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### The "Public Uses" of Eminent Domain: History and Policy

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Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 *Envtl. L.* 1 (1980).

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Originally published by *Environmental Law*, 11 *Envtl. L.* 1 (1980).



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# ARTICLES

## THE "PUBLIC USES" OF EMINENT DOMAIN: HISTORY AND POLICY

By

ERROL E. MEIDINGER\*

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## I. INTRODUCTION

### A. *Overview.*

“Eminent domain” refers to the power of the state to “take” private property. Least known of the taxing-police-taking triumvirate of governmental powers, eminent domain is said to be subject to only two requirements: that the taking be compensated and that it be for a public use. Both appear to be relatively recent developments, the compensation requirement emerging in Anglo-American jurisprudence in the late seventeenth century and the public use limitation coming largely after American independence from Britain.

Most litigation and much debate has centered on the compensation requirement: what constitutes fair payment to an often unwilling seller? But perhaps the more interesting issue is what constitutes a public use? Or more precisely, for what purposes can the state expropriate private property? Although the public use limitation seems largely a judicial invention, it is one that both reflects the prevalent ideology of private property and mediates the political challenges that might arise should the state’s ability to take property ever appear entirely unfettered.

The uses of eminent domain unfolded as the economy unfolded. Up through the eighteenth century eminent domain was employed primarily to build roads and to provide hydropower for grist mills widely used by local populations. In the latter case, owners of mill sites were allowed to build dams and take, upon paying compensation, the upstream lands flooded as a consequence. Upstream owners were limited to specified damages and precluded from enjoining the dams, a right they would have had under traditional nuisance law. The takings were justified in large part by the “public uses” made of them by local community members.

In the early nineteenth century the mill acts were put to use for new industries like paper mills and foundries. Since the actual “use by the public” held to justify the grist mill takings was no longer present and had been replaced by a distinct aura of economic favoritism, the public use doctrine became a major source of contention. It remained an important issue in the 1840s, when the railroads began to roll over the nation’s expanses, their progress greatly eased by legislative grants of eminent domain. A few

decades thereafter public utilities began to string their webs of communication and energy conduits across the countryside, also taking land at will. About the same time many of the western states, hungry for development, began to offer eminent domain power to virtually any enterprise promising to bring them capital. In this century eminent domain has been prominently employed and powerfully fought in various urban redevelopment projects. At every historical juncture the courts have had to decide whether to enforce takings with substantial new private development components. Their decisions form an interesting chapter in American political-economic history.

### *B. Objectives.*

The history and results of public use challenges are interesting not merely for their philosophical implications, but also for what they tell us about the changing relationship between state and economy. The chronicle of the public use limitation provides a useful perspective on which constituencies' interests have been served by government intervention and which have not. By effectively changing the structure of property rights, as will be seen, eminent domain can be used to distribute and redistribute material benefits.

Eminent domain policy remains politically important today. At present proposals are pending in various legislatures to grant condemnation power to a number of projects for accelerated resource exploitation. Congress for instance is considering whether to grant federal eminent domain to builders of coal slurry pipelines.<sup>1</sup> While particular applications of the power change, the underlying issues show some continuity.

What follows is the first product of an ongoing inquiry into the uses and consequences of eminent domain in the United States. Section II is a history of the public use requirement. It examines not only how the doctrine has been articulated and logically extended, but particularly what purposes have been accomplished under it. Section III is an analytic critique of the public use doctrine. After considering whether any principled standard can be developed to delimit the proper uses of eminent domain, it

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1. See U.S. COMPTROLLER GENERAL, COAL SLURRY PIPELINES: PROGRESS AND PROBLEMS FOR NEW ONES (April 20, 1979).

examines a number of the complicated empirical and political questions confronted in any effort to develop such a standard.<sup>2</sup>

## II. THE HISTORICAL CONTOURS

Two preliminary provisos: First, the analysis here is largely confined to development of the case law. Since all significant uses of eminent domain need not have reached appellate decision, the case law may be an incomplete or misleading indicator of the actual deployment and effects of eminent domain. Second, a premise of this article is that the most revealing dimension of eminent domain law is its interaction with the interests of privately held capital. Takings to facilitate traditional governmental functions (e.g., to build schools), though sometimes problematic,<sup>3</sup> are not so telling as those more directly facilitating private capital growth. Developments on both ends of the public-private continuum are noted, but the latter are emphasized.

### A. *The Mists of History*

The roots and development of eminent domain appear fully as obscure as those of the taxing and police powers. In his celebrated opinion in *Gardner v. Village of Newburgh*,<sup>4</sup> Chancellor Kent stated at least four justifications for ordering that downstream riparian owner be compensated for water taken by a village waterworks project—none of them being the state constitution, which at that time had no compensation requirement. First, he suggested that the failure to provide compensation to this type of property owner while compensating others was a legislative oversight.<sup>5</sup> Second, he cited the civil law writers, Grotius, Puf-

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2. Ongoing work involves extensive empirical research into the actual social consequences of different eminent domain policies. Therefore, much of what follows necessarily remains tentative. While social implications can often be inferred from judicial and legislative decisions, past socio-legal studies have indicated that such inferences are frequently either incorrect or seriously incomplete in light of the complex social arrangements in which legislative and judicial decisions operate. See, e.g., text accompanying notes 195-209 *infra*.

3. Should a governmental unit be allowed, for instance, to exercise eminent domain when there is no geographic monopoly and where other satisfactory sites are available on the market? Issues of this kind are discussed *infra*.

4. 2 Johns. Ch. 162 (N.Y. 1816).

5. The statute provided compensation to the owner of the spring and to owners of land across which conduits would be laid. *Id.* at 164.

fendorf, and Bynkershoek, for the proposition that compensation is required "by all temperate and civilized governments, from a deep and universal sense of its justice."<sup>6</sup> Third, he cited Blackstone:

The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the Legislature. And how does that Legislature interpose and compel? "Not," says Blackstone, "by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the Legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the Legislature indulges with caution, and which nothing but the Legislature can perform."<sup>7</sup>

Finally, the Chancellor noted the presence of compensation requirements in several other state constitutions,<sup>8</sup> and invoked the fifth amendment of the United States Constitution,<sup>9</sup> the applicability of which to the states was at that time subject to great doubt.

On the compensation requirement, and on the general source of the eminent domain power,<sup>10</sup> other jurists have done little better. Indeed they frequently cite Chancellor Kent's opinion as a key authority. Practical, historical, and philosophical assertions are often intermingled in justifying the basic power. Thus some courts have long relied on notions for natural law,<sup>11</sup> some on concepts of basic sovereignty,<sup>12</sup> and others on notions of reserved

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6. *Id.* at 166.

7. *Id.* at 167 (citations omitted).

8. Pennsylvania, Delaware, and Ohio, *id.*

9. *Id.* at 167-68.

10. It might be noted that the compensation requirement and the eminent domain power are counterposed and seem to derive from different grounds, the former from the rights of individuals, the latter from the rights of government.

11. *E.g.*, Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. 1816); Sinnickson v. Johnson, 17 N.J.L. 129 (1839); Young v. McKenzie, 3 Ga. 31 (1847). See generally Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1931).

12. The argument is that the power to condemn is inherent in the exercise of sovereignty. It is necessary to the existence of government, and all governments,

rights<sup>13</sup> and historical legitimacy.<sup>14</sup> Since these theories are primarily efforts to legitimate an accomplished state of affairs, and since this article is essentially an effort to comprehend the development of that state of affairs, it is more useful to examine the historical evidence than to debate the theories.

### 1. *Rome and the civil law jurisdictions*

Legal scholars have unearthed little direct evidence on the use of eminent domain in ancient times. They wonder, practically

by circular implication, possess it. *See, e.g.*, *Kohl v. United States*, 91 U.S. 367 (1876); *San Mateo County v. Coburn*, 130 Cal. 631, 63 P. 78 (1900); *Northeastern Gas Trans. Co. v. Collins*, 138 Conn. 582, 87 A.2d 139 (1952); *Water Works Co. v. Burkhart*, 41 Ind. 364 (1872); *Beekman v. Saratoga & S.R.R.*, 3 Paige Ch. 45 (N.Y. 1831); *Covington & Cincinnati Bridge Co. v. MacGruder*, 63 Ohio St. 455, 59 N.E. 216 (1900); *White v. Nashville & Nw.R.R.*, 54 Tenn. (7 Heisk.) 518 (1872); *Stearns v. Barre*, 73 Vt. 281, 50 A. 1086 (1901). Since *Kohl*, the inherent attribute of sovereignty notion has been invoked routinely by courts in all jurisdictions.

13. The reserved rights notion seems to trace to the civil law writer Grotius, who hypostatized that all land had been held by the sovereign prior to private possession and that private possession was subject to an implied reservation that the sovereign could retake possession. 1 NICHOLS ON EMINENT DOMAIN § 1.13 (rev. 3d ed. 1979) [hereinafter cited as 1 NICHOLS]. A variety of state decisions have recited this theory, *e.g.*, *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S.W. 792 (1887); *Todd v. Austin*, 34 Conn. 78 (1867); *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N.W. 894 (1891). The idea is also embodied in some state constitutions, *e.g.*, N.Y. CONST. art. 1, § 10; S.C. CONST. art. XIV, § 3. Various criticisms may be noted. First, this theory of origin does not necessarily imply a compensation requirement. Second, in the United States there are generally two sovereignties, both having eminent domain power over the same property. It is difficult to argue that both have some concurrent prior ownership interests, particularly as regards the colonial states. For a more extensive discussion, *see* 1 NICHOLS, *supra*, at § 1.13[3].

14. A variety of cases, including *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816), suggest eminent domain derives from common law practices. 1 NICHOLS, *supra* note 13, at § 1.13[2] cites 2 W. BLACKSTONE, COMMENTARIES §§ 408, 409 (1897) for the argument that eminent domain is a natural outgrowth of feudal tenure. An important case on the use of eminent domain for urban development, *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936), makes the same assertion. *See* text accompanying note 123 *infra*. Some courts, finally, have used an implied consent theory analogous to classical conceptions of social contract. Members of society, it is suggested, in coming together to organize governments, have impliedly consented that their property rights will yield to the needs of government. *See, e.g.*, *Embury v. Connor*, 3 Conn. 511 (1830); *Thatcher v. Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501 (1836); *Livingston v. Mayor of New York*, 11 Wend. 300 (N.Y. 1831); *Secombe v. Railroad Co.*, 90 U.S. (23 Wall.) 108 (1874). Available historical evidence is discussed in more detail *infra*.

in unison, whether the straight roads and aqueducts of ancient Rome might indicate some eminent domain-like power. Conclusions differ. Stoebeck seems to assume that the Romans employed some sort of eminent domain<sup>15</sup> while the reviser of *Nichols* doubts that they did.<sup>16</sup> The difference appears to be as much one of definition as of historical evidence, however.

Defined most broadly—as the state-compelled transfer of property—there can be little doubt that eminent domain was exercised by the Romans. Not only is it “impossible to believe that the construction of the Roman roads, extending in a straight line from one end of the Empire to the other, or of the Roman aqueducts, was at the mercy of the owners of land through which they were to pass,”<sup>17</sup> but there is evidence of provisions allowing appropriation, with compensation, of materials to repair aqueducts.<sup>18</sup> Moreover, the Romans carried out a number of land redistributions. Certain of them involved citizens holding full title and provided for some level of compensation (often only for buildings and improvements).<sup>19</sup>

Notably lacking in the Roman evidence are two features now thought central to eminent domain: established rights of the injured party to compensation and a legal proceeding to determine the validity and extent of the taking.<sup>20</sup> To equate the absence of these guarantees with the absence of eminent domain generally would be to treat legal forms as self-contained and to ignore their historical evolution. On the contrary, the most interesting aspects of eminent domain for purposes of this inquiry are the different accommodations between private and governmental prerogatives over property in different eras and societies.

In Rome it seems (as it may seem about our times to future scholars) that the public-private accommodation was somewhat fluid and ambiguous. The strong emphasis on inviolable private

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15. Stoebeck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554 (1972).

16. 1 NICHOLS, *supra* note 13, at § 1.2[1].

17. Jones, *Expropriation in Roman Law*, 45 L.Q. REV. 512, 521 (1929). See also Pound, *The Valuation of Property in Roman Law*, 34 HARV. L. REV. 227, 252 (1921), noting provisions for restitution or compensation in cases where property had been confiscated.

18. Jones, *supra* note 17, at 523.

19. *Id.* at 515-517.

20. *Id.*



property that prompts some to doubt the existence of eminent domain<sup>21</sup> was counterposed against an equally impressive and purposive state. Jones suggests that the prospects of aggrieved property owners may have varied substantially according to their political positions and the nature of the taking.<sup>22</sup> Nonetheless, there is a good deal of evidence to indicate that the Romans took privately held property to further a variety of public purposes.<sup>23</sup> The mode and terms of taking probably varied with particular situations and the accommodations reflected the relative powers of the parties and local exigencies. A more durable, standardized compromise would await other times and societies.

The demise of Rome, entailing as it did the relative demise of the nation-state, yielded an era of still more fluid, variable property rights. Under medieval fuedal systems most property rights became more directly tied—and subject—to patriarchal relations. With the reascendency of nation-states the legal structuring of eminent domain resumed. Though no systematic study of eminent domain in the civil law countries appears available in English (if at all), seventeenth century civil law writers, including Grotius,<sup>24</sup> Puffendorf,<sup>25</sup> Bynkershoek,<sup>26</sup> and others, gave the issue a lively enough concern to ensure its inclusion in the civil codes.<sup>27</sup> By that time however, English law had developed its own directions.

## 2. *England*

The roots of eminent domain in England are deeply buried and tangled. Despite the eventual emergence of a strong conception of private property, there appears to have been no unified, complementary doctrine of "takings" in the early English law.

21. 1 NICHOLS, *supra* note 13, at § 1.2[1].

22. Jones, *supra* note 17, at 523-24.

23. *Id.*

24. H. GROTIUS, *DE JURE BELLI ET PACIS* 385 (1625)(F. Kelsey trans. 1925).

25. S. PUFFENDORF, *DE JURE NATURAE ET GENTIUM* 1285 (1672) (C. & W. Oldfather trans. 1934).

26. C. VAN. BYNKERSHOEK, *QUAESTIONEM JURIS PUBLICI LIBRI DUO* 218-23 (1737) (T. Grank trans. 1930).

27. *E.g.*, FRENCH CODE CIVILE art. 545 ("No one can be compelled to give up his property, except for the public good, and for a "just and previous indemnity."); CONSTITUTIONAL LAW OF BELGIUM art. II; FUNDAMENTAL LAW OF HOLLAND art. 147.

*Nichols* notes several practices (e.g., "surveyance and preemption," "inquest of office") resembling eminent domain takings.<sup>28</sup> Nevertheless the assertion that the "power of eminent domain was thus well established in England by the time of the American Revolution, and the obligation to make compensation had become a necessary incident to the exercise of the power"<sup>29</sup> indulges a general tendency to find a close continuity in the development of English and American law which appears inappropriate in this instance. The primary problem is that takings which now would be categorized as exercises of eminent domain fell in prerevolutionary England into a variety of categories and derived from a variety of acts with differing justifications. *Stoebuck*, whose scholarship on the English law seems more thorough than that of *Nichols*, notes:

[A]s far as is known, no Englishman or American prior to the Revolution worked out a systematic speculative theory of eminent domain. . . . The English to this day have not raised the subject of eminent domain to the imperative level at which it now exists in America. They do not even use the phrase "eminent domain," but instead, "compulsory acquisition," "compulsory powers," or "expropriation." Compensation may be said to be a constitutional principle, to the extent such can exist without a constitution. Modern English treatises on expropriation scarcely go back of the Lands Clauses Act of 1845, which was the first permanent, general statute on the subject. Before that, the power to take and the duty to pay compensation were spelled out in each act that directed the particular project for which the taking would occur.<sup>30</sup>

At least well into the eighteenth century then, and probably a good deal later, the English law of takings consisted of a variety of loosely related arrangements—generally reflecting the relative powers of the king, the parliament, and the land owners when the arrangements were made.

