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Comments: The Continued Expansion of the Public Use Requirement in Eminent Domain

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THE CONTINUED EXPANSION OF THE PUBLIC USE REQUIREMENT IN EMINENT DOMAIN

I. INTRODUCTION

The doctrine of eminent domain enables a sovereign to take private property for a public benefit[1] and, as an inherent attribute of sovereignty, is operative without constitutional enumeration.[2] A disturbing feature of eminent domain is that a government may take a person's property even though he objects to the taking.[3] To curtail abuses, the United States Constitution[4] as well as state constitutions provide certain restrictions.[5] The fifth amendment, as extended to the states through the due process clause of the fourteenth amendment,[6] prohibits the taking of private property unless the taking is targeted for a public use and just compensation is provided. Despite these restrictions, the danger of abuse endures because of the liberal enforcement of the constitutional provisions by courts.

This comment examines the current status of the "public use" requirement as defined by recent Supreme Court decisions. First, the historical background of the public use limitation is briefly explored, the evolution of the limitation is traced, and two competing philosophies are examined. Second, the comment analyzes the recent developments in eminent domain law in areas such as urban renewal, land reform, and sports. Emphasis is placed upon both the state and federal courts' increasingly broader interpretation of the public use requirement and the corresponding deterioration of private property rights. Finally, the comment discusses the ramifications of these recent developments, analyzes the current trend in this area of eminent domain law, and makes recommendations designed to limit the potential abuses.

II. HISTORICAL BACKGROUND OF THE PUBLIC USE LIMITATION

From the inception of the public use requirement, its exact meaning has been debated. At one time, two competing theories existed. The

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1. James v. Oravo Contracting Co., 302 U.S. 134, 147 (1937); BLACK'S LAW DICTIONARY 470 (5th ed. 1979).
2. *See* C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 18.1 (1980).
3. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); *In re* Westlake Project, 96 Wash. 2d 616, 638 P.2d 549 (1981) (interpreting the public use limitation in section 16 of article 1 of the Washington Constitution).
4. The fifth amendment provides: "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." U.S. CONST. amend. V.
5. In Maryland, restrictions upon the use of eminent domain can be found in sections 40 through 40C of article III of the Maryland Constitution. MD. CONST. art. III, §§ 40-40C.
6. Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896).

first, coined the "broad view," regards public use as a public benefit.[7] Under this view, public use encompasses the creation of jobs, promotion of both land sales and industrial activity, and the development of natural resources within the state.[8] Under the broad view, condemned property may either be kept by a governing body or transferred to a private party. The second theory, labeled the "narrow view," advocates a "use-by-public" test which requires the public to actually use the condemned property.[9] Under this rule, there is no public use unless some right for the public to use the property exists after condemnation.[10]

The broad interpretation of public use first emerged in the early nineteenth century. Its emergence coincided with the nation's early economic growth and contributed to the development of the nation's commerce.[11] The broad interpretation enabled the government to quickly develop both railroad and highway networks throughout the country.[12] By the mid-1800's, however, some courts, fearing that the government had been given excessive freedom to interfere with private property rights, opted for the narrow interpretation of the public use requirement.[13] By the turn of the century courts were divided over which theory to apply.[14]

The Supreme Court first addressed this issue in *Missouri Pacific Railway v. Nebraska*.[15] In that case the Court held that a state exercise of eminent domain for a private use was a violation of the due process clause of the fourteenth amendment. Thereafter, the Court reversed direction. In *Mount Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*,[16] it repudiated the "use by the public" test as applied to state takings.[17] Later, in *Rindge Co. v. County of Los Angeles*,[18] the court demonstrated great deference to a state court's determination of what constitutes public use. Writing for the Court in *Rindge Co.*, Justice Sanford stated, "[T]his Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State."[19]

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7. Note, *City of Oakland v. Oakland Raiders: Defining the Parameters of Limitless Power*, 1983 UTAH L. REV. 397, 403.
8. *Id.*
9. *Id.* at 404.
10. *Id.*
11. Note, *The Public Use Requirement In Eminent Domain*, 57 OR. L. REV. 203, 206 (1978).
12. *Id.* at 207-08.
13. *Id.* at 209.
14. *Id.*
15. *See* Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896).
16. 240 U.S. 30 (1916).
17. *Id.* at 32.
18. 262 U.S. 700 (1923) (deferring to the state court's determination that a county's condemnation of land for use as a public highway is a public use).
19. *Id.* at 705-06; United States *ex. rel.* Tennessee Valley Auth. v. Welch, 150 F.2d 613

