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Comments: Eminent Domain: Private Corporations and the Public Use Limitation

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EMINENT DOMAIN: PRIVATE CORPORATIONS AND THE PUBLIC USE LIMITATION

"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."[1]

I. INTRODUCTION

Under the federal and state constitutions, property may not be taken for public use without just compensation. A corollary of this constitutional right is that private property may not be taken for private use. Recent state court decisions on this public use requirement illustrate a growing controversy surrounding the exercise of eminent domain to meet the needs of private corporations, when the public will benefit as a result.

This comment examines the history of the public use requirement: its origins, its scope, and particular public uses controlled by private corporations.[2] Cases demonstrating the modern conflict are analyzed within a topical framework emphasizing the precedent and recurrent reasoning. The conclusion is preceded by various proposals for addressing the problem of private corporate development as a public use.

II. BACKGROUND

A. Origins

The origins of the public use limitation are even harder to trace than those of eminent domain itself.[3] Apparently, the Roman Empire recognized the sovereign power to take private property,[4] but it was not until the seventeenth century that the legal philosopher, Hugo Grotius, coined the term "eminent domain."[5] The public use limitation is a more recent development in the law.[6] Although Grotius, Pufendorf, Bynkershoek, and other civil law writers contested the purposes for which property could be taken, prior to the establishment of the American colonies, the public use limitation was never specifically addressed by common law courts and scholars.[7]

The modern idea of a public use limitation on sovereign takings

1. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy,* 11 ENVT'L L. 1, 35 (1980) [hereinafter cited as Meidinger].
2. This comment will not discuss the just compensation requirement. For a thorough discussion of this subject, see 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN (3d rev. ed. 1979).
3. Berger, *The Public Use Requirement in Eminent Domain,* 57 OR. L. REV. 203, 204 (1979) [hereinafter cited as Berger]; *see* Meidinger, *supra* note 1, at 4.
4. 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.12 (3d rev. ed. 1979) [hereinafter cited as 1 NICHOLS].
5. *Id.* at 14 (citing H. GROTIUS, DE JURE BELLI ET PACIS 20 (1625)). The legal terminology is derived from the Latin phrase *dominium eminens.*
6. Berger, *supra* note 3, at 204.
7. Meidinger, *supra* note 1, at 16.

evolved slowly during the late American colonial period. When the Declaration of Independence was signed in 1776, only Pennsylvania and Virginia had constitutional provisions relating to public use.[8] The historical records are unclear as to why this restraint on governmental power received so little attention.[9] One hypothesis explaining the disinterest is that arbitrary and oppressive condemnation was not a serious abuse charged against the Crown or Parliament.[10]

James Madison's public use provision in the draft of the Constitution was slightly modified before ratification.[11] The provision was attached as the final clause of the fifth amendment to the Bill of Rights: "nor shall property be taken for public use, without just compensation."[12] Similar public use clauses were later adopted in various forms in state constitutions.[13] Although there was no express prohibition against taking property for private use in the federal or state constitutions, most courts viewed the corollary as arising by direct implication from the public use clauses.[14] Other courts maintained that the applicable due process clause was the constitutional restraint invalidating private takings.[15]

The source of the prohibition against private takings was not debated as extensively as the meaning of public use. Although little controversy arose concerning the definition of public use in the post-revolutionary era,[16] that period of relative tranquility was the classic example of the calm before the storm. The transportation and industrial revolutions dramatically altered the face of the American continent throughout the 1800's and well into the present century. As

8. Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 591 (1972). The public use provisions did not refer exclusively to the states' taking power. *Id.; see* PA. CONST. of 1776, DECL. OF RIGHTS art. VII; VA. CONST. of 1776, BILL OF RIGHTS § 6.
9. Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 591 (1972).
10. Meidinger, *supra* note 1, at 17. Other theories are that the drafters never contemplated that property could be taken for other than public use or that they may have assumed that takings for private use were permissible. *Id.*
11. Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 595 (1972). The modification of Madison's draft suggests the framers' intent to dilute the original language of the public use provision, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Id.*
12. U.S. CONST. amend. V.
13. *E.g.,* MD. CONST. art. III, § 40; S.C. CONST. art. I, § 30.
14. 2A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 7.1[2] (3d rev. ed. 1979) [hereinafter cited as 2A NICHOLS]; *see, e.g.,* Arnsperger v. Crawford, 101 Md. 247, 251, 61 A. 413, 415 (1905).
15. 2A NICHOLS, *supra* note 14, § 7.1[3]; *see, e.g.,* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896); Taylor v. Porter, 4 Hill 140, 145 (N.Y. 1843).
16. Comment, *Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L.J. 599, 600 (1949) [hereinafter cited as *Requiem*]. During that period, the functions of federal and state government were far more limited and public land was abundant. *Id.*

governmental and commercial organizations acquired the preciously coveted condemnation authority, there was a striking increase in the number of takings.[17] Consequently, a deluge of litigation ensued.[18] Courts and legal commentators that have undertaken the monumental task of exploring the legal history of the public use requirement agree that the development of the case law has been chaotic.[19] Nevertheless, from the complexity and confusion a few general patterns emerge.

B. Narrow View or Broad View

During the nineteenth century a definitional schism arose as state and, later, federal[20] tribunals embraced either a narrow or broad view of public use.[21] Essentially the narrow view stated that for property to be taken for public use, it must actually be used by the public.[22] New York was the first state to articulate the "use by the public" test in 1837.[23] In response to the sudden increase in condemnations for transportation and industrial purposes, many state courts adopted the narrow view.[24]

The narrow view gradually lost its initial support and has been relegated almost to the status of a legal relic.[25] The United States Supreme Court contributed to the demise of the narrow view in *Mount Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*[26] In that case, Justice Holmes rejected "use by the public" as the appro-

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17. *Id.*
18. *E.g.,* Owensboro v. McCormick, 581 S.W.2d 3, 5 (Ky. 1979). "It would extend this opinion beyond tolerable limits if we attempted to analyze the many Kentucky cases that have decided in particular instances whether condemnation sought was primarily for a public use." *Id.*
19. *Requiem, supra* note 16, at 605-06. The case law is "irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification." *Id.*
20. The federal courts did not review condemnations under the federal government's recognized condemnation authority until the 1870's. Meidinger, *supra* note 1, at 30. The first federal taking case reviewed by the Supreme Court was Kohl v. United States, 91 U.S. 367 (1875) (condemnation by federal government for postal road upheld).
21. 2A NICHOLS, *supra* note 14, § 7.2[1], [2]. *Compare, e.g.,* Ryerson v. Brown, 35 Mich. 333 (1877) (narrow view) *with* Great Falls Mfg. Co. v. Fernald, 47 N.H. 444 (1867) (broad view).
22. *E.g.,* Arnsperger v. Crawford, 101 Md. 247, 253, 61 A. 413, 415 (1905).
23. Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 56-62 (N.Y. 1837) (Tracy, J., concurring).
24. *E.g.*, Sadler v. Langham, 34 Ala. 311, 333 (1859); Ryerson v. Brown, 35 Mich. 333, 338 (1877); *In re* Niagara Falls, 108 N.Y. 375, 380, 15 N.E. 429, 432 (1888).
25. *Requiem, supra* note 16, at 614. "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." *Id. But see* note 28 and accompanying text *infra.*
26. 240 U.S. 30 (1916). In *Mount Vernon,* an Alabama statute provided for the condemnation of property for water power facilities. *Id.* at 31. The United States Supreme Court held that this state law did not violate the due process prohibition against private takings. *Id.* at 33.

