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## EMINENT DOMAIN AND REDEVELOPMENT: THE RETURN OF ENGINE CHARLIE\*

Barry Bennett\*\*

In May, 1981, groundbreaking began for a General Motors (GM) factory on the site of what had been a Polish neighborhood in Detroit. Bulldozers had been razing the area for months. In *Poletown Neighborhood Council v. City of Detroit*,<sup>1</sup> the Michigan Supreme Court, citing the economic revitalization and additional employment opportunities the factory was expected to generate, upheld the city's condemnation of the land for sale to GM as a valid exercise of the eminent domain power. It asserted that the benefit to GM's private interest was "incidental."<sup>2</sup>

Private entities, or governmental units acting on their behalf, have long been granted eminent domain privileges when necessary for the economic development of an area. The granting of these privileges has been based upon the well-established constitutional doctrine that private property can be condemned by eminent domain for a public use.<sup>3</sup> Recent condemnations, however, have allowed redevelopment of distressed areas by widening the scope of the eminent domain power through a redefinition of the concept of "public use."

The judicial practice of allowing condemnations when the benefit to a private enterprise is incidental to a primary public purpose is not a new one.<sup>4</sup> *Poletown*, however, is the first case that permitted a condemnation of private property so that an existing local industry could acquire land for its

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\* Engine Charlie is Charles Wilson, former General Motors executive, who made the famous statement that what's good for General Motors is good for the country.

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1. 410 Mich. 616, 304 N.W.2d 455 (1981).

2. *Id.* at 634-35, 304 N.W.2d at 459.

3. See 2A P. NICHOLS, NICHOLS ON EMINENT DOMAIN § 7.1, at 7-4.1 & n.1 (J. Sackman & R. VanBrunt rev. 3d ed. 1980) [hereinafter cited as NICHOLS]. See generally Berger, *The Public Use Requirement in Eminent Domain*, 57 ORE. L. REV. 203 (1978) (addressing the question of under what circumstances should a governmental or private party have the right to condemn the property of another); Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953) (considering the definitions of public use or public purpose as these concepts arise in connection with the power conferred on the designated local public agency to acquire blighted areas through the exercise of the eminent domain power); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940) ("It is settled law in every American court today that private property may not be taken by eminent domain except for a public use. . . .") [hereinafter cited as *Public Use*]; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949) (traces the history of the narrow "use by the public" test as a limitation on the eminent domain power and concludes that the Supreme Court has repudiated the doctrine of public use).

4. See NICHOLS, *supra* note 3, § 7.222[1]-[5], at 7-52 & n.1.

own expansion. Detroit justified the condemnation of Poletown as the only way to provide economic stimulus to a depressed area. This Article will explore whether this justification was valid. In so doing, the Article first traces the history of the use of eminent domain for economic and regional development, and then analyzes *Poletown* in light of past exercises of the power and the need for redevelopment in Detroit. The Article finally suggests possible solutions to urban crises to prevent the destruction of future Poletowns.

## EMERGENCE OF THE DOCTRINE—NINETEENTH CENTURY DEVELOPMENTS

### *Manufacturing Concerns*

The earliest uses of eminent domain in America, necessary for the development of the country and its natural resources, were rights of way for roads and flowage easements for mills.<sup>5</sup> Most states passed mill acts which allowed mill owners to flood neighboring land in operation of their mills.<sup>6</sup> The courts upheld the acts because the mills were required to be open to the public for the grinding of corn.<sup>7</sup> Roads could be cut through private property as long as they too were open to the public. The narrow view of public use which thus emerged defined the term literally: unless the public had an *actual* right to use the property after it was taken, the condemnation was impermissibly private.<sup>8</sup>

As the country became more industrialized and manufacturing establishments sought to use the mill acts to build mills which would not be open for general public use, the need for a broader definition of public use became apparent.<sup>9</sup> The public necessity for mills and roads led most courts to uphold condemnations even when a mill was wholly private or a road was

5. See Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 270-78 (1973) ("the various acts to encourage the construction of mills offer some of the earliest illustrations of American willingness to sacrifice the sanctity of private property in the interest of promoting economic development") [hereinafter cited as Horwitz]; Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 13-15 (1980) (the development of the eminent domain doctrine followed the development of the land and the first recorded uses of the doctrine were for building roads) [hereinafter cited as Meidinger]; *Public Use*, *supra* note 3, at 617 (the few situations which existed in early America where eminent domain was needed were for rights of way for roads and flowage easements for mills).

6. The general mill acts which existed in the majority of states are compiled in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17-18 (1885). These acts authorized private lands to be taken and flooded by the erection and maintenance of water mills and mill-dams upon any non-navigable stream. Owners of flooded lands were paid proper damages. *Id.* at 16.

7. See Scheiber, *The Road to Munn: Eminent Domain & the Concept of Public Purpose in the State Courts*, 5 PERSP. IN AM. HIST. 329, 371 (1971) [hereinafter cited as Scheiber].

8. See NICHOLS, *supra* note 3, § 7.2[1], at 7-22. The narrow view of public use implies the "use of many" or "by the public". The use must be in common and not for a particular individual.

9. *Id.* § 7.623; Horwitz, *supra* note 5, at 273.

built merely to provide private access to the builder's land.<sup>10</sup> These courts defined public use as public advantage or benefit. Anything substantially contributing to the public welfare by promoting the growth of industries or the development of an area was a permissible public use.<sup>11</sup>

Illustrative of early cases applying this broad view of public use is *Scudder v. Trenton Delaware Falls Co.*<sup>12</sup> In *Scudder*, a New Jersey court found that the development of the community's resources and the stimulus to its economy were public purposes that would allow a company chartered to supply water for manufacturing to condemn private land. The court noted that the water power created "[would] be sufficient for the erection of seventy mills, and factories, and other works . . ." and rejected the argument that the public must have a right to use it.<sup>13</sup> "[t]he ever varying condition of society is constantly presenting new objects of public importance and utility; and what . . . [is] a public use or benefit, may depend somewhat on the situation and wants of the community for the time being."<sup>14</sup>

The community need for additional employment encouraged other courts to adopt the broad public use definition. In *Boston & Roxbury Mill Corp. v. Newman*,<sup>15</sup> the Massachusetts Supreme Judicial Court upheld the application of the commonwealth's mill act to a manufacturing corporation. The court found a permissible public use when the citizens of a community, as well as the owner of the mill, benefited from the additional employment opportunities a new manufacturing establishment provided.<sup>16</sup>

Other states similarly expanded the scope of their mill acts.<sup>17</sup> The constitutionality of a taking under these expanded acts depended, however, on

10. *Public Use*, *supra* note 3, at 617-19. The first mills were grist mills for the grinding of grain, which the common law viewed as public in nature because of their crucial importance to the agrarian communities of the time. See Scheiber, *supra* note 7, at 371.

11. NICHOLS, *supra* note 3, § 7.2[2]. Nichols provides the clearest definition of this approach:

"[P]ublic use" means "public advantage," and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state (or which leads to the growth of towns and the creation of new resources for the employment of capital and labor), manifestly contributes to the general welfare and the prosperity of the whole community constitutes a public use.

*Id.* § 7.2[2], at 7-26 & n.9.

12. 1 N.J. Eq. 694 (1832).

13. *Id.* at 728-29.

14. *Id.* at 729.

15. 29 Mass. (12 Pick.) 467 (1832).

16. *Id.* at 477. In *Newman*, the court justified its determination of a "public use" in that "great numbers of citizens have the means of employment brought to their homes . . . [and] the interest or benefit arising from manufacturing establishments is distributed quite as much . . . among the laborers . . . [as] among the proprietors of the works." *Id.* See also *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 477-78 (1853) ("The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth . . . is a public use, justifying the exercise of the right of eminent domain").

17. See NICHOLS, *supra* note 3, § 7.623, at 7-317 & n.9; Scheiber, *supra* note 7, at 372-73.

local conditions as well as on whether manufacturing already had become dominant in the state.<sup>18</sup> In *Great Falls Manufacturing Co. v. Fernald*,<sup>19</sup> the Supreme Court of New Hampshire upheld the right of a cotton and woolen manufacturer to dam a river to obtain much needed water power even though the dam would flood nearby private lands. The court said that whether there was a "public interest" in improving the manufacturing capabilities of the state depended on the character of the business promoted, the employment opportunities created, and the state's natural productions and resources.<sup>20</sup> In granting the condemnation, the New Hampshire court noted that the state's agricultural sector was unable to compete with the great western producers and therefore depended on a nearby market which large manufacturing concerns provided. Furthermore, the manufacturers gave "profitable employment to great numbers of men and women."<sup>21</sup> The court noted that the state had an ample water supply favorable to manufacturing concerns, and had grown prosperous largely through developing such "natural advantages."<sup>22</sup>

In *Ryerson v. Brown*,<sup>23</sup> the Michigan Supreme Court, which many years later would decide *Poletown*, adhered to the narrow view of public use in invalidating a mill act. The court noted that in those states that had broadly applied the mill acts, manufacturers had "attracted a larger proportion than in other states, of the capital, skill, and labor of the community. In this state it is doubtful if such legislation would add at all to the aggregate of property."<sup>24</sup> The court held that nothing in the mill act in question "indicate[d] that the power obtained under it [was] to be employed *directly* for the public use."<sup>25</sup> Since the court saw no "use by the public," the condemnation of private land was unconstitutional.

Overall, the courts expanded the use of eminent domain in the nineteenth century to serve the needs of the newly-emerging industrial elite. The growth of cotton mills through the early 1800's provided much of the incentive for the expansion,<sup>26</sup> and by 1860, production of cotton goods was the country's leading manufacturing industry.<sup>27</sup> Manufacturing in general also

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18. This was a consideration in *Scudder v. Trenton Del. Falls Co.*, 1 N.J. Eq. 694 (1832), where the court pointed to the town of Paterson as "the manufacturing emporium of the state" and an excellent example of the benefits of industrialization. The court indicated that the taking of private property for the construction of a mill in the town "increased the value of property . . . ; opened a market for the produce of the soil, and [has] given a stimulus to industry of every kind." *Id.* at 728-29. Clearly, these "public benefits" were enough to justify a condemnation under the broad view.

19. 47 N.H. 444 (1867).

20. *Id.* at 460.

21. *Id.*

22. *Id.* at 461.

23. 35 Mich. 333 (1877).

24. *Id.* at 337.

25. *Id.* at 338 (emphasis added).

26. Horwitz, *supra* note 5, at 270.

27. This is based on the value added to the raw product by the manufacturing process. S.

was growing significantly, particularly in the second half of the century. Between 1850 and 1899, the number of manufacturing establishments in the country quadrupled, while the number of wage earners increased 550% and the value added by manufacturing from the raw material to the finished product increased twelvefold.<sup>28</sup> Throughout this period New England was the nation's leading manufacturing region,<sup>29</sup> and not surprisingly, the most hospitable to the use of eminent domain to aid the transition from an agricultural to an industrial society.<sup>30</sup>

### *The Railroads*

The need for transportation also led to the expanded use and meaning of eminent domain. In the agricultural society of early nineteenth century America, private parties were delegated eminent domain rights to construct turnpikes, canals, and bridges.<sup>31</sup> With the emergence of industry, the need for a great transportation network to aid the development and expansion of a vast, young country became apparent. As railroads began to cross the country, they also were granted extensive eminent domain privileges.<sup>32</sup> After 1860, when the first real railroad boom swept the country, the railroad industry's use of eminent domain increased dramatically.<sup>33</sup>

Responding to charges that the railroad companies were appropriating lands for private use, the courts said that the railroads were affected with a public interest and therefore were subject to governmental control of their rates and obligations.<sup>34</sup> The public use for which the private land was taken

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RATNER, J. SOLTOW & R. SYLLA, *THE EVOLUTION OF THE AMERICAN ECONOMY—GROWTH, WELFARE, AND DECISION MAKING 190* (1979).

28. E. JOHNSON & H. KROOS, *THE ORIGINS AND DEVELOPMENT OF THE AMERICAN ECONOMY 191* (1936) [hereinafter cited as JOHNSON & KROOS].

29. H. PERLOFF, E. DUNN, E. LAMPARD & R. MUTH, *REGIONS, RESOURCES AND ECONOMIC GROWTH 120-21* (1960).

30. In *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475 (1853), the Massachusetts Supreme Judicial Court upheld the right of a manufacturing company to flood its neighbor's land, noting that "manufacturing has come to be one of the great industrial pursuits of the commonwealth . . ." *Id.* at 478.

31. J. CADMAN, *THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS, 1791-1875*, at 222 (1949); Meidinger, *supra* note 5, at 26.

32. See *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641 (1890) (railroad determined to be a public highway and therefore it can take private property for right of way upon payment of just compensation to owner); *Swan v. Williams*, 2 Mich. 427 (1852) (legislature used eminent domain powers to obtain property for construction of railroad by private corporation). See also NICHOLS, *supra* note 3, § 7.521 (discussion of other decisions on point).

33. Meidinger, *supra* note 5, at 27. Railroad track mileage doubled from 1865 to 1873, and by 1893 the railroad companies had laid six times as much track as they had by 1860, a total of 181,000 miles of main track. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 728, 731 (Bicenn. ed. 1975).

