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Rex Non Potest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain

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REX NON PROTEST PECCARE[1]??? THE DECLINE AND FALL OF THE PUBLIC USE LIMITATION ON EMINENT DOMAIN

I. INTRODUCTION

It is a universally recognized principle of constitutional law that a taking of private property by eminent domain[2] must be for a public use.[3] However, the Supreme Court of the United States

1. "The king can do no wrong" is an ancient and fundamental principle of the English Constitution. BLACK'S LAW DICTIONARY 1485 (revised 4th ed. 1968).

2. Eminent domain is that attribute of sovereignty which permits the taking of private property by the government, or its deputized units, for a public use. The definition contains the additional proviso that eminent domain may only be exercised by payment of proper compensation to the owner for his loss. *See* 1 R. BUSHONG, PENNSYLVANIA LAND LAW 143, 144 (1938); 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 7 (3rd ed. 1971) [hereinafter cited as NICHOLS]; P. DRUM, THE LAW OF VIEWERS IN PENNSYLVANIA § 101a, at 142 (1940); I. LEVEY, CONDEMNATION IN U.S.A. § 1 (1969) [hereinafter cited as LEVEY]; J. Sackman, *The Right to Condemn*, 29 ALB. L. REV. 177 (1965).

3. *See, e.g.*, Cole v. La Grange, 113 U.S. 1 (1884); Gralapp v. Mississippi Power Co., 280 Ala. 368, 194 So. 2d 527 (1967); Alaska Gold Recovery Co. v. Northern Mining & Trading Co., 7 Alaska 386 (Dist. Ct. 1926), *rev'd on other grounds*, 20 F.2d 5 (9th Cir. 1927); Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481 (1942); City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); Sutter County v. Nicols, 152 Cal. 688, 93 P. 872 (1908); Driverless Car Co. v. Armstrong, 91 Colo. 334, 14 P.2d 1098 (1932); Farist Steel Co. v. Bridgeport, 60 Conn. 278, 22 A. 561 (1891); Clendaniel v. Conrad, 3 Boyce 549, 83 A. 1036 (1912); Hirsh v. Block, 267 F. 614, 50 App. D.C. 56, *rev'd on other grounds*, 256 U.S. 135 (1920); Marvin v. Housing Authority, 133 Fla. 590, 183 So. 145 (1938); Beazley v. De Kalb County, 210 Ga. 41, 77 S.E.2d 740 (1953); King v. Oahu R.R. & Land Co., 11 Haw. 717 (1st Cir. Ct. 1899); Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1931); Department of Pub. Works & Bldgs. v. Farina, 29 Ill. 2d 294, 194 N.E. 209 (1963); Kessler v. Indianapolis, 199 Ind. 420, 157 N.E. 547 (1927); Welding Supply Co. v. City of Des Moines, 256 Iowa 973, 129 N.W.2d 666 (1964); Strain v. Cities Service Co., 148 Kan. 393, 83 P.2d 124 (1938); Bell's Comm. v. Board of Educ., 192 Ky. 700, 234 S.W. 311 (1921); Crichton v. Lee, 209 La. 561, 25 So. 2d 229 (1946); Paine v. Savage, 126 Me. 121, 136 A. 664 (1927); Shreve v. City of Baltimore, 243 Md. 613, 222 A.2d 59 (1966); Sellors v. Town of Concord, 329 Mass. 259, 107 N.E.2d 784 (1952); Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952); Powell v. Town Bd., 175 Minn. 395, 221 N.W. 527 (1928); Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910); City of Kirkwood v. Cronin, 259 Mo. 207, 168 S.W. 674 (1914); Billings Sugar Co. v. Fish, 40 Mont. 256, 106 P. 565 (1910); Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967); Exeter & Hampton Elec. Co. v. Harding, 105 N.H. 317, 199 A.2d 298 (1964); State v. Lanza, 48 N.J. Super. 362, 137 A.2d 622, *aff'd* 27 N.J. 516, 143 A.2d 571 (1958); Board of County Comm'rs v. Sykes, 74 N.M. 435, 394 P.2d 278

has not in this century held a use to be private which a state court has declared to be public.[4] The paucity of reversals on this constitutional question[5] becomes understandable after analyzing the evolution of the public use doctrine. So irrefutably has the "wonderous elasticity"[6] of the public use limitation been demonstrated that the principle that private property can be condemned only for public purposes can accurately be viewed as having been repudiated.[7] There is only one inconsistency created by the demise