III. CURRENT INTERPRETATION OF PUBLIC USE

A. Urban Renewal

The urban renewal cases illustrate the current approach to public use taken by both federal and state courts. In *Berman v. Parker*,[20] the Supreme Court expanded the definition of public use and limited the scope of judicial review. The action arose after Congress passed the District of Columbia Redevelopment Act in 1945 to eliminate substandard housing and blighted areas in the District of Columbia.[21] Through the Act, Congress created the District of Columbia Redevelopment Land Agency (DCRLA), an entity possessing the power to acquire property through condemnation, to transfer it to public agencies, and to sell the remainder to private individuals or groups.[22] The Act authorized the agency to remove blighted sections of the community on an area-by-area basis.[23] The new uses of the land were to be determined by the DCRLA in accordance with the needs of each particular community.[24]

In *Berman*, the owners of a department store situated within a condemned area objected to their property being put under the management of a private agency and redeveloped for private uses.[25] Showing great deference to Congressional authority, the Court rejected the owner's claim and upheld the constitutionality of the Act.[26] The Court held that the Act was a legitimate exercise of Congress' police power over the District of Columbia and was therefore entitled to the same deference given to other police-power functions.[27] Further, the Court noted that the legislature may utilize its police power to control public safety, public health, morality, peace and quiet, and law and order.[28] Justice Douglas, delivering the majority opinion, stated:

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[29]

(4th Cir. 1945), *rev'd*, 327 U.S. 546 (1946) (court deferred to congressional finding that property taken for a dam project was for a public use).

20. 348 U.S. 26 (1954).
21. *Id.* at 28-29.
22. *Id.* at 29-30.
23. *Id.* at 34.
24. *Id.*
25. *Id.* at 31.
26. *Id.* at 32.
27. *Id.*
28. *Id.*
29. *Id.* at 33. Justice Douglas also stated: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Id.* at 32.

The liberalization of the public use clause has enabled governing bodies to literally pave the way for other transformations in urban development, including the use of eminent domain to end economic malaise. In *People ex rel. City of Urbana v. Paley*,[30] the City of Urbana employed the doctrine of eminent domain to foster economic revitalization.[31] After examining the constitutionality of the plan, the Supreme Court of Illinois held that it satisfied the public use requirement.[32] In so doing, the court averred:

> [T]oday's decision denotes that the application of the public-purpose doctrine to sanction urban development can no longer be restricted to areas where crime, vacancy or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public wealth.[33]

In *Courtesy Sandwich Shop v. Port of New York Authority*,[34] the New York Court of Appeals examined the validity of concurrent New York and New Jersey legislation which authorized the New York Port authority to condemn property for the construction of a world trade center. The proposed center was defined statutorily as a facility of commerce.[35] Ruling that the proposed revenue project was constitutional, the court noted that increasing the flow of commerce through the Port of New York was a legitimate public purpose.[36]

The use of eminent domain to keep private industry from leaving a community has also been sanctioned. In *Yonkers Community Development Agency v. Morris*,[37] the City of Yonkers, intent on keeping one of the largest employers in its community, condemned a tract of land and sold it to a company at a substantial discount.[38] In ruling that it was not unconstitutional for a city to use eminent domain to foster urban renewal by keeping an important business in the area,[39] the Court of Appeals of

30. 68 Ill. 2d 62, 368 N.E.2d 915 (1977).
31. *Id.* at 67, 368 N.E.2d at 920. (economic revitalization plan involved the acquisition of real and personal property for the purpose of implementing a redevelopment plan for the business district).
32. *Id.* at 78, 368 N.E.2d at 922.
33. *Id.* at 74-75, 368 N.E.2d at 920-21.
34. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).
35. "The proposed World Trade Center is defined by statute 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 . . . governmental services." *Id.* at 387, 190 N.E.2d at 404, 240 N.Y.S.2d at 4.
36. *Id.* at 389, 190 N.E.2d at 405, 240 N.Y.S.2d at 6.
37. 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112, *appeal dismissed*, 423 U.S. 1010 (1975).
38. *Id.* at 483, 335 N.E.2d at 331, 373 N.Y.S.2d at 118.
39. *Id.*

New York explained that urban renewal has evolved from an effort to remove substandard and unsanitary conditions to an instrument utilized to stop economic stagnation and encourage economic development.[40]

