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Articles

The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack

WILLIAM EPSTEIN†

I. Introduction

In *Poletown Neighborhood Council v. City of Detroit*,¹ the Supreme Court of Michigan approved a plan by Detroit to acquire by condemnation a large tract of land, on which was located a long established residential and commercial neighborhood, in order to convey it to the General Motors Corporation as a site for the construction of an assembly plant. When first announced in 1981, the decision provoked a mild ripple of national protest.² Most people, however, noting that the city and the automobile industry were suffering at the depths of a great recession, begrudgingly accepted Detroit's plan as but one further step in governmental attempts to revive industry and employment.³ As this Article will show, the public's initial misgivings were well founded. In fact, the *Poletown* decision is unprecedented in American law and represents a significant encroachment on constitutional rights. Specifically, applying the doctrine

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

2. The national protestors were, among others, Ralph Nader, who sent staff to institute protests, and Stuart Mott, the well-known philanthropist who gave donations to the Poletown Neighborhood Council. Local opponents included, of course, the Poletown Neighborhood Council. Blonston, *Poletown: The Profits, The Loss*, Detroit Free Press, Nov. 22, 1981, Magazine, at 10-11.

3. Among those who supported this plan locally were the United Auto Workers, the Archdiocese of Detroit, and Coleman A. Young, Mayor of Detroit. On the national scene, both Carter and Reagan evidenced support. *Id.* at 8.

of eminent domain⁴ to the factual situation presented in *Poletown* exceeded the public purpose limitation on the power of eminent domain. Although this limitation has been liberally construed in recent decades, no decision before *Poletown* had sanctioned this degree of governmental assistance to private enterprise.⁵ The purpose of this Article is to explain the nature of the public purpose barrier to governmental takings as it relates to direct governmental aid to private business and to determine its position in the American scheme of liberty.

II. The *Poletown* Decision

The *Poletown Neighborhood Council v. City of Detroit*⁶ decision is the proper place to begin examining the circumstances under which the power of eminent domain can and cannot be used to aid private enterprise. In 1980, when the plan in question was first proposed, Detroit was in the grips of a badly deteriorating economy.⁷ The high cost of doing business in Michigan

4. Eminent domain has been defined as

the right or power to take private property for public use. More precisely, it is the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property for such use on paying the owner a due compensation to be ascertained according to law.

29A C.J.S. *Eminent Domain* § 1 (1965). In *Woodmere Cemetery v. Roulo*, 104 Mich. 595, 62 N.W. 1010 (1895), the court stated that eminent domain is "the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." *Id.* at 599, 62 N.W. at 1011 (quoting T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 643 (6th ed. 1890)).

5. Prior to *Poletown*, the most extreme example of private assistance arising from the exercise of eminent domain was seen in the urban renewal cases, where blighted areas were condemned, the slums cleared, and the land reconveyed to private developers. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954). In these cases, however, it was considered that the public benefit was gained when the blighted buildings were razed, and thus the subsequent reconveyance was merely an indirect private benefit.

6. 410 Mich. 616, 304 N.W.2d 455 (1981).

7. *Id.* at 647, 304 N.W.2d at 465 (Ryan, J., dissenting). Unemployment had reached crisis proportions throughout the State of Michigan (14.2%), but particularly in the City of Detroit (18%). Among Detroit's black citizens unemployment was almost 30%. Many manufacturers were driven out of the state due to high business costs. The life blood of Detroit, the auto industry, was floundering with all four of the leading corporations reporting losses due to overseas competition. *Id.* (Ryan, J., dissenting).

had caused many businesses to flee to sunbelt states.⁸ Unemployment in Detroit stood at eighteen percent.⁹ Chrysler Corporation was surviving thanks only to a federally insured loan.¹⁰ The Ford Motor Company, the American Motors Corporation, and the General Motors Corporation all continued to sustain heavy losses.¹¹ Moreover, in order to combat competition from foreign manufacturers and compensate for the greatly increased price of gasoline, the automobile manufacturers felt compelled to plan for a new generation of smaller, cheaper, more efficient cars.¹² Fearing that its old Cadillac and Fisher Body plant in Detroit could not be renovated in conformity with modern production technology, General Motors planned to close these old facilities and to build a new plant elsewhere.¹³ This was the bleak context in which General Motors made its first overtures to the city about finding an appropriate new site in Detroit. Only one site met all of General Motors' needs, and this 465 acre area was rapidly approved for acquisition, redevelopment, and transfer by the city.¹⁴ The cost to the public of acquiring the land and preparing it for redevelopment was to be over \$200 million.¹⁵ General Motors, however, was to pay the city little more than \$8 million upon transfer of title.¹⁶ Moreover, the company insisted that Detroit move rapidly.¹⁷ For many months city officials worked with great speed to meet the company's de-

8. *Id.* (Ryan, J., dissenting).

9. *Id.* (Ryan, J., dissenting).

10. *See id.* (Ryan, J., dissenting). "It is appropriate to take judicial notice of the fact that the view is widely held that the Chrysler Corporation . . . is 'on the ropes'" *Id.* (Ryan, J., dissenting).

11. Each reported the largest losses in its history. *Id.* (Ryan, J., dissenting).

12. *Id.* (Ryan, J., dissenting).

13. *Id.* at 649, 304 N.W.2d at 466 (Ryan, J., dissenting). In explaining General Motors' motivation, Justice Ryan pointed to the inability of the old plants to meet more stringent emission control standards and cost and size problems presented by trying to convert an old plant to a spacious new one. *Id.* (Ryan, J., dissenting) (citing City of Detroit Community & Economic Development Department, Draft Environmental Impact Statement: Central Industrial Park, The Cities of Detroit and Hamtramck, Michigan (Oct. 15, 1980), p. II-4).

14. *Poletown*, 410 Mich. at 652-56, 304 N.W.2d at 467-69 (Ryan, J., dissenting).

15. *Id.* at 656, 304 N.W.2d at 469 (Ryan, J., dissenting). The public sector costs were projected to be \$201,450,000. *Id.* at 656 n.7, 304 N.W.2d at 469 n.7 (Ryan, J., dissenting).

16. *Id.* at 656, 304 N.W.2d at 469 (Ryan, J., dissenting).

17. *Id.* at 652-56, 304 N.W.2d at 468-69 (Ryan, J., dissenting).

mands.¹⁸ The use of Michigan's "quick-take" condemnation statute¹⁹ permitted a swift beginning to the taking process. Before long, the property owners in the target area, including the mostly elderly and largely Polish-American residents of the neighborhood known as Poletown,²⁰ found themselves in the shadow of the wrecker's iron ball. In the face of this fast moving threat to their homes and businesses, the property owners sued to enjoin the plan.²¹

Unfortunately for the property owners, the Michigan judiciary moved as quickly to approve the plan as the executive and legislative authorities of Detroit had moved to commence action

18. *Id.* at 652-56, 304 N.W.2d at 467-69 (Ryan, J., dissenting).

19. MICH. COMP. LAWS ANN. § 213.51-.77 (West Supp. 1982-1983). This statute sets out procedures for public and private agencies to acquire property through eminent domain. Before the negotiations for purchase, the condemning agency has to determine "just compensation." The necessity of the taking, as established by the agency, is binding on the courts unless there is evidence of "fraud" or "abuse of discretion." *Id.*

The *Poletown* dissenters characterized the statute as "quick take," which has been generally defined as allowing the acquisition of the affected private property prior to an ultimate adjudication for just compensation. A meritorious argument has been made that a statute which permits transfer of title and possession prior to a final determination of ultimate rights constitutes seizure of private property without due process of law. Ackerman & Yanich, *Eminent Domain: The Constitutionality of Condemnation Quick-Take Statutes*, 60 U. DET. J. URB. L. 1, 2 (1982).

[U]nlike a debtor who can obtain damages for wrongful attachment, a Michigan 'quick-take' condemnee has no statutory remedy for damages incurred as a result of a grossly inadequate deposit of 'estimated compensation.' Although the Michigan 'quick-take' statute requires that the offer of 'estimated compensation' be made in 'good faith,' judicial reluctance to find that any offer — no matter how inadequate — was not made in good faith has effectively foreclosed the existence of a remedy.

Id. at 17 (footnotes omitted).

20. *Poletown*, 410 Mich. at 658, 304 N.W.2d at 470 (Ryan, J., dissenting).