(1964); Cannata v. City of New York, 24 Misc. 2d 694, 204 N.Y.S.2d 982 (1960); State Highway Comm. v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967); Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 (1896); O'Neal v. Board of County Comm'rs, 3 Ohio St. 2d 53, 209 N.E.2d 393 (1965); Blincoe v. Choctaw R.R., 16 Okla. 286, 83 P. 903 (1905); Smith v. Cameron, 106 Or. 1, 210 P. 716 (1922); Lacy v. Montgomery, 181 Pa. Super. 640, 124 A.2d 492 (1956); *Re* Rhode Island Suburban R.R. Co., 22 R.I. 457, 48 A. 591 (1901); Riley v. Charleston Union Station, 71 S.C. 457, 51 S.E. 485 (1905); Illinois Central R.R. v. East Sioux Falls Quarry Co., 33 S.D. 63, 144 N.W. 724 (1913); Nashville Water Co. v. Dunlop, 138 S.W.2d 424 (Sup. Ct. Tenn. 1940); Weyel v. Lower Colorado River Authority, 121 S.W.2d 1032 (Tex. Civ. App. 1938); Highland Boy G.M. Co. v. Strickley, 28 Utah 215, 78 P. 296 (1904); Deerfield River Co. v. Wilmington Power & Paper Co., 83 Vt. 548, 77 A. 862 (1910); Rudee Inlet Authority v. Bastion, 206 Va. 906, 147 S.E.2d 131 (1966); City of Des Moines v. Hemenway, 73 Wash. 2d 430, 437 P.2d 171 (1968); State v. Montgomery, 94 W. Va. 189, 117 S.E. 888 (1923); Schumm v. Milwaukee County, 258 Wis. 256, 45 N.W.2d 673 (1951); Grover Land Co. v. Lovella Irr. Co., 21 Wyo. 204, 131 P. 43 (1913).

4. NICHOLS § 7.212[2]. Nichols states that "the Court has *never* actually held a use to be private which the courts of a state . . . have declared to be public." *Id.* (emphasis added). However, this statement is somewhat erroneous. In Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), the Court reversed a decision of the Nebraska Supreme Court ordering the railroad to allow a private combination to construct a grain elevator on its property. The Court held the order as "a taking of private property for the private use of another." *Id.* at 417. *See also* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 609, n.54 (1949).

5. The fifth amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision is a limitation upon the power of the United States as is the fifth amendment mandate that no person shall be deprived of life, liberty, or property without due process of law. The fourteenth amendment, however, imposes both of these limitations on the states. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896); NICHOLS § 7. 31[1]. Thus, a condemnation under the federal or state constitutions can only occur if the prerequisite is met that it be for a public use. *See also* E. SNITZER, PENNSYLVANIA EMINENT DOMAIN § 406-2.1 (1965).

6. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 601 (1949). The writer of this Comment described the natural law concept of "public good" in eminent domain cases as being of "wonderous elasticity."

7. *Id.* 614. *See generally* LEVEY at 172. Comment, *Compensation for Public Use—Congressional Action and the Fifth Amendment*, 32 TENN. L. REV. 615, 630 (1965):

of the public use limitation—it expurgates a part of the United States Constitution.

This Comment will analyze the status of the public use doctrine. While it is generally accepted that the phrase "public use" escapes precise definition,[8] the tests used in determining a public use can be identified. These tests,[9] and the constitutional questions arising from them, will be examined. A conclusion will be offered regarding the status of the guarantee that no private property will be taken for public use without just compensation,[10] and a recommendation as to appropriate future judicial action will be submitted.

II. The Limits of "Public Use"

The term *eminens dominium*, from which the modern concept eminent domain has devolved, was coined by Grotius in 1625.[11] Since its manifestation in the Bill of Rights,[12] the dialectic of eminent domain has undergone substantial revision. Because the states are subject to the same constitutional limitations as the federal government in their exercise of eminent domain,[13] the primary conceptual problem to be discussed is the meaning of the federal provision, though reference to state court decisions is necessary. The power of eminent domain is an inherent attribute of sovereignty existing without constitutional authorization;[14]

When faced with potential expropriation . . . an owner might reasonably ask two questions. First, can the Government use my land for this purpose? And, if so, to what extent will I be compensated? While the answer to the first question will almost always be in the affirmative, the second may involve a great deal of controversy.

8. Lerch v. Maryland Port Authority, 240 Md. 438, 444, 214 A.2d 761, 767 (1965); New York City Housing Authority v. Muller, 270 N.Y. 333, 340, 1 N.E.2d 153, 155 (1936); Johnson City v. Clominger, 213 Tenn. 71, 74, 372 S.W.2d 281 (1963); Nichols § 7.2; Comment, *What Constitutes A Public Use*, 23 Albany L. Rev. 386, 387 (1959).

9. *See* discussion beginning note 17 *supra*.

10. U.S. Const. amend V.

11. Grotius, De Jure Belli ac Pacis, Lib. III, Cap. xx. Grotius also first indicated that public use and compensation are requisite to eminent domain. *Id.* Lib. II Cap. xv, § vii.

12. U.S. Const. amend V: "nor shall private property be taken for public use without just compensation."

13. Nichols § 7.31[1]. Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896): "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution."