priate test.[27] While a few courts still adhere to the strictures of the narrow view,[28] most are vehement in refuting its soundness in favor of the broad view.[29]

The broad view of public use developed simultaneously with the narrow view.[30] Under the broad view property can be taken by eminent domain if it is to be devoted to a use that benefits the public.[31] The public benefit test has been accepted by numerous courts[32] and is the majority view.[33]

The Supreme Court's silence has done as much to contribute to the proliferation of the broad view as its decision in *Mount Vernon* did for the decline of the narrow view. Considerable deference has been granted by the High Court to state court determinations as to the constitutionality of legislatively authorized condemnations.[34] Nevertheless, departing from its prior reluctance to review such cases, in an 1896 case, *Missouri Pacific Railway Co. v. Nebraska,*[35] the Court for the first time raised the unconstitutionality of takings for private use.[36] In that case, a Nebraska state agency had ordered a railroad company to allow

27. *Id.* at 32. "The inadequacy of use by the general public as a universal test is established." *Id.*

28. *E.g.,* Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956); Phillips v. Foster, 215 Va. 543, 211 S.E.2d 93 (1975). In *Phillips,* the Supreme Court of Virginia held that a taking to drain private land was not for public use because the determinative issue was the predominance of public use and not public benefit. *Id.* at 543-44, 211 S.E.2d at 94. In *Edens,* a redevelopment law provided for the condemnation of a slum area for conversion into an industrial and commercial sector. 228 S.C. at 567, 91 S.E.2d at 280. Judge Stukes, for the Supreme Court of South Carolina, rejected execution of the plan because under state law, public use meant use by the public. *Id.* at 571, 91 S.E.2d at 283. Although a similar condemnation was upheld by the United States Supreme Court in Berman v. Parker, 348 U.S. 26 (1954), the South Carolina court stated that the High Court's concept of public use was different than the view adopted by that state. 228 S.C. at 575, 91 S.E.2d at 285.

29. *E.g.,* Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 182, 339 A.2d 278, 284 (1975); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 629-30, 304 N.W.2d 455, 457 (1981) (per curiam).

30. *Compare, e.g.,* Sadler v. Langham, 34 Ala. 311, 334 (1859) *and* Arnsperger v. Crawford, 101 Md. 247, 253, 61 A. 413, 415 (1905) (narrow view) *with* Boston & Roxbury Mill Dam Corp. v. Newman, 29 Mass. 467, 481 (1832) *and* Amoskeag Mfg. Co. v. Head, 56 N.H. 386, 400 (1876), *aff'd,* 113 U.S. 9 (1885) (broad view).

31. Berman v. Parker, 348 U.S. 26, 32 (1954); 2A NICHOLS, *supra* note 14, § 7.2[2].

32. *See, e.g.,* Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980); 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).

33. 2A NICHOLS, *supra* note 14, § 7.2[2].

34. Meidinger, *supra* note 1, at 31. The Court has not changed this policy. *See, e.g.,* TVA v. Two Tracts of Land, 387 F. Supp 319 (E.D. Tenn. 1974), *aff'd,* 532 F.2d 1083 (6th Cir.), *cert. denied,* 429 U.S. 827 (1976); 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).

35. 164 U.S. 403 (1896).

36. *Id.* at 416. The Court raised the due process private taking issue *sua sponte. Id.* at 417.

a group of farmers to erect a grain elevator near its tracks.[37] Justice Gray, for the Court, stated that the order, compelling surrender of an estate in land to a private association, was a taking of property from the railroad for the private use of business, in violation of the fourteenth amendment due process clause.[38] The Court observed that the association was neither incorporated for a public purpose nor constructing the elevator for general public use.[39] Unfortunately, Justice Gray did not expand on the precise test employed to invalidate the state action. *Missouri Pacific,* therefore, stands as an apparent anomaly in eminent domain law.[40] Since that decision over eighty-five years ago, the Supreme Court has not invoked the public use doctrine to invalidate a state condemnation for the benefit of private business.[41]

The broad versus narrow view debate has not helped in focusing on a clear definition of public use. The practical consequences of applying one view or the other have been minor because, for any given set of circumstances, both tests are unworkable.[42] Realizing the inadequacy of either approach, legal commentators have instead analyzed the history of particular public uses.

C. Infrastructure and Urban Development

Since colonial times, takings which have been essential for the public welfare have been routinely upheld as public uses, despite the benefit to private persons or businesses. The transportation and industrial network of the United States has, for the most part, been a product of private corporate development. Because courts believed that the sovereign power of eminent domain could be delegated to private interests when they provided services essential to citizens, takings were considered for public use despite substantial private benefit. Without condemnation authority, the infrastructure[43] vital to an industrialized society could never have been built in the American capital economy.

One of the earliest examples of takings by private interests for in-

37. *Id.* at 416.
38. *Id.* at 417.
39. *Id.*
40. The fifth amendment was not a basis for finding the proposed taking in *Missouri Pacific* unconstitutional. Direct application of this provision of the Bill of Rights to the states was rejected by the Court in Baron v. Baltimore, 32 U.S. 243, 247 (1833). It was not until the Court's 1897 Term that the fifth amendment was applied directly to the states through the fourteenth amendment due process clause. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897). Had *Missouri Pacific* been decided a year later under the incorporation theory, it might have had greater precedential value.
41. Berger, *supra* note 3, at 213.
42. 2A NICHOLS, *supra* note 14, § 7.2[3]; Berger, *supra* note 3, at 208; Meidinger, *supra* note 1, at 24.
43. "Infrastructure" in this context means major transportation arteries such as railways, highways, and intercoastal waterway facilities. The term also includes energy production and transport systems. *See* Meidinger, *supra* note 1, at 23-33, 37-41.

dustrial development was the mill acts.[44] Prior to the American Revolution, the mill acts permitted a lower riparian to build a dam to supply power for a mill.[45] If, as a result of such action, the land of an upper riparian was flooded, the lower could only be assessed damages.[46] By limiting the remedy to damages the law, in effect, gave the mill owner the right of private condemnation.[47] When courts began to address the public use requirement, mill acts were occasionally struck down under the narrow view[48] but, more often, were upheld by courts applying the broad public benefit test.[49] The mill acts were significant in the history of public use because they were the forerunners of modern legislation giving public utilities condemnation authority.[50] Moreover, they were the first statutes that permitted private businesses to condemn property notwithstanding the public use limitation.[51]

Another body of statutes that enabled a private individual to condemn property were the landlocked owner laws.[52] These laws allowed the owner of a landlocked parcel to build a road through the land of an adjacent owner to gain access to a public highway.[53] Federal and state governments in the young American republic could not provide roads in step with the westward expansion and conversion of wilderness to productive use.[54] Landlocked owner laws encountered some challenges under the public use limitation but were generally upheld.[55] This legislation could have played a more important role in the history of public use had it not been for the eventual supremacy of the railroads in the American economy during the 1900's.