In the 1980's, the definition of public use as a vehicle for urban renewal has continued to expand. In *Poletown Neighborhood Council v. City of Detroit*,[41] the Supreme Court of Michigan, in a challenge to the city of Detroit's exercise of eminent domain, significantly expanded the meaning of public use in the area of economic development. In 1980, General Motors Corporation notified the City of Detroit that it would close its Detroit Cadillac and Fisher plants in 1983.[42] General Motors stated, however, that it would build an assembly complex in the city if it could obtain a site that met specified criteria.[43] To avoid the loss of 6,000 jobs, the city purchased the small community of Poletown for $200 million. The city then resold Poletown to GM for $8 million.[44]

In exercising eminent domain, the city did not contend that Poletown was a blighted area. Instead, the city argued that due to the unemployment problem, it had a right to take private property and transfer it to private industry.[45] The court held that the legislative aim of alleviating unemployment and revitalizing the community's economic base was a valid interpretation of public use.[46] Consequently, because of the significant public benefit created, the property could be condemned.

B. Land Reform Outside of the Urban Setting

Eminent domain has also been employed to aid land reform outside of the urban setting. In *People of Puerto Rico v. Eastern Sugar Associates*,[47] large tracts of farmland belonging to a corporate owner on the island of Vieques were condemned in accordance with the land law of Puerto Rico and the Vieques Act.[48] The condemnation was aimed at improving the island's economy by subdividing large estates into smaller, privately operated units.[49]

The corporate landowner in *Eastern Sugar Associates* argued that the condemnation was not based on public use because the government intended to transfer the land to private individuals.[50] The Court of Appeals for the First Circuit disagreed.[51] In deciding that this was a proper

40. *Id.* at 481, 335 N.E.2d at 330, 373 N.Y.S.2d at 116-17.
41. 410 Mich. 616, 304 N.W.2d 455 (1981).
42. *Id.* at 636, 304 N.W.2d at 460.
43. *Id.*
44. *Id.* at 656, 304 N.W.2d at 469.
45. *Id.* at 638, 304 N.W.2d at 461.
46. *Id.* at 634, 304 N.W.2d at 459.
47. 156 F.2d 316 (1st Cir. 1946).
48. *Id.* at 318-19; *see also* 1941 P.R. Laws 1941, Act No. 26; 1944 P.R. Laws, Act. No. 90.
49. *Eastern Sugar Associates*, 156 F.2d at 318-19.
50. *Id.* at 323.
51. *Id.* at 323-24.

public use, the court deferred to the local legislature, reasoning that the legislature was familiar with local conditions and was in the best position to determine what land uses would stimulate the local economy.[52]

Similarly, in *Hawaii Housing Authority v. Midkiff*,[53] the United States Supreme Court considered whether the condemnation of private property by a state agency planning to transfer the property to a different private party was violative of the public use requirement. The dispute concerned the enactment of the Land Reform Act of 1967. The Act authorized the Hawaii Housing Authority, upon request by the lessees of the large landowners, to acquire property from the current owners by condemnation and sell it to the lessees.[54]

The plaintiffs were trustees of a major Hawaiian landholder.[55] The trustees contended that the state could not use its eminent domain power to transfer land from one private owner to another.[56] The United States Court of Appeals for the Ninth Circuit ruled in favor of the trustees, holding that the act was simply "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."[57]

In an opinion written by Justice O'Connor, the Supreme Court reversed the lower appellate court and held the act to be constitutional. The Court relied on its earlier interpretation of "police power" in *Berman v. Parker*[58] and ruled that the exercise of eminent domain was within the realm of the state's police power.[59] Justice O'Connor noted that the legislature determines what governmental purposes are within the police power.[60] Hence, at present, if the legislature concludes that a state governmental action involving eminent domain falls within the ambit of the police power, its decision is final, provided that, the exercise of the eminent domain power is rationally related to a legitimate public purpose.[61]

Equating the eminent domain power with the state's police power effectively limits the courts' role in protecting the constitutional re-

52. *Id.* at 324.
53. 467 U.S. 229 (1984).
54. *Id.* at 233. The land use plan examined in *Midkiff* resulted from the feudalistic land tenure system in Hawaii that allowed a handful of landowners to own the bulk of the land and lease it to individuals in small parcels. *Id.* at 232. The Hawaiian legislature found that forty-seven percent of the state's land belonged to seventy-two private landowners. *Id.* The legislature believed a land ownership change was necessary to reduce both the concentration of land ownership and land prices. *Id.* at 233.
55. *Id.* at 229.
56. *Id.* at 234-35.
57. Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd sub. nom.*, Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).
58. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 239-40 (1984) (quoting from Berman v. Parker, 348 U.S. 26, 32 (1954)).
59. *Id.* at 241-42.
60. *Id.* at 240-41.
61. *Id.* at 243.

straints regarding private property rights. Courts must accept the public purpose determination made by the legislature unless it is totally unreasonable. By applying the police power analysis, the public use requirement is subjected to such low-level scrutiny that almost any use may be deemed permissible.

