LOOKING TO THE PAST: A TIME TO REVERT TO THE TRADITIONAL DEFINITION OF PUBLIC USE

NANCY K. KUBASEK*

I. INTRODUCTION

Since the early 1970's we have seen an increasing use of the power of eminent domain to transfer private property from the hands of one property owner to those of another for the alleged public benefit of improving economic conditions. This trend began during a time of high unemployment and economic uncertainty, which may account for its origins. But when we examine the case law tracing the evolution of this trend, we cannot really justify the current interpretation of public use. It is time to reexamine the current interpretation of "public use" and the abuse of the power of eminent domain under the takings clause that has resulted from this interpretation, and return to a definition of public use that requires either actual use of the property by members of the general public or title of the property being held by a public agency with use of the property by select members of the public. Implementing this standard would better reflect the intent of the drafters of the United States Constitution and would treat all property owners fairly and equally. It would end one small facet of the all too pervasive corporate welfare that seems to be growing in this country.

After the introduction, this article traces the evolution of the interpretation of "public use." It then examines the current definition of public use in the context of industrial development cases. Section IV highlights some of the primary problems with this interpretation. The paper then concludes with an appeal for a return to the earliest definition of public use, a definition that requires actual use by the public.

II. HISTORY OF PUBLIC USE

A. UNDERSTANDING "PUBLIC USE"

The language of the Fifth Amendment explicitly limits the government's power of eminent domain by requiring that the government take property for only "public use."[1] However, the exact meaning of the phrase "public use" has never been precisely

* Professor of Legal Studies & International Business, Bowling Green State University.

[1] U.S. CONST. amend. V stating, in pertinent part, "[N]or shall private property be taken for public use without just compensation."

determined.[2] The potential problems associated with classifying any action providing a public benefit as a public use were illustrated in early court opinions.[3] The courts originally viewed the phrase "public use" very narrowly.[4] Under the early interpretation, to which this article argues we should return, the public must actually use, or have the opportunity to use, the property taken through eminent domain.[5]

The advent of industrialization in the nineteenth century forced the courts to consider whether the narrow interpretation of "public use" should be broadened.Where the proposed use of the land would result in a public benefit, the courts were willing to condone the use of eminent domain to transfer property from one private owner to another.[6] Despite the abundance of early cases[7] relying on the original, narrow, interpretation of "public use," changing times influenced the courts to expand the meaning of "public use" to encompass uses that would provide a public benefit or serve a public purpose.[8]

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[2] *See generally*, Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978); Errol Meidinger, *The Public Uses of Eminent Domain*, 11 ENVT'L L. 1 (1980); Laura Mansnerus, *Public Use, Private Use, And Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409. *See also* Prince George's County v. Collington Crossroads, Inc., 275 Md. 171, 181; 339 A.2d 278, 284 (1975).

[3] Dayton G. & S. Mining Co. v. Seawell, 11 Nev. 394, 410-11 (1876) stating "[i]f public occupation and enjoyment of the object for which the land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters," and concluding "[i]t is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals."

[4] Philip Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 616 (1940). *See also* Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. 420, 642 (1837) "[I]t has never been understood, at least, never in our republic, that the sovereign power can take the private property of A. and give it to B., by the right of 'eminent domain;' or, that it can take it at all, except for public purposes."

[5] For a major reference source regarding the law of eminent domain, *see generally*, 2A NICHOLS ON EMINENT DOMAIN (Julius L. Sackman ed., 3d ed. 1998) § 7.02[2], at 7-28.

[6] Berger, *supra* note 2, at 206.

[7] Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 A. 870, 872 (1908) ("It is sufficient that the general public, or any considerable portion thereof should have the right to the use"); Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N.W. 405, 414 (1906) ("But a use which, by physical conditions, is restricted to a very few persons who must use it within a very restricted area, is not a public use"); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (taking for a highway extension is for public use); Hariston v. Danville & W. Ry., 208 U.S. 598 (1908) (taking for railroad is for a public use); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (upholding statute allowing taking for irrigation district).

[8] 2A NICHOLS, *supra* note 5, at § 7.02[3][a], 7-32, stating "Many courts are inclined to sustain the broadest construction of public rights over private property and contend that 'public use' means 'public advantage.'" *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1997) , stating that a law is more likely to be upheld if it "is not meant to merely bring about a private benefit, but instead is designed to further a broader public purpose."

B. THE MILL ACTS CASES

The expansion of "public use" began with the judicial acceptance of the Mill Acts,[9] which employed the powers of eminent domain to transfer property to private owners for the promotion of economic development.[10] Under the acts,[11] a lower riparian owner was permitted to build a dam for the purpose of obtaining power for a mill even if the construction of the dam would result in the flooding of the upper riparian owner's land.[12] Because the mills served a public purpose, the upper riparian owner was allowed to seek only just compensation for the taking.[13]

Many of the originally erected mills were gristmills, and the miller was required by law to grind for those who purchased corn at the mill.[14] In this sense, the mills served the public purpose of grinding grain for the public.[15] Other mills with a less identifiable public use, such as sawmills, were still considered a "public use" and within the Mill Acts because they stimulated the economy or provided necessary resources to the state.[16] Most courts initially believed that significant benefit to the public would result from the private operation of mills, and were willing to uphold the statutes.[17] Still other courts, adhering to a more narrow interpretation of "use by the public," were unwilling to find the Mill Acts constitutional.[18]

Though replacement of waterpower with hydroelectric power removed the need for the Mill Acts, the majority of the court's willingness to accept the act as an appropriate use of eminent domain was significant.[19] The majority of the courts accepted a broad

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[9] 2A NICHOLS, *supra* note 5, at § 7.07[4][g] 7-297. The Mill Acts date back to colonial America. Massachusetts statutes (MASS. STATS. 1713-14, Ch. 12) referred to "mills serviceable to the public good and the benefit of the town." The revised acts permitted mill owners to flood any lands necessary to erect a mill.