14. *See* authority cited note 2 *supra*. This statement is a legal conclusion, not a philosophical premise. The first exercise of this "inherent attribute" in Anglo-American history occurred shortly after the Battle of Hastings in 1066. William the Conqueror, in order to buy the loyalty of his followers, declared all English lands forfeited. He then established the tenurial system of holding land whereby the king was lord over all estates. Note, *Diminishing Property Rights*, 69 W. Va. L. Rev. 171 (1967). Another example of land confiscation was Henry VII's dissolution of lesser

therefore, the mandate of the fifth amendment is a limitation upon rather than an extension of governmental power.[15] The first contested use of eminent domain by the federal government occurred in 1875.[16] By that time, however, the states had adopted two very different standards in determining whether a taking was for public use—the tests of "use by the public" and "public advantage."[17]

The narrower "use by the public" test requires that the public have at least a right to use or enjoy the property taken.[18] The broader test of "public advantage" holds that any taking which tends to contribute to the general welfare, promote the prosperity of any considerable number of people, or benefit the whole community is a public use.[19] The conflict between these evaluations of public use raged throughout the nineteenth century, resulting in "a massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification."[20] By 1896, when the Supreme Court declared that the due process clause of the fourteenth amendment placed the federal limitation upon the states,[21] both tests were well supported.[22] Al-

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monasteries in 1536, which was at least partially based on the rationalization that the revenues accruing therefrom would be used for "public purposes". MAYNARD, THE CROWN AND THE CROSS 131 (1950). The theory that confiscation is an inherent attribute of sovereignty was apparently accepted in England by this time, though not articulated by Grotius until 1636.

Inasmuch as sovereignty in the American system theoretically lies in the people, however, it is submitted that the concept of eminent domain as an inherent state power is philosophically repugnant. The rule is therefore accepted *arguendo*, as a generally accepted legal conclusion. The view that eminent domain is in derogation of common right has also had its judicial adherents. *See, e.g.*, Comm'rs of Beaufort County v. Bonner, 153 N.C. 66, 68 S.E. 970, 972 (1910).

15. NICHOLS §§ 7.1[1], 7.31[1]. *See, e.g.*, United States v. City of Tiffin, 190 Fed. 279, 280 (N.D. Ohio 1911); Burnett v. Central Neb. Pub. Power & Irr. Dist., 147 Neb. 458, 465, 23 N.W.2d 661, 666 (1946) (dictum).

16. *See* Kohl v. United States, 91 U.S. 367 (1875).

17. NICHOLS § 7.2[1], [2]. *See generally* LEVEY § 17 at 204.

18. NICHOLS § 7.2[1]; *See e.g.*, Shasta Power Co. v. Walker, 149 F. 568 (N.D. Cal. 1906); Bloodgood v. Mohawk & H.R.R., 18 Wend. 59, 64 (N.Y. 1837); Comment, *What Constitutes A Public Use,* 23 ALBANY L. REV. 390 (1959).

19. NICHOLS § 7.2[2]. *See e.g.*, Rindge Co. v. Los Angeles County, 262 U.S. 700 (1922); Bauer v. County of Ventura, 45 Cal. 276, 289 P.2d 1 (1955); Jacobs v. Clearview W.S. Co., 220 Pa. 388, 69 A. 870 (1908).

20. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L.J. at 606 (1949).

21. *See* Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896).

22. CUSHMAN, EXCESS CONDEMNATION 279 (1917); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L.J. 608 (1949).

though the Supreme Court refused on several occasions to adopt either test,[23] in 1916 the Court, through Mr. Justice Holmes, clearly rejected the narrow use of the public test.[24] The public use doctrine now refers to the broad "public benefit" test.[25]

Berman v. Parker,[26] decided by the United States Supreme Court in 1954, exemplifies the connotation of "public benefit" today. There the federal government had authorized a private agency to demolish portions of the District of Columbia on an area by area basis. The plan was to eliminate buildings which were structurally unsafe as well as those unsightly but otherwise sound. The lands were to be resold to individuals or other developers. The appellants, who owned a department store within the condemned area, claimed that the government was violating their fifth amendment rights since their property was to be put "under the management of a private, not a public agency and redeveloped for private, not public use."[27] The Court rejected the claim basing its decision on the "public interest":[28]

> 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 Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[29]

The *Berman* decision demonstrates that the "public interest" will override any property right of the individual. What then, are the limits of the "[p]ublic safety, public health, morality, peace and quiet, [or] law and order"?[30] Since the Constitution restricts the power of the state to take private property,[31] what are the constitutional limits of the public benefit test?

In *Berman*, the land in question was the appellant's private property. The legislature passed an act ordering its condemnation by a private agency. The land was to be resold to a private corporation or individual. Yet the fifth amendment did not limit the power of eminent domain since the property in question was not "beautiful."[32]

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23. *E.g.*, Clark v. Nash, 198 U.S. 361, 369 (1905).
24. Mt. Veron-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).
25. NICHOLS § 7.2[2]. Otherwise stated by various courts, the broad view of "public use" connotes "public advantage", or that which is "conducive to community prosperity." *Id.*
26. 348 U.S. 26 (1954).
27. *Id.* at 31.
28. *Id.* at 32.
29. *Id.* at 33.
30. *Id.* at 32.
31. *See* authority cited note 15 *supra*.
32. *But see* NICHOLS § 7.1.
When the state constitutions were adopted, the taking of property for private use in its bold form, as the seizure of the property of