C. Sports

A broad interpretation of the public use requirement in eminent domain law has also been applied where cities have used sports franchises to aid their economy. It has played an integral role during stadium construction and has been used as a vehicle in attempting to keep teams in their current locations. In *City of Oakland v. Oakland Raiders Ltd.*,[62] the Supreme Court of California considered whether a municipality could utilize eminent domain to keep a professional sports franchise from leaving the city. In 1980, the owner of the Oakland Raiders football team announced his intention to move the team to Los Angeles.[63] To prevent the move, the City of Oakland initiated an eminent domain action to acquire the property rights of the professional team.[64] Following decisions in favor of the Oakland Raiders in both the trial court and lower appellate court, the Supreme Court of California granted certiorari.[65]

The court considered two questions: (1) whether intangible property could be taken by eminent domain and (2) whether the public use requirement was broad enough to encompass the taking of a sports franchise.[66] In response to the first issue, the court held that intangible property could be taken by eminent domain.[67] This conclusion is significant because it broadened the eminent domain power beyond the taking of real property. As a result, franchises, patent rights, charters or any other form of contract throughout the country may be vulnerable to their sovereign's exercise of its eminent domain power.[68]

In respect to the second issue, the court held that "the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function. If such valid public use can be demonstrated, the statutes discussed . . . afford the City the power to acquire by eminent

62. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
63. *Id.* at 63, 646 P.2d at 837, 183 Cal. Rptr. at 675.
64. *Id.*
65. The lower appellate court upheld the trial court on the basis that the enterprise was intangible property not subject to acquisition by the city in an eminent domain proceeding. City of Oakland v. Oakland Raiders, Ltd., 123 Cal. App. 3d 422, 424, 176 Cal. Rptr. 646, 650 (1981), *vacated*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
66. City of Oakland v. Oakland Raiders, Ltd., 32 Cal. 3d 60, 64, 64 P.2d 835, 837, 183 Cal. Rptr. 673, 675 (1982).
67. *Id.* at 68, 646 P.2d at 840, 183 Cal. Rptr. at 678. "For eminent domain purposes, neither the federal nor the state constitution distinguishes between property which is real or personal, tangible or intangible . . . we conclude that our eminent domain law authorizes the taking of intangible property." *Id.*
68. *See id.* at 65, 646 P.2d at 837, 183 Cal. Rptr. at 677.

domain any property necessary to accomplish that use."[69]

The influence of eminent domain on sports franchises has also surfaced in *Mayor of Baltimore v. Baltimore Football Co.*[70] In 1984, Baltimore attempted to use its eminent domain power to enjoin the owner of the Baltimore Colts football team from moving the franchise to Indianapolis, Indiana. Fearing that a timely eminent domain action might succeed, Colts owner Robert Irsay moved the team's physical possessions out of Baltimore on March 29, 1984.[71] On March 30, 1984, Maryland's governing body enacted legislation that would enable Baltimore to condemn sports franchises.[72] On the same day, the Mayor and City Council of Baltimore enacted an ordinance authorizing condemnation.[73] Under the authority of the newly enacted legislation, the city filed a petition in the Circuit Court for Baltimore City. Subsequently, the city removed the condemnation action to the United States District Court for the District of Maryland.

After reviewing Maryland procedural law, the district court held that filing an eminent domain action did not give the city the right to attain possession of the franchise until compensation was paid.[74] Additionally, responding to the Colt's argument that condemnation may not proceed against property not located within Maryland, the court found three factors to be determinative of the location of the franchise: (1) the team's principal place of business; (2) the location of its essential tangible property; and (3) the owner's intentions.[75] After applying these factors to the case, the court ruled that the situs of the franchise was not in Baltimore, where the suit was brought, but in Indianapolis.[76] Therefore,

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69. *Id.* at 72, 646 P.2d at 843, 183 Cal. Rptr. at 681.
70. 624 F. Supp. 278 (D. Md. 1985).
71. *Id.* at 280.
72. *See* Act of March 29, 1984, ch. 6, 1984 Md. Laws 18, 20. The act amended the powers of the City of Baltimore to include the power:

> (2)(B) To acquire by purchase or condemnation any professional sports franchise which has or had the territorial rights to represent Baltimore City on or after January 1, 1983, including without limitation, (1) the franchise right to compete in an organized league or association; (2) the business entity owning or operating such franchise; (3) all contractual rights owned by the business entity which are necessary, incident, and appropriate to ownership and operation of such franchise; (4) all interests in and rights to real property owned by the business entity which are necessary, incident, and appropriate to ownership and operation of such franchise; and (5) any and all other property rights; wherever the same may be located in the state of Maryland, whether tangible, intangible, real, personal, or mixed owned by the business entity, or to which the business entity has a claim, which are necessary, incident to and appropriate to the operation of a professional sports franchise in Baltimore City; and to sell or otherwise dispose of such franchise and collateral rights, in whole or in part, subject to such restrictions and reservations as may be necessary or appropriate.

73. *See* Baltimore City, Md., Emergency Ordinance No. 32 (1984).
74. *Baltimore Football Co.*, 624 F. Supp. at 283.
75. *Id.* at 287.
76. *Id.* The court noted that (1) the team's principal place of business was in Indianap-

the city did not have the right to exercise eminent domain.[77]

Although the cities in both the *City of Oakland v. Oakland Raiders Ltd.* and the *Mayor of Baltimore v. Baltimore Football Co.* cases were unable to stop their teams from leaving through the use of eminent domain, the cases are nevertheless significant. These cases support the proposition that as long as certain requirements are satisfied,[78] ownership of a sports franchise can constitute a public purpose.

The question of what constitutes a public purpose has arisen in other contexts relating to professional sports franchises as well. In *Myer v. City of Cleveland*,[79] the Court of Appeals of Ohio held that Cleveland could use its eminent domain power to aid stadium construction because the taking of property was for a public purpose.[80] In arriving at this conclusion, the court noted that "generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes."[81]

Under the broad judicial interpretation of public use in eminent domain law, cities have also constructed stadiums for the purpose of enticing sports franchises to locate in their community. In *New Jersey Sports & Exposition Authority v. McCrane*,[82] the enabling legislation examined by the court was enacted "in order to induce professional athletic teams . . . to locate these franchises in the State."[83] The legislature also believed that the new facilities were needed to promote industrial and economic development, as well as to provide a forum for public events.[84]

In deciding whether the legislative act authorizing condemnation violated the New Jersey Constitution, the court stated that great deference should be given to the legislature's determination of what is a public purpose.[85] The court acknowledged that a sports complex would provide many new cultural, recreational and economic benefits to the people of

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olis, (2) the team's tangible property was not in Maryland on March 30, 1984, and (3) Irsay's intention was that the Colts be outside the jurisdiction of Maryland by the time any eminent domain action was filed. *Id.*

77. *Id.* The court pointed out that an eminent domain analysis was not required because the Colts prevailed on the threshold issue of the appropriate date for determining the situs of the franchise. *Id.*

78. In California, there are restrictions on the type of entity that could exercise the power of eminent domain. A municipality, such as Oakland, lacked this inherent power and therefore an express grant by law was necessary for the taking to be proper. City of Oakland v. Oakland Raiders, Ltd., 32 Cal. 3d 60, 64, 646 P.2d 835, 838, 183 Cal. Rptr. 673, 676 (1982).

79. 35 Ohio App. 20, 171 N.E. 606 (1930).

80. *Id.* at 22, 171 N.E. at 608.

81. *Id.* at 21, 171 N.E. at 607 (quoting Egan v. County of San Francisco, 165 Cal. 576, 133 P. 294 (1913)).

82. 119 N.J. Super. 457, 292 A.2d 580 (Super. Ct. Law Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972).

83. *Id.* at 463, 292 A.2d at 583.

84. *Id.*

85. *Id.* at 470, 292 A.2d at 590.

the state.[86] Additionally, it noted that a city, instead of concerning itself with mere survival, should attempt to develop a personality that attracts both tourists and businessmen.[87] Consequently, the court held that the construction and maintenance of a stadium was a public purpose.[88]

IV. A CRITICAL LOOK AT PUBLIC USE

Decisions in eminent domain cases demonstrate a willingness by both federal and state courts to expand the definition of public use and to observe greater deference to takings by Congress and state and local governments. The definition of public use in the exercise of eminent domain for urban renewal has been expanded to encompass removing blight,[89] keeping existing industry,[90] ending economic stagnation,[91] reducing unemployment,[92] and attracting professional sports franchises.[93] Although expansion in these areas has continued, some judges have expressed concern over the expansion of the definition of "public use." Referring to the public use and just compensation limitations on the power of eminent domain in its state constitution, the Supreme Court of Washington stated:

> These two restrictions were placed in the constitution for the protection of private property, and each one is equally as important to the property owner as the other. In other words, it is just as important that the proposed use of the property be limited to what the court decides to be a "really public" use as it is that property owner be given just compensation.[94]

In *Poletown Neighborhood Council v. City of Detroit*,[95] dissenting Justice Ryan, reiterating the fears expressed by earlier justices, argued that the majority decision "seriously jeopardized the security of all private property ownership."[96] A similar warning was voiced by Judge Van Voorhis' dissent in *Courtesy Sandwich Shop v. Port of New York Authority*.[97]

To encourage economic growth, the courts have significantly ex-

86. *Id.* at 477, 292 A.2d at 593.
87. *Id.* at 487, 292 A.2d at 597.
88. *Id.* at 493, 292 A.2d at 598.
89. *See supra* notes 20-29 and accompanying text.
90. *See supra* notes 37-40 and accompanying text.
91. *See supra* notes 30-33 and accompanying text.
92. *See supra* notes 41-46 and accompanying text.
93. *See supra* notes 82-88 and accompanying text.
94. Hogue v. Port of Seattle, 54 Wash. 2d 799, 838, 341 P.2d 171, 193 (1959).
95. 410 Mich. 616, 304 N.W.2d 455 (1981).
96. *Id.* at 645, 304 N.W.2d at 465.
97. 12 N.Y.2d 379, 398, 190 N.E.2d 402, 407, 240 N.Y.S.2d 1, 9 (Van Voorhis, J., dissenting), *appeal dismissed*, 375 U.S. 78 (1963) (per curiam). Judge Van Voorhis stated: "[T]here is a limit beyond which socialization cannot be carried without the destruction of the constitutional bases of private ownership and enterprise. . . . [C]ourts should enforce the constitutional rights of property which are involved here." *Id.* at 399, 190 N.E.2d at 411, 240 N.Y.S.2d at 14 (Van Voorhis, J., dissenting).

panded the definition of public use in the professional sports franchise context. Other than a possible commerce clause limitation and each state's own constitutional restrictions,[98] almost no limit to a government's ability to exercise eminent domain in the context of sports franchises is evident. In *City of Oakland v. Oakland Raiders Ltd.*,[99] Chief Justice Bird attacked the majority for not giving more consideration to the encroachment on private property rights caused by adopting an expanded view of public use.[100] Arguing for a more restrictive approach, Justice Bird stated, "At what point in the varied and complex business involved herein would this power to condemn end? In my view, this court should proceed more cautiously before placing a constitutional imprimatur upon this aspect of creeping statism."[101]

These judges question whether the expansion of our government's eminent domain power can coexist with an individual's right to own property. These dissenters acknowledge that a potential problem exists, but do not clarify or place limits on the definition of public use. Both the majority and dissenting positions tactfully skirt the dilemma. The majority avoids the issue by giving great deference to legislative determinations; the dissent declares that this will have an adverse effect in the future, yet offers no plausible solution to the problem. Meanwhile, private property rights are being eroded.

The United States and state constitutions are predicated upon the protection and preservation of individual rights, including the right to own property. Protecting private property from unwarranted interference is firmly rooted in our concept of how an ideal society should operate.[102] Recognizing this point in *Lynch v. Household Finance Corp.*,[103] Justice Stewart stated:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[104]

The current trend in interpreting the constitutional "public use" requirement subsumes private property rights in favor of uses that are arguably

98. *See* J. GELIN & D. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 1.3, at 9 (1982).
99. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
100. *Id.* at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683-84 (Bird, C.J., concurring in part and dissenting in part).
101. *Id.*
102. 405 U.S. 538 (1972).
103. *Id.* at 552.
104. *Id.*

not in the public interest. By examining the broad interpretation of public use and the expansive deference given to legislatures in exercising their eminent domain powers, it becomes apparent just how problematic this trend has become.

The decisions reviewed indicate that both the legislatures and the courts consider that the needs of the general public outweigh an individual's private property rights. This concept is currently accepted even when an individual's property is taken by the state and transferred to another individual. This is the same exercise of eminent domain that, in the past, was prohibited.[105]

The erosion of private property rights has occurred, in part, because of the absence of a specific definition of the term "public use." When complying with the public use clause, a government must show only that there is a rational basis for taking land.[106] Consequently, unless a statute authorizing condemnation is totally unreasonable, courts will defer to the legislative determinations.[107] As a result, property owners are provided with virtually no constitutional protection.