21. Following a 10-day non-jury trial, the Wayne County Circuit Court approved the exercise of eminent domain. As their second claim, the plaintiffs had challenged the project under a state environmental protection statute. The trial court also dismissed this claim, stating that the statute did not extend to cultural, social, and historical institutions. *Poletown Neighborhood Council v. City of Detroit*, No. 80-039-426 CZ, slip op. at 21 (Wayne County Cir. Ct. Dec. 8, 1980). Plaintiffs appealed to the court of appeals on December 12, 1980, and applied to the Supreme Court of Michigan for a leave to appeal prior to decision by the court of appeals on December 15, 1980. The Supreme Court of Michigan granted the motion for immediate consideration and bypass, and affirmed the trial court's decision on both claims on February 13, 1981. In a final challenge to the project, several *Poletown* residents filed an unsuccessful environmental action in federal district court under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1977 & Supp. IV 1983). See *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

upon it. Considering the speed at which it was issued, it is not surprising that the per curiam majority opinion of the Supreme Court of Michigan is brief, without justification, and lacking authority in support of this unprecedented decision.²² The core of the decision is perfunctory: "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community."²³ The court decided that General Motors' private gain was merely incidental to the overall public benefit of creating further employment.²⁴ In structuring its decision on a public purpose, the court utilized a broad public benefit standard which had been established through legislative interpretations and had been employed by prior Michigan case law; notably, slum clearance cases.²⁵

However, in strongly worded and detailed dissenting opinions, Justices Fitzgerald and Ryan articulated the issues and problems that they saw in the Poletown taking. Justice Fitzgerald argued that the legislative determination of public benefit should have been reviewed.²⁶ More importantly, he believed the taking was unconstitutional since it was for a private use with only an incidental public benefit,²⁷ a diametrically opposed conclusion from that of the majority.

Justice Ryan concurred with Justice Fitzgerald in his criticism of the majority's deference to the legislative determination.²⁸ He also took issue with the majority's finding of public necessity and their unwillingness to scrutinize what degree of control the public would have over General Motors to insure a

22. The court relied on the policy of deferring to the legislature on declarations of the public interest in attempting to justify its conclusion. *Poletown*, 410 Mich. at 633, 304 N.W.2d at 459.

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

24. *Id.*

25. See *In re Slum Clearance*, 331 Mich. 714, 50 N.W.2d 340 (1951); *General Dev. Corp. v. City of Detroit*, 322 Mich. 495, 33 N.W.2d 919 (1948); *In re Jeffries Homes Hous. Project*, 306 Mich. 638, 11 N.W.2d 272 (1943); *In re Brewster St. Hous. Site*, 291 Mich. 313, 289 N.W.2d 493 (1939).

26. *Poletown*, 410 Mich. at 638-39, 304 N.W.2d at 461-62 (Fitzgerald, J., dissenting).

27. *Id.* at 640-41, 304 N.W.2d at 462 (Fitzgerald, J., dissenting).

28. *Id.* at 667-69, 304 N.W.2d at 475 (Ryan, J., dissenting). Justice Ryan points out that whether a taking is public or private is a judicial determination, a position supported by Michigan case law. *Id.* (Ryan, J., dissenting).

public benefit.²⁹ Justice Ryan noted that the necessity had been created because of the specifications set forth by General Motors Corporation to increase their profit margin; not to eliminate regional unemployment.³⁰ Therefore, any economic benefit to the public would stem from the private use of the property by General Motors. Justice Ryan also emphasized that General Motors is responsible only to its stockholders, not the public and that the level of employment at the Poletown plant will be determined by private corporate managers, negating any public leverage on the internal operations of General Motors.³¹

The lack of authority cited by the court in support of the *Poletown* decision is not surprising, as the decision is contrary to a long, previously unbroken tradition of American law forbidding condemnation in direct aid of private enterprise³² except under certain circumstances not present in *Poletown*. To understand why *Poletown* is bad law, the general rule relating to the public use barrier and its exceptions must first be reviewed.

A. *The General Rule and the Exceptions*

The fifth amendment to the Constitution of the United States provides the basic foundation from which the public purpose barrier to the power of eminent domain has evolved: “[No person shall] be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*”³³ Moreover, with minor variations, the public purpose barrier is also part of the constitutional law of all of the states.³⁴

The general rule that condemnation cannot be used in direct aid of private enterprise is well illustrated in the recent case

29. *Id.* at 667-81, 304 N.W.2d at 474-80 (Ryan, J., dissenting).

30. *Id.* at 676, 304 N.W.2d at 478 (Ryan, J., dissenting).

31. *Id.* at 679, 304 N.W.2d at 480 (Ryan, J., dissenting).

32. See *infra* note 42 and accompanying text.

33. U.S. CONST. amend. V (emphasis added).

34. Article I, § 7(a) of the New York Constitution provides in relevant part: “Private property shall not be taken for *public use* without just compensation” N.Y. CONST. art. I, § 7(a) (emphasis added).

Some states’ constitutions have minor variations. See, e.g., CAL. CONST. art. I, § 19, which provides in relevant part the following: “Private property may be taken or damaged for *public use* only when just compensation . . . has first been paid to . . . the owner.” *Id.* (emphasis added).

of *Karesh v. City Council of Charleston*.³⁵ There, Charleston proposed a joint undertaking with a private corporation involving the redevelopment of a city block on which many active businesses were located.³⁶ Under the plan, the corporation would purchase a portion of the block and construct a hotel, a major department store, and a restaurant.³⁷ The city would then acquire the remaining portions of the block by purchase or condemnation and permit the corporation to construct a 500 car parking garage and a convention center on the land.³⁸ The garage and the convention center were to be leased on a long term basis to the corporation and operated as adjuncts to the hotel.³⁹ Both were to contain retail shops which the corporation would sublet to new merchants, rather than to those merchants displaced by the project.⁴⁰ Based upon these facts, the Supreme Court of South Carolina ruled that the plan was unconstitutional:

We conclude that the proposed undertaking by the City of Charleston and Holywell Corporation fails constitutionally because it envisions the utilization of the power of eminent domain for a taking of private property which will not be devoted to a public use. However attractive the proposed complex, however desirable the project from a municipal planning viewpoint, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases.⁴¹

A long line of cases from across the country stretching well back into the nineteenth century leaves no doubt that the South Carolina court correctly applied the general rule against direct governmental aid to private enterprise through the exercise of eminent domain.⁴²

35. 271 S.C. 339, 247 S.E.2d 342 (1978).

36. *Id.* at 341, 247 S.E.2d at 343.

37. *Id.*

38. *Id.*

39. *Id.* at 343, 247 S.E.2d at 344. The lease was to pay for and secure revenue bonds, which the city planned to issue. The bonds would pay for the cost of constructing the convention center and parking facility. *Id.* at 341, 247 S.E.2d at 344.

40. *Id.* at 343, 247 S.E.2d at 344-45.

41. *Id.* at 344-45, 247 S.E.2d at 345.

42. *See, e.g., City of Gary v. Much*, 94 N.E. 583 (Ind. App. 1911) (declaring as unconstitutional a plan to vacate a city street in order to give that land to a private com-

While the general rule against such direct governmental aid to private enterprise has remained unchanged throughout American history, there has always been controversy as to which circumstances constituted legitimate exceptions to the rule.⁴³ The great caution with which courts have declared exceptions, and their readiness to return to the general rule when exceptional circumstances were not presented, indicate how deeply this general rule is ingrained in traditional constitutional principles. Traditionally, exceptions to the rule have been declared in cases where the private enterprise aided by condemnation is indispensable to the economy of the entire community and direct governmental assistance is indispensable to that enterprise.⁴⁴ This exception will be referred to as the "indispensability exception." Recently, however, another exception has evolved. This exception holds that private business can benefit indirectly as a result of condemnation made for a different, legitimate public purpose.⁴⁵ This exception will be referred to as the "indirect benefit exception." The legitimate public purpose most often found in indirect benefit exception cases is slum clearance. A review of some of the decisions throughout history which have been deemed exceptions to the general rule will show that the *Poletown* decision is truly a drastic departure.

pany); Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957) (advising that condemnation for the benefit of private industrial development is unconstitutional); *Lowell v. Boston*, 111 Mass. 454 (1873) (declaring as unconstitutional a plan to rebuild private buildings after a fire).

43. The conflict in the earlier eminent domain cases centered on the interpretation of "public use." The narrow reading, where the public must be guaranteed access to the property acquired, eventually gave way to the broader interpretation of a tangible public benefit, or mere public advantage, as in public utilities and works. Condemnation for the benefit of private enterprise was seldom at issue. Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 413-14 (1983). In the 1940's and 1950's, courts were faced with determining the constitutionality of the most notable exception to the public use requirement: urban renewal. Most courts found slum clearance to be a valid public purpose. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936). There were, however, some decisions holding urban renewal by the statutory power of eminent domain unconstitutional. See *Adams v. Hous. Auth.*, 60 So. 2d 663 (Fla. 1952); *Housing Auth. of Atlanta v. Johnson*, 209 Ga. 560, 74 S.E.2d 891 (1953); *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956). Since *Berman*, most of these latter decisions are no longer followed.