34. See, e.g., *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 431 (1837) (although a railroad company is a private entity, the taking of private property for construction of the railroad is considered a public use when in the public interest); *Ryan v. Terminal*

was the benefit the public acquired from the speedy transportation of persons and goods, the economy of time and money to shippers and the traveling community, and the improvement of intercity communications. Therefore, since a railroad was organized to meet a public demand, it was immaterial that it also was organized primarily for private profit.<sup>35</sup> Courts gradually accepted this once controversial view, although they were continually troubled by aiding interests that were becoming further removed from public authority.

### *Resources and Utilities*

The last half of the nineteenth century and the beginning of the twentieth saw the expansion of mining in the West and the growth of power companies across the country. Both activities were regarded as vital for the development of local resources, and private property therefore had to accommodate their growth.<sup>37</sup> Western prosperity depended primarily on exploitation of the region's inherent advantages. Mining was necessary for the "public welfare"<sup>38</sup> and was "vitaly connected with the recognized public policy of developing . . . natural resources."<sup>39</sup> For example, in 1867 the Nevada Supreme Court noted that the state's natural conditions severely limited its economic development. Consequently, the court adopted the broad view of public use and allowed the condemnation of a strip of land to provide access to the mines. Since mining was the one great pursuit of the state, accounting for almost all of its "present prosperity,"<sup>40</sup> the appropriation of

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Co., 102 Tenn. 111, 124-25 (1899) ("[t]he corporation and its property being affected by a public use will be under governmental control, and the Legislature may at any time fix rates and make more specific the duties clearly implied from the Act of incorporation").

35. *Ryan v. Terminal Co.*, 102 Tenn. 111, 125 (1899) ("[A]n enterprise organized to meet a public demand is not reduced in its character because the parties instituting it have primarily in view private profit. Notwithstanding this it is still impressed with a public use.") The court made reference to several authorities concurring with this view. See 1 J. LEWIS, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 253 (3d ed. 1909) ("In determining whether the use . . . is public or not, it is an immaterial consideration that the control of the property is vested in private persons who are activated solely by motives of private gain, or that private benefits will incidentally accrue from the condemnation.")

36. See *NICHOLS*, *supra* note 3, § 7.521[4], at 7-258 & n.13. ("Land cannot, however, be taken for the use of a private railroad, . . . if a railroad is built solely for the use of a single corporation and the public has no right to use it . . .")

37. *Meidinger*, *supra* note 5, at 28, 32; *Public Use*, *supra* note 3, at 623.

38. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (the constitutionality of Utah statute authorizing use of eminent domain powers for mining purposes, upheld following *Clark v. Nash*, 198 U.S. 361 (1905)).

39. *Indianapolis Oolitic Stone Co. v. Alexander King Stone Co.*, 206 Ind. 412, 421, 190 N.E. 57, 60 (1934) (business of mining and quarrying is a public use because of the state's interest in development of its natural resources; eminent domain can be used to bring railroads to mines and quarries).

40. *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 409 (1876).

this private land was found to be a great public benefit and, thus, a legal taking for a public use.<sup>41</sup>

Likewise, in those states dependent on the development of the timber industry, the courts affirmed condemnations of private land for what were actually private logging roads. Again, this was justified on the basis of the state's natural conditions and the need for the development of its resources. One court noted that "the individual by the development of his own property tends to develop the entire state."<sup>42</sup>

Power and utility companies also were essential to the growth of towns and industry, and were awarded liberal eminent domain rights.<sup>43</sup> The Pennsylvania Supreme Court in 1908 provided the classic broad definition of eminent domain in allowing a company that supplied water for commercial and manufacturing purposes to condemn land. The court, quoting an author of a treatise on eminent domain, stated that "it is not essential that the whole community . . . should directly enjoy or participate in an improvement, to make the use public. If the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of the community, the use is public."<sup>44</sup> Although some courts still adhered to the narrow view in denying water and power companies condemnation privileges,<sup>45</sup> most courts allowed them to condemn, citing the benefits to the state's progress<sup>46</sup> and noting that any private profit derived from the condemnation was only an "incidental object" of the acquisition of the property.<sup>47</sup>

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41. *Id.* at 408. Since the discovery of the Comstock Lode in 1859, and until 1878, mining was almost solely responsible for the growth of the Nevada economy, providing capital for railroads, banks, and other businesses of the period. R. ELLIOTT, *NEVADA'S TWENTIETH-CENTURY MINING BOOM* 3 (1966).

42. *Codd v. McGoldrick Lumber Co.*, 48 Idaho 1, 14, 279 P. 298, 301 (1929). *See also* *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426 (1906) (permitted use of eminent domain to obtain land to be flooded in order to store logs at a saw mill because the complete development of the state's natural resources is a "public use"); *State v. Superior Court of Clallam County*, 62 Wash. 612, 114 P. 444 (1911) (operators of a tall logging road can use eminent domain powers to obtain right of way).

43. NICHOLS, *supra* note 3, §§ 7.522-.523.

44. *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393-94, 69 A. 870, 872 (1908) (quoting H. MILLS, *A TREATISE UPON THE LAW OF EMINENT DOMAIN* § 12 (1879)).

45. *See In re Eureka Basin Warehouse & Mfg. Co.*, 96 N.Y. 42 (1884) (eminent domain cannot be used to take property for a private company when the public benefit is only incidental and no public control of use exists); *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S.E. 194 (1903) (public interest in proposed use of property was so vague that the court could not make a determination of "public use").

46. *Walker v. Shasta Power Co.*, 160 F. 856 (9th Cir. 1908) (taking of right of way for a ditch and flume for purposes of providing electricity to the public is a public use and can be accomplished through the use of eminent domain); *Rockingham County Light & Power Co. v. Hobbs*, 72 N.H. 531, 58 A. 46 (1904) (eminent domain used for power line right of way).

47. *Gardner Water Co. v. Inhabitants of Town of Gardner*, 185 Mass. 190, 194, 69 N.E. 1051, 1053 (1904) (state has right to transfer property to private water corporation to assure the public of a constant supply of water).



By the beginning of the twentieth century, the continent was connected by rail and heavily industrialized. Had those who held power in 1800 been able to predict the events of a century, they would have seen their power being inexorably usurped by interests representing change. The nineteenth century was a dynamic time which was more concerned with developing property than with protecting it.<sup>48</sup> As a result, emerging industrial interests took precedence over more established elements of the economic community.<sup>49</sup> Eminent domain has been called the most potent weapon in the redistribution of power from the old property to the new.<sup>50</sup>

The twentieth century would seek to maintain and expand an economic structure that now was firmly in place. Eminent domain would pave the way for redevelopment projects involving numerous industries. The nineteenth century courts had provided the reasoning that would justify the expansion of the eminent domain doctrine in the twentieth century, as the needs of society continued to change.

#### THE TWENTIETH CENTURY—DEVELOPMENTS OF THE DOCTRINE

Twentieth century redevelopment through eminent domain first took the form of slum clearance and urban renewal. In *New York City Housing Authority v. Muller*,<sup>51</sup> the New York Court of Appeals upheld the condemnation of slum property for the construction of low-income housing. The court held that a public purpose or benefit was obtained by the slum clearance itself. The elimination of disease, juvenile delinquency, and crime, as well as the protection of the public health and welfare, were sufficient public advantages to render the condemnation constitutional.<sup>52</sup> *Muller* and its progeny appeared to signal an early interment for the narrow doctrine of "use by the public."<sup>53</sup>

The demise of the narrow view seemed complete when the United States Supreme Court, in *Berman v. Parker*,<sup>54</sup> found a public purpose in a taking

48. See generally J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24-29 (1956) ("[O]n the whole, the nineteenth century United States valued change more than stability and valued stability most often where it helped create a framework for change.")

49. Scheiber, *supra* note 7, at 331.

50. Horwitz, *supra* note 5, at 63.

51. 270 N.Y. 333, 1 N.E.2d 153 (1936).

52. *Id.* at 339, 1 N.E.2d at 154.

53. *E.g.*, *Murray v. LaGuardia*, 291 N.Y. 320, 52 N.E.2d 884 (1943) (eminent domain can be used for redevelopment plan even though private company also may benefit), *cert. denied*, 321 U.S. 771 (1944); *Nashville Hous. Auth. v. City of Nashville*, 192 Tenn. 103, 237 S.W.2d 946 (1951) (incidental benefit to private companies is irrelevant if public use test is met). See Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). At the time of the Comment, twenty-two state courts of last resort, following the lead of *Muller*, had endorsed slum clearance takings as being constitutionally unobjectionable. One commentator thus concluded that New York, the state which created the narrow doctrine of public use, had taken the vanguard in its final demolition. *Id.* at 608.

54. 348 U.S. 26 (1954).

for slum clearance, even though the property was to be resold to a private developer.<sup>55</sup> Similarly, the Supreme Court of Michigan upheld the right of a municipality to sell land acquired through an urban renewal project to a private party.<sup>56</sup> In so holding, the Michigan court succinctly stated the broad view of public use taken in the slum clearance cases: "The underlying public purpose [of the slum clearance acts] . . . is to eliminate urban blight. The elimination of urban blight is an adequate justification for the exercise of the power of eminent domain, even where the acquisition is followed by sale to private individuals."<sup>57</sup>

The more controversial case, however, is the condemnation of unblighted property for private industrial redevelopment. Not all courts have permitted such takings. In an early advisory opinion, the Supreme Judicial Court of Massachusetts indicated that condemnation to provide thoroughfares and facilities for commercial use in Boston would not be constitutional.<sup>58</sup> Despite the legislature's declaration that the city's prosperity depended on the existence of expanded facilities for traders, the court found that the promotion of profit-making interests was strictly private.<sup>59</sup> The court feared that if it found a public use in the condemnation of residents' homes and shops for new trading facilities, any "humble tradesman" could be forced to surrender his property whenever the legislature thought it could be used more profitably.<sup>60</sup>

Fifty years later, the Maine high court adhered to the narrow view in the face of similar legislation declaring the importance of industrial develop-

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55. *Id.* at 33-34. Only South Carolina has still refused to allow slum clearance takings when the land is to be resold to a private developer. See *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956) (held unconstitutional the use of eminent domain powers to obtain title to privately owned property to transform a lower class residential area into a commercial/industrial center).

56. *Sinas v. City of Lansing*, 382 Mich. 407, 170 N.W.2d 23 (1969).

57. *Id.* at 412, 170 N.W.2d at 26.

58. *In re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910). The Massachusetts court followed *Loan Ass'n v. Topeka*, 87 U.S. 655 (1874), where the Supreme Court held invalid a statute authorizing a town to issue public bonds in aid of a private manufacturing enterprise. 204 Mass. at 611, 91 N.E. at 407. See also *Mather v. City of Ottawa*, 114 Ill. 659, 3 N.E. 216 (1885) ("a municipal corporation is prohibited . . . from levying a tax in aid of a merely private enterprise although the purpose may be one which will add to the wealth and prosperity of the municipality"); *Weismer v. Village of Douglas*, 64 N.Y. 91 (1876) ("Any [industry in a community] . . . tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment . . ., [and] the enhancement in value of real estate . . . . But these are not the direct and immediate public uses and purposes to which money taken by tax may be directed."); *Attorney Gen. v. City of Eau Claire*, 37 Wis. 400 (1875) (the maintenance of a dam for the purpose of leasing the water to private persons for private use is not a public purpose for which a municipal corporation can be authorized to exercise the power of borrowing money and levying taxes). *But cf.* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) (cities and towns permitted to aid in construction of railroad or irrigation districts of large areas of arid and worthless land since the irrigation of arid lands is a public purpose and the water used is put to a public use).

59. 204 Mass. at 613, 91 N.E. at 408.

60. *Id.* at 613-14, 91 N.E. at 408.

ment to Bangor's economy.<sup>61</sup> The legislature had proposed the condemnation of land within the city to create an industrial park. The court found it "clear to all" that an existing shoe factory or paper mill in Bangor could not acquire additional facilities by eminent domain. Likewise, the land to be condemned for future enterprises would have no public use and would only provide a direct benefit to private industry.<sup>62</sup>

Two additional cases also disallowed condemnations of unblighted property for this purpose.<sup>63</sup> In *Hogue v. Port of Seattle*,<sup>64</sup> the Washington Supreme Court held unconstitutional an attempted exercise of the eminent domain power on prosperous agricultural land which was to be sold and used for an industrial park. The proposed project had been undertaken largely because of Seattle's increasing dependence on the aircraft industry. Boeing Airplane Co. alone employed over half of the industrial employees in the Seattle area. Thus, city officials regarded diversification essential to the economic well-being of the city. The court, however, held that the land in question was a fully developed agricultural area that could not be taken merely to be put to a "higher and better economic use."<sup>65</sup> The court said that "unless the state . . . can prove to a court that it seeks to acquire property for a 'really public' use, . . . the owner may not be deprived of it without his consent."<sup>66</sup> The dissent, in which three justices joined, would have allowed the condemnation in light of the "economic facts and other data unique to th[e] area."<sup>67</sup>

61. Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957). The court found that action under the legislation would give the city authority to do for private enterprise what they could not do for themselves. *Id.* at 447, 131 A.2d at 907. See also *Crommett v. City of Portland*, 150 Me. 217, 236, 107 A.2d 841, 852 (1954) (condemnation for slum clearance void because it was a taking of A's property for sale or lease to B on the ground that B's use would be economically or socially more desirable); *Haley v. Davenport*, 132 Me. 148, 168 A. 102 (1933) (an appropriation of property for a purpose which is a great benefit to the public is not for that reason, a taking for a public use); *Perkins v. Inhabitants of Milford*, 59 Me. 315 (1871) (town cannot tax in order to give an individual a gift at taxpayers' expense).