The 1963 case of *Courtesy Sandwich Shop v. New York Port Authority*[33] again exposes the meaning of "public use" in the modern context. Concurrent New York and New Jersey legislation had authorized the Port of New York Authority to condemn property for the construction of a World Trade Center. This Center was statutorily defined 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. . . ."[34] Also included was the power to condemn land for the construction of structures *not functionally* related to the project's purpose, but solely for "the production of incidental revenue . . . for the expenses of all or part of the port development project."[35] The New York Appellate Division stated that though a World Trade Center would otherwise be a public purpose, the statute was unconstitutional in that "it granted a power to condemn property to be used for no other purpose than the raising of revenue. . . ."[36] In reversing that decision, the New York Court of Appeals relied upon historical and sociological data, plus its own good sense of the general public welfare:

> The history of western civilization demonstrates the cause and effect relationship between a great port and a great city. . . . [P]iers, markets and slum clearance even esthetic improvements have been held to be a public purpose. . . . Nor can it be said that the use of property to produce revenue to help finance the operation of those activities that tend to achieve the purpose of the project does not itself perform such a function, provided, of course, that there are in fact such other activities to be supported by incidental revenue production. . . .[37]

Using the court's historical approach in criticizing this decision, it is interesting to note that Henry VIII used a rationalization that revenues would be used for public purposes in his dissolution of monasteries in 1536.[38] But the dissenting opinion[39] of Judge Van

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one man and the bestowal of it upon another, was sufficiently prohibited by the requirement of due process of law . . . [I]t is not within the power of a constitutional government to authorize the taking of the property of an individual without his consent for the private use of another, *upon specious grounds* of public advantage, even upon the payment of full compensation." *Id.* at 7-10 to 13 (emphasis added).

33. 12 N.Y.2d 379, 190 N.E.2d 402, *appeal dismissed*, 375 U.S. 78 (1963).
34. *Id.* at 382, 190 N.E.2d at 404.
35. *Id.*
36. *Id.*
37. *Id.* at 383, 190 N.E.2d at 405.
38. *See* discussion and authority cited note 14 *supra*.
39. 12 N.Y.2d 379, 386, 190 N.E.2d 402, 407 (1963) (dissenting opinion).

Voorhis in *Courtesy Sandwich Shop v. New York Port Authority* offers a constitutional and therefore more appropriate basis for discussion. This dissent argued that the statute put

> the Port Authority in the real estate business, by making it a potential landlord, as it says itself at page 6 of its own brief, of 'a community of firms engaged in direct import-export activities. . . .'
>
> Nothing in the statute indicates by what standard of judgment selection is to be made from among this multitude of private organizations engaged in export and import. . . .[40]
>
> This [statute] raises constitutional questions, if the Constitution any longer protects private property. . . .[41]
>
> Disregard of the constitutional protection of private property and stigmatization of the small or not so small entrepreneur as standing in the way of progress has everywhere characterized the advance of collectivism. To hold a purpose to be public merely for the reason that it is invoked by a public body to serve its ideas of the public good . . . can be done only on the assumption that we have passed the point of no return, that the trade, commerce and manufacture of our principal cities can be conducted by private enterprise only on a diminishing scale and that private capital should progressively be displaced by public capital which should increasingly take over. . . .[42]

No more precise deprecation of the *Courtesy* decision can be offered than the dissent of Judge Van Voorhis. However, the United States Supreme Court summarily dismissed an appeal of the New York decision "for want of a substantial federal question."[43]

More recent decisions reflect the unlimited elasticity of the public benefit test and the correlative destruction of the fifth amendment public use limitation.[44] These cases fall within that area of eminent domain known as excess condemnation. Excess condemnation is the taking of land in surplus of that necessary for proposed public improvements when such a taking can also be deemed for a public use.[45] This type of eminent domain has traditionally been justified on three theories of public use:

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40. *Id.* at 387, 190 N.E.2d at 408.

41. *Id.* at 388, 190 N.E.2d at 409.

42. *Id.* at 390-91, 190 N.E.2d at 411. *See also* Port of New York Authority v. 62 Cordlandt St. Rlty. Co., 18 N.Y.2d 250, 273 N.Y.S.2d 337, 340 (1966) (dissenting opinion of Judge Van Voorhis).

43. Courtesy Sandwich Shop v. Port of New York Authority, 375 U.S. 78 (1963).

44. The state courts sometime prevent condemnation, though such decisions now represent an exception to the rule. *See, e.g.,* Hogue v. Port of Seattle, 54 Wash. 2d 799, 838-839, 341 P.2d 171, 193 (1959).

45. NICHOLS § 7.5122; Comment, *The Public Use Limitation On Eminent Domain: An Advance Requiem*, 58 YALE L.J. 606 (1949); Note, *Eminent Domain—Excess Condemnation—Avoidance of Excessive Severance Damages Held a Valid Public Use*, 43 N.Y.U.L. REV. 795 (1968). *See, e.g.,* City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930); Miro v. Superior Court for County of San Bernardino, 5 Cal. App.

(1) The remnant theory, whereby property of such size and shape as to be of no practical value to the owner is condemned in excess of that required for the improvement;
(2) The restrictive theory, whereby the condemning authority acquires adjacent property in order to insure the attainment of the principal object by placing esthetic or safety restrictions on the excess; and,
(3) The recoupment theory, whereby additional land is acquired, usually in highway construction, to further the main object and to diminish the overall cost to a particular public improvement.[46]

As late as 1968, it could be stated confidently that the public use doctrine had not been extended to the point of accepting the recoupment theory of excess condemnation.[47] However, decisions of the same year make even the existence of this limitation on the power of eminent domain dubious. In *Department of Public Works v. Superior Court of Merced County*[48] the Supreme Court of California destroyed perhaps the last defense against governmental usurpation of private property. In this case, the condemnor sought to compel the trial court to proceed with condemnation of three parcels of real estate instead of two. The Department of Public Works had built a freeway across a farm owned by one Rodoni which had landlocked a remaining uncondemned parcel. Condemnation was sought upon this "excess" portion on the rationale that it was required to prevent the state from paying "excessive" severance damages for having blocked the farm from access to the road. It was argued that by selling that part of the parcel not needed for freeway purposes, the cost of the project would be reduced. The trial court recognize Rodoni's claim that taking property for such a purely economic purpose was not a public use under the California Constitution.[49] The department petitioned for a writ of mandate ordering the Merced County Superior Court to proceed with the condemnation. The Supreme Court of California reversed, order-

3d 91, 84 Cal. Rptr. 874 (1970); City of Carlsbad v. Ballard, 71 N.M. 397, 378 P.2d 814 (1963).

46. *See* NICHOLS § 7.5122[1], [2], [3]; Comment, *The Public Use Limitation of Excessive Severance Damages Held a Valid Public Use*, 43 N.Y. U.L. REV. 795 (1968).

47. Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910); Note, *Eminent Domain—Excess Condemnation—Avoidance of Excessive Severance Damages Held A Valid Public Use*, 43 N.Y.U.L. REV. 795 (1968).

48. 65 Cal. Rptr. 342, 436 P.2d 342 (1968).

49. The California Constitution is similar to the United States Constitution: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ." CAL. CONST. art. I, § 14.

ing the trial court to proceed if it found the taking justified to avoid excessive severance or consequential damages.[50] It permitted the department to condemn the property "adjacent to highways and other public works to be constructed by it and thereafter convey the adjacent property to private parties subject to restrictions protecting the highway or other public use."[51]

The most significant aspect of the *Merced County* case, however, involves the court's analysis of the three theories of excess condemnation. The court construed the enabling legislation as permitting the taking of remnants. It also held valid condemnation for the purpose of avoiding "excessive" severance damages.[52] The taking was justified on the remnant theory,[53] even though the land was not negligible in size. *Merced County* represents the acceptance of the recoupment theory of excess condemnation. The facts disclose that the land was condemned for a highway improvement project and that excess condemnation was sought to diminish the cost of the improvement. This case meets the definitional requisites for recoupment.[54] Conversely, the definition of the remnant theory requires that the property be of such size that it would be of no practical value to the owner, a circumstance absent from this case. Thus, the court affected a specious expansion of the remnant theory in order to find a public use without expressly adopting the more repugnant recoupment theory.[55] It is submitted that

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50. 65 Cal. Rptr. at 344, 436 P.2d at 344, 345.

51. *Id.* at 345, 436 P.2d at 345.

52. *Id.* at 346, 347, 436 P.2d at 346. Severance damages are the payments made to condemnees for hardship caused by having their property landlocked by the taking necessary for the public improvement.

53. *Id.*:

> Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value. Remnant takings have long been considered proper. . . . There is no reason to restrict this theory to the taking of parcels negligible in size. . . .

54. Nichols § 7.5122 3:

> [The recoupment theory] . . . , although sanctioned in countries in which the power of the legislature is not restricted by one written constitution, involves the taking of the property of one person and the sale of it to another for his private use and, until recently at least, was of doubtful validity in the United States. . . .

Nichols cites the *Merced County* case for the qualification that recoupment was not recognized "until recently at least". *See* NICHOLS § 7.5122[3] n.7 *citing* People v. Superior Court of Merced County, 65 Cal. Rptr. 342, 436 P.2d 342 (1968) (accepting recoupment theory); State Highway Dept. v. 9.88 Acres of Land, 253 A.2d 509 (Sup. Ct. Del. 1969) (rejecting recoupment theory); Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619 (1913) (rejecting recoupment theory); Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910) (rejecting recoupment theory); State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (1967) (accepting recoupment theory).

