

THE PUBLIC USE LIMITATION ON EMINENT DOMAIN: AN ADVANCE REQUIEM

LEGAL doctrines usually die quietly, if slowly. Their demise is generally accompanied by no more than soft sighs of relief at the courts' final acknowledgment of decay. But the theory of "public use" as a limitation on eminent domain¹—the notion that there are only certain limited "public purposes" for which private property may be expropriated—bulkied so large in its prime and has taken so long in dying that, at the risk of disturbing the death-watch, a few final words may be in order.

Despite the shibboleth that eminent domain was an "inherent attribute of sovereignty,"² the Federal Government did not assert its power of eminent domain in its own name in its own courts until 1875.³ And until the limitations of the Fifth Amendment on federal takings were applied to the states under the Fourteenth Amendment in 1896,⁴ state takings were not

1. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B. U. L. REV. 615 (1940); Note, 21 N.Y.U. L. Q. REV. 285 (1946); 1 LEWIS, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* c. VII (3d ed. 1909), hereinafter cited as LEWIS; 1 NICHOLS, *THE LAW OF EMINENT DOMAIN* c.c. IV-VI (2d ed. 1917), hereinafter cited as NICHOLS; RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* c. III (1894), hereinafter cited as RANDOLPH; MILLS, *ON THE LAW OF EMINENT DOMAIN* c.c. II, III (2d ed. 1888), hereinafter cited as MILLS; ROTTSCHAEFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* §§ 294-5 (1939); 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* c. XCIX (2d ed. 1929); 2 COOLEY, *CONSTITUTIONAL LIMITATIONS* 1124-41 (8th ed. 1927).

2. See, e.g., *United States v. Jones*, 109 U.S. 513, 518 (1883); *Room Co. v. Patterson*, 98 U.S. 403, 406 (1878); *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 79 (1900); *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 119 Ga. 354, 355, 46 S.E. 422, 423 (1904); *Hollister v. State*, 9 Idaho 8, 11, 71 Pac. 541, 543 (1903); *Ill. State Trust Co. v. St. Louis, I.M. & S. Ry.*, 208 Ill. 419, 422, 70 N.E. 357, 358 (1904); *Board of Regents v. Palmer*, 356 Mo. 946, 951, 204 S.W. 2d 291, 293 (1947); *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 392-4, 69 Atl. 870, 871 (1903); *Painter v. St. Clair*, 98 Va. 85, 87-8, 34 S.E. 989, 990 (1900).

See, also, LEWIS §§ 3, 367; MILLS § 1; NICHOLS § 17; ROTTSCHAEFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 691 (1939); Notes, 21 N. Y. U. L. Q. REV. 285 (1946), 46 COL. L. REV. 108 (1946). But see FREUND, *THE POLICE POWER* 541 (college ed. 1904).

3. The case first establishing the Federal Government's eminent domain power was *Kohl v. United States*, 91 U.S. 367 (1875), presaged in *People ex rel. Trombley v. Humphrey*, 23 Mich. 471 (1871) where a state was denied the power to condemn for the United States.

Prior to 1875, the usual procedure had been for a state to condemn property and turn it over to the United States. See *Reddall v. Bryan*, 14 Md. 444 (1859), *appeal dismissed*, 24 How. 420 (U.S. 1860); *Orr v. Quimby*, 54 N.H. 590 (1874); In the Matter of *League Island*, 1 Brewst. 524 (Pa. 1868). Consult LEWIS § 309; MILLS § 347; NICHOLS § 34; RANDOLPH § 33. There were, however, instances where the United States, as nominal condemnor, was deemed to be exercising a delegated power of the state. *United States v. Dumlplin Island*, 1 Barb. 24 (N.Y. Sup. Ct. 1847); cf., *Burt v. Merchants' Ins. Co.*, 106 Mass. 356 (1871).

4. The eminent domain clause in the Fifth Amendment—"nor shall private prop-

reviewed in the federal forum. Accordingly, until the last decade of the last century, the law of eminent domain developed primarily in the state courts and only gradually thereafter did the federal bench begin to make significant contribution.

DEVELOPMENT OF THE PUBLIC USE DOCTRINE IN THE STATE COURTS

Prior to the adoption of the federal and early state constitutions, governments rarely needed privately owned land.⁵ There were vast tracts available in the public domain and governmental activities were limited. And the abundance of unimproved and unoccupied private lands made the few instances of government acquisition relatively painless.⁶ Accordingly, the only significant limitation imposed upon the rare exercise of eminent domain was the payment of just compensation.⁷

This requirement was written into the federal⁸ and a few state constitutions, but was so generally accepted as a principle of "natural law" that a number of early state constitutions omitted it.⁹ Indeed, the courts of the time, even where express constitutional provisions existed, preferred to rely on natural law.¹⁰

erty be taken for a public use, without just compensation"—is not directly applicable to the states, but the due process clause of the Fourteenth Amendment incorporates the same requirements. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403, 417 (1896); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158 (1896); *Chicago Burlington & Quincy R. R. v. Chicago*, 166 U.S. 226, 236 (1897); cf. *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20 (1885). But see *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877).

5. The governmental power to take private property doubtless goes back as far as formalized government, but the term "eminent domain" was not coined by political philosophers until the modern concept of private property emerged from the decline of feudalism. NICHOLS 4-5, 22-3; LEWIS 7; FREUND, *THE POLICE POWER* § 504 (college ed. 1904); RANDOLPH 5. See, also, discussion in *Bloodgood v. Mohawk & H. R.R.*, 18 Wend. 9, 56-59 (N.Y. 1837).