44. See *infra* notes 46-89 and accompanying text.

45. See *infra* notes 90-109 and accompanying text.

B. *The Indispensability Exception*

The types of private enterprises which have at times been held to be indispensable to the entire community and have, therefore, warranted departures from the general rule under the indispensability exception have been largely limited to railroads, mills, irrigation projects, drainage projects, and port facilities.⁴⁶ The cases reveal that the standard used by courts in deciding whether an enterprise and direct governmental aid to it are indispensable is very high.⁴⁷

The indispensability exception is well illustrated in the landmark Michigan case of *People ex rel. Detroit & Howell Railroad v. Township Board of Salem*,⁴⁸ decided in 1870. In that case, several townships were authorized to pledge their credit to aid in the construction of a private railroad.⁴⁹ Although the case concerned the power of taxation, the court, as have later courts,⁵⁰ saw the pivotal issue to be one which these kinds of taxation controversies have in common with condemnation controversies.⁵¹ The court in its decision noted that direct governmental assistance to railroads was originally considered an ex-

46. See, e.g., *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918) (irrigation project); *Howard Mills Co. v. Schwartz Land & Coal Co.*, 77 Kan. 599, 95 P. 559 (1908) (mills); *Marchant v. Mayor of Baltimore*, 146 Md. 513, 126 A. 884 (1924) (harbor development); *People v. Salem*, 20 Mich. 452 (1870) (railroads); *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, *appeal dismissed*, 375 U.S. 78 (1963) (port facility); *Sublett v. City of Tulsa*, 405 P.2d 185 (Okla. 1965) (port facility).

47. An example is found in *Howard Mills Co. v. Schwartz Lumber & Coal Co.*, 77 Kan. 599, 95 P. 559 (1908). The court held that the mill's business activity added to the general prosperity but that this public benefit was not enough. To invoke the right of eminent domain the business "must be one in which the public has an exceptional and peculiar interest." *Id.* at 609, 95 P. at 563.

48. 20 Mich. 452 (1870).

49. *Id.* at 470.

50. See, e.g., *In re Legislature's Request for an Opinion on the Constitutionality of Chapter 2 of Amendatory Act No. 100 of the Public Acts of 1970 (Enrolled Senate Bill No. 1082)*, 384 Mich. 82, 180 N.W.2d 265 (1970) (upholding as constitutional, under the public purpose standard of *Salem*, the State School Aid Act authorizing purchase of services of lay teachers to teach secular subjects in non-public schools); *Michigan Sugar Co. v. Auditor Gen.*, 124 Mich. 674, 83 N.W. 625 (1900) (utilizing the standard of *Salem*, and holding unconstitutional, as authorizing tax for private purpose, payment of bounties to state sugar manufacturers). See also *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether [the] power [of eminent domain] is being exercised for a public purpose is an extremely narrow one.").

51. *People ex rel. Detroit & Howell R.R. v. Township Bd. of Salem*, 20 Mich. at 474.

ception to the general rule because such assistance had been critical to the growth of railroads which, much like public highways, had been critical to overall community development.⁵² The court went on to note, however, that while highways had remained a purely public concern, railroads had become largely conventional private enterprises: “[Railroads] are not, when in private hands, the *people's highways*; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated.”⁵³ Direct governmental aid to railroads was, therefore, no longer indispensable to the railroads or the community.⁵⁴ The forces of private enterprise would henceforth guarantee the growth of rail service:

It was at one time in this State deemed true policy that the government should supply railroad facilities to the traveling and commercial public, and while that policy prevailed, the right of taxation for the purpose was unquestionable. Our policy in that respect has changed; railroads are no longer public works, but private property; individuals and not the State own and control them for their own profit; the public may reap many and large benefits from them, and indeed are expected to do so, but only incidentally, and only as they might reap similar benefits from other modes of investing private capital.⁵⁵

Therefore, the indispensability exception was no longer applicable to the facts of that case.

Since *People ex rel. Detroit & Howell Railroad v. Township Board of Salem*, this strict interpretation of the indispensability exception to the rule against public aid to private enterprise has been repeated in cases across the country. One historical example is found in the Kansas case of *Howard Mills Co. v. Schwartz Lumber & Coal Co.*,⁵⁶ decided in 1908. The mill company sought to condemn neighboring land pursuant to a statute granting the power of eminent domain to public mills. In its opinion, the court acknowledged that public mills had been granted condem-

52. *Id.* at 477.

53. *Id.* at 478.

54. *See id.* at 479.

55. *Id.* at 485.

56. 77 Kan. 599, 95 P. 559 (1908).

nation power by statute as early as 1868.⁵⁷ The type of mill given authority to exercise governmental powers in this first and in later statutes, however, was one which was indispensable to the community: "The language used in the statute applies to and describes the old-fashioned grist mill — a mill operated for the accommodation of the public; a mill upon which the citizens for miles around were compelled to depend for the meal and flour from which their daily bread was made"⁵⁸ The days of the grist mill, however, were rapidly passing into history. Howard Mills Company, in fact, was the new, modern sort of mill, strictly an enterprise operated for private profit: "The mill of the defendant company . . . belongs to an entirely different category. It neither does, nor offers to do, such a grist mill business."⁵⁹ Not being indispensable to the community, the company was denied the power to exercise condemnation pursuant to the public mill statute.⁶⁰

A similar result was reached in *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*,⁶¹ a 1918 case from California involving irrigation. A 1911 statute, recodifying earlier statutes, declared irrigation to be a public necessity and provided that the power of eminent domain could be exercised by private companies in pursuit of the fulfillment of public irrigation needs.⁶² It was conceded by the irrigation company involved there, that the purpose of its proposed condemnation was to irrigate exclusively its own farm lands.⁶³ The court clearly found that the company's proposed use was purely private and therefore fell outside the scope of the statute.⁶⁴ Similar reasoning was demonstrated in *H.A. Bosworth & Son, Inc. v. Tamiola*,⁶⁵ a 1963 case from Connecticut dealing with the related problem of drainage. In this case, a private landowner desired to drain some land for devel-

57. *Id.* at 605, 95 P. at 561.

58. *Id.*

59. *Id.*

60. *Id.* at 609, 95 P. at 562-63.

61. 36 Cal. App. 556, 178 P. 150 (1918).

62. Act of May 1, 1911, ch. 719, 1911 Cal. Stat. 1407. The Act was entitled: "An Act regarding irrigation and declaring the same to be a public use." *Id.*

63. *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. at 559, 178 P. at 151.

64. *Id.* at 559, 178 P. at 151-53.

65. 24 Conn. Supp. 328, 190 A.2d 506 (1963).

opment into lots and streets.⁶⁶ Relying upon an old but still active statute declaring drainage to be a public use for purposes of eminent domain,⁶⁷ the landowner sought to condemn nearby land.⁶⁸ In denying that the landowner had an absolute right under statutory law to condemnation, the court stated the indispensability exception succinctly:

At the present time, the exercise of the right of eminent domain by an owner of land for drainage over adjacent land . . . may no longer be, in every instance, of general benefit or great advantage to the community. In many situations, the right may be sought primarily for private enhancement or gain, with only such incidental general benefit or community advantage as might accrue from any successful private endeavor. Thus it is possible for the . . . Drainage Act to operate constitutionally in one situation and unconstitutionally in another.⁶⁹

Private benefit alone, in other words, could not justify a deviation from the general rule. Time had not erased the old statute from the books. The court, however, relying upon the indispensability exception, severely restricted its scope to those projects greatly benefiting the public as originally contemplated by the legislature.⁷⁰

Cases involving the indispensability of private railroads, mills, irrigation projects, and drainage projects to the public may appear to be matter from the distant past and therefore arguably of little relevance to the problems of modern industry faced by the *Poletown* court. But the rules of law applied by courts in both old and contemporary cases involving port and harbor development demonstrate that the principles applied in the older cases have survived the passage of time intact.

The application of the indispensability exception in a modern case involving port development is illustrated in the

66. *Id.* at 329, 190 A.2d at 507.

67. CONN. GEN. STAT. ANN. § 52-456 (West 1960).

68. *H.A. Bosworth & Son, Inc. v. Tamiola*, 24 Conn. Supp. at 329, 190 A.2d at 507-08.

69. *Id.* at 335, 190 A.2d at 510.

70. *Id.* at 332-33, 190 A.2d at 509. *See also* *Smith v. Cameron*, 106 Or. 1, 210 P. 716 (1922) (public benefits insufficient to show public use of privately owned irrigation ditch).

Oklahoma case of *Sublett v. City of Tulsa*,⁷¹ decided in 1965. Acting in concert with the county port authority, the city planned to acquire land abutting the port of Tulsa by eminent domain, to redevelop that land as an industrial park, and lease the land and facilities on a long-term basis to the authority.⁷² The plan was part of a long-term federal, state, and local effort to improve the Arkansas River for purposes of navigation, hydroelectric power, flood control, and irrigation.⁷³ The court, in approving the plan, was able to cite numerous cases, both older and more recent, from across the country in support of its conclusion that port development was and had traditionally been considered indispensable to community well-being.⁷⁴ Among those cases it relied upon was the 1924 Maryland case of *Marchant v. Mayor of Baltimore*,⁷⁵ which quoted the following rule from *Dillon on Municipal Corporations*,⁷⁶ a widely respected treatise on municipal government: "To minister to the necessities of commerce, by providing fit and proper places in a seaport where ships can be loaded and unloaded with all proper facilities, is a public duty owing by the state, and through it by the municipality which governs and controls the port."⁷⁷ Referring to the city's right to lease the land and facilities following redevelopment, the court again quoted from *Marchant v. Mayor of Baltimore*, which this time quoted from the 1892 New York case of *In re Mayor of New York*:⁷⁸ "The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to common carriers by water, who are themselves engaged in fulfilling their obligations to the general public, — obligations which could not otherwise be properly or ef-

71. 405 P.2d 185 (Okla. 1965).