In discussing the future impact of the courts' limited review of condemnation, constitutional law scholar Laurence Tribe states that the decision in *Hawaii Housing Authority v. Midkiff* effectively grants states and municipalities the power to "rearrange property interests through eminent domain."[108] Tribe also notes that the "principle has important implications for rulings in such diverse areas as rent control, condominium conversion and efforts by states to deal with land shortage: absentee ownership and oligopolistic concentration of land holdings."[109]

Additional criticisms concerning unrestrained eminent domain use have been voiced. It has been argued that a governmentally compelled transfer of private property from one individual to another is often the result of improper motives, such as the desire to aid a favored citizen.[110] It has also been argued that a transfer of property from one private individual to another may result in a lack of public accountability[111] because the property may be taken out of the public's view. Further, condemna-

105. *See, e.g.*, Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); Cole v. LaGrange, 113 U.S. 1 (1885), *aff'g* 29 F. 871 (1885); Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798).

106. *See supra* note 61 and accompanying text.

107. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984). The Court noted that "[t]he constitutional requirement is satisfied if the state legislature rationally could have believed that the Act would promote its objective." *Id.* at 242 (quoting from Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

108. Note, *Hawaii Housing Authority v. Midkiff: A Wolf in Sheeps' Clothing?* 12 W. ST. U.L. REV. 325, 342 (1985) (citing Los Angeles Times, May 31, 1984, at 1, col. 6).

109. *Id.* at 342.

110. Note, *Constitutional Law — The Demise Of The Public Use Doctrine In State Takings: Hawaii Housing Authority v. Midkiff*, 18 CREIGTON L. REV. 789, 813 (1985).

111. *Id.*

tion could have adverse effects on future economic development.[112] For example, private investors may avoid investing in property which is deemed susceptible to a taking by a state or local government.

Possibly, the compelling circumstances in cases like *Poletown* and *Midkiff* warrant an intrusion upon private ownership. In both *Midkiff* and *Poletown*, private property was taken from one individual and given to another. Perhaps, in both instances, the lack of available land necessitated the condemnation. In *Midkiff*, land was limited because of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands.[113] In *Poletown*, the government was faced with the loss of a major employer in Detroit.[114]

At times, the definition of public use has expanded in circumstances when certain local conditions and problems need addressing. Land is a limited resource and condemnation for the good of the community can provide some solutions to societal problems. In permitting the unbridled expansion of eminent domain in these instances, however, courts fail to recognize that the trend evidenced by the decisions is still a real danger. As the Supreme Court of Kentucky noted:

> Naked and unconditional government 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 protections whether they be cast in the fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power.[115]

By limiting the public use requirement examination to a reasonableness test,[116] courts have kept the requirement in name only. By deferring to the state's expansive use of eminent domain, courts have left the term devoid of meaning.

V. ALTERNATIVE PROPOSALS

The public use requirement of the fifth amendment as presently viewed no longer appears to limit the use of eminent domain. Without

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112. *Id.*

113. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984); *see also supra* notes 53-61 and accompanying text.

114. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); *see also supra* notes 41-46 and accompanying text.

115. City of Owensboro v. McCormick, 581 S.W. 263, 4-6 (Ky. 1979) (court struck down the Kentucky Local Industrial Development Act which granted the unconditional right to condemn property and convey it to private developers for industrial development).

116. The "reasonableness" standard as used by the courts in examining governmental actions is extremely deferential. *See* Lindsey v. Natural Carbonic Gas Co., 222 U.S. 61 (1911).

an effective public use limitation, Congress and state legislators may abuse the discretionary power vested in them by the courts. Hence, several solutions offered by legal commentators merit scrutiny. One suggestion calls for the legislature to list all the approved uses of eminent domain.[117] This solution, however, is most likely not feasible. Today's societal problems are complex and ever changing.[118] Therefore, legislatures must be able to act without the restraints of precise, inflexible guidelines.[119]

Another suggestion aimed at curbing governmental taking powers involves shifting the burden of proof in an eminent domain dispute.[120] Currently, the burden rests on the party whose land is being taken to show that a proposed use is not public and is thus invalid.[121] Due to the weakened role of the public use restriction, an impossible burden is imposed upon the property owner. By shifting the burden of proof to the government, the sovereign would have to affirmatively demonstrate that the proposed use was a public one. Unfortunately, this proposal does not offer significant protection to the property rights of the individual because the test, which is the reasonableness of the taking, remains one the government would have little problem meeting.[122]

The only remaining viable solution is for courts to apply a stricter test in certain types of eminent domain actions. In this way a balance could be struck between the presumption of the right to own property and a governing body's right to exercise eminent domain. In those situations where a sovereign transfers private property from one individual to another, courts should apply a stricter scrutiny. In all other situations, the reasonableness standard could remain.