55. The recoupment theory issue was not the only example of stretched reasoning exhibited by the court in its desire to allow the condemnation. The California Constitution has a section extending the con-

the acceptance of excess condemnation represents the latest manifestation "of the voracious appetite of acquisitive government."[56]

The argument in favor of the present meaning of "public use" is represented by the following words:

> The law must not, in the eyes of those persons it serves, appear absurd. In seeking to define and delimit the legal construct, judges are spokesman for their society—'living oracles' Blackstone would say—deriving their concept of property from the imperceptibly changing community consensus.[57]

The meaning of the public use doctrine has changed by imperceptible degrees with the community consensus. And the acceptance of the consensus view rather than adherence to an objective principle has negated any limitation of constitutional law. The legalization of esthetic and excess condemnation reflects the sanction of a concept developed "in countries in which the power of the legislature is not restricted by one written constitution."[58] While legal writers have observed for at least two decades that the public benefit test has no limits,[59] the judiciary has proceeded on a path of intellectual abdication to legislative determinations of public use. The courts have attempted to recognize the public use limitation while expanding the scope of its application beyond reasonable limits. Thus the public use doctrine represents a false barrier against governmental abuse—a shibboleth used in deference to the Constitution.

III. The Sources of Decline

A. Judicial Review

The replacement of the "use by the public" test with the "public purpose" criterion for determining the presence of a public use

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demnation power of the legislature to include excess grounds for road and development "to preserve the view, appearance, light, air and usefulness of such public works." CAL. CONST. art. I § 14½. However, this provision limits the area of condemnation to two-hundred feet. The department wished to condemn more than two hundred feet. Thus, if section 14½ applied, no more than the two hundred feet could be condemned. The court ruled section 14½ inapplicable, which destroyed the two-hundred foot limitation. Thus, the necessity for confronting the recoupment theory was presented, since constitutionality must be under the general provision, CAL. CONST. art. I. § 14.

56. 65 Cal. Rptr. at 349, 436 P.2d at 349 (dissenting opinion).

57. STROEBUCK, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 764 (1969).

58. *See* quotation and authority cited note 54 *supra*.

59. *See, e.g.*, NICHOLS § 7.2[3]; Comment, *What Constitutes a Public Use*, 23 ALBANY L. REV. 386 (1959). The repudiation of the public use doc-

marked a significant change in the law of eminent domain. Jurists generally assumed that the judiciary would serve as an adequate bulwark against governmental abuse. An examination of the respective attitudes of the legislature and judicary indicates the fallacy of this assumption.

In every eminent domain case three major questions are presented: the necessity for the proposed improvement and for the particular property to be condemned; the amount of compensation to be awarded; and the existence of a public purpose.[60] Furthermore, the statute delegating authority to a private or public agency must be construed since legislative action is required before the power of eminent domain may be exercised.[61] The requirement of due process raises constitutional issues which can be determined ultimately only by the judiciary.[62] However, the acuteness of judicial scrutiny is questionable. For example, it is generally held that the legislative authorization for a taking raises a presumption that a public use exists.[63] If the legislature declares the presence of a public interest, the actuality of a public purpose is established *prima facie*.[64] Though application for a review will be permitted for a clear abuse of discretion,[65] the legislature will be given the benefit of any doubt.[66]

Judicial review has been said to be confined to cases of manifest arbitrariness and unreasonableness.[67] The criterion for re-

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

60. LEVEY at 167-68.

61. *See, e.g.*, Beth Medrosh Hagodal v. City of Aurora, 126 Colo. 267, 248 P.2d 732 (1952); Botts v. Southeastern Pipe-Line Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Strain v. Cities Service Gas Co., 148 Kan. 393, 83 P.2d 124 (1938); State Highway Commr. v. Union County Park Comm., 89 N.J. Super. 202, 214 A.2d 446 (1965); Memphis Housing Authority v. Memphis Laundry Cleaner Inc., 463 S.W.2d 677 (1971) (personal property); Brazos River Conservation & Reclamation Dist. v. Harmon, 178 S.W.2d 281 (Tex. Civ. App. 1944).

62. United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896); Shoemaker v. United States, 147 U.S. 282 (1893); Black Rock Placer Mining Dist. v. Summit W. & I. Co., 56 Cal. App. 2d 513, 133 P.2d 58 (1943); Varnadoe v. Housing Authority, 221 Ga. 467, 145 S.E.2d 493 (1965); *see also* LEVEY at 171; NICHOLS § 7.4; B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: PART II RIGHTS OF PROPERTY 241 (1965).

63. *See, e.g.*, United States v. Hunting Rights of Swan Lake Hunting Club, 237 F. Supp. 290 (D. Miss. 1964); *see also* LEVEY at 171; NICHOLS § 7.4[1].

64. Berman v. Parker, 348 U.S. 26 (1954); Government of Virgin Islands v. 50.05 Acres of Land, 185 F. Supp. 495 (D. Vir. Is. 1960); *see also* NICHOLS § 7.4[1].

65. NICHOLS § 7.4[1].

66. City of Menlo Park v. Artino, 151 Cal. App. 261, 268, 311 P.2d 135, 140 (1957); LEVEY at 172.

67. United States v. Gettysburg Elec. R. Co., 160 U.S. 668 (1896); State v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920); *see* LEVEY at 172; NICHOLS § 7.4[1].

versal is whether the taking constitutes fraud, bad faith, or abuse of discretion.[68] Thus, the ultimate question to be resolved is not whether the use is *actually* a public one, but whether the legislature *might reasonably* have considered it to be public.[69] This approach parallels the public purpose test, which holds essentially that a use is public if the government has the power to undertake the particular function in question.[70] However, it seriously lessens the degree of protection against violations of constitutional rights.