72. *Id.* at 191.

73. *Id.* at 190-91.

74. *Id.* at 194. The decisions cited by the court in *Sublett* include: *Commissioner v. Ten Eyck*, 76 F.2d 515 (2d Cir. 1935); *Wayland v. Snapp*, 232 Ark. 57, 334 S.W.2d 633 (1960); *Marchant v. Mayor of Baltimore*, 146 Md. 513, 126 A. 884 (1924); *Visina v. Freeman*, 252 Minn. 177, 89 N.W.2d 635 (1958); *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137 (Tex. Civ. App. 1954), *appeal dismissed*, 350 U.S. 804 (1955).

75. 146 Md. 513, 126 A. 884 (1924).

76. J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 269 (5th ed. 1911).

77. *Sublett v. City of Tulsa*, 405 P.2d at 195 (quoting *Marchant v. Mayor of Baltimore*, 146 Md. at 521, 126 A. at 887 (quoting J. DILLON, *supra* note 76)).

78. 135 N.Y. 253, 31 N.E. 1043 (1892).

fectually performed."⁷⁹ Similar results have been reached in numerous, recent cases.⁸⁰

The most important recent case involving the indispensability of port development is the 1963 New York case of *Courtesy Sandwich Shop v. Port of New York Authority*.⁸¹ The importance of this case is that, prior to *Poletown*, many observers considered it to be the most radical case approving condemnation in aid of private business in American law.⁸² A close examination of the opinion, however, reveals that the case is more conservative than is often believed and too far removed from the circumstances present in *Poletown* to serve as precedent for that case. In *Courtesy Sandwich Shop*, the Port Authority proposed to acquire and redevelop a large tract of land in lower Manhattan near the port of New York.⁸³ Among the projects to be developed on the land was an enormous multi-building complex, including two towers over 100 stories high, to be known as the World Trade Center.⁸⁴ The statute empowering the entire redevelopment defined the Center as "a facility of commerce . . . for the centralized accommodation of functions, activities and services for or incidental to the transportation of persons, the exchange, buying, selling and transportation of commodities . . . in world trade and commerce."⁸⁵ In other words, the purpose of the Center was to encourage and provide for the centralization of the city's private import-export businesses. The Authority hoped to attract as tenants for the Center some of New York's 200 combination export managers, 2000 general exporters, 4200

79. *Sublett v. City of Tulsa*, 405 P.2d at 195 (quoting *Marchant v. Mayor of Baltimore*, 146 Md. at 522, 126 A. at 887 (quoting *In re Mayor of New York*, 135 N.Y. at 265, 31 N.E. at 1046)).

80. See, e.g., *Goodpasture v. TVA*, 434 F.2d 760 (6th Cir. 1970); *United States ex rel. TVA v. Two Tracts of Land*, 387 F. Supp. 319 (E.D. Tenn. 1974), *aff'd*, 532 F.2d 1083, *cert. denied*, 429 U.S. 827 (1976).

81. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

82. See, e.g., Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 63 (1980). "*Courtesy Sandwich* . . . may be the prototype of the most important type of taking in the current era." *Id.*

83. *Courtesy Sandwich Shop v. Port of New York Auth.*, 12 N.Y.2d at 387, 190 N.E.2d at 404, 240 N.Y.S.2d at 4.

84. *Id.*

85. N.Y. UNCONSOL. LAWS § 6602 (McKinney 1979) (concurrent with N.J. STAT. ANN. § 32:1-35.51 (West 1963)).

general importers, and 2900 manufacturers which it claimed were responsible for seventy-six percent of then current American exports.⁸⁶ In order to acquire sufficient land for the project, the Authority proposed to condemn a large number of buildings which were part of an active commercial neighborhood whose small buildings and narrow streets dated back to the nineteenth century. The low rents charged for space in these old buildings made the area a major center for discount wholesale and retail sales and for light manufacturing. Despite the protests of the owners of these buildings that a rental office complex did not serve a legitimate public purpose,⁸⁷ the court approved of the plan.⁸⁸ But the approval rested upon a narrow and traditional justification — that of the indispensability of port development to general community well-being:

It is the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York. This benefit is not too remote or speculative as to render the means chosen to achieve it patently unreasonable; nor is the benefit sought itself an improper concern of government. The history of western civilization demonstrates the cause and effect relationship between a great port and a great city. Fostering harbor facilities has long been recognized by this court as a legitimate concern of government.⁸⁹

Thus the principle under which the court approved of the Center was as old and established as the scale of the Center was large and ambitious. At most, because of the scale of the project, the decision may represent an expansion in extent of governmental assistance permitted under the indispensability exception, but certainly no expansion in kind. After the controversy subsided, this decision left the law virtually as it had found it.

86. *Courtesy Sandwich Shop v. Port of New York Auth.*, 12 N.Y.2d at 393-94, 190 N.E.2d at 408, 240 N.Y.S.2d at 9 (Van Voorhis, J., dissenting).

87. *Id.* at 391, 190 N.E.2d at 406, 240 N.Y.S.2d at 7.

88. *Id.*

89. *Id.* at 388-89, 190 N.E.2d at 404-05, 240 N.Y.S.2d at 5 (citation omitted).

C. *The Indirect Benefit Exception*

Within the last several decades, courts have developed a new exception to the general rule forbidding the use of eminent domain in direct aid of private enterprise, the indirect benefit exception. In cases involving traditional exceptions to the general rule, such as those concerning railroads, mills, irrigation and drainage projects, and port development, courts have found a public purpose in indispensable governmental assistance to a private enterprise when that business was indispensable to the community at large. In cases involving this new exception, courts have found that the public purpose involved is the benefit gained by the community at large, while the benefit of government assistance to the private sector is merely an indirect incident of projects undertaken for the public good. So far, cases decided under the indirect benefit exception have been limited to those involving urban renewal projects.⁹⁰ Proponents of the *Poletown* decision argue that it can be justified on the same grounds as the urban renewal cases.⁹¹ A review of the cases, however, shows that the issue faced in *Poletown* was a very different one.

The first opinion which established that urban renewal was a legitimate public purpose was the New York case of *New York City Housing Authority v. Muller*,⁹² decided in 1936. Acting pursuant to the power granted by the nation's first large-scale urban renewal legislation,⁹³ the Housing Authority sought to condemn two nineteenth century tenements belonging to Muller.⁹⁴ These buildings, along with others nearby, were to be razed in order to provide land for a public housing project for

90. The leading urban renewal exception case is *Berman v. Parker*, 348 U.S. 26 (1954). See also *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936) (first New York recognition of indirect benefit exception for urban renewal).

91. For example, the city of Detroit based its justification for the *Poletown* taking on slum clearance cases. It argued that selling the property to General Motors was constitutional because selling property condemned for slum clearance was within constitutional limits. Brief for Appellees at 33-35, *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

92. 270 N.Y. 333, 1 N.E.2d 153 (1936).

93. State Housing Law, ch. 823, 1926 N.Y. Laws 1507, amended by Municipal Housing Authorities Law, ch. 4, 1934 N.Y. Laws 13, repealed by Public Housing Law, ch. 808, § 227, 1939 N.Y. Laws 1978, 2039.

94. *New York City Hous. Auth. v. Muller*, 270 N.Y. at 337, 1 N.E.2d at 153.

the poor.⁹⁵ The impetus for the proposal was the finding that the neighborhood was characterized by unsafe and unsanitary housing.⁹⁶ The court acknowledged initially that this was a case of first impression in American law.⁹⁷ It then sought to fashion a constitutionally permissible policy for the role of government in the task of urban renewal. Private enterprise, it noted, lacked the resources necessary to accomplish renewal on a large scale.⁹⁸ Governmental assistance was, therefore, needed:

The menace of the slums in New York City has been long recognized as serious enough to warrant public action. The Session Laws for nearly seventy years past are sprinkled with acts applying the taxing power and the police power in attempts to cure or check it. The slums still stand. The menace still exists. What objections, then, can be urged to the application of the third power [eminent domain], least drastic, but as here embodied probably the most effective of all?⁹⁹

Although *Muller* was the first case to sanction the use of eminent domain for purposes of urban renewal, it is really closely related to cases decided under the traditional indispensability exception. Prior to the mid to late nineteenth century, most buildings in New York City were made of wood. "Urban renewal" was a relatively simple and frequent matter. The buildings at issue in *Muller* were among the earliest examples of widespread construction in brick and other more long-lasting materials. By the 1930's, after housing mostly poor immigrants and other poor for generations, many of these buildings, often built without adequate water, electricity, light, or air, were crumbling and were unhealthy places in which to live.¹⁰⁰ Experiments with tax incentives and housing codes had long proven inadequate.¹⁰¹ Private business either could not or would not cope with the problem. Experience had shown that direct governmental intervention by the use of the power of eminent do-

95. *Id.*

96. *Id.*

97. *Id.* at 340, 1 N.E.2d at 154.