[10] For a detailed explanation of the development of Mill Acts in Massachusetts, *see* Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1789-1860*, 40 U. CHI. L. REV. 248, 270 (1973), stating "The various acts to encourage the construction of mills offer some of the earliest illustrations of American willingness to sacrifice the sanctity of private property in the interest of promoting economic development."

[11] For a complete list of the Mills Acts through 1884, *see* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 17-18 (1884). General Mills Acts were enacted in Alabama, Connecticut, Delaware, Florida, Georgia, Indiana, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

[12] Horwitz, *supra* note 9, at 272.

[13] *Id*. at 274, citing Skipworth v. Young, 19 Va. (5 Munf.) 276, 278 (1816) (stating "the property of another is, as it were, seized on, or subjected to injury to a certain extent, it being considered in fact for the public use …").

[14] 2A NICHOLS, *supra* note 5, at 7-297.

[15] *Id*.

[16] *Id*.

[17] Berger, *supra* note 2, at 206.

[18] *Id. See, e.g.*, Saddler v. Langham, 34 Ala. 311, 333 (1859); Gaylord v. Sanitary Dist., 204 Ill. 576, 584-85, 68 N.E. 522, 524-26 (1903); Ryerson v. Brown, 35 Mich. 333, 338-42 (1877).

[19] Berger, *supra* note 2 at 206-07, noting "In recent times, of course, the importance of the Mill Acts has declined…. But the significance of the area lies in the early acceptance of the broad view that it was the

view of "public use,"[20] and the courts were also willing to accept takings that, while providing a public benefit, were in the interests of a private entity.[21]

C. SLUM CLEARANCE CASES

The next line of cases to further erode the traditional public use definition was the slum clearance and urban redevelopment cases. One of the most influential cases in this line was the 1936 case of *New York City Housing Authority v. Muller*,[22] in which the court held that condemnation of blighted property for publicly operated slum clearance and public housing programs created a public benefit sufficient to satisfy the "public use" requirement. The court in this case applied a broad public advantage test and determined that the public would benefit from the elimination of slum conditions, such as juvenile delinquency, crime, and disease. Six years after the decision in *Muller*, twenty-three states had adopted the view that the benefits resulting from the development of public housing and slum elimination constituted a "public use."[23]

The United States Supreme Court reviewed the constitutionality of the state courts' decisions in slum clearance cases in 1954.[24] In *Berman v. Parker*, the Supreme Court

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great advantage to the public which justified the taking, even though a private individual undoubtedly received a substantial and perhaps greater benefit, and even though the public had no right to use the property."

[20] *Id. See also*, 2A NICHOLS, *supra* note 4, at 623-24.

[21] *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 605 (1949). For example, courts were willing to hold that the broader conception of "public use" or "public purpose" justified takings for gasoline filling stations, Standard Oil Co. v. Lincoln, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd per curiam*, 275 U.S. 504 (1927); tourists' camps, State *ex. rel.* Minner v. Dodge City, 123 Kan. 316, 255 P. 387 (1927); public golf courses, Booth v. Minneapolis, 163 Minn. 223, 203 N.W. 625 (1925); ice plants, Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677 (1926); municipal celebrations, Schieffelin v. Hylan, 236 N.Y. 254, 140 N.E. 689 (1923); city bands, Goodnight v. Wellington, 118 Tex. 207, 13 S.W.2d 353 (1929); and opera houses, Egan v. San Francisco, 165 Cal. 576, 133 P. 294 (1913).

[22] 1 N.E.2d 153 (N.Y. Ct. App. 1936)

[23] *See* Myres S. McDougal & Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 45-46 (1943). *In re* Opinions of the Justices, 235 Ala. 485, 179 So. 535 (1938); Humphrey v. Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940); Hogue v. Hous. Auth. of North Little Rock, 201 Ark. 263, 144 S.W.2d. 49 (1940); Hous. Auth. of Los Angeles County v. Dockweiler, 14 Cal.2d. 437, 94 P.2d 794 (1939); Moffat Tunnel Improvement Dist. v. Hous. Auth. of City and County of Denver, 125 P.2d 138 (Colo. 1942); State *ex rel.* Harper v. McDavid, 145 Fla. 605, 200 So. 100 (1941); Marvin v. Hous. Auth. of Jacksonville, 133 Fla. 590, 183 So. 145 (1938); Williamson v. Hous. Auth. of City of Augusta, 186 Ga. 673, 199 S.E. 43 (1938); Krause v. Peoria Hous. Auth., 370 Ill. 356, 19 N.E.2d 193 (1939); Edwards v. Hous. Auth. of City of Muncie, 215 Ind. 330, 19 N.E.2d 741 (1939); State *ex. rel.* Porterie v. Hous. Auth. of New Orleans, 190 La. 710, 182 So. 725 (1938); Matthaei v. Hous. Auth. of Baltimore, 171 Md. 506, 9 A.2d. 835 (1939); Allydonn Realty Corp. v. Holyoke Hous. Auth., 304 Mass. 288, 23 N.E.2d 665 (1939); Laret Inv. Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (1939); Rutherford v. Great Falls, 107 Mont. 512, 86 P.2d 656 (1939); Lennox v. Hous. Auth. of Omaha, 137 Neb. 582, 290 N.W. 451, 291 N.W. 100 (1940); Wells v. Hous. Auth. of Wilmington, 213 N.C. 744, 197 S.E. 693 (1938); Dornan v. Philadelphia Hous.. Auth., 331 Pa. 209, 200 A. 834 (1938); McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938); Knoxville Hous. Autho. v. Knoxville, 174 Tenn. 76, 13 S.W.2d 1085 (1939); Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79 (1940); Chapman v. Huntington W. Va. Hous. Auth., 121 W. Va. 319, 3 S.E.2d. 502 (1939).