While the rules governing judicial review of eminent domain cases adhere to the long recognized presumption of constitutionality which attaches to legislative action,[71] it is observed that the treatment accorded claims of violated rights in condemnation proceedings is dissimilar to that of other constitutional rights. For example, in the "criminal rights" field, the Supreme Court has stated, in relation to the right to remain silent, that the state, not the individual, must "shoulder the entire load";[72] the Court has energetically protected these rights. It is suggested that the basic similarities between civil liberties and property rights reflect a jurisprudential inconsistency with regard to the question of judicial review. Both the right to remain silent and right to be free from a taking of one's property for a private use are protected by the fifth amendment. Both provisions relating to these rights were intended to be limitations on government power. "If balance we must, should we not place on the individual's side the importance of the institution of property in a free society,"[73] just as we set the balance in favor of the individual where questions of criminal rights are concerned? The answer of the courts has been negative.

Viewing together the requirements for judicial review and the overbroad public benefit test, the danger to individual rights in property cases is manifest. First, a test has been developed which

68. Miro v. Superior Court for County of San Bernardino, 5 Cal. App. 3d 91, 84 Cal. Rptr. 874 (1970); Canal Authority v. Hayman, 243 So. 2d 131 (Sup. Ct. Fla. 1970); *see* Ghingher and Ghingher, A CONTEMPORARY APPRAISAL OF CONDEMNATION IN MARYLAND, 30 MD. L. REV. 301, 304 (1970).

69. NICHOLS § 7.4; *see generally* Wilmington Housing Authority v. Nos. 500, 502, & 504 King St. 245 A.2d 856 (Del. Super. Ct. 1969).

70. *See* United States v. 4,450.72 Acres of Land, 27 F. Supp. 16 (D. Minn. 1939); *see also* Comment, *Compensation For Public Use—Congressional Action and the Fifth Amendment*, 32 TENN. L. REV. 615, 617, 619 (1965).

71. *See, e.g.*, Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153 (1943); United States v. Carolene Products Co., 304 U.S. 144, 148 (1938); Becker Steel Co. v. Cummings, 296 U.S. 74, 79-80 (1935).

72. Miranda v. Arizona, 384 U.S. 436 at 460 (1966).

73. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: PART II THE RIGHTS OF PROPERTY at 233 (1965).

has no recognizable limits. Because the courts will not review state or Congressional action except for "fraud, bad faith, or abuse of discretion,"[74] the test reaches its logical extension which expunges any definitive boundary in determining a public use. The situation exists where the legislature, not the judiciary, establishes the constitutional guidelines for the public use limitation. Since the legislature is guided by the momentary whims of the consensus rather than adherence to any abstract principle, the interpreter of the Constitution becomes not the court but the consensus. While no one can doubt the judicial authority to abdicate its jurisdiction to the legislative branch, the wisdom of such an approach is dubious. And where some commentators believe "[n]either *liberty* nor *property* is . . . beyond the domain of public control,"[75] it is submitted that such conceptions adhere to anything but constitutional theory.

Thus the rules governing judicial review in eminent domain are both the evidence and the source of the demise of all limits on that governmental power. Inasmuch as the judicial default to legislative judgment accelerated the unlimited expansion of the public purpose test, it represents a source of decline. Inasmuch as the judiciary's reluctance to review legislative fiat regarding condemnation exposes a dichotomy between the treatment accorded property rights and other individual rights, it evidences a deeper source of the public use limitation's expurgation. The repudiation of the public use limitation has its roots in a deeper soil: the profundities of legal philosophy.

B. Philosophy of Law

With the gradual obscuration of the line between valid and invalid governmental action, the constitutional restraints upon public usurpation of property rights has become merely theoretical and "has all but most of its value as a practical restraint upon governmental action."[76] The catalyst for this unprecedented unleashing of government power in the American system lies in constitutional theory.

Professor Bernard Schwartz in his commentary on the Constitution[77] gives a significant analysis of this philosophical development. Recognizing that insofar as property rights are concerned the paramount factor today is governmental power rather than in-

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74. *See* authority cited note 68 *supra*.

75. HAMILTON, *Property-According to Locke*, 41 YALE L.J. 864 (1932). It is recognized, however, that the quoted statement is in accord with present law. *But see* ACTON, ESSAYS ON FREEDOM AND POWER at 45 (1948); "Liberty is not a means to a higher political end. It is itself the highest political end."

76. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: PART II. THE RIGHTS OF PROPERTY at 232 (1965) [hereinafter cited as SCHWARTZ].