62. 152 Me. at 446, 131 A.2d at 907.

63. Indeed, one commentator believed that the interment of the narrow view was premature in light of *Hogue* and *Raines*. See Note, *The Public Use Doctrine: "Advance Requiem" Revisited*, 1969 LAW & SOC. ORD. 688, 697-701.

64. 54 Wash. 2d 799, 341 P.2d 171 (1959).

65. *Id.* at 827, 341 P.2d at 187. The court further noted that it was their duty to uphold the rights of "private property owners against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe is essential for the public good." *Id.* at 838, 341 P.2d at 193. But see *Miller v. City of Tacoma*, 61 Wash. 2d 374, 378 P.2d 464 (1963) (state can condemn land located *within* a blighted area for urban renewal, even though the specific land was not substandard or offensive itself, since the clearance of the blighted conditions of the area as a whole is for a public purpose).

66. 54 Wash. 2d at 838-39, 341 P.2d at 193.

67. *Id.* at 843, 341 P.2d at 196 (Finley, J., dissenting). The dissent was based on *Ghold Realty Co. v. City of Hartford*, 141 Conn. 135, 104 A.2d 365 (1954), where the Connecticut court, using the broad view of public use, held that public use means "public usefulness, utility, or advantage or what is productive of general benefit . . ." *Id.* at 141, 104 A.2d at 368. Therefore, the dissent in *Hogue* argued that the overall benefit to be gained by improved

Similarly, in *City of Little Rock v. Raines*,<sup>68</sup> the Arkansas Supreme Court denied the city the right to condemn agricultural land for development of an industrial park. The court found that unlike slum clearance, the major purpose of which was the elimination of unsafe and unsanitary conditions, in this case the sole purpose of the industrial park was to sell or lease the land to private parties.<sup>69</sup> The court held, therefore, that in light of constitutional provisions prohibiting such a taking, if the people of Arkansas wished to confer on their cities the power to acquire private property by eminent domain for private industrial development, they should do so in clear statutory language.<sup>70</sup>

Other courts proved more hospitable to commercial interests. In *Atwood v. Willacy County Navigation District*,<sup>71</sup> the Texas Court of Civil Appeals allowed a condemnation of 1,760 acres of undeveloped land bordering on the Gulf of Mexico for the construction of a port and attendant facilities to be used in connection with the development and operation of the state's navigable waters. The court held that leasing portions of the land for industrial sites was necessary for the success of the port and thus was a legitimate public purpose of the Navigation District.<sup>72</sup> The court noted that because of its vast oil and gas reserves, the Texas Gulf Coast was "one of the rapidly developing industrial sections of the United States. . . [and that] industrial development and the successful operation of ports located upon either the gulf or the canal go hand in hand."<sup>73</sup>

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navigation, development of port facilities, and the influx of people and population growth in the Seattle area justified the taking as a "public use." 54 Wash. 2d at 843, 341 P.2d at 196 (Finley, J., dissenting).

68. 241 Ark. 1071, 411 S.W.2d 486 (1967).

69. *Id.* at 1086, 411 S.W. 2d at 494. The *Raines* court noted that in the case of slum clearance, once the public purpose is accomplished, the city's subsequent selling of a portion of the slum clearance property to a private enterprise does not make the use any less public or unconstitutional. *Id.*

70. *Id.*

71. 271 S.W.2d 137 (Tex. Civ. App. 1954).

72. *Id.* at 142.

73. *Id.* The basis for the court's rationale was laid down in *Housing Auth. of Dallas v. Higgenbotham*, 135 Tex. 158, 143 S.W.2d 79 (1940), in which the court held that courts should not intervene when the particular undertaking of the legislature was intended to include slum clearance and to provide safe and sanitary dwelling accommodations for persons of low income. Such an undertaking was found to be a public use. This doctrine of substantial compliance is applied to cases involving public improvements and special assessments. Shortly after *Atwood*, the Oregon Supreme Court, in *Port of Umatilla v. Richmond*, 212 Or. 596, 321 P.2d 338 (1958), upheld a condemnation for the development of a port and potential leasing of sites to private industry. The Oregon court heard the case on the assumption that the Port intended to lease sites to private parties at a future date even though no such purpose was set out in the resolution. Relying on its own slum clearance decision in *Foeller v. Housing Auth. of Portland*, 198 Or. 205, 256 P.2d 752 (1953), the court found that the Port's subsequent leasing would merely be an incidental part of the project and would not destroy its public character. 212 Or. at 614, 321 P.2d at 347. Past Oregon eminent domain cases, however, including *Foeller*, had been decided on the narrow ground of the public's actual right to use the property,

Likewise, in *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,<sup>74</sup> the New York Court of Appeals permitted condemnation of a flourishing small business area for the construction of the World Trade Center. New York's economy had begun to decline as the city aged. Noting the "cause and effect relationship between a great port and a great city," the court found a public purpose in facilitating the flow of commerce and centralizing all activity incident to that flow, thus attracting trade and stimulating the economic well-being of the city.<sup>75</sup>

Although some courts attempted to resurrect the narrow view of public use,<sup>76</sup> two more recent cases may have finally re-entombed it. In a 1975 decision, *Prince George's County v. Collington Crossroads, Inc.*,<sup>77</sup> the Maryland Court of Appeals allowed condemnation of approximately 323 acres of vacant land for the development of a multi-industry "employment center" or industrial park that was expected to attract new industries to the county and provide up to 5,800 new jobs for county residents. The county's condemnation petition cited the need to diversify its taxable base and establish "a healthy economic mix of gainful pursuits" so as not to depend too much on one segment of the economy.<sup>78</sup> In allowing the taking, the court emphasized that the park would attract industries which in the past had been difficult to attract. Furthermore, the county would maintain control of the park's development even after the sale of the land to private parties. The court concluded that the creation of the park was a constitutionally permissible public use.<sup>79</sup>

Similarly, in 1980, in *City of Minneapolis v. Wurtele*,<sup>80</sup> the Minnesota Supreme Court allowed a taking for construction of a retail-hotel-office space complex under a statute permitting cities to condemn areas which, though not blighted, showed a trend toward decreasing economic utility and

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and the court was reluctant to stray too far from precedent. *Port of Umatilla* illuminates courts' dilemma in adapting eminent domain law to modern conditions while trying to adhere to long-held doctrine.

74. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78, *rehearing denied*, 375 U.S. 960 (1963). *See also* *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *appeal dismissed*, 371 U.S. 4 (1962) (taking of substandard real estate which was 75% vacant, poorly developed, and incompatible with economic growth by a municipality for redevelopment by private corporations, was a species of public use; condemnation permitted). *Accord*, *Sublett v. City of Tulsa*, 405 P.2d 185 (Okla. 1965) (private property condemned for the development and improvement of harbors and ports is a public use, even though there is no indiscriminate public use or that certain ports are leased for separate private use by persons or corporations in continuous need of harbor or port conveniences).

75. 12 N.Y.2d at 388-89, 190 N.E.2d at 404-05, 240 N.Y.S.2d at 5-6.

76. *See* notes 58-70 and accompanying text *supra*.

77. 275 Md. 171, 339 A.2d 278 (1975).

78. *Id.* at 176, 339 A.2d at 281.

79. *Id.* at 179, 339 A.2d at 282-84. The court held that projects reasonably designed to benefit the general public by significantly enhancing the economic growth of the state or its subdivisions are public uses. *Id.* at 191, 339 A.2d at 289.

80. 291 N.W.2d 386 (Minn. 1980).

tax base.<sup>81</sup> The condemned land in downtown Minneapolis was stagnant and unproductive, and its revitalization was considered essential to maintain the downtown area as a viable business district. The complex was expected to provide 5,900 permanent jobs<sup>82</sup> and to attract conventioners and new residents, thus generating significant retail sales and property taxes. The court, therefore, held that a general public benefit existed to justify the taking as a public use.<sup>83</sup>

Thus, by the second half of the twentieth century, takings on behalf of private parties had expanded far beyond what the originators of the broad "public benefit" standard must have envisaged. Condemnation for sites for private industrial complexes, though not universally approved, was gradually gaining acceptance. But the country also had been transformed. At the start of the nineteenth century, the concentration of production in agriculture, handicrafts, and small businesses made it possible for most people to be self-employed.<sup>84</sup> By 1975, however, only seven percent of the nonfarm

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81. *Id.* at 390. Justice Fitzgerald, dissenting in *Poletown*, cited *Wurtele* as a case which has sustained the use of eminent domain power solely because of the economic benefits of development. Fitzgerald noted that the Michigan court had not followed this reasoning and cited two recent cases, *Karesh v. City Council of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978) and *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), which also have rejected the use of eminent domain when the sole purpose of the condemnation is to improve general economic conditions. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 643-44, 304 N.W.2d 455, 464 (1981) (Fitzgerald, J., dissenting). It should be noted that both South Carolina and Kentucky adhere strictly to the narrow view of the public use doctrine. South Carolina has not allowed condemnation for slum clearance. See note 55 *supra*. The Kentucky court pointed out that condemnation of blighted areas, which is of a general public benefit and is therefore a public use, is the sole exception to its narrow "use by the public" doctrine. 581 S.W.2d at 7.

82. In 1975, a federal district court cited growth in employment as a factor in allowing condemnation for the Tellico Dam, even though private profit was an incidental benefit of the project. *Tennessee Valley Auth. v. Two Tracts of Land*, 387 F. Supp. 319 (E.D. Tenn. 1974), *aff'd*, 532 F.2d 1083 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976). Likewise, issuance of industrial development bonds to attract industry to reduce unemployment consistently has been held to be for a public purpose. See, e.g., *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970) (issuance of bonds to finance a twenty year improvement program fulfills public purpose requirement of the constitution, since the bonds would develop industry and create jobs in an eroding economic community); *Dyche v. City of London*, 288 S.W.2d 648 (Ky. 1956) (municipal bonds issued to reduce abnormal unemployment and attract new industry into the area held to be a sufficient public use). In disallowing the issuance of bonds to acquire sites and construct buildings for lease to private industry, the North Carolina Supreme Court, in *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968), nevertheless noted that at least 42 states had held the issuance of bonds to cure unemployment to be for a public purpose. *Id.* at 147, 159 S.E.2d at 752. Those courts which permit industrial development bonds, but deny eminent domain rights in the same situation, note that the opportunity for abuse is far greater in the latter case, where the burden is placed on the few instead of the whole community. See *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979).

83. 291 N.W.2d at 390-91.

84. U.S. DEPT'S OF LABOR AND OF HEALTH, EDUCATION, AND WELFARE, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 149 (1976). In 1900, 27% of nonfarm laborers were self-employed. *Id.* at 147-49.

work force was self-employed.<sup>85</sup> The United States, once a land of farmers and small entrepreneurs, had become a nation of employees.

Moreover, the courts no longer were faced with a developing country, but with deteriorating cities and high unemployment. In 1909, the author of the leading treatise on eminent domain had first expressed the view that was repeated in every later edition of the work: land could not be taken for the erection of a large factory, no matter how beneficial to the community, since "the public mind would instinctively revolt at any attempt to take such land by eminent domain."<sup>86</sup> Since then land had been taken for essentially this purpose, and in a much changed country, the Michigan Supreme Court would be the first to formally renounce those words. And none would revolt but the dispossessed.<sup>87</sup>

#### POLETOWN NEIGHBORHOOD COUNCIL v. CITY OF DETROIT

In *Poletown Neighborhood Council v. City of Detroit*,<sup>88</sup> the Michigan Supreme Court, in a cursory *per curiam* opinion, rejected the argument of the neighborhood residents' association that a condemnation for a GM factory was an unconstitutional transfer of property from one private party to another. The condemnation was based on the Economic Development Corporations Act, which the Michigan legislature passed in 1974.<sup>89</sup> The Act was designed to encourage expansion of commercial enterprises and revitalize Michigan's weakened economy.<sup>90</sup> The plaintiff residents did not challenge the legislature's declaration that the alleviation of unemployment and the development of industry were essential public purposes, but argued only

85. *Id.*

86. NICHOLS, *supra* note 3, § 7.61[1]. The author cites for his position *Howard Mills Co. v. Schwartz Lumber & Coal Co.*, 77 Kan. 599, 95 P. 559 (1908), "the only case in which it has been attempted to take land for the site of a factory without the consent of the owner." NICHOLS, *supra* note 3, § 7.61[1]. The court in *Howard Mills Co.* asserted that "every legitimate business" contributes to the growth and development of its locality. To invoke eminent domain, however, a business must be one in which the public has "an exceptional and peculiar interest and one which . . . [the public] might on proper occasion control and manage . . ." 77 Kan. at 609, 95 P. at 562-63. The land sought to be condemned was being used in a lumber and coal business, and the condemnor may not have put it to a better use; therefore, the court refused to allow the eminent domain power to be employed. *Id.*

87. Justice Ryan cited the "chorus of approval" in favor of the condemnation supplied by business and governmental interests as well as the news media. The only dissenting voices were those of the "miniscule minority"—the Poletown residents. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 684, 304 N.W.2d 455, 482 (Ryan, J., dissenting).