[24] Berman v. Parker, 348 U.S. 26 (1954).

considered whether the District of Columbia Redevelopment Act,[25] an act that empowered the Columbia Redevelopment Land Agency to acquire land for redevelopment through eminent domain, constituted a taking of private property for "public use." The first area to be taken for redevelopment under the act was Area B.[26] An owner of a department store challenged the constitutionality of the taking, arguing that commercial property could not be taken constitutionally for the project.[27] In a unanimous decision, the Supreme Court rejected the argument and held that "the concept of public welfare is broad and inclusive."[28]

The Court recognized that private ownership of the redeveloped areas may exclude the public from the project, but held, nonetheless, "The public end may be as well or better served through an agency of private enterprise," and effectively rejected the narrower "public use as use by the public" test.[29] It was somewhat easy for the Court to make the claim as to the public benefit because private entities were not clamoring for the state to take specific pieces of property for them. The clear purpose of the acts authorizing takings for slum clearance purposes was to improve the conditions in the community for the public. By eliminating slum conditions, it was believed that undeniable benefits such as a reduction in the crime rates would occur.

Nonetheless, as a result of *Berman*, the scope of the "public use" doctrine was significantly expanded.[30] The Supreme Court's decision in this case reflects its acceptance of the early state court slum clearance and urban renewal decisions construing

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[25] 60 Stat. 790 §§ 5-701 – 5-719 (1951). In § 2 of the Act, Congress made a "legislative determination" that "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals and welfare; and it hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminated all such injurious conditions by employing all means necessary and appropriate for the purpose." Congress concluded, "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan … is hereby declared to be a public use."

[26] *See* Berman, 348 U.S. at 30. Surveys identified that in Area B "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health."

[27] *Id.* at 31

[28] *Id.* at 32. Further, the Court deferred to the legislature, stating that "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation … This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." The Court concluded, "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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." *Id*. at 33.

[29] *Id.* at 33-34.

[30] *See generally* Jonathon N. Portner, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542 (1988).

"public use" to mean of benefit to the public. Subsequent cases built on *Berman* and effectively redefined the boundaries of the "public use" doctrine.[31]

III. EMPLOYMENT AND INDUSTRIAL DEVELOPMENT

A. POLETOWN NEIGHBORHOOD COUNCIL V. CITY OF DETROIT

The next wave of cases to broaden the definition of public, and the line of cases to raise the greatest concerns that the courts have gone too far in their liberal definition of "public use," were the employment and industrial development cases. These cases entail the taking of private property from one owner and transferring title and unrestricted use of the property to another private property owner, often at the initiation of the transferee, for the alleged public benefit of increased employment or industrial development. Further broadening the meaning of "public use," several recent cases have approved the taking of private property for industrial development and other private uses under the premise that the private use will eventually provide a public benefit.[32]

Perhaps the most well known case in the employment and industrial development line of taking cases is the case of *Poletown Neighborhood Council v. City of Detroit.*[33] In this case the Supreme Court of Michigan, in a 6-2 decision, held that the taking of private residential and business property for the development of a General Motors Plant was constitutional.[34] The condemnation proceedings out of which this case arose took place at a time when unemployment was at an all time high, and General Motors had just announced its plans to close two of their plants located within the city.[35] However, it offered to build an assembly complex in the city if a suitable site could be found. A 465 acre site was ultimately found, and, acting under the authority of the Economic Development Corporations Act,[36] the city proceeded to use the power of eminent domain to take the property for General Motors.

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[31] *Id.*

[32] *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981)(upholding the taking of residential and commercial land for expansion of a General Motors plant); City of Duluth v. Minnesota, 390 N.W.2d 727 (1986)(upholding the taking of a 72-acre site containing small businesses, homes, and privately owned land for a paper mill to come in and revitalize the area with the jobs it would create). Most recently in Illinois the state Supreme Court upheld the right of the Southwest Illinois Development Authority to condemn 148 acres of an auto recycling business in downstate St. Clair County to transfer the land the nearby Gateway International Raceway for parking. See Southwestern Illinois Dev. Auth. v. National City Environmental LLC, 2001 Ill. Lexis (April 19, 2001); 304 Ill. App. 542, 710 N.E.2d 896 (Ill. Ct. App.).

[33] 304 N.W.2d 455 (Mich. 1981) (per curiam).

[34] *Id*. at 458. The Poletown Neighborhood Council challenged the constitutionality of the state's use of eminent domain to transfer property to private interest. The Council argued that "whatever incidental benefit may accrue to the public, assembling land to General Motors' specifications for conveyance to General Motors for its uncontrolled use in profit making is really a taking for private use and not a public use because General Motors is the primary beneficiary of the condemnation."