Railroad companies dominated the transportation industry and consequently took precedence in the delegated exercise of eminent domain.[56] They used condemnation authority with unparalleled speed and frequency.[57] In every jurisdiction where the use of eminent do-

44. 2A NICHOLS, *supra* note 14, § 7.623. All of the state mill acts effective in 1885 are listed in Head v. Amoskeag Mfg. Co., 113 U.S. 9, 17-18 (1885).
45. 2A NICHOLS, *supra* note 14, § 7.623.
46. *Id.*
47. Berger, *supra* note 3, at 206.
48. *E.g.,* Loughbridge v. Harris, 42 Ga. 500 (1871); Ryerson v. Brown, 35 Mich. 333 (1877); Tyler v. Beacher, 44 Vt. 648 (1871) (mill acts held unconstitutional).
49. *E.g.,* Hazen v. Essex Co., 66 Mass. 475 (1853); Great Falls Mfg. Co. v. Fernald, 47 N.H. 444 (1867); Scudder v. Trenton Falls, 1 N.J. Eq. 694 (1832) (mill acts upheld as providing public benefit).
50. Berger, *supra* note 3, at 206-07.
51. *Id.*
52. 2A NICHOLS, *supra* note 14, § 7.626.
53. Berger, *supra* note 3, at 207.
54. *Requiem, supra* note 16, at 601.
55. *Compare, e.g.,* County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 P. 915 (1903); Brewer v. Bowman, 9 Ga. 37 (1850) *and* Robinson v. Swope, 75 Ky. 21 (1876) (upholding private way laws) *with* Logan v. Stogdale, 123 Ind. 372, 24 N.E. 135 (1890); Welton v. Dickson, 38 Neb. 767, 57 N.W. 559 (1894) *and* Taylor v. Porter, 4 Hill 140 (N.Y. 1843) (invalidating private way laws).
56. Meidinger, *supra* note 1, at 26-27.
57. *E.g.,* Swan v. Williams, 2 Mich. 427 (1852); Concord R.R. v. Greely, 17 N.H. 47

main by the railroads was contested, the delegation of state power was upheld.[58] Without condemnation authority, railroads certainly could have never come into existence.[59]

The demands of new technology necessitated the ever increasing delegation of condemnation authority. Energy producers in the late nineteenth century used eminent domain both at the state and regional levels.[60] The need for direct routes and specialized configurations resulted in takings that could not be avoided.[61] When the iron horse gave way to the horseless carriage as the prevailing mode of commerce, the exercise of eminent domain shifted to the construction of turnpikes.[62] In addition, the shorelines of intercoastal waterways were subjected to condemnation for the development of canals and harbor facilities.[63] In summary, condemnations for instrumentalities of commerce were regularly upheld, despite the degree of private control, because of the anticipated public benefit.

From the turn of the century to modern times, eminent domain has been utilized in increasingly sophisticated and comprehensive projects, characterized by the cooperative efforts of government and industry. Their combined activities have had the greatest impact, however, in the field of urban development. Although examination by the judicial branch into urban revitalization schemes started over a hundred years ago,[64] state and federal judiciaries did not acknowledge urban renewal as a distinct body of law until the social reforms of the thirties evidenced a commitment to the eradication of urban blight.[65] Until the Supreme Court's 1954 landmark decision in *Berman v.*

(1845); State v. Snohomish County Court, 68 Wash. 572, 123 P. 996 (1912). For citation to numerous cases in which condemnations by the railroads were contested and upheld, see 2A NICHOLS, *supra* note 14, § 7.521.

58. 2A NICHOLS, *supra* note 14, § 7.521.
59. Berger, *supra* note 3, at 208.
60. 2A NICHOLS, *supra* note 14, § 7.522 (light and electricity), *id.* § 7.523 (gas and petroleum). The expansion of public utilities made the mill acts obsolete. Meidinger, *supra* note 1, at 32.
61. *See* Poletown Neighborhood Council v. Detroit, 416 Mich. 616, 678, 304 N.W.2d 455, 479 (1981) (Ryan, J., dissenting).
62. *E.g.,* Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).
63. *E.g.,* Marchant v. City of Baltimore, 146 Md. 513, 126 A. 884 (1924) (Baltimore harbor project); Rogers v. Bradshaw, 20 Johns. 735 (N.Y. 1823) (Erie Canal project).
64. Meidinger, *supra* note 1, at 33. The first case to deal with slum clearance and the public use limitation on eminent domain was Dingley v. Boston, 100 Mass. 544 (1868). In *Dingley,* a state law provided for the taking of urban areas to abate nuisances for the preservation of public health. *Id.* at 547-50. The Supreme Judicial Court of Massachusetts upheld the act because it provided for a use that was "unquestionably" public. *Id.* at 553.
65. New York Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936), was the first case to uphold the condemnation of a slum area for the construction of low income housing. A year later the United States Congress enacted the Housing Act of 1937, which authorized federal loans and grants for slum clearance and public housing construction. Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) (current version at 42 U.S.C. §§ 1401-1440 (1976)).

Parker,[66] federal and state urban renewal statutes met with varying degrees of success when confronted by the public use limitation.[67]

In *Berman v. Parker,*[68] the proprietor of a District of Columbia department store sought to enjoin the condemnation of his property.[69] The store, situated in a designated blighted area, was condemned under a congressional act[70] even though the business was viable.[71] Despite the owner's contention that the act violated the public use requirement of the fifth amendment,[72] the Supreme Court upheld the taking.[73] Justice Douglas, for the Court, stated that the elimination of crime and disease, under a comprehensive plan for slum clearance, was a legitimate purpose to be pursued under Congress' plenary power in the nation's capital.[74] The scope of judicial review was noted to be extremely narrow in such cases.[75] Answering the contention that redevelopment by a private corporation violated the public use requirement, the Court stated as follows:

> Once the object is within the authority of Congress the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end . . . . Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another . . . . The public end may be as well or better served through an agency of private enterprise than through a department of government — or so the Congress might conclude.[76]

Berman v. Parker[77] is the most influential eminent domain case in the present era of highly sophisticated infrastructure expansion and municipal development projects.[78] With the notable exception of

66. 348 U.S. 26 (1954).
67. *Compare* Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952) *and* Housing Auth. v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953) (condemnations invalidated) *with* Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954) *and* Papadinis v. City of Somerville, 331 Mass. 627, 121 N.E.2d 714 (1954) (condemnations upheld).
68. 348 U.S. 26 (1954).
69. *Id.* at 28.
70. District of Columbia Redevelopment Act, ch. 338, 63 Stat. 441 (codified at D.C. CODE ANN. §§ 5-701 to -719 (1961)).
71. 348 U.S. 26, 30 (1954).
72. *Id. at* 30-31.
73. *Id.* at 35.
74. *Id.* at 31-32. The United States Constitution authorizes Congress to legislate exclusively for the District of Columbia. U.S. CONST. art. 1, § 8, cl. 17.
75. 348 U.S. 26, 32 (1954).
76. *Id.* at 32-34 (citations omitted).
77. 348 U.S. 26 (1954).
78. Meidinger, *supra* note 1, at 35-38; *see* Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 590 (1972).