88. 410 Mich. 616, 304 N.W.2d 455 (1981).

89. MICH. COMP. LAWS § 125.1601 (Mich. Stat. Ann. § 5.3520 (1) (Callaghan 1976)).

90. The Act granted cities the right to condemn property for industrial and commercial sites. In passing the Act, the legislature cited the state's "need for programs to alleviate and prevent conditions of unemployment . . . to assist and retain local industries and commercial enterprises, to strengthen and revitalize the economy of this state and its municipalities . . . and . . . to encourage the location and expansion of commercial enterprises. . . ." *Id.* § 125.1602 (Mich. Stat. Ann. § 5.3520 (2) (Callaghan 1976)).

that in this instance, General Motors, a private corporation, was the primary beneficiary of the taking.

The court said that it must inspect such a charge with "heightened scrutiny" where, as here, the condemnation benefited specific and identifiable private interests.<sup>91</sup> It nevertheless dismissed the plaintiff's claim that assembling land to GM's specifications for conveyance to GM for uncontrolled use in profit-making activities was a taking for private use.<sup>92</sup> The court held that any benefit to GM's private interest was merely "incidental" to the public purposes for which the land was to be utilized, and therefore the transfer of property to GM was not unconstitutional.<sup>93</sup> The court cited the "substantial evidence of the severe economic conditions" in the city and made it clear that it would not uphold every condemnation that provided employment. In this instance, however, the public benefit was found to be "clear and significant."<sup>94</sup>

The two dissenting justices argued that the majority had gone too far. Justice Fitzgerald contended that there was no Michigan precedent for the decision. Distinguishing *Poletown* from the slum clearance cases, he reasoned that in the former case no public purpose would be served without the transfer of property to GM, while in the latter cases the clearance itself was the controlling public purpose. Thus, the transfer could not be considered incidental, and if allowed, there would be "virtually no limit to the use of condemnation to aid private businesses."<sup>95</sup>

Justice Ryan's dissent argued that Detroit, a city with its "economic back to the wall," had been coerced by GM's threat to build its plant elsewhere if a suitable local site could not be found quickly.<sup>96</sup> Ryan noted that historically, only private corporations involved in the "establishment or improvement of the avenues of commerce" had been allowed to condemn.<sup>97</sup> An exception to the general rule that eminent domain could not be used to transfer property to private corporations was created for railroad, canal, turnpike, ferry, and other private transportation companies. To justify condemnation on behalf of a private party, three conditions had to be met: extreme necessity on behalf of the condemnor, continuing accountability to the public, and selection of land according to facts of public significance.<sup>98</sup> Ryan argued that none of these factors was present in *Poletown*. GM could survive without the condemnation, the city was to retain no control over the

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91. 410 Mich. at 634-35, 304 N.W.2d at 459-60.

92. *Id.* at 631-32, 304 N.W.2d at 458.

93. *Id.* at 634, 304 N.W.2d at 459.

94. *Id.*

95. *Id.* at 644, 304 N.W.2d at 464 (Fitzgerald, J., dissenting).

96. *Id.* at 651, 304 N.W.2d at 467-68 (Ryan, J., dissenting).

97. *Id.* at 670-71, 304 N.W.2d at 476 (Ryan, J., dissenting). Ryan stated that the general rule is that a taking for a private corporation is prohibited unless the corporation's purpose is to create or expand on the transportation system and thereby benefit commerce. Justice Ryan referred to this as the "instrumentality of commerce" exception.

98. *Id.* at 674-75, 304 N.W.2d at 478-80.



operation of the plant, and the selection of the land was made according to GM's private specifications.

That *Poletown* was a break with precedent the majority could not and did not deny. The majority cited no authority for its decision, instead noted that the definition of a public use "changes with changing conditions of society."<sup>99</sup> An examination of the Michigan Supreme Court's past decisions leads one to conclude that the court formerly would have prohibited the taking.<sup>100</sup> The court had refused to allow condemnation in the mill act cases<sup>101</sup> and later had upheld the use of eminent domain for slum clearance only after finding that resale to private developers, though contemplated, was not the actual purpose of the acquisition.<sup>102</sup> In approving this use of eminent domain in *In re Slum Clearance in Detroit*,<sup>103</sup> the court distinguished *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*,<sup>104</sup> an earlier decision in which condemnation for the dual purpose of improving the navigability of the St. Joseph River, a public purpose, and providing water power for a corporation, a private purpose, was barred.<sup>105</sup> In *Berrien Springs Water-Power Co.*, the court found that the condemnation itself achieved no public purpose and the resale to and development by the power company would result in only concurrent public and private benefits. In *In re Slum Clearance in Detroit*,<sup>106</sup> however, slum clearance in and of itself

99. *Id.* at 630, 304 N.W.2d at 457 (quoting *Hayes v. Kalamazoo*, 316 Mich. 443, 453-54, 25 N.W.2d 787, 790-91 (1947)).

100. See *Shizas v. City of Detroit*, 333 Mich. 44, 52 N.W.2d 589 (1952) (land cannot be condemned if its use is for both off-street parking facilities and rentals to private businesses); *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N.W. 894 (1891) (statute void which allowed corporations to condemn land to establish and maintain rural cemeteries).

101. *E.g.*, *Ryerson v. Brown*, 35 Mich. 333 (1877) (land cannot be condemned for the purpose of aiding manufacturers to harness water power for their mills).

102. See *In re Slum Clearance in Detroit*, 331 Mich. 714, 50 N.W.2d 340 (1951) (slum clearance not unconstitutional although after the buildings were razed the site was to be sold to private persons for redevelopment). For the proposition that the public purpose will not be defeated because an incidental private benefit from a portion of the property will result, see *Cleveland v. City of Detroit*, 322 Mich. 172, 33 N.W.2d 747 (1948) (city's condemnation of private property for use as bus terminal not defeated because of incidental private benefits that would result); *General Dev. Corp. v. City of Detroit*, 322 Mich. 495, 33 N.W.2d 919 (1948) (city's temporary leasing of condemned land to tenants did not defeat the public purpose because of the recent war conditions); *In re Brewster St. Hous. Site*, 291 Mich. 313, 289 N.W. 493 (1939) (the incidental and necessary effect of creating a housing commission did not undermine the state's main objective in providing decent housing).

103. 331 Mich. 714, 50 N.W.2d 340 (1951).

104. 133 Mich. 48, 94 N.W. 379 (1903).

105. *Id.* at 52-53, 94 N.W. at 380-81. In *Berrien Springs*, the court found that the legislature had determined that it was a "public necessity" to require the improvement of navigability of the river. The legislature went beyond its power in doing so because it thereby also declared the incidental benefit of water power to a private entity a public necessity. In essence the legislature had provided for a taking of private land under the guise of eminent domain when the public and private purposes of the taking could not be separated. The court held that the act allowing this dual purpose was unconstitutional. *Id.* at 54-55, 94 N.W. at 381.

106. 331 Mich. 714, 720, 50 N.W.2d 340, 343 (1951). The court noted that the jury was asked

was found to have a substantial public purpose and any incidental or ancillary private benefit from resale of the land to private parties would not preclude use of eminent domain powers.

In *Shizas v. City of Detroit*,<sup>107</sup> decided in 1953, the court again barred condemnation when its public purpose was inseparable from its private benefits. In *Shizas*, the court disallowed a proposed taking for the construction of a municipal parking garage and retail complex to house twenty-two stores which the city planned to lease to private parties.<sup>108</sup> Although the leased area comprised less than twenty-five percent of the total floor space in the structure, the private use was not classified as incidental. Rather, the two purposes were "so interwoven that they [could] not be separated."<sup>109</sup> The intended allocation of rental revenues to the parking facility did not alter the complex's private character.

In 1972, the Michigan Supreme Court reaffirmed its position that slum clearance is a public use if the *controlling* purpose of such clearance is rehabilitation of blighted areas. In *City of Center Line v. Michigan Bell Tel. Co.*,<sup>110</sup> the court found that the property in question was acquired not "for the purpose of redevelopment at a profit to the city or any private developer, but to protect the health, safety, morals and general welfare of the municipality."<sup>111</sup> Although the cleared land was to be resold to a private developer, this was only an incidental and ancillary benefit to the primary and real purpose of the clearance.<sup>112</sup> Since there was no dual purpose involved, the court upheld the Rehabilitation of Blighted Areas Act, under which the condemnation was granted.<sup>113</sup>

In *Poletown*, the twin purposes of the condemnation for GM—which itself had recently suffered heavy losses and which was immediately conveyed a factory site that it needed to remain competitive—cannot be easily severed. If GM's plant is not profitable, the employment it is to create will be lost, the prosperity it is to bring will vanish. Instead of having a slum cleared away, the city will lose a viable residential area. Thus, it cannot be argued that the benefit to GM is merely incidental to a larger public benefit. Detroit's welfare is inextricably linked to GM's, and the public and private interests served can hardly be entwined more tightly.

Despite the *Poletown* court's failure to follow its own precedent, it correctly held that the definition of "public purpose" could not be static.

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to decide the necessity of the taking only for the clearly public purpose of slum clearance, and not for resale of the property. *Id.*

107. 333 Mich. 44, 52 N.W.2d 589 (1952).

108. *Id.* at 60, 52 N.W.2d at 596. The court stated: "A statute authorizing a taking of private property for uses partly public and partly private is void, where the private use is so combined with the public use that the two cannot be separated." *Id.* at 59, 52 N.W.2d at 596 (quoting 29 C.J.S. *Eminent Domain* § 31 at 268).

109. 333 Mich. at 60, 52 N.W.2d at 596.

110. 387 Mich. 260, 196 N.W.2d 144 (1972).

111. *Id.* at 265, 196 N.W.2d at 146.

112. *Id.*

113. *Id.* at 266, 196 N.W.2d at 147.

Many courts have not hesitated to expand the use of eminent domain and allow takings of private property to serve some perceived public good even when private interests were clearly benefited. The origins of such takings can be traced at least as far back as the early nineteenth century decisions extending the provisions of the mill acts to manufacturing firms.<sup>114</sup> Their progeny can be followed to the beginnings of the twentieth century in the cases permitting condemnations for mining, logging, and utility companies.<sup>115</sup>

Large scale takings for economic development, however, began only in the mid-twentieth century with the port district cases.<sup>116</sup> Such projects, involving the development of a public port and an industrial park as a necessary attendant, easily could be viewed as primarily public in nature. When these cases arose in the 1950's, the country was still in its post-World War II era of prosperity and growth, and the condemnations provided stimuli for areas of growing industrial strength. The impetus for the actions was much the same as that for much earlier takings.<sup>117</sup>

As the economy faltered, the courts were faced with a dilemma: permit what appeared to be a private use of eminent domain power and perhaps abandon the long-held public use doctrine altogether, or possibly allow decaying or underdeveloped areas to deteriorate totally. Neither alternative was acceptable. Instead, the courts allowed private development to proceed under the facade of public use and "incidental" private benefit.

*Poletown* is an extreme example of private development cloaked in the public use doctrine. Detroit was the most severely depressed of the nation's cities. It was, therefore, as the dissent argued, highly susceptible to GM's entreaties as well as its threats to leave. But *Poletown* does not fit easily within the framework of past cases. Previous decisions had used eminent domain to attract new and varied industry into an area, while *Poletown* was razed to allow an existing industry to remain. For example, in *Prince George's County v. Collington Crossroads, Inc.*,<sup>118</sup> the court noted that there was "no suggestion" that the condemnation's purpose was "to benefit any particular private businesses."<sup>119</sup> In *Poletown*, however, the "incidental" benefit would be concentrated entirely in one corporation.

Regardless of recent decisions in other states, *Poletown's* extremity starkly illustrates the evolution of eminent domain and its possible future. Histori-

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114. See notes 9-22 and accompanying text *supra*.

115. See notes 37-47 and accompanying text *supra*.

116. See notes 71-73 and accompanying text *supra*. Slum clearance cases should be classified differently from the later community development decisions. Slum clearance takings were intended primarily for the removal of blighted areas in cities, not for economic development. It was a particular section that needed the redevelopment, not the region as a whole.

117. See notes 74-83 and accompanying text *supra*.

118. 275 Md. 171, 339 A.2d 278 (1975).