[35] *Supra* note 32, at 636.

[36] MICH. COMP. LAWS §§ 207.551, 7.800(1).

The majority opinion in *Poletown* described the Economic Development Corporations Act as

The owners, who did not want their community destroyed, challenged the taking as being an abuse of the power of eminent domain because it was a taking of private property for a private use. After a ten-day trial, the trial court dismissed the plaintiffs' complaint. Plaintiffs appealed to the Court of Appeal, and also filed a motion for a bypass to the Michigan Supreme Court, which was granted.[37] In handing down its decision for the defendants, the Supreme Court, in a *per curiam* opinion, stated "the right of the public to receive and enjoy the benefits of a use determines whether the use is public or private."[38] The court agreed that "condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental public gain."[39]

Where the court really disagreed with the plaintiffs, however, was in the way it interpreted whether something was primarily a public purpose. Relying on *Berman*,[40] the court essentially said that whatever the legislature said was a public purpose was a public purpose.[41] Quoting *Gregory Marina, Inc. v. Detroit*, [42] the court wrote that " 'the determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.' "[43] After *Poletown*,[44] one wonders

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a part of the comprehensive legislation dealing with planning, housing and zoning whereby the State of Michigan is attempting to provide for the general health, safety, and welfare through alleviating unemployment, providing economic assistance to industry, assisting the rehabilitation of blighted areas, and fostering urban redevelopment.

Section 2 of the act provides:
There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and that it is accordingly necessary to assist and retain local industries and commercial enterprises to strengthen and revitalize the economy of this state and its municipalities; that accordingly it is necessary to provide means and methods for the encouragement and assistance of industrial and commercial enterprises in locating, purchasing, constructing, reconstructing, modernizing, improving, maintaining, repairing, furnishing, equipping, and expanding in this state and in its municipalities; and that it is also necessary to encourage the location and expansion of commercial enterprises to more conveniently provide needed services and facilities of the commercial enterprises to municipalities and the residents thereof. Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities." MICH. COMP. LAWS §§ 207.551-207.571; MICH. STAT. ANN. §§ 7.800(1)-7.800(21) (1999).
" [2]To further the objectives of this act, the legislature has authorized municipalities to acquire property by condemnation in order to provide industrial and commercial sites and the means of transfer from the municipality to private users. MICH. COMP. LAWS §§ 125.1622; MICH. STAT. ANN §§ 5.3520(22)." 304 N.W.2d at 458.

[37] 410 Mich. at 628.

[38] *Id*. at 630.

[39] *Id*. at 632.

[40] *See Berman supra* note 24 and accompanying text.

[41] 410 Mich at 632.

[42] 378 Mich. 364, 396, 144 N.W.2d 503 (1966).

[43] 410 Mich. at 632.

[44] For a more detailed explanation of the struggles of the Poletown community, *see generally* David Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council V. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L.Q. 671 (1988); John Bukowcyx, *The Decline and Fall of a Detroit Neighborhood: Poletown v. General Motors and the City of Detroit*, 41 WASH. & LEE L. REV. 49 (1984); Emily Lewis, Comment, *Corporate Prerogative, "Public Use" and a*

whether the "public use" requirement imposes any limitations on the government's assertion of eminent domain.[45]

B. OTHER TAKINGS OF PRIVATE PROPERTY

In *Hawaii Housing Authority v. Midkiff*,[46] the United States Supreme Court addressed the issue of "public use" for the first time since *Berman*,[47] and seemed to loosen the standard for public use even more. The Court upheld the Hawaii Land Reform Act[48] despite claims that it violated the Fifth Amendment's "public use" limitation.[49] Justice Sandra Day O'Connor wrote that "[t]he 'public use requirement is … coterminous with the scope of a sovereign's police powers."[50] The Court held that a taking constitutes a public use when the "exercise of the eminent domain power is rationally related to a conceivable public purpose."[51] O'Connor emphasized the importance of judicial restraint and deference to the legislature's decisions. The probability of such decisions being successful was not a factor that the courts were forced to consider.[52]

Using the test established in *Midkiff*, almost any private use, deemed by the legislature as providing some "conceivable" public benefit, will meet the "public use" requirement of the Fifth Amendment.[53] The flexibility of this expanded interpretation encourages government takings of private property for industrial development. The promises of employment and economic stimulation may never materialize, but the potential existence of such "benefits" is enough to satisfy the current "public use"

People's Plight: Poletown Neighborhood Council v. City of Detroit, 1982 DET. C.L. REV. 907; JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989).

[45] *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). "[M]ost observers today think the public use limitation is a dead letter. Three recent decisions, upholding takings that courts would very likely have found impermissible in the past, support this view." (referring to *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981); *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (1982); and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). *See also* Jeff Crabtree, *Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown?*, 20 CAL. W.L. REV. 82 (1983).

[46] 467 U.S. 229 (1984).

[47] 348 U.S. 26 (1954).

[48] HAW. REV. STAT. § 516 (1976). The Act was established to break up the land oligopolies and alleviate the problems stemming from concentrated land ownership. Pursuant to the Act, the state was permitted to use the power of eminent domain to require large landholders to transfer their residential lot ownership to the lessees presently residing on the lots.