South Carolina, which has rejected the rationale of *Berman,*[79] most states have enacted laws that allow condemnation for the private development of blighted areas.[80] Moreover, several jurisdictions have gone beyond slum clearance and have adopted local development acts that permit the taking of non-blighted property in non-blighted areas.[81] These acts figure prominently in programs for private commercial and industrial stimulation of local economies. Condemnations, pursuant to these statutes, have created a conflict among the states and generated the criticism of legal commentators as to whether such takings lie at the periphery of unconstitutional private use.[82]

III. THE OUTER LIMITS OF PUBLIC USE

In eminent domain law a growing concern exists that the public use requirement is in jeopardy. While the general appraisal of its viability as a constitutional restraint is not altogether fatalistic,[83] an evaluation of the modern case law is not encouraging. Recent opinions and law review articles have warned that property owners are virtually defenseless against governmental and commercial entities armed with condemnation authority.[84] The public benefit test, in their view, has made takings impervious to attacks based upon the public use limitation.[85] Takings are sporadic, swift, and ordinarily result in permanent deprivations of property.[86] Finally, some legal writers caution that eminent domain may become as much an inherent attribute of corporate planning as it is of state sovereignty.[87]

There are numerous reasons for examining in greater detail the public use requirement and the role of corporations in the exercise of eminent domain. The participation of large corporations in the decision-making process at the executive and legislative levels of government could infringe on the property rights of those who are not considered in a corporation's profit projections. In contrast to corporate power, the people most frequently affected by takings are often plagued

79. Edens v. City of Columbia, 228 S.C. 563, 573-76, 91 S.E.2d 280, 284-85 (1956).
80. *E.g.,* D.C. CODE ANN. § 5-804 (1981); MD. ANN. CODE art. 44A, § 13 (1980); VA. CODE § 36-27 (1976).
81. *E.g.,* MICH. COMP. LAWS § 125.1622 (1980); MINN. STAT. ANN. §§ 472.01-.02 (West 1978).
82. Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); Berger, *supra* note 3; Meidinger, *supra* note 1.
83. *Requiem, supra* note 16.
84. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 645-46, 304 N.W.2d 455, 464-65 (1981) (Ryan, J., dissenting); Meidinger, *supra* note 1, at 42.
85. *See* Meidinger, *supra* note 1, at 41-42.
86. *Id.* at 41-44.
87. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 683, 304 N.W.2d 455, 481 (1981) (Ryan, J., dissenting). "[W]hen the private corporation to be aided by eminent domain is . . . large and influential . . . , the power of eminent domain, for all practical purposes, is in the hands of the private corporation. The municipality is merely the conduit." *Id.*

by poor organization and political impotence.[88] Furthermore, judicial investigation into such takings is restricted because many condemnation hearings are expedited legal proceedings.[89] Finally, victims of governmental-industrial cooperation may not always be adequately compensated by the mere receipt of "fair market value" for their property.[90] The following analysis of representative cases, dealing with private municipal development and the public use limitation, is illustrative.

A. Representative Cases

In 1975 the Court of Appeals of Maryland decided *Prince George's County v. Collington Crossroads, Inc.*[91] In that case, the county sought to condemn property for the private development of an employment center for clean industry.[92] County authorities contended that the land was being taken for the public use of employment diversification and a larger tax base.[93] Maryland's highest court upheld the taking.[94] Judge Eldridge, for the court, noted that the project was too costly to attract private investment, without initial condemnation and resale.[95] Furthermore, control of the project by the county rendered the taking as one for public use under the Maryland Constitution.[96]

Karesh v. City Council of Charleston[97] was decided by South Carolina's highest court in 1978. The city, under a contract with the Holywell Corporation, attempted to condemn commercial property for

88. Comment, *State Constitutional Limitations on the Power of Eminent Domain,* 77 HARV. L. REV. 717, 719 (1964).

89. *E.g.,* MICH. COMP. LAWS §§ 213.51 to .77 (1980); MINN. STAT. ANN. § 117.042 (West 1976). State legislatures have prescribed various standards by which a municipality can acquire property quickly through condemnation; the general requirement is a high degree of public necessity. *See, e.g.,* MICH. COMP. LAWS §§ 213.51 to .77 (1980); MINN. STAT. ANN. § 117.042 (West 1976).

90. Fair market value has been held to satisfy the just compensation requirement. United States v. Powelson, 319 U.S. 266, 275 (1943). Certain costs borne by the condemnee, however, are not taken into account for valuation purposes, making fair market value less than adequate compensation.

> For example, the taking of the land from its owner may cause him to suffer many injuries (such as the expenditure of time and money in moving to another location, or a loss of good will resulting from the enforced relocation of his business) for which he would not be fully compensated if his recovery were based entirely on the value of the condemned land as the word "value" is generally construed by the courts.

1 J. BONBRIGHT, VALUATION OF PROPERTY 98 (1937).

91. 275 Md. 171, 339 A.2d 278 (1975).

92. *Id.* at 176-79, 339 A.2d at 281-82.

93. *Id.*

94. *Id.* at 190, 339 A.2d at 288.

95. *Id.* at 179-80, 339 A.2d at 283.

96. *Id.* The Maryland Constitution's public use provision provides, "The General Assembly shall enact no law authorizing property, to be taken for public use, without just compensation . . . ." MD. CONST. art. III, § 40.

97. 271 S.C. 339, 247 S.E.2d 342 (1978).

the development of a convention center and shopping complex.[98] State taxpayers sought declaratory and injunctive relief, claiming that the city could not take the property and lease it to a private corporation.[99] The court held that such condemnations contravene South Carolina's Constitution, which mandates that eminent domain can only be authorized for public use.[100]

Kentucky's highest appellate tribunal followed in 1979 with *Owensboro v. McCormick.*[101] Taxpayers in that state challenged the constitutionality of a local industrial authority act.[102] The Supreme Court of Kentucky ruled in favor of the taxpayers.[103] Justice Reed, for the court, held that property could not be condemned for ultimate conveyance to private commercial or industrial developers.[104] Justice Reed adopted a portion of the intermediate appellate court's opinion, which simply stated that no public use is involved when the land of one is condemned merely to enable another to build a factory or shopping center.[105]

In *Poletown Neighborhood Council v. Detroit*,[106] the Supreme Court of Michigan came to a conclusion that contrasted diametrically with the ruling of the *Owensboro* court.[107] *Poletown* attracted considerable attention from the local and national media when the residents of the small Polish-American community tried to stop the leveling of their homes, shops, and churches under the authority of a municipal development act.[108] The contemplated public use of the condemned five hundred acre tract was the construction of a General Motors Corporation "new generation" auto assembly facility.[109] General Motors had informed Detroit authorities that it was closing other plants, which could not be renovated, resulting in the loss of thousands of jobs to a city already crippled by severe unemployment.[110] Unless an area meeting the corporation's specifications was found, the new facility would be built elsewhere. Over the vigorous dissents of Justices Ryan[111] and

98. *Id.* at 341, 247 S.E.2d at 343.
99. *Id.* at 341, 247 S.E.2d at 344.
100. *Id.* at 344-45, 247 S.E.2d at 345 (construing S.C. CONST. art. 1, § 13).
101. 581 S.W.2d 3 (Ky. 1979).
102. KY. REV. STAT. §§ 152-810 to -930 (1970).
103. 581 S.W.2d 3, 8 (Ky. 1979).
104. *Id.* at 7-8.
105. *Id.* at 8 (quoting opinion of intermediate appellate court).
106. 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam).
107. *Compare* Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (per curiam) *with* Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979).
108. *E.g.*, Kelly, *The Last Days of Poletown,* TIME, Mar. 30, 1981, at 29; *Pushing the Boundaries of Eminent Domain,* BUS. WEEK, May 4, 1981, at 174.
109. 410 Mich. 616, 628, 304 N.W.2d 455, 457 (1981) (per curiam).
110. *Id.* at 630-32, 304 N.W.2d at 460.
111. *Id.* at 645-84, 304 N.W.2d at 464-82 (Ryan, J., dissenting). "This is an extraordinary case. The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations." *Id.* at 645, 304 N.W.2d at 464. Justice Ryan's *Poletown* dissent appeared well after the

Fitzgerald,[112] the majority upheld the act and proposed taking.[113] The *per curiam* decision acknowledged the judiciary's limited role and required deference to the legislature in determining public use.[114]

B. Scope of Judicial Review

In reconciling the conflict among states as to the permissible extent of public use, it is necessary to consider the degree of presumptive validity granted legislative determinations by state judiciaries. An examination of the representative cases, as to the measure of deference to be accorded the respective state assemblies, should provide insight into the divergent conclusions. The majority in *Poletown* relied on *Berman v. Parker*'s[115] expression of the narrow judicial responsibility.[116] "The United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.' "[117] The *Poletown* majority further stated that when statutory procedures are followed in condemnation proceedings, the scope of judicial review is even more severely restricted.[118]

In contrast, the two *Poletown* dissents emphasized the responsibility of the judiciary. Justice Fitzgerald accorded legislative announcements their due deference, but concluded that public use is ultimately a judicial question.[119] He noted that conclusive legislative determinations of public use would result in "outrageous" takings of property benefiting private corporations.[120] In Justice Ryan's dissent, he challenged the majority's reasoning on two fronts. First he traced Michigan law and concluded that the majority had ignored the greater deference accorded statutes exercising the taxing and spending power for a public purpose than those relating to eminent domain for public use.[121] Ryan next questioned the majority's reliance on *Berman* because Justice Douglas' decision in that case was confined to review of a congressional act by a federal court, directly applying the fifth amendment in an exclusively

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Supreme Court of Michigan reached its 5-2 decision. He delayed writing a separate opinion because he believed an adequate discussion of the constitutional issues could not be accomplished in the permitted two-week period. *Id.* The dissent contains a highly detailed factual account and, more importantly, the economic setting of the controversy. *Id.* The role of the nation's largest automobile corporation in the condemnation of the neighborhood of mostly retired Polish-American residents is graphically portrayed. *Id.* at 651-60, 304 N.W.2d at 467-71.

112. *Id.* at 636, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).
113. *Id.*
114. *Id.* at 632-33, 304 N.W.2d at 459.
115. 348 U.S. 26 (1954).
116. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 633, 304 N.W.2d 455, 459 (1981) (per curiam).
117. *Id.*
118. *Id.*
119. *Id.* at 638-39, 304 N.W.2d at 461-62 (Fitzgerald, J., dissenting).
120. *Id.*
121. *Id.* at 662-69, 304 N.W.2d at 472-75 (Ryan, J., dissenting).

federal jurisdiction.[122] Ryan concluded that the Supreme Court's ruling provided no logical support for the proposition that a state court should accord similar deference to a state legislature in construing its own constitution.[123]

The South Carolina court in *Karesh* took a strong position on the presumptive invalidity accorded legislative acts granting condemnation authority. The court reaffirmed that eminent domain was in derogation of the fundamental right to hold property in a constitutional system.[124] Strict construction by the court, in accordance with prior South Carolina case law, compelled invalidation of the proposed taking.[125] Thus, public use in South Carolina is clearly a judicial question.[126]

Judicial statements relating to the degree of deference granted legislative bodies do not necessarily explain any court's final ruling. The representative cases illustrate this point. For example, in *Collington Crossroads,* the Court of Appeals of Maryland recognized the judiciary's ultimate responsibility for enforcing the constitution's public use limitation on eminent domain.[127] Nevertheless, the court quoted at length from several Maryland cases indicating that public use is primarily a legislative determination.[128] This confusing dualism also appeared in the *Poletown per curiam* opinion. Qualifying the court's admitted deference to the legislature, the majority stated that the taking was subjected to the highest level of judicial scrutiny because property was taken from one person for the benefit of another.[129] Although the *Owensboro* court was silent as to the degree of deference granted the Kentucky legislature, it chided that body for not promulgating sufficient guidelines under the local development act.[130] Commenting on judicial reluctance to enter the public use debate, Professor Nichols stated, "The constitutional protection against the taking of property for private use cannot be evaded by any colorable declarations that the use is public however formally and officially made."[131]

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122. *Id.* at 668, 304 N.W.2d at 475.

123. *Id.*

124. Karesh v. City of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978) (citing Young v. Wiggins, 240 S.C. 426, 435, 126 S.E.2d 360, 365 (1962)).

125. *See* discussion of Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956), note 28 *supra.*

126. *See id.*

127. Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 181, 339 A.2d 278, 283 (1975).

128. *Id.* at 182-89, 339 A.2d at 283-87 (quoting Riden v. Philadelphia, B. & W. R.R., 182 Md. 336, 342-43, 35 A.2d 99, 102 (1943); VanVitsen v. Gutman, 79 Md. 405, 411-12, 29 A. 608, 610 (1894); New Central Coal v. George's Creek Coal & Iron Co., 37 Md. 537, 560 (1873)).

129. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 634-35, 304 N.W.2d 455, 459-60 (1981) (per curiam).

130. Owensboro v. McCormick, 581 S.W.2d 3, 4-5 (Ky. 1979).

131. 2A NICHOLS, *supra* note 14, § 7.4[1].

C. Distinguishing the Precedent

Similar cases have been cited by courts when confronted with takings under municipal development laws. The conflicting results raise the issue of the applicability of decisions concerning the taxing and spending power, slum clearance, and infrastructure development in condemnations such as those in the representative cases.

1. Taxing and Spending Power

The law of eminent domain uses such terms as public use, public purpose, and public benefit interchangeably. "Public purpose," however, is a common constitutional phrase that delineates state taxing and spending power.[132] The representative cases demonstrate a deep split as to the propriety of granting legislatures the same degree of discretion in eminent domain as that granted under the taxing and spending clauses. In *Collington Crossroads,* the Court of Appeals of Maryland expressly recognized the distinction between the exercise of eminent domain and the power to issue revenue bonds to finance private industrial and commercial projects for a public purpose.[133] Yet the court cited several bond issuance cases to support its broad interpretation of public use, justifying condemnation for the private development of an employment park.[134]

The Michigan court in *Poletown* did not distinguish between the two powers. In describing the "protean concept of public benefit,"[135] the court held the terms public use and public purpose to be synonymous.[136] A leading Michigan case defining the scope of the taxing and spending power was cited as direct authority for the General Motors condemnation.[137]

In contrast to the Maryland court and *Poletown* majority, the dissents in *Poletown* displayed opposition to blending the two concepts. The dissenting justices conceded that public use and public purpose, within their respective constitutional contexts, had changed and expanded since their adoption.[138] They distinguished the terms, however, based on the degree to which the taxing and spending power and emi-

132. *E.g.,* KY. CONST. § 171; MICH. CONST. art. 10, § 2; S.C. CONST. art. X, § 14.

133. Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 190 n.6, 339 A.2d 278, 288 n.6 (1975).

134. *Id.* at 190, 339 A.2d at 288 (1975) (citing Wilson v. Board of County Comm'rs, 273 Md. 30, 327 A.2d 488 (1974); Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965); Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957)).

135. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 630, 304 N.W.2d 455, 457 (1981) (per curiam).

136. *Id.*

137. *Id.* (citing Gregory Marina, Inc. v. Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966)).

138. *Id.* at 643, 304 N.W.2d at 463 (Fitzgerald, J., dissenting); *id.* at 664, 304 N.W.2d at 473 (Ryan, J., dissenting).

nent domain impinge upon property rights.[139] "[I]t is one thing to disagree with the purposes for which one's tax money is spent; it is quite another to be compelled to give up one's land."[140]

In *Karesh* the trial court relied on South Carolina's new finance and taxation article to uphold the taking.[141] The new section of the constitution recognized redevelopment by private corporations as a public purpose, enabling municipalities to incur indebtedness.[142] Holding that the new article was inapplicable to eminent domain cases, the appellate court observed that no repeal of the public use clause was intended.[143]

The same distinction was made in *Owensboro.* To support the proposed condemnation, the city relied on revenue bond cases that affirmed the right of local governments to purchase property for private industrial development.[144] Reducing unemployment was a proper public purpose under the state's taxing and spending power.[145] It was held, however, that this purpose for state expenditure was irrelevant to condemnation under the local industrial act.[146] The *Owensboro* decision, similar to the dissents in *Poletown,* distinguished the constitutional requirements of public use for condemnation from public purpose for taxing and spending:

> The opportunity for tyranny, particularly by the self righteous, exists in condemnation of private property to a vastly greater degree than the levy of taxes and expenditure of funds . . . . Abuse of the taxing and spending power can be effectively dealt with at the polls while it is difficult for a private citizen suffering from an abuse of the taking power to recover property permanently taken from him.[147]

2. Slum Clearance and Infrastructure Expansion

Public purpose is a term which describes the objective for which

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139. *Id.*

140. *Id.* at 666, 304 N.W.2d at 474 (Ryan, J., dissenting).
> Condemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry. The burden of taxation is distributed on the great majority of the population, leading to a more effective check on the improvident use of public funds. *Id.* at 641-42, 304 N.W.2d at 463 (Fitzgerald, J., dissenting).

141. Karesh v. City of Charleston, 271 S.C. 339, 345, 247 S.E.2d 342, 345 (1978) (citing S.C. CONST. art. X).

142. *Id.*

143. *Id.*

144. Owensboro v. McCormick, 581 S.W.2d 3, 6 (1979) (citing Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950)).

145. *Id.* at 6-7.

146. *Id.* (citing KY. REV. STAT. §§ 152.810-.930 (1970)).

147. *Id.* at 7.

state police power may be pursued legitimately.[148] Justice Douglas' opinion in *Berman v. Parker*[149] is replete with the phrase.[150] It is not unusual to find that the conflict concerning the taxing and spending power is reflected in the debate over the precedential value of slum clearance law to modern municipal development acts.

In both *Karesh* and *Owensboro,* the courts distinguished between condemnation and conveyance to private developers for slum clearance and conveyance to private developers for the sole purpose of corporate development.[151] Although the courts stated that such conveyances could not be permitted unless the property was blighted,[152] neither decision stated the rationale for elevating the factual distinction to legal significance. The dissenting opinions in *Poletown* provide the justification missing in *Karesh* and *Owensboro* for distinguishing between takings for slum clearance and condemnations solely for the derivative public benefits of private corporate development. Criticizing the majority's reliance on Michigan slum clearance cases, Justice Fitzgerald noted that in urban renewal law the public use served by condemnation occurs when the slum is eliminated, not when the property is conveyed to private developers.[153] Eradication of blight, he observed, was the controlling public use justifying eminent domain.[154] On the other hand, in *Poletown,* it would not be until General Motors developed the property that the controlling public use of relieving unemployment could be realized.[155] Justice Ryan agreed with this reasoning and cautioned that it was an extreme departure from precedent to link the public benefit directly with the corporation's private ownership and the complete supervision of its board of directors.[156]

The legal validity of distinguishing the slum clearance cases cited in *Owensboro, Karesh,* and *Poletown* is questionable. The public use achieved in urban renewal is the elimination of blight. Yet, vacant lots serve no public purpose in any comprehensive plan and cannot alone be considered as legitimate objectives of state police power. Elimination of slum conditions may be the controlling purpose of slum clearance, but not without a commensurate expectation of redevelopment, often placed in the hands of private corporations.[157]

In *Collington Crossroads,* the Court of Appeals of Maryland relied on infrastructure development law rather than slum clearance decisions

148. Berman v. Parker, 348 U.S. 26, 32 (1954).
149. 348 U.S. 26 (1954).
150. *Id.* at 33, 35.
151. *Compare* Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979) *with* Karesh v. City of Charleston, 271 S.C. 339, 345, 247 S.E.2d 342, 345 (1978).
152. *Id.*
153. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 640, 304 N.W.2d 455, 462 (1981) (Fitzgerald, J., dissenting).
154. *Id.*
155. *Id.*
156. *Id.* at 674, 304 N.W.2d at 477 (Ryan, J., dissenting).
157. See note 186 *infra.*

as precedent. The proposed condemnation in that case was supported by a prior decision, *Marchant v. City of Baltimore.*[158] In *Marchant,* land was condemned along the Patapsco River under a plan to expand privately operated harbor facilities serving the port of Baltimore.[159] Although the *Collington Crossroads* court suggested the illogic of permitting Baltimore City's condemnation along the river while rejecting Prince George's County's condemnation near two major highways,[160] the precedential value of *Marchant* was questionable. In *Marchant,* the public use served by the taking was the extension of harbor service for a major intercoastal waterway.[161] The contemplated public use in *Collington Crossroads,* however, was employment diversification rather than transportation, industrial, or commerical development.[162]

The Maryland court's almost exclusive reliance on infrastructure cases is unique. In *Karesh* and *Owensboro,* for example, the appellate tribunals did not deal with infrastructure cases in rejecting the proposed takings. Furthermore, the *Poletown* majority merely indicated that the condemnation on behalf of General Motors was within the general bounds of Michigan eminent domain law, including infrastructure decisions.[163] Justice Ryan, in his dissent, noted that condemnation for the purpose of infrastructure development falls within the instrumentality of commerce exception to the public use limitation.[164] He viewed the *Poletown* taking, the purpose of which was unemployment relief, as clearly outside this universally recognized exception.[165]

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158. 146 Md. 513, 126 A. 884 (1924).