6. So painless that originally no duty existed to compensate the owner of unimproved land when roads were laid through it. See NICHOLS 14. In the southern colonies, where there was less urban development, the practice of laying out highways without just compensation persisted even longer; and South Carolina not only took land without compensation, but timber, stones and other material as well, a custom which prevailed until long after the Revolution. See *State v. Dawson*, 3 Hill. 100 (S.C. 1836); NICHOLS 19; cf. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 80-81 (1931).

7. For the history of the development of the just compensation requirement, consult NICHOLS §§ 3, 204; 2 LEWIS § 671 *et seq.*

8. U.S. CONST. AMEND. V.

9. The first constitutions of most of the original states lacked any provisions pertaining to eminent domain. Massachusetts and Vermont were alone in requiring compensation—Pennsylvania was alone in requiring the consent of the landowner "or that of his legal representatives." By 1800, Pennsylvania had changed its constitution to require compensation, but in 1868, five of the original states were still without this guarantee. Most of the states later admitted to the Union provided for compensation in their constitutions. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 70 (1931).

10. *Ibid*; LEWIS §§ 10, 11; NICHOLS 622.

The same higher justice considered eminent domain justified for the public "good,"¹¹ the public "necessity,"¹² or the public "utility."¹³ As governmental activity expanded, these concepts became significant, for property-owners threatened with expropriation attempted to show that the proposed takings were for projects unrelated to the public good. In a number of states, where the desire was strong to encourage exploitation of natural wealth and to increase industrial development, the courts found—and, on further exploration, still find—the natural law concept of "public good" to be of wondrous elasticity.¹⁴ In these jurisdictions, in consequence, attempts to take property by eminent domain have rarely been invalidated. For example, a taking of land for the construction of a private road to be used only by the landowner on whose behalf it was constructed was approved as a "public use" on the theory that it provided a means for the homeowner to leave his home to vote and to serve on juries;¹⁵ again, a grant of eminent domain to a private gold mining enterprise was justified by the relationship of gold to the national currency.¹⁶

But the country was undergoing a great industrial transformation. To accelerate this movement, many states delegated eminent domain to favored

11. See 1 BL. COMM. *139.

12. The French Declaration of Rights of 1789, Article 17, provides: "*Les propriétés étant un droit inviolable et sacré, nul ne peut en être privé si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité.*" DAGUIN, AXIOMES, APHORISMES ET BROCARDS FRANÇAIS DE DROIT 183 (1926).

13. GROTIUS, DE JURE BELLI ET PACIS Lib. II, Cap. XIV, §vii, indicates public utility and compensation as the two requirements of eminent domain.

14. NICHOLS 130-1; LEWIS 504; CUSHMAN, EXCESS CONDEMNATION 280-1 (1917); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 618-24 (1940); Note, 21 N.Y.U.L.Q. REV. 285, 286 (1946).

"... [I]t is enough if the taking tends to enlarge resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community." *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 785, 88 Pac. 426, 431 (1906).

15. See *Brewer v. Bowman*, 9 Ga. 37, 40-1 (1850); *Robinson v. Swope*, 12 Bush. 21, 24-5 (Ky. 1876). Some courts accomplished the same objective with more directness. See *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S.W. 762 (1907); *People ex rel. Ayres v. Richards*, 38 Mich. 214 (1878).

16. *Hand Gold Mining Co. v. Parker*, 59 Ga. 419 (1877). Comparable rationalizations were offered for grants to private lumbering projects, *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444 (1911) (boom companies compared to common carriers); *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269 (1907) (timber driving company having serviced only the company which owns it, nevertheless, performs a "public" service). *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790 (1896) (land may be taken for railroad the main purpose of which is to carry logs to sawmill because railroad is open to public, is permanent, and will be useful for settling area).

enterprises,¹⁷ railroads being the principal beneficiaries. As the exercise of the power became more prevalent, the courts began to seek limitations in the interest of protecting private property.¹⁸ Moreover, the judicial-legislative struggle for supremacy was well begun.¹⁹ It may not then be altogether coincidental that some courts, having already started in other fields to abandon "natural law" for strict constitutional interpretation, began seeking their definition of the scope of eminent domain in the written constitution.²⁰ By adroit construction, if not sophistic inference, severe limitations could be imposed: the power of eminent domain is an inherent attribute of sovereignty and exists without constitutional recognition; therefore, con-

17. On the delegation of eminent domain, see LEWIS §§ 370-4, 376-8; MILLS §§ 60-4; 2 NICHOLS § 346 *et seq.*; RANDOLPH §§ 101-21.

18. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 617-8 (1940).

"It seems to us, if railroad corporations were permitted *ad libitum* to do what this defendant in error asks to be done, 'no deadlier blow could be dealt the private rights of the citizens.' If the doctrine claimed by defendant in error should prevail, then corporations might go to any private place they chose, to rolling-mills, ice-houses, tanneries, sugar-refineries, brick-yards, grocery-stores *etc.*, and in the country to stone-quarries, coal-mines, stock-farms *etc.*, and, if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so-called protection by the constitution of the rights of private property would by the arbitrary ruling of the courts be rendered nugatory and void. The mere declaration in a petition, that the property is to be appropriated to public use does not make it so; and evidence, that the public will have a right to use it, amounts to nothing in the face of the fact, that the only incentive to ask for the condemnation was a private gain, and it was apparent, that the general public had no interest in it.