98. *Id.* at 341, 1 N.E.2d at 155.

99. *Id.*

100. *See, e.g., id.* at 338, 1 N.E.2d at 154.

101. *Id.* at 341, 1 N.E.2d at 155.

main was indispensable to the job.¹⁰² The *Muller* court, therefore, was the first American court to have the opportunity to confront the problem of deteriorated older city neighborhoods. In that sense, its decision was new. But in its application of established legal doctrine, the decision was in accord with tradition. The principle which underlies *Muller* is the same as that which underlies the older cases of railroads, mills, irrigation and drainage projects, and port development — that government involvement by eminent domain is indispensable to the project and that the project is indispensable to the well-being of the community.

The next landmark urban renewal case was *Berman v. Parker*,¹⁰³ where, in 1954, the United States Supreme Court approved a redevelopment plan for an area of Washington, D.C. The Court's enthusiastic endorsement of a wide range of renewal projects has been cited and quoted with approval in innumerable urban renewal cases from courts across the country: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."¹⁰⁴ In addition to this broad approval in principle, the Court also addressed two controversial questions which have arisen often in renewal cases since *Muller*. The first concerned a challenge to the participation of private businesses in redevelopment. At issue was whether the participation of private enterprises as owners or long-term tenants of the redeveloped land negated the public purpose of the overall renewal project.¹⁰⁵ Did private participation and benefit mean that the taking of the condemnee's land was for a private, rather than public, purpose? Here, the Court ruled that the promotion of private enterprise as part of a larger redevelopment plan was a legitimate indirect benefit of the public purpose.¹⁰⁶ The second issue was whether sound structures located in the midst of a depressed area could be taken along with deteriorated structures in order to gather large tracts of land for redevelopment. Here again, the Court ap-

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

103. 348 U.S. 26 (1954).

104. *Id.* at 33 (citation omitted).

105. *Id.* at 31.

106. *Id.* at 33-34.

proved of the plan.¹⁰⁷ Not only individual slum buildings, it ruled, but also "blighted areas that tend to produce slums"¹⁰⁸ were appropriate for redevelopment. After *Berman v. Parker*, urban renewal was never again seriously challenged in principle as a legitimate use of the power of eminent domain.¹⁰⁹

Although *Berman v. Parker* settled any remaining controversy concerning the constitutional legitimacy of the use of eminent domain for purposes of urban renewal, the courts have continued to wrestle with many questions concerning the constitutional propriety of individual redevelopment projects. One important question which has continued to cause controversy is the proper role of private enterprise in renewal projects. Is governmental taking of property from one private owner in order to transfer it to another private owner a legitimate use of condemnation? Under what circumstances, if any, can eminent domain be exercised when private enterprise is to participate and benefit, and under what circumstances can it not? Can the *Poletown* decision be justified on this basis? The jurisdiction where this issue has most fully been litigated has been New York. An examination of cases decided in New York and elsewhere will show that these decisions do not provide precedent for *Poletown*.

The first New York case of note on the question of the constitutional limitations on the power of eminent domain when used in direct aid of private business was *City of Utica v. Damiano*,¹¹⁰ decided in 1959. There, the city sought to condemn land in order to widen a street so as to provide a nearby land-locked parcel of land with access to public roads.¹¹¹ The city's stated purpose was to enhance the value of that land for the private owner and thereby also to enhance its value to the city for purposes of taxation.¹¹² Damiano, the condemnee, claimed that the

107. *Id.* at 34-35.

108. *Id.* at 35.

109. "Although *Berman* is not binding on state courts interpreting their own constitutions, it has nevertheless been widely cited." Note, *supra* note 43, at 417 (footnotes omitted). See also *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 483, 335 N.E.2d 327, 332, 373 N.Y.S.2d 112, 119 (1975).

110. 22 Misc. 2d 804, 193 N.Y.S.2d 295 (Oneida County Ct. 1959).

111. *Id.* at 806, 193 N.Y.S.2d at 298.

112. *Id.* at 806, 193 N.Y.S.2d at 299.

use of eminent domain to take his land in order to benefit that of his neighbor was a taking for private, rather than public, purpose.¹¹³ The court, noting that the public purpose limitation had recently been more liberally interpreted, approved the condemnation.¹¹⁴ But the scope of the decision was limited. The court was persuaded by the fact that the only reason that the parcel was land-locked was because, when the road was originally constructed, Damiano, over whose land the road was being built, had misrepresented the access problem of the neighboring parcel.¹¹⁵ Quoting from an earlier New York case, which itself quoted from an even earlier Iowa case, the court ruled that "[t]he state is not bound to allow its citizens to be walled in, insulated, imprisoned, but may provide them a way of deliverance,"¹¹⁶ and especially here, when the condemnee himself created the problem.

The next New York case, *Cannata v. City of New York*,¹¹⁷ decided in 1960, was of much greater significance. The condemnees in *Cannata* challenged the city's proposal to condemn their properties in order to use their land as part of an industrial redevelopment project.¹¹⁸ The City Planning Commission had recommended this project after determining that the general area was mostly vacant and that many of the existing structures had deteriorated badly.¹¹⁹ In addition, the Commission found that

conditions in the area had led to a high incidence of tax delinquency, resulting in an impairment of the area's economic value; that there was a multiplicity of lot ownership constituting a barrier to economical land assembly through private action; that a study of the area revealed that residential development had been deterred because of the physical containment and isolation of the

113. *Id.* at 806, 193 N.Y.S.2d at 299.

114. *Id.* at 808-09, 193 N.Y.S.2d at 300-01.

115. *Id.* at 806, 193 N.Y.S.2d at 298-99.

116. *Id.* at 809, 193 N.Y.S.2d at 301 (quoting *In re Town of Whitestown*, 24 Misc. 150, 152, 53 N.Y.S. 397, 399 (Oneida County Ct. 1898) (quoting *Bankhead v. Brown*, 25 Iowa 540, 546 (1868))).

117. 24 Misc. 2d 694, 204 N.Y.S.2d 982 (Sup. Ct. 1960), *rev'd on other grounds*, 14 A.D.2d 813, 221 N.Y.S. 457 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *appeal dismissed*, 371 U.S. 4 (1962).

118. *Id.* at 695-97, 204 N.Y.S.2d at 985-86.

119. *Id.* at 697, 204 N.Y.S.2d at 986.

area from adjacent neighborhoods; that there was a substantial industrial section with sizable plots in part of the area and that [extensive and costly filling operations were required to prepare the land for residential construction].¹²⁰

In view of these circumstances, the Commission found that the usual operations of private enterprise would be ineffective in promoting development of the area; thus public participation was necessary for the removal of the blighted sites and for the orderly growth of the larger area.¹²¹ Given these circumstances, the court approved of the plan.¹²² But again, the scope of the decision was carefully and narrowly drawn:

Where, as in this case, the purpose for the acquisition of the land is designed to facilitate other projects such as slum clearance, which are incontrovertibly in the public interest, by providing for relocation of establishments displaced by such projects, such acquisition may be deemed under such circumstances, to constitute a needful adjunct to such projects and thus considered to be for a public purpose. . . . [A]nd if it appears that upon completion of the project the public good will be enhanced, it is of no moment that private interests may be benefited thereby.¹²³

The decision, although an expansion of prior law, contains several important limitations. First, the area in question was a slum or at least generally blighted.¹²⁴ Second, the relocation of industry on the site was part of a broader plan to clear slums and blighted areas city-wide and to encourage businesses displaced by other clearance projects to remain in the city.¹²⁵ Third, the area required governmental assistance in order to accomplish redevelopment, the private sector having failed in its efforts.¹²⁶ Finally, the benefit to private enterprise was only incidental to the primary purpose of clearing slums and general blight.¹²⁷ The decision, in other words, has much more in common with earlier exceptions to the general rule which forbid the

120. *Id.* at 698, 204 N.Y.S.2d at 987.

121. *Id.*

122. *Id.* at 700, 204 N.Y.S.2d at 989.

123. *Id.* at 702, 204 N.Y.S.2d at 991 (footnotes omitted).

124. *Id.* at 699-700, 204 N.Y.S.2d at 989.

125. *Id.* at 701-02, 204 N.Y.S.2d at 991.

126. *Id.* at 698, 204 N.Y.S.2d at 987.

127. *Id.* at 702, 204 N.Y.S.2d at 991.

use of condemnation for the benefit of private enterprise than with the decision in *Poletown*. Whatever private benefit accrues, it must be incidental to the overall redevelopment plan, which itself must be indispensable to an otherwise legitimate public purpose, such as the clearance of an individual slum or blighted area. In addition, private profit must be incidental to another recognized benefit to the overall community, that of the promotion of general industrial development in the wake of displacement caused by other clearance projects.