[49] Hawaii Housing Authority, *supra* note 45, at 233. The Hawaii Housing Authority requested that a large Hawaii landowner, the Bishop Estate, negotiate the sale of residential lots. The trustees of the state challenged the Act, arguing that it violated the "public use" limitation of the Fifth Amendment.

[50] 467 U.S. at 240.

[51] *Id.* at 241.

[52] *Id.* at 242, stating "Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if … the … [state] Legislature *rationally could have believed* that the [Act] would promote its objective,'" citing *Western & Southern Life Ins. Co. v. St. Bd. Of Equalization*, 451 U.S. 648, 671-72 (1981).

[53] *See generally* Brine, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 CORNELL L. REV. 428 (1986).

standard.[54] Though states have traditionally been reluctant to include private takings under the "public use" limitation,[55] the opinions in *Poletown*, *Midkiff*, and other similar cases[56] are weakening the doctrine of "public use" and setting precedent for takings that primarily serve a private interest.[57]

For example, the North Dakota Supreme Court held in *City of Jamestown v. Leevers Supermarkets, Inc.*[58] that stimulation of economic growth and removal economic stagnation met the "public use" requirement.[59] Pursuant to North Dakota's Urban Renewal Law,[60] the city of Jamestown invoked its eminent domain authority to condemn private property to provide for the construction of a grocery store.[61] Similar to the statute used in *Poletown*, the North Dakota law empowers municipalities to encourage economic development to eliminate unemployment, underemployment, and joblessness.[62] The city argued that a new grocery store was necessary to increase the low wage base and increase

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[54] 467 U.S. at 240, citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), explaining that the legislature's "public use" determination is required "until it is shown to involve an impossibility."

[55] *See, e.g.*, City of Little Rock v. Raines, 411 S.W.2d 486 (Ark. 1967); City of Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979); Karesh v. City Council of Charleston, 247 S.E.2d 342, 344 (S.C. 1978); Baycol, Inc. v. Downtown Dev. Auth., 315 So.2d 451, 455-56 (Fla. 1975); Rudee Inlet Auth. v. Bastian, 147 S.E.2d 131, 135-36 (Va. 1966); Hogue v. Port of Seattle, 341 P.2d 171, 191 (Wash. 1959).

[56] *See e.g.*, MCDA v. Opus, 582 N.W. 2d 596 (Minn. 1998); City of Duluth v. Minnesota, 390 N.W.2d 727 (Minn. 1986); City of Urbana v. Paley, 368 N.E.2d 915 (Ill. 1977); Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d. 327 (N.Y. App. Ct. 1975).

In *Paley*, the City of Urbana used its power of eminent domain to revitalize the city's failing economy through taking private property for industrial development. The court held, "Today's decision denotes that the application of the public-purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions … Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public wealth." 368 N.E.2d at 920-21.

In *Yonkers*, the court upheld the condemnation of a privately owned parcel of land as a constitutionally permitted use of the state's power of eminent domain. The city condemned the land and conveyed it to the Otis Elevator Company to keep Otis from leaving the city. Similar to *Poletown*, the motivation for the taking was the preservation of jobs and the avoidance of projected economic devastation.

[57] Laura Mansnerus, *What Public? Whose Use?*, N.Y. TIMES, Mar. 22, 1998, at 14NJ, stating "More and more often, courts are finding that a public use is whatever the legislature says it is – not just building roads and schools but enticing bigger, better employers and taxpayers, whoever they may be."

[58] 552 N.W.2d 365 (N.D. 1996)

[59] *Id.* at 369, concluding "the stimulation of commercial growth and removal of economic stagnation … are objectives satisfying the public use and purpose requirement."

[60] N.D. CENT. CODE § 40-58-02 (Supp. 1999)

[61] 552 N.W.2d at 367-68. The owners of the property owned the only two existing full-service grocery stores in the city of Jamestown. The proposed grocery store would be in direct competition with the property owners' exiting grocery stores.

[62] N.D. CENT. CODE § 40-58-02 (2)-(3) (Supp. 1999) provides:

(2) It is found and declared that there exist in municipalities of the state conditions of unemployment, underemployment, and joblessness detrimental to the economic growth of the state economy; that it is appropriate to implement economic development programs both desirable and necessary to eliminate the causes of unemployment, underemployment, and joblessness for the benefit of the state economy; and that tax increment financing is an economic development program designed to facilitate projects that create economic growth and development.

(3) It is further found and declared that the powers conferred by this chapter are for public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

the number of people working full-time jobs in Jamestown.[63] Recognizing the similarities between *City of Jamestown* and *Poletown*, the court noted that a private taking could be held constitutional if it served a primarily public purpose.[64] The court reversed the decision and remanded the case to the trial court to determine whether the primary object of the development was for the economic welfare of Jamestown.[65]

It was estimated that since the mid-1990's there have been about 30 of these taking every year. If the economy slows down, as many economists forecast, then the number of these taking seems likely to increase.

IV. PROBLEMS WITH PUBLIC BENEFIT RULE OF INTERPRETATION

There are a number of specific problems with the courts' interpretation of public use. Some of these key problems will be discussed in this section. They include: the use of a faulty analogy between the economic redevelopment cases and the slum clearance cases; the uncertainty of the economic benefits promised in the economic redevelopment cases; the insecurity over property rights that result from the rule; and the underlying assumption that economic growth is always good.