"We would do nothing to hinder the development of the State nor to cripple railroad companies in assisting such development, but at the same time we must protect the property-rights of the citizens. Whatever corporations may be entitled under a proper construction of the law they will receive; but they must not be permitted to take private property for private use." *Railroad Co. v. Iron Works*, 31 W.Va. 710, 735, 8 S.E. 453, 467 (1888).

See, also, *Howard Mills Co. v. Schwartz L.&C. Co.*, 77 Kan. 599, 609, 95 Pac. 559, 562 (1908); *Arnsperger v. Crawford*, 101 Md. 247, 253, 61 Atl. 413, 417 (1905); *Bloodgood v. Mohawk & H.R.R.*, 18 Wend. 9, 65 (N.Y. 1837) (concurring opinion of Senator Tracy); *Borden v. Trespalacios R.&Y. Co.*, 98 Tex. 494, 509, 86 S.W. 11, 14 (1905); *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 684-5 (1903).

19. When the "public interest" is the only limitation on the power of eminent domain, "is there any limitation which can be set to the exertion of the legislative will in the appropriation of private property?" *Bloodgood v. Mohawk & H. R. R.*, 18 Wend. 9, 60 (N.Y. 1837) (concurring opinion of Senator Tracy). "It seems to me that such a construction of legislative powers is inconsistent with secure possession and enjoyment of private property. . . ." *Id.* at 62.

See, also, NICHOLS 31-40, 130; Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 618 (1940).

20. NICHOLS 119-120; Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B. U. L. REV. 615, 616 (1940); *cf.* *Loan Association v. Topeka*, 20 Wall. 655 (U.S. 1874), discussed in Grant, *The "Higher Law" Background of Eminent Domain*, 6 Wis. L. REV. 67, 68 (1931).

stitutional provisions relating to eminent domain must be construed as limitations upon, rather than grants of, power; and, in order to give the words "public use" in the typical phrase "nor shall private property be taken for public use without just compensation" any meaning at all, it must be carefully defined.²¹

"Use by the Public" Test

Eagerly, the courts seized upon their task of definition. By the middle of the nineteenth century, the definition had grown quite narrow.²² A distinction, originating in an unsupported New York dictum,²³ was drawn between a purpose beneficial to the public and a purpose in which the public had a "right of use." The indirect contribution to the prosperity of the entire community resulting from activities from which only some individuals would profit was not sufficient to justify the exercise of eminent domain. It was necessary that the public possess a "right" to use the facility or service for which the property was desired.²⁴

This distinction was not only consonant with the commonly understood meaning of the term "public use"—a public use exists when the public uses something—but was also hailed as a definitive test which would remove the question from the realm of speculation.²⁵

The refinement proved, however, somewhat disappointing to the courts which adopted it. For example, what proportion of the public must have a right of use before a purpose could be said to justify the exercise of eminent domain? ²⁶ What of situations where the public was to pay for the privilege

21. See LEWIS § 256; NICHOLS 120; Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 616 (1940); RANDOLPH § 39. See, also, cases and authorities cited note 3 *supra*.

22. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 617 (1940).

23. *Bloodgood v. Mohawk & H. R.R.*, 18 Wend. 9, 60-1 (N.Y. 1837) (concurring opinion of Senator Tracy). This suit was one for *trespass quare clausum fregit* against defendant railroad which had entered upon and damaged plaintiff's land. The railroad justified its entry under its acts of incorporation giving it the power of eminent domain. The main question was whether this grant of eminent domain was constitutional. A secondary question was whether the act required payment of compensation prior to the entry upon the land. Held: the legislature has the constitutional power to authorize the taking of private property for the purpose of constructing railroads, but that "by the true construction of the defendants' charter or act of incorporation, they were not authorized to take and appropriate the plaintiff's land to their use . . . until his damages were appraised and paid. . . ." *Id.* at 78.

24. *Id.* at 64. See LEWIS 506; NICHOLS 129; MILLS 94; RANDOLPH § 56; Note, 21 N.Y.U.L.Q.REV. 285, 290 (1946).

25. See LEWIS § 258; CUSHMAN, *EXCESS CONDEMNATION* 279-80 (1917); Note, 21 N.Y.U.L.Q. REV. 285, 287-8 (1946).

26. "It is sufficient that the general public, or any considerable portion thereof, should have the right to the use." *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393, 69 Atl. 870, 872 (1908). ". . . [B]ut 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

of using the thing for which eminent domain was to be employed? Was this a "right" of use? ²⁷ Where public utilities took property by eminent domain, would not private individuals alone—the stockholders—profit directly from the taking? ²⁸

Tradition, however, furnished a far greater obstacle than the cases raising these sticky questions. The test might permit a taking for the construction of theaters and hotels which, of course, would be used by the public; yet these had never before been thought to justify eminent domain.²⁹ On the other hand, since the beginning of the century eminent domain had been employed to further certain private activities. When this assistance had first been given, constitutions limiting the powers of the legislatures had not yet been written, and the abundance of natural resources had made people considerably less scrupulous regarding property rights.³⁰ These actions had been too long sanctioned for the courts not now to sustain them.³¹ Accordingly, the courts invoked evasive and awkward rationales, or admitted the existence of exceptions to the test.

The Mill Acts presented the problem in its trickiest form. These acts were, for the most part, carry-overs from the colonial period when mills

public use." *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 452, 107 N.W. 405, 414 (1906); *see Matter of Split Rock Cable Road Co.*, 128 N.Y. 408, 416, 28 N.E. 506, 508 (1891); *Matter of Niagara Falls & Whirlpool Ry.*, 108 N.Y. 375, 386, 15 N.E. 429, 432-3 (1888). *See also* discussion and cases cited in LEWIS § 254; MILLS § 12; NICHOLS § 46; RANDOLPH § 56.