The most important recent New York case, and that which of all American decisions is perhaps most like *Poletown*, is the 1975 case of *Yonkers Community Development Agency v. Morris*.¹²⁸ The Otis Elevator Company, one of the city's largest employers, threatened to leave the area because of lack of space to expand and modernize its facilities.¹²⁹ The city, in order to persuade the company to remain, offered three sites, but Otis deemed none of them to be suitable.¹³⁰ Finally, the property in question in the case, that adjoining Otis' old factory, was selected by the city and approved by the company.¹³¹ The city then sought to acquire the property, to clear and prepare the land for redevelopment, and to sell it to Otis.¹³² The opinion approving the plan deserves careful attention. The court noted that there could be only two possible justifications for this project, one conventional and the other more extreme and possibly unconstitutional.¹³³ The first was that the sale to Otis could be justified as an incidental benefit to Otis resulting from its participation in a large-scale plan of slum clearance:

Where [the] land is found to be substandard, its taking for urban renewal is for a public purpose The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible nature of the tak-

128. 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112 (1975), *aff'g* 45 A.D.2d 889, 357 N.Y.S.2d 887 (2d Dep't 1974), *appeal dismissed*, 423 U.S. 1010 (1975).

129. *Yonkers Community Dev. Agency v. Morris*, 45 A.D.2d at 890, 357 N.Y.S.2d at 889 (Munder, J., dissenting).

130. *Id.* (Munder, J., dissenting).

131. *Id.* (Munder, J., dissenting).

132. *Id.* at 890, 357 N.Y.S.2d at 889-90 (Munder, J., dissenting).

133. *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d at 482, 335 N.E.2d at 331, 373 N.Y.S.2d at 117.

ing of the substandard property.¹³⁴

The second was that the sale could be justified solely on the basis that assistance to this specific company was in the wider community interest:

Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.¹³⁵

In this case, the land had been declared to be blighted by the local city council and planning board.¹³⁶ Therefore, the participation of Otis in the project was justified under the indirect benefit exception to the general rule, as a private benefit incidental to the larger public purpose of slum clearance.¹³⁷ Having found the overall plan to be a lawful urban renewal program, the court did not reach the second possible justification. All that can be said safely is that the court left open for future cases the possibility that circumstances could arise wherein direct governmental assistance to a private enterprise by means of eminent domain could be considered constitutional solely as a public benefit to the community at large, absent a finding that the property to be condemned was blighted.¹³⁸

Recent cases from jurisdictions other than New York have developed rules of law similar to those which emerged from *Cannata* and *Morris*.¹³⁹ The most instructive recent case is a 1982 decision from Maryland, *Mayor and City Council of Baltimore v. Chertkoff*.¹⁴⁰ The condemnee in this case owned land near a river in an old, deteriorated city neighborhood which he leased to a company that operated a concrete batching plant.¹⁴¹ The city proposed to condemn this and other land for the purpose of

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See, e.g., *State v. Miami Beach Redev. Agency*, 392 So. 2d 875 (Fla. 1981); *In re City of Seattle*, 96 Wash. 2d 616, 638 P.2d 549 (1981).

140. 293 Md. 32, 441 A.2d 1044 (1982).

141. *Id.* at 36-37, 441 A.2d at 1048.

developing the area for recreation.¹⁴² An additional aspect of the plan was the elimination of industry incompatible with the nearby recreation area and the encouragement of industry which would be compatible.¹⁴³ The city, in fact, intended to sell the condemnee's land to his neighbor who operated a glass manufacturing plant, a use which the city deemed to be compatible with the overall plan.¹⁴⁴ The court approved of the redevelopment plan, but on the grounds that the neighbor's private benefit was incidental to the plan's primary purpose, slum clearance and general redevelopment:

Manifestly, if the . . . ordinance was devised simply as a vehicle to condemn Chertkof's property for the private use of [his neighbor] for reasons unassociated with the public purposes underlying urban renewal programs, the taking would not be "in furtherance of a genuine renewal plan" and would not therefore be for a public purpose.¹⁴⁵

III. Analysis

In summary, two related exceptions emerge from the cases decided on the issue of the limitations on the governmental use of eminent domain in aid of private enterprise throughout American history. The first, which includes, for example, older and more recent cases involving railroads, mills, irrigation and drainage projects, and port development, requires that the private business be indispensable to the community at large and that the direct governmental assistance by means of condemnation be indispensable to the particular business. The second, which is limited to recent cases involving urban renewal, requires that the benefit gained by a private company which participates in a redevelopment project be incidental to the primary public purpose of slum clearance. The *Poletown Neighborhood Council v. City of Detroit*¹⁴⁶ decision falls within neither of these exceptions. It is the first decision of its kind and the most radi-

142. *Id.* at 38, 441 A.2d at 1049.

143. *Id.* at 40, 441 A.2d at 1050.

144. *Id.* at 41, 441 A.2d at 1050.

145. *Id.* at 44, 441 A.2d at 1052 (quoting *Master Royalties v. Baltimore*, 235 Md. 74, 88, 369 A.2d 652, 659 (1964)).

146. 410 Mich. 616, 304 N.W.2d 455 (1981).

cal eminent domain decision since the public purpose barrier was first clearly established in the mid to late nineteenth century.¹⁴⁷ But a question can be raised as to whether the decision, although without legal precedent, is nonetheless a good one. Why should it not be considered a justifiably activist judicial response to the necessity of economic recovery?

In order to understand why the *Poletown* decision is not only unprecedented but exceeds constitutional boundaries, it is necessary to appreciate the importance of the public purpose barrier to the exercise of the power of eminent domain in the American scheme of constitutional liberty. It is commonly said, in accordance with the literal language of the fifth amendment and similar state constitutional provisions, that the public purpose limitation protects property and not liberty. But this literal reading fails to take into account the fact that eighteenth century notions of property rights and liberty, although not identical, were more closely interrelated than those notions are now.¹⁴⁸ Even today, the public purpose barrier not only protects property in the strict sense of the term but also certain very basic liberties. The liberty protected by the public purpose barrier was well understood and cherished by the drafters of the Bill of Rights.¹⁴⁹ The ideas which epitomized the thinking of the revolutionaries were that governments of all kinds tended towards growth at the expense of individual liberties and that a constitutional government of limited and delegated powers was the kind of government least likely to grow large and oppress liberty.¹⁵⁰

147. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 259-61 (1977). "During the 1840s and 1850s judges everywhere began to turn away from the view that a public purpose inhered in any state promoted activity that simply increased the gross national product." *Id.* at 261.

148. "Government is instituted no less for protection of the property, than of the persons, of individuals." *THE FEDERALIST* No. 54, at 370 (J. Madison) (J. Cooke ed. 1961).

149. Madison's draft of what is now the fifth amendment included 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." 1 *ANNALS OF CONG.* 433-36 (J. Gales, Sr. ed. 1834).

150. According to Tribe:

[T]he state or federal government as a whole had no power to act outside its rightful jurisdiction to intrude upon the "natural rights" reserved to the people within the private domain or to trench upon the prerogatives of other governmental departments. Rights belonging to citizens by virtue of their very citizenship, including personal security, personal liberty, and private property, would thus be pre-

In the eighteenth century, as had been true throughout the entire development of the common law constitutional tradition, hard won property rights stood literally and symbolically between an overreaching government and the liberty of the people.¹⁵¹ The drafters of the Bill of Rights had a long tradition of constitutional struggle upon which to draw. The Magna Carta in 1215, for example, included five articles against unjustified takings.¹⁵² The Petition of Right in 1627, which sought redress against the oppressive policies of King James I and later served as a rallying point for parliamentarians during the English Civil War, sought relief against unauthorized royal demands for gifts, loans, benevolences, taxes, or "such like charge."¹⁵³ To the revo-

served not only by decentralization of power and mutually checking forces . . . but by rules enforceable in the proper tribunals at the behest of threatened citizens.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 427 (1978) (footnote omitted).

151.

The more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government. Story, for example, stated that the compensation provision, 'is laid down by jurists as a principle of universal law [because] in a free government, almost all other rights would become worthless, if the government possessed an *uncontrollable* power over the private fortune of every citizen.'

Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 60 (1964) (quoting 2 J. STORY, *CONSTITUTION* 547-48 (4th ed. 1873) (emphasis added)).

152. *Great Charter of Liberties*, in *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 42 (G. Adams & H. Stephens eds. 1927). The articles read as follows:

28. No constable or other bailiff of ours shall take any one's grain or other chattels, without immediately paying for them in money, unless he is able to obtain a postponement at the goodwill of the seller.

29. No constable shall require any knight to give money in place of his ward of a castle if he is willing to furnish that ward in his own person or through another honest man, if he himself is not able to do it for a reasonable cause; and if we shall lead or send him into the army he shall be free from ward in proportion to the amount of time during which he has been in the army through us.

30. No sheriff or bailiff of ours or any one else shall take horses or wagons of any free man for carrying purposes except on the permission of that free man.

31. Neither we nor our bailiffs will take the wood of another man for castles, or for anything else which we are doing, except by the permission of him to whom the wood belongs.