159. *Id.* at 520-21, 126 A. at 887.

160. Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 190-91, 339 A.2d 278, 288-89 (1975).

> To say that Prince George's County may not accomplish these purposes [of providing employment opportunities as well as general economic benefit] by condemning land for the establishment of certain desired types of private businesses in an industrial park along its major highways, whereas the City of Baltimore can accomplish the same purposes by condemning land for private businesses along its waterway, would be wholly illogical.

Id. (citations omitted).

161. 146 Md. 513, 521, 126 A. 884, 887 (1924).

162. Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 189-90, 339 A.2d 278, 288 (1975). Maryland's highest court was aware of the departure taken in *Collington Crossroads* from prior decisions: "None of the cases in this Court applying [the Maryland public use provision] have involved condemnations of land for industrial or commercial purposes in contexts other than those associated with railroads, public utilities, or port development." *Id.*

163. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981) (per curiam).

164. *Id.* at 672, 304 N.W.2d at 476 (Ryan, J., dissenting). "That a taking of property for a highway is a taking for public use has been universally recognized from time immemorial." *Id.* (quoting Rindge Co. v. County of Los Angeles, 262 U.S. 700, 706 (1923)).

165. *Id.* at 672, 304 N.W.2d at 477 (Ryan, J., dissenting).

IV. PRESCRIPTION FOR REEVALUATION

Within the last few years jurists and legal commentators, cognizant of the dwindling constitutional protection of public use provisions, have offered various guidelines to raise the level of judicial scrutiny in condemnation cases. Their proposals are particularly sensitive to takings that benefit private corporations. The tests proposed by Lawrence Berger,[166] Errol Meidinger[167] and Justice Ryan of Michigan[168] represent the most recent and well reasoned approaches to this issue. While all three have their differences, similarities, and limitations, any one of them is preferable to the outcome determinative analysis adopted in the recent cases upholding condemnation to promote corporate development.

Writing in 1979, Lawrence Berger suggested that courts weigh three factors to reconcile the public need for private enterprises with the right of the individual to own property. The first factor would weigh in favor of takings promoting economic efficiency and the optimum use of resources.[169] The second consideration would be the net increase in the value of the property after the condemnation.[170] The third factor would be whether the public benefit sufficiently outweighed the loss to be borne by the condemnee.[171] An affirmative burden of proof would rest on the condemning authority.[172] Although Berger recognized that courts have utilized all the aforementioned considerations, he noted that the factors had never been applied in a formal and systematic manner.[173]

Responding to Berger's approach a year later, Errol Meidinger suggested that Berger's factors would do little to help the private property owner and could actually result in an increased number of takings.[174] Meidinger joined Berger in criticizing the traditional public benefit test, but proposed a stricter test to solve the problem of indiscriminate takings.[175] Two elements figure prominently in Meidinger's test. The first is that the public necessity for a particular condemnation must be conclusively established.[176] Secondly, the condemnation must result in the least private injury to the condemnee for the greatest pub-

166. Berger, *supra* note 3, at 237-46.
167. Meidinger, *supra* note 1, at 43-49.
168. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 645, 304 N.W.2d 455, 465 (1981) (Ryan, J., dissenting).
169. Berger, *supra* note 3, at 239-40.
170. *Id.* at 240-41. Berger described this element as a "monopoly" factor. *Id.*
171. *Id.* at 241-43.
172. *Id.* at 223-25.
173. *Id.* One of the principal benefits of the Berger test would be greater predictability. Berger does point out that errors in the suggested calculations would likely favor the condemning authority. *Id.*
174. Meidinger, *supra* note 1, at 52.
175. *Id.* at 47.
176. *Id.*

lic good.[177] Despite the differences in Meidinger's and Berger's attempts to raise the level of judicial scrutiny, apparently both concur that the interests of all the parties involved should be balanced.

Justice Ryan in his *Poletown* dissent also suggested that a balancing test should be applied when condemnations are sought on behalf of private corporations. The *Poletown* majority employed a traditional broad view of public use, which they defined as the "protean concept of public benefit."[178] In dissent, Ryan proposed a test requiring the presence of three factors to satisfy the public use limitations.[179] The first factor, "extreme public necessity otherwise impracticable,"[180] would require the indispensability of eminent domain to the very existence of corporate enterprises vital to the public.[181] "With regard to highways, railroads, canals, and other instrumentalities of commerce, it takes little imagination to recognize that without eminent domain these essential improvements, all of which require particular configurations of property — narrow and generally straight ribbons of land — would be 'otherwise impracticable'; they would not exist at all."[182] The second factor in Ryan's test is some form of governmental control over the project after condemnation, during its private operation.[183] Public accountability, Ryan noted, is an element that has traditionally justified takings for private corporations, under the theory that these corporations are acting as public agents.[184] For example, railroads and public utilities are highly regulated industries, which must provide services without discrimination.[185] The third requirement Justice Ryan believed necessary to condone condemnations aiding private corporations

177. *Id.* at 45.

178. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 630, 304 N.W.2d 455, 457 (1981) (per curiam).

179. *Id.* at 674-75, 304 N.W.2d at 478 (Ryan, J., dissenting).

180. *Id.* at 675, 304 N.W.2d at 478. This factor applies to slum clearance and all categories of infrastructure (instrumentalities of commerce and public utilities). *Id.* Unfortunately the dissent did not expand upon who should make the determination of extreme public necessity. Clearly the Michigan legislature and local authorities saw the public necessity in Detroit as unemployment relief. The impracticability element, arguably, was satisfied by the selection of Poletown as the only appropriate site fulfilling the needs of General Motors.

181. *Id.*

182. *Id.* at 675-76, 304 N.W.2d at 478 (Ryan, J., dissenting).

183. *Id.* at 677, 304 N.W.2d at 479.

184. *Id.* at 679, 304 N.W.2d at 479-80.

185. Meidinger, *supra* note 1, at 22. Governmental control was the second major consideration in *Collington Crossroads* justifying the taking. Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 180, 339 A.2d 278, 283 (1975). The word "control" was perhaps too strong a characterization of the county's relationship with the private development. Prince George's County's prohibition against "nuisances and hazards" placed no greater restrictions on the developers than those that would have existed if the land had been sold without initial condemnation. *Id.* Moreover, "clean" industrial development was not the type of activity that would disrupt the area's environmental quality. Although the county required a certain percentage of the land to remain undeveloped, the open space

is that site selection must be made without reference to the corporations' interests.[186] The presence of a corporation's "guiding hand"[187] behind any proposed condemnation is an alarming concept. Evidence of manipulation of municipal governments should make any taking on a corporation's behalf inherently suspect and presumptively invalid.[188]

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provision provided for private ownership of the land, including a privately maintained golf course. *Id.*

An important issue raised in Justice Ryan's dissent, which was left unanswered, was the applicability of "public accountability" to slum clearance. Once developers have accomplished the objectives of a comprehensive plan, they normally operate as private owners. *See, e.g.,* Berman v. Parker, 348 U.S. 26, 30 (1954). However, the liability of such private owners under 42 U.S.C. § 1983 (Supp. IV 1980), for deprivation of constitutionally protected rights, suggests that state involvement entails some degree of public accountability. *See* Male v. Crossroads Assocs., 469 F.2d 616 (2d Cir. 1972).

186. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 680, 304 N.W.2d 453, 480 (1981) (Ryan, J., dissenting). Justice Ryan's third factor, independent site selection, requires condemnation site selection to be dependent upon considerations separate from corporate interests. *Id.* For example, the path of a railroad is determined by topography, demography, and technology. *Id.* These factors, however, are not necessarily independent of a railroad company's interest. Once the public need for a railroad has been established, these same considerations, essential to efficient operation, are also taken into account to assure maximum profits.

Justice Ryan also applied independent site selection to urban renewal. *Id.* Slum clearance takings, he noted, are based upon an initial determination that an area is blighted, without reference to the needs of repurchasing develcpers. *Id.* Such a condemnation, however, would not proceed without the initial determination of the feasibility of commercial redevelopment. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954).

Justice Fitzgerald in his *Poletown* dissent distinguished *Collington Crossroads* and another similar case, City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980), from the General Motors taking because in the Maryland and Minnesota cases, governmental entities rather than corporations had chosen the sites. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 643-44, 304 N.W.2d 455, 464 (1981) (Fitzgerald, J., dissenting).

187. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 653, 304 N.W.2d 455, 468 (1981) (Ryan, J., dissenting).

188. City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980). In *Wurtele,* the appellants contended that the taking for a municipal development project was motivated by the private economic interests of the developing corporation and financing bank. *Id.* at 390. The court stated that a municipality's finding of public purpose could be negated by a showing of bad faith or tainted motive. *Id.* (citing Housing & Redevelopment Auth. v. Shapiro, 297 Minn. 103, 210 N.W.2d 211 (1973)). Justice Peterson, for the Supreme Court of Minnesota, held that the evidence was inconclusive and indicated that business redevelopment projects require the involvement and the initiative of private business interests in the community. *Id.*

In Mayor & City Council of Baltimore v. Chertkof, 293 Md. 32, 441 A.2d 1044 (1982), the owner of a tract of land bordering on the Patapsco River filed an action in federal court under 42 U.S.C. § 1983, alleging that the proposed condemnation of his property violated the fourteenth amendment. The landowner, who had leased a portion of the tract to a concrete batching plant, claimed that a corporation which operated a glass manufacturing facility on an adjacent tract sought to purchase his land but he refused to sell. He further alleged that Baltimore City officials and the corporation conspired to include his property in the

Surely the gravest consequences will result when sovereign powers are usurped by independent corporate strategists.

Justice Ryan summarized his *Poletown* dissent by enunciating a rule of law that would take into account the competing interests of the government, the public, the corporation, and the private property owner in condemnations benefiting private corporations.[189] Although acknowledging the competing interests, he would place a special burden on the condemning authority: "[T]he right to own and occupy land will not be subordinated to private corporate interests unless the use of the land condemned by or for the corporation is invested with public attributes sufficient to fairly deem the corporate activity governmental."[190]

V. CONCLUSION

Infrastructure development is essential to an industrialized society. It is generally accepted that if states had not delegated eminent domain authority to private corporations, a relatively small group of individuals could have prevented establishment of the American transportation-industrial network. The theory under which the constitutional public use limitation was satisfied was that these private enterprises provided a public benefit. Subsequently, industrialization had the adverse effect of concentrating the population into large urban centers. In the twentieth century, urban decay reached catastrophic proportions; the economy could not respond to the social pressure for relief. With the aid of condemnation authority, the private economy instilled new vigor into blighted metropolitan areas.

One of the major social concerns in the United States today is the paralyzing level of unemployment, particularly in cities. Unemployment was the focal point in *Collington Crossroads, Owensboro,* and *Poletown,* and at least a consideration before the *Karesh* court. Yet,

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Middle Branch urban renewal plan authorized under the Baltimore City Charter. *Id.* at 37, 441 A.2d at 1048. The United States District Court for the District of Maryland certified ten questions to the Court of Appeals of Maryland because the pertinent provisions of the City Charter had never been addressed in the state courts. *Id.* at 38, 441 A.2d at 1049. Chief Judge Murphy, for the court, observed:

> Although § 15A does not restrict the City's power of condemnation for genuine urban renewal purposes under § 15, even where such a taking may culminate in the disposition of the condemned industrial property to another industrial user for expansion purposes (and result in some industrial or economic growth), nevertheless if the urban renewal plan or a part of it is merely a pretext, a ruse, a contrivance to condemn private industrial property for the private economic enhancement of another industry, as Chertkof claims, the condemnation, as well as the offending segment of the urban renewal plan and ordinance, would be in violation of § 15A.

Id. at 47, 441 A.2d at 1053.

189. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 681, 304 N.W.2d 453, 481 (1981) (Ryan, J., dissenting).

190. *Id.*

reconciliation of these cases and their use of precedent is difficult. In *Karesh,* the rejection of the proposed condemnation was predictable for two reasons. First, South Carolina had rejected the rationale of *Berman v. Parker*[191] and, second, the court had long adhered to a strict definition of public use. The Supreme Court of Kentucky, in *Owensboro,* refused to allow condemnation under the state's municipal development law because it went beyond the scope of public use. The strict view of public use was predicated upon a narrow interpretation of precedent and a refusal to analogize distinct police powers because of the potential for serious abuse unique to eminent domain. The Court of Appeals of Maryland presented a more pragmatic view of precedent when it addressed the issue of condemnation to promote employment through commercial development. Such an expansive reading of public use was possible when the traditional public benefit test was applied. Michigan's high court took essentially the same approach.

Although of no legal consequence, there is a fundamental difference between the Michigan and Maryland decisions. In *Collington Crossroads,* the condemnee was an incorporeal entity, a corporation. On the other hand, in *Poletown,* the condemnees were elderly residents of a picturesque American ethnic community. The apparent victimization of *Poletown* captured the attention of the nation, lawyer and layman alike. Justice Ryan, in his dissent, did not understate the calamitous unemployment in Detroit. Yet, he was unable to reconcile General Motor's condemnation of *Poletown* with the constitutional prohibition against takings for private use.

Certainly no one can question the sincerity of state and local authorities attempting to alleviate economic ills. Reducing the number of people on unemployment rolls is a legitimate objective of the states' police power. But condemnations serving private corporate interests, with the derivative effect of stimulating local economies, is not an ordinary means to serve that worthy end. All corporate undertakings normally benefit the public to some extent. It is one of the axioms upon which a free enterprise system is based. In the past, however, only those undertakings that had risen to the level of governmental responsibility were afforded eminent domain authority. In keeping with this precedent, the determinative issue should be whether corporate viability has, in and of itself, become a responsibility of government.

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191. 348 U.S. 26 (1954).