27. The fact, that the public had to pay to use the facility created by the exercise of eminent domain did not bring the purpose within the prohibitions of the "use by the public" test so long as the condemnor was required *inter alia* to render impartial service to all and to charge tolls regulated by law. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 694 (1897); *see, Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N.E. 765 (1903); *Washington ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150 (1905); *Tyler v. Beacher*, 44 Vt. 648 (1871). *See also* LEWIS § 313; MILLS §§ 13, 14.

28. "The authorities concur in holding that an enterprise organized to meet a public demand is not reduced in its character because the parties instituting it have primarily in view private profit. Notwithstanding this it is still impressed with a public use." *Ryan v. Terminal Co.*, 102 Tenn. 111, 125, 50 S.W. 744, 747 (1899). *See Cottrill v. Myrick*, 12 Me. 222, 233 (1835); *Gardner Water Co. v. Inhabitants of Gardner*, 185 Mass. 190, 194, 69 N.E. 1051, 1053 (1904); NICHOLS § 48; RANDOLPH § 54.

29. *See Dayton G. & S. Mining Co. v. Seawell*, 11 Nev. 394, 410-11 (1876) where the court, in adopting the public "utility, benefit and advantage" construction of public use, points out that "[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 that "[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." This objection is also made at NICHOLS 132.

30. NICHOLS § 82.

31. *Ibid.*; LEWIS 552-3; *cf.* 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 134 (2d ed. 1904). *But see Sadler v. Langham*, 34 Ala. 311, 334 (1859).

were essential to community existence. In general, the statutes authorized riparian owners to erect and maintain mills on the condition that upstream landowners would be compensated for any floodings caused by the mills' operation.³² No clearer instance of a taking of property for the benefit of private individuals could be presented, and literal application of the "use by the public" test would seemingly require invalidation.³³

In some instances the acts were reluctantly sustained by opinions indicating that, had the problem been new, opposite decisions would have resulted.³⁴ Other courts relied upon the continued public acquiescence in the validity of the Acts,³⁵ and a number of courts termed the statutes omnipotent "police regulations."³⁶

By the beginning of the present century, there had developed a massive

32. *E.g.*, LAWS OF ALABAMA 623-6 (Toulmin, 1823) (Act of 1811 as amended by Act of 1812); 2 LAWS OF KENTUCKY 933-9 (Littell & Swigert, 1822) (Act of 1797); 2 LAWS OF MASSACHUSETTS 344-7 (Thomas, 1799) (Act of 1796 amending Acts of 1706, 1713 and 1728); THE PUBLIC LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 374-7 (1822) (Acts of 1734, 1738 and 1798); 3 LAWS OF SOUTH CAROLINA 609-10 (Cooper, 1838), 4 *Id.* 540 (Act of 1744 revived in 1783 after a 36 year lapse); 6 LAWS OF VIRGINIA 55-60 (Hening, 1819) (Act of 1748).

Head v. Amoskeag Manufacturing Co., 113 U.S. 9 (1885), the case in which the New Hampshire Mill Act was held not to violate the Fourteenth Amendment, contains a comprehensive discussion of the various Mill Acts in effect throughout the states.

The Mill Acts are also discussed in: ANGELL, A TREATISE ON THE LAW OF WATERCOURSES c. XII (7th ed. 1877); GOULD, A TREATISE ON THE LAW OF WATERS §§ 253, 254 and c. XIV (3d ed. 1900); LEWIS §§ 275-80; NICHOLS §§ 83, 84. A brief discussion is also contained in 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1134 *et seq.* (8th ed. 1927). Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 619-21 (1940) contains a more sophisticated analysis.

33. "The property in such cases is not taken into possession and use by the public . . . nor . . . do the individuals composing the public, derive any direct use, profit, or convenience from them . . . except insofar as the public . . . is incidentally benefitted by those enterprises which reduce the powers of nature to the service of man." *Miller v. Troost*, 14 Minn. 365, 368 (1869). See LEWIS § 278.

34. See, *e.g.*, *Fleming v. Hull*, 73 Iowa 598, 602, 35 N.W. 673, 675 (1887); *Harding v. Funk*, 8 Kan. 315, 324 (1871); *Murdock v. Stickney*, 8 Cush. 113, 117 (Mass. 1851); *Stowell v. Flagg*, 11 Mass. 364, 368 (1814); *Miller v. Troost*, 14 Minn. 365, 369 (1869); *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351, 353 (1860).

35. See, *e.g.*, *Olmstead v. Camp*, 33 Conn. 532, 552 (1866); *Miller v. Troost*, 14 Minn. 365, 369 (1869); ANGELL, A TREATISE ON THE LAW OF WATERCOURSES, 651 (7th ed. 1877); NICHOLS 227; *cf.*, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 134 (2d ed. 1904). But see, *Sadler v. Langham*, 34 Ala. 311, 334 (1859) where this argument was considered and rejected. Consider LEWIS § 278.

36. This approach was popular in Massachusetts. See *Lowell v. City of Boston*, 111 Mass. 454, 466-7 (1873); *Fiske v. Framingham Mfg. Co.*, 12 Pick. 67, 70 (Mass. 1832); *Murdock v. Stickney*, 8 Cush. 113, 116 (Mass. 1851). But see *Chase v. Sutton Mfg. Co.*, 4 Cush. 152, 169-70 (Mass. 1849).

