases Which Have Considered Applying Commerce Clause Review to Proposed Takings*

In addressing the insufficiency of traditional taking analysis in *Raiders IV,* the appeals court stated that a determination of "[w]hether the commerce clause precludes taking by eminent domain of intangible property . . . is a novel question posed, it seems, for the first time in this case."[107] While it may be true that *Raiders IV* is the first case to subject intangible property takings to a commerce clause analysis, there are other cases that have considered the use of commerce clause review as a limitation on proposed takings of real property. Although these other cases involve real property interests, these interests are nonetheless tied as closely to interstate commerce as the intangible property interests in *Raiders IV.*

In *Southern Railway Co. v. State Highway Department of Georgia,*[108] the State Highway Department (Department) sought to condemn and thereby acquire title to a strip of land owned by Southern Railway Company (Southern). The Department wanted the land for a proposed widening and reconstruction of an existing State-aid road.[109] A portion of one of Southern's depots, however, was constructed upon the strip of land, and the Department's plans called for demolishing the depot to allow for reconstruction of the road. Responding to the Department's eminent domain action, Southern answered by alleging, inter alia, that the proposed taking was arbitrary, capricious and for an unnecessary purpose.[110] Southern also objected on the ground that the Department's actions would violate the commerce clause of the Constitution.[111] The trial court sustained the Department's demurrer to these objections and Southern appealed.

The case was considered on appeal by the Georgia Supreme Court. Reasoning that Southern had made adequate averments and allegations in its answer regarding the activities of the Department, the court overruled the Department's demurrer, allowed Southern's answer and objections to stand, and remanded the case.[112] During the course of its analysis the court made some observations regarding commerce clause review in an eminent domain action.

Most notable among the court's statements was that "[a] State may exercise its power of eminent domain . . . although interstate com-

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107. *Id.*
108. 219 Ga. 435, 134 S.E.2d 12 (1963).
109. 219 Ga. at 435, 134 S.E.2d at 13.
110. 219 Ga. at 436, 134 S.E.2d at 14.
111. *Id.*
112. 219 Ga. at 441, 134 S.E.2d at 16.

merce may be indirectly or incidentally involved."[113] The court then stated that "a State can not by an arbitrary, capricious and unnecessary exercise of its power of eminent domain take and destroy property . . . ."[114] After a brief review of the facts of the case, the court concluded that "such [proposed] action by the State Highway Department [was] an unauthorized interference with and an undue burden on the interstate commerce business which [Southern] conduct[ed] at its depot."[115]

It is less than clear after an initial review of *Southern Railway* whether the Georgia Supreme Court was relying on the "arbitrary, capricious and unnecessary exercise" language, or whether it was relying on the dormant commerce clause analysis to decide the case. If the court was focusing on the commerce clause, then this case certainly adds credibility to the task undertaken by the appeals court in *Raiders IV*. If, on the other hand, *Southern Railway* was resolved on traditional takings grounds, one must look elsewhere for precedential support for invoking dormant commerce clause analysis.

A careful reading of *Southern Railway* discloses that the court's analysis was not truly dormant commerce clause review. Two observations support this conclusion. First, the court engaged in some confus ing causal reasoning:

> [T]he State in this condemnation proceeding, is arbitrarily, capriciously and for an unnecessary purpose seeking to take and destroy property of the defendant railway company . . . and since [it does], we hold that such action . . . is an unauthorized interference with and an undue burden on the interstate commerce business [of Southern].[116]

The initial portion of this statement refering to arbitrary and capricious action sounds very much like traditional due process analysis. The use of "unnecessary purpose" creates the impression that the court is speaking in terms of "valid public use"—a well established prong of fifth amendment taking analysis. If these characterizations of the court's statements are correct, meaning that the court's anaylsis centered on due process and traditional taking doctrine, the inclusion of the statements concerning interstate commerce are mere surplusage. To further support this assertion one need only look at what this causal statement fails to foreclose. Nothing in the court's opinion indicates

113. 219 Ga. at 440, 134 S.E.2d at 16.
114. *Id.*
115. 219 Ga. at 441, 134 S.E.2d at 16.
116. *Id.*

what the result would have been if the Department's proposed taking were not arbitrary, capricious or for an unnecessary purpose. Because the court did not find that the Department's activities, of their own weight and irrespective of their ability to create other constitutional infirmities, would create undue burdens on interstate commerce, the inevitable conclusion must be that the real bite in terms of the court's review is actually due process and traditional taking doctrine.

A second reason for not relying heavily on *Southern Railway* to sanction the use of commerce clause review in proposed taking cases is that the Georgia Supreme Court was merely reviewing a trial court's grant of a demurrer to and a motion to strike Southern's answer to the complaint.[117] As such, an extensive, well-developed factual record would have been unavailable for the reviewing court. Given the absence of a factual record, it is difficult to imagine that a court could conclude as a matter of law that a proposed taking would create an impermissible burden on interstate commerce.

The second case which raises the commerce clause as a possible limitation on the power of eminent domain is *City of Houston v. Fort Worth & Denver Railway.*[118] The City of Houston (Houston) brought suit to condemn land owned by Fort Worth & Denver Railway (Railroad). This land was used as the Railroad's yard and also contained a portion of its main tracks. The proposed use was to construct municipal streets.[119] After a jury trial, Houston was awarded an easement on the land, and the Railroad was awarded $84,770 for expenses it would incur as a result of the easement. Both parties appealed the judgment.[120]

One of the Railroad's major points of error was that the trial court had disregarded the jury's responses to a set of special jury interrogatories.[121] The Railroad argued that the responses to these interrogatories would support a finding that Houston's proposed taking would violate the commerce clause.[122]

In addressing this issue the Texas Court of Civil Appeals noted that "[t]he Railroad has cited no case in which condemnation has been disallowed under this [commerce clause] theory and we have found none."[123] Furthermore, the court found that this type of taking had been approved by both state and federal courts in a number of cases

117. 219 Ga. at 438, 134 S.E.2d at 15.
118. 619 S.W.2d 234 (Tex. Civ. App. 1981).
119. *Id.* at 235.
120. *Id.*
121. *Id.*
122. *Id.* at 236.
123. *Id.* at 238.

involving a greater potential for impermissible interference with interstate commerce than was present in *City of Houston*.[124] Therefore, the court held that the burdens on commerce were only slight and overruled this point of error.[125]

It is significant that the court in *City of Houston* found the absence of precedent invoking commerce clause review in eminent domain cases to be a major impediment to engaging in such a review. The appeals court in *Raiders IV* found the absence of such precedent "unremarkable . . . [serving] merely to point out that eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations . . . ."[126] Clearly, both the absence of precedent advocating commerce clause review and the body of precedent, albeit a small body, counseling either implicitly, in the case of *Southern Railway*, or explicitly, in the case of *City of Houston*, against commerce clause review did not serve to enlighten the appeals court in *Raiders IV* as to the path it should take.

Both *Southern Railway* and *City of Houston* involved the taking of real property which created commerce clause implications. While the *Raiders IV* court did justifiably conclude that real property cases rarely implicate commerce clause considerations, it would have been prudent for the appeals court to at least mention these rare cases and explain why, even though they raise commerce clause considerations, their failure to invoke commerce clause review should not be persuasive in *Raiders IV*. The failure of the appeals court to distinguish *Southern Railway* and *City of Houston* impugns the credibility and persuasiveness of *Raiders IV*. Moreover, it would be more than inexcuseable if the impetus for introducing commerce clause review in *Raiders IV* sprang, in part, from a less than thorough evaluation of existing law.

2. *The Absence of Commerce Clause Review in Previous Taking Cases Involving Intangible Property Interests*

There should be little doubt that intangible property rights in the form of contractual rights, franchise or corporate stock rights, or other incorporeal interests, are not immune from condemnation under eminent domain. A substantial body of case law recognizes the opposite—that such intangible rights may be taken.[127] The only limitations imposed on the exercise of eminent domain with respect to these types

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124. *Id.*

125. *Id.*

126. *Raiders IV*, 174 Cal. App. 3d 414, 419, 220 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985).

127. *See* 26 AM.JUR.2D *Eminent Domain* §§ 73, 80, 81, 83 and supp. (1966), *see also* 29A C.J.S. *Eminent Domain* § 78.

of interests are that the taking satisfy some public use and that just compensation be paid.[128]

The United States Supreme Court, as well as state supreme courts, have recognized that property of corporations, including real assets, stock and even the franchise right itself may be taken through eminent domain. The only limitations imposed have been public necessity and just compensation. For example, in *Greenwood v. Freight Co.*, the Supreme Court stated that "[t]he property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation."[129] The Rhode Island Supreme Court echoed this sentiment in *Narragansett Electric Lighting Co. v. Sabre.* The court stated:

> Contract rights are property and as such may be taken under power of eminent domain . . . . Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. Its whole property may be likewise taken. Shares of stock represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the state necessary in furtherance of public uses.[130]

The United States Supreme Court has more recently reaffirmed the notion that intangible interests may properly be subject to condemnation. In *United States Trust Co. of New York v. State of New Jersey*[131] the States of New York and New Jersey entered into a contract to create a Port Authority to coordinate commercial activity in the Port of New York. The Authority was empowered to issue bonds for the construction and acquisition of necessary facilities.[132] The agreement between the two States stipulated that neither State would use revenue from outstanding bonds which was pledged as security for the bonds. Several years after entering into the agreement, New Jersey repealed its enabling legislation and began using the revenue pledged as security.[133] A holder of the bonds sued. The Supreme Court held that New Jersey was prohibited from this action by the contract clause of the United States Constitution.[134]

In a footnote in its decision the Supreme Court stated clearly that

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128. *See, e.g.*, New Orleans Gaslight Co. v. Lousiana Light & H.P. & Mfg. Co., 115 U.S. 650 (1885); Narragansett Electric Lighting Co. v. Sabre, 50 R.I. 288, 146 A. 777 (1929).

129. 105 U.S. 13 (1881).

130. Narragansett Electric Lighting Co. v. Sabre, 50 R.I. 288, 303, 146 A. 777, 784 (1929) (citations omitted).

131. 431 U.S. 1 (1977).

132. *Id.* at 8.

133. *Id.* at 14.

134. *Id.* at 32.

contract rights are a form of property and as such may be taken for a public purpose, provided just compensation is paid.[135] The Court made no reference to the necessity of ensuring that such a proposed taking be harmonious with the commerce clause. If the commerce clause is, in fact, a relevant point of analysis in takings involving intangible property, it is not unreasonable to suppose that the Court would have at least mentioned it, particularly in light of the manifold interstate commerce factors involved in *United States Trust.* While this case is not controlling precedent because it was decided under a contract clause analysis, it nevertheless indicates that it is not obvious to the Court that there is some pressing need to supplement traditional takings analysis with dormant commerce clause review.

Courts have additionally held that where a taking of contractual rights comports with traditional taking doctrine, there cannot be a violation of the Constitution's contract clause.[136] In essence, courts recognize that the eminent domain power, properly exercised, is superior to the contract clause.[137] If courts are willing to recognize the primacy of eminent domain over this constitutional protection, why does the eminent domain power not likewise supercede the commerce clause limitation? Arguably, this could be precisely what *Southern Railway* established by its causal reasoning.[138] The court there found an impermissible burden on commerce only after determining that the taking violated traditional taking procedure.[139] The argument certainly can be made that *Southern Railway* recognizes the inverse: no commerce clause violation can be found where traditional taking requirements are satisfied. Moreover, to hold that the commerce clause limits a state's ability to take intangible property rights is to sanction a significant intrusion upon one of the inherent attributes of state sovereignty—the power of eminent domain.

The simple conclusion is that courts have considered the taking of intangible property rights and have determined that the only limitations on such takings are public use and just compensation.[140] No court (except the appeals court in *Raiders IV*) has recognized commerce clause review as needful, or even helpful, in taking cases simply because the Constitution does not require it. The long-standing view is that the commerce clause prevents states from discriminating against out-of-

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135. *Id.* at 19 n.16.
136. 26 AM.JUR.2D *Eminent Domain* § 81 (1966).
137. *Id.*
138. *See supra* note 116 and accompanying text.
139. *Id.*
140. *See supra* note 127.

state commerce.[141] In the Raiders line of cases there is no indication that California, through delegation of its eminent domain power to the City, was seeking to favor its own commerce over that of other states.

C. *Even if the Commerce Clause was Rightfully Invoked by the Appeals Court, Would the Supposed Burdens On Commerce be More than Incidental?*

The preceding discussion argues simply that the commerce clause review should not have been invoked in *Raiders IV*. For a moment let us assume, solely for analytical purposes, that commerce clause review was appropriately invoked by the appeals court. The question then becomes whether the burdens on interstate commerce identified in *Raiders IV* are more than incidental.

The appeals court identified two burdens on interstate commerce which would result from the City's proposed taking. First, the City's proposed taking of the Franchise conflicted with the NFL's constitution and by-laws.[142] Second, the permanent indenturing of the Franchise to the City was anathema to the NFL's commercial interests.[143]

To properly analyze whether the first source was a legitimate basis for concluding that the City was impermissibly burdening commerce, the posture of the NFL in the course of the Raiders litigation must be determined. A determination that the NFL sympathized with the City, and was thus willing to make certain concessions to eliminate or reduce any anticipated impediments to its commerce as a result of the taking, would undermine the appeals court's conclusion that the proposed taking would adversely affect interstate commerce.

There is little doubt that the NFL sided with the City in its attempts to prevent the Franchise from relocating.[144] In fact, the NFL itself was sued by the the Los Angeles Memorial Coliseum Commission for attempting to keep the Franchise in the City by enforcing the franchise relocation provisions in the NFL's own constitution.[145] The Ninth Circuit Court of Appeals held that the NFL had violated federal antitrust laws by attempting to block the move.[146] Obviously, if the NFL was willing to side with the City and attempt to block the Franchise's move, the NFL should be willing to make the necessary

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141. *See generally* Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

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

143. *Id.*

144. Petition for Writ of Certiorari, *supra* note 68 at 15 and 16.

145. Los Angeles Memorial Coliseum Comm. v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 426 U.S. 990 (1984).

146. *Id.* at 1401.

changes in its regulations to allow the City to avoid burdening the NFL's commerce, thus avoiding the supposed constitutional infirmity of the taking identified by the court in *Raiders IV*.[147] This would be especially reasonable since by so amending its regulations the NFL could accomplish its objective of keeping the Franchise in the City, yet avoid potential liability for violating federal antitrust laws.

In *Los Angeles Memorial Coliseum Commission v. NFL*,[148] the Ninth Circuit also made an observation about the NFL which conflicts with an observation made by the appeals court in *Raiders IV*. The Ninth Circuit observed that the NFL is not a single entity which has an interdependence on gate receipts, television revenues and other revenues.[149] The appeals court in *Raiders IV* held that the NFL did have this interdependence, and that because of it any action by a city to disturb it would create more than incidental burdens on commerce.[150] Clearly, one of the two characterizations is wrong. Because the determination in *Raiders IV* that the City's proposed taking would create substantial burdens on commerce rests on the characterization of the NFL as a joint, interdependent venture, a finding that the NFL is not a joint venture must cast serious doubt on the impact the City's taking would have on commerce.

Another point of divergence between *Raiders IV* and *Los Angeles Memorial Coliseum* is that in the former case the appeals court refused to deal with the possibility that the NFL rules and by-laws had to be subordinated to a sovereign's exercise of eminent domain powers. But in the latter case, the court struck down the NFL's franchise relocation rules on antitrust grounds, obviously showing less reverence for the NFL and its rules than was displayed in *Raiders IV*.[151] It seems clear that if any burdening of the NFL was created, it was created by the Raiders, not the City.[152]

The second burden on commerce identified by the appeals court was that the idenfuring of the Franchise to the City was incompatible with NFL interests.[153] But as noted in the preceding discussion, the NFL could have taken action to remedy any burden to its commerce simply by altering its rules. To the extent that *Raiders IV* relies on the burdening of the NFL's commerce to find burdens on interstate commerce, that finding should be seriously questioned in light of the fact

147. Petition for Writ of Certiorari, *supra* note 68 at 15.
148. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).
149. *Id.* at 1390.
150. *Raiders IV*, 174 Cal. App. 3d 414, 420, 220 Cal. Rptr. 153, 157 (Cal. Ct. App. 1985).
151. 726 F.2d at 1401.
152. Petition for Writ of Certiorari, *supra* note 68 at 16.
153. 174 Cal. App. 3d at 420, 220 Cal. Rptr. at 157.

that the NFL could have taken action necessary to eliminate these burdens, thereby keeping the Franchise in the City.[154]

VI. CONCLUSION

This note makes no attempt to advance an opinion whether the Raiders should or should not have been allowed to leave Oakland. Rather, it questions the propriety of using the dormant commerce clause as a limitation on an eminent domain action. Such use has no support in prior case law. Use of the commerce clause in *Raiders IV* is particulary disconcerting because the factual setting of that case is so vastly different from factual settings found in traditional dormant commerce clause cases. No previous cases have ever applied dormant commerce clause review to this type of governmental action. The appeals court did not attempt to justify its revolutionary approach, except to say that prior cases have simply never presented the issue as *Raiders IV* did.

While the appeals court perceived itself as rightfully undetered by the absence of prior case law on this matter, the fact remains that a significant body of law exists which counsels against the use of dormant commerce clause review in these type of cases. The appeals court should have taken a hard look at these cases which reject the use of the dormant commerce clause.

The appeals court's analysis on the City's entitlement to the market participant exception, while appropriately rejecting its application in *Raiders IV,* failed to provide a sound conceptual framework for evaluating the applicability of market participant status when a governmental entity's action does not fall neatly into either the regulation or participation category. Because of the unique character of eminent domain takings, being actions that are not entirely market regulation nor market participation, the appeals court's failure to do more than summarily reject the City's entitlement to the exception leaves the decision wanting.

The court's decision that the proposed taking would create substantial burdens on commerce appears to be on anything but secure ground. The irony of all of the Raiders litigation is that the crucial, traditional, and fundamental points of taking analysis, namely public use and just compensation, received virtually no attention in comparison with other issues. The question which must be posed from this point on, in light of *Raiders IV,* is whether the potential burdens on interstate commerce of all planned takings of intangible property rights

154. Petition for Writ of Certiorari, *supra* note 68 at 16.

must be assessed before the issues of public use and just compensation are reached.

If this approach gains popularity, there will be obvious ramifications on the taking of real property—at least to the extent that real property takings impact interstate commerce. The fact that the Raiders cases even arose, the fact that the California courts had such difficulty resolving the issues, and the fact that the taking was invalidated by unconventional reliance on the dormant commerce clause, speak forcefully for the proposition that judicial resolution of sports franchise takings may be inadequate. Congressional resolution of this clouded area may be the only viable alternative.

Greg L. Johnson