119. *Id.* at 190, 339 A.2d at 288. The court in *Prince George's County* further noted that the county would maintain significant control over the land after it was sold to private developers. *Id.* at 180, 339 A.2d at 283.

cally, private industry was granted eminent domain privileges to develop an emerging nation which might otherwise have faltered. The original grist mills were essential to the community's existence until industrialism brought prosperity and growth. Railroads spread this prosperity, providing Eastern manufacturers and Western miners and loggers with distant markets. The courts utilized the ever-widening doctrines of eminent domain and public use to encourage prosperity and to develop a state's natural advantages.<sup>120</sup>

With increased prosperity, eminent domain served in the nineteenth century to transfer property and power from the old elite to the new. In *Poletown*, eminent domain served to maintain power in an elite that was already well-established and seemingly impregnable. It served this purpose in previous redevelopment cases, notably *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, where the construction of the World Trade Center was intended to attract large international firms.<sup>121</sup> But in *Poletown* the beneficiary was the third largest industrial corporation in the nation—a solely private enterprise that was firmly entrenched in Detroit. Ironically, the city now sought to restore the prosperity lost because of its dependence on that very corporation. The condemnation of *Poletown* introduced an element foreign to the law of eminent domain and never addressed by the court: the concept of responsibility for the economic decline of the city. Thus, an evaluation of *Poletown* requires an examination of two factors: the relationship between Detroit's economy and GM, and GM's own decline and need for a new factory.

#### GENERAL MOTORS AND DETROIT'S ECONOMY

The major benefit of the proposed GM factory in Detroit was to be the creation of 6,150 new jobs.<sup>122</sup> This prospect was the most significant factor in the court's decision, as Michigan's unemployment rate stood at 14.2% and Detroit's unemployment rate at eighteen percent.<sup>123</sup> Indeed, the economic conditions of Detroit at the time of the *Poletown* decision were bleak. In 1979, new motor vehicle sales declined substantially from the record 1978 figure of 15.3 million.<sup>124</sup> At the end of the third quarter of 1979, more than 85,000 auto workers across the nation were on indefinite

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120. The courts have concentrated on the states' then current prosperity and the states' further need to develop their material resources. See *Codd v. McGoldrick Lumber Co.*, 48 Idaho 1, 279 P. 298 (1929) (timber); *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394 (1876) (mining); *Great Falls Mfg. Co. v. Fernald*, 47 N.H. 444 (1876) (water power); *Atwood v. Willacy Co. Navigation Dist.*, 271 S.W.2d 137 (Tex. Civ. App. 1954) (oil).

121. See notes 74-75 and accompanying text *supra*.

122. 410 Mich. at 650, 304 N.W.2d at 467 (1981) (Ryan, J., dissenting) (quoting CITY OF DETROIT COMMUNITY & ECONOMIC DEV. DEP'T DRAFT ENVIRONMENTAL IMPACT STATEMENT: CENTRAL INDUSTRIAL PARK, THE CITIES OF DETROIT AND HAMTRAMCK, MICHIGAN II-4 to II-5 (Oct. 15, 1980)).

123. 410 Mich. at 647, 304 N.W.2d at 465 (Ryan, J., dissenting). Both of these unemployment rates were far greater than the national average.

124. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 23 (Oct. 1979).

layoff,<sup>125</sup> and by July, 1981 that figure had risen to 153,000. These layoffs included 67,000 GM workers, reflecting a steady increase in layoffs since January.<sup>126</sup> Forty thousand autoworkers had been laid off in Detroit alone since 1979. Less than one month before *Poletown* was decided, General Motors announced that it was planning to cut its worldwide salaried staff by ten percent. If cuts were made proportionately by region, this would mean 5,000 jobs lost in the Detroit area.<sup>127</sup>

Justice Ryan, dissenting in *Poletown*, noted that the cause of the economic crisis was Detroit's dependence on "the now foundering automobile industry."<sup>128</sup> Detroit's dependence was greatest on GM, which in 1980 employed fifty-eight percent of American automobile workers.<sup>129</sup> Justice Ryan's observations were not unique. The Detroit area's heavy dependence on the automobile industry had in the past continually led to alternating periods of economic boom and malaise. The motor vehicle industry has always been among the most cyclically sensitive industries,<sup>130</sup> and periods of both prosperity and recession are accentuated in areas economically dependent on it.<sup>131</sup>

A study of Michigan's economic performance from the late 1960's to the late 1970's emphasized its "long history as a cyclically sensitive state" with a repeated "boom and bust cycle."<sup>132</sup> The study concluded that the state's concentration in durable goods manufacturing, particularly in the motor vehicle industry, was the major factor in this pattern.<sup>133</sup> In Detroit, manufacturing accounted for 33.7% of total employment in 1977, and the transportation equipment industry, which includes the automobile and related industries, accounted for 41.9% of manufacturing employment.<sup>134</sup> Thus, Detroit's cycles mirrored those of the state. In the 1973-1975 recession, manufacturing employment in the city dropped 20.1%, resulting in the loss of 125,000 jobs.<sup>135</sup> Michigan's average 1974 unemployment rate of

125. *Id.*

126. Sacramento Union, July 24, 1981, at B8, col. 6.

127. N.Y. Times, Feb. 21, 1981, at 31, col. 4.

128. 410 Mich. at 647, 304 N.W.2d at 465 (Ryan, J., dissenting).

129. Worthy, *The 500: The Fortune Directory of the Largest U.S. Industrial Corporations*, FORTUNE, May 4, 1981, at 324-25, 330-31.

130. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 18 (May 1980).

131. In the 1920's, Michigan was even more prosperous than the rest of the country, while in the 1930's the depression there was particularly severe. During and immediately after World War II, Michigan was again prosperous as the car companies first produced war armaments and then supplied the heavy post-war consumer demand for autos. MICHIGAN ENERGY SURVEY COMMITTEE, ENERGY AND THE MICHIGAN ECONOMY, A FORECAST 44-45 (1967). Auto sales declined by 25% in 1956, which resulted in Michigan unemployment reaching 7% in that year and 14% during the recession of 1958. Through the early and mid-1960's Michigan was again exceptionally prosperous as the economy and automobile production both surged. *Id.* at 46.

132. P. KOZLOWSKI, BUSINESS CONDITIONS IN MICHIGAN METROPOLITAN AREAS I (1979).

133. *Id.* at 7-8.

134. *Id.* at 78-79.

135. By contrast, nonmanufacturing employment fell 3.6% during the same period. *Id.* at

8.5% was the highest of 27 large states the Department of Labor studied.<sup>136</sup> When Detroit's unemployment rate hit eighteen percent in February, 1975, however, a news report noted that the city had actually suffered from unemployment averaging around nine percent since the late 1960's, when local businesses began to leave and "the carmakers stepped up automation of their facilities."<sup>137</sup> Moreover, while historically the motor vehicle industry has employed a steady ratio of production workers to salaried officials, this proportion fell noticeably during the recession years of the 1950's, 1960's, and 1970's, since "production workers are more directly affected by the demand for automobiles."<sup>138</sup> Those whom the proposed factory is to employ are always the first to see their jobs disappear.<sup>139</sup>

Thus, Detroit's and Michigan's exceptional prosperity as well as crises are attributable primarily to the auto industry and few would wish to see the industry disappear. But in *Poletown* the industry was pitted against individual property rights which also are not easily sacrificed. The concern in this case was not the undisputed contribution of GM to the city's former prosperity, but the relief of current high unemployment. The court's action must be evaluated in those specific terms, and in such terms one must weigh the sacrifice of a "unique" ethnic neighborhood<sup>140</sup> against GM's role in the economic crisis.

Without other options, the city attempted to reverse its economic decline by increasing its dependency on the cause of that decline. The city and the court turned for help to an entity, and an industry, whose very nature made the solution uncertain. History has shown that employment in the auto in-

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81. Furthermore, nationwide employment in the motor vehicle and equipment industry fell by 12.2%, or 114,000 workers, between November 1973 and March 1974. ECONOMIC REPORT OF THE PRESIDENT 59 (1975).

136. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1974, at 2 (1976). Detroit's average unemployment of nine percent in 1974 was the highest among the 30 large labor areas profiled. *Id.* at 3.

137. *Detroit's Gamble to Get Rolling Again*, TIME, Feb. 10, 1975, at 73.

138. U.S. DEP'TS OF LABOR AND OF HEALTH, EDUCATION, AND WELFARE, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 93 (1977).

139. Two courts had previously considered the public use exception in connection with an area's dependence on one employer. In *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959), which arose in a time of prosperity, the court rejected a taking without addressing the evidence of the aircraft industry's dominance in the city. *Id.* at 839, 341 P.2d at 194. When *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975), was decided, the county was beginning to feel the effects of its dependence on the federal government, and the court permitted the condemnation of the land to construct a new industrial park. *Id.* at 190-91, 339 A.2d at 288-89. The court permitted condemnations because such takings were designed to lessen dependence on a single employer—the opposite scenario from the *Poletown* case.

140. 410 Mich. 616, 683, 304 N.W.2d 455, 481 (1981) (Ryan, J., dissenting). More importantly than financial loss, the condemnation could result in "intangible losses, such as severance or [sic] personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Id.* at 682-83, 304 N.W.2d at 481 (Ryan, J., dissenting).

dustry is unlikely to remain stable. The proposed plant was itself intended to replace two factories GM was planning to close in 1983. Thus, the jobs created would simply replace those which would otherwise be lost, and would not make up for the total loss of employment in the city. General Motors in fact guaranteed only 3,000 of the promised 6,150 jobs, while the project displaced nearly 3,500 residents. Moreover, even this guarantee of 3,000 jobs is suspect. On November 3, 1981, GM, still in the shadow of a vanished neighborhood, announced a one-year delay in the construction of the factory. It denied charges that all plans for the new plant had been dropped.<sup>141</sup>

Only Justice Ryan's dissent recognized the inherent instability of the result in *Poletown*. He noted GM's lack of guarantees regarding employment at the proposed plant and speculated as to what the automotive industry's condition would be in ten or twenty years.<sup>142</sup> Automation had already been credited with perpetuating a high unemployment rate in Detroit. Furthermore, General Motors plans to install 5,000 robots in its assembly plants by 1985 and 14,000 by 1990, thereby replacing many production workers.<sup>143</sup> It seems Detroit has pursued an unlikely saviour.

#### GENERAL MOTORS' NEED FOR A NEW FACTORY

According to the Environmental Impact Statement the city prepared, GM needed a "new generation" manufacturing facility for production of its new models because it would be too costly and time consuming to retool its existing assembly plants.<sup>144</sup> The existing plants were unsuitable in two major respects: first, for manufacturing automobiles meeting future hydrocarbon emission control standards, and second, for production of "a more competitive product line that meets energy efficiency criteria"—in essence, smaller cars.<sup>145</sup>

#### *Hydrocarbon Emission Control Standards*

Although GM would have to modify existing facilities to meet stationary emission control standards, the immediate problem facing it was vehicle compliance with movable hydrocarbon emission requirements. The failure to meet these standards is traceable to GM's own actions. In January 1969, the federal government charged the four major American automobile com-

141. Washington Post, Nov. 4, 1981, at D8, col. 1.

142. Justice Ryan surmised, "[f]or all that can be known now, in light of present trends, the plant could be fully automated in 10 years." 410 Mich. at 679, 304 N.W.2d at 480 (Ryan, J., dissenting).

143. Shinoff, *A Hard Look: Are Workers Victims of Industry's Productivity Push?*, S.F. Examiner, May 22, 1981, at 1, col. 3 (morning ed.).

144. 410 Mich. 616, 648-49, 304 N.W.2d 455, 466 (1981), (quoting CITY OF DETROIT COMMUNITY & ECONOMIC DEV. DEP'T DRAFT ENVIRONMENTAL IMPACT STATEMENT: CENTRAL INDUSTRIAL PARK, THE CITIES OF DETROIT AND HAMTRAMCK, MICHIGAN II-4 (Oct. 15, 1980)).

145. *Id.*

panies—GM, Ford, Chrysler, and American Motors—and others with having conspired since 1953 to delay the development of devices to control automobile air pollution.<sup>146</sup> The government alleged, among other charges, that the defendants had agreed with one another not to compete in developing and marketing pollution control devices and not to market a car with such devices until an agreed-upon date. On October 28, 1969, the carmakers entered into a consent decree with the government settling the suit. Without conceding that a conspiracy had existed, they agreed not to conspire in the future to delay installation of pollution control equipment, nor to engage in other anti-competitive practices.<sup>147</sup>

A Justice Department memorandum regarding the case was presented to a congressional hearing on large corporations.<sup>148</sup> The memo charged that the “big four” automakers, since they had the most to lose financially, were most active in the anti-competition scheme.<sup>149</sup> The memorandum quoted an internal GM document that expressed reluctance to undertake the production of devices that would not contribute to the saleable aspects of automobiles, even though “they appear to be based on sound principles.”<sup>150</sup> The memorandum claimed that reliance on the anti-competitive cooperation had enabled the automobile manufacturers to disregard other approaches to the problem of emissions, thereby further delaying a solution.<sup>151</sup>

The alleged conspiracy, which apparently ended in 1969, may have little to do with GM’s ability to meet emission control standards after 1980. Nevertheless, ignoring the problem of pollution for fifteen years or more arguably could seriously impede later progress in controlling it. At the very least, it raises issues of GM’s good faith, its own exacerbation of the need for a new factory, and the implicit fairness of taking property to meet that need.

### *Fuel-Efficient Cars*

Similarly, GM’s deliberate decision to delay building smaller, more fuel efficient cars also exacerbated its problems when consumers turned to the smaller models. GM initially announced plans to build lightweight cars immediately after World War II, but abandoned them in 1946. Lawrence

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146. N.Y. Times, Oct. 29, 1969, at 28, col. 1. The practices alleged in the Justice Department’s original complaint included any concerted action to delay installation of fume control equipment, to restrict individual company publicity on technical advances, to require joint appraisal of equipment patents and to acquire patents on a pool basis, or to respond only jointly to governmental requests for information or proposals.

147. *Id.*

148. *Role of Giant Corporations, Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. (1971).

149. *Id.* at 1663.

150. *Id.* at 1664.

151. *Id.* at 1685. One such approach the industry ignored was a carburetor that would have reduced pollutants at a manufacturer’s cost of six dollars per unit. *Id.* at 1686.



White, in his study of the automobile industry after the war, concluded that the car companies were deliberately slow in entering the small car market because such cars were less profitable than larger models. The companies also were reluctant to enter the market until they were sure they could all compete effectively.<sup>152</sup> Throughout the 1950's, American cars continually grew larger and heavier, while in the middle of the decade the smaller imports began to sell well. The major American automakers disparaged the phenomenon as temporary, but finally introduced their own compact cars in 1959.<sup>153</sup> Import sales appeared to have reached their peak in the early 1960's, but then began to rise again in 1963. Again, the American companies disparaged the trend until 1968<sup>154</sup> when GM, Ford, and American Motors again announced plans for new, smaller cars.<sup>155</sup>

The market share of domestic compact cars increased slightly in 1967 after a decline from 1963-1966.<sup>156</sup> But imports, almost all of them compacts, doubled their market share between 1963 and 1968,<sup>157</sup> when import sales increased by thirty percent over 1967.<sup>158</sup> Thus, the overall market share of smaller cars—imports and domestic compacts—had remained steady for the preceding three years.<sup>159</sup> In the first quarter of 1970, sales of most domestic cars dropped drastically while those of fuel-efficient imports and compacts continued to rise, evincing the "growing demand for small cars."<sup>160</sup>

Despite the trend toward smaller cars and the fact that transportation was the largest consumer of oil in a country that consumed one-third of the world's energy,<sup>161</sup> the automakers continued to produce heavier, less fuel-efficient cars.<sup>162</sup> At the time of the oil embargo in 1973, GM cars averaged

152. L. WHITE, *THE AUTOMOBILE INDUSTRY SINCE 1945*, at 178-85 (1971) [hereinafter cited as WHITE].

153. *Id.*

154. *Id.* at 187-88.

155. *Id.*

156. U.S. DEP'T OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, OCT. 1967, at 13.

157. *Id.*

158. *Id.* at 12. About 960,000 imports were sold in the 12 months ending September 1968, as compared with 740,000 in the preceding year. *Id.*

159. *Id.* at 13. As the 1969 model year opened, the car manufacturers announced renewed plans to produce small cars to compete with the imports. *Id.*

160. U.S. DEP'T OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, MAY 1970, at 4.

161. ECONOMIC REPORT OF THE PRESIDENT 112 (1974). The figures given in the tables therein are for 1972. For the first nine months of 1973 the U.S. share of total world oil imports was 19%. *Id.* at 116.

162. The market share of small cars continued to grow from 1970-1973. U.S. DEP'T OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, MAY 1974, pt. I, at 5. In 1973, the Society of Automotive Engineers, in a pre-oil embargo study, found that American cars had continually increased in weight. A typical standard car increased from 3,550 pounds in 1965 to 4,275 pounds in 1973, resulting in a decrease in gas mileage of 21%. MacDonald, *Fuel Consumption Trends in Today's Vehicles*, in 1973 *ENERGY AND THE AUTOMOBILE 22* (Society of Automotive Engineers, Inc.). The Society further noted that "the small-car trend [is] still gaining momentum . . . [We] see a continuation of the trend to smaller cars and are planning accordingly."

lower gas mileage than those of any other American automaker.<sup>163</sup> Between 1962 and 1972, General Motors' share of the new car market had fallen from 51.9% to 44.2% primarily due to the sale of imports, which "did not greatly trouble GM."<sup>164</sup> Industry observers noted that GM had decided to stay in the "highly profitable big-car market, rather than compete head-on in the less profitable small-car field."<sup>165</sup> During the same period, Ford's market share fell by only two percent, while Chrysler's rose, as each adjusted more quickly than GM to the changing times.<sup>166</sup>

Thus the oil embargo only accelerated a trend that had been visible for years. American automakers had been planning to compete with the imports since at least the 1950's, but until 1968 American cars were not technologically different from the 1946 models.<sup>167</sup> In 1981, President Carter stated in his annual economic report that finally "competition on the basis of technological advances and fuel economy is replacing competition based on style and performance. . . . Vehicles manufactured according to stringent quality standards . . . are replacing vehicles whose style changed annually but whose technology evolved more slowly."<sup>168</sup> Style changes were more profitable and less risky than technological developments.

It has been nine years since the 1973 oil embargo, and GM has yet to replace its inadequate facilities. Not until 1977 did the car companies begin an extensive "downsizing" program to reduce the size of their cars.<sup>169</sup> In

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*Id.* at 23. In 1967, formerly optional equipment, including automatic transmission, power steering, and power brakes, became standard on many models. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, OCT. 1967, at 12. All of these now standard items further reduced the gas mileage of American cars. Orski, *The Potential for Fuel Conservation: The Case of the Automobile*, OECD OBSERVER, Feb. 1974, at 13, 17. The use of automatic transmission can produce a loss in fuel economy of over 10%, although the penalty increases considerably in the case of heavier cars equipped with emission controls. Furthermore, air conditioning results in an average fuel economy penalty of 9% and can reach as high as 20% in city driving in hot weather. *Id.*

163. Burck, *How G.M. Turned Itself Around*, FORTUNE, Jan. 16, 1978, at 87. In 1973, the average gas mileage of a typical GM car was 12 miles per gallon. *Id.*

164. *Id.* at 88. Following "strictly financial logic," GM concluded that it should "stick with its traditional policies, which had earned it dominance of the highly profitable big-car market." *Id.*

165. *Id.* The author notes that one executive told a reporter that, "there's something wrong with people who like small cars." *Id.*

166. *Id.*

167. WHITE, *supra* note 150, at 211.

168. ECONOMIC REPORT OF THE PRESIDENT 123 (1981).

169. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, SEPT. 1977, at 4. "Downsizing" is the reduction of the size and weight of a car without affecting its interior size. The ability to do so destroys the argument that the American buyer needed the extra room which large cars supposedly provided. At the same time, the Department of Commerce abandoned its previous classification of automobiles into "short, medium, and long" (before that it had used "low weight, low-medium, high-medium, and high weight") in favor of "subcompact, compact, intermediate, and full-size." Thus, the unfavorable connotations of the higher categories were removed; instead, it was made to sound as if the largest cars were actually only "full-size," or normal, while smaller cars were something less than full.

the meantime, they continued to produce big cars until 1979 when the second sudden increase in oil prices and subsequent gas shortage again led to a precipitous decline in sales of larger models.<sup>170</sup> Meanwhile, small cars had increased their market share to 56.5% in 1975, and intermediate cars increased their share to 28% in 1977.<sup>171</sup>

At least by the early 1970's GM was on notice that the nature of its competition had changed. Instead of meeting this competition, it precipitated its own decline and Detroit's along with it, and has now condemned land for facilities it might have acquired on its own years before. GM resisted the inevitable until its failures became too burdensome. Then, in 1980, suddenly in a rush, GM provided Detroit a deadline of May 1, 1981 for conveyance of suitable land. Detroit hurriedly complied.

GM's own creation of its need for eminent domain was not an issue in *Poletown*, nor is it likely to have changed the result. But once more, the unspoken issue is whether the proposed condemnor's responsibility for economic decline and loss of employment should enter into the court's balance. The record well substantiates the dissent's contention that GM, in operation of its new plant, will be motivated not by reference to the rate of regional unemployment, but by profit.<sup>172</sup> In the past, profit-motivated entities have been delegated eminent domain rights only because their operation was directly in the public interest. GM's apparent reference to profit, however, was not always in the best interests of the society that has vested GM with the "high and dangerous" privilege<sup>173</sup> of eminent domain, except to the extent that that society was the "incidental beneficiary" of GM's successes. The court could hardly admit to this turnaround. But when the past is ignored, so is the potential for abuse of a nominally public power. As the dissent in *Poletown* emphasized, Detroit was a deteriorating city which could not withstand the pressure exerted by the "immense political and economic power" wielded by the giant General Motors.<sup>174</sup>

The failure of earlier courts to consider size when granting eminent domain powers is not a persuasive reason for ignoring size in *Poletown*. The early courts ignored size because enterprises were small. Under the mill acts,

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170. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, OCT. 1979, at 21. The market share of full-size cars fell gradually from 38.5% to 33% before the gasoline shortage, then to 20.5% in 1975, before rising to 24% in 1977. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, SEPT. 1977, at 5.

171. Small cars increased their market share from 40.5% in 1971 to 56.5% in 1975, while intermediates increased their share from 21% in 1971 to 28% in 1977. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, SEPT. 1977, at 5.

172. 410 Mich. 616, 679, 304 N.W.2d 455, 480 (1981) (Ryan, J., dissenting).

173. *Kinney v. Citizens' Water & Light Co.*, 173 Ind. 252, 255, 90 N.E. 129, 130 (1909) (appropriation of a right of way by a utility for the purpose of constructing a side railroad track not within purview of state statute permitting utilities limited eminent domain powers).

174. 410 Mich. 616, 679, 304 N.W.2d 455, 467 (1981) (Ryan, J., dissenting). In 1980, GM was the third largest industrial corporation in the nation ranked by sales, second by assets, and first by number of employees. Worthy, *The 500: Fortune Directory of The Largest U.S. Industrial Corporations*, FORTUNE, May 4, 1981, at 324-25.

all size mills were allowed the privilege of flooding their neighbors' land.<sup>175</sup> Manufacturing concerns were quite small at first, and in the early 1800's, no firm controlled as much as ten percent of the output of a product.<sup>176</sup> After 1850, even as industry and its use of eminent domain grew, the size and power of firms could not compare to that of today's.<sup>177</sup>

The concentration of industry accelerated after 1900. In 1909, the largest 100 firms engaged in manufacturing, mining, and distribution owned 17.7% of the assets of all such firms. By 1929, the largest 100 firms controlled 25.5% of all assets, and by 1958, 29.8%.<sup>178</sup> By 1930, the 200 largest manufacturing and transportation firms produced over half of the goods and services in those industries.<sup>179</sup>

In manufacturing alone, the growth and concentration has been even more striking. By 1968, the largest 100 manufacturing firms held a larger share of the market than the 200 largest in 1950. The share of those 200 largest firms increased from fifty-seven percent in 1966 to sixty-one percent just two years later.<sup>180</sup> In 1973, there were 136 manufacturing corporations with assets over a billion dollars, which together held fifty-three percent of the assets of all industrials.<sup>181</sup> By 1980, there were 244, which controlled sixty-four percent of all such assets.<sup>182</sup>

As these manufacturing corporations exert increasing influence and control over cities with decreasing options, the danger exists that they will be able to write their own terms in a condemnation as GM did in *Poletown*. Control by any government entity over such corporate behemoths seems impossible. Yet control by public authority over the development of a project generally has been considered crucial to condemnations on behalf of private parties.<sup>183</sup> For example, in *Prince George's County v. Collington Crossroads, Inc.*,<sup>184</sup> the court emphasized that the county would retain significant control over the industrial park to be created by eminent domain, thus assuring that it would serve the public interest. GM, by contrast, presented Detroit with the criteria for its site, and the majority never addressed the control issue.

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175. See generally NICHOLS, *supra* note 3, § 7.623.

176. JOHNSON & KROOS, *supra* note 28, at 192.

177. In the 1970's, the two largest manufacturing firms had greater sales per year than all manufacturing corporations in 1900, even adjusting for inflation. Mueller, *Conglomerates: A Nonindustry*, in THE STRUCTURE OF AMERICAN INDUSTRY 443 (W. Adams ed. 5th ed. 1977).

178. Collins & Preston, *The Size and Structure of the Largest Industrial Firms, 1909-1958*, 51 AM. ECON. REV. 986, 989 (1961).

179. JOHNSON & KROOS, *supra* note 28, at 192.

180. Mueller, *Conglomerates: A Nonindustry*, in THE STRUCTURE OF AMERICAN INDUSTRY 443 (W. Adams ed. 5th ed. 1977).

181. FTC Q. FINANCIAL REP. MANU. CORP. 4TH QUARTER 1973, at 61 (1973).

182. FTC Q. FINANCIAL REP. MANU. CORP. 4TH QUARTER 1980, at 17 (1980).

183. See, e.g., *City and County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955), where the court denied a condemnation for a parking garage to be constructed and leased by private parties. The city would not have had the control over the facility necessary to assure that it would be operated in the public interest.