The "Massachusetts Doctrine" may be credited to the inventive genius of Chief Justice Shaw of the Massachusetts Supreme Judicial Court. See Nicholas, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 619-20 (1940); LEWIS § 280. See generally, LEWIS § 279; NICHOLS § 84.

body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification.³⁷ The exceptions became so wide and so numerous that the "use by the public" test was no longer an important impediment to the requirements of transportation, mining and agricultural enterprises, nor, for that matter, to the needs of industry at large.³⁸

An offspring of the "use by the public" test, however—the rejection of "excess condemnation"—continued to cause difficulty.

Excess condemnation³⁹ is the practice of taking more property than is physically necessary for the creation of a public improvement and subsequently selling or leasing the surplus.⁴⁰ It provides an effective method of controlling the development of the area immediately surrounding the public improvement, since the condemnor can sell or lease subject to any restrictions which it deems desirable. Furthermore, since compensation which

37. "No question has ever been submitted to the courts upon which there is greater variety and conflict of reasoning and result than that presented as to the meaning of the words 'public use'. . . . The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide. . . . The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it." *Dayton G. & S. Mining Co. v. Seawell*, 11 Nev. 394, 400-1 (1876). Cf. *In re United States*, 28 F. Supp. 758, 761 (W.D.N.Y. 1939); *Oury v. Goodwin*, 3 Ariz. 255, 262, 26 Pac. 376, 378 (1891); *Tanner v. Treasury Tunnel Mining & Reduction Co.*, 35 Colo. 593, 595, 83 Pac. 464, 465 (1906).

The commentators have also had difficulties: 2 COOLEY, *CONSTITUTIONAL LIMITATIONS*, 1129 (8th ed. 1927) ("We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use."); CUSHMAN, *EXCESS CONDEMNATION* 277 (1917) ("One who seeks to find in the utterances of courts a clear statement of the meaning of the term 'public use' is doomed to disappointment. He finds chaos and conflict rather than unanimity or even similarity of opinion."); LEWIS 505 ("It is, of course, impossible to reconcile these different views. . . ."); NICHOLS 128-9 ("Efforts have been continually made to find a concise definition which will embrace all the undertakings which may be constitutionally endowed with the power of eminent domain and will exclude all others, but the task has never been accomplished. The difficulty is due in part to the impossibility of reconciling the decisions of the courts of the various states, or even of the same state . . .").

38. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.REV. 615, 624 (1940).

39. CUSHMAN, *EXCESS CONDEMNATION* (1917) is the outstanding work on the subject and is still helpful despite the fact that it is more than thirty years old. For more recent treatments, see Hart, *Excess Condemnation—A Solution of Some Problems of Urban Life*, 11 MARQ. L. REV. 222 (1927); Nichols, *Excess Condemnation in Connection with Housing*, 4 LEGAL NOTES ON LOCAL GOV. 14 (1938); Steiner, *Excess Condemnation*, 3 MO. L. REV. 1 (1938); Note, *The Constitutionality of Excess Condemnation*, 46 COL. L. REV. 108 (1946).

40. CUSHMAN, *op. cit. supra* note 39, at 2; Hart, *supra* note 39, at 226; 46 COL. L. REV. 108 (1946).

the condemnor pays for the acquisition of the property is generally considerably less than the value of the property after the creation of the improvement, the profits thus realized aid in defraying the cost of the improvement itself.⁴¹ These advantages made excess condemnation increasingly popular among the states and cities,⁴² but courts occasionally outlawed it as violating the requirement that the taking must be for a public use.⁴³ But to invalidate these takings, the courts applied not a broad conception of "public use" but rather the narrow test of whether the public has a "right of use."⁴⁴ The antipathy to "excess condemnation" flourished during the early decades of the present century. But within the last fifteen years, it appears, no state court has outlawed the technique.

The expanding social philosophy of the present century has brought in the state courts an almost complete abandonment of the "use by the public" test.⁴⁵ Symptomatic are the housing and slum clearance cases of the last decade. In 1937, Congress enacted a housing statute⁴⁶ which granted federal subsidies to states which would condemn slum areas and construct homes for the use of families which could not otherwise afford them. Eminent domain was, of course, necessary to execute this program. Since, however, the dwellings for which the eminent domain power was to be employed

41. CUSHMAN, *op. cit. supra* note 39, at II, III, IV; Hart, *supra* note 39, at 226; 46 COL. L. REV. 108 (1946); Nichols, *supra* note 39, at 14.

42. Many states, for example, have passed constitutional amendments expressly permitting excess condemnation. See, *e.g.*, OHIO CONST. ART. XVIII, § 10; MICH. CONST. ART. XIII, § 5; MASS. CONST. ARTICLES OF AMENDMENT, ART. XXXIX; MO. CONST. ART. I, § 27; N.Y. CONST. ART. I, § 7(e); WIS. CONST. ART. XI, § 3B.

43. Opinion of the Justices to the House of Representatives, 204 Mass. 607, 91 N.E. 405 (1910) (advisory opinion); Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 Pa. 47, 88 Atl. 904 (1913); Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921). See also CUSHMAN *op. cit. supra* note 39, at 305; Hart, *supra* note 39, at 233; 46 COL. L. REV. 108, 111 (1946).