Courts have articulated restrictions that must be complied with before the government may transfer property from one individual to another through eminent domain. For example, in *Berrien Springs Water Power Co. v. Berrien Circuit Judge*,[123] the Supreme Court of Michigan stated that such a transfer of property was invalid unless the property is devoted to public use independent of the will of the private entity acquiring it.[124] Additionally, other courts have stated that such a transfer is not permissible unless the taking is to aid an instrumentality of commerce,[125] or a private improvement where the public welfare requires that the improvement be undertaken.[126]

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117. *See* Note, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown*, 20 CAL. W.L. REV. 82, 105 (1983).
118. *See* Note, *supra* note 117, at 105.
119. *Id.*
120. *Id.* at 105-06.
121. *See id.* at 106.
122. *See supra* text accompanying note 61.
123. 133 Mich. 48, 94 N.W. 379 (1903).
124. *Id.* at 53, 94 N.W. 380-81.
125. *See supra* notes 34-36 and accompanying text.
126. *See supra* notes 41-46 and accompanying text.

Some courts have also held that before a condemnation resulting in property transfers between private parties can occur, the following three requirements must be met: (1) public necessity of the extreme sort; (2) continued accountability to the public; and (3) land selection according to facts of independent significance.[127] Condemnation for the purpose of urban renewal could satisfy this first requirement. In those cases involving urban blight, condemnation of private property was necessary because the property was detrimental to the community as a whole. The second requirement would pacify all of those who did not object to condemnations in cases like *Poletown*[128] and *Midkiff*,[129] but were concerned about the possible subsequent ramifications of such rulings. While a city may still take another person's property to satisfy a legitimate public purpose, it can do so only if it continues to show the public how this purpose has been satisfied. Finally, the third requirement calls for the government to prove that the property condemned was chosen for public benefit, not for the advantage of the property beneficiary.

As Justice Stewart has stated, the right to enjoy property is a "personal" right,[130] and restrictions were placed in the constitution for its safeguarding.[131] To ensure the protection of the right, courts should adopt a two-tiered analysis similar to the one used in equal protection cases. First, if the property taken is retained by the condemning authority, it is only necessary to show that the taking is reasonable. Second, in cases where property is transferred to a private party, courts should examine the action more closely. In these cases, the condemnor must show that the taking serves a more urgent and necessary governmental interest.

Courts and legislatures should not, however, return to the narrower interpretation of public use adopted in the early 20th century as a means to solve this dilemma.[132] That approach would altogether prohibit the transfer of condemned property to private individuals. As a result, our economy would suffer. As seen in *Poletown*[133] and *Midkiff*,[134] certain local conditions may demand a condemnation action. In contrast, merely requiring governing bodies to meet a reasonableness standard when property is transferred from one private individual to another nullifies the effect of the fifth amendment's public use clause. The clause was meant to provide citizens and their property with protection against governmental action.[135] It is a judicial responsibility to ensure that this pro-

127. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 622, 304 N.W.2d 455, 478-80 (1981).
128. *See supra* notes 41-46 and accompanying text.
129. *See supra* notes 53-61 and accompanying text.
130. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).
131. *Id.* at 544.
132. *See supra* notes 9-10, 13, 15 and accompanying text.
133. *See supra* notes 41-46 and accompanying text.
134. *See supra* notes 53-61 and accompanying text.
135. United States v. Carmack, 329 U.S. 230, 241-42 (1945).

tection continues.

VI. CONCLUSION

Throughout this century, most courts have so expanded the definition of public use that the constitutional clause no longer acts as a restraint on the taking of private property. At the expense of the private property holder, courts now give great deference to governing bodies by requiring only that the purpose behind a condemnation action be reasonable. To more adequately protect private property rights, courts should enact a test that applies a stricter scrutiny to situations where property is taken from a private party and given to another. A more stringent test would ensure that condemnations are actually for the public good and that the constitutional public use requirement is not ignored.

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