184. 275 Md. 171, 180, 339 A.2d 278, 283 (1975).

*Courtesy Sandwich Shop, Inc. v. Port of New York Authority*<sup>185</sup> first posed the dilemma cities face today. The lone dissenter contended that New York, in its desire to reverse the decline of its relative economic position on the East Coast, was stigmatizing "the small or not so small entrepreneur as standing in the way of progress. . . ."<sup>186</sup> The majority, which relied on the slum clearance cases, failed even to note that the area discarded in favor of the World Trade Center was an economically vibrant small business district. The Port Authority's brief emphasized the number and size of the import-export firms it hoped to attract, which included a share of the 2,900 United States manufacturers then responsible for seventy-six percent of American exports.<sup>187</sup>

But the dilemma faced in *Poletown* was far more stark. It involved but one giant corporation already dominant in Detroit which, by leaving, could bankrupt a city already near insolvency. In truth, the city, and the court, may have had no realistic choice. This is precisely the danger that cities today must confront. Simply because of its size and power, GM was able to create and hold the hope for relief of Detroit's crisis. Size was in fact the only real criterion involved.<sup>188</sup> Justice Fitzgerald's fear that *Poletown* meant there is "virtually no limit to the use of condemnation to aid private businesses"<sup>189</sup> needs an addendum—so long as the private business is large and powerful enough. The majority acknowledged as much in its declaration that a condemnation would not be accepted simply because it may provide "some jobs" or add to the industrial or commercial base.

In the short run the project should benefit Detroit—disregarding the demise of a community—by providing employment. But Detroit long ago sacrificed its autonomy and relinquished control over its own fate, and in *Poletown* it simply enshrined that choice. Thus, the long range outlook is less certain. As industrial corporations grow ever greater and industrial cities ever weaker, so is the outlook for private property rights.

## WHAT IS TO BE DONE?

### *The Public Corporation*

The ever increasing power, strength, and size of huge corporations such as GM, together with court decisions such as *Poletown*, may indicate that individual property rights are becoming increasingly susceptible to infringement. Today's large corporations affect the lives of thousands of individuals

185. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (eminent domain usage was permitted even though only incidental public revenue was raised through development), *appeal dismissed*, 375 U.S. 78, *rehearing denied*, 375 U.S. 960 (1963).

186. *Id.* at 399, 190 N.E.2d at 411, 240 N.Y.S.2d at 14 (Van Voorhis, J., dissenting).

187. *Id.* at 393-94, 190 N.E.2d at 408, 240 N.Y.S.2d at 9 (Van Voorhis, J., dissenting).

188. The shoe factory, which the Supreme Judicial Court of Maine would not condemn, would hardly have had such power. Opinion of the Justices, 152 Me. 440, 446, 131 A.2d 904, 907 (1957).

189. 410 Mich. 616, 644, 304 N.W.2d 455, 464 (1981) (Fitzgerald, J., dissenting).

and determine the fate of cities. Detroit's decline although extreme, only echoes the demise of older industrial cities throughout the northeastern United States. Since the 1950's, even as the economy grew, industry has relocated in the South and Southwest amid cries of an urban crisis.

Thirty years ago the crisis was only impending; now it is threatening to engulf an entire region. As long as no solution is found to resurrect northeastern cities, the overconfident Sun Belt cannot be considered immune from the same fate. What is to be done? How can these corporations be forced to recognize the responsibilities which they owe to the cities they abandon and the public they desert unemployed?

The separation of corporate power from corporate responsibility to the public may be traced to the corporate managers, who may or may not live in a city, and who may or may not care about the effects of their decisions on the city's fate. It is they who determine whether the nation's largest metropolitan areas shall prosper or perish. Accountable only to anonymous stockholders, they wield the power of a government while serving an invisible constituency. Only the sacredness of a Lockean conception of private property permits the arbitrary exercise of a power so vast.

In 1689 John Locke proposed that by adding his labor to the land, he claimed it as his own. In the early stages of capitalism, when small companies were owned and managed by a few entrepreneurs, capitalists could justifiably appropriate this theory of property for the emerging corporate law. Locke's earth is far removed, however, from the intangible rights, evidenced by a certificate, which the inert shareholder retains in the modern corporation.

The obsolescence of this legal and economic theory was recognized fifty years ago when Adolph Berle and Gardiner Means published *The Modern Corporation and Private Property*.<sup>190</sup> Berle and Means asserted that, in the case of the giant corporation, the classical "atom of property" had been split. No longer did the same person own property and control its disposition. Instead, titular ownership was vested in great numbers of stockholders able to exert little or no influence over a management group which might own little if any stock themselves. Separation of ownership and control was complete in huge corporations. For example, in 1932 the largest shareholder of American Telephone & Telegraph Company owned less than one percent of the company's stock.<sup>191</sup> It was this separation that permitted massive aggregations of property.

Thus, the private corporation evolved into a "quasi-public" entity.<sup>192</sup> No longer do the owners of an enterprise control the means of production; nor do those in control benefit directly when the enterprise is profitable. The rise of the giant corporation "destroys the very foundation on which the

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190. A. BERLE, JR. & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

191. *Id.* at 4-5.

192. *Id.* at 5.

economic order of the past three centuries has rested."<sup>193</sup> To Berle and Means, the effect of this "revolution" was clear: the corporation must be analyzed not as a business enterprise but as a social organization with power comparable to that of the state.<sup>194</sup> The stockholders, by surrendering responsibility for the property, relinquished the right to have the corporation operated solely in their interest. The quasi-public corporation instead encompasses the economic interests of the investing public, the workers, and the consumers of its products, as well as those who control the corporation. Consequently, the owner of neither half of the severed atom can stand inviolate against the "paramount interests of the community."<sup>195</sup>

The economist John Kenneth Galbraith asks whether a firm such as Lockheed, which does most of its business with the government, has its working capital supplied by the government, has its cost overruns socialized by the government, and has been rescued from disaster by the government, is not properly viewed as a public entity.<sup>196</sup> That such firms are subject to the forces of the market—the theoretical justification for continuing to view them as private—few would seriously contend. Lockheed is but the extreme case. General Motors unilaterally sets the prices for its cars, dictates car design and employment contracts, and influences highway construction, all with "profound public effect." In fact, its public decisions in any year are "far more consequential than those of any state legislature."<sup>197</sup>

Corporate planners, not the market, determine the prices, costs, and level of production of today's giant corporations. Industrial planning, akin to the state's authoritative decisions in noncapitalist economies, has replaced the free enterprise system. The multinational firm has much more in common with the socialist state than with the pin factory of Adam Smith.<sup>198</sup>

The public corporations also are largely subsidized by the government. Massive government expenditures, first introduced as state policy after the Depression, ensure a high level of demand for their products.<sup>199</sup> In addition, direct governmental outlays to business result in a system of "subsidized, and risk-underwritten private enterprise."<sup>200</sup> In 1975, the federal government provided thirty-seven percent of the funding for industrial research and development.<sup>201</sup> Corporate giants are the primary beneficiaries of such governmental largesse, as forty-three percent of this money went to companies with over 25,000 employees, and a full twenty-one percent to the

193. *Id.* at 8.

194. *Id.* at 352.

195. *Id.* at 352-56.

196. Galbraith, *On the Economic Image of Corporate Enterprise*, in *CORPORATE POWER IN AMERICA* 4 (R. Nader & M. Green ed. 1973).

197. *Id.* at 5-6.

198. See generally J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (3d ed. rev. 1978) [hereinafter cited as GALBRAITH].

199. *Id.* at 230-42.

200. E. HERMAN, *CORPORATE CONTROL, CORPORATE POWER* 167 (1981) [hereinafter cited as HERMAN].

201. NATIONAL SCIENCE FOUNDATION, *RESEARCH AND DEVELOPMENT IN INDUSTRY*, 1975, at 2 (1976).

four firms with the largest research and development programs in the country.<sup>202</sup>

Defense spending is the major element of this business-government partnership. The Department of Defense provided two-thirds of all federal funds for research and development awarded to industry in 1975.<sup>203</sup> Military production has been largely contracted out to private industry, thus underwriting the risk of undertaking advanced technological development.<sup>204</sup> Traditional roles are now reversed. Risk has been transferred from the private sector to the government while business has become the state's weapons producer, leading to reduced research and production capability on the part of the military.<sup>205</sup> Supplying a military force is uniquely characteristic of the state, but neither Adam Smith nor several generations of his descendants could have foreseen a concern as vast and powerful as General Motors.<sup>206</sup>

### *Possible Solutions: Making Public Corporations Accountable*

Corporations have increasingly deserted Northern cities for the South's promise of endless sun, industrial peace, and lower wages. Large firms have taken advantage of their great flexibility to abandon local workers and communities.<sup>207</sup> Left in the wake of these desertions are the unemployed, their own fate determined by the corporation they once served. Gurney Breckenfeld described Detroit as a city with "numerous [empty] factories built as recently as the 1940's and 1950's, . . . the atmosphere is almost sepulchral, an eerie compound of emptiness and half-hidden menace. Downtown has become a hollow core pocked by vacant stores and boarded-up taverns."<sup>208</sup> Elsewhere scenes are similar if not quite so bleak.<sup>209</sup>

202. *Id.* at 6-7.

203. *Id.* at 3.

204. GALBRAITH, *supra* note 198, at 239-40. Between 1960 and 1975, more than \$450 billion in prime military contracts were awarded to private business. K. SALE, *POWER SHIFT* 24 (1975).

205. HERMAN, *supra* note 200, at 166 (citing H. NIEBURG, *IN THE NAME OF SCIENCE* (1966)).

206. With gross receipts approximately equal to Sweden's gross national product; with employees and their families about as large as the total population of New Zealand; with outlays larger than those of the central government of France or West Germany, wholly dependent for its survival . . . on a vast network of laws, protections, services, inducements, constraints, and coercions provided by innumerable governments, federal, state, local, foreign, General Motors is de facto the public's business.

R. DAHL, *AFTER THE REVOLUTION?* 120 (1970).

207. HERMAN, *supra* note 200, at 261.

208. Breckenfeld, *Refilling the Metropolitan Doughnut*, in *THE RISE OF THE SUNBELT CITIES* 233 (D. Perry & A. Watkins ed. 1977) [hereinafter cited as Breckenfeld]. Many businesses have traveled only the short distance to the suburbs. The Detroit suburb of Southfield alone has acquired, at the city's expense: Bendix, Federal-Mogul, Macabees Mutual Life Insurance, Michigan Bell, the Eaton Corporation, IBM, Xerox, Levitt and Sons, SCM, State Farm Mutual, Allstate, Honeywell, Enjay Chemical, Control Data, Sperry Rand, Reynolds Aluminum, and Merrill, Lynch, Pierce, Fenner & Smith. C. LARSON & S. NIKKEL, *URBAN PROBLEMS* 121 (1979) [hereinafter cited as LARSON & NIKKEL].

209. For example, in 1970, 43 firms left St. Louis for the suburbs. In just two years, Boston



Can a solution be found? In many areas the service sector has grown even as the manufacturing sector has declined, and some see the growth of services as the answer to a declining industrial base. The economies of younger, more prosperous cities are far more service-oriented than those of their aged brethren.<sup>210</sup> But the service sector is comprised largely of low-paying, low-skilled jobs disproportionately held by minorities and the poor. Although these are the groups most in need of aid, we must ask whether we wish to enforce a dual economy. Moreover, services, historically less sensitive to the business cycle than manufacturing, also have become cyclically unstable in older areas.<sup>211</sup> As the service sector employs an increasingly larger percentage of the work force, this trend is likely to accelerate; it is difficult to envision an American appetite so vast as to provide continuous employment for a nation of McDonald's hamburger servers, busily scooping beef patties into ever-widening jaws.

Many analysts have suggested that an attempt be made to reclaim the urban industrial sector. They suggest a "business-government partnership" whereby cities make it as attractive as possible for corporations to do business within their borders. Cities are advised to provide wage subsidies for firms hiring the unemployed.<sup>212</sup> Abandoning "ill-conceived taxes" which provide "businesses and the affluent an incentive to leave" the city<sup>213</sup> and allowing corporate tax incentives will encourage businesses to remain.<sup>214</sup> Finally cities must tailor their administrative regulations to serve corporate needs.<sup>215</sup>

More drastic measures also may be needed to entice new businesses into urban areas. Some analysts propose that corporations be given traditional municipal powers, including "land assembly . . . zoning, with the ability to influence local zoning ordinances or even [the ability] to develop special industrial districts . . . bonding, with the power to issue tax exempt bonds . . . [and] the capacity to design, develop, and . . . operate necessary services."<sup>216</sup> Although cities may be unwilling to cede certain municipal

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lost 75 companies to suburbia. LARSON & NIKKEL, *supra* note 208, at 121 (citing Cassidy, *Moving to the Suburbs*, THE NEW REPUBLIC, June 22, 1972, at 21). Other older cities have suffered similar losses.

210. Harrison & Hill, *The Changing Structure of Jobs in the Older Cities*, in CENTRAL CITY ECONOMIC DEVELOPMENT 33 (B. Chinitz ed. 1979).

211. *Id.* at 27-28.