44. *E.g.*, "Applying the doctrine that to constitute a public use for which private property may be appropriated there must be a use or right of use by the public it is apparent, we think, that the sections of the Act of 1907 authorizing the acquisition of private property outside a . . . parkway . . . are not a constitutional exercise of legislative authority. It will be observed that these sections confer authority to appropriate and resell with such restrictions as may be prescribed property outside the lines of the parkway, and it is justified by declaring that it is done in order to protect the parkway and for 'the preservation of the view, appearance, light, air, health or usefulness thereof.' The protection of the highway is the only 'public use' to which the land is to be applied. The property is not to be taken and held by the city for any use for which a statute confers on the city the right to appropriate it. Saving the restriction contained in the conveyance, the city can exercise no control over it, and hence cannot use it for any purpose. . . The use to be made of the property located outside a public highway is not a public use for which private property may be taken by the city. . . ." Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 Pa. 47, 55-56, 88 Atl. 904, 907 (1913).

45. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 626 (1940); Comment, *Public Land Ownership*, 52 YALE L. J. 634, 640 (1943). Cf. Laughlin v. City of Portland, 111 Me. 486, 492, 90 Atl. 318, 321 (1914).

46. 50 STAT. 888 (1937), 42 U.S.C. §§ 1401-30 (1940).

were for the use of only those individuals who would lease them, such acquisitions could well have run afoul of the "use by the public" test. But twenty-two state courts of last resort have endorsed the takings as being constitutionally unobjectionable,⁴⁷ following the lead of the New York Court of Appeals in *New York City Housing Authority v. Muller*.⁴⁸ Thus the state which created the narrow doctrine of "use by the public" has taken the vanguard in its final demolition.

Although the "use by the public" test continues to be raised occasionally by counsel litigating state takings, its effect is virtually nil. Emptied of its only tangible content, the doctrine of "public use" itself loses all practical significance. True, even a broad concept of "public use" implies a limitation, and many state courts still accord vocal acknowledgment to the concept. But they invariably find that the particular project under consideration is satisfactorily public in nature.⁴⁹

EMINENT DOMAIN IN THE FEDERAL COURTS

Takings by States

Toward the end of the last century, the Supreme Court held that the "due process" clause of the Fourteenth Amendment prohibits a state from taking private property for a private use.⁵⁰ This interpretation of the Fourteenth Amendment, of course, gave the federal courts the power to circumscribe the states' exercise of eminent domain by whatever theory of public use they chose to adopt. And by this time both the "use by the public" test and the vaguer notion of public benefit and advantage had crystallized into two well-established lines of authority.⁵¹

In the cases first presenting the question, the Supreme Court was careful to avoid adopting either test. Instead, it sanctioned, on the ground of peculiar conditions within the particular state, state condemnations which might otherwise have fallen afoul of the "use by the public" test.⁵² Then

47. See cases collected in McDougal and Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L. J. 42, 46 n. 13 (1942).

48. 270 N.Y. 333, 1 N.E.2d 153 (1936).

49. *E.g.*, *Amalgamated Housing Corp. v. Kelly*, 82 N.Y.S.2d 577 (Sup. Ct. 1948).

50. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896); *see Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 236 (1897); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

51. See CUSHMAN, *op. cit. supra* note 39, at 279 (1917).

52. *E.g.*, "It is obvious, however, that what is a public use frequently and largely depends upon facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896). "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or the climate, or other peculiarity of the state . . . we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation." *Clark v. Nash*, 198 U.S. 361, 367-8 (1905).

the Court bowed to the other side of the argument by declaring that "we do not be desired [sic] to be understood . . . as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."⁵³ Mr. Justice Moody tersely summarized the Court's record up to 1908: "No case can be recalled where this court has condemned as a violation of the 14th Amendment a taking upheld by a state court as a taking for public uses in conformity with its laws."⁵⁴ In 1916 the Supreme Court expressly repudiated the "use by the public" test as applied to state takings⁵⁵ and thereafter consistently refused to recognize it.⁵⁶

Federal Takings

Once the Federal Government's power of eminent domain had been established in 1875,⁵⁷ it became necessary for the courts to determine what limitation the doctrine of public use placed upon federal takings. Conveniently waiting was the case law which had been developed by the state courts dealing with state constitutional provisions similar or identical with the federal provision.⁵⁸ But the fundamental political difference in the character of the state and federal governments—states are complete sovereigns except for those powers taken from them by the Federal Constitution; the Federal Government is a government only of delegated powers⁵⁹—presented a question which state courts did not deal with under state constitutions.

As a result, in the early federal condemnation cases in which the question

53. *Clark v. Nash*, 198 U.S. 361, 369 (1905).

54. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 599, 607 (1903). Justice Moody apparently overlooked or read narrowly *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). There the highest Nebraska court had refused to invalidate a taking in the face of an argument that the taking was of private property for a private use, *State v. Missouri Pac. Ry. Co.*, 29 Neb. 550, 45 N.W. 785 (1890). The United States Supreme Court reversed, saying, at 417: "[T]he order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of petitioners. 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."

55. "The inadequacy of the use by the general public as a universal test is established." Mr. Justice Holmes in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916).

56. See *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 719 (1923); *Block v. Hirsch*, 256 U.S. 135, 155 (1921); *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U.S. 563, 570 (1917).

57. See note 3 *supra*.

58. The eminent domain provision in the Fifth Amendment has been the model for the provisions in most state constitutions. See, e.g., *ARK. CONST. ART. II, § 22*; *CAL. CONST. ART. I, § 14*; *CONN. CONST. ART. I, § 11*.