A. FAULTY ANALOGY TO SLUM CASES

The faulty analogy between slum clearance cases and takings for industrial development and employment was articulated by Justice Fitzgerald in his dissent in the *Poletown* case.[66] In slum clearance cases, the transfer of the property to private holders was not the primary purpose of the taking;[67] however, in *Poletown* and similar economic development cases, the transfer of the property to private holders was the principle factor

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[63] 552 N.W.2d at 371.

[64] *Id.* at 374.

[65] *Id.*, concluding "If the court makes the necessary finding that the primary object of this development is for the economic welfare of the City and its residents, rather than for the primary benefit of private interests, then it should reinstate the judgment of taking and awarding the just compensation to Leevers and JB for the taking."

[66] 304 N.W.2d at 462. Justice Fitzgerald wrote: "The city places great reliance on a number of slum clearance cases here and elsewhere in which it has been held that the fact that the property taken is eventually transferred to private parties does not defeat a claim that the taking is for a public use … Despite the superficial similarity of these cases to the instant one based on the ultimate disposition of the property, these decisions do not justify the condemnation proposed by the city. The public purpose that has been found to support the slum clearance cases is the benefit to the public health and welfare that arises from the elimination of existing blight, even though the ultimate disposition of the property will benefit private interests."

[67] *Id.*, citing Ellis v. City of Grand Rapids, 331 Mich. 720. "Therefore, it is obvious that the private uses which will finally be involved after a redevelopment project has been implemented are of an incidental or ancillary character, and that of paramount importance is the established public purpose of beautification and redevelopment. Once this primary purpose has been established, it is generally irrelevant what incidental or secondary purposes are involved."

driving the taking.[68] Though the city of Poletown was old, it was not a blighted community.[69] Unlike the majority of the slum clearance cases, the destruction of Poletown did not result in the rebirth of a stronger, safer community. Rather, an existing community,[70] rich with culture and known as a place of racial harmony,[71] was destroyed in pursuit of economic growth, employment, and more Cadillacs.[72]

In his dissent, Justice Ryan also argued that *Poletown* was distinguishable from the earlier slum clearance cases.[73] Citing reference to several slum clearance cases,[74] Ryan emphasized the important distinctions between the slum clearance cases and *Poletown.*[75] Slum clearance takings are instigated to eliminate blight, danger, and disease.[76] If a private corporation benefits as a result of the slum clearance taking, the taking is still a public use because the private corporation's interests were not the primary purpose of the taking.[77] Stating "the inapplicability of the slum clearance cases is evident,"[78] Ryan noted that the primary purpose for the taking in *Poletown* was to benefit a private corporation.[79]

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[68] 304 N.W.2d at 462. Justice Fitzgerald further cited *In Re Slum Clearance*: "It seems to us that the public purpose of slum clearance is in any event he one *controlling* purpose of the condemnation." He distinguished *Poletown* from the earlier slum clearance cases by showing that the public purpose was not the "controlling" purpose of the condemnation, "However, in the present case the transfer of the property to General Motors after the condemnation cannot be considered incidental to the taking. It is only through the acquisition and use of the property by General Motors that the 'public purpose' of promotion employment can be achieved."

[69] Appendix for Appellant at 93, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, citing the Historical Anderson's Report.

[70] *See* ROBERT NISBET, THE QUEST FOR COMMUNITY (1953), noting that when communities are destroyed for the purposes of reindustrialization, citizens become atomistic, alienated, insecure, and indifferent to the larger society.

[71] Emily Lewis, Comment, *Corporate Prerogative, "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit,* 1982 DET. C.L. REV. 907, at 909. The article describes Poletown as an "ethnically and racially diverse" area and the "embodiment of a stable, integrated community" and cites *Draft, Environmental Impact Statement* at IV 24-5. According to demographic studies the racial composition of the area, in addition to Poles, included Yeminis, Albanians, and Filipinos.

[72] *See generally* Bukowcyx, *surpa* note 44.

[73] 304 N.W.2d, at 477.

[74] *Id.* citing, In re Slum Clearance, 50 N.W.2d 340 (Mich. 1951); General Dev. Corp. v. City of Detroit, 33 N.W.2d 919 (Mich. 1948); In re Jeffries Homes Hous. Project, 11 N.W.2d 272 (Mich. 1943); In re Brewster St. Hous. Site, 289 N.W. 493 (Mich. Ct. 1939).

[75] 304 N.W.2d. at 477. Justice Ryan concluded, "The distinction, however, between those cases and the one at hand is evident. The fact that the private developers in the cited cases, to whom the city sold the cleared land, eventually benefited from the projects does not lend validity to the condemnation under consideration here … in those cases the object of eminent domain was found, and the decision to exercise the power was made, entirely apart from considerations relating to private corporations."

[76] *Id.*

[77] *Id.* In the earlier slum clearance cases, Ryan noted that the court recognized that the private interest was secondary. Citing *In re Slum Clearance*, 50 N.W.2d 340 (1951), he concluded "It was not the purpose of this condemnation proceeding to acquire property for resale. It was to remove slums for reasons of the health, morals, safety and welfare of the whole community."

[78] *Id.*

[79] *Id.* stating, "In the case before us the reputed public 'benefit' to be gained is inextricably bound to ownership, development and use of the property in question by one, and only one, private corporation, General Motors, and then only in *the* manner prescribed by the corporation. The public 'benefit' claimed by defendant to result can be achieved only if condemnation is executed upon an area, within a timetable, essentially for a price, and entirely for a purpose determined not by any public entity, but by the board of

Although the ambiguity of the term "public benefit" has been established, it is clear that the "public use" in slum clearance cases was the primary reason for the taking, whereas the "public use" in takings for industrial development, if identifiable, is generally secondary.[80]

B. UNCERTAINTY OF ECONOMIC BENEFIT

Justice Ryan also identified the uncertainty of an economic benefit in a private-transferee taking.[81] When property is given to a private corporation, the state loses the opportunity to control the use of the land, and the new private owner, not held accountable to the public, can use the property to benefit primarily private interests. As a result of this lack of control, the proposed benefits of the taking may not be realized by the public.

In 1991, General Motors announced that it would close twenty-one plants and terminate 74,000 jobs by 1995.[82] Among the affected plants was the Willow Run Plant in Ypsilanti, Michigan.[83] Seven years prior to announcing the closing of the plant, General Motors promised to maintain 4,900 jobs for twelve years in exchange for significant tax abatements.[84] The abatements were allotted pursuant to the Michigan Plant Rehabilitation and Industrial Developments Districts Act.[85] The Act authorizes municipalities to create industrial development districts and grant tax abatements.[86] The Township of Ypsilanti sought an injunction to keep General Motors from leaving, and the injunction was granted at the circuit court level.[87]

The decision was reversed on appeal,[88] and General Motors closed the plant at Willow Run. The Township of Ypsilanti relied on tax abatements to attract industry, jobs and

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directors of General Motors. There may never be a clearer case than this of condemning land for a private corporation."

[80] *Id.*

[81] *Id.* at 479-80.

[82] William Scheweke, et. al., *Bidding for Business: Are Cities and States Selling Themselves Short?* CORPORATE ENTERPRISE DEVELOPMENT 26 (1994)

[83] *Id.*

[84] Charter Township of Ypsilanti v. General Motors Corp., No. 92-43075-CK, 1993 132285 at *4-7 (Mich. Cir. Ct. Feb. 9, 1993), rev'd, 506 N.W.2d 556 (Mich. Ct. App. 1993). *See also* Stephen Ranklin, *GM Tale One of Many Twists, Uncertainties*, CHI. TRIB., Mar. 2, 1992, at C1; Jolie Solomon, et. al., *Can GM Fix Itself*, NEWSWEEK, Nov. 2, 1992, at 54; Jim Kise, *Struggle Begins For Autoplant*, YPSILANTI PRESS, May 13, 1992, at A1; Paul Hoversten, "*Real People, Real Blood, in Mich*., USA TODAY, Feb. 24, 1992, at 3A.

[85] MICH. COMP. LAWS § 207.551-571 (1991).

[86] Ypsilanti, *supra* note 84, at *4. Since the passage of the Michigan tax abatement law in 1974, General Motors has received 122 tax abatements.

[87] *Charter Township of Ypsilant*, , No. 92-43075-CK, 1993 132285 at *13, holding that General Motors had breached its agreement with Ypsilanti. Judge Shelton stated that the court would be allowing injustice "if General Motors, having lulled the people of the Ypsilanti area into giving up millions of tax dollars … is allowed to simply decide that it will desert 4,500 workers and their families because it thinks it can make these same cars a little cheaper somewhere else." Further, "perhaps another judge in another court would not feel moved by that injustice and would labor to find a legal rationalization to allow such conduct. But in this Court it is my responsibility to make that decision. My conscience will not allow this injustice to happen."

[88] Charter Township of Ypsilanti v. General Motors Corporation, 506 N.W.2d 556 (Mich. Ct. App. 1993)

growth to its community.[89] Unfortunately, the economic benefits promised by the development were never fully realized, and project actually had adverse affects on the community through the loss of several thousand jobs.[90] Although this is just one example, it is illustrative of what has taken place in a large number of communities all across the country.

C. INSECURITY OVER PROPERTY RIGHTS

Another very significant concern expressed by Justice Ryan in his dissent in *Poletown* was the possibility that decisions like those made by the majority would create insecurity over property rights. He wrote, "This case is extraordinary. The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership."[91]

The recent trend of using eminent domain to acquire private property is not only dangerously expansive,[92] but it also threatens the security of property by eliminating any meaningful barriers to takings by the state.[93] It is interesting to note that this trend is developing at the same time that court are showing an increased willingness to find that regulatory takings have occurred when government regulations adversely impact the value of ones' property.[94] This expanded definition of what constitutes a regulatory taking is partially motivated by a concern over the security of property rights.

D. ASSUMPTION THAT ECONOMIC GROWTH IS ALWAYS GOOD

Though courts eagerly iterate certain attributes of economic growth, such as increased employment and an increased tax base, as public benefits,[95] they often fail to recognize the less desirable effects to economic growth, particularly in cases where the growth

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[89] Leah Samuels, *Taxpayers Lose Under Engler's MEGA Deal*, METROTIMES, July 12-18, 1995 (referencing Michigan's recently enacted bill creating the Michigan Economic Growth Authority (MEGA). MICH. COMP. LAWS § 207.808 (1995). MEGA is permitted to grant tax abatements to businesses in an effort to promote economic development and to create jobs.)

[90] Under General Motor's plan, 4,014 jobs were lost at the Willow Run plant, but 10,000 to 18,000 jobs were also lost at parts suppliers and other similar industries. *See* Stephen Franklin, *GM Tale One of Many Twists, Uncertainties*, CHI. TRIB., Mar. 2, 1992, at C1.