212. Chinitz, *Toward a National Urban Policy*, in CENTRAL CITY ECONOMIC DEVELOPMENT 8 (B. Chinitz ed. 1979).

213. Breckenfeld, *supra* note 208, at 250.

214. Schwartz, *The Scope for Local Government Action*, in CENTRAL CITY ECONOMIC DEVELOPMENT 166 (B. Chinitz ed. 1979).

215. *Id.* at 168. Schwartz asserts that regulations should fit the needs of the corporate "client." She suggests as a solution that the state become, if not the executive committee of the bourgeoisie, at least the executive committee of the business world. What Marx asserted was true one hundred years ago, and capitalists have vehemently denied ever since, she proposes as a solution.

216. Starr, *Economic Development Strategies—No. 1: Industrial Preservation*, NATION'S CITIES, April, 1978, at 24.

functions, urban governments must "stop asking companies to stay in [their] cities and start making it in their best interest to do so."<sup>217</sup>

Such proposals clearly illuminate the public nature of the corporation and the subservient position of the city. When corporations are given tax incentives and subsidies, control over a city's land use policies, and partnership status with local officials to determine governmental regulations, the myth of private enterprise must surely fall. Corporations should not be given public powers such as GM received in *Poletown* without accepting the accompanying public responsibility. Incentives offered in the hope of enticing industry result in a competition for survival with the most beneficent metropolis emerging as the fittest. This scenario may be appropriate in an air fare war among international airlines; it is hardly a compelling way to determine a nation's urban future.

With incentives to lure corporations into economically depressed areas, the financial risk normally associated with the private sector is safely transferred to the public. There is no guarantee that industry once attracted to a city will remain, and the promise of more jobs may well prove ephemeral. A competitor need only raise the stakes to lure a corporation away, while the corporate operations are, in the interim, almost wholly underwritten by public funds. For example, in order to remain in Detroit, General Motors required the city to "provide for the construction and upgrading of site perimeter roads" at a cost of \$23.5 million, to absorb a \$3.5 million penalty for using underground utility service instead of overhead service, and to bear the expense of disposing of toxic wastes found on the site.<sup>218</sup> The project cost Detroit over \$200 million, while the property was sold to GM for only \$8 million.<sup>219</sup>

Other automobile companies had already built plants in the southern United States and General Motors again was threatening to build in the Sun Belt. GM therefore was granted a public power to alleviate the unemployment for which it was largely responsible. The automaker's history of ignoring the public good peculiarly demonstrates the need to redefine the nature of the corporation so that power and responsibility are once more merged.

In 1964, Berle asserted that all power must be based on legitimacy, to which corporations had but "the slenderest claim."<sup>220</sup> Of the three summary points to this argument, the third, that "[g]reat corporate power is exercised in relation to certain obligations," including the obligation to provide "at least some continuity of employment," was "destined to be in in-

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217. *Id.*

218. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 656, 304 N.W.2d 455, 469 (1981) (Ryan, J., dissenting).

219. *Id.* at 656, 304 N.W.2d at 469 (Ryan, J., dissenting). GM also was granted the maximum allowable tax abatement for 12 years. *Id.* at 657, 304 N.W.2d at 470 (Ryan, J., dissenting).

220. Berle, *Economic Power and the Free Society*, in *THE CORPORATION TAKEOVER* 91, 103 (A. Hacker ed. 1970) [hereinafter cited as Berle].

finitely greater controversy” than the first two.<sup>221</sup> This hesitant statement, scarcely less controversial now, is an indication that the obligations a corporation owes to the public have remained undefined since the incipency of corporate political power. It is time to recognize that the hesitancy of Berle’s statement is its only failing.

When corporations are given public powers to provide employment, they accordingly have an obligation to provide such employment. Their fulfillment of this obligation must not be left to individual caprice. If a neighborhood is destroyed so that 6,000 can work for GM, then GM must create and guarantee 6,000 jobs. Unless it does so, GM’s claim to legitimacy fails. The court can and should require GM to guarantee these jobs before granting it the eminent domain power or other public rights.

Requiring these guarantees, however, might only drive GM southward. Thus corporate obligations must be the same in Houston; for Houston shall not forever prosper, and some unknowable years from now will despair for having learned so little from Detroit today. Great corporations cannot be allowed to abandon a city arbitrarily, solely in the interest of their stockholders. Given their flexibility, such corporations now have “a structural bias *toward* irresponsibility, in the sense of a greater capability of externalization of social costs through abandonment.”<sup>222</sup> If they do relocate, they must compensate the abandoned city for the increased unemployment and welfare and the decrease in the tax base. Since businesses routinely pay relocation expenses of their executives, they should be required to do the same for any workers who wish to remain with them. The alternative is a desperate city, totally dependent upon a corporation for its future as an urban center.<sup>223</sup>

Corporations also must provide greater job security against downturns in the business cycle. The employer’s apparently indisputable right to reduce the work force whenever business falls need not be sacrosanct. Most other industrialized nations provide greater protection against unjust dismissal

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221. *Id.* at 105. Berle listed other obligations, including the need for the corporation to supply the demand in the area of its production, to establish a price which would not be considered extortionate, and to give continuing attention to the technical progress of the art.

222. HERMAN, *supra* note 200, at 261. The author notes that this is “the logical outcome of the workings of a market that is efficient in the private but not in a social sense.” *Id.*

223. J. WRIGHT, ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS 226-27 (1979). The case is described by John DeLorean, former vice-president of General Motors, where in the early 1970’s GM built two new assembly plants in the South, despite Detroit’s offer of cheap land and pleas for relief of its automobile industry-induced crisis. DeLorean tells of a proposal for one plant to be built in Detroit and one in Pontiac, which was similarly depressed. He presented GM’s top management with “compelling financial reasons” for construction in Detroit: cheap urban renewal land, a pool of skilled workers, and cheaper shipping costs. A similar case was made for Pontiac. In addition, he argued that General Motors had a social obligation to the city since the automobile industry had caused its depression. With no “serious consideration” of his case, the plants were built in Memphis, Tennessee and Oklahoma City, Oklahoma.

and economic layoffs.<sup>224</sup> In Japan—which the American automobile industry is admonished to emulate and to which it now compares itself—workers for most medium and large firms customarily are hired for lifetime employment, gaining tenure after a one-year probation period.<sup>225</sup> They are dismissed thereafter only for good cause and are generally not subject even to temporary layoffs, which are exceptional. Employment security for employees of Japanese firms is one of the principal—and publicly acknowledged—concerns of corporate management.<sup>226</sup>

That concern was demonstrated during the 1971 recession. Many Japanese firms laid off workers but guaranteed them eighty to one hundred percent of their wages. In the less severe recession of 1974, workers in Japanese firms were guaranteed ninety percent of their salaries while on layoff.<sup>227</sup> Reduced working hours and overtime also limit the effects of recession and spread its costs more thinly across the Japanese labor force.<sup>228</sup> In 1974, legislation was passed in Japan providing government subsidies to firms which do not dismiss employees during business slumps. Firms which have undergone a production decline of over twenty percent from the previous year qualify for subsidies of one-half of wages for large firms and two-thirds for small and medium-sized companies.<sup>229</sup> Government and industry share the burden of retaining employees, and the incentive to lay off, so strong in the United States, is greatly mitigated.

Modern researchers dispute earlier conclusions that the Japanese system is based on traditional social norms and cannot be duplicated elsewhere. They argue that lifetime employment became widespread only after World War I, when Japanese workers sought protection in the face of a large excess of labor, and has survived because of its economic benefits to worker and firm.<sup>230</sup> All credit the fierce loyalty of Japanese workers primarily to industry's commitment to job security.

An American comparison may be the longshoremen's contract in New York and New Jersey, which guarantees workers compensation for 2,080 hours of work a year until retirement age.<sup>231</sup> Such a commitment in this

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224. R. COLE, WORK, MOBILITY, AND PARTICIPATION 257 (1979) [hereinafter cited as COLE]. The author notes that "[i]t is one of the minor ironies of our times that foreign firms increasingly treat us as an underdeveloped nation." Absence of worker protection in the United States serves as an incentive to locate plants here.

225. Galenson & Odaka, *The Japanese Labor Market*, in ASIA'S NEW GIANT 614 (H. Patrick & H. Rosovsky ed. 1976) [hereinafter cited as Galenson & Odaka]. Japanese workers generally join a firm after graduation from high school and remain with it until retirement at age 55. Only the minority of workers who work for the larger concerns are covered under the system. Women and temporary employees are also generally excluded.

226. Pucik, *Lifetime Employment in Japan: An Alternative to the "Culture-Structure" Casual Model*, 33 J. INT'L AFF. 158, 159 (1979) [hereinafter cited as Pucik].

227. Galenson & Odaka, *supra* note 225, at 617.

228. COLE, *supra* note 224, at 256.

229. *Id.* at 256, 258-59.

230. See, e.g., Galenson & Odaka, *supra* note 225, at 614; Pucik, *supra* note 226, at 159-60.

231. COLE, *supra* note 224, at 260.

highly volatile industry ultimately may lead to similar agreements in other cyclically-sensitive industries, such as the auto industry. Permanent employment, involving a lifelong commitment by both parties, will not arise in this country by custom alone.<sup>232</sup>

The low employee mobility within the Japanese system may in any case be less desirable in the United States. In practice, however, many workers do not change jobs, and the incentive to stay put would surely increase with the employer's guarantee of job security and a higher quality of work life. Employment need not be lifelong, however, in order to be secure. "[T]he anachronistic practice of making selected workers arbitrarily vulnerable to protracted periods of unemployment"<sup>233</sup> must be discarded. The social and psychological costs of losing one's job, even temporarily, cannot be ignored. If General Motors is obliged to retain employees on the payroll, it may not be so complacent about its declining market. Contractual commitments are significant steps toward a modern theory of employment. But so long as they preserve the outdated notion of corporate autonomy, they are nothing more.

#### CONCLUSION

As the corporation is the center of the economic life, so is the city the heart of the civic. Like so much else, this too has been forgotten. We are told to implement the appropriate management techniques, to operate our cities like successful corporations, and only secondarily, if then, to recall why they exist. We are reminded that "the protean force that shapes cities is self-interest—of individuals and companies."<sup>234</sup>

But that is the past. Corporate self-interest has helped destroy twentieth-century cities. The private sector, as long as it is regarded as private, will not now rescue them.<sup>235</sup> We must reverse our perspective. We must not run

232. This commitment to assure that auto workers are secure in their employment is evidenced by the recent tentative agreement reached between GM and the United Auto Workers. Under the agreement, GM's employees will receive profit-sharing starting in 1983, guaranteed income for laid-off workers with 10 years' seniority and experimental plant programs where 80% of the work force are guaranteed lifetime job security. Furthermore, it is estimated that GM will save \$2.5 billion by reason of the agreement. Chicago Sun-Times, March 22, 1982, at 1, col. 5.

233. COLE, *supra* note 224, at 260.

234. Breckenfeld, *supra* note 208, at 246.

235. Historian Sam Bass Warner has poignantly recognized the need for a new approach:

Under the American tradition, the first purpose of the citizen is the private search for wealth; the goal of a city is to be a community of private money makers. Once the scope of many city dwellers' search for wealth exceeded the bounds of the municipality, the American city ceased to be an effective community. Ever afterwards it lacked the desire, the power, the wealth, and the talent necessary to create a humane environment for all its citizens. From that first moment of bigness, from about the mid-nineteenth century onward, the successes and failures of American cities have depended upon the unplanned outcomes of the private market. The private market's demand for workers, its capacities for

cities as businesses, but instead we must recognize that corporations have become social institutions. The Hellenic concept of a city as a community with an active body politic and spirited public life must be revived.<sup>236</sup> Great multinational corporations have only broken such traditional community links.<sup>237</sup>

Clearly more is necessary than simply to redefine corporate legal responsibilities. Our failure yet to have done so is but a symptom of a greater failure of social consciousness. Even so, the recognition of the proper place in society of the most powerful organism of our time will not be without further effect. Berle cogently recognized this too: "Their [corporate] power can enslave us beyond present belief, or perhaps set us free beyond present imagination."<sup>238</sup> Let us hope we have not already made our choice.

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dividing land, building houses, stores and factories, and its needs for public services have determined the shape and quality of America's big cities. What the private market could do well American cities have done well, what the private market did badly, or neglected, our cities have been unable to overcome.

The twentieth-century failure of urban America to create a humane environment is thus the story of an enduring tradition of privatism in a changing world.

Warner, *Preface* to S. WARNER, JR., *THE PRIVATE CITY*, at x-xi (1968).

236. See Bookchin, *Toward a Vision of the Urban Future*, in *THE RISE OF THE SUNBELT CITIES* 265-67 (D. Perry & A. Watkins ed. 1977).

237. See HERMAN, *supra* note 200, at 301. Where cities have revived, the revival has been based on "great wealth amassed elsewhere," resulting in "the transformation of the nation's once flourishing and then degraded cities into the global headquarters of multinational power." F. Schurmann & S. Close, *The Emergence of Global City U.S.A.*, *THE PROGRESSIVE*, Jan., 1979, at 27.

238. Berle, *supra* note 220, at 103.