77. SCHWARTZ, PART III RIGHTS OF THE PERSON 4-10 (1968).

dividual right,[78] Schwartz attributes this decline to a theoretical shift of emphasis to a "personal rights" versus "property rights" dichotomy.[79] This distinction between rights is traceable to the 1938 case of *United States v. Carolene Products Co.*[80] which first contracted the presumption of constitutionality in cases where legislation appears on its face to contradict a specific Constitutional prohibition. This decision foreshadowed a declaration four years later that the freedoms of speech and religion occupied a "preferred position" in the Constitution.[81] Today, the "notion that personal, as opposed to property, rights are in a prefered position in the organic scheme"[82] is the predominant philosophical theory underlying constitutional law. In the context of the instant discussion, the preferred position philosophy is clearly the source of the present law of eminent domain. It is from this theoretical base that a restricted scope of judicial review has grown. It is from this philosophical origin that the unlimited governmental power to condemn private property has developed.

The preferred position hypothesis can be deprecated on various grounds. Professor Schwartz criticized it as being contrary to the intent of the Founding Fathers.[83] Justices Frankfurter and Jackson felt that the theory created a fallacious distinction which relegated property rights to a deferred position.[84] It is additionally urged that the preferred position philosophy negates the cocept of "rights." Rights do not exist *in vacuo*; they have significance only in relation to the individual. There are no "public rights" or "criminal rights," *only* personal rights. Of those, property rights are but one. Any attempt to divorce the concept of a "right" from the human entity must result in contradiction. It is sug-

78. *Id.* at 4.
79. *Id.* at 5.
80. 304 U.S. 144 (1938).
81. *See* Jones v. Opelika, 316 U.S. 584 (1942).
82. SCHWARTZ, *op. cit., supra* note 77, at 7. The theory has not been adopted without dissent, however. Both Justices Frankfurter and Jackson deprecated it:

> The major weakness in the preferred-position philosophy is that pointed out by Justice Jackson 1949. 'We cannot', he said, 'give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds.' Under the preferred-position approach, personal rights may be elevated to an exalted status; but the clear implication is that other constitutional rights are marked as only secondary, to be relegated to a deferred position.

Id. at 8 *citing* Brinegar v. United States, 338 U.S. 160, 180 (1949) (dissenting opinion).
83. *Id.* at 8.
84. *See* discussion and authority cited note 82 *supra.*

gested that the theoretical groundings of constitutional law with respect to property rights do reflect such an extension of the fallacious preferred rights theory. Its existence in the law of eminent domain is manifest.

IV. Conclusion

The public use doctrine of eminent domain now represents a major paradox in legal philosophy. On one hand, the fifth amendment of the Constitution limits the power of government to the condemnation of property for public uses. On the other, the test of a public use has been expanded to a degree which no longer recognizes a significant boundary. The danger of this inconsistency lies in "the invasion of private rights . . . , not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[85] Its source lies in the legal quandary concerning the nature of property rights.

A recommendation of future action must begin at the origin of this paradox. It is therefore submitted that a reexamination of the philosophical basis of the preferred rights theory is required. The determination that property rights stand on an equal plane with other constitutional guarantees would necessitate the revitalization of judicial review in eminent domain cases. It would also require the judiciary to formulate objective criteria for a finding of a public use.

Though blatantly contradictory to the theoretical and practical considerations of the law today, it is submitted that the "public benefit" test must be abolished. This solution is not pragmatic; it is philosophic. Excess and esthetic condemnation would be beyond the constitutional limitation. But the fact that the constitution does not guarantee all things to all people must be recognized. The question in eminent domain cases involves two conflicting propositions—the desire of the consensus to have its demands met versus the rights of the individual. In any such contest, the balance must be in favor of individual rights if adherence to the constitution is to be obtained.

Therefore, the following test for "public use" is suggested. In the ordinary sense of the word "use," a "user" is connoted. The Constitution requires that the use must be public; therefore, so must be the "user." The only identifiable public user is the government. It is submitted that the objective test for a public use must require that the condemned property be taken by the government for functions over which the government will have control and

85. Madison, Writings V 271-74 *cited in* 1 Pollak, The Constitution And The Supreme Court 122 (1966).

operation. This test is not a mere return to the "use by the public" criterion. It goes far beyond that test, which permitted condemnation of private property by railroads and utilities on the theory that the public would ultimately use their facilities.[86] The "use by the public" test in these decisions also accepted the principle that individual rights—liberty—must give way to public desire. It is this concept that the "governmental user" test contradicts. Under the "governmental user" principle, highways, government buildings, armed forces facilities, government facilities for the control of navigation and all other functions where condemnation is recognized under the commerce clause[87] would be constitutionally acceptable. But in no instance would a private individual or corporation be permitted to condemn the private property of another. While this proposal may be rejected as anachronistic, specious, and unduly restrictive, it is submitted that it is required if the fifth amendment is to have any significance. It is not anachronistic, since it has never been attempted before. It is specious only if the uncompromising nature of liberty is rejected. It is unduly restrictive only to the extent that it requires the public to purchase their demands under a consensual free enterprise system.

MARTIN J. KING

86. *See* NICHOLS § 7.2.

87. The commerce clause furnishes a primary source of authority for governmental acquisition of land. *See* SCHWARTZ at 232. It is submitted, however, that the Commerce Clause should only extend as far as the Fifth Amendment limitation on the governments power to take private property.