32. We will not hold the lands of those convicted of a felony for more than a year and a day, after which the lands shall be returned to the lords of the fiefs.

Id. at 46.

153. *Petition of Right, 1628*, 3 *Car.*, ch. 1., in *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 339 (G. Adams & H. Stephens eds. 1927).

lutionary generation, therefore, limiting the power of governmental takings to public purposes was a traditional and necessary means of protecting individual liberty by limiting the power of and thus the potential for oppression by the government. Although notions of liberty today are more complex and less tied to property rights than during the eighteenth century, the principle remains the same. The public purpose barrier today, as always, marks one of the critical constitutional boundaries between the individual and the power of the state.

The public purpose barrier to the use of eminent domain, therefore, is a basic component of the American scheme of constitutional liberty. But like all rules of law, it has been the subject of judicially recognized exceptions. This Article has described the history of these exceptions since the mid-nineteenth century. The fundamental question raised here, however, has yet to be answered. Why is *Poletown* bad law? Is it not a relatively small step from the exceptions recognized in *Cannata v. City of New York*¹⁵⁴ and *Yonkers Community Development Agency v. Morris*¹⁵⁵ to the situation in *Poletown*? Is *Poletown* an idea whose time has come?

The answer to the question of why *Poletown* sets dangerous precedent cannot be found in the brief language of the federal or state constitutions but in the wider experience of political and economic life. The answer is to be found in the fact that the public purpose barrier is a critical pillar not only of constitutional notions of political liberty but of economic liberalism as well. What is meant by the term "economic liberalism" in this context is the century or more long American tradition of a competitive but regulated market economy. The best explanation of why condemnation for the purpose of assisting private enterprise violates the spirit of economic liberalism is found in the cases which have considered the issue explicitly.

The importance of the public purpose barrier to the spirit of economic liberalism is explained well by Judge Cooley in *People*

154. 24 Misc. 2d 694, 204 N.Y.S.2d 982 (Sup. Ct. 1960), *rev'd on other grounds*, 14 A.D.2d 813, 221 N.Y.S.2d 457 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *appeal dismissed*, 371 U.S. 4 (1962).

155. 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112 (1975), *aff'g* 45 A.D.2d 889, 357 N.Y.S.2d 887 (2d Dep't 1974), *appeal dismissed*, 423 U.S. 1010 (1975).

ex rel. Detroit & Howell Railroad v. Township Board of Salem,¹⁵⁶ the 1870 Michigan case which held that direct governmental assistance by means of taxation was no longer indispensable to the development of railroads and, therefore, that such governmental projects were in violation of the constitutional prohibition against takings for a private purpose.¹⁵⁷ Of critical importance here is the fact that the court considered the dispositive issue to be similar to that found in cases involving eminent domain. Judge Cooley's attitude towards the public purpose barrier was far from conservative. In fact, he urged judges to interpret this constitutional provision very liberally: "[W]ise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people."¹⁵⁸

But even this high degree of liberality must have its limit, and the limit is reached when the powers of taxation or eminent domain are exercised primarily for private economic advantage. The spirit of economic liberalism does not easily tolerate governmental interference with the competitive market in order to aid a single private business, even if that business is important to the community. With respect to this point, Judge Cooley's opinion is worth quoting at length:

By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise.¹⁵⁹

156. 20 Mich. 452 (1870).

157. *Id.* at 492-94.

158. *Id.* at 475.

159. *Id.* at 484-85.

He wrote that the term "public purpose" as regards taxation "has no relation to the urgency of the public need or to the . . . public benefit [that would] follow."¹⁶⁰ It is merely a term used to distinguish "the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality."¹⁶¹

A similar denunciation of direct governmental aid to private enterprise arose in *Citizens' Savings & Loan Ass'n v. Topeka*,¹⁶² decided by the Supreme Court of the United States in 1874. This case challenged the issuance of bonds which were made payable by the city to an iron works company for the purpose of aiding and encouraging that company to remain in Topeka.¹⁶³ In the process of declaring the bonds to have been issued without a public purpose, the Court wrote:

[I]n the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose. . . . If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.¹⁶⁴

Recent cases have continued to recognize the fundamental importance to economic liberalism of the public purpose barrier to the exercise of eminent domain. A particularly instructive recent example is *City of Owensboro v. McCormick*,¹⁶⁵ decided by the Supreme Court of Kentucky in 1979. The plaintiffs here sought to have the Kentucky Local Industrial Development Authority Act¹⁶⁶ declared unconstitutional.¹⁶⁷ The Act provided for

160. *Id.* at 485.

161. *Id.* (emphasis omitted).

162. 87 U.S. (20 Wall.) 655 (1874).

163. *Id.* at 656.

164. *Id.* at 665.

165. 581 S.W.2d 3 (Ky. 1979).

166. KY. REV. STAT. §§ 152.810-930 (1980).

the creation of local authorities whose purpose was to develop industrial sites, parks, and subdivisions.¹⁶⁸ Under the Act, cities would have the power to condemn any private property for the benefit of the authority, so that the authority could in turn convey that land to a private owner for industrial or commercial development.¹⁶⁹ The court declared the Act to be unconstitu-

167. *City of Owensboro v. McCormick*, 581 S.W.2d at 4.

168. The Kentucky statute provides in relevant part:

152.820. Purpose. — The purpose of KRS 152.810 to 152.930 is to create local industrial development authorities to aid in the acquisition, retention and development of land for industrial and commercial purposes in Kentucky; to aid in the development and promotion of industrial sites, parks and subdivisions for accommodating industrial and commercial needs; to promote and stimulate the acquisition, retention and development of land for industrial and commercial purposes in Kentucky by other local development organizations both public and private. . . .

152.830. Establishment of local industrial development authority. — (1) Any governmental unit by act of its legislative body may establish a nonprofit industrial development authority to be composed of six (6) members. (2) The authority shall be a body politic and corporate with the usual corporate attributes, and in its corporate name may sue and be sued, contract and be contracted with and do all things reasonable or necessary to effectively carry out the duty prescribed by KRS 152.810 to 152.930.

152.840. Functions of authority. — (1) The purpose, duties and powers of the authority shall be to: (a) Acquire, retain and develop land for industrial and commercial purposes in Kentucky; aid in the development of the industrial and commercial sites, parks and subdivisions to meet industrial and commercial needs in Kentucky. (b) Encourage the acquisition, retention and development of land for industrial and commercial needs in Kentucky by other local development organizations, both public and private. (c) Cooperate with the U.S. Army Corps of Engineers and other federal agencies in formulating development plans and in acquiring and developing land for industrial and commercial purposes in accordance with these plans.

KY. REV. STAT. §§ 152.820-.840(1)(c) (1980).

169. Section 152.840(1)(d) gives the authority the power to [a]cquire by contract, lease, purchase, gift, condemnation or otherwise any real or personal property, or rights therein, necessary or suitable for establishing industrial sites, parks or subdivisions. . . . The authority may sell or convey any or all land owned or optioned by it to any public or private organization, governmental unit, or industry for the purpose of constructing and/or operating any industrial or commercial facility. Provided, however, that no sale or conveyance of any land shall be made to a private organization or industry without such organization or industry first having executed a written contract with the authority providing that if no actual construction of an industrial facility is commenced within two (2) years, the organization or industry shall reconvey the land, free and clear of liens and encumbrances, to the authority, and the authority shall return to the organization or industry 95 percent (95%) of the purchase price paid therefor.

Id. § 152.840(1)(d).

Section 152.850, however, places limitations on the condemnation power.

tional to the extent that it granted cities or other governmental units the unconditional right to condemn private property for this purpose.¹⁷⁰ It explained its decision in much the same manner as had Judge Cooley, over 100 years earlier:

Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections¹⁷¹

The court further explained that the only constitutionally permissible way for private enterprise to acquire the private property of another by means of a governmental scheme involving the exercise of the power of eminent domain is for the business to participate incidentally in a broader program of urban renewal.¹⁷²

The *Poletown* decision is bad law because it sanctions a plan whose primary purpose was the business advantage of a single company. As noted by the dissent in *Poletown*, unlike previous Michigan decisions¹⁷³ no requirement of governmental

Notwithstanding any other provision or section of KRS 152.810 to 152.930, no governmental unit shall have the power to condemn property under KRS 152.810 to 152.930 unless the governmental unit has first given proper public notice as required by law stating the specific purpose for which the property to be condemned shall be used and said purposes shall be pleaded and proved in such condemnation action. The property shall be developed within a period of five (5) years pursuant to the purpose stated, and the failure of the authority to so develop shall entitle the person or persons whose property was condemned to repurchase the property at the price the authority paid to the governmental unit for the same. The person from whom the land is taken by condemnation shall have the right to re-acquire the land as aforementioned by application to the court of competent jurisdiction, if such procedure be necessary, and shall be entitled to recovery of his costs and reasonable attorney's fees necessary to re-acquire said land.

Id. § 152.850.