[91] 304 N.W.2d at 464-65

[92] Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 369 (1983).

[93] *Id.* at 378, asking, "After *Poletown*, what is left of the public-use limitation? And if the constitutional public-use limitation provides no meaningful barrier to takings by the state, will society soon tolerate private-transferee takings as a regular courses of the state's business? Will society no longer protect one's security in private ownership of property?" Ross argues that the security of property rights is already threatened by existing governmental practices and use restrictions.

[94] *See, e.g.*, Lucas v. South Carolina Coastal Comm'n, 112 U.S. 2886 (1992); City of Monterey v. Del Monte Dunes, 119 S.Ct. 1624 (1999).

[95] *See*,*Poletown*, 304 N.W.2d at 460.

occurs too quickly or prematurely.[96] An increase in economic growth may also lead to increased levels of noise, increased traffic congestion, and significant environmental degradation. A municipality's public services must be able to provide for the increasing demands of new developments.[97] Additionally, economic growth results in a need for new housing, schools, and other necessities.[98] If the community lacks the resources necessary to accommodate the economic growth, the overall benefit to the public is questionable.[99]

V. A PROPOSAL FOR A RETURN TO A RESTRICTIVE INTERPRETATION OF PUBLIC USE

The foregoing discussion has clearly demonstrated that the present minimum level of scrutiny that the court applies to a government's determination that a taking is for a public purpose must be replaced with a different standard[100] when one private entity's property is being taken for transferal to another private entity. Failure to implement a more heightened level of scrutiny is not only inconsistent with the framers' intent in drafting the takings clause, but creates unnecessary instability, gives governments too much power that may be abused, and perhaps most importantly simply is not fair to the thousands of property owners whose property may be taken from them and transferred to some other private property owner with little, if any, real benefit going to the public.

Two recent cases provide evidence that some courts are beginning to reconsider the trend toward an ever-broadening interpretation of public use: *Casino Redevelopment Authority v. Banin*[101] and *City of Chattanooga v. Classic Refinery.*[102] In the former case,[103] the court examined more carefully the likelihood of the intended purpose being fulfilled, and its approval of the taking was denied because a close examination of the proposed transfer revealed that Donald Trump (the well-known developer) was in no way obligated to use the property, once he received it, in a manner that would be designed to further the public purpose for which the land was being taken. He could simply use the

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[96] Brenda Jones Quick, *Dolan v. City of Tigard: The Case that Nobody Won*, 1995 DET. C.L. REV. 79, 80.
[97] *Id. See also* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 479-80 (1991); James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 87-88 (1987).
[98] Been, *supra* note 97, at 480.
[99] 2A NICHOLAS, *supra* note 4, at 89.
[100] The need for this heightened level of scrutiny seems especially strong in situations in which the taking is not initially conceived of by a governmental agency to fulfill a public purpose, but by some private entity that would be the party ultimately receiving title to the land being taken by the government, as well as in situations where the alleged public benefit is a broad, public policy objective such as increasing employment.
[101] 727 A. 2d 102 (N.J. Super. Ct. 1998).
[102] 1998 Tenn. App. LEXIS 854 (1988).
[103] The Casino Redevelopment Authority argued that the public benefits of transferring private land to Trump's Casino for an expanded casino parking lot included the development of more hotel rooms in Atlantic City dedicated to housing conventioneers, redevelopment of a portion of the city that was run down, and the creation of more short term construction and permanent hospitality jobs.

land for building an expansion of his casino and putting in more slot machines to generate more income for his property.[104]

In the latter case, the government had attempted to take residential and commercial property for a parking lot for a new stadium project. While the proposed taking was being litigated, the stadium was built. Since the legitimate public purpose of the takings, to build a stadium, had already been accomplished before the case could be decided, it was clear, according to the court, that in this case, the proposed taking was unnecessary. Thus, in this case, rather than merely accepting the state's claim that the taking was necessary for the public purpose of building a stadium, the court carefully examined the facts of the situation and asked whether it was really necessary to take the property in order to meet what was a legitimate public purpose, the building of a stadium. Since the purpose had already been met, the taking could not be necessary.

Despite the slightly different nature of the judicial inquiry in each of these cases, it is clear that the courts were exercising a higher level of scrutiny than had been seen recently, and that their analyses were much more likely to determine whether or not the takings really would further a legitimate public purpose. In both cases, had the courts simply given deference to the state's claim of the necessity of the taking for a public purpose, the courts would have allowed the takings.

If all courts scrutinized the alleged public benefit, and the likelihood of its occurrence as carefully as these two courts, this article would not be necessary. But these two cases are anomalies. Far more common are situations in which the court accepts on face value the claims of the party wanting the property that once the transference occurs, an economic resurgence for the area is soon to follow.

VII. CONCLUSION

There are too many instances, like the *Poletown* case, in which the ultimate and only real beneficiary of the taking is the party to whom the property was transferred. And often, as in the *Poletown* case, it is not just the person whose property was taken who suffered a loss; it is an entire community. The net impact is a public loss, not a public benefit.

The government needs to be able to take private property for legitimate public purposes, but it has apparently become far too easy today for some private entities to bully governments into abusing this power. The courts must now fulfill their role as guardian of individuals' rights. The only way for them to do so is by returning to the strict standard of public use requiring actual access by the public.

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[104] 727 A.2d at 104-105.