*Stoebuck* distinguishes the king's prerogatives from parliament's. The king's included dominion of the sea, control over navigation, defense of the realm, providing for his household, and many others, most of them deriving from periods before parliament's ascendancy.<sup>31</sup> The royal prerogatives in turn carried im-

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28. 1 *NICHOLS*, *supra* note 13, at § 1.2[1].

29. *Id.* § 1.21[5].

30. *Stoebuck*, *supra* note 15, at 554.

31. *Id.* at 562.

plied powers for implementation, frequently impinging on private property rights.<sup>32</sup> Most, according to Stoebuck, were done without compensation.<sup>33</sup>

In distinguishing the king's prerogative from parliament's, Stoebuck asserts that whatever else the king might do, he could never take a possessory estate in land. He might acquire interests such as profits and easements, but not estates.<sup>34</sup> Stoebuck suggests this limitation—assuming its historical accuracy—might have been sustained on the theory that the king, as ultimate lord and grantor, could not derogate from his own grant.

Presumably the effectuation of this theory could be traced to the growing political and economic power of the landed classes, but Stoebuck chooses to pursue a more philosophical tack. He argues that the king's inability to take possessory estates fundamentally distinguished his prerogatives from eminent domain: only parliament could truly exercise eminent domain (*i.e.*, authorize the taking of possessory estates).<sup>35</sup> This distinction seems suspiciously compatible with the Lockean notions of social contract and representative consent which Stoebuck soon brings into the discussion. He finds not only that there is a philosophical basis for distinguishing the taking powers of the king from those of parliament—the taking of possessory estates is a far more serious matter and should be allowed only upon the consent of one's elected representatives—but that the English practice actually corresponds to this principle. Such a neat fit between political theory and social practice always raises the question whether the practice has been accurately described. Moreover, Stoebuck's approach largely ignores the political process by which the parlia-

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32. *Id.* at 563:

Under some of these powers, the king or his ministers might make use of private land and to some extent even destroy the substance of it, all without compensation. For instance, the king might, it was finally decided in 1606, dig in private land for saltpeter to make gunpowder for defense of the realm. Or he might, through his commissioners of sewers, rebuild and repair ancient drains, ditches, and streams for draining the land to the sea. This came from his power to guard against the sea and to regulate navigation. From the same power, he might build and repair lighthouses, build dikes, and grant port franchises. . . . Fortifications could be built without compensation on private land, these being, of course, for defense of the realm.

33. *Id.*

34. *Id.* at 564.

35. *Id.*

ment gradually gained political power and perhaps came to constrain the king from takings he could earlier have accomplished through sheer coercion.

Nonetheless, the parliamentary history probably reflected the primary considerations—philosophical and political—that would eventually play a large role in forming the American practice. Stoebuck's search for the first parliamentary act authorizing a compulsory taking of a possessory estate is illuminating, even if it is not accepted as the categorical standard for the first exercise of eminent domain. His concise, original findings are best conveyed by quotation:

The first definite evidence of expropriation of land and, therefore, of eminent domain, is found in the earliest of the several statutes of sewers, enacted in 1427.\* Reciting that ancient ditches, gutters, walls, bridges, and causeways for draining lowlands in Lincoln County had fallen into disrepair, the statute appointed commissioners of sewers to maintain them, with power to assess benefitted landowners. Evidence of power to take land is fleeting: "where shall need of new to make." There is no indication of condemnation procedure, nor of a compensation requirement. Coke, however, says the taking of land for new works was authorized under this act and under the several renewals of it.\*\* A most interesting statute of

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\* Stat. 6 Hen. 6, c. 5 (1427). The earliest statute found that even remotely contains elements of eminent domain was the Statute of Winchester of 1285, which required landowners to cut down underbrush along roads so that robbers might not hide. Stat. Winchester, 13 Edw. 1, Stat. 2, c. 5 (1285). Obviously this was not an exercise of eminent domain but of what we would call the police power, as were some other statutes of the Middle Ages that required riparian owners to remove such obstructions as "gorces, mills, wears, stanks, stakes and kiddles" from navigable streams. Stat. of Cloths, 25 Edw. 3, Stat. 4, c. 4 (1350). See also Stat. 1 Hen. 5, c. 2 (1413); Stat. 4 Hen. 6, c. 5 (1425); Stat. 9 Hen. 6, c. 9 (1430). To their contemporaries, the Statute of Winchester and the navigable-stream taking acts would likely have been understood as passed in aid of the King's prerogative powers.

Another practice that falls short of eminent domain is the old English system, also very much a part of American history, of requiring landowners to contribute labor and materials to the repair of roads. See, e.g., Stat. for Mending of Roads, 2 & 3 Phil. & M., c. 8 (1555); Stat. 5 Eliz., c. 13 (1562); Stat. 18 Eliz., c. 10 (1576); Stat. 29 Eliz., c. 5 & 2 (1587); Stat. 3 & 4 W. & M., c. 12, §§ 5, 6, 7 (1691); Stat. 1 Geo. 1, Stat. 2, c. 52 (1715); Stat. 7 Geo. 2, c. 9 (1734).

\*\* Case of the Isle of Ely, 10 Coke. 141, 77 Eng. Rep. 1139 (1610). The original statute was for ten years. It was continued from time to time by Stat. 18 Hen. 6, c. 10 (1439); Stat. 23 Hen. 6, c. 8 (1444-45); Stat. 12 Edw. 4, c. 6 (1472); Stat. 4 Hen. 7, c. 1 (1488-89); and Stat. 6 Hen. 8, c. 10 (1514-15).

1512 definitely allowed land on the Cornish coast to be taken, or at least occupied, for fortifications and, in express language, without compensation.# Why without compensation? Obviously because the act was in aid of the king's prerogative to build fortifications, as the statutes of sewers were in aid of his prerogative to drain land into the sea. Perhaps it is significant also that it was thought necessary explicitly to deny compensation, hinting that someone in 1512 might otherwise have expected it. At all events, by 1514 and again in 1539 we have clear examples of eminent domain with compensation in a form we would recognize today. The 1514 statute authorized the city of Canterbury to improve a river, but provided that anyone whose mill, bridge, or dam was removed should be "reasonably satisfied."## In 1539 the statute granted power to the mayor and bailiffs of Exeter to clear the River Exe providing that "they shall pay to the owners and farmers of so much ground as they shall dig, the rate of twenty years purchase, or so much as shall be adjudged by the justices of assise in the county of *Devon*.† It is interesting to note that the cities of Canterbury and Exeter were authorized by Parliament to perform works the king might have done under his prerogative powers. Not only does this indicate the king's power was not exclusive, but it suggests that, while the king might have acted without paying compensation, Parliament would not. After this period of time, Parliament exercised its power of eminent domain regularly and often. . . .<sup>36</sup>

That some of the king's and parliament's powers appear to have been concurrent may also cut against Stoebeck's nice distinction to some degree, but the gradual emergence—and tenuousness—of eminent domain doctrine shows through. The basic direction of the doctrine was set. Increasingly, both the king's and parliament's takings of property were judicially mediated and compensated.<sup>37</sup> One standard, however, the public use requirement, never has been imposed in England.<sup>38</sup> In America it was to become a linchpin—perhaps double hinged—in the relation between state and economy.

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#Stat. 4 Hen. 8, c. 1 (1512).

##Stat. 6 Hen. 8, c. 17 (1514-15).

† Stat. 31 Hen. 8, c. 4 (1539).

36. *Id.* at 565-66.

37. Stoebeck notes that all of the king's prerogative powers except one (the power to destroy property to halt a conflagration) now probably have been comprehended within expropriation doctrines requiring compensation. *Id.*

38. 1 NICHOLS, *supra* note 13, at § 1.2[5].

## B. America

European settlement of America graciously occurred late enough to leave a better record of its history and legal arrangements. Eminent domain emerged quite early in the process.

### 1. The Colonies

Not surprisingly, the development of eminent domain doctrine followed the development of the land. The first recorded uses of eminent domain were for building roads.<sup>39</sup> In Massachusetts a statute of 1639 authorized county courts, upon a complaint stating that a highway was needed, to appoint local citizens to lay one out.<sup>40</sup> Destroying houses, gardens, or orchards was prohibited. Compensation, with appeal to the county court, was to redress damage to other "improved ground." Stoebuck documents similar schemes for Connecticut, Delaware, New Hampshire, and North Carolina.<sup>41</sup>

Early takings in some other colonies were not so consistent with the current mode. New York, for instance, was a Dutch colony subject to civil law provisions allowing the taking of private lands for public ways without compensation. Even under the Dutch, however, there is evidence to suggest that compensation was occasionally paid.<sup>42</sup> By 1691, after the British had been in control for some time, rights to damages and court hearing appear to have become fairly general.

The proprietary colonial governments of New Jersey and

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39. In Great Britain eminent domain evidently had not been much used, partly, it may be presumed, because the Romans established many of the rights of way during their conquest and partly because many of the other roads were initially established as tollroads and later given or sold to the government due to the difficulties of maintenance.

40. 1 LAWS OF COLONY OF NEW PLYMOUTH (1639); 1 NICHOLS, *supra* note 13, at § 1.22[2]. By 1693 the statute had been revised to require a court-appointed committee of freeholders to determine whether the way was required for public necessity and convenience. Mass. L. 1693, ch. 10, *found in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 47-49 (B. Green printer 1726) (*as cited in* Stoebuck, *supra* note 15, at 580).

41. Stoebuck, *supra* note 15, at 581.

42. Nichols notes a 1656 provision requiring burgomasters to give notice to property holders who might be damaged by streets and, if agreement could not be reached, to refer damages to two or three disinterested appraisers. 1 NICHOLS, *supra* note 13, at § 1.22[3].

Pennsylvania both reserved rights to take back for highway purposes six percent of all the lands they granted. As a result eminent domain problems were not initially as prominent in those colonies. Nonetheless, the courts evidently provided some resistance when improved property was involved, and both governments gave damages for specified types of improvements.<sup>43</sup>

The history in several other colonies is not clear. Practices in early Georgia, Maryland, and Virginia are not really known.<sup>44</sup>

For quite some time the less urban colonies in the South took land for highways without compensating owners.<sup>45</sup> Overall, roads may have been viewed more as grants than as takings in those more rural environs. In any case, compensation requirements were slow in coming. South Carolina in particular continued to take land and materials for highways without compensation until well after independence—about 1836.<sup>46</sup>

Though public road building was the primary and probably the most doctrinally influential use of eminent domain during the colonial period, other uses should be noted. First, eminent domain was also used in most colonies to take land for *private* rights-of-way. Authorizations varied, but generally appear to have allowed land-locked owners to condemn rights-of-way, at their own expense, across neighboring lands to gain access to public highways.<sup>47</sup> Some of the new roads, according to *Nichols*, were open to the public and others were not.<sup>48</sup>

Second, there existed a variety of "mill dam acts" allowing

43. *Id.* §§ 1.22[4]-[5]. Stoebuck argues that the rationale for generally denying compensation in New Jersey was that the owners' benefits exceeded their losses. After 1765 the practice of paying for highways evidently became more common in New Jersey. Stoebuck, *supra* note 15, at 581-82.

44. See Stoebuck, *supra* note 15, at 581-82.

45. 1 NICHOLS, *supra* note 13, at § 1.22[6].

46. *State v. Dawson*, 3 S.C.L. (3 Hill) 100 (1836) (Richardson, J., dissenting), offers a frequently cited discussion of this practice.

47. 1 NICHOLS, *supra* note 13, at § 1.22[7] and 2A NICHOLS ON EMINENT DOMAIN (rev. 3d ed. 1979) § 7.626. *Nichols* does not document thoroughly that private way provisions existed in "most, if not all, of the colonies," but does note statutes enacted in Plymouth Colony in 1671. 1 LAWS OF COLONY OF NEW PLYMOUTH 278 as cited in 2A NICHOLS § 7.626; in New York in 1772, *Taylor v. Porter*, 4 Hill 773 (N.Y. 1843); and in Pennsylvania in 1735, *Palairret's Appeal*, 67 Pa. 479, 5 Am. Rep. 450 (1871).

48. 1 NICHOLS, *supra* note 13, at § 1.22[7].

downstream riparian owners to dam streams and condemn the flooded property of upstream owners, rather than negotiate for the rights or be subject to traditional nuisance remedies. While the origins and contents of these provisions are obscure and subject to some scholarly disagreement,<sup>49</sup> they appear to have been relatively common in prerevolutionary times. *Nichols* attributes them to seven colonies: New Hampshire, Massachusetts, Rhode Island, Delaware, Maryland, Virginia, and North Carolina.<sup>50</sup> Virginia's mill dam act was apparently the earliest, dating from 1667.<sup>51</sup> The New England colonies evidently limited use of the statutes to parties already owning land on both sides of the stream while the southern colonies allowed those owning mill sites on one side to condemn an acre on the other side for dam abutments.<sup>52</sup> In all cases, of course, damages were paid by the condemning party, though as will be seen below, payments did not always reflect the full value of the property rights in question.

By the end of the colonial period then, eminent domain as a legal form had begun to take shape. Though far from universal, compensation was a reasonably well-established principle.<sup>53</sup> Some

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49. Compare Horwitz, *The Transformation of the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 270-79 (1973) with 1 NICHOLS, *supra* note 13, at § 1.22[8] and Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978).

50. 1 NICHOLS, *supra* note 13, at § 1.22[8], citing the opinion of Justice Gray in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

51. 1 NICHOLS, *supra* note 13, at § 1.22[8]. Horwitz, *supra* note 49, at 270, labeled the Massachusetts Act, dating from 1713, the oldest. It seems reasonable to presume that the reviser of NICHOLS found materials of which Horwitz was unaware.

52. 1 NICHOLS, *supra* note 13, at § 1.22[8]. A further difference between the New England and Southern practices is reflected in present procedures. The Massachusetts Acts did not require mill owners to institute proceedings to validate the flooding. Rather, any party damaged by the flooding was required to apply for a court warrant ordering a jury to appraise his yearly damage. The verdict arrived at precluded any further legal proceedings (aside from collection actions) by the damaged party. (For an interesting analysis of this device, see Horwitz, *supra* note 49.) The Southern colonies, in contrast, generally required the mill owner to sue out a writ *ad quod damnum*, with the damaged owners as respondents, before a taking could be validated. A minority of states still follow the Massachusetts approach; takings can be accomplished without judicial proceedings and damages are contingent upon the initiation of proceedings by the damaged landowner. Most states, however, require judicial proceedings, particularly for takings by privately held corporations.

53. Stoeck's finding should be kept in mind, however. "As far as exhaustive



form of court redress also appears to have been regularly available. But the question of what *purposes* eminent domain should be available for—a question the English had never discussed and the civil law writers had contested<sup>54</sup>—was still in a more embryonic form. Already eminent domain's exercise was split between governmental bodies and private parties. That it could bypass market processes and override traditional property rights, moreover, made eminent domain a potent and highly desired power. Finally, the uses to which it was already applied manifested no internal limits of applicability. Thus it would become a much sought after and contested prerogative in the land settlement and economic expansion America would soon undergo. Much of the process centered on defining and applying what would come to be known as the "public use" requirement.

## 2. *The States*

At the time of the American Revolution neither established practice nor doctrine limited the exercise of eminent domain to public uses. Indeed in 1776 only two state constitutions contained the words, "public use," or the idea, and none explicitly limited eminent domain to public uses.<sup>55</sup> Pennsylvania's provision read: "but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives. . . ."<sup>56</sup> Virginia's provided "that . . . all men . . . cannot be taxed or deprived of their property for public use, without their own consent, or that of representatives so elected."<sup>57</sup> In grammatical terms at least, neither provision di-

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research shows, there was not a single English, nor, for that matter, any reported American colonial, decision rendered prior to the formation of the Union in which it was held or said that compensation was required for a taking." Stoebuck, *supra* note 15, at 575. Stoebuck may belie his own research in finding that "early state courts were justified in their claim that compensation was a principle of the common law—of immemorable usage in our land and in the land of our land." *Id.* at 583.

54. See Stoebuck, *supra* note 15, at 588-90.

55. Stoebuck, *supra* note 15, at 591-92. This study appears the most thorough historically and should be consulted for further details and references.

56. PA. CONST. Declaration of Rights, art. VIII (1776), found in 5 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3083 (1909), as cited in Stoebuck, *supra* note 15, at 591 n.129.

57. VA. CONST. Bill of Rights, § 6 (1776), found in 7 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909) as cited in Stoebuck, *supra* note 15, at 591

rectly limited takings to public uses. Several states shortly thereafter adopted similarly phrased provisions, but none of the other eleven state constitutions had expressed the concept of public use at the time of independence.<sup>58</sup>

The historical evidence is not rich enough to select definitively among alternative possible interpretations of language like that of the Pennsylvania and Virginia articles. Perhaps the drafters had never contemplated that property might be taken for *other* than public uses. Perhaps they assumed that it could be. Perhaps the matter simply had never received much attention. Some combination of the first and last propositions appears most plausible. Further, it may be surmised that eminent domain had yet to emerge distinctly from the complex of due process considerations flowing from the development of *Magna Charta*. Both the quoted provisions for instance, emphasize the Lockean notions of representation and effective consent, rather than the substantive nature of the use.

The provision that finally emerged in the Bill of Rights in 1789 perpetuated the ambiguity. Madison's draft of what is now the fifth amendment included double jeopardy, compulsory testimony, and general due process clauses along with an eminent domain clause: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."<sup>59</sup> In ratification it was merged with several more provisions and shortened to the current form: "nor shall private property be taken for public use, without just compensation."<sup>60</sup> Whether the revision was intended simply to economize on language or also to weaken the public use provision must be left to the most ethereal forms of speculation. If the available evidence demonstrates anything, it is that eminent domain was not high among the concerns of those debating the Bill of Rights. Indeed there is little evidence that it was a concern at all. Eminent domain was one prerogative the British had not been charged with abusing in the New World. Moreover, the framers may well have assumed that representative government would adequately protect against abuses of eminent domain, particularly so long as

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n.130.

58. Stoebuck, *supra* note 15, at 591.

59. 1 ANNALS OF CONG. 433-36 (Gales & Seaton eds. 1789).

60. U.S. CONST. amend. V, cl. 5.

compensation was assured. In any event, the public use limitation as it emerged from the various constitutional conventions at the end of the eighteenth century remained a very rough-hewn and largely implicit restraint. Perhaps even more than most other constitutional provisions, it would receive most of its shaping and articulation in actual conflicts over takings still to be attempted.

*a. Standard governmental functions*

The available evidence indicates that during the first decades after independence the primary uses of eminent domain remained essentially what they had been during the colonial era: building roads and mill dams. At the same time a relatively benign class of uses was growing more common. These were takings to carry on general governmental functions<sup>61</sup>—for example, to build town halls, capitols, court houses, fire stations, schools, post offices, and so on. Though there is evidence that eminent domain was used for these purposes from quite early times, litigated cases are sparse enough to suggest either that such takings were relatively infrequent or that they ordinarily were not thought unreasonable.<sup>62</sup> Both answers are likely true. In the early stages of national settlement, land usually was not scarce. Most governmental bodies probably found it convenient simply to purchase property available on the market. In addition, these takings fall readily enough into the commonsense notion of public use to make challenges based on the public use requirement unpromising and therefore relatively unlikely.

In any event, traditional governmental takings are not of great interest here. Such takings, when compensated, have been seen as legitimate from the earliest times. They fall by common understanding within the notion of public use. Most important, their role in the capital development and resource exploitation of

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61. "Governmental function" is here used in a broad, general sense. The elusive distinction between proprietary and governmental functions sometimes discussed in state and local government law should not be imputed. Here the concept of governmental function includes some services, *e.g.*, education, that might otherwise be considered proprietary.

62. "That land may be taken by eminent domain to enable the United States, a state, or a county, city, or town to carry on its governmental functions is so generally conceded that there are few cases in which the question has been litigated." 2A NICHOLS, *supra* note 47, at § 7.5111.

the nation has been relatively slight.<sup>63</sup> They are therefore summarized briefly here and considered as an analytic class in the next section.

The most common types of governmental function takings have been listed. For the most part they consist of takings to construct governmental buildings. Takings to establish lighthouses, public cemeteries, auditoriums, and convention centers also have been allowed.<sup>64</sup> Takings to carry out governmental *welfare* functions are relatively commonplace. Thus condemnations of property for hospitals, "almshouses," and schools (occasionally privately operated) routinely have been upheld.<sup>65</sup>

The most controversial class of governmental takings probably reflects the general tenor in property law against allowing governments too much latitude to enforce "esthetic" purposes. It includes condemnations to establish parks, to preserve historic properties, and to prevent degradation of designated landscapes (scenic easements). This family of takings has been the latest to develop and doctrine in the area still appears somewhat unsettled. It has two branches, neither of which will be dealt with extensively here. The first involves cases where the governmental body purports to be exercising the police power by regulating the use of property, but is alleged in fact to be effecting a taking. Historic preservation ordinances provide the best example. The legal question is ordinarily whether the restriction sufficiently decreases the value of the property to amount to a taking requiring compensation.<sup>66</sup> The practical object often is simply to nullify the

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63. An exception is acknowledged for such general welfare functions as education and medical services. But these are much more related to tax and expenditure policies than to eminent domain, which has been relatively incidental to their implementation.

64. See 2A NICHOLS, *supra* note 47, at §§ 7.515, 7.5181.

65. *Id.* §§ 7.515, 7.517.

66. The most frequently cited doctrinal standard was set out by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), one of the few Supreme Court cases invalidating a police power regulation as a taking. The case may no longer be good law, but its general formulation remains common: to make it "commercially impracticable" to exploit a property interest "has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Compare one of the most interesting contemporary cases in the area, *Penn Cent. Transp. v. City of New York*, 438 U.S. 104 (1978), where a landmark-preservation ordinance applied to bar construction of an office building atop Grand Central Terminal, and thus severely diminishing earning ability, was held not to be a

restrictions, the presumption being that the governmental unit would be unwilling to compensate all similarly situated property owners and therefore would not enforce the restraint. The public purpose limitation has rarely come into play in these cases, since practically all of them assume that the purpose validly could be accomplished under the eminent domain power. This assumption was given notable substance as early as 1896, when the Supreme Court upheld a federal statute providing for the taking, restoration, and preservation of the Gettysburg Battlefield.<sup>67</sup>

The second type of "esthetics" case involves attempts to use eminent domain directly for esthetic purposes. Whether the power could validly be exercised to create parks was doubted from the time of *Bynkershoek*<sup>68</sup> down to *Shoemaker v. United States* in 1893.<sup>69</sup> *Shoemaker* emphatically allowed the taking of land for a park. Half a century earlier Justice Putnam had, in dictum to a case considered in more detail below, confidently asserted that: "Property is nevertheless sufficiently guarded by the Constitution. The individual is protected in its enjoyment, saving only when the public want it, not merely for some ornamental, but for some necessary and useful purposes."<sup>70</sup> That uses for which property might be expropriated should be more meritorious or materially pressing than parks and other niceties had been a widely held sentiment. Yet there evidently was no developed doctrine, nor even sharply defined rationale, to support this attitude. As applied to the physical establishment of parks, the no-

taking, in part because other beneficial uses were still available.

67. *United States v. Gettysburg Ry.*, 160 U.S. 668 (1896). See generally 2A NICHOLS, *supra* note 47, at § 7.519[1].

68. Since the subject then is bound to part with his property for both reasons, as I said, must he also lose it for purposes of public pleasure or aesthetic gratification or even public decoration alone? I should not think so, nor did the Roman senate think so in the case of Marcus Licinius Crassus, who objected to leading through his farm an aqueduct which the praetors were building and which was said to have no other occasion than public pleasure and decoration.

C. VAN BYNKERSHOEK, *supra* note 26, at 15.

69. Justice Shiras observed: "In the memory of men now living, a proposition to take private property without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." *Shoemaker v. United States*, 147 U.S. 282 (1893).

70. *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. 467, 481 (12 Pick. 68, 70) (1832).

tion took a crippling blow from *Shoemaker*. But it has enjoyed a longer existence in the more ethereal realm of incorporeal hereditaments.

The most extensive litigation of incorporeal condemnations has been over takings of "scenic easements."<sup>71</sup> Scenic easements are rights to "use" the scenic beauty of a given parcel of property—i.e., to prevent the owner from destroying that beauty. The easements typically forbid the erection of billboards, creation of dumps, or removal of trees and shrubs, and permit only agricultural or residential uses.

The argument that scenic easements do not satisfy the public use requirement follows the somewhat elliptical logic that the public does not acquire any affirmative privileges to "use" the property in a physical sense and that since scenic easements may be seen as merely a set of compensated land use restrictions, they are not legitimate exercises of eminent domain. Though a number of states apparently have not yet adjudicated the exact question, the likelihood that the public use requirement will be found satisfied is high. This seems so first because the state courts have become ever more permissive of property restrictions for esthetic purposes imposed via the police power.<sup>72</sup> Stricter standards for compensated property restraints would be difficult to rationalize. But more important, the overall development of the public use requirement has been in a direction that would make it virtually

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71. Most of the scenic easements litigation arose from a provision of the Highway Beautification Act of 1965 setting aside three percent of all apportioned funds for roadside development and scenic preservation around federal-aid highways. Pub. L. No. 89-285, tit. III, § 301(a), 79 Stat. 1032 (1965) (amending 23 U.S.C. § 319 (1976)).

72. The cases are collected in Annot., 21 A.L.R.3d 1222, 1234-41 (1968). There also exists a strong, though not invincible, notion that as long as a given goal legitimately may be pursued by government, it matters little which power is used to do so. Though suggested by a number of early cases, it was most directly expressed in the influential case of *New York Housing Auth. v. Muller*, 270 N.Y. 333, 340, 1 N.E.2d 153, 155 (1936) (discussed *infra*):

The fundamental purpose of government is to protect the health, safety and general welfare of the public. . . . Its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain. . . . [I]t seems to be constitutionally immaterial whether one or another of the sovereign powers is employed.

The Supreme Court effectively accepted this view in *Tennessee Valley Auth. v. Welch*, 327 U.S. 546 (1946).

anomalous if esthetic uses were not included. In *Berman v. Parker*, an urban redevelopment case discussed below, the Supreme Court emphasized the broad scope of considerations, including esthetic ones, which legislatures could find to be public uses.<sup>73</sup> More recently, several influential state supreme court cases have held scenic easement takings to be valid exercises of eminent domain.<sup>74</sup> In the widely discussed *Kamrowski* decision, the Wisconsin Supreme court noted that "[t]he learned trial judge succinctly answered plaintiff's claim that occupancy by the public is essential in order to have a public use by saying that in the instant case, the occupancy is visual."<sup>75</sup> Thus semantic formulations for handling the problem are available, and given the general direction of land use doctrine there can be little doubt that takings of scenic easements generally will be sustained.

What is perhaps most intriguing about this recent controversy, however, is that esthetic takings have been seen as the most marginal, the most vulnerable type. Takings for more material or utilitarian purposes often have not received as much debate. They fall into several general categories. First are takings by *governmental* bodies to facilitate governmentally provided economic support functions. These include such "infrastructure" components as highways, airports, and waste disposal systems. Next are takings by "*public service corporations*," such as railroads and power companies. Public service corporations supposedly earn their eminent domain privileges by being obligated to provide necessary services without discrimination and at reasonable rates. Finally, there are takings by ordinary *private enterprises* for which a special set of justifications ostensibly must operate.

While these categories provide a useful framework for considering state-economy developments, it must be noted at the outset that the actual deployment of eminent domain follows no simple progression from one to the next. Nor, as will be seen more clearly in the next section, is the type of organization exercising

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73. *Berman v. Parker*, 348 U.S. 26 (1954).

74. *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966); *Department of Pub. Works & Bldgs. v. Keller*, 61 Ill. 2d 320, 335 N.E.2d 434 (1975); *Hardesty v. State Rds. Comm'n*, 276 Md. 25, 343 A.2d 884 (1975); *Wes Outdoors Advertising Co. v. Goldberg*, 55 N.J. 347, 262 A.2d 199 (1970).

75. *Kamrowski v. State*, 31 Wis. 2d 256, 264, 142 N.W.2d 793, 797 (1966).

eminent domain necessarily a critical factor to the validity or desirability of a taking. The purposes served, and the forces at work, often are independent of the label placed on the organization doing the taking.

To outline as simply as possible the development of the case law, the following discussion is organized chronologically for the most part.<sup>76</sup> Two themes, the progression of actual uses and the evolution of public use doctrine, interweave with and highlight one another throughout.

*b. Capital development and resource exploitation*

As the Colonial period gave way to the national period the primary uses of eminent domain were establishing roads and flooding lands to provide water power. Both were of course closely linked to economic development. Roads were essential to opening up the ever-expanding interior and exploiting its resources. Ready water power was equally critical to the development and implementation of new industrial technologies. Building of public roads would continue to the present, with certain surges and special forms to be noted below, but without any substantial opposition on the public use question. Private roads and mill dams gave rise to a more complicated history.

The seven prerevolutionary mill acts had expanded to twenty-nine by 1884, when the only known compilation was done.<sup>77</sup> The uses to which they were put had expanded commensurately. The era of the grist mill used by local farmers gave way in the first half of the nineteenth century to one of saw mills, cotton mills, pulp mills, and foundries, and legislatures generally were quite willing to extend mill act prerogatives to the new industries. That the uses were growing increasingly private was not addressed in the courts until after the process was well underway. The first significant public use challenge to the new devolutions indicates how far the new uses already had proceeded. In an 1832

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76. This chronological organization is all the more appropriate if one commentator's depiction of the case as "massive. . . , irreconcilable in its consistency, confusing in its detail, and defiant of all attempts at classification" is accepted. Comment, *The Public Use Limitation on Eminent Domain: An Advance Re-quiem*, 58 YALE L.J. 599, 605-606 (1949).

77. The mill acts are compiled in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885).



case several condemnees challenged the New Jersey legislature's authorization of a private corporation to take land for seventy mill sites along a six-mile stretch of the Delaware River.<sup>78</sup> The court rejected their argument that the act took private property for private use and private profit, noting the changing "situation and wants of the community" and intimating that the statute should be upheld because the community generally benefited from it. The Massachusetts high court upheld a similar statute soon afterward<sup>79</sup> and a variety of states followed the lead thus established.<sup>80</sup> By 1870 similar acts had been upheld in Connecticut, New Hampshire, Maine, Tennessee, Indiana, and Wisconsin,<sup>81</sup> all primarily on the theory that a taking which contributed to the *overall benefit* of the community met the public use test.

The lack of limits on the types of takings such a general public benefit test could justify, and its inconsistency with the ideology of inviolable private property, gave rise to a concurrent countermovement in public use doctrine. Following the lead of New York, a number of courts struck down private eminent domain authorizations, gradually articulating the view that public use meant literally *use by the public*.<sup>82</sup> Thus two separate positions, the "broad" public benefit view and the "narrow" use-by-the-public view, began to grow up beside each other, but the practical consequences appear rather minor. Only in New York, Georgia, and Alabama was there any consistent rejection of mill dam delegations for general manufacturing.<sup>83</sup> Many courts, while formally embracing the use-by-the-public view, developed elaborate methods of evading its implications. Perhaps most artful was the Massachusetts court, which had for some time been at the forefront in allowing eminent domain to private users on very favorable terms.<sup>84</sup> In order to sustain the water power preroga-

78. *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694 (1832).

79. *Boston & Roxbury Mill Dam Corp. v. Newman*, 29 Mass. 467 (12 Pick. 68) (1832).

80. See the cases cited in 2A NICHOLS, *supra* note 47, at § 7.623.

81. See also, Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 240 (1973).

82. Tracy concurring in *Bloodgood v. Mohawk & Hudson R.R.*, 18 Wend. 9, 56-62 (N.Y. 1837); *Sadler v. Langhorn*, 34 Ala. 311, 333 (1859). See generally cases cited in 2A NICHOLS, *supra* note 47, at § 7.623.

83. *Id.* See also Scheiber, *supra* note 81.

84. For a thorough discussion, see Horwitz, *supra* note 49, at 270-78. Horwitz

tives which had become integral to Massachusetts's rapidly growing manufacturing sector while still subscribing to the use-by-the-public view, Chief Justice Shaw held that the mill acts were not eminent domain exercises at all, but rather police power exercises requiring "compulsory joint development of property."<sup>85</sup> The ability of industries to get water power fared no worse in most other jurisdictions and it is doubtful that the use-by-the-public doctrine operated to any significant degree to inhibit industrial growth through water power.

Deriving from the same period is another class of controversial takings, the so-called landlocked-owner statutes allowing condemnations by private individuals to build essentially private roads. Though arguably violating the strict public use standard and regularly challenged up to comparatively recent times, landlocked-owner takings generally have been upheld. A variety of justifications have been advanced, none of them strictly consistent with a use-by-the-public standard. Perhaps the most persuasive for the country's early history was that since the country consisted largely of wilderness and since the government could not hope to furnish all the roads needed, "the use of condemnation to open private roads . . . was a necessity if the country was to be developed at all."<sup>86</sup> The courts rationalized upholding such tak-

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draws much of his analysis from developments in Massachusetts, and documents a variety of instances in which the courts were willing to cut back the rights of upstream owners in order to facilitate development.

85. Initially in *Fish v. Farmingham Mfg. Co.*, 29 Mass. 451 (12 Pick. 36) (1832); most strongly stated in *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 116 (1851). See also *Bates v. Weymouth Iron Co.*, 62 Mass. (8 Cush.) 548, 553:

It is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision . . . for regulating the rights of proprietors . . . in a manner best calculated on the whole, to promote and secure their common rights in [the stream].

The United States Supreme Court, through a former Massachusetts judge, Justice Gray, accepted this view for a while. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885). This was despite the fact that the state court in the case had viewed the statute as an exercise of eminent domain and upheld it under the broad public benefit test. *Amoskeag Mfg. Co. v. Head*, 56 N.H. 386 (1876). See also *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 621 (1940). (This *Nichols*, it should be noted, was not the author of *Nichols on Eminent Domain*, cited at notes 13 & 47, *supra*.)

86. *Berger, The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 207 (1978).

ings against public use challenges in a variety of ways. Some found that though the condemning owner would pay for the road's maintenance, it was in practice open to the public to reach the condemnor's property and therefore satisfied the use-by-the-public test.<sup>87</sup> Others applied a broader public benefit test and found it easily satisfied.<sup>88</sup> A third group, however, mostly applying a use-by-the-public standard, struck down the private road-building statutes.<sup>89</sup> A number of states responded by amending their constitutions to define necessary private road takings as public uses.<sup>90</sup>

While takings for small private roads were regularly challenged, and caused the courts some consternation, much more substantial delegations of eminent domain to private interests were accomplished and exercised without causing significant strains on the case law, for they could pass both the narrow and broad tests. The first recipients were turnpike and canal companies. Among the seminal projects were the Lancaster Turnpike, completed in 1794, and the Erie Canal, completed in 1825. They were complemented by numerous similar projects in the first several decades of the eighteenth century.<sup>91</sup> Then, as the railroads

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87. See cases cited in 2A NICHOLS, *supra* note 47, at § 7.626.

88. *Id.* One case, *Brewer v. Bowman*, 9 Ga. 37, 41-42 (1850), is especially interesting in that the Georgia courts had been among the stronger resisters of mill act delegations. See text accompanying note 82 *supra*.

89. *Id.* The Washington court actually construed a state constitutional provision providing for compensated takings of private ways to apply only where there was an implied grant arising out of a conveyance. In such a common law easement-by-necessity case, of course, compensation would have been unnecessary. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 P. 681 (1903).

90. *Id.*

91. It is interesting to note that though New York had taken perhaps the strictest position in hewing out the use-by-the-public standard, it was very liberal in allowing the delegation of eminent domain and a variety of other expediting prerogatives, some discussed below, to the Erie Canal project. The canal project could of course meet either the public use or the public benefit standards and raise other meritorious justifications as well. Without doubt it contributed enormously to the initial settlement of the interior. Many of the issues were discussed in an interesting opinion by Chancellor Kent in *Rogers v. Bradshaw*, 20 Johns. 735 (N.Y. 1823), upholding a taking for the project. See generally in this area E. KIRKLAND, *MEN, CITIES AND TRANSPORTATION: A STUDY IN NEW ENGLAND HISTORY, 1820-1900* (1948); R. SHAW, *ERIE WATER WEST: A HISTORY OF THE ERIE CANAL, 1792-1854* (1966); H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861* (1969). Schieber, *supra* note 81, at 237, states that "[d]evolution of eminent domain power upon turnpike, bridge, canal, and railroad

took over supremacy in building the transport sector they also took over the exercise of eminent domain—and put it to more extensive use than ever before.<sup>92</sup> Road building, a stagnating enterprise, receded to the towns and counties, and few substantial new roads were established during the era. Many canal companies languished or went bankrupt.<sup>93</sup> The railroads meanwhile systematically began to span the country and even push back its frontiers. From the most embryonic beginnings in 1830, almost 3000 miles of track had been established by 1840 and 30,000 miles by 1860. As the industry really hit its stride in the next several decades, so did its use of eminent domain.

Some of the artful devices created to assist developers during the mill dam era were carried to new levels of sophistication for the railroads. The legislatures and courts also showed fresh ingenuity in ensuring the rapid expansion of the railroad system. Not only were condemnees frequently limited by state statute to defined damages and methods of valuation, as they had been under the mill acts, but the courts showed a marked solicitude for the peculiar problems facing the railroads. After declaring them public service corporations bound to provide their services at reasonable rates to all comers without discrimination, the courts graciously shielded them from most nuisance, trespass, and damage suits as they would have shielded state officials.<sup>94</sup> They tended to limit takings findings to cases of physical invasion and often refused to grant damages for significant incursions on the productivity of property.<sup>95</sup> Finally, the courts applied applied an “offsetting damages” doctrine, allowing railroads to offset the value of the land directly taken by the increase in value of the con-

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companies was done in every state.”

92. Every jurisdiction in which it was challenged upheld the use of eminent domain by railroads. For citations to the multitude of cases, see 2A NICHOLS, *supra* note 47, at § 7.521.

93. About half the canals in the United States were abandoned during the ensuing railroad era. See E. KIRKLAND, *supra* note 91.

94. For more detailed documentation of these rulings, see Scheiber, *supra* note 81; KIRKLAND, *supra* note 91; Horwitz, *supra* note 49; Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AMERICAN HISTORY 329 (1971); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

95. *Id.* See, e.g., Penn. R.R. v. Merchant, 119 Pa. 541 (1888); see generally 1 ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* 37-38 (2d ed. 1953) [hereinafter cited as VALUATION].

demnee's remaining property. A number of states tended to presume offsets, allowing railroads to take property at virtually no cost.<sup>96</sup>

Thus by the 1870s the ostensible tightening of the public use requirement had been counterbalanced by an unprecedented extension of eminent domain to privately held corporations. In most cases, the delegations could be upheld under either the strict or the narrow standard. Turnpikes, railroads, bridges, and canals were all arguably used by the general public. Mill dam takings created more complicated problems, but they were for the most part upheld. Now that broad transportation and substantial industrial sectors had been developed, the country was entering a period of accelerated industrial development that would also prove to be unprecedented. In its turn, this period of development would create some new problems in the deployment of eminent domain.

First, following directly on the growth of railroads, and in part driven by that growth, came a major expansion in mining. Though there is no evidence of mining companies using eminent domain to obtain their mining claims, they were virtually always able to condemn property for access and transport facilities.<sup>97</sup> Private-road statutes were of course as readily available to mining companies as to other private interests, but the court found the justifications so much more persuasive—under general “affected with a public interest” notions—as to immunize them from some forms of common liability, especially in states with major mining industries. In a well-known Pennsylvania case, for instance, a coal mining company was shielded from liability for runoff pollution of downstream water supplies.<sup>98</sup>

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96. See generally the articles by Scheiber, cited at notes 81 & 94, *supra*.

97. *Id.* Note also, for instance, that the Stock Raising Homestead Act of 1916, ch. 9, § 9, 39 Stat. 864 (current version at 43 U.S.C. § 299 (1976)), reserved all coal and minerals to the federal government, as well as rights to enter, prospect, and mine. Under the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976), and the Mining Law of 1872, ch. 152, 17 Stat. 91 (current version at 30 U.S.C. § 22 (1976)), the government made rights to prospect for and to mine the reserved minerals rather easy to obtain. The holder of the surface estate had a right to compensation for damage to improved land, but no right to prohibit prospecting or mining. Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 864 (current version at 43 U.S.C. § 799 (1976)).

98. “The necessities of a great public industry, which although in the hands of a private corporation, serves a great public interest” justified such “trifling in-

The surge in eastern and midwestern industrial growth after the 1860s and the stunning railroad proliferation of the period (about 70,000 miles of track were laid in the 1880s alone) created a major drive to exploit western resources and open western markets. The new western states were more than willing, and to spur their development they followed Colorado's lead in handing out eminent domain to practically any source of capital that could use it.<sup>99</sup> Not only were many conventional private uses constitutionally declared public, but some constitutions declared that property might be taken for *private* use. Colorado, for instance, allowed takings for "private ways of necessity, . . . reservoirs, drains, flumes, or ditches on or across the lands of others, for mining, milling, domestic, or sanitary purposes."<sup>100</sup> Idaho's constitution was equally liberal, making mining and irrigation public uses as well as "any other use necessary to the complete development of the material resources of the state."<sup>101</sup>

The burst in private takings after 1865 gave rise to several interesting doctrinal developments. The New Hampshire high court led off by upholding a mill act delegation to a general manufacturing firm, based largely on the particular topographical nature of the state.<sup>102</sup> The definition of public use, it argued, depended on the nature of a state's resources and industry. Since New Hampshire was well endowed with water power, but not with other natural resources, the state legislature should naturally take the steps necessary to the thorough exploitation of water power. Many of the western states, primarily in upholding private irrigation takings, seized on this rationale. A decade later the Nevada high court developed one of the most defensible rationales and workable tests thus far for private takings. Upholding a statute authorizing condemnations of land, lumber and other con-

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conveniences to particular persons." *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 149 (1886).

99. See generally 2A NICHOLS, *supra* note 47, at § 7.6; Scheiber, *supra* notes 81 & 94.

100. As quoted in Scheiber, *supra* note 81, at 244. See also 2A NICHOLS, *supra* note 47, at § 7.6; Bakken, *The Impact of the Colorado State Constitution on Rocky Mountain Constitution Making*, 47 COLO. MAGAZINE HIST. 152 (1970) (as cited in Scheiber, *supra* note 81).

101. IDAHO CONST. art. I, § 14 (1890). Regarding Montana practices, see Kaze, *Eminent Domain: Exploitation of Montana's Natural Resources*, 35 MONT. L. REV. 279 (1974).

102. *Great Falls Mfg. Co. v. Fernald*, 47 N.H. 444, 461 (1867).

struction materials by mining companies, the court distinguished ordinary businesses capable of being operated on any of a variety of sites from those, like mining, which are site-dependent.<sup>103</sup> The latter could legitimately be delegated eminent domain powers. The ruling was still underpinned, however, by a general public benefit analysis, and it was this proposition for which the decision was almost exclusively cited over the next several decades.

During the same era the federal courts were for the first time entering the field of eminent domain. Not long after a state court struck down a state effort to condemn land in behalf of the federal government,<sup>104</sup> the common practice up to then, the Supreme Court declared that the federal government had eminent domain power of its own.<sup>105</sup> A body of federal doctrine, borrowing heavily on the state cases, began to develop on the public use requirement under the fifth amendment. Not surprisingly, the Supreme Court long avoided taking a position on the narrow use-by-the-public versus broad public benefit tests, though a tendency to apply the general one gradually became clear.<sup>106</sup> Meanwhile there was also a growing tendency to challenge state takings under the fourteenth amendment.<sup>107</sup> In 1885 for instance, the Supreme Court held that a New Hampshire mill act delegation to a general manufacturing company did not violate the fourteenth amendment.<sup>108</sup> Its overall standards for both types of takings, state and federal, tended to be liberal—though judging from the early cases the federal government also showed some restraint in exercising the power. In 1896, the Supreme Court finally was forced explicitly to hold that the fifth amendment public use requirement applied to the states through the fourteenth amendment due process clause when it, for the first and only known time, invalidated a state exercise of eminent domain.<sup>109</sup> At issue was a state agency

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103. *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 411 (1876).

104. *Trombley v. Humphrey*, 23 Mich. 471 (1871).

105. *Kohl v. United States*, 91 U.S. 367 (1875) (postal power includes power to obtain sites for post offices by eminent domain).

106. Many of the early takings, *e.g.*, for post offices and parks, passed both tests.

107. *See Comment, supra* note 76, at 609-10; *Berger, supra* note 86, at 212-14.

108. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

109. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896); *see also Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896); *Chicago, B. & O. R.R. v. Chicago*, 166 U.S. 226, 236 (1897).

order, to a railroad that had originally obtained its property by eminent domain, to allow a private individual the right to build a grain elevator on railroad land on terms similar to the terms the railroad had already allowed several others. Without stating a test, the Court held the state order an unconstitutional taking for a *private* use.<sup>110</sup> In the ordinary run of cases, however, the Supreme Court has shown great deference to state court public use findings,<sup>111</sup> and has not even reviewed such a finding for some time.<sup>112</sup>

Though the Court thus established rather loose standards for the public use requirement, allowing states great policy latitude, it evidently sought to prevent abuses by tightening up the compensation requirement, awarding for instance, consequential as well as direct damages.<sup>113</sup> A complementary movement emerged at the state level. Many states began to require jury trials in cases of private takings, to limit offsetting valuation allowances, to require prior payment of damages, and to include a broader variety of damages in compensation formulas.<sup>114</sup> In a sense, however, the whole process was becoming routinized. The frenetic growth of the economy from after the Civil War through the first decade of this century had spent itself and the future of most regions seemed secure. It no longer was necessary to offer great inducements to secure capital. Much of the fixed capital available in natural resources had been appropriated and the surplus used for

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110. The Court had previously struck down state laws held to impose taxes for a private purpose, though it is not clear under what constitutional provision. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874); *Cole v. LaGrange*, 113 U.S. 1 (1884).

111. In 1916 the Court, in an opinion written by Justice Holmes, explicitly repudiated the use-by-the-public test as applied to state takings: "The inadequacy of the use by the general public as a universal test is established." *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916). Earlier it had noted its failure to reverse state court determinations that takings satisfied the public use requirement. *Hairston v. Danville & Western Ry.*, 208 U.S. 599, 607 (1908). The Court also affirmed its willingness to consider the particular resources of the state, the "relative importance of industries to the general public welfare, and the long-established methods and habits of the people." *Id.* at 606.

112. *E.g.*, *Courtesy Sandwich Shop v. Port of New York Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963), *appeal dismissed*, 375 U.S. 78 (1963).

113. *E.g.*, *United States v. Lynah*, 188 U.S. 445 (1903). *See generally* VALUATION, *supra* note 95, at 35-38.

114. *Id.* *See also* Scheiber, *supra* note 81, at 249.



industrial investment.<sup>115</sup> A great part of the infrastructure necessary to support the new industrial system had been established.

Energy producers were taking their place beside the railroads as expansive, region- or nationwide enterprises. Power companies had grown up locally and become defined as public utilities by the end of the century. The reasonableness, indeed necessity, of giving them eminent domain in urban areas had been manifest, for without it they evidently would not have been able to operate economically. The courts gradually rationalized such grants by noting that the product—electricity or gas—was used by the public though the physical plant might not be.<sup>116</sup> Soon, however, intracity distribution networks became intercity, then interstate. Interstate transmission systems create some problems of legal logic, since users are often citizens of states other than the one granting the eminent domain power. The courts generally have upheld such takings, occasionally invoking such dubious justifications as what one commentator has called the “purely hypothetical right of the farmers along the transmission line to insist that the power be stepped down and made available to them,”<sup>117</sup> and generally emphasizing the public service nature of the corporations involved—though the logic again becomes somewhat strained.<sup>118</sup> Telegraph and telephone companies have undergone parallel growth and integration, and have received equally solicitous treatment by the courts.

The salient fact about the condition of the country at the turn of the century was that an integrated, national, and heavily

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115. For an exemplary analysis, see J. HURST, *LAW AND ECONOMIC GROWTH* 181-83 (1964). Calling natural resources “capital” is of course a loose usage, and is inconsistent with formal Marxian analysis. Nonetheless, the basic notion that natural resource policies are in fact capital allocation policies seems a very useful one and deserves further inquiry.

116. See cases cited in 2A NICHOLS, *supra* note 47, at §§ 7.522 (light and power) & 7.523 (gas, petroleum, and oil). It may be noted, parenthetically, that the development of centralized power distribution systems, and particularly of hydro-electric power, made the mill dam problems obsolete. The same local power could still be provided essentially to support advanced, privately held manufacturing concerns. But first it entered the undifferentiated mass of available energy, to which the entire public would theoretically, and more or less practically, have access. Therefore it became most difficult to mount any serious public use challenge.

117. See Nichols, *supra* note 85, at 623, and text accompanying footnotes 144-45 *infra*.

118. See, e.g., Annot., 90 A.L.R. 1032 (1934).

industrial economy had been established. Though legal commentators would continue to fret about such individualized matters as private road takings for landlocked owners,<sup>119</sup> the key uses of the taking power would increasingly be for more comprehensive and far-reaching purposes. Eminent domain was becoming an instrument of large, systematically planned projects, often industry-related and frequently involving a complex form of industry-government cooperation. The major cases have occurred in two areas: urban redevelopment and infrastructure expansion.

### 1. *Urban redevelopment*

Though the courts arguably began deciding urban redevelopment cases involving eminent domain over a hundred years ago,<sup>120</sup> the current era of redevelopment cases began with a variety of government programs instituted during the great depression. The courts in the earlier cases had often struck down programs because they involved project ownership or enjoyment by private individuals.<sup>121</sup> (Of course this was somewhat inconsistent with their willingness to find that private ownership and benefit from public service corporations did not violate the public use requirement.<sup>122</sup>) A major departure was taken in *New York City Housing Authority v. Muller*,<sup>123</sup> a 1936 case in which the New York Court of Appeals upheld the condemnation of slum property to build low-income housing. The court found decreasing the juvenile delinquency, crime, and disease it believed was caused by slums to be a broad public benefit satisfying the public use requirement. Noting the failure of police power and taxation measures to correct such problems, the court thought that eminent domain could very properly be used to address them.

The *Muller* decision was followed closely by the United States Housing Act of 1937,<sup>124</sup> which authorized federal loans and grants to local housing agencies for slum clearance and low rent public housing construction. A barrage of cases challenged conse-

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119. See, e.g., 2A NICHOLS, *supra* note 47, at § 7.626.

120. E.g., *Dingley v. City of Boston*, 100 Mass. 544 (1868).

121. See Nichols, *supra* note 85, at 624-26.

122. See cases cited in 2A NICHOLS, *supra* note 47, at § 7.521.

123. 270 N.Y. 333, 1 N.E.2d 153 (1936).

124. Ch. 896, 50 Stat. 888 (1937) (now codified, as amended, at 42 U.S.C. §§ 1401-1440 (1976)).

quent condemnations by local housing agencies. The great majority of state courts upheld them, generally following *Muller's* broad public benefit approach and sidestepping the argument that, since each unit would be open to but one family at a time, the use-by-the-public test would not be met.<sup>125</sup>

Still a new barrage of cases resulted from the Housing Act of 1949,<sup>126</sup> which provided up to three-fourths federal capitalization for general urban renewal projects in which condemned slum land could be resold to private developers and some commercial and industrial development would be permissible. Though a small group of state courts invalidated condemnations under the program for failing to meet the use-by-the-public requirement, the majority upheld them, particularly after the United States Supreme Court upheld a condemnation in the District of Columbia. In *Berman v. Parker*, an owner of a successful department store in a blighted area sought to enjoin condemnation of his property.<sup>127</sup> The owner argued, among other things, that since his property was not blighted and would be resold to a private developer, the taking violated general due process requirements as well as the public use requirement. The Court rejected his challenge, using very broad language. Speaking of "public purpose" rather than "public use," it emphasized that Congress must have very broad discretion in choosing public objectives, that the purpose of eliminating slum conditions was eminently justifiable, and, as noted above, intimated that even esthetic purposes might be sufficient to justify a taking.

Though the Court did not directly embrace a broad public benefit analysis, there could remain little doubt that this was its approach, at least with regard to federal takings. Since Congress has a somewhat similar relationship to the District of Columbia as do state legislatures to their own dominions, and since the Court has generally shown significant deference to state policies

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125. For a complete listing, see 2A NICHOLS, *supra* note 47, at § 7.5156 n.6.

126. Ch. 338, 63 Stat. 413 (1949) (now codified, as amended, at 42 U.S.C. §§ 1441-1490g (1976)). See also RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 823-85 (1950).

127. 348 U.S. 26 (1954). Compare *Kaskel v. Impellitteri*, 306 N.Y. 73, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954), in which the court refused to overturn an administrative finding of blight. The District of Columbia program previously had been upheld in *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953), *modified*, 348 U.S. 26 (1954).

within their own realms, it seems doubtful that it would apply a stricter standard to state takings. One further doctrinal dimension of the decision should be noted. The Court explicitly carried through a growing tendency<sup>128</sup> to equate the public use test with a basic constitutional power analysis. Thus if a government instrumentality can legitimately seek a given objective, the Court said, it can use eminent domain to accomplish it.<sup>129</sup>

In the overall development of legitimate public uses, the re-development strategies satisfying the public use requirement have progressed from governmentally-operated public housing programs, taking only blighted property, to privately operated projects with complex functions taking nonblighted property in blighted areas. Only South Carolina still holds *Berman*-type takings to fail its public use test.<sup>130</sup> Though no logical limits are evident in the cases, it nonetheless remains to be seen how far courts will be willing to go in allowing local development authorities to condemn property for commercial purposes.

Efforts to take productive properties in nonblighted areas to further private industrial or commercial redevelopment plans have had mixed success. A few states have found insufficient public use justifications and invalidated such takings,<sup>131</sup> while most have upheld them based on broad public benefit analyses, often stressing local employment benefits.<sup>132</sup> Perhaps the most intrigu-

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128. Comment, *supra* note 76.

129. This tendency had been foreshadowed in *United States v. Carmack*, 329 U.S. 230 (1946), where the Court's central concern was whether due process requirements had been met. It portrayed a taking as a legislative undertaking, which only had to be material to the prosperity of the community.

130. *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956). Georgia and Florida had originally invalidated such takings, then reversed their positions, Georgia acting by constitutional amendment. See generally 2A NICHOLS, *supra* note 47, at § 7.5156.

131. *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967); *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959) (effort to condemn agricultural and residential lands for resale as industrial property failed public use test).

132. *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. 87 (1976); *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975); *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S. 2d 1, *appeal dismissed* 375 U.S. 78 (1963); *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).

ing case in the latter group is *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,<sup>133</sup> in which the condemnation of property to build the World Trade Center was challenged. The New York high court found the "improvement of the Port of New York by facilitating the flow of commerce and centralizing all activity incident thereto . . . a public purpose supporting the condemnation of property for any activity functionally related to that purpose."<sup>134</sup> It employed a very broad public benefit analysis and even noted that the "history of western civilization demonstrates the cause and effect relationship between a great port and a great city."<sup>135</sup>

Though the implications of the type of economic arrangement involved cannot be fully analyzed here, it should be noted that *Courtesy Sandwich* may reflect a new stage in the development of state-economy relationships. While the nominal challenger was a quaintly-named and perhaps even family-owned business, much of the opposition to the project came from far more powerful interests, primarily the city's major real estate firms.<sup>136</sup> The project the government undertook in building the World Trade Center was so large that its office space alone would exceed the total in cities the size of Boston.<sup>137</sup> Yet the state legislature's authorization to carry out such a massive intervention reflects the fact that it had the strong support of other major sectors of capital and labor, which evidently saw it as necessary, or at least helpful, to the continued viability of the New York economy. This type of thoroughgoing government-economy partnership is perhaps presaged by several noteworthy infrastructure expansion projects.

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133. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

134. *Id.* at 389, 190 N.E.2d at 406, 240 N.Y.S.2d at 6. The court also found the purpose of raising revenue from rentals to private parties "incidental" to the primary public purpose of centralizing port functions and improving the economic conditions of the city, and therefore valid. Judge Van Voorhis, dissenting alone, thought the public use test not met because the statute "put the Port Authority in the real estate business."

135. *Id.* at 388, 190 N.E.2d at 406, 240 N.Y.S.2d at 5.

136. See O'Donnell, *Skyscraper Controversy*, Wall St. J., March 5, 1964, at 12, cols. 2-3.

137. *Id.*

## 2. Infrastructure expansion

Several major undertakings after World War I made extensive use of eminent domain without incurring significant challenges. Most notable are the interstate highway system authorized in 1944,<sup>138</sup> the construction of which has thus far cost nearly \$100 billion, and the Saint Lawrence Seaway, completed in 1959, which has played a significant role in maintaining a vital industrial link between the Northeast and the Midwest.

Several less ambitious projects, however, have been more controversial. *Brown v. United States*, frequently cited as establishing the legitimacy of "substitute condemnation," involved the congressionally authorized taking of three-fourths of a town by the Tennessee Valley Authority (TVA) in order to build a reservoir, as well as the additional taking of a roughly equivalent amount of nearby land to which the condemned part of the town and its buildings were to be moved and reunited with the part left intact.<sup>139</sup> Finding the taking of the town valid, the Supreme Court also upheld the taking of the neighboring land, finding it "so closely connected with the acquisition of the district to be flooded, and so necessary to the carrying out of the project," that the public use of the reservoir also justified the additional taking.<sup>140</sup> It added that the additional taking was the "best means of making the parties whole."<sup>141</sup>

Direct congressional authorization to use eminent domain was lacking in *Tennessee Valley Authority v. Welch*, as was the neat plan simply to preserve a community.<sup>142</sup> In this case a reservoir project would cut off the only road to a small village. The construction of a new road was out of the question under wartime conditions. Local governmental bodies objected to TVA's offer to pay damages for the road as inadequate to cover the costs of providing standard governmental services to the newly isolated community. Eventually, TVA condemned all the land owned by members of the village and joined the land with a neighboring national

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138. The qualification here of course is that esthetic easements authorized by affiliated programs have faced rougher going. See text accompanying notes 71-74 *supra*.

139. 263 U.S. 78 (1923).

140. *Id.* at 81.

141. *Id.* at 83.

142. 327 U.S. 546 (1946).

park. The Supreme Court's eventual upholding of the condemnations had two important effects. First, it expanded the scope of takings that could be justified by any given public purpose, since the use to which the condemned land would be put (a park) had little to do with the public purpose justifying the reservoir project. Second, it indicated that federal agencies could employ eminent domain broadly in carrying out their missions. TVA has since executed more thoroughgoing projects and has not faced a successful challenge on general public use grounds.<sup>143</sup>

In the present era eminent domain is perhaps most important with regard to energy transportation and distribution. As noted above, takings for such purposes have long been established and it had perhaps seemed that most of the problems were disposed of. But the relentless expansion and centralization of energy usage, the exhaustion of local energy sources in many areas, the development of new distribution technologies,<sup>144</sup> and the increasing value of land and environmental amenities have combined to bring energy transportation problems once again to the fore. *Square Butte Electric Cooperative v. Hilken*<sup>145</sup> involved right-of-way condemnations for a direct current power line to carry electricity from a new coal-fired power plant in west-central North Dakota roughly 600 miles to a load center in far eastern Minnesota. The project was being carried out by a Minnesota wholesale utility cooperative and financed by a privately-held Minnesota utility. In part for financing reasons, the wholesale cooperative organized a North Dakota corporation, having only one employee and a total capitalization of \$10,000, to carry out the project. Because it was a cooperative under North Dakota law, the new corporation qualified to produce electricity and exercise

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143. Both *Brown* and *Welch* involved hydroelectric projects, arguably fairly well-connected to TVA's original mandate. However, there is some question whether TVA was ever authorized to sell electricity. See Wirtz, *The Legal Framework of the Tennessee Valley Authority*, 43 TENN. L. REV. 574 (1976). When the Authority expanded into coal and nuclear projects, however, it was also sustained. *United States v. An Easement and Right-of-Way Over Two Tracts of Land*, 246 F. Supp. 263 (W.D. Ky. 1965), *aff'd*, 375 F.2d 120 (6th Cir. 1967) (steam plant and transmission lines upheld); *United States v. Three Tracts of Land*, 377 F. Supp. 631 (N.D. Ala. 1974) (condemnation for Bellafonte Nuclear Plant upheld); *Rainbow Realty Co. v. TVA*, 124 F. Supp. 436 (M.D. Tenn. 1954) (condemnation for coal-fired plant upheld).

144. See note 1 *supra* and accompanying text.

145. 244 N.W.2d 519 (N.D. 1976).

eminent domain in the state without oversight by the Public Service Commission.<sup>146</sup>

The entire output of the new plant was committed to the privately held utility for the first seven years of generation. Thereafter, the wholesale cooperative would have periodic options on portions of the output, gradually increasing from thirty percent after seven years to fifty-one percent after seventeen years. Four of the wholesaler's member cooperatives and half of its endpoint users were from North Dakota. Since exercising an option would require majority vote of the member cooperatives, Minnesota interests could formally control the output of the plant. The facts that the line was direct current (making tie-ins at any intermediate point unusually expensive) and that the only planned transformer was to be located in far eastern Minnesota made the likelihood that any of the project's electricity would actually be used in North Dakota rather low. Nonetheless, both Minnesota utilities were members of the regional power pool from which North Dakota utilities might obtain extra electricity in emergencies.

The primary purpose of the project was to supply the rapidly growing power needs of private taconite producers in Minnesota. Evidence at trial indicated that the private utility was roughly twice as large as the wholesale cooperative and that it projected far more massive load growth than did the cooperative,<sup>147</sup> again making it seem somewhat unlikely that the cooperative would exercise its option and forego the relatively high premium it could expect for selling the electricity to the private utility.

In ruling on contested right-of-way takings the trial court held that while the proposed route met the statutory requirement of being "compatible with the greatest public benefit and the least private injury,"<sup>148</sup> the proposed taking did not meet the public use requirement.<sup>149</sup> The utility had alleged a panoply of ostensible benefits to North Dakota:

a back-up reserve of power, from which North Dakota member utilities might draw in emergency; a potential reduction in electricity costs for North Dakota consumers; a potential option to supply a portion of the electricity sent over the . . . line to North Dakota

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146. N.D. CENT. CODE § 49-02-01.1 (1978).

147. 224 N.W.2d 529.

148. *Id.* at 521.

149. *Id.*



consumers; a potential source of electricity to meet North Dakota's future demands; and a stabilization of [the power supply] in North Dakota.<sup>150</sup>

But the trial court found the alleged benefits too remote, speculative, and indirect to support the finding of substantial public benefit it thought required by North Dakota law.

On appeal, a sharply divided state supreme court reversed the trial court's public use holding. All of the justices accepted the prevailing plurality's statement of the substantive law:

[T]he following elements must be present for a public use to exist in the state where the property sought to be condemned lies. First, the public must have either a right to benefit guaranteed by regulatory control through a public service commission or an actual benefit. Second, although other states may also be benefited, the public in the state which authorizes the taking must derive a substantial and direct benefit, something greater than an indirect advantage. Third, the public benefit, while not confined exclusively to the state authorizing the use of the power, is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained.<sup>151</sup>

The prevailing plurality acknowledged the absence of benefits guaranteed by regulatory control, the traditional public utility justification, but it found the requirements of actual, direct, and substantial benefits satisfied. To do so the plurality overrode the trial court's findings of fact. Specifically, it found the addition of the plant's capacity to the reserve power supply of the region, the rather tenuous possibility that the direct current line would stabilize "low frequency oscillations" in the regional system (an argument the utility had not made on appeal), the possibility that the cooperative might exercise its options in the future, the possibility that the power so obtained would not be as expensive as new capacity, and the possibility that another plant might be built alongside the first to serve North Dakota consumers sufficient, cumulatively, to satisfy the public use requirement.<sup>152</sup> The concurring opinion disagreed with the reversals of fact findings, but found that the trial court had erred on issues of law by allocating

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150. Note, *Interstate Public Use: An Issue Occuring in Condemnation for Interstate Power Lines*, 52 N.D. L. REV. 563, 565-66 (1976).

151. 224 N.W.2d 525 (citations omitted).

152. *Id.* at 530.

the burden of proving a public use to the condemning utility and requiring a showing of direct rather than indirect benefits. (In the latter regard, the opinion appears internally contradictory.<sup>153</sup>)

The joint dissents, as noted, accepted the plurality statement of law, but found the standard unsatisfied. They found any public benefits far too "remote, indirect, incidental, and speculative,"<sup>154</sup> and the general concept of public benefit pushed beyond any usefulness as a limitation on the taking power.<sup>155</sup>

This generally unexceptional case has been worth discussing at some length for two reasons. First, it raises the same basic analytical problems which have troubled public use doctrine from its beginnings. On the one hand, it seems clear that there will indeed be some "public benefit" from the project; on the other, if this public benefit is sufficient to justify the exercise of eminent domain, is there any even moderately salutary project which can be denied the power on public use grounds? Some public benefit can be found in virtually any capital development program. Second, however, the fact situation is also relatively typical of the societal context in which eminent domain now is used. The power is widely available, it frequently serves major long-distance resource transfers between multistate and sometimes multinational enterprises, it is an important component in relatively complicated investment decisions and it is relatively lightly regulated and reviewed. The question remains whether matters should be otherwise, and how.

### III. STALKING THE ELUSIVE LIMITING PRINCIPLE

#### A. *Current Status of Public Use Doctrine*

Though it cannot quite be said that the public use requirement no longer exists for eminent domain,<sup>156</sup> it imposes very little

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153. *Id.* at 533.

154. *Id.* at 536-37.

155. *Id.* at 539.

156. It would hardly do to omit the oft-quoted words:

Legal doctrines usually die quietly, if slowly. Their demise is generally accompanied by no more than soft sighs of relief at the courts' final acknowledgement of decay. But the theory of "public use" as a limitation on eminent domain . . . bulked so large in its prime and has taken so long in dying that, at the risk of disturbing the deathwatch, a few final words might be in order.

systematic limitation on the power. Takings by government are virtually invulnerable to public use challenge. Governmental or not, practically all takings are subject to the liberal public benefit standard. Conceptually the public benefit standard is amorphous enough to allow practically any taking, but it leaves room for the courts to invalidate takings on occasion. The use-by-the-public standard, on the other hand, has been invoked to uphold takings that meet the test but has not been the primary ground for invalidating a significant taking for quite some time.<sup>157</sup>

The net result is that analytically almost any taking can meet the public use requirement, except perhaps the bald transfer of property from one private holder to another without some supervening governmental purpose. The rather close margins of even this exception are indicated by the landlocked-owner and urban redevelopment case. For the most part then, the public use requirement operates as an incremental and somewhat idiosyncratic restraint—a slight added drag on takings, the exact operation of which is somewhat unpredictable.<sup>158</sup> *Berman* made explicit what

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The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion, although rarely with so much directness. Doubtless the doctrine will continue to be evoked nostalgically in dicta and may even be employed authoritatively in rare, atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue.

Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 614 (1949).

157. In any event, it is often argued that a pure use-by-the-public approach probably would be unworkable, since it would permit takings for public places like hotels and theaters but forbid them for well-established, seemingly reasonable uses like roads for landlocked owners. This problem was noted at least as early as *Dayton Gold & Silver*:

If public occupation and enjoyment of the object for which the land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. . . . It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals.

*Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410-11 (1876). Moreover, as described *supra*, the rise of the use-by-the-public doctrine in the early nineteenth century was accompanied by a massive expansion in the actual deployment of eminent domain.

158. Compare *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12

appears to have been an accomplished state of affairs: if a purpose is within the governmental power, eminent domain probably may be used to achieve it.<sup>159</sup> The main question is not whether a taking is for a "public" purpose, but whether it is for a *legitimate* purpose. By retaining the public use requirement without clearly defining it, the courts have retained, perhaps cannily, the prerogative of reviewing the legitimacy and wisdom of particular purposes.

*B. The Desirability of a Special Standard for Eminent Domain*

Since the public use requirement appears to be largely a judicial creation, its retention by the courts is not particularly surprising. But is there a justification for it? Takings, after all, are already subject to compensation and ordinary due process requirements. Is there a particular danger in eminent domain that mandates stricter scrutiny? Are takings intrinsically amenable to a special form of analysis?

Though these questions have not been widely debated, the commentators discussing them have come out on all sides. Many of the civil law writers thought special constraints should be placed on the power so that property would be taken only for relatively worthy purposes, though they did not agree on how such purposes should be defined.<sup>160</sup> Many modern commentators find nothing special about the use of eminent domain. Stoebuck, for instance, speculates that the main danger in eminent domain would be its capacity to tyrannize, but considers the danger hollow.<sup>161</sup> He argued that as long as they are compensated, condemnees are as likely to find takings unoppressive as to find them oppressive. Sometimes they will be happy, even quite happy, to get market value for property, and sometimes not. Eminent domain therefore is a dull instrument for accomplishing political oppression, no better than any other governmental power. And since

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N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) and *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 391 P.2d 171 (1959) with *Square Butte Elec. Cooperative v. Hilken*, 244 N.W.2d 519 (N.D. 1976).

159. *Supra* note 73.

160. See notes 24-26 *supra*.

161. Stoebuck, *supra* note 15. Stoebuck is responding to Sax's concern that eminent domain spends its force on a single owner. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 53-54 (1964).

it is as appropriate to governmental undertakings as any other power, it should be scrutinized on similar terms. It has even been suggested that takings should be scrutinized less rigorously than ordinary tax expenditures, since the condemnee will at least receive compensation while taxpayers will simply be out the money involved in improper expenditures.<sup>162</sup>

There are also strong arguments for subjecting exercises of eminent domain to closer scrutiny.<sup>163</sup> Not only does the tendency not to compensate for relocation expenses or loss of business goodwill tend to make indemnification less than complete, but condemnations often are not subject to the political checks facing more general types of governmental actions. Takings typically affect a relatively small number of condemnees, who are often poorly organized and politically ineffectual.<sup>164</sup> Moreover, exactly what land will be condemned is frequently not known when projects which will involve condemnations are authorized; therefore potential condemnees are unable to plead their causes during the decision process. Finally, an increasing amount of condemnation is federally authorized or funded, thus making opposition by affected parties less likely to be effective. But if special standards were to be applied to takings, what form might they take?

### C. *Alternative Standards*

#### 1. *A stricter public benefit test*

Historically, the concept of public benefit has been framed quite broadly. In upholding a water company's taking of an easement to lay water pipes, the Pennsylvania Supreme Court re-

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162. 1 COOLEY, TAXATION § 176 (4th ed. 1942).

163. See, e.g., Comment, *State Constitutional Limitations on Eminent Domain*, 77 HARV. L.R. 717 (1964).

164. Moreover, condemnations may be motivated by such dubious purposes as racial exclusion. *Deerfield Park Dist. v. Progress Development Corp.*, 26 Ill. 2d 296, 186 N.E.2d 360 (1962), cert. denied, 372 U.S. 968 (1963), involved condemnation of land for a park immediately after announcement of plans to build a racially integrated housing development on the site. A referendum the previous year had rejected a bond issue for the park. The court essentially refused to consider interests beyond the condemnee's ownership interest and held him to have a cause of action only by showing deprivation to be the "sole and exclusive purpose" of the condemnation. A showing that the park would actually be created, conversely, would inherently validate the taking. *Accord*, *City of Creve Coeur v. Weinstein*, 329 S.W.2d 399 (Mo. Ct. App. 1959).

peated a common formulation: "if the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public."<sup>165</sup> In its loosest form, particularly if legislative or administrative findings of fact are accepted, this standard will sustain virtually any taking that can be connected somehow to community betterment. At the same time, however, courts retain some latitude whether to be satisfied with a colorable public benefit or to require something more substantial.

More strictly, although they might sometimes need legislative or constitutional authorization, the courts could require that a taking be *necessary* to carrying out a public purpose.<sup>166</sup> Connecticut's proposed 1965 constitution had a provision reading: "No property shall be taken for public use unless the taking be necessary for such use, and then, only upon payment of just compensation."<sup>167</sup> Presumably under such a provision courts would require condemnors to show that their projects could not reasonably be carried out without the condemnation.

Montana and North Dakota take a parallel but somewhat stricter approach. The North Dakota statute is noted in *Square Butte*.<sup>168</sup> The Montana provision is virtually identical: "in all cases where land is required for public use, . . . it must be located in the manner which will be most compatible with the greatest public good and the least private injury."<sup>169</sup> Thus the condemnor has a duty to minimize the cost and maximize the benefit of a taking. This is an explicit and rather stringent cost-benefit test.

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165. *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393-94, 69 A. 870, 872 (1908).

166. Courts at present are split on how closely administrative takings determinations are to be reviewed. The general view appears to be that an arbitrariness test should be used. *See, e.g.*, *Urban Renewal Agency v. Iacommetti*, 79 Nev. 113, 379 P.2d 466 (1963); *Grisanti v. Cleveland*, 181 N.E.2d 299 (Ohio Ct. App.), *cert. denied*, 371 U.S. 68 (1962).

167. C. BERGER, *LAND OWNERSHIP AND USE* 889 (2d ed. 1975). Berger notes that the Connecticut Urban Renewal Association spent large sums to fight the provision. In the end, the proposed constitution was rejected.

168. *Square Butte Elec. Cooperative v. Hilken*, 244 N.W.2d 519, 522 (N.D. 1976).

169. MONT. REV. CODES ANN. § 93-9906 (1964). This strict provision to some extent reflects the backlash that occurred in Montana, which was once at the forefront of states granting eminent domain to any and every interest.

The question is not simply whether a taking's benefits exceed its costs, but whether the taking is optimal to carrying out the project. Despite the formally strict standard however, costs and benefits are notoriously difficult to estimate and the courts necessarily will have some latitude in deciding how closely to second-guess condemnations. It might be argued that by requiring optimal decisions the standard is unworkable anyway, but this is not necessarily the case.

In perhaps its most activist foray into administrative decision making, the Montana Supreme Court considered a State Highway Commission condemnation to build a 14.2-mile road directly parallel to an existing one.<sup>170</sup> The Commission had not seriously considered whether the existing road feasibly could be improved, and the new road was to cut across prime farm acreage. Presuming both possible roadways equal on the public benefit side, the court ordered the Commission to perform a detailed study on the private injury question and not to condemn the new right-of-way unless it would cause less private injury than use of the existing one. While a more conventional cost-benefit analysis would also have allowed the benefits of the two roads to be discounted for potentially differing values like future maintenance costs, the court's application of the limitation clause appears reasonable. It forced the Commission to take the constitutional requirement seriously and not to use the condemnation power at its apparent whim.

The Montana, North Dakota, and Connecticut provisions could also be combined in something like the following form to provide perhaps the strictest curb on takings which still allows a broad variety of purposes: "In every case where property is to be taken for a public purpose, the taking must be reasonably necessary to carrying out that purpose and the property must be selected so as to provide the greatest public good and the least private injury." This formulation may seem little different from the Montana and North Dakota provisions since they arguably also contain a necessity requirement, particularly as applied in the case just discussed. The Montana road case however, had an unusual fact situation in the prior existence of an almost identical facility. The primary reason for requiring that a taking be neces-

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170. *State Highway Comm'n v. Danielsen*, 146 Mont. 539, 409 P.2d 443 (1965).

sary would be to prohibit condemnations where equivalent property could reasonably be obtained on comparable terms on the market, which the Montana provision does not do explicitly.

This approach potentially involves significant implementation problems, particularly with level of scrutiny and burden of proof, but a bare outline of how it might be structured can be suggested. First, a taking by a duly authorized agency or instrumentality would be presumptively valid. In order to overturn it a challenger would have to show by clear preponderance of evidence either that alternative, equally satisfactory property is available for purchase at market value or that the taking of an alternative, equally satisfactory property would involve substantially less private injury. Private injury could be shown in either economic or noneconomic terms. For instance, a taking requiring that a family relocate could involve more private injury than one involving property of the same value but not requiring anyone to move. The superiority of the challenger's alternative would have to be clear and not merely colorable.

To overcome a *prima facie* showing of nonnecessity or of a superior alternative, an agency would have to demonstrate a substantial consideration supporting its decision, for example a non-frivolous, nonarbitrary reason why the property requiring the family to move is in fact superior for its purposes. Ordinarily the agency should be able to translate such reasons into cost factors. To prevail over the *prima facie* showing, those cost factors would have to be more than speculative and would have to be consequential relative to the size and overall purposes of the project. Finally, if the challenger's case proposed condemnation of other properties, owners of those properties would be subject to compulsory joinder in order to ensure consideration of all factors relevant to the decision. An order of the court would then be binding on all parties involved.

To be sure, a proposal like this also raises the prospect of a substantial increase in litigation. While probably diminishing public use challenges in the old mode, it would allow significantly expanded judicial oversight of particular takings decisions. With proper procedural structuring, however, the probable rise in litigation would not be significant. The key would be to make takings decisions relatively difficult to assail, but still vulnerable enough to force condemnors to act prudently. The best way to do



this appears to be to allow the challenger to attack a particular decision, but to require a showing of a substantially better alternative to invalidate the taking. Presumably the very possibility of effective challenge would constrain parties with condemnation power to use it sparingly. Since more than valuation, which is fairly predictable, would be at issue, the costs of litigation could rapidly make it more cost effective to purchase other property on the market or at least to select for condemnation property likely to result in the least disruption to other parties.

Still, it might be asserted that cost considerations,<sup>171</sup> especially the one-time, relatively minor ones involved in many property acquisitions, are often not very effective in channeling the decisions of large governmental agencies or powerful, often quasi-monopolistic corporations. While this may be true, the framework just proposed should nonetheless significantly curb the effects of cost-unresponsiveness by simply invalidating indefensible takings. No longer would any taking become immune simply by being for a public use or purpose. It could be challenged on grounds of its necessity and appropriateness.

There are at least two kinds of problems, however, that neither this nor any other proposal limited to eminent domain can adequately deal with. First, it will still be easier to take property from poorer or more poorly organized segments of society than from others. Even the relatively strict limitation on takings set out above requires court challenge for effective implementation. As will be seen below, there is some evidence to indicate that the poor generally fare less well than the rich in condemnation proceedings, probably due to their more limited legal sophistication and resources. It might well be as logical for a condemnor to minimize the problems of challenge by taking property from relatively poor and powerless parties as by taking the most appropriate property necessary for the particular project.<sup>171</sup>

Second, even under the strictly framed standard, it would be difficult for courts to decide cases like *Square Butte*<sup>172</sup> differently. The court in that case found the cost-benefit standard for the proposed route satisfied; if the project was to be carried out, the

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171. See text accompanying notes 192-99 *infra*.

172. *Square Butte Elec. Cooperative v. Hilken*, 244 N.W.2d 519 (N.D. 1976).

proposed means were acceptable.<sup>173</sup> To invalidate the project a court would therefore have to find it *unnecessary*. In cases which involve complex demand projections, numerous but ambiguous alternatives, and major amounts of investment, as do most important eminent domain projects, courts can be expected to resist second-guessing projects that comport generally with legislatively approved purposes. Although courts are willing occasionally to make a somewhat legislative decision by finding a failure to meet the public use requirement, it is quite doubtful that they would be willing or able to evaluate the broad necessity of capital projects on a regular basis.

Thus both the narrow and broad forms of general necessity review face significant limitations as policy correctives. One more conception of necessity, however, the site-dependency rationale first propounded in *Dayton Gold and Silver Mining*,<sup>174</sup> merits consideration.

## 2. *A site-dependency or monopoly test*

Today's most common justification for eminent domain is the "hold-out problem." Stated in lay terms it is the possibility that an owner of property necessary to the completion of a substantial project either will refuse to sell and thus entirely thwart the project's possible benefits or will hold out for an exorbitant price and thereby "blackmail" society for a higher than fair price. In economic terms the problem is defined as a seller holding out for a higher price from a buyer known to be "assembling" properties for a particular configuration (*e.g.*, a railroad right-of-way) than the seller would ask from a buyer not suspected of planning such an assembly. Where hold-out behavior occurs, fewer projects requiring assembly will be carried out than if sellers sold at their true—"atomistic"—prices, and the net production available to society will be lower than if goods were compared, bought, and sold at their true opportunity costs. Production is thus expected to be sub- or at least nonoptimal.<sup>175</sup>

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173. *Id.* at 527-30.

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

175. See F. Munch, *An Economic Analysis of Eminent Domain* 7 (December 1973) (unpublished dissertation, University of Chicago Department of Economics). The hold-out owner is trying to extract an additional "rent" for his property from the project. If only one or a few owners were to do so the project might still

Conceptually, the seemingly perfect solution to this problem is eminent domain, through which a hold-out owner can be forced to transfer property at market, rather than hold-out, value. It can be argued that eminent domain is appropriate wherever there is likely to be a hold-out or monopoly problem—for example where a mining company wishes to produce a claim but is confronted by high right-of-way rent demands from a landowner standing between the mining claim and an essential transportation artery.<sup>176</sup> Rather than pay the rent and thus raise costs unnecessarily, or not produce the claim and thus also contribute to higher mineral prices, the mining company could use eminent domain to establish the right-of-way at a fair price. But should an assembler be granted eminent domain whenever it confronts a potential monopoly or hold-out problem? The question can best be addressed by examining a proposal that this is exactly what should be done.

Lawrence Berger proposes to discard the traditional public use requirement and to grant eminent domain whenever there is a degree of relative monopoly in landholding and the taking would lead to substantially increased property values.<sup>177</sup> While standards would be somewhat stricter for private than for public condemnors, the category, "public," is defined inclusively. Takings for railroads, hospitals, streets, hotels, theaters, and industrial plants would all be public by meeting the criterion of "benefit[ing] large numbers of persons in a nondiscriminatory and nonexclusionary manner."<sup>178</sup> Berger justifies this very broad definition of "public" by arguing that it is "impossible to distinguish

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be pursued, but with a slight transfer of income from the assembler to landowners. With "perfect information," possibly all owners could hold out for precisely their "shares" of the available rent, and the project could still be completed; yet as soon as information becomes poor or one owner decides to hold out to get part of a neighbor's share of the rent as well, the system fails to allocate resources optimally.

176. Strictly speaking, the monopoly and hold-out problems are not the same, since hold-out behavior may occur where substitute properties could have been purchased but the project has progressed sufficiently to make that difficult and to make it more efficient to pay the owner some rent. No monopoly rents, based for instance on the absolute uniqueness of the property, need be possible. A hold-out owner may seek simply to capture part of another owner's share of the rent.

177. L. Berger, *supra* note 49. It is important to differentiate L. Berger from C. Berger, *supra* note 167, whose views on this question appear to be quite different.

178. Berger, *supra* note 49, at 225.

rationally a large plant employing half the town and a railroad right of way, saying there may be condemnation in the latter case but not in the former."<sup>179</sup>

"Private" takings, "benefit[ing] one, or a relatively limited number of persons,"<sup>180</sup> would have to meet the following criteria. First, the condemnee would have to hold a monopoly or near monopoly over the proposed use.<sup>181</sup> By monopoly, Berger generally means control of the only property on which the project could reasonably be carried out. In a landlocked owner case, for instance, he simply means the only land on which the condemnor could afford to pay the costs. Second, "the increase in values to the properties resulting from the taking should exceed the costs in making any change in resources."<sup>182</sup> In a landlocked owner case this would mean that the increase to the value of the formerly landlocked property would more than offset the decrease to the value of the property over which a way is condemned (and, presumably, the general costs of the process). Third, the "importance of the condemnor's need should outweigh the harm to be inflicted upon the condemnee."<sup>183</sup> Though Berger does not make the meaning of this criterion clear, he suggests it should be used to avoid "frivolously motivated" condemnations. As a further way of avoiding marginal condemnations, Berger thinks "the condemnor should have to pay as compensation, the greater of any increase in values to his land resulting from the taking, or 150% of the fair market value of the land taken."<sup>184</sup>

Berger would apply parallel, but significantly less stringent requirements to the inclusively defined public takings.

A condemnee monopoly requirement should be imposed but less strictly enforced. The increase in value test should be used but only where market or other measures are meaningful. In addition, there ought to be some showing that the public benefit outweighs

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179. *Id.* at 226.

180. *Id.*

181. *Id.* at 235.

182. *Id.* at 245. It is not entirely clear what values Berger means to include in this requirement. For instance, earlier in the article he states an apparently narrower test: "the total values of all properties involved after the change in resources is higher than the total values before the change." *Id.* at 235. Presumably he subtracts all transaction costs from property values.

183. *Id.* at 245.

184. *Id.*

the harm to the condemnee. Finally a liberalized system of damages with awards somewhat in excess of fair market value [120 to 150 percent] should be initiated.<sup>185</sup>

For both types of takings Berger would require damages somewhat in excess of market value. Though his reasons for doing so are not articulated, several may be suggested. First, the current owner of property might value it at more than market value. Indeed this would be a sign of proper resource distribution, each holder valuing his resources more than any other potential holder is willing to pay for them.<sup>186</sup> It is of course very difficult to distinguish actual personal utility from hold-out behavior. Berger attempts a solution by providing that the present owner would be more likely to get "fair" compensation and the new owner would have to pay the full value of the improvement to his property. Thus biasing the liabilities somewhat against takings would also contribute to a second consideration: the transaction costs involved in giving up property, arranging to replace it, and so on, would be avoided in most cases where they were not in fact justified. Finally, Berger may be seeking to avoid the criticism that his scheme would open the flood gates to a torrent of takings.

Yet if the floodgates must be held back to some degree, what is the reason for opening them in the first place? Berger's espoused but relatively unsubstantiated grounds are "fairness" and "economic efficiency."<sup>187</sup> The fairness rationale holds that it does not seem equitable to give eminent domain to some large-scale private interests and not to others. Since a factory can provide as much economic benefit to a community as a railroad, the factory should have as ready access to eminent domain as the railroad.<sup>188</sup> This supposed equity argument depends, however, on some major

185. *Id.*

186. See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 39-44 (2d ed. 1977). As Posner notes, the value placed on property by an eccentric is no less valid in pure economic terms than any other value.

If I refuse to sell for less than \$25,000 a house that no one else would pay more than \$15,000 for, it does not follow that I am irrational, even if no "objective" factors such as moving expenses justify my insisting on such a premium. It follows only that I value the house more than other people. The extra value I place on the property has the same status in economic analysis as any other value.

*Id.* at 40.

187. Berger, *supra* note 49, at 226.

188. See note 159 *supra* and accompanying text.

efficiency assumptions. First, it assumes that monopoly and hold-out problems will be as serious for factories as for railroads. This seems a dubious assumption, since railroads are ordinarily a good deal more site-dependent than factories and must assemble far larger numbers of properties to carry out most projects.<sup>189</sup> Therefore the probabilities of encountering hold-out owners who will drive assembly costs significantly above opportunity costs are much higher for railroads.

Second, the argument that eminent domain should be given to factories—rather than taken away from railroads, for instance—assumes that using eminent domain in fact contributes to economic efficiency. This is a hypothetical and vulnerable assumption. Condemning property inherently entails special costs, for example those of a fairly substantial fact-finding and adjudication process. Other possible costs considered below are less obvious, but estimates of the costs and efficiency of eminent domain need not remain entirely speculative. At least some data comparing the costs of land acquisition with and without eminent domain already exist.

Munch has studied and compared property assemblies accomplished through condemnation and through market purchase, and her research indicates little difference in total costs.<sup>190</sup> Though her study is too complicated to be fully recounted here, several of its main findings should be noted. First, though prices paid in market assembly tend to exceed market values, "eminent domain does not substantially reduce the total cost of land, if at all."<sup>191</sup> Second, "[t]he main impact of eminent domain is in the distribution of the assembly rent: high valued parcels capture more than their proportionate share, at the expense of low valued parcels, which get less than market value. In the market assemblies, the distribution is apparently random, with the bias, if any, in favor of low valued parcels."<sup>192</sup> In a word, eminent domain does

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189. It also bears noting that railroad right-of-way condemnations are not nearly as common these days as factory expansions.

190. F. Munch, *supra* note 175.

191. *Id.* at 81-82.

192. *Id.* at 83. In estimating the coefficients of the biased prices, Munch found that (in 1972 prices), "as a rough approximation, a \$7,000 parcel receives about \$5,000, a \$13,000 property breaks even, and a \$40,000 property may get two or three times its market value." *Id.* at 60.

In addition she found that while "eminent domain does reduce the rise in

not demonstrably contribute to efficiency and appears to bias payments in favor of more expensive properties. There are of course qualifications to Munch's study, the main ones being that her sample of market assemblies is not large and that the study is limited to properties located in Chicago. Even on relatively narrow economic grounds, though, it casts significant doubt on the somewhat sanguine assumption that broader dissemination of eminent domain would contribute to economic efficiency.

In addition, eminent domain may impose significant non-market costs. An important reason high valued properties receive proportionately more than low valued ones in condemnations is probably that owners of more expensive properties have better access to the legal resources necessary to obtain favorable compensation. To further expand legal intervention in the property transfer process would diminish the value of ownership relative to that of legal sophistication and resources, which are distributed perhaps more unequally than property itself. It would thus contribute to making this society somewhat more inegalitarian than it already is and would add nonmonetary regressive effects to the monetary ones.

Berger's scheme also is subject to several other serious criticisms. Essentially, it puts too small a burden on the prospective condemner, particularly if it can qualify as "public." If a factory wishes to expand and finds its way blocked by an unwilling farmer, all it need show to condemn his property is that it is the only land onto which the factory could reasonably expand and that the net value of the two properties would increase.<sup>193</sup> In the process the factory has almost complete latitude in defining the relevant options. There might be an alternative, like relocating, that would be more expensive for the factory but impose lower total costs upon the community. With the factory in control of

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prices over time, *i.e.*, the gains from settling later, . . . this net effect is compounded from some prices being depressed over time—those going to court—while some parcels settling out of court do succeed in holding out for higher prices." *Id.* at 82-83.

193. In theory, Berger leaves open an escape hatch in his third criterion and requires that the public benefit outweigh the harm to the condemnee. In practice this standard would seem either to be conclusory, the relative benefits being decided by the increase in property value, or to be very arbitrary, depending on the individual values of judges. All but the least competent courts would probably try to avoid the latter alternative.

the relevant information it would be next to impossible for the farmer to prove such a case. An attempt to do so would be irrelevant anyway, since alternative possibilities are not a factor in Berger's scheme. The liberal compensation requirement would not always solve the problems either, since the twenty to fifty percent over market value could easily be less than the difference between the net social costs of the expansion and an alternative project. Moreover, in all practicality it should be noted that the court or agency in charge of the condemnation proceedings might thwart the liberal compensation provision by simply decreasing base property value in order to make net compensation equal to what it sees as an appropriate market value.<sup>194</sup>

Finally, a large corporation will often have significant ability to manipulate the property market. Depending on the corporation's use of its property, and perhaps its policies with respect to surrounding properties, it could exercise significant influence on the "market value" of the farmer's property. Giving it condemnation power would mean giving it the right to take the farmer's property at slightly over the "market value" it may have largely determined. The farmer, if left alone, might bargain for a higher share of the value of his property to the factory (which in reality might be many times its market value). In pure economic terms, there is nothing to say that the factory, rather than the farmer, is entitled to that rent.<sup>195</sup> One distribution of the rent is no more economically efficient than any other.

Berger's proposed scheme, accordingly, is not as he would claim merely a neutral mechanism for increasing economic efficiency. It is a significant shift in property entitlements from current owners to prospective buyers. If any prospective buyer values a piece of property over its nominal market value and the changed use is likely to raise its market value, the prospective buyer may take the property even if it is worth more to the current owner than its market value in the new use. Further, certain types of prospective buyers will benefit disproportionately. The definition of "public" makes eminent domain available on especially favorable terms to large-scale, relatively centralized organizations. The large department store, for instance, could exercise

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194. See, e.g., C. Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

195. See Munch, *supra* note 175, ch. 2.



eminent domain on more favorable terms than the small corner grocery.<sup>196</sup> Indeed, it probably could *condemn* the corner grocery if it wished.

The nondiscrimination, nonexclusion requirement,<sup>197</sup> moreover, is not sufficient to eliminate another probable bias in benefits. Large clubs, particularly the kind well-financed enough to seek large property expansions, will often have memberships biased toward the upper socio-economic strata. The public golf club Berger uses in one hypothetical,<sup>198</sup> though legally open to all, will typically consist of those who can afford and whose peer groups encourage membership.<sup>199</sup> Giving the club eminent domain gives it the right to take the farmer's land whenever it is willing to pay more than the market price for farmland, but does not necessarily contribute much to "efficiency" as it is often thought of in relation to production. While conventional economic doctrine does not posit that one type of purchase (*e.g.*, for farming) at a given price brings more utility than another (*e.g.*, for a golf club), neither does it make the assumption that an increase in the market value of property always equals an increase in utility. This is because, as already noted, the current owner's utility from owning the property may exceed that of the new owner and the new market value. Ordinarily market mechanisms would decide whose utility is higher—on the basis of who was willing to sacrifice the most income to hold the property. As has been shown, Berger's proposal for overriding the market is seriously flawed even on relatively conservative theoretical and empirical grounds. Several

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196. This assumes that the large department store could qualify as public and the corner grocery could not. While it is fairly clear that the first assumption is true, the second is debatable, largely because Berger's concept of public is rather poorly defined. Perhaps the corner store could also qualify as public. If so, there would be very few takings that could not be found public. Nonetheless, there would still be a substantial inequality between the department store and the grocery, since the former would ordinarily have the resources to buy out the latter but not *vice versa*. Finally, Berger never notes the possibility raised in this hypothetical of anticompetitive effects. Perhaps this is where the balancing criterion would operate to include antitrust considerations and to disallow the taking. Again, it would place the kind of broad policy responsibility on the courts that they are likely to wish to avoid, and with good reason.

197. See note 178 *supra*.

198. *Supra* note 86, at 238.

199. See, *e.g.*, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1978, Table 771.

broader problems with his assumptions remain to be noted.

First, it may not be tenable to assume that true social utility is accurately or adequately reflected by willingness to pay and market value. Willingness to pay is based on ability to pay, which is, obviously, a function of income distribution. Though a poor person may get as much satisfaction out of a particular piece of property as a rich person, and may even produce as much with it, if ability to pay determines allocation the rich person will get the property over the poor person. This problem with market allocation would be exacerbated by giving eminent domain to prospective buyers. No longer could the less wealthy party ensure continued enjoyment of property simply by refusing to sell. If the transfer would raise market value, sale could be compelled. Market value, moreover, may be an even poorer indicator of utility than effective demand. As already noted, it can be manipulated by large economic organizations, and it is inherently uncertain, amorphous, and difficult to measure. The rub is that it is also heavily influenced by ability to pay. Property values in poor neighborhoods will ordinarily be low, because poor people cannot afford to pay a great deal for property. Should wealthier people wish to purchase property there, they could pay more than the residents, and the "market value" of the properties would be higher after the property transfer than before. Under the right set of facts (*e.g.*, a nondiscriminatory, nonexclusionary condominium association whose only practicable avenue of expansion is into the poorer neighborhood), Berger's scheme might grant the wealthier group the added advantage of eminent domain. To be sure, the poorer owners might sell in any event, but under this proposed scheme they would have even less choice and less bargaining power in the matter.<sup>200</sup>

Second, while ostensibly emphasizing the public nature of benefits provided by many takings, Berger's scheme in effect considers only private (market) forms of benefit. Sax raises a parallel problem in considering which governmental restraints on prop-

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200. A problem afflicting all takings in poorer neighborhoods should also be noted here. Poorer neighborhoods generally contain a much higher proportion of renters than wealthier areas. Not only are renters usually not compensated for inconvenience, however, but the poorer they are the harder it will often be for them to find affordable replacement housing, particularly in reasonable proximity to work, services, and so forth.

erty use should be treated as takings and which ones as regulations.<sup>201</sup> Noting that courts ordinarily ask "whether, and to what extent, the owner's ability to profit from the piece of property in question, *considered by itself*, has been impaired,"<sup>202</sup> he proposes that courts should "recognize diffusely-held claims [primarily rights to be free of spillover effects from private uses of other property] as public rights, entitled to equal consideration in legislative or judicial resolution of conflicting claims to the common resource base."<sup>203</sup> Relying in part on the same assumption that underlies Berger's argument—that market transactions in private rights often fail to maximize net social utility—Sax comes to what is in some ways a contrary conclusion. The taking power should be exercised less, not more. Instead, regulations which in the past have sometimes been held to be "takings" should be recast as balances of public and private rights not requiring compensation where nonspillover uses are economically possible. The decisive difference between Berger's and Sax's analyses is Berger's willingness to make market value the sole indicator of the social utility of any use of property. Sax assumes, probably more realistically, that spillover costs can often exceed the benefits of market-maximizing uses.<sup>204</sup>

Third, Berger may be seriously overestimating the problems posed by monopoly and hold-out property ownership. To pursue hold-out behavior, a property owner must be aware of a buyer's plan to assemble a number of properties. Buyers of course know that if sellers are aware of assembly plans they may hold out for more than they otherwise would and for more than the property is worth to them. Therefore, rational buyers generally pursue strategies aimed at avoiding such prices. Two that are well developed are the use of middlemen and option-to-purchase contracts.

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201. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971).

202. *Id.* at 151 (emphasis in original).

203. *Id.* at 159.

204. Spillover effects of course can themselves be seen as takings depending on the operative definition of property rights. Much of what the courts and legislatures did to foster development during the early period of eminent domain in America was to define certain spillovers of industrialization (consequential damages generally) not to be takings and to minimize compensation for other costs by presumptively setting damages. See Horwitz, *supra* note 49; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

Middlemen are regularly employed to conceal the fact that the same buyer is behind a number of offers. According to Munch's evidence, they frequently are quite successful.<sup>205</sup> Options contracts may also be used to hold each seller to a fair proportion of the available economic rent. Where properties are fairly homogeneous, the option contract may even provide that if any other seller obtains a higher price, the first seller will receive an equalizing increment.

It may safely be speculated that the vast majority of property assemblies have been accomplished by these and similar market means.<sup>206</sup> Though it is impossible to estimate on a macro level whether significant inefficiencies (*i.e.*, losses in productivity) have been caused by the hold-out or monopoly property-holding Berger seeks to avoid, evidence for the proposition that eminent domain would improve on them is very weak. Eminent domain imposes its own distinct costs on property transfers, and effective means of assembly on the market are available. Therefore, it seems very unlikely that expanded use of the power will lead to any net efficiencies in resource use. It might, however, redistribute benefits from some segments of society to others.

#### D. *Eminent Domain in the Future: The Power to Take as a Political Commodity*

Berger's naively sweeping proposal to expand the availability of eminent domain is enlightening in part because it manifests the kinds of biases inherent in any proposal to structure or restructure property rights.<sup>207</sup> However, to note that his proposed scheme probably would not contribute to economic efficiency and

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205. F. Munch, *supra* note 175, at 25-33.

206. *Id.* See also Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

207. See also Dales, *Beyond the Marketplace*, 1975 CANADIAN J. ECON. 8 (1975) (arguing generally that welfare performance is inherently a function of the structure of rights); Michelman, *supra* note 204, at 1204. It should be noted that this approach implicitly rejects Coase's theorem that the placement of entitlements has no effect on efficiency—or at least finds it irrelevant to this type of question. Coase, *The Problem of Social Cost*, 33 J. LAW AND ECON. 1 (1960). The problem is not so much that the assumptions of zero transaction costs and perfect information are violated—although they are—but that the political-judicial system can be used to *alter* entitlements in midstream, thereby effecting substantial redistributions.

that its benefits and costs would not be evenly distributed is not to dispose of the policy problem. Current eminent domain policies undoubtedly involve social biases and the inevitable new ones will too. Yet we understand rather little about the actual content of biases in current policies or the implications of alternative policies. Which of the alternative standards discussed in the preceding section, for example, would be the more desirable? The question breaks down into two problems. The first is to ascertain the concrete social consequences of each alternative. The second is to understand that any policy actually adopted will reflect the relative political effectiveness of parties who stand to benefit and lose from it.

With regard to the issue of actual consequences, a further lesson of Berger's proposal is that few of the answers can be derived from abstract hypothesizing. Stronger conclusions may be possible in other fields, like torts, where the discussants have a richer personal understanding of the consequences of alternative policies.<sup>208</sup> With respect to eminent domain, an extensive, rather elaborately argued scheme like Berger's can be largely dismantled with one, relatively modest empirical study.<sup>209</sup> While that study does indicate regressive income effects for an existing eminent domain policy however, it tells us little about the broader purposes and possible effects of the policy.

Conceptually, it seems clear that the increasing use of eminent domain detailed in the previous section is inconsistent with stable, relatively inviolable property rights. Several decades ago, Schumpeter mused generally about a continuing "evaporation" of property rights.<sup>210</sup> Where might they be evaporating to? Focusing historically on the question, Horwitz finds eminent domain the most potent instrument used in redistributing power from what he terms the "old" to the "new" property during the antebellum period.<sup>211</sup> The old property was located in the property holders of a settled, largely agrarian economy, the new property in the capitalists of an emerging, largely industrial economy. The spillovers from the new property and the need to concentrate increasing

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208. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

209. F. Munch, *supra* note 175.

210. J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 141 (1942).

211. Horwitz, *supra* note 49.

quantities of resources in single industrial uses were inconsistent with the agrarian principle of undisturbed enjoyment of property.<sup>212</sup> The expanded use of eminent domain, the elimination of many previously available remedies for property damage, and the diminished compensation provisions which accompanied them, all inured to the benefit of the new property over the old. The process may be portrayed as one of subsidization in which the currency was legal rights. By slowly eroding the legal rights of the old property and augmenting those of the new property, the legislatures and courts lowered the costs of economic development for the emerging bourgeoisie and imposed many of these costs on the old agrarian order.<sup>213</sup>

Can the process be seen to have continued in the postbellum period? Yes, although its thrust probably has changed somewhat. In an effort to analyze the massive growth—the so-called quiet revolution—in land use planning during the past half-century, Geisler argues that the process is a result, not of the emergence of a new land ethic, but of the continuing development of American capitalism.<sup>214</sup> From the increasingly large-scale, but still competitive capitalism of the late eighteenth century has emerged a “dual economy” composed of a competitive but subordinate sector and a superordinate, essentially noncompetitive “monopoly” sector.<sup>215</sup>

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212. At least one court was very explicit about this problem:

[T]he general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as to not injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization.

Losee v. Buchanan, 51 N.Y. 476, 484 (1873).

213. Horwitz concludes that “by the time of the Civil War American courts had created a variety of legal doctrines whose primary effect was to force those injured by economic activities to bear the cost of those improvements.” Horwitz, *supra* note 49, at 278. It should be noted that Horwitz’s analysis is also subject to the methodological problems noted above regarding Berger. It is difficult to infer social effects from legal policies. Horwitz, however, has taken the trouble to specify a theoretical framework and to place the legal decisions in their historical context.

214. Geisler, *A Sociological Interpretation of Land Use Planning in a Capitalist Society* (1979) (unpublished dissertation, Department of Rural Sociology, University of Wisconsin, Madison).

215. For expositions of the dual economy thesis, see J. O’CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973); E. MANDEL, *LATE CAPITALISM* (rev. ed. 1975).

While the dual economy theory is too involved either to present fully or to critique here, Geisler's essential thesis is that the quiet revolution is government's response to the expansive needs for planning and resource coordination of the monopoly sector. It is "control on the cheap," since control is effectuated without ownership. The process of control outstripping ownership, which initially occurred internal to business organizations, is now being reproduced externally with the assistance of the state.

Geisler argues that the quiet revolution subsidizes the monopoly sector in three general ways. First, by limiting current uses it subsidizes future production and prevents disruptive resource exhaustion. Second, it socializes mounting environmental overhead costs. In order to prevent total social costs from growing too high, certain resource owners are kept from maximizing the profitability of their resources while others already doing so are allowed to continue. Third, the quiet revolution effects a new distribution of wealth tied to control over property rather than to its exclusive ownership. In legal terms, others are given rights to control property without any transfer of possession or ownership. Owners are thus deprived of some of their "property," control and use prerogatives, without being paid for it.<sup>216</sup>

A proposal like Berger's provides a striking complement to the process Geisler portrays. Hooked in tandem to the expanded land use control system, the expanded eminent domain scheme would help assure orderly resource availability at very predictable prices. Limiting compensation to a function of externally determined market value would prevent resource owners from holding out for high prices. At the same time, because they would be subject to takings of any property not developed to its highest market value, owners would be under continuous pressures to sell or develop. But that development would have to occur within land use control schemes already in place. As control of resources has become increasingly centralized in government and monopoly sector corporations, their respective planning apparatuses have become more comprehensive and more integrated. They increas-

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216. There are of course alternative interpretations, like Sax's argument that such correlative rights have always existed and that the quiet revolution has only been necessary because of the intensified spillover problems coming with increasing industrialization and resource scarcity, which cannot be ruled out on existing evidence.

ingly collaborate in determining the broad policies under which resources will be developed. Those policies in turn are responded to by regional and local planning agencies, which increasingly identify their interests with those of major capital-controlling corporations and federal agencies.

The role of eminent domain in the broad scheme just postulated, though narrow, could be quite consequential. Providing eminent domain in all hold-out situations would eliminate many significant cost uncertainties and force property transfers at externally determined prices. The prospect of compulsory transfer would prompt owners to continually seek to sell under favorable market conditions. And it seems likely that predictable prices and the possibility of compelling sale will grow in importance as land-based resources become more scarce and monopoly rents more possible.

Even in a less grandiose form, eminent domain will probably become increasingly important to continued economic expansion (which is generally believed necessary to the survival of the economy). The contemporary economy is heavily built up with plant and capital of all kinds. Possibilities for internal geographic expansion are declining rapidly and there is strong international competition for every external market. Therefore, in order to maintain returns on investment and facilitate capital expansion, it is becoming increasingly important to replace still viable but outmoded economic components with new, usually more capital-intensive ones. *Courtesy Sandwich*, where eminent domain was used to excise a thriving business district and replace it with the World Trade Center, may be the prototype of the most important type of taking in the current era.<sup>217</sup> Not only does the sheer scale of today's projects make market assembly difficult, but major economic forces with opposing interests, like the real estate groups in *Courtesy Sandwich*, will often commit significant economic and political resources to stopping them. Such a problem seems to be facing a new mode of coal transport, slurry pipelines. Railroads,

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217. See *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963). *Courtesy Sandwich* also suggests, of course, that to some extent the goals Berger would generalize are already being implemented through eminent domain. The only difference is that project sponsors still have to persuade a governmental authority of the project's merits.



which would lose business and profits to the pipelines, are refusing to sell rights-of-way to slurry developers. The pipeline developers are accordingly seeking both state and federal eminent domain powers, and may soon become the first major private interest directly to receive federal eminent domain.<sup>218</sup>

The very fact that eminent domain remains a government-granted prerogative is critical, however. To be effectuated any proposal for a policy change in the use of a governmental power must make its way through the apparatus of the polity. As has been noted, different policies will have differentially biased social consequences, and it will be in the interests of affected constituents to support or oppose policies depending on their particular prospects. At present—in part due to an emphasis on studies like Berger's which, while ostensibly neutral and efficiency-oriented, in fact obscure major differential impacts—we have only the most general idea of the concrete consequences of different condemnation policies. It does seem clear that a scheme like Berger's would contribute to an increasingly fluid set of property relationships and increasingly centralized resource control. It would in fact accomplish a major transfer of entitlements to development and expansion-oriented interests. Current owners would lose the right to keep land as it is, and prospective buyers would gain the right to develop it. The alternative proposal for a stricter public benefit test, on the other hand, would probably inhibit that transfer process somewhat. It would also allow more variety in the structure of land use and probably would facilitate greater continuity. Nonetheless, as noted above, its ability to influence substantive outcomes is subject to the general limitations of the judicial function.

The actual determination of future policy will doubtless reflect the relative political powers and efforts of the groups standing to benefit or lose. A general proposal to expand eminent domain, for instance, seems unlikely to be implemented any time soon because it would face stiff opposition from many property holders seeing their rights and security in property threatened.

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218. See U.S. COMPTROLLER GENERAL, *COAL SLURRY PIPELINES: PROGRESS AND PROBLEMS FOR NEW ONES* (April 20, 1979). Coal slurries transport pulverized coal, suspended in water, through underground pipelines. One of the obvious ironies here is that many of the railroads involved originally obtained their rights-of-way through eminent domain.

On the other hand, more moderate extensions toward the same end through intermittent authorization of condemnations may well be accomplished without significant opposition—largely because of our present failure to ascertain their cumulative consequences.

To some degree, the lack of a broad political understanding of eminent domain reflects the fact that it is an amorphous, elusive phenomenon. Takings occur sporadically and for all sorts of purposes. Both policy alternatives discussed above focused primarily on how easy it should be to use eminent domain, not on what it should be used for. The latter has clearly evolved as a political question, and no general answers to it would be meaningful at this juncture.<sup>219</sup> Yet the question of how easy it should be to exercise eminent domain, because it in practice entails shifts in property entitlements, may be more fundamental in some ways, and must also be subject to political consideration. As the critique of Berger's proposal demonstrates, the question cannot be analyzed purely in philosophical or logical terms. To attempt to do so is to obscure the critical issue of differential social effects. The consequences of alternative policies are not "neutral" and the assumptions used in supposedly neutral "efficiency" analysis largely predispose its outcome.<sup>220</sup>

To contribute meaningfully to policymaking in the area, ana-

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219. As has been suggested, while ostensibly ruling on whether the use of eminent domain was "public" the courts appear occasionally to have been ruling on the political-philosophical legitimacy of the taking in question. Just how political the question is may be indicated by the fact that while the courts generally are willing to allow takings to provide roads for individual landlocked owners, they never would have allowed them for land redistribution from wealthy to poor, even though such takings could be justified on similar grounds as the urban redevelopment takings. That kind of purpose, use-by-the-public or not, would simply be too threatening to the established economic order.

By comparison, it might be noted that several Latin American countries which also espouse public purpose requirements have in the past amended their constitutions to allow for the "social reform" of land redistribution. A. LOWENFELD, *EXPROPRIATION IN THE AMERICAS: A COMPARATIVE LAW STUDY* 314 (1971) (Chile, Peru, and Venezuela). It should also be noted that the more subtle changes in entitlements discussed above accomplish redistribution similar in kind—though usually in the opposite direction—and perhaps even similar in degree.

220. See generally, Samuels, *Normative Premises in Regulatory Theory*, 1 J. POST KEYNESIAN ECON. 100 (1978); Schmid, *Nonmarket Values and Efficiency of Public Investments in Water Resources*, 83 AMER. ECON. REV. 57 (1967).

lysts will have to delve much farther into the terrain of concrete consequences. Because eminent domain is both such a sporadic and such an ubiquitous phenomenon, it is peculiarly difficult to study empirically. No single set of takings, for instance, can be "sampled" to somehow derive the effects of alternative policies. Consequences will only become manifest over relatively long time periods and across numerous instances. The inquiry therefore demands an unusual synthesis and its hypotheses will be more ambiguous than those in some other areas. Yet, because the questions involved reach fundamentally to the relationship between the structure of property rights and the nature of the social order they support, they are worth pursuing. Given the more substantial understanding which should result, impacted parties might actually be able to pursue their interests in the matter with the political vigor they deserve.