170. Although the government urged adoption of an expansive version of "public purpose" as used in cases involving revenue bonds issued for the acquisition of industrial property or public funds expended to promote industrial development by attracting new industry to all parts of the state, the court would not equate "public benefit" or "public purpose" to "public use" in the eminent domain sense. *City of Owensboro v. McCormick*, 581 S.W.2d at 5.

171. *Id.*

172. *Id.* at 7.

173. See *Detroit Int'l Bridge Co. v. American Seed Co.*, 249 Mich. 289, 296, 228

control or continuing accountability to the public was demanded of General Motors to ensure that the promised public benefit would come to fruition.¹⁷⁴ This was undoubtedly due to General Motors' superior bargaining position.¹⁷⁵ Though the Supreme Court found that a second requirement was satisfied for the exercise of eminent domain in Michigan, i.e., that the taking of the affected property be necessary to the objective purpose of the undertaking,¹⁷⁶ it should be noted that this necessity was created by General Motors itself when it prescribed specifications for the plant site which must be met in order for the city to forestall relocation.¹⁷⁷ The folly of this decision and the wisdom of the rule it breaks is well illustrated by the events which have taken place in the automobile industry, in Detroit and nationwide since 1981. At the time of the *Poletown* decision, Detroit needed employment for its citizens and General Motors needed to build a modern factory in order to make the smaller cars thought necessary to compete with foreign manufacturers and to cope with the steep rise in gasoline prices. Only two years later, however, things have changed. Automobile sales and profits are up.¹⁷⁸ Employment is increasing.¹⁷⁹ Americans, moreover, are

N.W. 791, 793 (1930) (imposing on corporations an obligation to preserve public purpose); *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 53, 94 N.W. 379, 380-81 (1903) ("Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." (citations omitted)); *Board of Health v. Van Hoesen*, 87 Mich. 533, 539, 49 N.W. 894, 896 (1891) ("[T]he state must have a voice in the manner in which the public may avail itself of that use."); *Swan v. Williams*, 2 Mich. 427, 440 (1852) ("By the terms of the charter the title to the lands is contingent upon their occupation as a railroad.").

174. "[T]here are no guarantees from General Motors about employment levels at the new assembly plant . . ." *Poletown*, 410 Mich. at 679, 304 N.W.2d at 480 (Ryan, J., dissenting). See *supra* notes 29-30 and accompanying text.

175. *Poletown*, 410 Mich. at 652, 655, 304 N.W.2d at 467, 469 (Ryan, J., dissenting).

176. See *Ryerson v. Brown*, 35 Mich. 333, 339 (1877); *People ex rel. Detroit & Howell R.R. v. Township Bd. of Salem*, 20 Mich. 452, 480 (1870).

177. *Poletown*, 410 Mich. at 676, 304 N.W.2d at 478 (Ryan, J., dissenting).

178. A short three years after *Poletown*, the auto industry announced a remarkable recovery.

The industry reported today that it continued its rebound last year from the worst sales slump since World War II, selling 6,786,977 cars for the year, an increase of 17.9 percent over the 5,756,658 sold in 1982. Including import sales of 2,368,764, a total of 9,155,741 cars were sold in the United States in 1983, making it the best sales year since 1979, when 10.5 million were sold.

Holusha, *Detroit Closes Out A Banner Year*, N.Y. Times, Jan. 6, 1984, at D6, col. 2.

again demanding big cars. The small car boom which prompted General Motors' desire for expansion and innovation is already over.¹⁸⁰ The taking of Poletown by the city has contributed nothing to the growing profit recovery of General Motors.¹⁸¹ The best and worst efforts of government notwithstanding, this recovery is due primarily to the same complicated market forces which have caused competitive market economies to experience inevitable waves of boom and bust over time. The plan approved in *Poletown* violates the spirit of economic liberalism by distorting the operation of these mysterious but inexorable market forces on behalf of one particular company. Though these results are seen through the visual acuity of hindsight, they are nonetheless predictable and should serve as a lesson to future courts faced with similar questions. Detroit may never be able to show that the Poletown taking created many jobs.¹⁸² A few things are certain, however. Poletown, previously a stable, lower middle

179. The unemployment rate in the third quarter of 1982 was 10.6% whereas in the third quarter of 1983, unemployment dropped to 8.1%. N.Y. Times, Jan. 15, 1984, at F14 (Week in Business, *Data Bank*), col. 4.

180. "The scant 6.7 percent increase in American car sales so far this year conceals the best part for Detroit, that sales of big cars are running ahead of this average." Peterson, *In Motor City, Prosperity May Not Be Just Around The Corner*, N.Y. Times, June 25, 1983, at 6, col. 1.

181. "G.M. said its 1983 sales rose 15.3 percent, to 4,053,561, from 3,515,660." Holusha, *Detroit Closes Out A Banner Year*, N.Y. Times, Jan. 6, 1984, at D13, col. 2. General Motors is not expected to begin operating its Poletown plant until 1984. Telephone interview with an editor of the *Detroit Free Press* (Jan. 4, 1984).

182. The Poletown plant will take over the manufacturing done at the present Detroit plants. The Fleetwood Fisher Body & Clark Avenue Cadillac plant will close with the resultant loss of 10,000 jobs. The Poletown plant will replace 6000 jobs leaving a loss of 4000 positions. Betzold, *Push Comes to Shove*, *Detroit Metro Times*, Nov. 13, 1980, at 8, col. 1. Moreover, at the time of the Poletown taking, no attempt was made by Detroit to insure that new jobs would be created in the Poletown plant. One possibility would have been to have contract negotiations with General Motors to insure an acceptable or threshold level of employment for Detroit residents. Note, *Real Property — Eminent Domain — Expansion of the Public Use Doctrine to Include the Alleviation of Unemployment and Revitalization of the Economic Base of a Community*, 28 WAYNE L. REV. 1975, 1994 (1983). As perhaps as a direct result of this omission by Detroit, indications are that although sales are up at General Motors the increased productivity has been performed by workers doing "overtime." Peterson, *In Motor City, Prosperity May Not Be Just Around The Corner*, N.Y. Times, June 25, 1983, at 6, col. 1.

Another trend also does not bode well for the increased employment of Detroit residents by General Motors. By 1985, General Motors will have 5000 robots in operation. By 1990, an estimated 14,000 robots will be doing jobs formerly held by workers. *G.M. Takes on the Japanese*, *NEWSWEEK*, May 11, 1981, at 56.

and working class community, is no more. Because the standards of valuation used to calculate compensation for the exercise of the power of eminent domain fall below true full market value,¹⁸³ the former residents doubtlessly lost wealth, as well as a way of life they had enjoyed until the bulldozers arrived. General Motors, regardless of whatever good or bad fortune may befall the planned expansion site, has unquestionably gained wealth and market advantage. It acquired for \$8 million a valuable property which it otherwise could not have acquired and which cost the city \$200 million to condemn and prepare for development.¹⁸⁴ In other words, the only certain result of the Poletown plan is that one of the largest corporations in the world gained a great amount of wealth and that many small people lost much of what they had.

IV. Conclusion

The Poletown condemnation was oppressive to property rights and to liberty and violates the spirit of economic liberalism. Even more disturbing is what appears to be a general judicial trend in favor of ever wider uses of the power of eminent domain, sometimes at the expense of individual rights. Almost twenty years ago, Professor Joseph Sax warned in an influential article that the overreaching use of eminent domain leads to tyranny.¹⁸⁵ Several years later, Professor Frank Michelman similarly warned that judges deciding taking cases should be more careful to protect the individual from excessive governmental schemes.¹⁸⁶ But these sentiments are not unanimous in the academic community, or among the members of the bar and bench. Professor William Stoebuck, for example, has written that the power of eminent domain should be effectively unlimited:

The conclusion is that there is no sufficient reason to limit the exercise of eminent domain any more than of other powers of

183. See, e.g., Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 243, 245 (1978) (suggesting that condemnees in private takings be allowed 150% of market value of the land acquired since markets tend to undervalue a private landowner's interest).

184. *Poletown*, 410 Mich. at 656, 304 N.W.2d at 469.

185. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

186. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

government. All exercises, including regulations and taxations, are intrusions upon individual liberty, but they are necessary to prevent greater human losses in an interdependent society. Eminent domain poses no special threat to the individual that would require special limitations on the occasions of its exercise.¹⁸⁷

The ironic aftermath of the *Poletown Neighborhood Council v. City of Detroit*¹⁸⁸ decision shows that Sax and Michelman were correct to urge vigilance. Stoebuck is mistaken. The power of eminent domain must be more narrowly exercised than other powers of government because in cases involving the exercise of the power of eminent domain a relatively few individuals bear the total burden, whereas the burden in cases involving regulation and taxation is more widely shared. Regulation and taxation can be crushing, but the power of eminent domain exercised in *Poletown* was obliterating. Regulations can be repealed and taxes can be refunded, but condemnation is irreversible. The constitutional barriers against the overreaching exercise of the power of eminent domain are worthy of careful protection.

187. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 597 (1972).

188. 410 Mich. 616, 304 N.W.2d 455 (1981).