59. U. S. CONST. AMEND. X.

of public use was raised, two streams of inquiry appear simultaneously. The first is whether the use is a public one; the second, whether the Federal Government has the constitutional power to condemn for the proposed public use.⁶⁰

As was the case with the public use limitation in state condemnations, the Supreme Court in dealing with federal condemnations did not make an early choice between the "use by the public" test and the broad public benefit theory. The early federal takings were for activities which could have withstood the rigours of the "use by the public" test, such as parks⁶¹ and national monuments,⁶² and therefore, a choice was not essential. In later cases, however, it became apparent that federal takings were not being subjected to the "use by the public" test but were to be upheld if they were beneficial or advantageous to the public.⁶³

On the issue of constitutional power, the Supreme Court in early cases implied such power as a concomitant of the powers expressly delegated to the United States by the Constitution.⁶⁴ More recently, a lower federal

60. Although judicial discussions of these questions are not outstanding examples of organizational analysis, the problems are treated as separate and distinct. *See, e.g.*, *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896) (taking land for war memorial park is for a public use and power comes from national defense powers among others); *Shoemaker v. United States*, 147 U.S. 282 (1893) (taking land for a park is for a public use and power to do so in the District of Columbia stems from "district clause" of Constitution); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 657 (1890) (taking of right-of-way for railroad constitutional under the commerce power, and railroads are a public use).

61. *See Shoemaker v. United States*, 147 U.S. 282 (1893).

62. *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896). Other early takings were for post-offices, *Kohl v. United States*, 91 U.S. 367 (1875); and light-houses, *Chappell v. United States*, 160 U.S. 499 (1896).

63. In *Brown v. United States*, 263 U.S. 78, 83 (1923), the right of the Federal Government to condemn property for the purpose of awarding it to the condemnee of another federal condemnation was upheld. *See, also*, *Old Dominion Land Co. v. United States*, 292 Fed. 20, 22 (4th Cir. 1924) *aff'd* 269 U.S. 55 (1925), upholding a federal taking for the purpose of avoiding financial loss to the United States; and *International Paper Co. v. United States*, 282 U.S. 399 (1931), where the property expropriated was to be turned over to private corporations. In the latter case, the United States, the taker, argued that the taking was not for a public use in order to avoid being required to pay just compensation; this unique situation may weaken the case as a precedent.

64. *United States v. Gettysburg Ry. Co.*, 160 U.S. 668 (1896) has often been relied upon in subsequent decisions. The language most directly in point is: "The government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purposes be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers." *Id.* at 681. The Court cites in support the words of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421 (U.S. 1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

court paraphrased this to mean that the United States has the power to condemn "when it is necessary and proper to do so in carrying out its federal powers."⁶⁵ The expressly delegated powers with which the federal exercise of eminent domain has been allied have included the commerce power,⁶⁶ the power to raise armies,⁶⁷ and the power to legislate for the District of Columbia.⁶⁸

Within the last decade there has been a tendency on the part of the lower federal courts to blend the two limitations—public use and constitutional power—into one. Thus, when the United States sought to acquire lands for the purpose of creating an Indian reserve,⁶⁹ the court addressed itself first to the question of whether the Federal Government had the constitutional power to act as a guardian of the Indians. After finding such power in the commerce clause, the court decided that the United States could constitutionally acquire the land in question, concluding that "it is a public use if the project comes within the purview of federal power."⁷⁰ Similarly, where the United States sought to acquire certain lands for the purpose of preserving an historic site, the court, in addressing itself to the objection that the land was not to be taken for a public use, stated: "If the Federal Government, under the Constitution, has the power to embark upon the project for which the land is sought, then the use is a public one."⁷¹

It was in the light of this background that the Supreme Court in 1946

65. "The right of the United States to condemn land is recognized when it is necessary and proper to do so in carrying out its federal powers." *United States v. 4,450.72 Acres of Land, Clearwater County, State of Minnesota*, 27 F. Supp. 167, 174 (D. Minn. 1939).

66. *See Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 657 (1890); *United States v. 4,450.72 Acres of Land, Clearwater County, State of Minnesota*, 27 F. Supp. 167, 173 (D. Minn. 1939).

67. *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 681-3 (1896): "Congress has the power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. . . . The power to condemn for this purpose (the creation of a national park at Gettysburg) need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of these powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred." *See*, also, *Barnridge v. United States*, 101 F.2d 295 (8th Cir. 1939) upholding the taking of land possessed of exceptional value as commemorating or illustrating the history of the United States under the Historic Sites Act.

68. *See Shoemaker v. United States*, 147 U.S. 282, 298 (1893). That the Federal Government has the power to condemn to establish parks, *see United States v. Dielmann*, 101 F.2d 421 (7th Cir. 1939); for purpose of reforestation and forestation, prevention of forest fires and soil erosion, and flood control, *see United States v. Eighty Acres of Land in Williamson County, Ill.*, 26 F. Supp. 315 (E.D. Ill. 1939); *United States v. 546.03 Acres, More or Less, of Land Situate in Union Tp., Bedford County, Pa.*, 22 F. Supp. 775 (W.D. Pa. 1938).

69. *United States v. 4,450.72 Acres of Land, Clearwater County, Minnesota*, 27 F. Supp. 167 (D. Minn. 1939).

70. *Id.* at 174.

71. *Barnridge v. United States*, 101 F.2d 295, 298 (8th Cir. 1939).

considered *United States ex rel. Tennessee Valley Authority v. Welch*.⁷² Its peculiar fact situation provided the Court with a particularly appropriate opportunity to indicate its position on the public use limitation.

