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# Eminent Domain Exercised - Stare Decisis or a Warning: City of Oakland v. Oakland Raiders

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# Eminent Domain Exercised — *Stare Decisis* or a Warning: *City of Oakland v. Oakland Raiders*

## I. Introduction

The California Supreme Court construed the power of eminent domain[1] broadly in *City of Oakland v. Oakland Raiders*,[2] holding that no fundamental rights were violated[3] when the city condemned[4] a professional football franchise which desired to move to another city.[5] The extent to which a city may use its power of eminent domain to displace inherent property rights is an important issue.[6] A significant controversy in the *Raiders* case was the circumstances under which such property rights may be condemned.

This casenote is presented as follows: Part II sets forth the facts of the case; Part III discusses the background of the legal issues; Part IV summarizes the majority and dissenting opinions; Part V analyzes these opinions; and, Part VI concludes that the majority's view fails to recognize the possible consequences of

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1. Eminent domain is "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." BLACK'S LAW DICTIONARY 470 (5th ed. 1979).

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

3. The case was remanded to resolve certain jurisdictional and proof uncertainties. *Raiders*, 32 Cal. 3d at 75, 646 P.2d at 844, 183 Cal. Rptr. at 682; *see infra* text accompanying notes 83-84. For additional discussion of the procedural history of the case, see *infra* text accompanying notes 9-13.

4. Condemnation is the "[p]rocess of taking private property for public use through the power of eminent domain." BLACK'S LAW DICTIONARY 264 (5th ed. 1979). *See also* 29A C.J.S. *Eminent Domain* § 1 (1965) (condemnation as the exercise of the power of eminent domain). For the requirements for exercising eminent domain, see *infra* note 13 & notes 31-35 and accompanying text.

5. *See infra* text accompanying notes 7-13.

6. *See generally* Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980) (a study of the uses and consequences of eminent domain in the United States).

Eminent domain is referred to as a "traditional" sovereign power since it dates at least as far back as the Romans. Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1978). *See infra* note 22 and accompanying text.

the decision for American business.

## II. Facts

The Oakland Raiders (the Raiders), a professional football team, is owned by a partnership directed by Allen Davis, one of two general partners.[7] In 1966, the partnership and the Oakland-Alameda County Coliseum, Inc., a publicly owned nonprofit corporation, entered into a license agreement for a five-year term with five three-year renewal options in favor of the partnership.[8] Options were exercised in 1970, 1973, and 1976, but not in 1979 for the 1980-81 season.[9] The partnership was dissatisfied with the license agreement and contract negotiations were eventually terminated.[10] When the partnership indicated its intention to move the franchise to Los Angeles, the City of Oakland commenced an action in eminent domain to keep the franchise in Oakland.[11]

The Monterey County Superior Court granted summary judgment for the Raiders because "no 'public use' essential to an eminent domain action could be found, and [because the city]

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7. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 63, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

8. *Id.*

9. *Id.*

10. *Id.*

11. The reasons for the city's action were:

1. The Coliseum complex would continue to operate as a public facility and would continue to meet its bond obligations.

2. The city's residents would continue to enjoy the recreational benefits associated with the Coliseum and the franchise.

3. The intangible goodwill, community spirit, pride, and mental well-being of the city's residents would be maintained and increased.

4. The city's continuance of its hundreds of millions of dollars worth of economic revitalization programs would not be threatened.

Brief for Appellant at 20, City of Oakland v. Oakland Raiders, 123 Cal. App. 3d 422, 176 Cal. Rptr. 646 (1981) (brief submitted to intermediate appellate court), *superseded*, City of Oakland v. Oakland Raiders, 31 Cal. 3d 656, *reprinted as modified*, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

The city's counsel described the ultimate "public use" as follows:

> [T]he primary objective and purpose of the City is to retain the franchise, and thus to carry on the primary purpose and objective of the entire Coliseum project. It is *not* the City's purpose to indulge in private business or activity, but rather to pay just compensation for the franchise, an object of personal property bought and sold routinely on the open market.

*Id.* at 30.

lacked the authority to exercise eminent domain for the purpose of retaining the Raiders' franchise in Oakland."[12] The appellate court affirmed, holding that the eminent domain statute[13] "does

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12. Brief for Appellant at 7, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982)(quoting the lower court; trial court decisions are not reported in California.)

A "public use" is required in order for a municipality to exercise eminent domain. *See infra* text accompanying notes 42-52.

13. California's eminent domain statute provides in relevant part:

§ 37350.5 Power of Eminent Domain

A city may acquire by eminent domain any property necessary to carry out any of its powers or functions.

§ 37353 Acquisition for parking, public ways, golf courses

The legislative body may acquire property needed for . . . (c) Golf courses; provided, however, that no existing golf course may be acquired by means of proceedings pursuant to eminent domain.

CAL GOV'T CODE § 37350.5 (West 1982 & Supp. 1983); *id.* at § 37353 (West 1968).

Other statutes pertinent to the discussion of eminent domain include:

§ 1235.125 Interest

When used with reference to property, "interest" includes any right, title, or estate in property.

§ 1235.160 Person

"Person" includes any public entity, individual, association, organization, partnership, trust or corporation.

§ 1235.170 Property

"Property" includes real and personal property and any interest therein.

§ 1235.190 Public Entity

"Public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

§ 1240.010 Exercise of power for public use

The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object or function is a public use.

§ 1240.030 Requirements

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

(a) The public interest and necessity require the project.

(b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The property sought to be acquired is necessary for the project.

§ 1240.050 Property within territorial limits; acquisition; exception

A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its statutory powers.

§ 1240.120 Acquisition of property for principal purpose; intent to sell, lease, etc. acquired property

not authorize the condemnation of the diverse contract rights necessary to the operation of the Raiders' business enterprise."[14] The City of Oakland then appealed to the California Supreme Court,[15] the decision of which is the focus of this paper.

## III. Background

### A. *Eminent Domain — A Traditional Power*

The power of eminent domain is an inherent attribute of sovereignty.[16] For centuries, sovereigns have had the right "to take private property for reasons of extreme necessity or public utility upon payment of compensation."[17] The historical justifications for allowing this governmental power have been described as notions of natural law,[18] concepts of basic sovereignty,[19] notions of reserved rights, and historical legitimacy.[20]

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(a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.

§ 1263.010 Rights of property owner; single payment for loss

(a) The owner of property acquired by eminent domain is entitled to compensation as provided in this chapter.

CAL. CIV. PROC. CODE §§ 1235.125, .160, .170, .190, 1240.010, .030, .050, .120, 1263.010 (West 1982).

14. City of Oakland v. Oakland Raiders, 123 Cal. App. 3d at 432, 176 Cal. Rptr. at 650. The intermediate appellate court focused on one issue: whether the intangible nature of the franchise precluded condemnation. The court held that such condemnation was precluded, since the former eminent domain statute, which related only to "real property and real property interests, in practice," would not have permitted condemnation. *Id.* at 431, 176 Cal. Rptr. at 648. *See infra* text accompanying notes 137-40.

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

16. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 676 (1982). *See* Meidinger, *supra* note 6, at 5.

17. Berger, *supra* note 6, at 204.

18. Meidinger, *supra* note 6, at 5.

19. *Id. See also* County of San Mateo v. Coburn, 130 Cal. 631, 63 P. 78 (1900) (right of eminent domain as attribute of sovereignty), *reh'g denied*, 130 Cal. 637, 63 P. 621 (1901).

The "natural law" theory emanates from the belief that government efficiency requires that there be a "competent power in the legislature to take private property for necessary or useful *public* purposes."[21] The concept of sovereignty justifies the power to condemn as a necessary part of a government's supreme authority.[22] Notions of "reserved rights" are derived from the theory that since the sovereign had once held all of the nation's land, all subsequent private possession was subject to an implied reservation permitting the sovereign to retake possession.[23] The "historical legitimacy" justification arises from case law suggesting that the power of eminent domain is derived from the common law.[24]

Whatever the justifications, eminent domain is "an accomplished state of affairs"[25] which has served many purposes. Through eminent domain, nations have been able to acquire the property necessary to expand industry,[26] develop the economy by constructing roads and dams,[27] satisfy aesthetic purposes by establishing parks and preserves,[28] redevelop worn urban areas,[29]

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20. Meidinger, *supra* note 6, at 5-6.

21. Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. 1816).

22. "The argument is that the power to condemn is inherent in the exercise of sovereignty. It is necessary to the existence of government, and all governments, by the circular implication, possess it." Meidinger, *supra* note 6, at 5-6 n.12. This justification is also present in the California eminent domain statute. CAL. GOV'T CODE § 37350.5 (West Supp. 1983). *See supra* note 13. "Its purpose is to give a city *adequate authority* to carry out its municipal functions." *Eminent Domain Law*, 13 CAL. L. REV. COMM. REPORTS 1001 (1975), *reprinted in* CAL. GOV'T CODE § 37350.5 (West Supp. 1983) [hereinafter cited as COMMISSION REPORTS].

The difficulty lies in defining what are necessary "powers and functions." *See infra* note 42.

23. This theory probably originated with the civil law writer, Hugo Grotius, who seems to be the originator of the term "eminent domain." *See* 1 NICHOLS, NICHOLS' THE LAW OF EMINENT DOMAIN §§ 1.12[1], 1.13[2] (rev. 3d ed. 1981); Berger, *supra* note 6, at 204.

24. In *Gardner v. Trustees of the Village of Newburgh*, the court justified the "just compensation" requirement by stating that "in taking private property for public uses . . . the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments from a deep and universal sense of its justice." Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. at 166.

25. Meidinger, *supra* note 6, at 6.

26. *Id.* at 2.

27. *Id.* at 23.

28. *Id.* at 19.

29. *Id.* at 33.

and provide "private ways of necessity."[30]

## B. *Exercising the Power of Eminent Domain*

### 1. *Requirements*

Both the United States Constitution and the California Constitution establish two prerequisites for a proper exercise of eminent domain:[31] the property taken must be for a public use and the owner must receive just compensation.[32] California statutes mandate further[33] that the project for which the property is sought be designed to maximize the public benefit and to minimize the private injury, and that the property be necessary[34] for

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30. *Id.* at 14, 29.

The power is not limited to public entities. In *University of So. Cal. v. Robbins*, the court held that a private corporation may be granted the right to take land under eminent domain for purposes of constructing a university library. University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (1934), *cert. denied*, 295 U.S. 738 (1935).

31. U.S. CONST. amend. V. The fourteenth amendment's due process clause imposed the same requirements on the states. No state shall "deprive any person of . . . property without due process of law . . . ." *Id.* at XIV, § 1. "Private property may be taken or damaged for *public use* only when *just compensation* . . . has first been paid to . . . the owner." CAL. CONST. art. I, § 19. (emphasis added).

These two requirements are also contained in the state statute. CAL. CIV. PROC. CODE §§ 1240.010, 1263.010 (West 1982). *See supra* note 13. The "public use" requirement is occasionally referred to as the "public purpose" requirement. *See Raiders*, 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679; Meidinger, *supra* note 6, at 43. There is authority, however, that illustrates how the terms are not always synonymous. *See* Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 284-86 (1982).

32. *Id.*

33. *See supra* note 13.

34. The issue of whether an exercise of eminent domain is "necessary" is a legislative matter. "The general rule of necessity . . . is not a matter of judicial cognizance but one for the determination of the legislative branch of the government . . . ." Adirondack Ry. v. New York State, 176 U.S. 335, 349 (1900).

The California Code provides: "Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity . . . *conclusively* establishes [necessity]." CAL. CIV. PROC. CODE § 1245.250 (West 1982) (emphasis added). The justification is said to involve "sound policy reasons. [N]o matter how qualified and learned a particular court may be, . . . a court is not the suitable agency or tribunal to make such complex *non-legal* determinations." Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 S. CAL. L. REV. 369, 376 (1955) (emphasis added). The only time that the issue of necessity is questionable by the courts (in California) is when there is a "gross abuse of discretion by the governing body." CAL. CIV. PROC. CODE § 1245.255 (West 1982). However, the issue of whether an exercise of eminent domain is for a "public use" is justiciable. *See infra* note 38.

the project.[35]

If these conditions are satisfied,[36] a public entity in California, such as a city,[37] has the authority to condemn private property. In case of controversy, the courts have subject matter jurisdiction over the issues of "public use" and "just compensation."[38]

### 2. *Defining a "Public Use"*

The meaning of "[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government,[39] and other differing circumstances brought

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35. CAL. CIV. PROC. CODE § 1240.030 (West 1982). *See supra* note 13.

36. The burden of proving that the proposed condemnation is not for a "public use" rests on the condemnee (i.e. the person whose property is sought to be taken by eminent domain). *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-96 (1962); People *ex rel.* Dep't Pub. Works v. Superior Ct., 68 Cal. 2d 206, 215-16, 436 P.2d 342, 348, 65 Cal. Rptr. 342, 348 (1968).

37. CAL. GOV'T CODE § 37350.5 (West Supp. 1983). *See supra* note 13.

38. This Note addresses only the "public use" issue. The "just compensation" requirement was not at issue in *Raiders*. Brief for Appellant at 8, City of Oakland v. Oakland Raiders, 123 Cal. App. 422, 176 Cal. Rptr. 646 (1981).

For a discussion of just compensation and the property rights involved, see Humbach, *supra* note 32.

Other than the "public use" and "just compensation" issues, "[a]ll other questions involved in the taking of private property are of a legislative nature." University of So. Cal. v. Robbins, 1 Cal. App. 2d at 525, 37 P.2d at 164. One commentator noted: "It has been said that the law has finally eliminated the public use requirement as an effective barrier to takings. This is most certainly a vast overstatement of what the law is." Berger, *supra* note 6, at 223.

Furthermore, the Law Revision Commission's comments state that the revised statute "does not preclude judicial review to determine whether the proposed use in a particular case is actually a public use." COMMISSION REPORTS *supra* note 22. *See, e.g.*, People *ex rel.* Dep't Pub. Works v. Superior Ct., 68 Cal. 2d at 215-16, 436 P.2d at 348, 65 Cal. Rptr. at 348.

If the legislature declares, however, that a "public use" does exist, this decision is said to be "entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding[s] *unless* it *clearly* appears to be *erroneous and without reasonable foundation.*" Housing Auth. v. Dockweiler, 14 Cal. 2d 437, 449-50, 94 P. 2d 794, 801 (1939) (emphasis added). The emphasized portion is the standard announced by the Law Revision Commission. *See* COMMISSION REPORTS *supra* note 22.

39. A "function of government" is a broad term. In California, it has been employed by the courts to include:

(1) "[T]he acquisition, construction, maintenance and repair of roads and streets," (Blum v. City and County of San Francisco, 200 Cal. App. 2d 639, 646, 19 Cal. Rptr. 574, 578 (1st Dist. 1962));

about by an increase in population and new modes of communication and transportation."[40]

In determining whether a proposed taking would be for a public use, courts frequently examine "the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."[41] Considerations include whether "[a]n elementary object of . . . [the] government [action] is to further the . . . general welfare of the people,"[42] or whether there is "anything calculated to promote the education, the recreation or the pleasure of the public."[43] Under the guise of such considerations, courts have gone so far as to hold that "alleviating unemployment and revitalizing the economic base of the community"[44] are valid reasons for exercising the power of eminent domain.

Proposed condemnations deemed not to satisfy the public use requirement include those where the government intends to use a business as the original owner did. *West River Bridge Co. v. Dix*[45] affirmed the principle that "[n]o state . . . [can] resume

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(2) "[T]he furnishing of fire protection," (Firestone Tire & Rubber Co. v. Board of Supervisors, 166 Cal. App. 2d 519, 529, 333 P.2d 378, 385 (2d Dist. 1958));

(3) "[E]ducation, public health, street maintenance," (Atlas Hotels, Inc. v. Acker, 230 Cal. App. 2d 658, 666, 41 Cal. Rptr. 231, 236 (4th Dist. 1964));

(4) "[T]raffic regulation," (People v. Ayon, 54 Cal. 2d 217, 227, 352 P. 2d 519, 525, 5 Cal. Rptr. 151, 227, *cert. denied*, 364 U.S. 827 (1960));

(5) "[D]issemination of information," (Kilgore v. Younger, 30 Cal. 3d 770, 782, 640 P.2d 793, 800, 180 Cal. Rptr. 657, 664 (1982));

(6) "[O]peration of the courts," (Allegrezza v. Superior Ct., 47 Cal. App. 3d 948, 952, 121 Cal. Rptr. 245, 248 (1st Dist. 1975)); and,

(7) [W]hatever "local government is authorized to do," (Northeast Sacramento County Sanitation Dist. v. Northridge Park County Water Dist. of Sacramento County, 247 Cal. App. 2d 317, 325, 55 Cal. Rptr. 494, 499 (3d Dist. 1966)).

40. Barnes v. City of New Haven, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953) (footnote added).

41. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160 (1896).

42. New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 473, 292 A.2d 580, 589 (1971), *modifying* 61 N.J. 1, 292 A.2d 545, *appeal dismissed*, East Rutherford v. New Jersey Sports & Exposition Auth., 409 U.S. 943 (1972).

43. Egan v. City of San Francisco, 165 Cal. 576, 582, 133 P. 294, 296 (1913). *See also* Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923).

44. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981). For the court's determination that owning an established sports team is an appropriate function of the city, see *infra* notes 79-80 and accompanying text.

45. 47 U.S. (6 How.) 507 (1848) (McLean, J., concurring).

a charter, under the power of appropriation, and carry on the functions of the corporations . . . . The power [of eminent domain] must not only be exercised *bona fide* by a State, but the property, not its product, must be applied to public use."[46] Assuming the functions of the condemned business, under this reasoning, would not be a valid "public use."[47]

Even if the condemnor were to transfer the condemned property to a third party, the public use requirement would not be fulfilled.

> [T]he property of the city, held in trust for public uses [can] not be turned over to [a private] corporation. And the conclusion [is] not altered by the circumstance that the purposes to which the property was to be applied were, to some extent at least, within the scope of municipal activities.[48]

This concept is supported by cases which have held that "[t]he State has no right to condemn *land* solely for resale to private ownership."[49]

### 3. *Property subject to condemnation*

The California statute allows for the condemnation of "any property."[50] Since property is defined as including "real and personal property and *any interest* therein,"[51] both tangible and intangible property are subject to eminent domain.[52] It is unclear,

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46. *Id.* at 537. "[T]he courts have universally read . . . [the public use] provisions as a proscription against takings for a private purpose." Berger, *supra* note 6, at 205.

47. In *Poletown Neighborhood Council*, the court stated that "[t]he heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user." Poletown Neighborhood Council v. City of Detroit, 410 Mich. at 632, 304 N.W.2d at 458.

48. Egan v. City of San Francisco, 165 Cal. at 584, 133 P. at 297.

49. State *ex rel.* State Highway Dep't v. 9.88 Acres of Land, 253 A.2d 509, 512 (Del. 1969) (emphasis added); *see also* Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); Egan v. City of San Francisco, 165 Cal. at 584, 133 P. at 297 ("use by a private corporation . . . [is] not a public use"); Chicago & N.W. Ry. Co. v. Town of Cicero, 157 Ill. 48, 53-54, 41 N.E. 640, 641 (1895).

50. CAL. GOV'T CODE § 37350.5 (West 1982). *See supra* note 13.

51. CAL. CIV. PROC. CODE § 1235.170 (West 1982) (emphasis added). *See supra* note 13. The Law Revision Commission's comments state that the statute is intended to encompass "all interests in property of whatever character or extent." COMMISSION REPORTS *supra* note 22.

52. "[C]ontracts are subject to the right of . . . eminent domain." El Paso v. Simmons, 379 U.S. 497, 525, *reh'g denied*, 380 U.S. 926 (1965). Furthermore, the Supreme

however, whether intangible property alone may be condemned or whether it must be associated with tangible property that is being condemned.[53]

## IV. Decision of the Court

### A. *The Majority Opinion*

The issues in *City of Oakland v. Oakland Raiders* were, according to the majority, whether intangible property is subject to condemnation[54] and whether the proposed taking was in furtherance of a "public use."[55] After discussing briefly the origins and broad scope of the power of eminent domain,[56] the court considered California's revised statute,[57] which gives its cities the power to condemn.[58]

The court, while acknowledging that the intent of the statute is to define property as broadly as possible,[59] noted that there is little applicable California law with respect to the condemnation of the contractual and other rights involved.[60] The court observed, however, that case law[61] indicates and commentators[62] agree that the condemnation of intangible property is

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Court has long recognized that: "A franchise is property, and nothing more; it is incorporeal property . . . ." West River Bridge Co. v. Dix, 47 U.S. (6 How.) at 534.

53. *See infra* note 129.

54. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

55. *Id.* Recall that the "public use" issue is justiciable, unlike the "necessity" issue. *See supra* notes 32, 34 & 38.

56. Justice Richardson stated that any constitutional provisions "merely place limitations upon" the exercise of eminent domain, indicating that whatever powers are not specifically excluded are implicitly included. *Raiders*, 32 Cal. 3d at 64, 646 P.2d at 838, 183 Cal. Rptr. at 676.

57. See *supra* note 13 for reprinted portions of the pertinent sections.

58. CAL. GOV'T CODE § 37350.5 (West Supp. 1983). *See supra* note 13.

59. *See* COMMISSION REPORTS, *supra* note 22, at 1001 (comments pertaining to the definition of property for eminent domain purposes).

60. *Raiders*, 32 Cal. 3d at 66, 646 P.2d at 839, 183 Cal. Rptr. at 677.

61. *Id.* at 67, 646 P.2d at 839-40, 183 Cal. Rptr. at 677-78.

The court cited several cases in the inverse condemnation context. *See, e.g.*, Armstrong v. United States, 364 U.S. 40 (1960), *on remand*, 287 F.2d 577 (Ct. Cl. 1961) (destruction of materialmen's liens on boats held compensable taking); Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) (destruction of the value of franchise held compensable taking).

62. *Id.* at 67, 646 P.2d at 839, 183 Cal. Rptr. at 677 (citing NICHOLS, *supra* note 23, at § 2.1[2]).

acceptable. The court concluded on the basis of legislative intent,[63] the lack of contrary precedent,[64] and the general acceptance of the condemnation of intangibles[65] that distinguishing between different types of property is irrelevant,[66] and held that the state eminent domain statute authorizes the condemnation of intangible property.[67]

To resolve the "public use" issue, the court set forth basic guidelines. It had previously defined "public use" as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[68] The court also noted that "the general statutory scheme would appear to afford cities considerable discretion in identifying and implementing public uses."[69] Having established this deferential level of scrutiny, the court cited examples of public entities[70] that had condemned recreational facilities such as stadiums.[71] Despite these broad guidelines, the court declined, on the record before it, to decide the issue it had framed: whether the "difference between managing and owning the facility in which the game is played, and managing and owning the team which plays in the facility [is] *legally substantial.*"[72] Although the court's language implied that there is no difference, the court did not preclude a contrary conclusion on a fuller record.[73] Furthermore,

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63. *Id.* at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678.

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

65. *Id.* at 67, 646 P.2d at 839-40, 183 Cal. Rptr. at 677-78.

66. This determination is consonant with the legislature's broad definition of property in this context. *See supra* note 61 and accompanying text.

67. *Id.* at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678 (the court's holding on this issue was identical to the trial court's holding).

68. *Id.* at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679. This test was announced in Bauer v. County of Ventura, 45 Cal. 2d 276, 284, 289 P.2d 1, 6 (1955).

69. *Raiders*, 32 Cal. 3d at 70, 646 P.2d at 841, 183 Cal. Rptr. at 679.

70. For California's list of "public entities," see CAL. CIV. PROC. CODE § 1235.190 (West 1982). *See supra* note 13.

71. On this issue, the court wrote: "The examples of Candlestick Park in San Francisco and Anaheim Stadium in Anaheim both owned and operated by municipalities, further suggest the acceptance of the general principle that providing access to recreation to its residents in the form of spectator sports is an appropriate function of city government." *Raiders*, 32 Cal. 3d at 71, 646 P.2d at 841, 183 Cal. Rptr. at 680.

72. *Id.* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680 (emphasis added).

73. Indeed, the court's original conclusion, before it was modified, was that this difference "seem[ed] legally insubstantial." City of Oakland v. Oakland Raiders, 31 Cal. 3d 656 (1982) (available Oct., 1982, on LEXIS, States Library, Cal. file).

the court concluded that the acquisition *and* operation of a sports franchise may be an appropriate municipal function.[74]

The Raiders' argument that it is improper for the city to condemn an established sports team[75] was quashed by the majority's statutory construction.[76] The court reasoned that since the condemnation of an existing golf course is specifically forbidden,[77] a municipality may condemn any *other* "existing business unless expressly forbidden to do so."[78] Similarly, the majority disposed of the Raiders' argument that if the city were to transfer ownership to private parties after condemning the Raiders, then it would be violating principles of eminent domain.[79] The court pointed to the language in the eminent domain statute: "[A] person may acquire property under subdivision (a) with the intent to sell, lease, exchange or otherwise dispose of the property . . . ."[80] This language, the court suggested, gives the city authority to acquire the franchise *even if* it intends a subsequent transfer.[81]

Having dealt with the Raiders' primary arguments on appeal, the court directed the trial court to make inquiry into two factual issues.[82] First, the trial court must determine whether the intangible nature of the property rights constituted property that is within the territorial limitations required by statute.[83] Second, the trial court must consider evidence of the "public" nature of the use to determine whether a valid "public use" exists.[84]

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74. *Raiders*, 32 Cal. 3d at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.

75. *Id.* at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

76. *Id.*

77. CAL. GOV'T CODE § 37353 (West 1968). *See supra* note 13.

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

79. *Id.*

80. *Id.* at 73-74, 646 P.2d at 843, 183 Cal. Rptr. at 681-82. CAL. CIV. PROC. CODE § 1240.120(b) (West 1982). *See supra* note 13.

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

82. *Id.* at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.

83. *Id.* at 75, 646 P.2d at 844, 183 Cal. Rptr. at 682. CAL. CIV. PROC. CODE § 1240.050 (West 1982). *See supra* note 13.

84. *Raiders*, 32 Cal. 3d at 75, 646 P.2d at 844, 183 Cal. Rptr. at 683.

### B. *The Concurrence*

Chief Justice Bird, concurring in part and dissenting in part, warned that the eminent domain power, as defined by the majority, was "virtually without limit,"[85] but she conceded that the current state of the law forced her to agree with the result.[86]

The Chief Justice cautioned that this result implies that a city may seize *any* "viable, ongoing business"[87] which attempts to leave the city. She questioned whether it is *proper* for a municipality to invade property rights in the furtherance of policy interests in this context,[88] describing condemnation for the sole purpose of preventing relocation as "dangerous and heavyhanded."[89]

Chief Justice Bird stated, however, that since eminent domain is generally a legislative matter, the judicial branch can intervene only when the legislative action reflects a "gross abuse of discretion"[90] or the statute is "arbitrary, capricious, [or] totally lacking in evidentiary support."[91] Finding none of these conditions present in the instant case, she concurred with the majority's decision.[92]

## V. Analysis

The majority pointed out that the two main issues of the case were: first, whether the intangible nature of the property allows for condemnation,[93] and second, whether the proposed taking would constitute a "public use."[94]

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85. *Id.* at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

86. *Id.*

87. *Id.* at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

88. *Id.* at 77, 646 P.2d at 845, 183 Cal. Rptr. at 684 (Bird, C.J., concurring and dissenting).

89. *Id.* at 78, 646 P.2d at 846, 183 Cal. Rptr. at 684 (Bird, C.J., concurring and dissenting).

90. *Id.* at 79, 646 P.2d at 846, 183 Cal. Rptr. at 685 (Bird, C.J., concurring and dissenting) (citing CAL. CIV. PROC. CODE § 1245.255 (West 1982)).

91. *Id.*

92. *Id.*

93. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64, 646 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).

94. *Id.*

## A. *Public Use*

### 1. *There is a difference between owning a team and owning the stadium in which the team plays*

A severe weakness in the court's opinion is its handling of the following question: "Is the obvious difference between managing and owning the *facility* in which the game is played, and managing and owning the *team* which plays in the facility, legally substantial?"[95] Although the court did not answer the question, finding the record incomplete, the opinion implies that the answer is no.[96]

The court, by finding no objection to condemning an existing team, contravened the concept that a municipality may not condemn a business in order to use it as the original owner did.[97] The Pennsylvania Supreme Court when faced with an analogous factual matrix resolved, in dictum, that a city ordinance authorizing a loan to build a sports complex was valid, but stated that "there would be no conflict with the public nature of the stadium, for the City would be entering into the lease, *not to engage in the private business of promoting sporting events . . . (which might be a private, not a public, use).*"[98] According to this reasoning, if the City of Oakland intended to conduct the Raiders' business itself, the "use," arguably, would be "private," not "public." Since the courts have universally read the public use requirement as a proscription against takings for a private purpose,[99] the city's proposed condemnation is improper.

The court's answer to the preceding argument was that since the state statute expressly prohibits the condemnation of an existing golf course,[100] but not the condemnation of any other businesses,[101] other businesses may be condemned.[102] The court

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95. *Id.* at 72, 646 P.2d at 842, 183 Cal. Rptr. at 680 (emphasis added).

96. *See supra* note 73 and accompanying text.

97. *See supra* text accompanying notes 45-47.

98. Martin v. City of Philadelphia, 420 Pa. 14, 18, 215 A.2d 894, 896 (1966) (emphasis added).

99. Berger, *supra* note 6, at 205.

100. CAL. GOV'T CODE § 37353 (West 1968). *See supra* note 13.

101. A golf course is not the same as the business that is operating the golf course. The majority confused property, such as a stadium, with other property, such as a team, which is a business.

102. *See Raiders*, 32 Cal. 3d at 60, 646 P.2d at 843, 183 Cal. Rptr. at 681.

inappropriately applied the maxim of *expressio unius est exclusio alterius*.[103] It seems illogical to conclude that the legislature's intent was to discriminate against every business in favor of golf. The court made no effort to ascertain the legislature's reason for specifically mentioning golf courses.[104] At the very least, this anomaly requires examination of the legislative intent for such an exception, rather than mechanical application of a statutory maxim.

Even under the majority's interpretation of the statute, the city does not have the authority to take control of the Raiders' business activities under traditional interpretations of "public use."[105] In the past, California courts have unequivocally stated: "[I]n the absence of *express* legislative sanction, . . . [cities have] no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals."[106]

If the city did not intend to manage the Raiders, but to transfer the business to a third party immediately after condemnation, it still would be overreaching its authority.[107] The California Supreme Court has held that "the property of the city, held in trust for public uses [can] not be turned over to [a private] corporation."[108] Furthermore, courts have recognized that states have no right to condemn *land* solely for resale to private parties.[109] Thus, if the *Raiders* court's view that tangible property (land) and intangible property (a sports franchise) are on

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103. This cannon of statutory construction is that the inclusion of one possibility excludes the rest. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

104. A more plausible explanation for the legislature's special mention of golf courses in the statute concerns the indivisibility of a golf course; i.e., a golf course with less than eighteen holes is useless.

105. The court cited the following cases as authority for this proposition: Ravettino v. City of San Diego, 70 Cal. App. 37, 160 P.2d 52 (1945); Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487 (1928), *later appealed at*, 107 Cal. App. 15, 290 P. 140 (1930); Vallejo Ferry Co. v. City of Vallejo, 146 Cal. 392, 80 P. 514 (1905); Low v. City of Marysville, 5 Cal. 214 (1855).

106. *See, e.g.*, Ravettino v. City of San Diego, 70 Cal. App. at 44, 160 P.2d at 56 (emphasis added).

107. *See supra* note 49 and accompanying text.

108. Egan v. City of San Francisco, 165 Cal. 576, 584, 133 P. 294, 297 (1913).

109. State *ex rel.* State Highway Dep't v. 9.88 Acres of Land, 253 A.2d 509, 512 (Del. 1969).

equal footing for eminent domain purposes[110] is accepted, it follows that a city has no right to condemn a franchise solely for resale to a private corporation.

The majority's analysis does not overcome this conclusion despite its reliance on statutory authority. The majority argued that condemnation of the Raiders followed by an immediate transfer would be valid under the statute.[111] According to the statute, however, to "acquire property . . . with the intent to sell, lease, exchange or otherwise dispose of [it]," the property must *first* be "acquire[d] property."[112] Otherwise, a city could obtain *any* property for *any* actual purpose as long as its "intended" purpose was to transfer the property. Thus, the majority's argument only serves to beg the question: may the city condemn the Raiders? Since the city may neither own the Raiders itself[113] nor transfer the Raiders to a third party, the correct answer should be no.[114]

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110. *See supra* text accompanying notes 63-67.

111. *See supra* note 80 and accompanying text.

112. CAL. CIV. PROC. CODE § 1240.120(b) (West 1982). *See supra* note 13.

113. If a city did own a team, the players would necessarily be public employees who, in California (which follows the common law rule), are not allowed to strike. San Diego v. American Fed'n of State Employees, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970). *See* 52 CAL. JUR. 3D, *Public Lands* § 182 n.71 (1979) (for additional citations). Therefore, since the players of all of the other teams of the National Football League may strike, the city, in effect, would be discriminating against its own players; there might be an equal protection violation under the fourteenth amendment.

114. This seems to be the city's actual intention. See *supra* note 11 for excerpts of the city's brief. In *Egan v. City of San Francisco*, the city condemned property, allowed a private corporation to build an opera house on it, and then sought to transfer absolute control to the corporation. The court stated that "[t]he public use of public property cannot, under any provisions of charter, or statute . . . coexist with private management and control of such property." Egan v. City of San Francisco, 165 Cal. at 583-84, 133 P. at 296. The court concluded that "[i]f the *management* of an opera house constitues a public use, the public character of the use can exist *only so long as the control is retained in the hands of some public agency*." *Id.* at 584, 133 P. at 297 (emphasis added).

Transferring the ownership of condemned property to a third party violates the principle that "the property of one individual cannot, without his consent, be devoted to the private use of another, even when there is an incidental or colorable benefit to the public." New York City Hous. Auth. v. Muller, 270 N.Y. 333, 343, 1 N.E.2d 153, 156 (1936).

*2. The city's intended use is not a proper government function*

*New Jersey Sports & Exposition Authority v. McCrane,*[115] cited with approval by the majority,[116] lists the following criteria for determining whether the intended use is a proper government function:[117] that the "activity or service has been historically engaged in by local government; that it is widely so furnished today; that it would not be performed as well by a private corporation, and that it is or cannot be undertaken for private profit."[118] A *facility*[119] such as a sports complex may satisfy all these criteria for economic reasons.[120] None of these criteria, however, would be satisfied by a football franchise.

Unlike the condemnation of numerous sports facilities, such as Candlestick Park and Anaheim Stadium,[121] a sports team has never been condemned.[122] Thus, it can not be said that governments have *historically engaged* in operating sports teams or that such activity by government is *widely furnished today.*

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115. 119 N.J. Super. 457, 292 A.2d 580 (1971).

116. *Raiders*, 32 Cal. 3d at 71, 646 P.2d at 842, 183 Cal. Rptr. at 680.

117. New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. at 488, 292 A.2d at 598.

118. *Id.* The case also states that an elementary object of the condemnation is to further the *general welfare. Id.* at 473, 292 A.2d at 589.

"[L]egislation to be justified and supported by [the term *general welfare*] must at least promote the welfare of the general public as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry." *In re* Kazas, 22 Cal. App. 2d 161, 172-73, 70 P.2d 962, 968 (1937). Applying this standard to the Raiders, it could be argued that keeping the team in the city would economically benefit the general public and not merely a small percentage of the city's citizens. However, the concept of prohibiting a business from moving to another city contravenes fundamentals of free enterprise and thus, does not "promote the [general] welfare of the general public" of California. *Id.*

119. *McCrane* involved the condemnation of land on which a sports complex was to be built. New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. at 463-64, 292 A.2d at 584.

120. Government financing is needed due to the extensive costs of building sports facilities. *Id.* at 489, 292 A.2d at 598. The court concluded: "[T]he view that the construction and maintenance of stadiums and related *facilities* constitutes a public purpose has received virtually universal approval in most jurisdictions." *Id.* at 488, 292 A.2d at 598 (emphasis added).

121. *See supra* note 71.

122. *See generally* note 60 and accompanying text. Presumably, if any sports team had been condemned, the condemnation would have been challenged and the court would have cited the results of such a court challenge.

Similarly, while a private corporation may find it economically burdensome to operate a sports facility,[123] it is clear that private ownership of sports teams has not only been *performed well* but that it has been done so for *private profit*. This is evident from the fact that almost every professional sports team in America is privately owned.

### B. *The Intangible Nature of the Franchise*

Two Supreme Court cases indicate that an exercise of eminent domain directed primarily at a contract would violate the right to contract. Justice McLean's concurrence in *West River Bridge Co. v. Dix*[124] suggests that where the primary target of condemnation proceedings is intangible property, there may be constitutional problems.[125] In avoiding the conclusion that condemnation of contractual rights would be an impairment of the constitutional right to contract,[126] Justice McLean resolved that "[t]he power [of eminent domain] acts upon the property and not on the contract."[127] Similarly, in *Long Island Water Supply Co. v. Brooklyn*,[128] any possible impairment of a contract was justified as a consequence of the appropriation of tangible property, the contract being a mere incident to that property.

Thus, since the Raiders' franchise is comprised primarily of contracts, it cannot properly be the target of condemnation under the Supreme Court's reasoning. The precedent relied on by the majority in *Raiders* addresses the situation where the primary target of the condemnation was tangible property[129] to be used for stadiums,[130] opera houses,[131] fairgrounds,[132] and park

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123. On the other hand, a public entity (the *sovereign*) would not find such activity economically burdensome. This is related to the theory that condemnation is an inherent attribute of sovereignty. *See supra* note 22 and accompanying text.

124. 47 U.S. (6 How.) 507, 536 (1848) (McLean, J., concurring).

125. *See generally id.* at 538-39.

126. U.S. CONST. art. I, § 10, cl. 1. "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." *Id.*

127. West River Bridge Co. v. Dix, 47 U.S. (6 How.) at 536 (McLean, J., concurring).

128. 166 U.S. 685, 690 (1897).

129. It is clear that intangible property is subject to condemnation. *See supra* text accompanying notes 50-52. It is unclear if such property is condemnable without being linked to condemned tangible property. *See supra* note 53 and accompanying text.

130. City of Los Angeles v. Superior Ct., 51 Cal. 2d 423, 333 P.2d 745 (1959).

131. Egan v. City of San Francisco, 165 Cal. 576, 133 P. 294 (1913).

areas.[133] On the basis of *West River Bridge* and *Long Island Water*, there is a legally substantial difference between condemning predominantly intangible property, such as a franchise, and predominantly tangible property, such as a facility. The authority cited by the majority, dealing with tangible property, is not germane to the *Raiders* situation. The legislative intent behind California's eminent domain statute provides further support for the distinction between tangible and intangible property.[134] The statute, allowing for the condemnation of any conceivable property interest,[135] seems to favor the city. According to the Law Revision Commission, however, "the Eminent Domain Law is basically a reorganization and *restatement of existing California law* with numerous minor changes of a technical or corrective nature."[136] This statement, together with a judicially recognized concession by the city, in the lower court, that "the taking here would not have been possible under the former law,"[137] implies that the proposed condemnation would be invalid.

### C. *Constitutional Implications*

Under the majority's interpretation of the California eminent domain statute, a municipality may condemn any existing business unless expressly forbidden to do so.[138] This authoriza-

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132. County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 38 Cal. Rptr. 474 (1st Dist. 1964).

133. Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923). *See also* Armstrong v. United States, 364 U.S. 40 (1960) (shipbuilding materials); Ligget & Meyers Tobacco Co. v. United States, 274 U.S. 215 (1927) (tobacco products); Porter v. United States, 473 F.2d 1329 (5th Cir. 1973) (personal effects of Lee Harvey Oswald); City of N. Sacramento v. Citizens Util. Co., 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (3d Dist. 1961) (water supply system); University of So. Cal. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (1934) (land for university library); *In re* Fifth Ave. Coach Lines, Inc., 18 N.Y.2d 212, 219 N.E.2d 410, 273 N.Y.S.2d 52 (1966) (bus company's property); Milwaukee & Suburban Transp. Corp. v. Milwaukee County, 82 Wis. 2d 420, 263 N.W.2d 503 (1978) (mass transit system).

134. *See* COMMISSION REPORTS, *supra* note 22.

135. *See supra* text accompanying notes 50-52.

136. *Recommendation Proposing the Eminent Domain Law*, 12 CAL. L. REV. COMM. REPORTS 1619 (1974) (emphasis added).

137. *Raiders*, 123 Cal. App. 3d 422, 425, 176 Cal. Rptr. 646, 648. Under the prior *Code of Civil Procedure*, only real property and real property interests were condemnable. *See id.*

138. *Raiders*, 30 Cal. 3d at 73, 646 P.2d at 843, 183 Cal. Rptr. at 681.

tion effectively allows cities in California to keep any business in California from moving to another part of the state or to a different state. Such power in local government raises two potential constitutional problems: an infringement on the right to travel, and an impermissible burden on interstate commerce.

### 1. *A corporation's right to travel*

The freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.[139] The right to *interstate* travel has been described as "a 'fundamental' right which . . . should be regarded as having its source in the Due Process Clause of the Fifth Amendment."[140]

Corporations are generally designated as "artificial person[s]."[141] As a result, their constitutional rights are said to be measured by the same laws as the rights of a natural person.[142] Still, "the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons."[143] The issue of whether corporations enjoy a right to travel depends on whether the right was intended to be *purely* personal.[144]

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139. United States v. Guest, 383 U.S. 745, 758 (1966). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . . Freedom of movement across frontiers . . . and inside frontiers as well, was a part of our heritage." Kent v. Dulles, 357 U.S. 116, 125-26 (1958).

140. Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting).

141. A corporation is an artificial person, and in situations where it is capable of functioning, its rights, duties, and liabilities do not differ from those of a natural person under similar conditions. Under the federal Constitution, the rights of a corporation are to be measured by the same laws as the rights of a person, as both come within the purview of the fourteenth amendment. A corporation may invoke the equal protection and due process clauses of that amendment against any proscribed action by the state. 15 CAL. JUR 3D, *Corporations* § 9 (1979).

142. *Id.*

143. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 824, *reh'g denied*, 438 U.S. 907 (1978) (Rehnquist, J., dissenting).

144. In *Bellotti*, a first amendment case, the Court stated: "The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute infringes the right] meant to [be] protect[ed]." *Id.* at 776.

Furthermore, one commentator has noted the limitations on the constitutional rights afforded corporations. He wrote:

> Purely personal guarantees are unavailable to corporations and other organizations where the historic function of the guarantee has been limited to the protection of the individual. Whether a particular guarantee is purely personal or is unavailable to corporations for some other reason depends upon the nature, history,

Since one possible source of the right to travel suggested by the Supreme Court is the commerce clause,[145] it is conceivable that there is a link between the right to travel and interstate commerce. Thus, any corporation which was barred from freely crossing state borders would have its right to interstate travel violated. The right to travel interstate may not be violated absent a compelling governmental interest justifying the constitutional infringement.[146] It is difficult to imagine an interest compelling enough to justify restraining the movement and, necessarily, the expansion of business in interstate commerce. The Supreme Court has held that a state may not "in any form or under any guise, directly burden the prosecution of interstate business."[147]

More germane to the *Raiders* situation[148] is the right to *intrastate* travel which has been acknowledged by both the federal[149] and the California courts.[150] Although the Supreme Court has not specifically addressed the scope of this right,[151] one fed-

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and purpose of the particular constitutional provision which is being asserted by the organization.

9 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4248.1 (Supp. 1982).

145. Shapiro v. Thompson, 394 U.S. at 666.

146. The Supreme Court announced this level of scrutiny in *Maher v. Roe*, where it wrote: "[C]ases involving the right to travel have consistently held that statutes penalizing the fundamental right to travel must pass muster under the compelling-state-interest test, irrespective of whether the statute actually deters travel." Maher v. Roe, 432 U.S. 464, 488 (1977).

147. International Textbook Co. v. Pigg, 217 U.S. 91, 112 (1910).

148. The Raiders are not a corporation but a limited partnership. *See supra* text accompanying note 7.

149. In arguing that the right to interstate travel necessarily implies a right to intrastate travel, a federal court stated that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); *see also* Smith v. Turner, 48 U.S. (7 How.) 283 (1849), where the Court asserted that all citizens "must have the right to pass and repass through every part of [the United States] without interruption, as freely as in our own States." *Id.* at 492. This clearly indicates the assumption of a right to intrastate travel.

150. *In re* White, 97 Cal. App. 3d 141, 148, 158 Cal. Rptr. 562, 567 (5th Dist. 1979). "[T]he right to intrastate travel . . . is a basic human right protected by the United States and California Constitutions as a whole." *Id.*

151. The Supreme Court noted the distinction, but did not address the scope, stating: "[A] constitutional distinction between interstate and intrastate travel [is] a question we do not now consider . . . ." Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974); *see also In re* White, 97 Cal. App. 3d at 148 n.3, 158 Cal. Rptr. at 567 n.3.

eral court described it as a "correlative" of the constitutional right to interstate travel.[152] A failure to recognize this right "could produce irrational results"[153] with regard to typical geographical circumstances.

The right to travel intrastate is violated when the right to "migrate, resettle, find a new job, and start a new life"[154] is infringed upon. Generally, this standard applies to durational residency requirements under which an individual must live in a jurisdiction for a statutory period before becoming entitled to certain benefits.[155] The right to *interstate* travel, and thus the right to *intrastate* travel as well,[156] has been expanded, however, to include situations where a violation of civil rights adversely affects citizens' free movement through commerce.[157]

An infringement of the right to intrastate travel must either be justified by "legitimate governmental demands"[158] or subjected to a balancing test.[159]

The right of a California corporation to travel intrastate is endangered by the majority's interpretation of the eminent do-

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152. King v. New Rochelle Mun. Hous. Auth., 442 F.2d at 648.

153. Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, 1145-46 (1975).

The author provides an excellent example:

> [I]n *Cole v. Housing Authority*, the First Circuit invalidated a city . . . durational residence requirement for admittance to low income housing in Newport, Rhode Island. In light of *Shapiro* there was little doubt that the requirement could not exclude a plaintiff who had recently moved from New York. But a second plaintiff had moved from Providence, and thus was penalized only for intrastate travel. If the right to travel were only applicable interstate, a court would have been in the anomalous position of permitting the exclusion of persons who moved less than thirty miles while invalidating the exclusion of persons who had moved several hundreds of miles. The more logical conclusion was reached by the *Cole* court.

*Id.* at 1146 (citing Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970); Shapiro v. Thompson, 394 U.S. 618 (1969)).

154. Memorial Hosp. v. Maricopa County, 415 U.S. at 255. This doctrine originated in Shapiro v. Thompson, 394 U.S. at 629.

155. In *Shapiro v. Thompson*, residents of Connecticut, Pennsylvania, and the District of Columbia were denied welfare assistance since they had not lived in their respective jurisdictions long enough. Shapiro v. Thompson, 394 U.S. at 642.

156. *See supra* note 151.

157. *In re* White, 97 Cal. App. 3d 141, 158 Cal. Rptr. 562 (5th Dist. 1979) (probation of prostitute was conditioned so that she was excluded from certain high prostitution areas of the city).

158. *Id.* at 149-50, 158 Cal. Rptr. at 567 (California's standard).

159. Bykofsky v. Borough of Middletown, 401 F. Supp 1242, 1262 (M.D. Pa.), *aff'd without opinion*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976).

main statute since the condemnation of the corporation would eliminate its being able to "migrate" or "resettle." That is, by the definition of eminent domain,[160] a corporation's free movement would be adversely affected if the corporation was required to forego its property rights, which are arguably violated.[161] It is unlikely that it would be easier to find compelling state interests justifying an infringement of the right to travel intrastate than to travel interstate. Consequently, by authorizing eminent domain in the *Raiders* situation, the California Supreme Court gave the City of Oakland, and every other municipality,[162] a license to immobilize both man and his business so as to stunt the growth of American business.

### 2. *The effect on interstate commerce*

If the City of Oakland could use eminent domain to keep the Raiders from moving within California, then it could also prevent the franchise from moving out of the state. Such an exercise of power would interfere with interstate commerce. *Black's Law Dictionary* defines commerce as "[t]he exchange of goods, productions, or property of any kind . . . [and][t]he transportation of persons and property."[163] This definition suggests that commerce includes the transportation of property of any kind, including a business. The majority's interpretation of the eminent domain statute, giving California cities the power to keep businesses within California,[164] adversely affects interstate commerce by reducing the number of businesses that pass through interstate commerce.

This infringement on interstate commerce implicates the commerce clause,[165] regardless of the absence of prohibitory federal statutes.[166] Thus, even if keeping a business such as the

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160. *See supra* note 1.

161. *See Raiders*, 32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

162. For a list of what constitutes a "public entity" in California, see CAL. CIV. PROC. CODE § 1235.190 (West 1982). *See supra* note 13.

163. BLACK'S LAW DICTIONARY 244 (5th ed. 1979).

164. *See supra* text accompanying notes 77-79.

165. "The Congress shall have the Power to . . . regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cls. 1 & 2.

166. The Supreme Court has stated that:

Raiders within the state may increase the level of economic welfare,[167] this effect would be "too remote and indirect to justify obstructions to the normal flow of commerce."[168]

The danger of such an exercise of power is:

> [I]f a state can, in this way, impose restrictions upon interstate commerce for the *benefit and protection of its own citizens,* we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.[169]

## VI. Conclusion

Leaving some unresolved issues to be handled by the lower court, the majority found it permissible for a city to condemn a viable business.[170] The majority's seemingly conservative approach is radically impractical. An attempt to follow the "current state of the law" does not justify taking black letter law to its extreme.[171] All laws and policies affecting a given circumstance "must be construed together so as to give each an appropriate place in a reasonable and lawful plan."[172]

Chief Justice Bird's opinion appears to be an appeal to the legislature to revise the statute to prevent its being as broadly

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> The commerce clause, by its *own force,* prohibits discrimination against interstate commerce, *whatever its form or method,* and the decisions of this Court have recognized that there is scope for its like operation when state regulation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185-86 (1937) (emphasis added), *reh'g denied,* 303 U.S. 667 (1938).

Thus, even in the absence of Congressional action, state regulation of interstate commerce granting a more favorable position to residents than to nonresidents runs afoul of the Constitution.

167. For the city's reasons for condemnation, see *supra* note 11.

168. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935).

169. Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 498 (1887) (emphasis added).

170. *See supra* text accompanying note 78.

171. In *Kahn v. Southern Ry. Co.,* the court examined the implications of certain ordinances which limited the time that railroads could block a street crossing. Kahn v. Southern Ry. Co., 202 F.2d 875 (4th Cir. 1953). It was noted that "the literal interpretation of the ordinances," would lead to unreasonable restrictions and that it was "not unreasonable to suppose that this drastic result was intended." *Id.* at 878.

172. *Id.*

interpreted as it has been by the *Raiders* court.[173]

## Addendum

On July 22, 1983, the Superior Court for the County of Monterey issued an intended decision, resolving the issues that had been remanded to it in favor of the Raiders. The court determined that the City of Oakland was not authorized to exercise the power of eminent domain for the following reasons: the personnel contracts were not located entirely within the city; there was no reasonable probability that the property would be devoted to a public use; the property sought to be condemned was not subject to acquisition by eminent domain for the stated purpose [of public use]; the resolution of necessity was not satisfactory; and the public interest and necessity of the city did not require the aquisition of the Raiders.[174]

Accordingly, the court dismissed the action as to the Oakland Raiders' franchise.[175] The decision is confined, however, to the facts of the Raiders' situation. Pursuant to the California Supreme Court's opinion in *City of Oakland v. Oakland Raiders*,[176] another California city may be able to condemn a business attempting to move if it can show that the business will be put to a necessary public use that requires its condemnation.

*Michael Schiano*

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173. *See supra* text accompanying notes 85-86 & 90.
174. City of Oakland v. Oakland Raiders, No. 76044 (Cal. Ct. App. 1983).
175. *Id.*
176. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).