Under Congressional authorization, the TVA had begun construction of the great Fontana Dam on the Little Tennessee River in North Carolina. Essential to the development of the project was the creation of a huge reservoir which cut off the only road to a rural settlement. The war made immediate construction of a new road impossible. The TVA volunteered to pay damages, but the state and county both objected on the ground that damages would be inadequate to cover police protection and school and health services for the isolated village. In order to save the state and county the expensive and temporarily impossible task of providing these services, the TVA ultimately agreed to acquire the land in the isolated area by purchase or condemnation and join it to the adjacent Smoky Mountains National Park. Almost all of the land was acquired by purchase. Condemnation proceedings were instituted against the remaining landowners who contested the taking as not being for a public use.

The district court ruled against the TVA⁷³ and the circuit court unanimously affirmed.⁷⁴ Writing for the higher bench, Judge Parker unearthed the "use by the public" test⁷⁵ and declared that the TVA's condemnation did not meet its standard.⁷⁶ This was bolstered by terming the condemnation "excessive" and therefore unconstitutional.⁷⁷ Finally, the court found in the statutes establishing the TVA no authority for such a taking even if it were for a public use.⁷⁸

72. 327 U.S. 546 (1946); see Note, 20 So. CALIF. L. REV. 99 (1946).

73. The opinion is not reported.

74. U.S. *ex rel.* TVA v. Welch, 150 F.2d 613 (4th Cir. 1945).

75. *Id.* at 617.

76. The precise basis of decision is not clear. Judge Parker says: "The lands here in question are certainly not being taken for any of the purposes enumerated in the statute. Their condemnation can be sustained only if they may be taken by the TVA for use in discharging a liability arising from the taking and flooding of the highway. This, we think, is taking not for the public use for which the statute gives the right of condemnation, but for a private use, or at most for a public use not authorized by statute. . . ." U.S. *ex rel.* TVA v. Welch, 150 F.2d 613, 616 (4th Cir. 1945).

77. "The only land which it was necessary for the TVA to take . . . was the land covered by the reservoir. In taking this, it flooded the highway affording access to the lands in question. To condemn (these) lands . . . was excess condemnation. . . ." *Id.* at 617. Judge Parker relied on *Richmond v. Carneal*, 129 Va. 388, 106 S.E. 403 (1921), and *City of Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929), in both of which excess condemnation was held unconstitutional.

At least technically, Judge Parker either (1) erroneously classified the taking in the *Welch* case as "excess condemnation," the error being that the term had never before embraced the use of "excess" lands for so manifestly a public use as a national park; or (2) exalted "excess condemnation" as a separate constitutional objection unrelated to the "public use" criterion. There is, of course, the further possibility that he was attempting to look through form to substance.

78. *Id.* at 616.

The Supreme Court reversed, sustaining the condemnation unanimously.⁷⁹ All of the justices agreed that the taking was for a public use and that the act establishing the TVA authorized the action. They viewed the taking of the "additional" land as part of an "inseparable transaction"—the development of the Fontana Dam project—and refused to consider the particular use to which the contested land was to be put.⁸⁰

Disagreement was registered, however, over the suggestion in the Court's opinion, written by Justice Black,⁸¹ that a legislative declaration of public use foreclosed judicial review. Justice Reed, with whom Chief Justice Stone joined, concurring, insisted that the determination of a public use was always reviewable by the courts.⁸² Justice Frankfurter, separately concurring, read the Court's opinion to include no suggestion of immunity from judicial review but merely as an exhortation in favor of extreme judicial deference to the special competence of the legislature.⁸³

The most significant aspect of the *Welch* decision is its acceptance of the theory developed in the lower federal courts that, where a federal power exists, eminent domain may be employed in its exercise. Since a congressional determination of "public use" is to be conclusive, the Court will henceforth refuse to consider the separate questions of constitutional power and public use but, having found the one, will assume the existence of the other. Doctrinally, the concurring justices seem to have denied this proposition or denied its propounding. In practical terms, however, since the *Welch* case's factual situation was so extreme, it may be cautiously suspected that the Court is united. Moreover, if the judicial opposition to "excess condemnation" ever had any doctrinal existence apart from the "public use" test, the opposition is evidently no longer significant in view of the *Welch* opinion's concept of an "inseparable transaction."

The conclusion that follows is that so far as the federal courts are con-

79. Justice Jackson took no part in consideration or decision of the case. Justice Black wrote the opinion for the Court, Burton, Douglas, Murphy, and Rutledge, JJ., joining. Justice Reed and Chief Justice Stone concurred in a separate opinion. Justice Frankfurter concurred in a separate opinion.

80. "We would do violence to fact were we to break one inseparable transaction into separate units. We view the entire transaction as a single integrated effort on the part of the TVA to carry on its congressionally authorized functions." U.S. *ex rel. TVA v. Welch*, 327 U.S. 546, 552-3 (1946) (Opinion of the Court).

"The acquisition of the whole area was a factor in these arrangements and the condemnation of these smaller tracts is a part of the transaction." Reed, J., and Stone, C.J., concurring. *Id.* at 556.

"I join in the opinion of the Court. . . ." Frankfurter, J., concurring. *Id.* at 557.

81. "We think it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the fullest extent." *Id.* at 551-2.

82. "This taking is for a public purpose but whether it is or not is a judicial question." *Id.* at 556.

83. *Id.* at 557-8.

cerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications.

CONCLUSION

The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion, although rarely with so much directness. Doubtless the doctrine will continue to be evoked nostalgically in dicta and may even be employed authoritatively in rare, atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue.