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"SETTING THE RECORD STRAIGHT:
EMINENT DOMAIN LAW AND THE CONCEPT OF
PUBLIC USE IN LATE NINETEENTH CENTURY AMERICA"

by

M. H. CERSONSKY

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IN PARTIAL FULFILLMENT OF THE
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MAY, 1980
ABSTRACT

"SETTING THE RECORD STRAIGHT: EMINENT DOMAIN LAW AND THE CONCEPT OF PUBLIC USE IN LATE NINETEENTH CENTURY AMERICA"

by

M. H. Cersonsky

Over the past twenty years interest in legal history has steadily increased. One area which has attracted much attention is that of eminent domain law and its role in America's economic development from 1860 to 1910. The general question posed is whether eminent domain law served to expedite the economic expansion America experienced during those years. In particular the question becomes whether the public use requirement was interpreted to allow takings for manufacturing plants, mines or lumber camps and thereby aid economic growth. This question was extremely important because it was litigated in over forty states, leading courts and commentators to proclaim it was the most difficult issue ever submitted to the courts.

To date the leading scholar in this field is Harry N. Scheiber. His two main points are: (1) that eminent domain condemnations, especially between 1870 and 1910, went unchecked, to aid business and therefore economic growth, and (2) the public use requirement became insignificant because of the broad "general benefit" definition adopted by the courts. Scheiber's works form an important part of the economic interpretation of nineteenth century law as advanced by J. Willard Hurst. According to this interpretation all law was shaped to facili-
tate economic development.

A rigorous analysis of the case law reveals that both of Scheiber's points are erroneous. Indeed the years 1870 to 1910 saw an ever increasing number of proposed takings by private businesses struck down by courts in the vast majority of states. The key tool used to strike such takings was the public use requirement as the courts endorsed a narrow right to use test as opposed to the broad benefit formulation suggested by Scheiber.

Thus what truly happened was that the majority of courts rejected the broad benefit analysis and therefore struck down the majority of takings by private business. Where takings were upheld they were permitted for reasons other than economic growth. For example in the Western Mountain states takings were allowed because of either unique geographic and climatic conditions or special broad state constitutional provisions which declared a public use takings by certain industries. In the East takings were permitted only upon the basis of earlier decisions decided in the first half of the century. These decisions were limited in scope and never expanded beyond the grist mill takings approved earlier. Nonetheless the basic point remains that between 1870 and 1910 the clear majority of courts would not allow eminent domain condemnations on the ground of economic benefit.
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SETTING THE RECORD STRAIGHT:
EMINENT DOMAIN LAW AND THE CONCEPT OF PUBLIC
USE IN LATE NINETEENTH CENTURY AMERICA

INTRODUCTION

The power of eminent domain, or the power of the state to appropriate private property for public purposes upon payment of proper compensation, has long been part of American legal history. The Fifth Amendment of the United States Constitution holds "nor shall private property be taken for public use, without just compensation." Most every state constitution has a similar clause. While Americans may have recognized the power of eminent domain crucial questions concerning its application remained unanswered. For instance when could property be said to be actually taken so as to require compensation? How was compensation to be calculated? What constituted a public use justifying the taking? The answers to these questions varied throughout the nineteenth century as the notion of eminent domain evolved in both judicial and legislative bodies.

The question which proved most troublesome for the courts was that concerning the term "public use." "The chief difficulty, and the one which has led to an irreconcilable conflict in the cases," commented the Illinois Supreme Court, "is to discover some satisfactory tests by which a public use may in all kinds of cases be distinguished from a private one." The Nevada Supreme Court concurred, observing:
No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use,"...

The public use requirement attracted so much attention because during the nineteenth century condemnations were attempted not only by governmental entities but also by private businesses, who had been delegated the power of eminent domain by State legislatures. Unhappy landowners whose property was about to be taken fought back. Their battleground was the courtroom, and their chief weapon was the public use requirement. Attorneys for the landowners argued that the proposed taking by the private manufacturer or mining company was not a taking for a public use, but a taking for the private use of the particular manufacturer or mining company and therefore violated the public use requirement. Courts, in almost every state, at one time or another had to address this issue.

The power of eminent domain, then as now, was awesome. It possessed the potential to affect economic development in a particular area. For example the power could be used in the building of railroads, the mining of valuable ores, or the draining of lands to make such lands more productive. In these ways the power of eminent domain could be said to aid economic development. But how often and to what extent was this power used in this manner? How did the courts respond to the argument of the property owners? Did they approve such takings and aid business or not?

Recent scholarship has sought to answer these questions. To date the leading scholar in this field is Harry N. Scheiber. His two main works on eminent domain law have been well received. One of his articles has been published no fewer than three times and therefore must
rank as the leading work on eminent domain law and the public use concept.  

In his writings Scheiber maintains that the power of eminent domain was used to subsidize economic development, and that condemnations and eminent domain takings would occur whenever economic development demanded. He charges that the courts bent over backwards to permit takings of private property so as not to hinder the material advancement of the country. According to Scheiber:

The heyday of expropriation as an instrument of public policy designed to subsidize private enterprise can probably be dated as beginning in the 1870's and lasting until about 1910. During that era...all constitutional stops were pulled out.

One such constitutional stop was the public use requirement. Scheiber contends that this supposed barrier against eminent domain condemnations was no barrier at all because the courts accepted the mere assertion that one private interest, say "mining, irrigation, lumbering or manufacturing--was so vitally necessary to the common weal as to be a public use by inference."  

Scheiber’s efforts form an important part of the new legal historical scholarship, which has grown steadily, if not dramatically, over the past two decades. Led by J. Willard Hurst the new focus has been upon state law and state courts as opposed to the more traditional emphasis upon the United States Supreme Court and the constitutional doctrines it expounded. Hurst was a pioneer in recognizing that pivotal issues facing American society were argued and decided by state judiciaries and legislatures.

But Hurst has done more than blaze a trail to unexplored areas of
American law, he has offered a conceptual framework in which to understand nineteenth century law. The key to his approach is economic development. According to Hurst, the concern of nineteenth century America was upon economic development. Law reflected this concern and was molded by judges to aid economic growth.\textsuperscript{14} Hurst's interpretation has become the dominant interpretation of nineteenth century law and has attracted many outstanding scholars.\textsuperscript{15} The picture of eminent domain law portrayed by Scheiber is consistent with this interpretation because it shows the courts applied eminent domain law in such a way as to allow takings which aided business and economic development.

These then are Scheiber's two basic points: (1) that eminent domain condemnations went unchecked, especially between 1870 and 1910, to aid business and therefore economic prosperity, and (2) the public use requirement became insignificant because of the broad "general benefit" definition which was adopted by the courts. To each of these points I must take exception. The remainder of this paper will be devoted to showing that Scheiber's position represents the minority view and that in reality the majority of state courts took a restrictive view toward eminent domain takings. In addition it will be shown that the public use requirement, instead of disintegrating into a mere formality, became a heated issue which saw the clear majority of states adopt a narrower test than the broad benefit or advantage test relied upon by Scheiber. The result being that the public use requirement became a powerful restraining force upon the power of eminent domain--particularly in the areas of manufacturing, mining, drainage and lumbering.

To present the contrary interpretation this paper is divided into
six chapters. The first chapter will examine the public use concept as it evolved in the context of tax aid to business through city or county subscriptions of bonds or stocks in private corporations like railroads. This exploration of tax aid is necessary because often times courts would apply the definition of public use developed in a tax case to an eminent domain case. 16

The next two chapters will scrutinize the public use requirement in eminent domain law. Particular attention will be given to those cases involving proposed takings for manufacturing, business, mining, drainage and lumbering purposes. The fourth and fifth chapters will explore the factors affecting the courts' decisions. The rise of judicial formalism and the general skeptical, (and at times hostile) attitude toward business and enterpreneurs in the late nineteenth century will be investigated.

Finally a general thesis will be suggested. The thesis begins with the general proposition that the majority of courts took a dim view of eminent domain takings and were not afraid to strike them down. Yet not all takings were disallowed. When such takings did occur they can be explained for one of three reasons. First is the existence of many unique geographical and climatic conditions which made certain eminent domain condemnations matters of necessity and survival, not just of convenience. Second, and directly related to these special conditions, are the broad state constitutional provisions which declared many business uses, like mining, to be a public use leaving the state courts no discretion in the matter. Third is the doctrine of stare decisis, which holds that once a principle of law is laid down in one case it is to
be followed in all similar cases. Many eminent domain takings were upheld in the first half of the nineteenth century, when the courts were more concerned with public policy and economic development. In the second half of the century, when the courts attitude on these issues changed, takings would be upheld, not on the ground of economic benefit, but rather upon *stare decisis*. This is especially true of mill dam takings. Please note this third exception refutes Scheiber's contention because it shows that the courts were concerned not with economics, but legalistic principles which they were obligated to follow. Nonetheless it will be shown that these exceptions represent a minority of jurisdictions and that the clear majority would not allow takings solely on the ground of economic benefit.
NOTES FOR INTRODUCTION


2. U.S. Const. Amend. V.


4. Many times in the late nineteenth century challenges were made to the judiciary's authority to decide what constituted a public use. In place of the judiciary, it was contended that the legislatures since they determined "the expediency of exercising the right of eminent domain for public purposes, were also the sole judges of what are public purposes . . . (thus) the courts cannot review and consider it." Coster v The Tide Water Co., 18 N.J. Eq. 54,67 (1866). However the courts rejected such claims arguing like the New Jersey Supreme Court:

    If this were so, the restrictions of the constitution would be of little avail; the legislature, who determined to exceed their power to gratify some favorite, only need to recite that it would be a great public benefit to have L's hotel transferred to S, and they could make the grant. Id.

Compare Memphis Freight Co. v Mayor & Alderman of Memphis 44 Tenn. (4 Cold) 419, 427 (1867); Dayton Mining Co. v Seawell, 11 Nev 394, 399, (1876), and Arnspurger v Crawford, 61 Atl. 413 (Md. C.C.A. 1905) which found that a legislature cannot decide the question of public use because if this were permitted "the constitutional restraint would be utterly nugatory . . ." Thus by the early twentieth century the courts could safely conclude "whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary. Of the correctness of this proposition we entertain no doubt." Chesapeake Stone Co. v Moreland, 125 Ky. 656, 104 S.W. 762, 766 (1907). And the Arnspurger Court, acknowledged that "all the authorities hold whether a use is public or private is a question not for the legislature but for the judiciary."

5. Scholl v German Coal Co., 118 Ill. 427, 10 N.E. 199, 201 (1887).

6. Dayton Mining Co. v Seawell, 11 Nev. 394, 400-401 (1876).
Other decisions noting the complexity of the public use question include: *In Re Barre Water Co.*, 62 Vt. 27, 20 Atl. 108,110 (1890); Minnesota Canal and Power Co. v. Kouchiching Co., 107 N.W. 403, 411 (Minn. 1906); Chesapeake Stone Co. v. Moreland, Supra note 4, at 764. This problem did not go unnoticed by the commentators. Dickinson, note 3 supra at 21 n. 3. See text accompanying note 1, chapter 2 infra.


10. Ibid., at 243.

11. Ibid., (emphasis added).

12. For example publications and course offerings have increased. Innovative programs combining both law and graduate degrees in history and other disciplines have sprouted. See generally Wythe Holt, supra note 8, and Harry N. Scheiber, review of "Essays in Nineteenth-Century American Legal History," in American Journal of Comparative Law 350 (1978); Lawrence M. Friedman and Harry N. Scheiber, eds. *American Law and the Constitutional Order*, note 9 supra at vii. For Scheiber's contribution see note 8 supra.

13. Friedman and Scheiber, eds. *American Law and the Constitutional Order*, Ibid. at 1. Other scholars have also come to similar conclusions. As G. Edward White explained: "Since state legislatures were active in the area of economic regulation throughout the nineteenth
century, delicate questions involving the allocation of power among governmental branches or the limits of legislative authority over private enterprise were regularly entrusted to the state judiciary before 1900." He adds, "the cases represented ideological and political disputes of the first magnitude. Since congress had tactily allowed the state to take the lead in regulating entrepreneurial activity, the pattern of regulation tolerated by state courts serve as a pattern for the nation." The American Judicial Tradition. (New York: Oxford University Press, 1976, paperback edition 1978), p. 109-110.


15. Included in group are Morton J. Horwitz, Lawrence Friedman, and Harry N. Scheiber.

16. See note 5 chap. 1 infra.

17. The doctrine of stare decisis holds that once a court lays down a principle of law concerning a particular state of facts, that court and all courts subordinate to it will adhere to that principle in all similar cases. In other words "To abide by, or adhere to, decided cases." Black's Law Dictionary, 4th ed. (1968), s.v. "stare decisis."
I.
THE CONCEPT OF PUBLIC USE AND THE TAX POWER

A. The Concept Prior to the Civil War

Our study of the public use concept begins not with eminent domain law, but with the stock subscription cases. The reason is that the tax power, like the eminent domain power, was limited by a public use requirement. Many courts recognized the closeness of these two powers. In 1853 Chief Justice Black of the Pennsylvania Supreme Court announced "(a) corporation may be aided by an exertion of the taxing power, as well as with the right of eminent domain." Other courts agreed. In the words of the Iowa Supreme Court: "If the State can, for any purpose, take the land of a citizen, it may tax him for a like purpose. The object or purpose should be a public one in either case." The United States Supreme Court also recognized that the exercise of either power, eminent domain or taxation, can only be for "a public object." The closeness of the two powers was also noted in eminent domain cases. Thus when California's highest court struck down a taking as not for a public use in 1876 the only authority it relied on was a tax case.

Tax aid litigation usually centered around a local government buying a private corporation's stocks or bonds with the understanding that the corporation would locate its business in the particular city or county. The majority of the subscriptions were taken in railroad corporations with the hope that the presence of a railroad line would "aid, encourage, and stimulate commerce." Manufacturers were another beneficiary of this aid.

Throughout most of the 1850's such aid received the blessing of the courts. In upholding subscriptions the Pennsylvania Supreme Court
proclaimed, "A railroad is a public highway for the public benefit," and noted the advantages of "rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth." A New York court found that railroads "add to the value of property, promote trade and contribute to the convenience of the inhabitants of any place." Based on such decisions numerous railroad construction projects began supported by aid from the cities and towns through which they were to be built. This trend reached its high point during the Civil War.

However, on the eve of the Civil War the first winds of a coming storm appear. A glimpse of this storm is provided in County of Lawrence v. North-Western Railroad Co. Here the municipality came into court seeking to have its contract for subscription of stock in North-Western Railroad Company declared invalid. It sought relief because the company was totally mismanaged making the stock purchased worthless. While the court found the contract valid it scolded the county officials for getting involved. When told that the officials had relied on the promises of the company replied, "If they were cheated by relying on such opinions, we have no authority to relieve them. . . . They ought not to have relied, on the hopes expressed by the railroad officers."

But the Court was also addressing a large audience. It announced its purpose was to inform the people how such wrongdoings occur so that they can be avoided in the future. "The experience which this court has had," lectured the Court, "wherein the credit of public bodies has been lent to aid in the construction of railroads, has not been at all
agreeable, and this case is one of the worst of them." At the same time the Court emphasized that the legislation which permitted municipalities to buy stock "had been totally inadequate to protect the public against investments, or against improper management of them." The Court's words fell on a receptive audience as Pennsylvania had already amended her Constitution to prohibit any local government from becoming a stockholder in any company or corporation.\

The change in attitude witnessed in Pennsylvania between 1853 and 1859 was repeated many times in other states during the next decade. In New York, many roads were built which were of "doubtful utility" and located where neither population or expected business could support a profitable venture. In California one justice noted that permitting municipal governments to take stock subscriptions had "been frequently and grossly abused" creating great debts and popular discontent leading to constitutional amendments. The prime cause of this shift in sentiment was the Civil War and the abnormal conditions it brought which induced "individuals or communities to engage in hazardous enterprises and to pledge their means or credit to support them."\n
When railroads went broke and left municipalities with a tax obligation but nothing in return the local governments attempted to repudiate their debts to the railroad company or the company's creditors. The creditors resisted and recourse was to the courts. All these cases turned on a single issue--"whether the taxation by which this aid was afforded to building of railroads was for a public purpose." If the building of railroads was found to be a public purpose, then the debt and the law authorizing it would be valid, if not, the debt and law would be void.
B. The Courts' Reaction and the Railroad Cases

The reaction began in Iowa in 1862. In that year the Iowa Supreme Court invalidated an act which authorized counties to subscribe to the stock of railroad companies. The decision turned on the idea that aid to railroad corporations was not a legitimate function of municipal government. The purposes of private railroad companies and public municipal corporations were contrasted. The clear implication is that public aid is not to be given to private businesses.

In 1868 the Iowa Supreme Court again confronted the question of local-government aid to railroads. In an opinion by Chief Justice Dillon, the implication of Wapello became a rule of law. Chief Justice Dillon found that railroads were private corporations, not public, and therefore to take money from citizens at large (tax money) to aid such a private business would violate "the sacredness of private property" and violate the requirements of due process of law. It was argued that to strike down this aid would have "disastrous effects, in retarding the growth and slopement of the State..." But Dillon was unmoved by such considerations for economic growth. "As such considerations have no place in the judicial determination of the question... I dismiss them," announced Dillon. He believed any other decision "would be dearly purchased at the expense of the fundamental rights of the citizen." The opinion thus emphasizes individual rights and not the importance of economic development.

The Hanson decision was cited approvingly by the Wisconsin Supreme Court when it struck down a railroad aid law in 1870. The Wisconsin justices, like their counterparts in Iowa, found that a railroad "con-
stitutes a private corporation in the fullest sense of the term," noting that the rolling stock, buildings and other property of the railroad was private property which was owned and used for the profit of the corporation's stockholders. This Court too rejected the bid for a broad definition of public purpose which would include the advantages arising from the establishment of railroads, mills or manufacturing.

One authority relied upon by both the Hanson and Whiting decisions was Thomas McIntyre Cooley's landmark treatise Constitutional Limitations. In his treatise Cooley had argued against aid to private enterprises. In 1870, while sitting on the Michigan Supreme Court, he was given the opportunity to put his writings into effect. The case, commonly known as People v. Salem, originated when the Michigan Legislature in 1864 authorized certain townships to execute and issue municipal bonds on behalf of the Detroit and Howell Railroad Company. Cooley acknowledged that at one time the state of Michigan had attempted to provide railroad facilities for the public. At that time taxation for railroads "was unquestionable." "Our policy in that respect has changed," he explained, "railroads are no longer public works, but private property; individuals and not the State own and control them for their own profit." As a result railroads "cannot be aided by the public funds any more than any other private undertaking. . . ." In keeping with the earlier decisions, Cooley rejected the broad benefit argument that railroads should be allowed such aid because of benefits and advantages they bring to a community. According to Cooley, the term 'public purposes,' as employed to denote
the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. 33

The question of tax aid to railroads was framed differently in People ex rel. D. etc. R.R. Co. v. Batchelor. 34 In 1870 the New York legislature passed an act which compelled, not merely authorized, cities and towns to construct and repair railroads owned by private corporations or to become stockholders in such corporations by exchanging municipal bonds for corporate stock. This was an attempt to expand the situations in which a railroad company could receive governmental aid. Earlier tax aid to railroads had been upheld in New York, but this time the aid was disallowed. 35 Railroad companies were now viewed as private entities which operated their lines "for the benefit of its stockholders." 36 Unlike before, the general promotion of business was found not sufficient to constitute a public purpose. 37 Applying the test of whether the purpose to be effected was private or public, the Court decided it was private and declared the entire act void. 38

From these cases a definite trend appears in the State courts. No longer is aid to railroads encouraged and protected by the courts. No longer is the broad general benefit rationale able to shield and protect the railroads' tax support. At least in the state courts, the concept of public purpose has become a weapon capable of piercing the railroads' subsidies.

With so much at stake the railroads interests were determined to continue the struggle. Defeated in the state courts, they moved the battle to the Supreme Court. Here their arguments were better received. In Gelpeke v. Dubuque, the Supreme Court reversed the Iowa Wapello
decision on the basis that earlier decisions upholding tax aid were "sustained by reason and authority" including "adjudication in sixteen states of the Union." Secondly the court found that a contract, if valid when made, can't be declared void by subsequent acts of a legislature or court. The question of public purpose was not addressed.

However in 1873 the issue was addressed. In the companion cases of Olcott v. Supervisors and Chicago, Burlington & Quincy R.R. v. Otoe the Supreme Court again upheld tax subscriptions of railroad stocks. In Olcott, Justice Strong repeated the contract argument used in Gelpke to reverse the Wisconsin Supreme Court's decision in the Whiting case. But Justice Strong did not stop there. He went on to argue that aid to railroads was for a public purpose. Specifically he maintained that such aid was proper because: (1) railroads aided the public generally; (2) railroads had been granted the power of eminent domain, so they must be for a public use, and (3) railways were like highways, which always had been a proper object of government activity. One year later, in a case up from Michigan, the Supreme Court affirmed its holdings in Olcott and Otoe.

C. The Courts' Reaction and Non-Railroad Industries

Railroads were not the only industry which government tried to aid through tax subscriptions. Mills, manufacturing operations, farmers and others were also the object of government encouragement. The attitude of the state courts toward these endeavors was no more favorable than it had been toward the railroads. A prime example of the courts' reluctance to permit aid to private enterprise is the case of Allen v. Inhabitants of Jay.
In 1871 the Maine Legislature authorized the raising of $10,000 to induce a saw-mill, grist-mill and box factory owners to move their operations from Livermore to Jay. The purpose of the act was made quite clear, the encouragement of manufacturing in the town of Jay. When the act was brought before the Maine Supreme Court the act was invalidated as not being for a public purpose. The Maine justices reaffirmed that the courts, not the legislature, were the final authority on what constitutes a public use. "It is beyond the legislative power," declared the court, "to make that public which is essentially private." And in the eyes of this tribunal saw-mills and other manufacturing businesses were private. As the Court elaborated:

The sawmill and the gristmill are private property, as are all other mills and farms owned by individuals carried on for their own use and profit, and enacting that they are for a public use, without changing the rights of the public in the least degree, as to their right to use them cannot alter the question.

Besides holding that mills are not a public use the above quotation is particularly noteworthy because it exemplifies the second definition of public use—the "right to use" test. This test is much narrower than the broad public benefit test which looked to general economic prosperity to find a public purpose or use. The focus of the right to use test is upon the right of the public to control or utilize the object independent of the wishes of the owner. If the public has no special right to use the object, say for instance a mill, and the owner of the mill can
refuse to do business with anyone for any reason, then the mill cannot be one for a public use. The chief inquiry for a court using this text is upon the rights of the public, in the use of the particular object, for which a taking was attempted, and not into the general economic benefit a particular taking might produce. Under the right to use test economic repercussions are of little consequence. As will be seen the majority of courts turned to the right to use test to strike down aid to private businesses time and again. Thus in the Jay case the court denied aid and rejected the broad benefit definition describing such benefits from manufacturing enterprises as "possible, contingent and indirect." 50

The denial of tax money to assist private businesses became commonplace in the following 30 years. 51 In the 1870's courts in New York, Kansas and West Virginia denied aid to lumber, wool and iron producers. 52 Similar results were reached in the 1880's. 53 The next decade witnessed futile attempts to increase the development of natural resources like coal, gas and oil in Kansas, or increase the production of sugar in Michigan. 54 By 1904 the disposition of this issue was well-settled, leading the North Dakota Supreme Court to conclude:

Instances are numerous where cities have attempted to promote their commercial importance by aiding manufacturing and industrial enterprises through the aid of local taxation, and in every instance the attempted exercise of power, when called in question has been condemned as unlawful. 55

Previously when state courts had stopped tax aid to private railroad corporations, the dissatisfied parties sought and received relief in the United States Supreme Court. 56 With non-railroad corporations
the situation was different. The key case was Loan Association v. Topeka
decided in 1875. Topeka had issued bonds payable to a bridge and iron
work manufacturer "to aid and encourage that company in establishing and
operating bridge shops" in the city. The sole issue for the Court was
whether such aid was for a public purpose.

Justice Miller, with great joy, authored the majority opinion.
In the earlier railroad cases he was always in the dissent, but now his
time had come. He had not forgotten his past defeats, noting on two
different occasions that "the question is not new." After reviewing
the railroad cases which had upheld tax aid, Miller reminded his col-
leagues, "of the disastrous consequences which have followed its recog-
nition by the courts and which were predicted when it was first es-
established. . . ."

In the harshest terms Miller criticized tax aid to private enter-
prise, describing such practices as nothing less than robbery. And as
to the particular issue of tax aid to manufacturers he found, "no
difficulty in holding that this is not such a public purpose. . . ."
At the same time the broad public benefit argument was rejected, with
Miller citing favorably the Maine case of Allen v. The Inhabitants of
Jay. In one last stab at the railroad cases Miller cited the over-
ruled Whiting v. Fond du Lac as supporting the principle prohibiting
government tax support to businesses.

Loan Association v. Topeka laid down a rule which was varied from
only once or twice in the next 40 years. That rule, which prohibited
the states from aiding private enterprises through taxes, was adhered
to by both the Supreme Court and the lower federal courts. In discus-
sing this rule Justice Gray concluded:

Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

Therefore throughout the late nineteenth century, with the exception of railroads, American business could not expect any tax aid because of the solid front of judicial opinion, both state and federal.
FOOTNOTES


2. Anderson v. The Kerns Drainage Co., 14 Ind. 199, 200 (1860); In Stockton & Visalia R.R. Co. v. City of Stockton, 41 Cal. 147, 183 (1871) the California Supreme Court remarked "No proposition . . . can be affirmed with greater confidence . . . that as fostering the 'public use' aid may be extended to the construction of such roads by means of the power of eminent domain or of subscription to capital stock . . . ."

3. Stewart v. The Board of Supervisors of Polk County, 30 Iowa 9, 24 (1870). The court added that both the right of eminent domain and the taxing power were sovereign powers. Id. at 23-4. It concluded that "there is the same authority for the exercise of the sovereign power of taxation in aid of the construction of railroads that there is for the exercise of the right of eminent domain . . . ." Id. at 30.

4. Cole v. City of La Grange, 113 U.S. 1, 6 (1885).

5. Con. Channel Co. v. C.P.R.R. Co., 51 Cal. 269, 272 (1876). Here the California court referred to no other authority to support its decision denying an eminent domain taking for mining as not for a public use than Loan Assoc. v. City of Topeka, 87 U.S. (20 Wall.) 655 (1875). The California Court noted

   The reasoning of that opinion is applicable to the present case. It is not competent for the Legislature to authorize the levy of a public tax, or the taking of private property for the encouragement of a purely private industry.

   Another eminent domain case acknowledging that the same public use test applies to eminent domain and tax cases is Fallsburg Power and Mfg. v. Alexander, 43 S.E. 194, 198 (Va. 1902).


7. See text and accompanying notes 44-66 infra, p. 17-22 chap. 1.


9. Bank of Rome v. The Village of Rome, 18 N.Y. 38, 43 (1858). Court held subscription of railroad stock was in the interests of the municipality.

10. Williams et al v. Town of Duanesburgh, 66, N.Y. 129, 132 (1876). The actions in New York were typical of the country as a whole a railroad building took a giant leap forward aided by tax-supported subscriptions. Harry N. Scheiber, "The Road to Munn," note 7 supra, chap. one, at 387.


13. Id. at 149-50. Among the abuses was the directors' distribution of $22,000 for securing the charter at the state capital.


18. *Stockton & Visalla R.R. Co. v City of Stockton*, 41 Cal. 147, 201 (J. Crockett concurring 1871).

19. *Williams* note 17 *supra* at 132-3. Scholars have also pointed to the Civil War as boom to municipal aid to railroads. Scheiber, "The Road to Munn," note 7, *supra* at 387. A major reason for this was the closing of the Mississippi River and Southern markets, so that in states like Illinois, railroad transportation became vital to farmers and merchants. Harold D. Woodman, "Chicago Businessmen and the 'Granger' Laws." 36 Agricultural History 16 (1962).

20. *Loan Assoc. v. Topeka*, 87 U.S. 655, 661 (20 Wall.) (1875). "In all the controversy this has been the turning-point of the judgment of the courts."


25. *Ibid.*, p. 59. He also revealed a skeptical view toward what he termed "an artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprises...."


if it should be shown, as it undoubtedly can in numerous towns and places, that the establishment of mills and manufactories would be greatly beneficial to the inhabitants, far more so, perhaps than the building of a railroad, then it would follow that the people of such towns and places could be taxed for the purpose of giving the money to persons or corporations proposing to build such mills or manufactories. This last is a proposition upon which no one will insist; and we are clearly convinced that that contended for in this case is equally untenable.


31. Ibid., p. 485. He believed that "there is nothing in the business of carrying goods and passengers which gives the persons who conduct it a claim upon the public different in its nature from that of the manufacturer or the merchant." Ibid., p. 489.

32. Ibid., p. 486.

33. Ibid., p. 484-5.

34. 53 N.Y. 128, (1873).


36. 53 N.Y. 128, 140.

37. In stark contrast to the language of the Rome decision 15 years earlier, see text accompany note 26 supra, The Batchellor court found that a town could not be compelled "to become a stockholder in a banking or manufacturing corporation, although it appeared that the particular corporation would largely promote the public interest where the business was conducted." Ibid., p. 143.

38. More specifically the court determined that railroad corporations were private as to ownership thus "the act in question relates in part to private, that to this extent it is void; and as the latter is inseparably connected with the former, the entire act must be held void." Ibid., p. 143.

39. 68 U.S. (1 Wall.) 175, 205-6 (1864).
40. 83 U.S. 678 (1873).

41. 83 U.S. 667 (1873).

42. 83 U.S. 678 at 690.

43. Ibid., p. 692-696 passim.

44. Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 678 (1874). In an opinion by Justice Swayne the Court found that railroads "animate the sources of prosperity, and minister to the growth of the cities and towns within the sphere of their influence." at 676. Attention was also given to stare decisis by reference to the general weight of authority upholding such; (at 677) as well as the prohibition upon impairing contract obligations by subsequent actions by legislatures or courts. (at 678).

45. 60 Me. 124 (1872). A year earlier the Maine court struck down an act to assist corporations in establishing manufacturing facilities through gifts or loans of bonds. Opinions of Justices, 58 Me. 590 (1871).

46. Ibid., p. 126-7. The legislative act found it of benefit to the town of Jay and the people of Maine to loan $10,000 "for the encouragement of manufacturing in said town."

47. Ibid., p. 136

48. Ibid., p. 135-6.

49. See text accompanying notes 1 & 2 supra this chap. for examples of the broad definition.

50. 60 Me. at 137. And at 130 the court asked rhetorically:

But because all useful labor, all productive industry conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of its special kind of manufacturing? If so, then there is no kind of labor, no manufacturing for which the minority of a town may not be assessed for the benefit of an individual. There is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill.

And in the following year the Maine court invalidated a tax exemption because it was a gift for a private purpose in that it gave a competitive edge to one manufacturer. Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62, 75 (1873).
51. See generally 112 A.L.R. 571.

52. Weismer v. Douglas, 64 N.Y. 91 (1876); McConnell v. Hamm, 16 Kan. 228 (1876), and Ohio Valley Iron Workers v. Moundsville, 11 W. Va. 1 (1877).

53. Aid to mills and factories was disallowed in Central Branch V.P.R. Co. v. Smith, 23 Kan. 745 (1880); Coates v. Campbell, 37 Minn. 498, (1887), and to a sawmill in Clee v. Sanders, 74, Mich. 692 (1889).


55. Manning v. Devils Lake, 13 N.D. 47, 99 N.W. 51,53 (1904). Here the construction of a bridge outside the limits of a municipality was held to be a private purpose though the court admitted that the bridge would stimulate the commercial activity of the city.

56. Text accompanying notes 39-44 supra.

57. 87 U.S. (20 Wall) 555 (1875).

58. Text accompanying note 20 supra.

59. 87 U.S. at 659,660.

60. Ibid., p. 662.

61. Ibid., p. 664. "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation." (emphasis added)

62. Ibid., p. 665. The broad benefit definition was not accepted because "No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury, to the importunities of two-thirds of the businessmen of the city or town."

63. Ibid., p. 667.

64. Clyde E. Jacobs, Law Writers and the Courts. (Berkeley and Los Angeles: University of California Press, 1954), p. 134. According to Jacobs in all but one of 40 cases involving aid to private businesses which came before the courts, both state and federal "the judiciary ruled against the constitutionality of the aid on the
ground that it was not for a public purpose." He refers to United States v. Realty Co., 163 U.S. 427 (1896), however there are a few others such as Township of Burlington v. Beasley, 94 U.S. 310, 313 (1876), upholding local bonds for a steam grist mill to grind grain in Kansas; Fellows v. Walker, 39 F. 651, 653, (Cir. Ct. W.D. Ohio 1889), permitting bonds to secure natural gas and piping in Toledo; and The George W. Elder, 159 F. 1005 (D.C. Ore. 1908), allowing taxes to create a port for Portland. Yet the vast majority denied such aid.

65. Examples include: manufacturers, Parkersburg v. Brown, 106 U.S. 487 (1882) and Cole v. La Grange, 113 U.S. 1, 6-9 (1885); Stave and barrel mill, Sutherland-Innes v. Village of Evart, 86 F. 597, 604 (6th Cir. 1898); sugar refinery, Dodge v. Mission Township, 107 F. 827, 823-3, (8th Cir. 1901).

66. Cole v. La Grange, 113 U.S. 1, 6 (1885).

67. Jacobs, Law Writers and the Courts, note 64 supra, p. 129.
II.
THE PUBLIC USE CONCEPT AND THE POWER OF
EMINENT DOMAIN—AID TO MANUFACTURING

Up to now it has been demonstrated that except for aid to railroads, American courts were not pushing for economic development with regard to the tax power. But this does not dispose with the main inquiry of this essay—was the power of eminent domain used by the courts to promote private enterprise. To this task our efforts are now devoted.

The first set of cases to be examined will be those involving takings by mills, manufacturers or general commercial ventures. The usual scenario would find a mill owner or manufacturer attempting to build a dam to create a reservoir of water power, to operate the mill. The friction arose when the waters behind the dam would build up and wash on to or overflow the lands bordering those of the mill owner. The owners of these lands often were not satisfied with mere compensation for their losses, they wished to keep their lands, and to do so, were more than willing to go to court. The issue, as in the tax cases, was whether the proposed taking was for a public use. So willing were landowners to fight for their land, that one nineteenth-century commentator in writing upon the subject of eminent domain and the public use requirement exclaimed, "This question has doubtless been productive of more litigation and has more sorely puzzled both the judges and jurists than any other in American jurisprudence."¹ And in particular the same author pointed to the mill acquisitions as the center point of this controversy.²
A. Mill Manufacturing Takings Prior to 1870

Until about 1870 the majority of courts would sustain takings for mills and factories, finding such takings were for a public use. Massachusetts, Connecticut, New Hampshire and New Jersey decisions illustrate the majority position.\(^3\) These courts followed the broad public benefit definition of public use, the same that was used to validate tax aid in the early state railroad cases.\(^4\) However there was a distinct countercurrent to this wave of takings which has often been overlooked.

The first and best example of this trend was Harding v. Goodlet.\(^4\) Important because it was often cited by later courts to deny takings and also because it was decided in the same year as the Scudder case in New Jersey which has been held out as an example of the courts pro-growth attitude.\(^5\) In Harding the proposed condemnation was for the construction of three mills--grist-mill, saw-mill, and paper-mill. The Tennessee Supreme Court acknowledged that the grist-mill would be for a public purpose but that the other two mills had "no public character." The court then denied takings for any of the mills because of the conflict between private and public uses. A proposed public use could not legitimize takings for a private use. The Tennessee justices feared that individuals could abuse the mill dam statute by simply applying for a grist-mill and whatever other mill they wanted and thus satisfy the public use requirement. Such action, feared the Court, "would be mocking the citizen, who would thus be despoiled of his land to enrich another."\(^6\)
Scheiber claims that this case supports the idea that the courts would uphold takings if they would be conducive to the prosperity of the state. With all due respect to Professor Scheiber he simply did not read the case and misread the secondary source he relied upon. A reading of the case itself shows economic development was not a critical factor in the minds of the judges, whereas protection of private rights was. The secondary source relied upon is Cooley's opinion in Ryerson v. Brown. Cooley states "In Tennessee, Indiana, Connecticut and Kansas, such statutes have been considered sustainable on principle." He then cites the Harding case. What this language indicates is that a grist mill taking in theory or in principle was valid, not that the courts actually upheld them. Moreover it was only grist-mills takings which were upheld, not mills in general. And even where such acts were upheld it was not always on the ground of public utility.

A case similar to Harding arose in 1859 in Alabama. The Alabama court struck down as unconstitutional a statute passed in 1812 which provided for the erection of dams for grist mills, saw-mills, cotton gins and other useful works. The enactment gave the power of eminent domain to the builders of such dams. Like their neighbors to the north the Alabama justices recognized the grist-mill as a public use but no other mills. The statute involved made no such distinction between grist-mills and mills in general. The Court duly noted that the act had been in existence for nearly 50 years and that railroads and canals were public uses, but refused to extend the public use concept to cover mills and factories in general. In this case declared the Court, "we have no discretion but to pronounce the entire clause unconstitutional."
The previous two cases while denying proposed takings, allowed an exception to permit an eminent domain taking in the case of grist-mills. The 1867 case of Memphis Freight Co. v. Mayor and Alderman of Memphis explains why this exception existed and also shows that mill operators were not the only ones frustrated in their desire to exercise the power of eminent domain. The Memphis Freight Company secured a charter from the legislature granting it the right to build sheds and construct railways inside Memphis. The company then sought to have a portion of land lying in Memphis condemned so it could construct railways from its warehouses to the Mississippi River. The purpose being to expedite their business of loading and unloading boats, erecting machinery and so on. The city owned the land in question and resisted the proposed railroad.

As in Harding v. Goodlet the Tennessee Supreme Court ruled against the business interests seeking the condemnation. Aiding private enterprise was found not sufficient to create a public use. To determine what constituted a public use the Court adopted the narrow "right to use" test. In the Court's words:

There is a distinction between a public use and public convenience. To authorize the taking of private property for public use, the use must be for the people at large—for travelers, for all—and must also be compulsory by them, and not optional with the corporators—must be a right by the people, and not a favor—must be under public regulations as to tolls. . . But where it is a public convenience, not a necessity, the right to take private property does not exist.

This test has two parts: (1) a physical right on the part of the public to actually use the object benefitting from the taking, for example to ride upon the railroad; or (2) the right of the public to regulate
and control the object benefitting from the taking, such as a railroad or a mill. In the case at bar the freight company's railroad flunked both parts of the test. "The erection of these sheds and railroad tracks," observed the Court, "have no public character, but are wholly for the use of the petitioners." The second prong of the test was also not met because:

there is no restriction on their charges for services; no duties are defined; no penalties for a violation of their duties; no regulations of toll. They are left free to act as private persons in any manner that will best promote their interests. Finding that there was nothing in the proposed railroad making it a public use the Court held void the company's charter granting it the right to build the railroad.

The right to use test explains the exception created for grist-mills and why takings for such mills were permitted. The grist-mill met both parts of the test because generally speaking the grist-mill operator was required by law to grind grain for anyone who called upon him. Moreover his compensation and duties were prescribed by law. "The grist-mill is a public mill," said the Tennessee Court, and "the miller is a public servant."

B. 1870-1879 The Tide Turns

Our study now turns to the period of 1870-1910, the period Scheiber calls the "heyday of expropriation." Each decade will be examined to identify not only the denial of takings but also the reasoning utilized by the courts. Two cases involving mill acts were decided in 1871. In Loughbridge v. Harris the Supreme Court of Georgia held
unconstitutional an act of the legislature which had as its purpose the encouragement of "the building of mills and other manufacturing establishments in this state." The strength of the Court's complete disregard for economic considerations is witnessed by the fact that the act provided for the regulation of the charges of such mills but not even that could save the act.

The second case of 1871 was *Tyler v. Beacher* decided by the Vermont Supreme Court. Here the owner of a grist-mill attempted to raise the level of a pond under the authority of an act permitting the flowage of land "whenever it would, in the opinion of the commissioners, be of public use or benefit." Both the county court and commissioners appointed to assess damages and benefit found that the raising of the water "was of undoubted public benefit." But the supreme court disagreed. In a unanimous decision the Vermont justices adopted the right to use test to stop the taking. The Court then distinguished other cases on the grounds that either the mill acts were in force prior to the constitutional requirement of public use, as in Massachusetts; or that grist-mills were declared public mills requiring such mills to serve any at regulated tolls. Railroads were also distinguished from the present case because "all persons have the right to ride (them) ... upon payment of a common charge." In Vermont grist mills were not regulated and so could pass the right to use test.

Four years later the question of taking for manufacturing purposes was argued in Wisconsin. Earlier the Wisconsin courts had been unable to prevent public tax aid to railroads, but now they were successful in stopping a city from building a dam and leasing water power
to manufacturing concerns. The Court rejected in no uncertain terms the argument that the principle upholding the mill dam act for grist mills should apply to manufacturing enterprises as well. The Wisconsin Court noted that the only reason the mill dam act was upheld was because of the rule of stare decisis citing the 1860 case of Fisher v. Horicon Co. "But the court has never been disposed to extend the doctrine or authority of that case: probably never will," warned Wisconsin's highest court. The hostility to aiding private enterprise is underscored by the fact that this act had two purposes: one, public water-works for the city; the other, private-leasing water power to factories. Yet instead of allowing the public purpose to control and thereby validate the act, the court made the requirement that both purposes be lawful. The result, the act was struck down.

The final case of this decade to be reviewed is Chief Justice Cooley's decision in Ryerson v. Brown. As in the other cases the issue was the constitutionality of a state statute designed to encourage water-power manufactories by giving the owner of such an operation the power to flood neighboring lands. Cooley's decision, which set aside the proposed taking is important for three reasons. First he throws his influential support behind the right to use test. He maintained that it was "essential that the statute should require the use to the public in fact; in other words, that it should contain provisions entitling the public to accommodations." The statute here failed to meet this test because nothing in it required the manufacturer "to be employed directly for the public use."

Secondly, Cooley helped to establish a new hurdle for proposed
condemnations. The new requirement was that before the power of eminent domain could be exercised, a necessity must exist. This meant that the "object to be accomplished must be one which otherwise is impracticable." He then explained how railroads could be aided by eminent domain but not mills and factories:

A railway cannot run around unreasonable land-owners; but no one man and no number of men can prevent the establishment of a machine shop or a saw-mill by refusing to part with the lands they may happen to own. No particular motive power is indispensable. At the worst the question presented in any case will be a question of different degrees of convenience or of probable profits. A mill at one spot on a stream may be more profitable than at another; a machine shop at one point may be more cheaply operated by water power than by steam power; but steam is not excluded from any part of the state because of any general conviction that water power is more advantageous or more economical. When the owner of a mill-site enters upon the calculation whether he shall improve the site in order to obtain operating power for machinery, or on the other hand provide steam machinery, the question that confronts him is not one of necessity, but of comparative cost, expense of operation and probable returns.  

Questions of profit, while important and necessary to every businessman, were not important and necessary in eminent domain law.

The final contribution of Cooley's opinion was its awareness of the critical role local geographical conditions had played in those cases which had permitted takings for mills. He found that in those states where water power was plentiful and the soil "somewhat sterile" manufacturers played an important role in the economy of those states. Obviously he's referring to the New England states like Massachusetts and Connecticut, where broad eminent domain takings had been permitted.

Prior to 1870 a majority of state courts permitted eminent domain takings for mills and manufacturing plants. But the seeds and precedent
for denying such takings were also present. The Tennessee Supreme Court with its decisions in *Harding v. Goodlet* and *Memphis Freight Co. v. Memphis* led the way. The most important innovation was to apply the right to use test to eminent domain law. In the 1870's as the seeds begin to bear fruit the right to use test became a powerful sword used to cut down takings in Vermont and Michigan. Other courts also struck down takings as in Georgia and Wisconsin. With Cooley's decision in *Ryerson* a framework to understand cases eminent domain uses is provided. By turning to the right to use test, the necessity test or local conditions one can explain the majority of cases decided in the next 30 years. But of greater significance is the fact that within the next 30 years the vast majority of courts denied eminent domain takings for mills and factories.

C. 1880-1889: A Period of Refinement

In this decade two cases of note were decided. The first of these was *Varner v. Martin*, which became one of the most cited cases in the area of eminent domain law. The case also stands as a refinement of earlier thoughts, particularly those of Cooley on the concepts of eminent domain and public use. It was the clearness with which the notions of right to use, necessity, and the role of local conditions, were expressed that warrants a full discussion.

The facts concerned a taking for a private road going from a public road across Varner's land to Martin's property. The commissioner appointed to assess the advantages and disadvantages of the road found the road to be absolutely necessary for Martin to gain the benefit of his 90-acre tract but no other advantages. The West Virginia Supreme
Court, disallowed this proposed condemnations, but its opinion went far beyond the narrow facts of the case.

The Court announced a three part test to govern all taking questions. The first part was the familiar right to use test. The public's right had to be definite and fixed, as well as independent of the person or corporation obtaining the condemned property. Moreover the public use was "to be guarded and controlled by the general public through the laws passed by the Legislature." Parts two and three represent an amplification of Cooley's necessity test. According to the Varner Court, the public use must be needful or "one which cannot be given up without obvious general loss and inconvenience. Third, "it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation..." If any of the three parts were not satisfied the taking or the act authorizing the taking would be struck down.

Next the test was applied to sawmills and manufactories. The Court determined that takings for such enterprises would be void because the first part of the test was not met. As was plainly stated:

The general public have no definite and fixed use of any such mills and manufactories; they have no use of them, which is independent of the will of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owners of them. For the Legislatures have never required saw mills or manufactories generally to do work for any one, except those for whom they chose to work, nor have they fixed their prices for work, nor do they require them to continue their business as manufacturers any longer than they chose to do so.

Justice Green, who authored the opinion, also addressed the issue
why mill acts had previously been upheld. "The truth seems to be, that in the early history of this country when water power was the exclusive means whereby mills could be driven," he explained,

the Legislature encouraged the development of this water power as a matter of great public utility, and from an urgent necessity then supposed to exist, delegated this power of eminent domain to persons desiring to erect mills, and in so doing frequently exceeded their constitutional powers.\(^{40}\)

He added that the courts at first upheld these acts without much consideration. Later they were upheld because of long acquiescence and public necessity. "But in modern times," he proudly concluded, "when these questions have been considered under more favorable circumstances, the decisions have been generally against the constitutionality of these mill acts."\(^{41}\) In the following years this assertion would be verified time and again.

The other major case decided in the 1880's was the Matter of the Application of Eureka Basin Warehouse and Manufacturing Co.\(^{42}\) (henceforth Eureka Basin). At issue was a taking for a major economic undertaking by a private corporation. The charter of the Eureka Basin Company was very broad and included the construction of basins, docks, wharves, warehouses, mills, foundries and factories. By the authority of the legislature the company was authorized to develop a port in the city of Brooklyn in 1868.\(^{43}\) In 1881 the company was delegated the power of eminent domain. The legislature further declared that the basin being constructed was public and to be open to public use.\(^{44}\)

In a somewhat unusual turn of events the New York court was so dissatisfied with the arguments of both counsel that it ordered a
rehearing and specifically told the parties the issue it wanted presented. In particular the Court was concerned with a provision of the 1881 act which excluded the act's application to a large part of the basin. 45

Despite the lack of assistance from counsel the New York Court of Appeals found the proposed taking not to be for a public use. "The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory," wrote Judge Rapello for the unanimous Court. He specifically rejected the broad public use argument, holding:

the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or direct their management is conferred upon the public. 46

The narrow right to use test again triumphed over the promotion of business enterprise.

A recurring example of the courts' lack of enthusiasm for the wants of business is the railroad spur track litigation. A spur track was a branch railroad line which branched off from the main line and would extend to a private business establishment, thus connecting the business operation with the all important main line. In the 1880's railroads attempted to construct such lines to manufacturers, mills and mines. 47 In 1886 the Illinois Supreme Court halted a proposed track three-quarters of a mile long leading to a brick-works. 48 The
Illinois Court strictly construed the railroad charter which made no provision for spur lines. The Court suggested that increasing its business and adding to the volume of freight carried on the main line would violate the charter because this may overload the main line which was the only line the company had been authorized to build. In Texas a spur track to a sawmill, lumber yards and shingle mill was also denied. The Texas appellate court emphasized that the power of eminent domain was to be strictly construed citing two treatises, one of which was Cooley's. The question of spur of tracks was quite controversial and there was much contrary authority as witnessed by the Texas court's reference to the dissent in the case of Getz's Appeal. And while the Getz case approved a spur track to a factory the annotation following the case concluded: "The preponderance of authority seems therefore against the principal case."

D. 1890-1899: Years of Entrenchment

On the whole the 1890's represent an affirmation of the principles developed in earlier cases. Take for instance takings by manufacturers. In Vermont a manufacturer sought to overflow neighboring lands to develop a supply of water power for his machinery. The case presented no difficulty to the Vermont justices who merely relied upon a previous decision to block the proposed condemnation. The court added that mere increased productivity or value would not justify an eminent domain proceeding. "One man cannot have another's property simply because it would be worth more in his hands," advised the judges. Indeed
the denial of takings by manufacturers had been so well established that
not even direct action by a state government could legitimize it. As
the United States Supreme Court commented:

It is probably true that it is beyond the competency
of the state to appropriate to itself the property
of individuals for the sole purpose of creating a
water power to be leased for manufacturing purposes.
This would be a case of taking the property of one
man for the benefit of another, which is not a con-
stitutional exercise of the right of eminent domain. 57

Another type of taking still prohibited by the courts was that for
commercial centers and markets. Such a case arose in Pennsylvania in
1891. 58 In a per curiam decision the Pennsylvania judiciary repudiated
the broad public benefit definition of public use and embraced the narrow
right to use test as the "true criterion" to judge what was a public
use. 59

The courts also maintained a stern view toward spur track acqui-
sitions. Two cases involving well-known breweries illustrate the
point. 60 In these cases, the respective cities, St. Louis and St.
Paul, passed ordinances permitting the breweries to lay railroad tracks
from their breweries to the main railroad arteries to facilitate bringing
in supplies and shipping out products. To reach their objective
the spur tracks had to cross public streets. Suit was brought by
property owners whose land fronted the streets where the railroads
were to run. The Bush line was but 1/4 mile and its hours of operation
were limited. 61 Moreover it could not obstruct any street for more thanive minutes. In Minnesota the average obstruction was but for one
minute.

Despite these concessions the courts in both states ruled against
the breweries because the cities did not have the power to permit the
construction of private railways on or across public streets. The rail-
ways of the breweries were inconsistent with the public's easement in
the streets noted the Minnesota opinion. The same opinion found "an
invasion upon the private right of property of another in the part of
the street so used. . . ." In Missouri the court found the purpose
of the railroad to be "purely private," and therefore the city violated
its duty to keep the streets open.

One new issue which did appear in the 1890's concerned grain
elevators and the attempt of private associations to take land from
railroads to erect their own private grain elevators. The lead case
was Missouri Pacific Railway Co. v. Nebraska. In an opinion by
Justice Gray the Supreme Court unanimously held against the taking because
it involved the taking of one private company's property and giving to
another equally private company.

The 1880's and 1890's were not years of innovation for the public
use concept vis a vis manufacturing enterprise or commercial trade
centers. Precedent striking such takings had already been established.
Basically the years represent a refinement of the principles applicable
to eminent domain law. Yet there was one major addition to the judi-
ciary's arsenal against eminent domain appropriations and that was
requirement of strict construction of eminent domain statutes and pro-
ceedings. These years also demonstrate an entrenching of the narrow
right to use concept. From this solid base American judges were
now ready to embark on a great offensive against eminent domain takings
in the first years of the twentieth century.
E. 1900-1910: The Heyday of NON-Expropriation

The turn of the century marked the beginning of a bleak period for manufacturers and mill owners seeking to expand their holdings through the power of eminent domain. Blows against takings were delivered from coast to coast during the first ten years of the new century. For example in 1901 an electric railway company sought to condemn a lot for its power house where it would generate electricity for its cars. The Rhode Island Supreme Court found such a taking was not for public use.\(^{67}\)

While the company argued that getting power to supply its cars was an absolute necessity the Rhode Island judges remained steadfast. Applying the right to use theory the court determined that the public had "no interest in the source of supply."\(^{68}\) The necessity requirement, first promulgated by Cooley, was also utilized to deny this taking. "It is evident that the proceeding is for the private benefit of the company, and not for the public use," wrote Chief Justice Stiness.\(^{69}\)

This Rhode Island decision, as well as a 1900 Georgia case which declared a sawmill to be a purely private use, were both cited in the well-researched *Fallsburg Power & Mfg. Co. v. Alexander* opinion handed down in 1902 by Virginia's highest court.\(^{70}\) The *Fallsburg* opinion reviews many cases and authorities, like the *Varner* case and Cooley's famous *Constitutional Limitations* but really comes down to the simple question whether the taking of land by a company to build dams and plants to generate light, power or heat was a public purpose. The Virginia Court answered this question in the negative finding the public benefit argument "vague, indefinite and uncertain" and the public's right to use unsettled and indefinite.\(^{71}\)
The year 1903 was a particularly bad one to be arguing on behalf of manufacturers. Courts in four states rejected proposed condemnations. In Vermont counsel for an electric company made "an earnest plea for a liberal construction of the term 'public use.'" Counsel contended that "the term 'public benefit' is a better expression of what is meant, and cases (were) cited where it (was) said that 'public use' is synonymous with that term." Relying in part on past precedent, and the right to use test, the Court denied this taking. However a new authority had been introduced into the battle against eminent domain takings and that was a treatise on eminent domain law by John Lewis. Lewis was a strong advocate of the narrow right to use test and his writings became very popular.

In the Mid-West three defeats were recorded by the manufacturing and industrial interests. In Missouri, the Southwest Missouri Light Company sought to condemn land under the state's milldam act to produce gas and electricity for Joplin and other cities. But the state supreme court gave a very restrictive interpretation of the milldam act using the definition of the word "mill" as it was understood when the act was passed, and that was in 1822. In Minnesota, the city of St. Paul attempted to lease land for manufacturing purposes, but a trial court correctly held such leases void and the legislative act authorizing such leases unconstitutional. And the Illinois Supreme Court, confronting the questions of whether mills and machinery constituted a public use for the first time, found that they did not. Any attempt to authorize condemnations for mills and machinery, other than grist mills, was held unconstitutional.
Electrical plants remained in the forefront of litigation in 1905. Cases from both the Atlantic and Pacific Coasts illustrate the hostile attitude of the courts toward such takings. In Maine an electric company's bid to secure additional property was turned down. The company wanted to extend poles and wires across 24 farms from its plant to supply power to a manufacturing corporation. The necessity and right to use tests were applied. As for necessity the Maine Court found that the manufacturing firm could get electric power without the intervention of the state, thus the "mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the Constitution." In what must have seemed to be a cruel distinction (to the proponents of the taking), it was held that the power of eminent domain could be used to generate electricity for public lighting, but the eminent domain power could not be used to generate electricity for manufacturing purposes. This distinction was based on the public's right to use the electricity in the case of lighting and its lack of such right in regards to the manufacturing process. And very plainly the Court rejected any reference to economic growth or public benefit by concluding, "We cannot find any ground for sustaining the Defendant's contention, except that of 'public benefit' or general utility, and we think that is not sufficient."

From the Pacific coast came State v. White River Power Co. At first glance this case does not appear much different from the other cases which denied an electric plant's application to construct a dam for power. As was usual for this type of case the decision adopted the right to test as enunciated in Varner v. Martin, and re-
jected the broad public use test for the reasons of indefiniteness and uncertainty as articulated in Fallsburg Power & Mfg. Co. v. Alexander. What makes this case noteworthy is the willingness of the Washington State Supreme Court to use the United States Constitution to invalidate a state constitutional provision. One article of the state constitution declared: "The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use." The Washington judges were not inhibited by this language, they maintained:

> If it was intended by the article in question to extend the right of eminent domain to private manufacturing corporations, or to authorize the taking of private property for a private use, it violates the due process clause of the federal Constitution. A state is powerless, by statute or by constitutional provision, to declare a use public which is essentially and inherently private.

In the following year the Minnesota Supreme Court faced a proposed taking for the creation of a water reservoir to supply water power for:

1. manufacturing concerns
2. generate electric power for sale to the public,
3. open canals and waterways for navigation.

The litigation focused on the first two purposes. In the course of his opinion, Justice Elliot, provided an excellent analysis of the public use concept as it had developed to date. In the on-going battle between the broad public benefit definition and the narrow right to use test, Justice Elliot left little doubt which theory won out. He explained:

> It has been thought that any instrumentality which tends to promote the public good, such as manufacturing establishments which furnish labor for mechanics, develop and utilize natural advantages, and to create new markets for the products of the community, are of such great public benefit as to justify the state in...
taking private property in their aid. But such indirect advantages to the general public do not justify the exercise of the power of eminent domain.

He then described as "exceptions" those cases upholding the constitutionality of various mill-dam, drainage, mining and irrigation statutes. The right to use test was then applied to the proposed uses. The electric power use passed muster because it was available to the general public on equal terms. However the water power use was a different matter entirely. Unlike electric power, which could be subdivided into many units and transmitted great distances to many people, water power was thought to be restricted to a very few persons because water power must be used at its source with the result "that a very few individuals will use the power for manufacturing purposes to the exclusion of all others."

The effect, said Justice Elliot, "is the creation of a power plant to create water power to sell to a few manufacturers for use in their private business." This case then resembles the 1832 case of Harding v. Goodlet where a taking for both a public and private purpose was proposed. It is not surprising that the Minnesota Court in 1906 would rely on this precedent to strike down taking because "where the purposes stated in the petition are part public and part private, the right to proceed must be denied." Reliance on Harding exemplifies the reluctance of most courts to condone eminent domain condemnations. If the courts were bent on permitting such takings surely they could say that the public use outweighs the private one and therefore permit the taking. But the majority of courts, when confronted with both a private and a public use, failed to avail them-
selves of this option and instead would ban the taking.\textsuperscript{92}

In the following years courts in Virginia and Michigan continued to block takings based upon the precedent in those states.\textsuperscript{93} The cases are consistent with the majority of cases decided after 1870 which denied takings for manufacturing and general business purposes. These cases, taken as a group, demonstrate an unsympathetic view to economic development. The courts, instead of looking to public benefit and utility, decided cases on the narrow right to use test which ignored economic considerations. Two cases, from Kansas and Indiana, epitomize the low priority economic factors held in the minds of judges.

The first case is \textit{Howard Mills Co. v. Schwartz Lumber \& Coal Co.} decided in 1908.\textsuperscript{94} Here the mill company, engaged in the manufacture and sale of flour, feed and other grain products, was operating at between 50-65\% capacity. To reach full capacity additional space was needed for more machinery and storage. The added machinery would increase fuel consumption by 25\%. To meet these needs the company sought to condemn neighboring land which had no permanent buildings upon it. The statute relied upon to authorize the taking stated that "lands may be appropriated for the use of ... milling or other manufacturing corporations using power ... ."\textsuperscript{95} The Kansas Supreme Court admitted that if the statute was construed literally it would confer the power of eminent domain upon any milling or manufacturing corporation. This the Kansas court would not do. The aid of business was found not to be a public use. After noting that businesses can "contribute to the growth and development of the locality where they are situated" the Court held:
To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare. This is not enough.

The same lack of concern for business interests was repeated one year later in *Kinney v. Citizens Water and Light Co.* Here a narrow construction of the company's grant of the eminent domain power was used to deny the company land for a spur track. The spur track was sought so the company could transport fuel and supplies to its plant by rail instead of horse drawn wagons. The light company did not supply manufacturers with power but rather served the town of Greenwood "with water, electric light, and other conveniences . . . ." But not even this fact could save the company. Nor could solid business reasoning. The Indiana Court simply set aside the solid "business" reasons supporting the taking. From the Court's vantage:

The facts, pleaded show only that the desired track extension would afford appealee a prudent, economical, and convenient facility in connection with the carrying on of its business, which would enable it either to make greater profits, or to serve its patrons at lower rates.

It is clear that in Indiana a business could expect no help from the courts through the power of eminent domain. The same was true for millers, manufacturers, and power plants in the majority of other states from 1870-1910.
FOOTNOTES


2. Ibid., at 33. Dickinson maintains "the validity of the so-called 'Mill Acts' or acts authorizing the acquisition of property by condemnation for the purposes of mills, has produced a greater conflict than, doubtless, any other single subject in American jurisprudence."

3. See generally Scheiber's two works, "Property Law, Expropriation, and Resource Allocation by Government," note 7, chap. 1, supra at 239-40, 243-244 supra at 385-6. Specific authority includes: Talbot v. Hudson, 82 Mass. 417, 425 (1860); Todd v. Austin, 34 Conn. 78, 90 (1867) (concurring opinion); Scudder v. Trenton Del. Falls Co. 1 N.J. Eq. 694 (1832); Great Falls Manufacturing Co. v. Fernald, 47 N.H. 444, 461 (1867). Scheiber also claims that the courts of Tennessee and Wisconsin upheld such acts presumably on the same broad definition and refers to cases listed in Ryerson v. Brown 35 Mich. 333, 336-7 (1877). As will be shown such cases do not support Scheiber's claim that economic development was always a high priority. See pages infra.

4. 11 Tenn. (3 Yerg.) 40 (1832).


8. Ibid.


10. Sadler v Longham, 34 Ala. 311 (1859).

11. Ibid., at 333. "All other mills and all other machinery, propelled by water-power, no matter how private or exclusive the use, are as plainly embraced within the language of the enactment, as are water grist-mills which grind for toll."

12. Ibid., p. 334.
13. 44 Tenn. (4 Cold.) 419 (1867).


15. Ibid., p. 423. "The public is not interested in the erection of these railways, except in the facilities that may be afforded in the loading and unloading of boats; it is purely a private enterprise . . . ."

16. Ibid., 427.

17. Ibid., 430.

18. Ibid., at 431. At 430 the Court remarked: "There is nothing in this charter to show it was for a public use."

19. Ibid., p. 429. Other courts also recognized public regulation as critical to finding a public use. The Tennessee Court relied upon:

   the case of the West River Bridge Company, where Judge Woodbury says: "The uses for which the property is taken, must be under public regulation; it must be a right with the people to use the property; not optional with the owners." These are evidences showing the purpose in taking private property for a public use. None exist in this case.

20. 42 Ga. 500 (1871).

21. Ibid.

22. 44 Vt. 648 (1871).


24. 44 Vt. 648, 656, among the cases distinguished was Harding v. Goodlet.

25. Ibid.

26. Attorney General v. The City of Eau Claire and others, 37 Wis. 400 (1875).

27. See Chap. 1, text accompanying notes 26-28, 40-43.

28. At 37 Wis. 400, 435, The Court announced:

   if the statute under consideration grant power to the city to construct and maintain the dam, for the purpose
of leasing the water power for manufacturing purposes, it is a power for a private and not a public use, and cannot be upheld. Curtis v. Whipple, 24 Wis. 350; Whiting v. S & P R R Co., 25 Wis. 167 (1870).

Note how this court applies the definition of public use in the tax aid cases to this eminent domain taking.

28b. Ibid., p. 436 citing 10 Wis. 351 (1860).

29. Ibid.

30. Ibid., p. 437.

31. 35 Mich. 333 (1877).


33. Ibid., p. 338.

34. Ibid., p. 339. In the courts words:

If, however, the use to which the property is to be devoted were one which would justify an exercise of the power, it would still be imperative that a necessity should exist for its exercise.

35. Ibid., p. 340. The California Supreme Court also was unmoved by economic considerations in Spring Valley Water Works v San Mateo Water Works, 64 Cal. 123, 28 Pac. 447, 450 (1883). "Necessary the property might be . . . as a matter of economy, but necessary it would not be for the public use. A corporation . . . cannot condemn whatever it may find convenient and profitable to acquire, on the ground merely that it may save expense."

36. The role of geographic conditions is discussed in full in Chapter 3 pp. 65-67 infra.

37. 21 W. Va. 534 (1883).

38. Ibid., p. 556. As with Cooley, the West Virginia opinion found railroads and ferries met the tests and takings for them were recognized.

39. Ibid., p. 557-8. Earlier the court recognized the grist-mill exception because the public could compel the owner of such mills to grind grain at prices fixed by law. Ibid., p. 547.

40. Ibid., p. 559.

41. Ibid.
42. 96 N.Y. 42 (1884).

43. Ibid., p. 45.

44. Ibid., p. 46-7 N.Y. Laws of 1881, Ch. 637.

45. Ibid., p. 47-8. They scolded both attorneys. Judge Rapallo, author of the opinion complained that this proviso:

gives quite a different complexion to the enterprise, but which, for some unexplained reason, has not been referred to by counsel on either side, although this court expressly directed the case to be reargued on the question whether it was a proper one for the exercise by the corporation of the right of eminent domain.

46. Ibid., p. 48-9.

47. The cases involving mines is discussed in Chapter 3, development of natural resources. pgs. 58-69, infra.


49. Ibid., p. 52.

50. Ibid., p. 51. "The fact that the building of collateral branch roads may add to the earnings of the main line or increase its business will not authorize appellant to build the same under its charter and condemn lands therefore," said the court.


52. Ibid., p. 278. In the words of Cooley:

There is no rule more familiar or better settled than this, that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain—of the highest powers of sovereignty pertaining to the State and interfering most seriously and vexatiously with the ordinary rights of property." Cooley Const. Lim. 4th Ed. p. 660.

Wood, Railway Law was more succinct "But the power must be strictly pursued." 40. 40.

54. Annotation, Getz's Appeal, 3 Am. & Eng. R.R. Cas. 186 at 197. (1881).

55. In Re Barre Water Co. 62 Vt. 27, 20 At. 108-111 (1890). The Court remarked: To enter upon an extended discussion of the subject is unnecessary, for this court has laid down the law of it fully and clearly in Tyler v. Beacher, 44 Vt. 648 (1871). For a discussion on this case see text Chapter 2 accompanying notes 22-25 supra.

56. Ibid., p. 111.


59. Ibid., p. 990, After quoting verbatim the lower courts opinion the state supreme court announced: "It would be difficult to add anything profitably to the opinion of the learned president of the court below, and we adopt it as the opinion of this court." Ibid., p. 992. In regard to the broad benefit or advantage definition Judge Thayer wrote: "If this definition were accepted, any man's property might be taken upon the shallowest pretense of a public use."

60. Glaessner v. Anheuser-Busch Brewing Assn., 100 Mo. 508, 13 S.J., 707 (1890); and Gustafson v. Hamm, 56 Minn. 334, 57 N.W. 1054 (1894).

61. It could not operate between the hours of 8-9 a.m., 11-1 p.m., and 3-4:30 p.m.

62. 56 Minn. 334, 57 N.W. 1054, 1055 (1894).

63. 100 Mo. 508, 13 S.W. 707, 709 (1890).

64. 164 U.S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489 (1896).

65. Ibid., p. 417. The Nebraska Supreme Court adhered to this decision in Chicago B. & Q.R. Co. v. State Bd. of Transportation, 50 Neb. 399, N.W. 955, 956 (1897).

66. It must be noted that in the arid Western States like Colorado, Arizona, Nevada, Utah, Montana, Idaho, and Wyoming the broad public use definition was being applied. However because of different constitutional provisions and unique geographic and climatic conditions these states are easily distinguishable from the majority of the country. This theme will be elaborated upon in the last chapter. Also see note 88 infra. this chapter.


68. Ibid., p. 592.
69. Ibid. The Court had determined the location of the supply to be "a matter of convenience to the company, not of necessity" because the lot was near a wharf so coal could be shipped by water as well as by railroad.

70. 43 S.E. 194, 198 (1902). The Georgia case was Garbutt Lumber Co. v. Georgia & A. Ry., 36 S.E. 942, 943 (Ga. 1900) which held

One who owns a sawmill, and is engaged in preparing lumber for market, is engaged in a business in which the public is in no way interested, and a business which from its very nature is a purely private enterprise, and necessarily entered into for the purpose of private pecuniary gain. Loughbridge v. Harris, 42 Ga. 500 (1871).

Loughbridge is discussed in text accompanying notes 20-21 supra. Chapter 2. The attempted condemnation was stopped in Garbutt.

71. Ibid., The opinion reads:

the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefited by the use of it by the company, is by no means fixed and definite.


74. See Chapter 5 infra on Judicial Formalism, Treatises & Lewis.

75. Southwest Missouri Light Co. v. Scheurich, 174 Mo. 235, 73 S.W. 496, 497-8 (1903). The Court looked back at 1825, when the act was revised, and sought to find out what type of mills the legislature then had in mind when the act was passed. The Court announced:

Grist mills were the only kind the people of this state in those early days had any practical familiarity with. When they used the word 'mill' it was in that sense. And that is the original and only natural meaning of the word. The signification that is derived from its modern application to various manufacturing machines is artificial.

76. Sanborn v. Van Duyne, 96 N.W. 41, 42, 43 (Minn. 1903).


78. Ibid., The Illinois justices rejected the benefit argument and ac-
cepted the right to use test. In the Court's words, "The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."


80. Ibid., p. 795.

81. Ibid., p. 794-5.

82. Ibid., p. 795.

83. 82 Pac. 150 (Wash. 1905).

84. Ibid., p. 152-3. Varner is discussed on pp. 35-37 text accompanying notes 37-41 supra, and Fallsburg, p. 42 text accompanying notes 70-71 same chapter.


86. Ibid.


88. The main reason given for these exceptions was geographic necessity, like water power to grind grain in early New England and water for irrigation in the arid West. Ibid., p. 411-412. This theme of geographic necessity will be developed in chapter 6.

89. Ibid., p. 414. The court noted that the company's petition stated it would sell water power to anyone who desired to purchase it. Such willingness had only theoretical value because of the physical impossibility "for water power to be sold from the wheels to more than a few persons."

90. Ibid.

91. Ibid., p. 411. Harding is discussed notes 4-6 supra.

92. Lewis, summarizes this point writing:

If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void. Thus, an act which authorized the erection of a dam across a navigable river by a city, either for the purpose of water works for the city, or for the purpose of leasing the water for private use, was held void. Eminent Domain Law, note 73 supra, 206, p. 494. See the Batchelor case note 34, chap. 1, for the same result in a tax case.

93. In Dice v. Sherman, 59 S.E. 388 (Va. 1907), the Virginia court struck
down a mill dam taking to power a public cider mill and a telephone exchange. Relying on Varner v. Martin, Fallsburg Mfg. v. Alexander and other precedent the court found the public benefit too vague and that the private benefit "too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain . . . ." Ibid., p. 389. In the Michigan case of Pere Marquette R. Co. v. U.S. Gypsum Co., 154 Mich. 290, 117 N.W. 733 (1908), it was found that a spur track was not a public use where it reached a private factory and the railroad contracted to use the track only when it did not interfere with the business of the manufacturer.

94. 77 Kan. 599, 95 Pac. 559 (1908).
96. 95 Pac. at 562.
97. 90 N.E. 129 (Ind. 1909).
98. Ibid., p. 131.
99. Eminent domain takings were limited to those purposes which the court deemed necessary for water and light companies such as the construction of their works and the laying of pipe lines, conduits, poles and wires but "not such ways of railway communication as might become expedient and desirable because of an unfavorable location of the power plant, voluntarily chosen." Ibid.
III.
THE PUBLIC USE CONCEPT AND THE DEVELOPMENT OF NATURAL RESOURCES

In the second half of the nineteenth century America moved from an agricultural economy to an industrial one. Factories, mills and the rise of cities symbolize this change. The new industries of the cities were in need of raw materials to produce their finished products. Other natural resources, like coal, came into demand to fuel and power these new industries. Thus an integral part of America's economic growth was the mining industry which sought to fulfill the needs of an ever-growing industrial economy. At the same time America's population grew as large numbers of immigrants, especially from eastern Europe, arrived seeking jobs and a better way of life. No doubt the overall population increase also increased the demand for food and agricultural production, as well as the need for wood products for buildings, housing and wagons. The agricultural and lumber industries therefore remained significant.¹

In the last chapter the role of eminent domain law as a tool to aid the growing industries of America was scrutinized. Now the focus shifts to the development or exploitation of America's natural resources. In essence the question becomes: Did American judges allow certain industries, like mining, agricultural or lumber, a free hand in the use of the eminent domain power because of these industries' beneficial effect upon the economy? Or phrased in a positive manner: Did American courts use the power of eminent domain to promote these industries?

A. Mining As a Public Use

1. 1870-1879: The Formative Years

Prior to 1870 very few states had occasion to pass upon eminent
domain takings involving mining. The great increase in litigation after that year apparently coincides with the greater demand for natural resources created by the growth of American industry. The mine operators like the railroads and manufacturers before them, tried to use condemnations in their business ventures. While the operators may have thought mining to be a public use, the courts did not always agree.

The courts’ hostility to mine related takings first surfaces in 1868. In Iowa, led by Chief Justice Dillon, the state supreme court held unconstitutional an act of the legislature permitting the construction of private roads. In this case the act had been invoked by the James Bankhead Company to establish a private road from its coal banks to a public road which ran to a railroad depot. The commissioners appointed to assess the damages found the road would be of great benefit to the coal company and others desiring access to the coal banks. But since the road was private, not public, it was disallowed.

The repeated attempts of James Rhodes to secure a railroad from his coal field to a factory, conveys in part, the hard stance taken by many courts against eminent domain appropriations. In 1866 Rhodes constructed a railroad for his coal bank to the rolling-mill ironworks of Reis, Brown & Berger, with whom he had contracted to supply with coal for five years. Any excess coal produced was shipped elsewhere. Property owners whose land fronted an alley which the railroad crossed brought suit claiming the alley was blocked and that operation of the locomotive was a nuisance. In January of 1868 the suit was heard by the Court of Common Pleas which ordered the railroad to be dismantled and the alley restored to its previous condition. The case was
appealed to the State Supreme Court. Rhodes fared no better before this tribunal. In its opinion the Court considered the road to be private because it was intended solely for the use of private mills and machinery. Moreover, it was thought, that in such a road the public could have no advantage. Therefore Rhodes was found to be without the power of eminent domain and the lower court's decision was upheld.\(^5\)

But Rhodes was undaunted. Within a month he obtained from the state legislature a charter incorporating the "Neshannack Railroad, Coal and Ore Company." Section two of this charter authorized the company to build and operate a railroad in Lawrence County to carry coal, minerals and merchandise. It also provided that the company may purchase any railroad, whether complete or not, in the same county. Of course, Lawrence county is where Rhodes' own railroad was located.

With this tailor-made charter Rhodes moved quickly. The company was organized on February 3, 1868 and on March 9, 1868, Rhodes sold his railroad and everything connected with it including rails, locomotives, cars, side-tracks, timber and switches. Even his coal-lease and contract to supply the mill were transferred. The railway which had only been partially taken up was immediately restored and operations began as usual. Everyday anywhere from 135 to 150 tons of coal were transported. Throughout Rhodes remained in control as if he were still the sole owner of the railroad.\(^7\)

These happenings were contested by the alley landowners, and the case again reached the state supreme court. The high court was totally unimpressed by the recent manipulations. "It is clear, therefore, that this is still a private road, terminating at the rolling-mill of Reis,
Brown and Berger," wrote Judge Read. 8 Once again the dismantling of
the railroad and the restoration of the alley to its pre-railroad
condition was ordered. 9

Yet Rhodes was not the only coal operator whose ambitious plans
were stymied by the Pennsylvania Court. In Edgewood Railroad Co.'s
Appeal, the owners of the Hampton Coal Mines sought to connect their
mines to the Edgewood railroad station. 10 To do this they organized
the Edgewood Railroad Company, under a liberal act of the state legis-
lature which permitted three or more citizens to form a company to con-
struct a railroad. 11 The act limited such railroads to 5 miles and
provided they were to be for a public use, defined as the conveyance of
persons and property.

A master was appointed by the trial court when an injunction was
sought to halt the railroad. The master found the railroad was for a
public use because it was "for the development of the coal mineral
wealth of that neighborhood." Showing good business sense the master
added the railroad "is located on the best and most advantageous
route to connect the said coal field with the Pennsylvania railroad." 12
While the master supported the taking the Court of Common Pleas did
not, and the company appealed.

The opinion confronted directly the broad public benefit argument
as laid out by the master. 13 After reviewing the argument Judge
Woodward, author of the opinion, labeled it "speculative, strained and
vague." He continued:

But all these possibilities are too remote to be
grounds for anything beyond conjecture. To rest
the legal rights of parties on such chances would be simply to obliterate those rights.\textsuperscript{14}

Development of coal mines thus did not fulfill any special public need or advantage justifying the use of eminent domain.\textsuperscript{15}

With the broad benefit test out of the way the Court applied the right to use test, with the railroad line flunking the test. "(T)he defendants are precluded from affording facilities for any business but their own', observed the Court, adding "(t)hey are confined to the use of the land for such purposes as are connected with the ordinary working of coal property." As a result, Judge Woodward concluded, it would be impossible for the line to convey persons and property as required by the legislative enactment concerning railroad incorporations.\textsuperscript{16}

Meanwhile the mining industry was suffering another setback, this time in West Virginia.\textsuperscript{17} The Valley City Salt Company, which had been organized to mine and sell salt and coal, sought to acquire a subterranean underground right of way. The plan was to build an underground railroad from its salt furnace to a 30 acre coal track owned by the company and remove part of the coal to fire its furnace and sell the remainder to the public. When the affected property owners objected the dispute ended up in court.

In finding that the proposed taking was not for public use the West Virginia Supreme Court adopted the narrow right to use test. Justice Paull writing for the majority suggested a 3-part test, which was later refined nine years later in Varner v. Martin decided by the same court.\textsuperscript{18} The three factors emphasized by the Court were: (1) the public's actual ability to use the subterranean road; (2) the govern-
ment's power to regulate and control the passage, and (3) "the impossibility or extreme difficulty, at least, of effectuating the same purposes in any other way . . . ."19 Since coal could be gotten from other sources and the public "would not use" the subterranean right of way, the test was failed and the taking denied. At the same time Justice Paull limited eminent domain takings to transportation enterprises like highways, turnpikes, canals, and that old favorite of the courts—the grist mill or flouring mill.20

Across the continent in California similar holdings were reached. The California legislature had approved a statute which stated the right of eminent domain could be exercised for tunnels, ditches, flumes, pipes and dumping-places for working mines . . . ."21 One mining company purchased a tract of land for $60,000 and spent additional large sums to open and develop its mine. It soon became evident that the only practical way to work this mine "was to excavate a ditch, and build a flume through the mine" to carry away the dirt and gravel tailings. However to build this flume it was necessary to pass over and use land not owned by the company. Using the aforementioned statute the company sought to condemn the land necessary to construct the flume. The condemnation was challenged and the California Supreme Court upheld the challenge finding that mining operations did not qualify as a public use because they were private enterprises conducted "solely for the personal profit" of their operators.22 The California courts never waived from this position.23
2. 1880-1899: A Split Develops

In the next two decades a major split in eminent domain law occurs. Older states like Illinois, New York and Ohio continued to regard mining as a private enterprise and would not permit takings by such enterprises. In Ohio one railway company had its corporate charter revoked because it failed to operate as a common carrier in that it did not perform any duties for the public. Instead, the company had constructed a short 2½ mile track suitable only for the transportation of coal. Moreover the track ran from a set of coal mines owned by the principal stockholders of the railway company to a nearby station. The Illinois Supreme Court made use of the right to use test to stop a coal company's attempted condemnation. In so doing the Court described the coal, coalworks and tramway of the company as "in the strictest sense private property . . ." The right to use test delivered another death blow to a mining company's plans for expansion in New York. When a soda ash producer built a tramway from its quarry to its process plant the New York Court of Appeal disallowed the road because "There is no public highway leading to the road by means of which the public can obtain access for its use." The message of these cases is clear—facilitating production from mines will not constitute a public use justifying the appropriation of private property.

There was, however, a different message coming from the new states west of the Great Plains. In these arid and mountainous regions mining was placed in a privileged category by the judiciary. The leading case is *Dayton Mining Co. v. Seawell* in which a Nevada statute entitled "An act to encourage the mining, willing, smelting, or other
reduction of ores in the State of Nevada" was challenged.\(^28\) The case arose when the mining company, acting under the statute, attempted to condemn a strip of land to transport wood, lumber and other materials to carry on its mining operation.

In no uncertain terms Chief Justice Hawley announced that in Nevada mining was a public purpose, and therefore the power of eminent domain could be exercised in its behalf. To support this conclusion the Chief Justice relied upon the broad public benefit test. He explained:

that mining is the paramount interest of the state is not questioned. That anything which tends directly to encourage mineral developments and increase mineral resources of the state is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition.\(^29\)

The broad benefit test was followed by other western states as in the Utah case of Highland Boy Gold Mine Co. v. Strickley.\(^30\) The mining company here worked a set of mines high up in Bingham Canyon, near Salt Lake City. To get its ore to market the company had built an aerial bucket line from its mines to a railway station two miles away. The ore was carried in suspended buckets 1200 feet down to the station. In building this line the company condemned a right of way across Strickley's mining claim and he resisted.

In upholding both the condemnation and the act authorizing it the Utah judges discussed in detail the role mining played in their state. They observed:
The mining industry in this state, and in others similarly situated, not only produces a home market for the markets of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish, which, without the stimulus thus furnished, would languish. The encouragement of mining was "the public policy of the state" and the legislative enactment furthered that policy. The broad benefit definition was also adopted by courts in Arizona, Colorado, Idaho and Montana, in addition to Nevada and Utah.

Basically two factors can be attributed for the adoption of the broad benefit analysis in the West. First was the harsh climate and terrain. The judges and legislators were both aware of how tough life could be. So when a state statute encouraging an industry, say mining, came before the courts, the judiciary viewed the matter not as one for private profit but as a matter of survival. In more hospitable surroundings, like California or the Mid-West, such matters of necessity did not enter into the judicial decisionmaking process.

Even the United States Supreme Court paid close attention to local conditions, and would yield to state decisions on such matters. Take for instance Clark v. Nash, in which a Utah statute permitting one landowner to condemn another's land for the purpose of irrigation was upheld. Justice Peckham, writing for the majority, suggested that in most states this statute would be unconstitutional. He cautioned his readers that the validity of such acts may depend upon "some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted." He further stated that the Court was always "strongly inclined to hold with the state
courts, when they uphold a state statute providing for such condemnation," because

The validity of such statutes may sometimes depend upon different facts... Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.36

Thus "having reference to the above peculiarities which exist in the state of Utah," the Court affirmed the state court's judgment that the act was constitutional.37

For clarity's sake it should be noted that the Supreme Court did not embrace the broad benefit definition for all cases. "(W)e do not desire to be understood by this decision," wrote Justice Peckham, "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."38

The second factor leading to the West's adherence to the broad benefit definition was the language of the state constitutions. The rugged conditions which affected the judges in their decisions likewise influenced the framers of these documents.39 As a result the definition of public use was enlarged to include mining, irrigation and other projects which would assist in the development of natural resources. At least eight states, west of the Mississippi, made irrigation a public use in their constitutions and others passed statutes providing for irrigation takings.40 Mining was given the same status in Arizona, Colorado, Idaho, Illinois and Wyoming.41 Writing in 1894 Charles C. Dickinson claimed: "Acts for the encouragement of mining have been
sustained, but generally because of express constitutional provisions authorizing the same." 42

Indeed two sets of property rights may be said to have existed in this era, one for the West and one for the East. Climate and topography were the chief reasons for this distinction. In discussing water rights, Justice Peckham explained:

The rights of a riparian owner ... are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East. ... 43

3. 1900-1910: The Right to Use Test Flourishes

The distinction between East and West continued into the new century. In Indiana proceedings to condemn for an oil and gas line were begun. This provided a forum for the broad benefit definition, supported by a wave of western precedent, to challenge the right to use test, on the latter's home ground. The challenge fell short as the Indiana appellate court found that the "better reasoned cases of other states hold that land cannot be condemned for the use of a private mining corporation." 44 The court relied upon precedent from California and the East including cases from Illinois, Pennsylvania and West Virginia. 45 As for the broad benefit theory the Indiana Court rejected it outright, saying, "It is not enough that the general prosperity of the community is promoted." 46 And the right to use test triumphed with the court saying that there must be a definite public right to use the property, a right protected and controlled by law. 47
A similar fate greeted the broad benefit analysis four years later in Tennessee. In attempting to secure a connection between a main railroad line and its mines, the Alfred Phosphate Company argued that the surrounding county would benefit from its spur track through the development of the phosphate industry. But the Tennessee Supreme Court was not persuaded. Thus the broad benefit theory remained confined to the Western mountain states, while the narrow right to use test controlled elsewhere in the rest of the country.

Before leaving the mining cases one final comment is in order, and that is that application of the right to use test did not automatically mean that a proposed taking was doomed. If a proposed spur track was open to the public as a matter of right, and this right was free from interference by the operator of the railroad then the test was satisfied. As the Arkansas Supreme Court explained:

The railway's franchise empowers it to establish none but public stations. It can place no unreasonable restraint on the right of the public to use it. If the railway maintains a coal shipping station at that point, and unreasonably refuses to accord to appellee, or others who have occasion to ship coal therefrom, facilities for doing so, the courts can afford a remedy for the wrong; and if the railway abuses the privileges of condemning private property to a public use, by turning the property acquired by condemnation to a private use, doubtless the easement it acquired by condemnation may be revoked, and the possession restored to the owner of the fee.

This stance was followed in Kentucky, Iowa, Wisconsin and elsewhere.

Nor can these cases be said to represent a subterfuge or excuse to support economic development. In almost every case the broad benefit analysis was explicitly rejected."A railway cannot exercise the right of eminent domain to establish a private shipping station for an individ-
ual shipper." exclaimed the Arkansas Court. The Court went on to say, "The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public." Similar sentiments were expressed in Iowa where it was said:

If the purpose and effect of this statute was to confer on the mine-owner the exclusive right to occupy and use the ground appropriated . . . and the only rights intended to be conferred on the public are such advantages and conveniences as may occur to it incidentally from the developing of the mine and the marketing of the product, we would have no hesitancy in holding that it would not be sustained; for in that case the use to which the property would be put would be essentially a private use.\(^52\)

Therefore, insofar as mining is concerned, the right to use test held sway in the large majority of states. In these states if this test was not satisfied the judges would strike down eminent domain takings without regard to public benefit or its synonym economic development. In a distinct minority of jurisdictions, namely the mountain states of the West, takings by the mining industry were permitted based on their benefit to society. The difference arose from the particular climatic and geographic conditions of that region, which called for a more liberal approach to takings. It should not be forgotten that the Supreme Court itself recognized the need for this difference. But the basic point remains that between 1870 and 1910 mining was not considered a public use by the majority of courts.

**B. Drainage As a Public Use**

Besides mining, another potential use for the power of eminent domain was drainage. Takings for drainage were not always connected with economic development as in takings to drain a swamp to protect the health
of nearby inhabitants. "The promotion of the public health is undoubtedly a public use within the meaning of the constitution," wrote John Lewis, a long-time advocate of the narrow right to use test. But what of drainage and economic development?

An early case involving drainage was *Cypress Pond Draining Co. v. Hooper*, decided in 1859. The draining company was incorporated to drain approximately 14,621 acres. The company's board of directors owned but 3,840 acres and most of their acreage was low wasteland. Being susceptible to floods their land was almost valueless, however with proper drainage their land could become very valuable. To support the project taxes were levied on all the landowners without their consent. When the tax was challenged the Kentucky Court ruled that the act of incorporation was "inoperative and void." The Court found that the act was "to appropriate the property of the appellees, without their consent, to the use of other private individuals. . .". A more explicit rejection of drainage as a public use was announced the following year. "The draining of a man's farm simply to render it more valuable to the owner," wrote the Indiana Supreme Court, "would not be a work of public utility in the constitutional sense of the term."

The denial of public aid to drainage projects in the form of tax dollars was paralleled by a denial of public aid in the eminent domain cases. After the Civil War, the Tide Water Company sought to drain the marshes near Newark Bay in New Jersey. To accomplish this task the company sought to condemn a tract of nearby land. The company justified the taking by arguing general economic benefit. It claimed that the completion of the project "would add considerably to the wealth and
population of the State," including tax revenues. But the New Jersey chancellors viewed the case from a different perspective. To them the completion of the project was "for the benefit and use of the owners." Applying the right to use test, the chancellors found no right had been granted to the public in the drained marshes. The fact that "any stranger walking upon them, pasturing his horse, or cutting grass there, would be a trespasser," was crucial. Consequently the petition for condemnation was dismissed.

In the 1880's drainage takings were blocked in Nebraska, Iowa and Ohio. The Ohio Court faced the broad benefit argument squarely and rejected it. Relying on Anderson v. Kerns Irrigation Co., it determined that draining farms to render them more productive was not a public use. "We think the mere fact that the proposed ditch would enable the parties to raise more corn and larger crops, did not authorize a verdict in favor of establishing the ditch," wrote the Court.

In the next decade Wisconsin judges would hold invalid a statute granting the power of eminent domain for the construction of ditches, drains and levees "for agricultural, sanitary or mining purposes." And in Indiana it was said:

The mere fact that a system of drainage would render lands tillable, more productive, or increase their value, does not authorize the exercise of either the police power or the power of eminent domain.

The final drainage case to be examined is In Re Tuthill. It is worthy of attention for two reasons: (1) the very hostile stance taken toward agricultural development, and (2) the analytical framework provided to explain the drainage issue. In 1894 New York's constitution was amended
to permit "the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains and ditches upon the lands of others..." (emphasis added). In total disregard for the wishes of the people, as expressed in the 1894 amendment, Judge Gray boldly asserted his belief that the people cannot affect or impair the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially of private benefit, and which has always been held to be such.67

While daring, Judge Gray was not so audacious to rest the decision on belief alone. Like all judges he needed authority to support him. In other states, judges blocking eminent domain takings would turn to their state constitutional provision which permitted the taking of private property only for a public use. However that option was not available in this situation. Judge Gray therefore turn to the Federal Constitution to strike not only the particular taking but the state constitutional amendment as well. Finding that agricultural was "a purely private purpose" and that to take another's property for private purpose was in violation of the Federal Constitution, he revealed "I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative."68

The second main feature of this decision is its explanation of why takings aiding business enterprises had been upheld. The explanation was basically a restatement of the local condition exception announced earlier in both manufacturing and mining cases.69 It was suggested that reference be made to local conditions and court decisions which may "illustrate some settled policy of the community." In regard to the
mill acts in New England and the irrigation enactments of the West, Judge Gray maintained that they were upheld "either in view of a policy in force prior to the adoption the state constitutions, or within a similar principle, by long exercise of a legislative power which the state courts had sustained." 70

The last phrase in the preceding excerpt is most significant. That phrase: "long exercise of a legislative power which the state courts had sustained;" intimates a third reason why eminent domain takings were approved and that is the doctrine of stare decisis. 71 Paying deference to this doctrine the New York Court announced with relief:

(W)e are not embarrassed by any long acquiescence, or by . . . judicial or legislative precedents . . . in holding that no imperative reasons of public policy warrant the delegation of the power to exercise the right of eminent domain in such cases. 72

With the close of our survey of the drainage cases certain trends deserve mention. First, takings for agriculture to increase crop production, even in farm states like Nebraska, Ohio and Iowa was not permitted. However, if such takings could be coupled with an obvious public use, like health, or had been approved over a long period of time they might be sustained. . Second, the drainage cases, along with the mining litigation, show the three reasons why takings which aided businesses were upheld. The reasons were: (1) severe local conditions, such as climate and terrain; (2) broad local law, namely state constitutional provisions, and (3) the doctrine of stare decisis. 73

C. Lumber As a Public Use

Our investigation now moves to the lumber industry. It is appro-
priate to end this survey with this industry because the bulk of its litigation occurred after 1900. A major exception occurred in 1888 when the Oregon Supreme Court upheld an appropriation by a lumber company to construct a canal to carry its own wood and materials and those of others for a fee. In addition the proposed canal was to furnish water to a nearby town. The public use concept was found to be no barrier to this taking as the court adopted the broad benefit theory. "The industries of this state are in their infancy, and its resources are comparatively undeveloped," commented the Court, "and we would hesitate before laying down a rule of construction that might retard the growth or development of either." Expounding basic economic arguments the Court determined that the public had an interest "in the cheap delivery of the timber, lumber, and other products of the forest," or other commodities sent to the market.

Ten years later Oregon's high court reversed itself. In Apex Trans. Co. v. Garbade, the company sought to build a logging road for the Bridal Veil Lumbering Company. The company was acting under an 1895 legislative enactment which granted the right of eminent domain to corporations involved in building roads to transport lumber products, and characterized such work as for the public benefit.

In reaching its decision the Court considered not only the peculiar nature of the road involved and the company's charter but also the exact location of the road. This last fact tipped the scales against the taking. Since both termini of the proposed road were upon the property of the Bridal Veil Lumbering Company and the public therefore had no access to the road except over private property, the Court held there
was no public use. In effect the right to use test became the law in Oregon. And in subsequent years it remained the law.

Following the turn of the century the lumber industry endured a series of defeats on both the East and West coasts. In Georgia the supreme court described the lumber business as "a purely private enterprise" in upholding a permanent injunction against construction of a tramroad to get timber to a sawmill. State courts in Washington, North Carolina and West Virginia continued to shoot down proposed takings.

The Washington and North Carolina cases are very similar because of the major effort made by the lumber industry's attorneys on behalf of the broad benefit definition. In Washington the judges remarked upon the "painstaking" efforts of counsel to portray the magnitude of the lumber business in that state and its presumable impact on the state's economy. Counsel urged the Court "to announce a broad and statesmanlike principle . . . one which would further the business prosperity of the state rather than one which would hamper and retard it." In the Tar Heel State industry lawyers, in an argument described as "able and interesting," stressed economic development. Reference was made to the large and valuable timber standing upon the mountains in the western portion of the state. By bringing this timber to market "the revenues of the state will be increased, the development of the natural resources encouraged, immigration brought into that section, and many other benefits (will) accrue to the public," contended the lumber industry's advocate.

In both cases the valiant efforts fell short. These cases symbolize not merely the rejection of the broad benefit definition but something far greater. They suggest why the broad benefit definition was
held in such low repute by American judges between 1870 and 1910. The
Washington Court in rejecting the broad benefit argument suggested that
the argument should have been addressed to the constitutions framers.
Why? Because a "court cannot invade the province of the law-making powers
of government, and intrude into its decrees its opinion on questions of
public policy."  
84 In other words the Court did not want to rest its
decisions upon public policy rationale. For most judges, decisions were
to be based on legal principles alone. Policy matters were to be handled
by the legislature.  
85 For this reason the right to use test was quite
popular for it required a judge only to see if the public had a legal
right to use property or whether the property's use was regulated by law.
There was no need for a court to consider such matters as how many people
would benefit from the taking, or how large the benefit might be, or
how big an area would be affected.

The second main reason the broad benefit definition failed to gain
many adherents was the growing skepticism with which the public and
the courts viewed business as a whole. The North Carolina
Court denounced the broad benefit arguments because:

it is manifest that valuable private property rights
and stores of natural wealth and resources for feeding,
clothing and making comfortable the rapidly increasing
population have been sacrificed . . . that great and
dangerous monopolies have been fostered by the liberal
construction put upon the term "public use."  
86

This statement, placed against the background of increasing state and fed-
eral regulation of business demonstrate that America's admiration for the
entrepreneur was now coupled with an increasing wariness.  
87

This review of lumber litigation brings to light three aspects of
eminent domain law. First, the litigation shows that aid to the lumber industry did not constitute a public use justifying the exercise of eminent domain. Second, the litigation demonstrates the continued dominance of the narrow right to use test at the expense of its broad benefit counterpart. Finally these cases provide some insight as to why the right to use test triumphed, namely, formalistic judicial reasoning and skepticism toward business.

D. Conclusion: The Dominance of the Right to Use Test

In the preceding chapters numerous examples abound of the right to use test being applied to strike down attempted appropriations for either manufacturing, mining, drainage or lumbering purposes. Jurisdictions applying this test and denying takings far outnumber those which adopted the broad benefit definition to condone eminent domain takings by private businesses.

But the dominance of the right to use test also extended to cases where condemnations were approved. The mining spur track cases from Iowa, Arkansas and Kentucky are excellent examples of this. In the mill-dam cases the public's right to use the mills and the doctrine of stare decisis were just enough to get certain takings approved. The Maine Supreme Court noted that the mill act "pushes the power of eminent domain to the very verge of constitutional inhibition." The Court suggested if it were a new question the act might be unconstitutional. However because of "its great antiquity, and the long acquiescence of our citizens in its provisions, it must be deemed to be the settled law of the state," wrote the Court. At the same time the Court adopted the right to use test finding appropriations of land
permissible when the public had certain well-defined rights in the proposed use. Another state court stressed that mill act taking "can be vindicated only on the ground that the mill is public, every citizen having the right under the regulations . . . to have his grain ground there."92

Another important trend in late nineteenth century eminent domain law was the switch of state courts from the broad benefit test to the narrow right to use test. A superb illustration of this trend occurred in New Hampshire. In the 1867 case of Great Falls Manufacturing Co. v. Fernald, the New Hampshire Court declared it was legitimate to shape the law to fit "the character of our business and natural productions and resources" of the state.93 Professor Scheiber says this is one of the two main precedents used to bolster the broad public benefit argument for the years 1870-1910.94 What Scheiber ignores is that during this time period the New Hampshire Court completely rejected this position.

The switch occurred in Rockingham County Light and Power Co. v. Hobbs.95 Here the taking was for an electric power company. Again the doctrine of stare decisis played a critical role in the court's thinking.96 And the court upheld the taking because the company assumed "the obligations of a quasi--public corporation" in that it would supply electric power "at reasonable rates without discrimination to all who desire it."97 In effect then, the Court had adopted the right to use test. And to erase any doubt of the Court's new position the Great Falls holding was emasculated, as the Court announced;

the doctrine of Great Falls Mfg. Co. v. Fernald is sui generis, and is not applicable to the full extent of its import. . . . These cases cannot be
regarded as deciding that "public use" in the Bill of Rights is synonymous with public benefit, public advantage, or any use that is for the benefit and welfare of the state. Whatever was said by Perley, C.J. in the Fernald case, having a tendency to show that such was his view, must be understood as having reference to the facts of that case, and not as expressing a general rule to be applied whenever the question of public use arises. 99

Maryland also experienced this switch in judicial reasoning. In 1831 a railroad taking was upheld because the building of the track "must result in such a general advantage to the people as to warrant the court in pronouncing it . . . a public use . . . ." 99 However in 1905 the Maryland Supreme Court wholeheartedly endorsed the right to use test quoting the Pennsylvania's highest appellate court, "the test whether a use is public or not is whether a public trust is imposed upon the property." In other words "whether the public has a legal right to the use which cannot be . . . denied or withdrawn at the pleasure of the owner." 100

So as to leave no doubt as to the dominance of the right to use test the following tables are provided. Table 1 lists the states which switched from the broad benefit analysis to the narrow right to use test. Table 2 is a nearly complete breakdown of all states on the public use issue in eminent domain cases. The obvious conclusion is that American judges between 1870 and 1910 did not place economic development at the top of their minds when deciding eminent domain cases. And where takings by private businesses were upheld unique local conditions paved the way, either through constitutional provision, as in the West, or by stare decisis and long use, as in New England.
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FOOTNOTES


2. Lewis, Law of Eminent Domain, p. 466-69, cites no cases earlier than 1871 in his discussion of mines. A lengthy annotation published in 1928 finds only two states with cases prior to 1870, Pennsylvania and Iowa, but the latter's case was only in 1868. Bankhead v. Brown 25 Iowa 540 (1868). See Annot. 54 A.L.R. 56 (1928). The early Pennsylvania cases


5. Ibid., p. 214.


7. Ibid., p. 213, 216.

8. Ibid., p. 216.

9. Ibid., p. 217. The Court added to Rhodes' misery by assessing him the costs of the suit and the appeal.

10. 79 Pa. St. 257 (1876).


12. 79 Pa. St. at 266.

13. Ibid., p. 268. The argument ran as follows:

(T)he mining of 50,000 bushels of coal per day would give employment to hundreds of persons ... Their wages would be spent in the neighborhood for rents and subsistence. The value of the property would be enhanced thereby. All the owners of coal would be benefited by this coal field being brought into market in the like manner that they are benefited by other developments of the mineral wealth of the state.


15. Ibid., p. 269. The power of eminent domain was to be used only when some existing public need is to be supplied, or some present public advantage is to be gained. In this case the Court believed that
... not one element of public advantage has resulted from this road that would not be gained by the construction of any lateral railroad extending from a great highway like the Pennsylvania railroad to coal mines of the kind and capacity of those of the Hampton Company. *Ibid.*, p. 270.


19. *Ibid.*, p. 199, and at page 200 the Court elaborated:

We are unable to see in this evidence and report of commissioners any of the requisitions of the rule: the work is not even needed to supply a limited neighborhood with coal; they can otherwise obtain their supplies; it is not extremely difficult, much less impossible to do so; and there is no remaining supervision of law to regulate or secure any possible public interests.


21. Calif. Code of Civ. Proc. sec. 1238, subd. 5. The act also included "outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from the mines."

22. *Con. Channel Co. v. C.P.R.R. Co.*, 51 Cal. 269, 271 (1876). Additionally the Court noted the flume was "constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground ... No public use can possibly be subserved by it."

23. *Lorenz v. Jacob*, 63 Cal. 73 (1883), (taking for a ditch, whose real purpose was to work mines, denied); *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74 (1887), (taking for right of way through a tunnel denied); *Sutter County v. Nichols*, 152 Cal. 688, 93 Pac. 872, 875 (1908), (gold mining is not a public purpose). In this last case the court rejected the broad benefit analysis when it said: "It cannot be admitted, that the mining of gold to be wholly to the private use of this miner, to whatever extent it may increase the general output, is a public purpose in behalf of which the power of eminent domain may be resorted to . . . ."
24. The State v. Rwy Co., 40 Ohio St. 504 (1884).

25. Schoil v. German Coal Co., 118 Ill. 427, 10 N.E. 199, 201 (1887). Since the company could use the proposed tramway exclusively without violating any right of the public's, and since it owed no legal duty to the public, the Court held the public had no right to use the facility.
26. Ibid., The public was found to have no more interest in such works than it has in any other private business.


28. 11 Nev. 394, 398 (1876), Nev. Stat. 1875, 111.

29. Ibid., p. 402. Later, at p. 409, he emphasized "mining is the greatest of the industrial pursuits in this state."

30. 28 Utah 215, 78 Pac. 296 (1904); aff'd, 206 U.S. 527 (1906).

31. 78 Pac. at 298. J. McCarthy, author of the decision, also noted that "The mining industry in this state is second in importance only to that of irrigation." Ibid., at 247.

32. Ibid., p. 298.


34. 198 U.S. 361 (1905).

35. Ibid., p. 368.

36. Ibid.

37. Ibid., p. 370.

38. Ibid., p. 369. The Court stressed: "We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated we are at opinion that the use is a public one . . . ."


we are not inclined to accept that liberal definition of the phrase "public use" adopted by some authorities, which makes it mean no more than the public welfare or good, and
under which almost any kind of extensive business
which promotes the prosperity and comfort of the
country might be aided by the power of eminent domain.


42. Charles E. Dickinson, note Introduction, 3 *supra* at 34-5.

43. Clark v. Nash, 198 U.S. at 370. The Court concluded: "This Court
must recognize the difference of climate and soil, which render
necessary these different laws in the states so situated." This
same phenomena was noted by Clesson S. Kinney, a former student of
Thomas M. Cooley, in his *Treatise on the Law of Irrigation*,
(Washington: W.H. Lowdermilk & Co. 1894) p. 150-188. He labels
the different set of rights in the West as the "arid region doctrine"
He explains on page 153 the direct effect of climatic conditions upon
the law:

So the cause of the change in the arid region from the
common law rules (as the same are in force in England
and adopted by the Eastern States during the early
history of our country) can be attributed principally
to the difference in the condition of the arid region
from that of England and the East, as regards the equal
or unequal distribution of moisture.

44. Great Western Natural Gas & Oil Co. v. Hawkins, 66 N.E. 765, 771
(Ind. App. 1903). The Court held that these cases were "based
on the correct theory that the mining of ores is a private enter-
prise conducted solely for the benefit of the person or corporation
operating the mine."

45. *Ibid.* The cases are: Consolidated Channel Co. v. C.P.R.R. Co., (Cal.
1876), text with notes 21-22 *supra*; Scholl v. German Coal Co.,
(Ill. 1887), text with notes 25-26 *supra*; Edgewood Railroad Co.'s
Appeal, (Pa. 1876), text with notes 10-16 *supra*; Salt Co. v. Brown;
(W. Va. 1874), text with notes 17-20 *supra*.

46. *Ibid.*, p. 768. In sweeping language it was determined that while
furnaces, mills and manufactures promote, in a general sense, the
public welfare, "they lie without the domain of public uses for
which private ownership may be displaced by compulsory proceedings."


48. Alfred Phosphate Co. v. Duck River Phosphate Co. 113 S.W. 410 (Tenn.
1907). At p. 413 the Court determined the company was not a common
carrier and that "the only tonnage that would pass over this road
would be the private traffic of the petitioner."

50. Other cases include: Chesapeake Stone Co. v. Moreland, 126 Ky. 656, S.W. 762, 765 (1907); Phillips v. Watson, 63 Iowa 28, 18 N.W. 659, 661 (1884); Morrison v. Thistle Coal Co., 119 Iowa 705, 94 N.W. 507, 508 (1903); Chicago, etc. R. Co. v. Morehouse, 112 Wis. 1, 88 Am. St. Rep. 918, 923, 87 N.W. 849 (1901). For a complete listing see Annot. 54 A.L.R. 56, 69-70, (1928).


52. Phillips v. Watson, 18 N.W. at 661. The pattern established in the Arkansas and Iowa courts was followed in the twentieth century. In Chesapeake Stone Co. v. Moreland, note 50 supra, 104 S.W. at 765, Kentucky's highest court declared, "Nor is the fact that the public interest will be promoted by the contemplated improvement sufficient to authorize the taking . . . ." One page later the Court emphasized:

But the fact that the resources of mines and quarries are necessary for the public use will not in itself authorize the private owner in their development to take the land of the citizen for his individual use. While the courts will not shut their eyes to the necessity that exists for the development of the state, and will aid in every reasonable way the effort of those who are trying to build it up, yet these considerations will not be permitted to destroy the ancient and valuable right that private property shall not be taken except for public use.

53. Lewis, Law of Eminent Domain, note 73 chap. 2 supra, at 1:275. Drainage for the public health was always recognized as a public use. See Duke v. O'Bryan, 100 Ky. 710, 39 S.W. 444, 445-6 (1893), and Minnesota Canal and Power Co. v. Kooching, 107 N.W. 405, 412 (Minn. 1906).

54. 59 Ky. (2 Me.) 350 (1859).

55. Ibid., p. 356.

56. Ibid., p. 355.


59. Ibid.

60. In Jenal v. Green Island Draining Co., 12 Neb. 163, 167, 10 N.W. 568 (1881), the statute allowed three or more owners of wet lands to form a corporation to drain such lands and condemn a right of way for a ditch. In declaring this statute unconstitutional the
Court noted the ditch could serve only private interests and thus constituted "an infringement of the right of private property." Also on point are Fleming v. Hull, 73 Iowa 598, 35 N.W. 673 (1887); and McQuillen v. Hatton, 42 Ohio St. 202 (1884).

61. 42 Ohio St. at 204.

62. Ibid., p. 204, 205.

63. Wis. Laws 1891 c. 401, cited in Theresa Drainage Dist. v. Schmidt, 90 Wis. 301, 63 N.W. 288, 288-9 (1895). In their broad decision the Wisconsin tribunal turned their back on the broad benefit analysis, writing:

No doubt, such an improvement may be useful to some, or perhaps many, private owners of land, by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public only indirectly and remotely. . . .

64. Gifford Drainage Dist. v. Shroer, 44 N.W. 636, 638 (Ind. 1896).

65. 163 N.Y. 133, 57 N.E. 303 (1900).

66. N.Y. Const. art. 1, amend. 7 (1894).

67. 57 N.E. at 307. This statement shows a clear readiness on the Court's part to hold the law in a static condition. Flexibility and a readiness to aid dynamic economic forces is certainly absent.

68. Ibid. It should almost go without saying that the Court rejected the broad public use argument. Ibid., p. 305.


70. 57 N.E. at 305. The importance of constitutional provisions to drainage takings was also recognized in Williams v. Wedding, 165 Ky. 361, 176 S.W. 1176, 1181 (1915).

71. See note 17, Ch. 1 supra, for a definition of the term.

72. 57 N.E. at 305.

73. These factors will be reviewed in Chapters Five and Six. Chapter 5 is devoted entirely to judicial reasoning and stare decisis.

74. Dallas Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78 (1888).

75. Ibid., p. 80.
76. 32 Or. 582, 52 Pac. 573 (1898). It was to be a typical logging
dirt road with timbers laid crosswise and "imbedded in the earth
so that two or three inches project above the surface, thus form-
ing a track or way upon which logs or heavy timber may be more
readily drawn by logging teams than upon the ground."

77. Or. Laws 1895 p. 60.

78. 52 Pac. at 573, 574. To support its decision the Court cited those
well-known treatise writers Lewis and Cooley. Ibid., at 574.

79. Anderson v. Smith-Powers Logging Co., 71 Or. 276, 139 Pac. 736, 743,
(1914). Here the broad benefit definition of public use was
rejected outright. Again in 1922 an Oregon court observed:

Oregon has some of the largest and finest timbered
areas in the world. The commercial timber now
standing in Oregon is worth billions of dollars.
Timber is one of the foremost resources of this
great commonwealth; and this fact was strongly but
unsuccessfully urged in Anderson v. Smith-Powers
Logging Company, supra.

Smith v. Cameron. 210 Pac. 716, 721 (Or. 1922).

The Georgia Court based its determination on the right to use
interest and ignored state statutes permitting private railroads to
cross over any other railroad "when necessary to reach minerals
timber or other materials." Ga. Acts. 1899, p. 31. A similar result
803 (Ga. 1911) where the Court found no necessity for the Lumber
Company's road which crossed the railway company's tracks.

81. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681 (1903);
Cozad v. Kanawha Hardwood Co., 139 N.C. 283, 51 S.E. 932 (1905);
Hench v. Pritt, 62 W. Va. 270, 57 S.E. 808 (1907). Cases from
West Virginia denying takings by both miners and manufacturers have
previously been discussed. Salt Company v. Brown, text accompan-
ing notes 17-21 supra, and Varner v. Martin, text accompanying
notes 37-41, chapter 2 supra.

82. Healy Lumber Co. v. Morris, 74 Pac. at 682.


84. Healy Lumber Co. v. Morris, 74 Pac. at 682. Justice Dunbar
continued: "Its duty is to strictly recognize its legal limita-
tions and confine itself to the narrower duties of interpretation
and construction."
85. This theme of judicial reluctance to become involved in matters of policy is developed fully in Chapter 5, which discusses formalistic judicial thinking and its effect on eminent domain law.


87. The demise of the nation's all-out support for business growth in general, and in eminent domain law in particular, is the subject of Chapter 4.

88. Nichols, The Law of Eminent Domain, note 40, ch. 3, supra, p. 257 n. 95, concludes:

Although lumbering is in many states an industry of the greatest importance and the difficulty of bringing out logs... is often serious, the accepted principles of constitutional law have not been departed from, and the courts have not allowed the power of eminent domain to be bestowed upon individuals or corporations to enable them to get their logs to market by land or water.

Nichols did note an exception in states like Idaho, where the state constitution declared lumbering to be a public use.

89. See text and notes 49-52 supra, this chapter.


91. Ibid., p. 324.


93. 47 N.H. 444, 461 (1867).

94. Scheiber, "Property Law." at 243-244.

95. 72 N.H. 531, 58 Atl. 46 (1904).

96. Ibid., p. 47. The Court quoted from an earlier New Hampshire case, Salisbury Mills v. Forsaith, 57 N.H. 124 (1874):

I agree... that the act goes to the verge of the constitutional power of the Legislature, and I may say that, but for the authorities by which the court thought they should be governed in the late case of Amoskeag Co. v. Head, I should find great difficulty in sustaining it.

97. Ibid., p. 49. The position adopted here was consistent with the general trend. Nichols, The Law of Eminent Domain, 1:219-220, observed that takings for electric plants were not sustained on the ground of public benefit, but rather because the
power was distributed to the public in the manner of a public service, yet "when the circumstances are such that but few factories can use the power, the use is not considered public."

98. Ibid., p. 47. Sui generis means "the only one of its kind;" according to Black's Law Dictionary, 4th ed. 1968.


IV.
GENERAL ATTITUDES TOWARD BUSINESS
AND EMINENT DOMAIN LAW

In 1905 the North Carolina Supreme Court prevented an eminent
domain taking because "great and dangerous monopolies have been fostered
by the liberal construction put upon the term 'public use.'"\(^1\) This fear
of big business and monopolies was not confined to the North Carolina
judiciary, but was shared by the nation as a whole.

As American society became more and more industrialized, businesses
grew and "impinged on the lives of individuals as never before."\(^2\) As
the power of business grew so did the response of the people, which usually
took the form of state regulation. In order to free itself of these
unwanted chains the business community turned to the courts. At the
Supreme Court level this issue replaced the nation-state relationship
as the most pressing matter.\(^3\)

The rise of these regulations has been classified as part of a three
stage process of "promotion, repudiation and regulation."\(^4\) Under stage
one of this process, roughly from 1830 to 1870, the public demanded
railroads and canals to improve not just transportation, but more
importantly the economy. Better transportation was thought to ensure
economic prosperity. The main beneficiary of this sentiment was the
railroad. To expedite railroad construction and therefore economic
bliss, state governments gave the railroads aid in a variety of manners.
Two of the most important of these were the tax and eminent domain

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powers. The tax power was used when local communities pledged tax
dollars in return for stock in railroad companies, or when a municipality
pledged bonds to a railroad company. In either case this use of the
tax power received the unequivocal approval of the courts.\textsuperscript{5}

This same concern with economic growth and prosperity ran through
the early eminent domain cases. In Massachusetts, Chief Justice
Lemanuel Shaw upheld a mill dam taking because the establishment of
a manufacturing mill was of great public interest since manufacturing
had become one of the great industries of his state.\textsuperscript{6} Chancellor
Walworth, writing in New York, advocated that the broad benefit
definition be applied to the words "public use." "(I)f the public
interest can be in any way promoted by the taking of property," he
wrote, "it must rest in the wisdom of the legislature to determine
whether the benefit to the public, will be of sufficient importance to
render it expedient . . . to exercise the right of eminent domain."
He added:

Upon the same principle of public benefit, . . . in-
dividuals and corporate bodies, have been authorized
to take private property for the purpose of making
public highways, turnpike roads and canals; of
erecting and constructing wharves and basins; of
establishing ferries; of draining swamps and marshes,
. . . In all such cases the object of the legisla-
tive grant of power is the public benefit derived
from the contemplated improvement . . . .\textsuperscript{7}

A. Repudiation: Business Loses the Public's Support

This general enthusiasm for government aid to private enterprise
began to decline in the 1850's. The first glimpse of this trend occurs
in the tax subscription cases in Pennsylvania. The great hopes and
expectations accompanying the tax support to various railroad companies failed to materialize. When this happened cities and towns were left with a financial obligation to the railroad company or worse yet, the company's creditors, without receiving anything in return.\(^8\)

When the municipalities found themselves in this predicament of paying out tax dollars but getting little or nothing in return, they reacted by repudiating these unwanted financial commitments. This then is the second stage of the three part process. Naturally the municipal governments were taken to court by the holders of these obligations. To justify the repudiation government lawyers claimed that the contracts creating the debt were invalid because they involved the taking of tax money for a non-public purpose. They argued, in other words, that tax money can be spent only for public purposes and that buying stock in a private railroad or manufacturing company was not a public purpose. Judges in Pennsylvania did not yield to public pressure and upheld the validity of municipal obligations on the basis of contract law. But in a number of states beginning in Iowa in 1862 judges "bowed before angry popular reaction" and voided the obligations.\(^9\)

In the years following the Civil War many courts commented on the large debts and abuses which accompanied local governments buying stock in private corporations.\(^10\) State supreme courts in Iowa, Wisconsin, Michigan and New York refused to validate stock subscription schemes for railroad companies.\(^11\) And while the United States Supreme Court overruled the state decisions in regard to the railroads, the Court joined the states in preventing tax aid to non-railroad industries, like manufacturing enterprises. The reason for the denial was that
these enterprises were not for a public purpose or public use.  

Further evidence of the public's new anti-business attitude can be found in the state constitutions which either prohibited or restricted municipalities from subscribing in the stock of private corporations. At least nine states had such provisions including: Alabama, Arkansas, California, Colorado, Delaware, Indiana, Missouri, Pennsylvania and Texas. Thus in the arena of tax aid the public's anti-business anti-aid sentiments were echoed by the judiciary when it struck down such aid.

B. Regulation: Further Erosion of Public Support

The issue of tax aid was not the only way in which the public's displeasure with the growing power of business was registered. If tax aid was upheld, as in the case of railroads, or if a business never received such aid, as with warehouse operators, the public would turn to regulation to control the excesses of these business entities. This third stage of the promotion, repudiation and regulation cycle began around 1870 with the Granger Movement in Illinois and the surrounding states. The movement illustrated the frustration of small farmers and businessmen when confronted by large powerful corporations like the railroads. In short, aid to railroads and other corporations was no longer seen as a sure-fire way to enrich a community.

The public's hostility toward the railroads centered upon rate discrimination, which took three forms: (1) discrimination in favor of long haul users like grain merchants and manufacturers; (2) discrimination against seasonal users like farmers, and (3) discrimination along non-competitive lines which tended to hurt the small user.
Yet one other fact added to the public's outrage toward the railroads and that was their apparent collusion with local grain elevator operators. The connection between the two occurred in one of two ways. First some railroads, to increase business and guarantee elevator space and handling facilities along their tracks, would grant special rates and rebates to grain dealers and elevator operators. Secondly railroads might build their own elevators and buy grain themselves. Competing dealers would be denied access to the railways or charged at higher rates. Farmers and small merchants thus believed themselves to be surrounded by monopolies squeezing them for every last penny. 19

The first and foremost reaction to this set of events occurred in Illinois. A survey of Illinois legislation in the 1860's shows a constant move towards railroad regulation. Yet it was not until the Constitution of 1870 that significant legislation appeared. The fact that the railroad sections passed by a larger margin than the constitution itself shows the strong support such regulatory action had. The vote on the constitution was 134,227 in favor with 35,443 opposed and the railroad sections were approved 144,750 to 23,525. 20 The key constitutional sections provided that the legislature should establish reasonable maximum rates for the railroads and prevent unjust discrimination in rates. 21 Legislation to carry out these provisions occurred in 1871 and 1873 showing that the support of such regulation was not an overnight flash.

The same attitude which shaped the regulatory provisions of the Illinois and other state constitutions also left its mark upon eminent domain law. Both the taking concept and the compensation requirements
were enlarged after 1850 shifting more of the burden of economic expansion from the individual landowner to the corporate condemnor. Tracing the development of each of these notions will illustrate, in part, the shift in American sentiment from economic growth at any cost in the first-half of the nineteenth century, to a more balanced approach, which took into consideration the rights and interest of individuals and not just the wants of private corporations.

C. Reform of the Taking Concept

The Fifth Amendment holds "nor shall private property be taken for public use, without just compensation." In order for there to be an argument as to what is a public use or what is proper compensation, there must first be a taking. Precisely what constituted a taking was an on-going controversy in the 19th century.

The change-of-grade cases often provided the setting which raised this issue. The problem arose when a city changed the grade of its streets. If it lowered the street grade it might expose the foundation of adjacent buildings and create the danger of collapse. On the other hand, if the grade were raised the first story of a building could be covered up and access to the building completely blocked. In either case the abutting land owner would go to court claiming his property had been taken and that he was owed compensation. More times than not, especially before 1870, the property owner would find no relief in the courts. For example in an early case with facts like those described in the first situation above, the Supreme Judicial Court of Massachusetts denied a homeowner compensation stating that compensa-
tion has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government. The same result occurred where the street grade was raised. The denial of compensation was contagious and spread to other fact situations such as where an individual's land was flooded by the construction of a dam downstream.

The denial of compensation was based on the courts' definition of what constituted a taking. Mere damage or even destruction of property value was not a taking, rather the property had to be formally appropriated for public use. The Pennsylvania Supreme Court could be speaking for the majority of courts when it declared, "(t)he constitutional provisions for the case of private property taken for public use, extends not to the case of property injured or destroyed." The Maine Supreme Court claimed that to take land for public use the state had to deprive the owner of his title. As a result of these pronouncements indirect or consequential damages were found not compensable. The rationale behind this denial was stated as early as 1828 when a New York Court explained that consequential damages arising from public improvements must be borne as part of the price of living in organized society and that "the general good is to prevail over partial individual convenience." Summarizing the status of the law on this point in 1857, one commentator observed:

It seems to be settled that, to entitle the owner to protection, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim renumeration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.
This rule has been repeatedly declared in many of the States of the Union.\textsuperscript{31}

In the 1870's with the cases of \textit{Pumpelly v. Green Bay Company}\textsuperscript{32} and \textit{Eaton v. Boston Concord and Montreal R.R.}\textsuperscript{33} the taking concept begins to expand. As noted before there was diversity among the states in their application of eminent domain law. So while the majority may have adhered to a narrow taking concept some courts did award compensation for the destruction or loss of value to property.\textsuperscript{34} Yet the majority of legal writers point to \textit{Pumpelly} and \textit{Eaton} as the vanguard of a new expanded taking concept.\textsuperscript{35} In \textit{Pumpelly} a dam had been built under a state statute for flood control causing the waters behind the dam to overflow onto 640 acres of Pumpelly's land. While there had been no physical appropriation of the land for public use, the Supreme Court found compensation was required because:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.\textsuperscript{36} (emphasis in original)

\textit{Eaton} also involved a flooded land situation. Here a railroad company in laying tracks across Eaton's land had cut into a nearby ridge allowing an adjacent river to flood his farmland periodically making it unfit for farming. Although it paid for the land on which its track lay, the railroad refused to pay for the flooding damage. In deciding the case the New Hampshire Supreme Court announced that property consisted of a bundle of rights, including the right "to possess, use,
enjoy, and dispose of a thing," and therefore any physical interference which subverts the owner's rights in the property is a taking of that property.\textsuperscript{37} Although these cases marked a new, broader path for determining when a taking had occurred both were limited in their immediate impact because subsequent cases limited their holdings to narrow fact situations such as where there was a permanent physical invasion of land as in a flood.\textsuperscript{38} However in the remainder of the nineteenth century and into the twentieth century a definite, if slow moving, trend can be detected which allowed compensation where there had been a physical interference with the legal relations of property.\textsuperscript{39}

The legal treatise writers exemplify the division of opinion regarding eminent domain takings in the last quarter of the nineteenth century. The conflict between Thomas M. Cooley and Christopher G. Tiedman is a case in point. Cooley followed closely the physical encroachment test which required a physical invasion of property depriving the owner of the ordinary use of his property. He cited favorably the flooding cases like\textsuperscript{40} Pumpelly. However where there was no direct encroachment upon an individual's property, as in a change in the street grade, Cooley maintains that "in these and similar cases the law affords no redress for the injury."\textsuperscript{41} Tiedman, on the other hand, would follow a more liberal test in regard to the street grade situation. The "complete exclusion from the ordinary use of the street or an ... unreasonable interference with such use," writes Tiedman, "would support a claim for compensation, as being a taking of property in the exercise of the right of eminent domain."\textsuperscript{42}

One of the factors broadening the scope of what constituted a
taking was a change in the definition of property. So long as property 
was thought of as merely a tangible item there could be no taking until 
the tangible item was possessed by the government. (Whether intended or 
not this was consistent with the old common law emphasis on possession 
rather than ownership.) However if property is viewed as the rights 
and privileges associated with the use and enjoyment of a tangible object 
then a taking occurs when any of these rights is adversely affected. 
In the words of the New Hampshire Supreme Court, "Property is taken, when 
any one of those proprietary rights is taken, of which property consists."43

But it was not a change in legal principles which truly explains 
the new expanded definition of taking, rather, it was the harsh effects 
of the old narrow taking view which ignited the wrath of the people who 
took their complaint to their state constitutional conventions. This is what 
really moved the law. The denial of compensation on the grounds that 
there was no taking had a progressively severe affect upon landowners 
because of the dramatic changes in America's economic and social life. 
During the colonial period and the early Republic, highways could be 
laid out with slight grades which inflicted little damage upon 
neighboring lands. At this time claims for damages to adjoining lands 
were infrequent.44 However with the rapid growth of the country two 
factors came into play which greatly increased the number of damage 
claims. The first factor was the rise of the railroad.45 State legis-
latures eager for the fruits of railroad transportation quickly dele-
gated the power of eminent domain to the railroads. Unlike the dirt 
highways of the eighteenth century the laying of railroads "required 
much cutting and filling to establish a reasonably level road bed,"

which had the side effect of inflicting great injury upon adjacent
lands. One of the ramifications of this was an increase in the
number of damage claims against those exercising the power of eminent
domain.

The other major factor affecting damage claims, and eminent
domain law in general, was the rise of the large city. To accommodate
the increased traffic within the cities it often became necessary to
raise or lower street grades. Sometimes this was done so that railroads
could be laid in the streets. Unfortunately for the adjacent landowner
this process would all too often undermine the foundation of his build-
ings or block access to them, in either case he suffered large economic
setbacks. However because of the courts' narrow view of what
constituted a taking these property owners got no compensation.47

In 1870 Illinois became the first state to address this problem
at its constitutional convention. The push for constitutional revision
was led by the political and business leaders of Cook County who were
looking for better ways to deal with Chicago's increasing urban
problems, for in the preceding ten years, the population of Chicago
had tripled.48 Among Chicago's many woes was the damage to property
committed by street railroad construction within the city. In describ-
ing the situation at the Constitutional Convention, William H. Underwood
exclaimed:

The courts have decided that cities in their
grading, may cut down lots so as to almost ruin
men and subject them to enormous expense, or they
may raise the grade of streets so as to cause water
to run upon lots, and make property comparatively
worthless, but that is a damage for which lot-
owners are entitled to no compensation.49
The situation was so severe that Philip Michols in his two volume work on the law of eminent domain concluded, "It was in the rapidly growing city of Chicago that the most serious injuries to property by the construction of public improvements occurred. . . ."\textsuperscript{50}

The Illinois Constitution of 1870 addressed the hardships of Chicago property owners in two ways. First the new document forbade the legislature from granting the right to construct and operate street railroads without local consent. This prohibition was inspired by the infamous "Ninety-nine Year Act" which, passed in 1865, extended for ninety-nine years the charters of the three street car corporations operating in Chicago.\textsuperscript{51} The second approach utilized by the constitution was to add the words "or damaged" after the word "taken". Now the constitution read: "Private property shall not be taken or damaged for public use without just compensation."\textsuperscript{52} This provision was warmly received in other states so that by 1879 eleven other states had similar versions and eventually the total would rise to twenty-two.\textsuperscript{53} It cannot be overlooked that the same Illinois Constitution which regulated railroads and warehouses was the first to expand the concept of taking for eminent domain purposes. The attitude of the public did indeed influence eminent domain law.

\textbf{D. Reform of the Just Compensation Requirement--The Role of Juries}

Another aspect of eminent domain law which was greatly influenced by the public was the compensation requirement. The public's input mainly affected the procedure for determining the amount of compensation owed. In particular emphasis was placed upon the role of juries and the offset doctrine.
During the colonial period it was the custom, in assessing damages in condemnation cases, to have a tribunal of less than twelve determine the damages, but this was not a jury. Later, when new constitutions were adopted after Independence, the common practice in most of the original thirteen states remained "to refer the question of damages from the construction of ways or drains of mill dams to a commission of viewers or appraisers, generally three or five in number." Yet some states, like New York and Pennsylvania, apparently through statutes, allowed jury determination of damages. And in such states the use of juries came under attack by companies who had been delegated eminent domain authority because of the large damages juries awarded. Even when damage awards were low, complaints were heard, as in 1798 when a canal company reported to the New York legislature that in one case damages were assessed at only one dollar but the cost of litigation amounted to $375. Occasionally the legislatures would grant the companies request, and stop jury assessment of damages. In the 1830's, with the introduction of railroads, the elimination of jury assessments became commonplace, as an obvious accommodation to the railroad companies.

The reason most states, with the exception of Massachusetts and Maine, could at one time require jury assessments and at another time prohibit them was that juries were found not to be required for condemnation proceedings by either the Federal Constitution or most state constitutions. In Massachusetts and Maine juries were thought to be constitutionally guaranteed. While the Seventh Amendment to the United States Constitution states that in suits where the value exceeds twenty dollars "the right of trial by jury shall be preserved," one commentator
has noted that this merely preserved the right of trial by jury in suits at common law.59 Two reasons therefore arise as to why the Constitution fails to require the use of juries in eminent domain cases. First, condemnation proceedings were not suits at common law, and second, the amendment only preserves the right to a jury, it does not create a new right where one had not previously existed.60 In light of the fact that juries had not been part of such proceedings in the past, their use could not be compelled by the Seventh Amendment.61 Thus when the lack of a jury was argued as a constitutional infringement the Supreme Court remained unconvinced, Justice Brewer, citing Cooley among others, announced:

Neither can it be said that there was not "due process of law" in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury.62

The use of juries fared no better under state constitutional provisions guarding the right of trial by jury. The majority of state constitutions provide only that "the right of trial by jury shall remain inviolate or shall continue as theretofore practiced." At least eighteen states use the "inviolate" language, while another six use the "therefore practiced" or similar formulation.63 As with the federal provisions, these constitutional provisions did not expand the use of juries to proceedings which had not used juries previously, rather these provisions were only a guarantee of maintaining the status quo. Since most states had not employed juries in assessing damages in the past it was determined by thirty-two state courts that juries were not required by their respective state constitutions.64
While the courts may have believed that an impartial tribunal, such as a board of appraisors, could meet the constitutional command of determining a fair compensation for the injured party, in practice, this failed to occur. The main obstacle to securing fair compensation was the offset doctrine. This doctrine provided that in cases where a landowner's property was not entirely taken that any benefits accruing to the remaining land should be offset or subtracted from the estimated amount of damages due from the condemned land. The doctrine appears to coincide with the use of appraisors or commissions, like in New York in 1810. And even Massachusetts amended its constitution to allow for consideration of benefits to the remaining land in 1829 which was when other states were removing juries and replacing them with appraisors. The presence of the offset doctrine, coupled with sly behind the scene maneuvers, led to the abuse of property owners at the hands of those exercising the power of eminent domain. Take for example Ohio, where the railroads were quite successful in obtaining the appointment of friendly appraisors who would frequently assess the benefits accruing to the remaining land as equal to the damages from the expropriated property. Elsewhere, such as in Illinois, damage awards were often just one dollar.

In 1851 the states, through their constitutional conventions, began to respond to these abuses. One of the ways sought to remedy the problem was through the use of jurics. The Ohio convention of 1850 was the first state to embark on such a program. In addition to requiring that compensation be determined by a jury of twelve men the convention also wrote into the new constitution commands of prior payment to the injured party
and a prohibition of considering benefit in damage determination.\textsuperscript{68}

Before the 1850's had ended both Iowa and Kansas had adopted nearly identical provisions.\textsuperscript{69} Meanwhile in 1851 Michigan added a new twist to the use of juries by requiring that "the necessity for the taking should be passed upon by a jury or by commissioners appointed by a court."\textsuperscript{70} Eventually twenty states would adopt constitutional requirements for the use of juries in determining the value of property taken through condemnation.\textsuperscript{71} Of special interest is the fact that in six of these states, Arkansas, Illinois, Maryland, Missouri, Ohio, and Pennsylvania, the constitutional revisions specifically overturned court decisions which had held that juries were not required by the respective state constitutions.\textsuperscript{72} This notion of jury determination for compensation was later added to federal eminent domain proceedings by statute and judicial construction.\textsuperscript{73}

E. Response of the Courts

The public's demand for jury assessments was not lost on the courts. For instance in the Matter of Peter Townsend, a New Jersey corporation had flooded land in New York when it built a channel to increase trade with New York City.\textsuperscript{74} Later the New York legislature passed an act which not only authorized the reservoir taking but also provided for determining the compensation by three appraisors. The key issue was whether the legislature could deprive a landowner of access to the common courts and leave him redress only to a summary proceeding of three appraisors. The acts' validity was sustained by the trial court, but the appellate court reversed holding that landowners had the right of redress to the local courts and to have their damages assessed by a jury.\textsuperscript{75}
Of added importance is that a strong presentation was made to uphold the act on the basis of economic growth. In a vigorous dissent, Judge Miller argued that all railroads and canals augment trade and "contribute benefit and advantage to the city, and to the whole State, and to the whole country." He continued that every avenue of commerce which accommodates trade with New York City "is of paramount importance."  

This same lack of concern with economic consequences permeated the public use cases. This sentiment manifested itself not only through the rejection of the broad benefit analysis but also through the courts' willingness to pierce the corporate veil and determine who really benefited from a proposed taking before allowing the taking. Time and again the courts would look beyond a statute or corporate charter which asserted that the proposed taking was to be for a public use. In Tennessee it was suggested that because the state-approved charter of the company provided that any right of way condemned would be a public road, then "the Legislature has impressed a public character upon this property." But the Tennessee court was unimpressed finding that "a mere legislative declaration that the right of way shall be a public road would not change its character."  

In regards to corporate documents, the Oregon Supreme Court maintained that a court is "not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation . . . ." Instead a court may resort to other evidence to show what actual business will be conducted on the condemned land.  

Spur track takings gave the courts their greatest opportunity to perform their probing surgery. A typical case is Robinson v. Pittsburgh R.R. Co. Here the owners of the Pittsburgh Coal Mining Company formed
a new corporation, the Pittsburgh Railroad Company. The new corporation then sought to condemn a right of way from the mineowner's mine to a river so as to transport coal to market. The railway corporation's charter stated its purpose was to transport freight and passengers and that the railway was for a public use. However when constructed the railway had no cars for passengers and the only freight cars were for carrying coal. Based on this evidence the Court annulled the corporate franchise and dissolved the corporation. 80

The repeated attempts of business executives to incorporate puppet transportation corporations, endowed with the power of eminent domain, were met by the repeated refusals of the courts to approve takings by these new single purpose corporations. New York judges were especially tough on this matter. In one case the New York judiciary found that practically all the incorporators of a cable road company were stockholders in the mining company to which the one proposed track of cable road company was to run. 81 This fact, coupled with the inability of the public to use the road, led to the condemnation's defeat. In addition to those states already mentioned, (Tennessee, Oregon, California and New York) courts in Illinois, Louisiana, Maine, New Jersey and Virginia would go beyond declarations of public use to see how the proposed taking would actually be used. 82 In the candid words of the Louisiana Supreme Court:

Because a corporation is organized as a railroad corporation, and says in its petition that it wants the property for a public purpose, it does not follow that the property is not sought to be taken for a private purpose. What men say in their notarial acts and in their petitions is not always true. 83

In this chapter I have tried to show how a shift in public sentiment
away from government support of business occurred in the second half of the nineteenth century. The most vivid portrayal of this shift is in regard to tax aid. Prior to 1860 the public and the courts smiled on municipal governments buying into railroad corporations. When things did not turn out as planned these same local governments attempted to repudiate their debts. Except for the railroads, the Courts blocked all tax aid given to private industries. Later the public would turn to regulations to curb the power of the mighty corporations. Thus in the last third of nineteenth century a healthy antagonism towards business can be seen developing in America as evidenced not only by state regulations but also by the arrival of the Interstate Commerce Commission and the Sherman Anti-Trust Act on the federal level.

This new separation of the public's interest from that of business' left its mark on eminent domain law. Two important techniques for keeping the cost of condemnations down—a narrow taking concept and use of appraisors—eroded away through judicial precedent and more importantly, through state constitutional amendment. This last factor demonstrates the public's uproar over the inequities of the old system which favored the condemnor. Finally we saw that American judges were not willing to accept the corporations assertions that their taking was for a public use. Now the judiciary was willing to look behind the corporate assertions to see if the taking truly was to be for a public use, or was it only a subterfuge to aid private business.

Placed against this background, the adoption of the narrow right to use test seems quite logical. In fact taken as group, the three concepts of eminent domain—taking, public use and just compensation follow a
parallel path according to the general attitude toward economic ex-
pansion. Prior to 1850 support for business and economic expansion
was strong. Each eminent domain concept reflected this belief. The
taking concept was narrow so as to cut down the cost of business growth.
The procedure for compensation, by eliminating juries and utilizing the
offset doctrine, was also aimed at reducing costs. And the public use
concept was broad, giving as many businesses as possible the opportunity
to expand and increase their wealth. But between 1850 and 1870 a shift
of opinion occurs and not surprisingly, so did each of the three concepts.
In 1870 through judicial precedent and state amendment, the notion of
taking was broadened, which meant higher costs to those using the
power of eminent domain. After 1850, by amendment again, the compensa-
tion procedure was modified to ensure juries assess damages and not
appraisors susceptible to condemning influence. This too increased
the costs to business, but the public didn't seem to mind. In this way
eminent domain law consistently followed the public's attitude toward
business. When the public's attitude was favorable toward business so
was eminent domain law. And when the public's attitude shifted so did
eminent domain law. This shift in attitudes explains in part the popu-
licity of the restrictive right to use test between 1870 and 1910.
FOOTNOTES


3. Ibid., p. 103.


5. Tax aid to railroads was supported by the courts for the precise reason of economic development. For examples of this support see text and accompanying notes 23-28 chap. 1 supra.


8. See text accompanying notes 29-32 Chap. 1 supra.


10. See text and notes 33-35 Chap. 1 supra.

11. See Hanson v. Verner, 27 Iowa 28 (1868); Whiting v. Sheboygan and Fond du Lac R.R. Co., 25 Wis. 167 (1870); The People ex rel. The Detroit & Howell Railroad Co. v. The Township Board of Salem, 20 Mich. 452 (1870); People ex rel. D. etc. R.R. Co. v. Batchellor, 53 N.Y. 128 (1873). These cases are discussed fully on pages 13-15.

12. See generally text accompanying notes 61-71 for state decisions and notes 72-83 for the federal cases. See especially in text note 71 and note 82.

13. Ala. Const. of 1901, art. 1 sec. 29, "eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads . . . ." Ark. Const. of 1874, art. XX (1884); Calif. Const. of 1879, art. IV §22; Col. Const. of 1876, art. V. §34 and art. XI §1; Del. Const. of 1879, art. VIII §8; Ind. Const. of 1851, art. 10 §6. (merely restricted subscrip.); Md. Const. of 1875, art. IX §6; Pa. Const. of 1838, art XI §7 (1857), and Tex. Const. of 1876, art. XI §3.

The social protests of the post-Civil War era stemmed from the great pace of industrialization, and more particularly, from the swift concentration of economic power in the large corporation. Midwestern and Southern farmers, unable to control their marketing through organization and suffering from a long-term international price decline, complained bitterly of monopolistic rates by railroads, grain elevators and banks.

15. McCurdy, "Justice Field" at 246. He notes that "(by) the 1870's... various socioeconomic groups began to perceive that their interests were no longer congruent with those of the corporations that government had created and subsided." See Hyman, *A More Perfect Union*, p. 313.

16. Long haul discrimination existed because in most cases railroad companies "had to construct and maintain their own highways and had to provide elaborate terminal facilities. The companies therefore assumed that the larger the volume of business the easier to distribute the fixed overhead expenses. The effect of this policy, to seek long-haul traffic at lower rates than for the short hauls, put a burden on the short haul customers such as farmers who "at some places had to haul their wheat fifteen or twenty miles beyond their nearest market to get the benefit of more favorable rates." George H. Miller, *Railroads and the Granger Laws*, (Madison: The University of Wisconsin Press, 1971) p. 17 and Rasmus S. Saby, "Railroad Legislation in Minnesota, 1849-1895," *Collections of the Minnesota Historical Society*, vol. 15 (May 1915) p. 68.

17. Since the railroad business was seasonal there often was a heavy demand, but the demand was one way, like at harvest time. Railroad management reasoned that since the trains would have to return anyway, would it not be better to offer low fares to induce business on the return trip rather than have the trains run empty. Consequently "a manufacturer will send on his goods West and pay not more than five per cent a twentieth or thirtieth part of what the farmer pays on his products," complained Edward Martin in his book, *History of the Granger Movement*, (Philadelphia 1873) Burt Franklin: Research and Source Works Series #164 (American Classics in History and Social Science #24) (reprint ed., New York: Burt Franklin, 1967), p. 317.

18. The third factor which contributed to rate discrimination was the fierce competition between the railroads. Since economics dictated
low fares over long hauls, note 16, supra, where competition existed the railroads lowered prices even further to attract customers to cover overhead operating expenses. To make up for these low rates at competitive points the companies would raise rates along the non-competitive lines.


22. U.S. Const. Amend. V.

23. Perhaps the best known example of this situation is Callender v. Marsh, 1 Pick. (18 Mass.) 418, (1823).

24. See Roberts v. City of Chicago, 26 Ill. 249 (1861), and Murphy v. City of Chicago, 29 Ill. 279 (1862).


32. 80 U.S. (13 Wall.) 166 (1871).

33. 51 N.H. 504 (1872).

34. Early cases awarding damages for the destruction or loss of value to property include: Crenshaw v. Slate River Company, 6 Rand 245, 264 (Va. 1828); Boston and Roxbury Mill Corp. v. Newman, 12 Pick. (12 Mass.) 467 (1832); Clover v. Powell, 2 Stockt. (10 N.J. Eq.) 211 (1854); Old Colony and Ball River R.R. v. County of Plymouth, 14 Gray (80 Mass.) 144 (1859). Surprisingly scholars like Cormack (supra note 31) and Reznick (note 35 infra) have ignored Nevins v. City of Peoria, 41 Ill. 502 (1866), which held that "To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid. at 511. And at p. 515 the Court specifically rejects the notion of damnum absque injuria, which means that some injuries are not recoverable under the law, and as applied here usually means that private inconvenience must be sacrificed for the public good. What makes this case significant is that the holding of the case was designed to do the same thing as article II 13 of the 1870 Constitution, namely provide compensation to person's whose property was damaged, but not taken. Later cases ignored Nevins like City of Pekin v. Brevton, 67 Ill. 477, 480-481 (1873), where in upholding a recovery for consequential damages, the only authority referred to was the new constitution's clause. Why Nevins was overlooked at the constitutional convention and in subsequent decisions remains a mystery.


36. 80 U.S. (13 Wall.) at 177.

37. 51 N.H. at 511.

38. For example Transportation Company v. Chicago, 99 U.S. 635, 642 (1878), characterized Pumpelly as a most extreme construction and limited its application to direct physical encroachments.

316, 335 (1872); McCombs v. Akron, 15 Ohio 474 (1846); and Ranson v. Sault Ste. Marie, 143 Mich. 661, 107 N.W. 439 (1906). For an exhaustive list of such case using the legal relations concept see Cormack, "Legal Concepts in Eminent Domain" note 31 supra, p. 261 Appendix B.

40. Cooley, Constitutional Limitations, p. 671-672 and 675.

41. Ibid., at 672-673.

42. Tiedeman, Police Power, note 1, Chapter 1, supra, p. 419.

43. Thompson v. Androscoggin Co., 54 N.H. 545, 551 (1874).


45. The importance of the railroad was described by Henry Hitchcock in American State Constitutions, An Address Delivered Before the New York State Bar Association at its Tenth Annual Meeting at Albany New York, Jan. 10, 1887, (New York: C.P. Putnam's Sons, 1887) at page 453 relying on Professor Hadley's work on railroads he observed: "A new system of commercial and social relations had arisen among us . . . Of these changes the railroad is at once an instrument and an example . . . . No one symptom in business or in politics marks the direction of national activity so clearly as does the way in which the transportation system is organized and controlled."


51. Cornelius, Constitution Making, p. 75-76. Dissatisfaction arose from the suspect circumstances which surrounded the passage of this law such as: (1) speeding the bill through the House where it passed 66 to 3; (2) being read in the Senate three times in one day and passed that same day, and (3) overturning the governor's veto which was a response to the public uproar against the bill.

52. Illinois Const. of 1870, art. II 13.

53. Nichols, The Law of E.D., 2:844. For example in the Texas Con-
stitutional Convention of 1875 the Committee on Bill of Rights' report allowed compensation for property which was taken, damaged or destroyed. On the convention floor one delegate offered an amendment which would have struck the words "damaged" and "destroyed". The defeat of this amendment indicates that the delegates did not desire to have the old narrow view of takings but rather chose to follow the new broader approach. *Journal of the Constitutional Convention of the State of Texas, 1875*, p. 349, Printed for the Convention at the "News" Office Galveston, 1875.


56. Ibid., p. 84.

57. For a complete discussion of the use of juries in condemnation proceedings in Massachusetts and Maine see Nichols, *The Law of Eminent Domain*, 2:941-942. For a list of the cases declaring that the use of juries is not required see 2:940, note 12. Among the states listed are Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, South Carolina and Vermont.

58. U.S. Const. Amend. VII.


60. *Beatty v. U.S.*, 203 Fed. 620, 626 (Fourth Circuit, 1913), where it was observed that "the process of condemnation as practiced since our written Constitution did not exist at common law." Condemnation proceedings were not suits at common law because the term "eminent domain" was alien to the common law. The term is believed to have originated with Hugo Grotius' *De Jure Belli ac Pacis*, published in 1625. Noting that an individual's right or rights could be taken from him by the force of dominium eminen, Grotius maintained that to exercise this force the state must act for the public's advantage and "that compensation from the public funds be made, if possible, to the one who has lost his right."


63. Nichols, The Law of Eminent Domain, 2:939-940 note 11. To Nichols list of states using the "inviolate" language should be added the state of Iowa, see Iowa Const. art. I, sec. 8.

64. Ibid., p. 940.

65. Horwitz, Transformation of American Law, p. 84 and notes therein.

66. Scheiber, "Property Law," p. 237. Scheiber points out in note 20 of the same page that in New York because of the offset technique awards of six cents became a "cause celebre".

67. Tonica and Petersburgh R.R. Co. v. Unsicker, 22 Ill. 221 (1854). Here the commissioners appointed at the railroads insistence assessed damages at one dollar, but fortunately for Unsicker he had the right to appeal to a jury which assessed his damages at $800.


69. Ibid., at 235. See Ohio Constitution art. I, sec. 18.

70. Nichols, The Law of Eminent Domain, 2:922. Apparently the Michigan delegates were unaware of the difficulties Ohio property owners had experienced with court appointed appraisors. Wisconsin also adopted a provision requiring a jury to consider the necessity of taking before a municipality could exercise the power of eminent domain. Wisconsin Constitution, art. 11, sec. 2.

71. Ibid., at 939, note 10. Cooley also acknowledges this trend at page 705 note 1 of his Treatise on Constitutional Limitations.

72. Ibid., at 939 note 10. However this figure may be higher than Nichols calculated because a review of his figures in note 64 supra, which lists the states where the courts held juries were not constitutionally required, reveals the following: Florida, Iowa, New York, North Dakota and South Carolina. Yet on page 939 of his work Nichols cites the following constitutions as requiring jury determination of compensation: Florida, Const. art. VI, sec. 29; Iowa, Const. art. I, sec. 9; New York, Const. art. I, sec. 7; North Dakota, Const. art. I, sec. 14; and the South Carolina Const. art. XII, sec. 6. Further doubt may be cast on Nichols' figures because this author has discovered that he referred to the wrong section of the Iowa Constitution in reference to the requirement of juries. He
referred to art. I, sec. 9, when the proper section is sec. 18.

73. Ibid., at 939 note 8. See Chappell v. U.S., 160 U.S. 499 (1896) and Beatty v. U.S., 203 Fed. 620 (1913). The statute involved was sec. 2 of 25 Stat. 357, c. 728 (U.S. Comp. St. 1901, p. 2517) (1888), which stated that federal eminent domain proceedings will conform as nearly possible to those in the state in which the action arose. The language of the Beatty opinion seems to make the use of juries mandatory because the Court reversed a condemnation proceeding because of the lack of a jury. 203 Fed. at 627.

74. 39 N.Y. 171 (1868). The flooding occurred when a reservoir was built to supply the canal with water.

75. Ibid., p. 179.

76. Ibid., p. 183. (J. Miller dissenting).

77. Alfred Phosphate Co. v. Duck River Phosphate Co., 113 S.W. 410,414 (Tenn. 1907). The Court said the true question is how the property sought to be condemned will be used.


79. 53 Cal. 694 (1879).

80. Ibid p 695 and 697. Similar drastic action occurred in Ohio. See State v. Rwy. Co. (1884) text accompany note 24 chap. 3. In Pennsylvania only the condemnations were stopped. See McCandless's Appeal and Edgewood Railroad Co.'s Appeal, text accompanying notes 4-15, Chap. 3.


82. Chicago & E.R.R. Co. v. Wiltse, 116 Ill. 499, 6 N.E. 49,52 (1886); New Orleans Terminal Co. v. Teller, 113 La. 733, 37 So. 624-628 (1904); Brown v. Gerald, 61 Alt. 785,795 (Me. 1905), (look to ultimate use); Costar v. The Tide Water Co., 18 N.J. Eq. 54, 66 (1866); Fallsburg Pwr. & Mfg. v. Alexander, 43 S.E. 194, 198 (Va. 1902).

83. New Orleans Terminal Co. v. Teller, 37 So. at 628. In this case the Court held as proper a series of questions concerning the terminal company's stock subscription, employees hired and rolling stock purchased. The Court even allowed the company's attorney to be put on the stand and asked "How much stock do you hold in the New Orleans Terminal Company?" All these inquiries were found relevant to the question of public use., Ibid., p. 628,629.
V.

JUDICIAL REASONING AND THE PUBLIC USE CONCEPT

At the close of the last chapter it was shown how eminent domain law was molded to further economic growth prior to the Civil War. The taking concept was narrow, the public use concept broad, and the compensation procedures were designed to lower the costs of compensation. Businesses could condemn private property for a wide variety of purposes knowing full well that their expenditures would be minimal.

All of this was quite consistent with the prevailing notions of how law was to operate in ante-bellum America. When confronting new problems judges looked not to past precedent or abstract principles, but rather looked at the actual ramifications of their decisions. Judges centered their attention upon social policy and tried to make their decisions achieve certain policy goals. To put it simply, they were result oriented. Through their decisions judges wanted to achieve results which would benefit society, and the main vehicle they used to achieve this goal was economic growth. As William E. Nelson explained "the law focused primarily on the promotion of economic growth by deciding specific cases in a manner 'most conducive to the general prosperity of commerce.'"\(^1\)

Another historian, Morton J. Horwitz, has claimed, "during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channeling economic development."\(^2\)

The same author labels this notion as the "instrumental conception of law."\(^3\) But why the fancy label? All that Horwitz describes is plain vanilla utilitarianism as laid out by Jeremy Bentham.\(^4\) But whatever one calls it, the promotion of economic prosperity did play a big role in the
early tax aid and eminent domain cases.\textsuperscript{5}

In 1859 Darwin published his renowned \textit{Origin of Species} and Marx his famous \textit{Critique of Political Economy}. Darwin thus became "the scientist and Marx . . . the sociologist."\textsuperscript{6} Their books provided the impetus for science and scientific thinking to dominate intellectual thought. The belief arose that the problems could be solved by applying scientific principles and reasoning.\textsuperscript{7} This scientific mode of thought was welcomed in late nineteenth century America where social and economic changes were moving rapidly as America was transformed from a rural and agricultural society to an urban and industrial giant. Soon all intellectual disciplines were restructured so as to accommodate the scientific study of man and society.\textsuperscript{8} And the hope that science offered was not limited to the ivory towers of academia, but spread out in all directions for the application of science was considered a cure all for society's ills. Consequently it was thought that the "new social sciences would purify all American institutions including government, prevent repetition of the Civil War's strains and sacrifices, and initiate the social stability for which many yearned."\textsuperscript{9} Naturally there was a spillover effect into the law, because, "the law is, after all, the science of justice, . . ."\textsuperscript{10} Or as Professor Tredeman suggested, "The adjudicated cases constitute nothing more than materials out of which the scientific jurist is to construct a science of jurisprudence."\textsuperscript{11}

In the years following the Civil War, scientific reasoning, which in legal circles has been labeled judicial formalism, came to dominate legal thinking. Its dominance continued throughout the nineteenth century and on into the twentieth century. Judicial formalism achieved
such widespread success because its two key elements; one, avoidance of policy considerations, and two, reliance on past precedent to assure certainty, responded to particular needs of American law.

A. The Elements of Formalism

1. Principles Not Policy

With the defeat of the pro-slavery forces on the battlefield, the arguments and style of reasoning with which they had held their enemies at bay in the courtroom were doomed. Before the war judicial concern for economic growth and national unity led judges to decide in favor of slavery interests. For example Chief Justice Shaw ruled that runaway slaves must be returned to preserve the Union. With the discrediting of this utilitarian or instrumental reasoning a void was created which judicial formalism could easily fill. This formalism consisted of basic a priori principles derived from anti-slavery arguments along with the notion that law was a science, meaning law was a set of principles to be uncovered by judges. With formalism judges could now avoid controversial and embarrassing policy oriented decisions.

A prominent theme of this formalism was the notion that "Law is not made by the courts, at the most only promulgated by them." If judges could not make law, what law were they to refer to in rendering their decisions? The answer was the law, or principles of law, previously articulated by the courts. This meant a judge should first determine what were the pertinent principles of law, and then apply those principles to the facts of the case. "In deciding individual cases, judges no longer saw their task as the promotion of the goal of economic development," writes Nelson, "but as the preservation of the logical structure of the
rules and fundamental principles of the law."  

And to find these principles where did the legal profession turn but to science, the new panacea for all intellectual pursuits. Decisions were read, dissected, classified, and arranged so as to establish a doctrine of law.\(^\text{17}\) Langdell's great innovation in legal teaching, the case book method, had as its purpose the immitation of the methodology of the physical sciences. As William A. Keener, Dean of the Columbia College Law School, explained:

The case system then proceeds on the theory that law is a science and, as a science, should be studied in the original sources, and that the original sources are the adjudged cases . . . . Under this system the student is taught to look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the mineralogist. It should be remembered that the student is not simply given the specimen and asked to find out as best he can what it is, but each specimen is accompanied by an elaborate explanation and classification.\(^\text{19}\)

The strength of the scientific movement is also illustrated by treatise writers. The treatise writer saw as his function the extraction of principles from case law and arranging them in a coherent manner. Cooley is perhaps the foremost treatise writer of the period. His approach began with the premise that "law was a science, governed by axioms." The treatise writer was to discover these axioms, and articulate and arrange them. In this way everlasting rules of law might be known.\(^\text{19}\)

Treatises covering almost every aspect of the law now appeared ranging from Cooley's work on torts, to Tiedeman's on police power, to Dillon's on municipal corporations.\(^\text{20}\) Lesser known treatises covered most any subject imagineable including highways and streets, mining, oil and gas, irrigation, electricity, and even hotels, not to mention eminent domain
law. 21

2. Precedent Not Policy

A second need of American society and American law was stability and certainty. A great war had been fought settling the tension filled questions of slavery and state rights. But the war's conclusion did not bring tranquility, instead it marked the beginning of a period of rapid social change. Cities grew and businesses turned into monopolies. Large numbers of immigrants from southern and eastern Europe arrived with their strange languages and customs. Labor strife occurred and Darwinianism seemed to shake the very foundations of religion. For many Americans society must have appeared to be adrift upon a turbulent sea.

The law responded to what Oliver W. Holmes called, "that longing for certainty and for repose," through judicial formalism. 22 In particular this was achieved through the use of precedent and the doctrine of stare decisis. In ante-bellum jurisprudence precedents were used only if they supported the desired result, otherwise they were ignored and social policy reasons would control. 23 But with the downfall of policy and the rise of principle, past cases gained in stature because they contained the all-important principles. This explains the popularity of the case book method because it introduced the student to the principles of law in their natural habitat, the cases.

The use of precedent also flourished because it made law more of a science. If the chemist and physicist had their laboratories, so did the lawyer, only his was called the law library. 24 This idea justified the presence of law schools in the universities, as Dean Keener noted,
"it is only by regarding law as a science that one can justify its being taught in a university, . . ." And the rise in the number of law schools suggests the correctness of Keener's comment. In addition precedent aided the legal practitioner by making it easier for him to know precisely what the law is, and therefore advise his clients with more assurance. Or, as Mr. Justice Holmes wrote, "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." Moreover this formalism helped to "professionalize" the legal profession by insisting that knowledge of the law could be achieved only through rigorous study. It separated law from politics and lay people alike, thus creating a special aura around the law which only the professional lawyer could unravel.

Principles, science, predictability and precedent all came together in the doctrine of stare decisis. J.G. Sutherland in his treatise "Statutes and Statutory Construction," shows this interrelationship, when he wrote:

The certainty and stability of the law are among its chief excellencies . . . When a point has been once settled by decision, it forms a precedent which is not afterwards to be departed from. Such precedents must from the nature of our legal system be the same to the science of the law as a convincing series of experiments is to any other branch of inductive philosophy.

He too notes the practical side, namely, the lawyers need for stability so that they "can give safe advice to those who consult them" so that the public may "venture with confidence to buy and trust and interact with one another."
The triumph of judicial formalism was not always greeted with approbation. Toward the turn of the century sharp protests concerning formalism were registered. Two of the best known critics were Oliver W. Holmes and Roscoe Pound. In 1897 Holmes spoke of the danger of thinking that a legal system "can be worked out like mathematics from some general axioms of conduct." He criticized the judiciary for failing "to recognize their duty of weighing consideration of social advantage." "I look forward to a time when the part played by history in the explanation of dogma shall be very small," Holmes stated, "and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." In one of the law's most famous quotations Holmes argued that the worth of every legal rule should be examined in terms of its effect on society, and found "revolting" that a rule of law "persists from blind imitation of the past . . . ." Without a doubt, Holmes was urging a return to the old utilitarian analysis of law.

But the prestige of Holmes was not enough to unset judicial formalism from its throne. And so 11 years later Roscoe Pound would complain:

(Law) must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

He too urged that principles and doctrines be adjusted to human needs and for judges to give "a fresh illustration of the intelligent application of the principle to a concrete case, producing a workable and a just result."
These vigorous attacks on judicial formalism show how dominant formalism had become between 1870 and 1910. This dominance is also reflected in eminent domain law, especially in regard to the public use concept. As shown in Chapters 2 and 3, the narrow right to use test was adopted in the vast majority of states. The reason was that this test was consistent with judicial formalism because one, it avoided policy discussions, and two, it required merely the application of principle. "It is not the number of people who use the property taken under the law of eminent domain that constitutes the use of it a public one," wrote the Kentucky Supreme Court, "nor does the fact that the benefits will be in a large measure local enter into the question." What did control was whether the public had the right to use the condemned land on the same terms as the condemnor. So if the public could obtain the use of the property upon demand, like with a railroad ticket, then the test was passed. If the public could not demand use the property, as with a manufacturing plant, then the test was failed and the taking blocked as one for a private use. In an age of judicial formalism this test was much more acceptable than the purely policy oriented public benefit test. And the history of the taking and compensation concepts verify the power of formalism because, the major source of change for these concepts came from state constitutional amendments, not the judiciary, which was burdened by past precedent.

B. Judicial Formalism and The Public Use Concept

1. Stare Decisis and Tax Aid

Up to now the emphasis has been upon those cases where takings
and tax aid were denied private enterprises. But what about those cases where such aid was allowed? Although these cases constitute a minority, they do show what reasoning the judges followed, and therefore shed light on a main query of the essay—the role of economic development in judicial decision making.

In the tax area, aid was allowed only for railroads, and in those cases which adjudicated this issue judicial formalism was prominent. This was true at both the federal and state level after 1860 when utilitarian reasoning fell into disfavor. In the United States Supreme Court's first adjudication of this matter, Gelpke v. Dubuque, formalism is quite apparent. In rejecting the city's attempt to repudiate its debt, the Court relied on earlier Iowa state decisions which had upheld such aid, explaining that these earlier decisions "are sustained by reason and authority, and they are in harmony with the adjudications of sixteen states of the Union." The old policy arguments of national unity and comity toward state decisions on state law, fell before the axe of judicial principle as the Court proclaimed: "We shall never immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice." Then in a later case from Iowa the Court commented that the weight of authority still supported such aid and that irrespective of State law, the earlier case of Gelpke now controlled.

When the question of public use was directly addressed by the Court, stare decisis was again right there. In the Otoe case, holding in favor of tax aid, Justice Strong remarked that the "highest courts of the States have affirmed it in nearly a hundred decisions, and this court
has assented the same doctrine nearly a score of times." And one year later the Court not only stressed precedent but also another facet of judicial formalism, namely a court's duty "to apply the law, not to make it." While formalistic reasoning may have been prevalent in the Supreme Court it was both prominent and controlling in the state courts, as Stewart v. The Board of Supervisors of Polk County demonstrates. Utilizing principle and precedent, but avoiding policy, the Iowa Supreme Court sustained the tax support for the railroad. The court concluded:

We find, then, that upon principle and reason there is the same authority for the exercise of the sovereign power of taxation in aid of the construction of railroads that there is for the exercise of the right of eminent domain, and that this view is sustained by an overwhelming weight of authority. Our plain duty, therefore, is to sustain the act in question. And the question whether its enactment was dictated by a wise State policy or not we must leave to the general assembly, where it exclusively belongs under the constitution. (emphasis added)

Formalism always placed a high priority on citations of past cases and the Iowa Court took this to heart by string citing, that is listing one case after another, thirty-three decisions from nineteen states. So powerful was stare decisis that the dissenter, Justice Beck, also used past precedent and tried to hold the Court to the earlier case of Hanson v. Vernor. Nor was this a mere concession to judicial etiquette, but a sincere argument, because Beck admired the doctrine greatly. "Stare decisis" believed Beck, "is a maxim the application of which is necessary, not only to secure private rights, but to preserve and maintain the authority and confidence due to courts of last resort..." Thus both the majority and the dissent adhered to this formalistic
doctrine.

The *Stewart* case was reluctantly followed seven years later as the Iowa Court explained, "If the question were a new one the writer hereof would be disposed to hold the act unconstitutional." Judges in California, Kansas, Ohio and New York expressed the exact same position, that were it not for the previous adjudication on tax aid to railroads, they would hold such aid unconstitutional. But formalism manifested itself in other ways such as string citing like in the Ohio case which listed eighteen cases in a row, all from Ohio. In keeping with the formalism requirement of avoiding policy decisions the courts often said "it is now too late to inquire whether the question has been settled properly or otherwise." But it did not mean the courts were unaware of the repercussions of their decisions, it is that they chose to ignore them and follow *stare decisis* instead. "It is doubtless true, that in many cases severe taxation without compensating benefits will be entailed to pay the indebtedness created under the bonding acts," observed the New Court of Appeals. But the Court added, "We adhere to the decision in *The Bank of Rome v. The Village of Rome*. The question involved in that case is not now open to controversy in this court." In short in those cases where tax aid to railroads was upheld "the doctrine of *stare decisis* had here a most forcible application."

2. *Stare Decisis* and Eminent Domain—Where Mill Takings Were Upheld

Even before the Civil War, in eminent domain cases involving the mill dams, judges began to retreat from their broad policy justifications for eminent domain takings and tended to rest their holdings on past
precedent. Thus in Maine when a mill act taking was challenged the state's highest court commented that the act "pushes the power of eminent domain to the very verge of constitutional inhibition."\textsuperscript{58} Moreover the justices warned, that if this were a new question the constitutionality of the act "might well be doubted."\textsuperscript{59} However because of its "great antiquity and long acquiescence of our citizens," the Maine Court deemed the mill act "to be the settled law of the state."\textsuperscript{60}

As in the railroad tax cases, the Maine tribunal was willing to analyze the policies behind the law, but not to act upon that analysis. For example the Court considered that in the early history of the country "the erection of mills was deemed a matter of great public convenience and necessity, and as such deserving the special protection of the legislative power." The reason being that mills were few and the capital to build them was scarce. "But, recognized the Court, "the reasons in which this policy originated have long since ceased to exist."\textsuperscript{61} What is critical to a proper understanding of nineteenth century eminent domain law is that the act was upheld, not on the grounds of public benefit or policy, but upon the formalistic doctrine of \textit{stare decisis}.

Besides Maine, Wisconsin judges also shifted their rationale in support of mill-dam condemnations in the pre-war years. In 1849 the state mill act was upheld because it enhanced the value of land, advanced settlement and promoted civilization.\textsuperscript{62} Yet eleven years later the Court remarked:

\begin{quote}
We are free to confess that if the question as to the constitutionality of mill dam law were now for the first time presented to this court, and we were not
embarrassed by former adjudications upon it, we should doubtless come to a different conclusion upon the question from that arrived by the majority of the Court in Newcomb v. Smith (decided in 1849).63

In all fairness it should be noted that there is a policy reason supporting stare decisis and that is the fact that people had invested their money in mills relying on the power of the mills to take whatever land necessary for their successful operation. To protect these investments, the Wisconsin Court declared "The rule stare decisis, has great force in such a state of things, and emphatically applies."64 Still the taking was permitted not on the basis of public benefit, but rather upon the basis of necessity and the public's right to use the mill, as well as stare decisis.65 And in 1875 the Wisconsin judges reiterated "This court, as now organized, has, in submission to the rule stare decisis, reluctantly, against its own views, followed Newcomb v. Smith in upholding the mill dam act."66

The doctrine of stare decisis continued to be the primary ground on which the mill dam act and takings under it were upheld in many states through 1910. In 1869 Minnesota's Supreme Court admitted, "Had not similar laws in states having constitutional restraints similar to ours been uniformly sustained by the courts, we should hesitate before upholding this one."67 The same opinion explained that "the decisions, . . . are so numerous and by courts of so great authority that we are constrained to hold the law constitutional."68 Courts in Kansas, Iowa and New Hampshire reached the same conclusion.69

The Kansas decision in Harding v. Funk deserves special attention because it is a superb, if not the best, example of judicial formalism in an eminent domain case. The facts of the case were not extraordinary,
they involved the usual dispute between a millowner, seeking to build a dam to obtain water power for his mill, with the owner of the land to be damaged protesting. The attorneys for both sides must have known the court's distaste for policy discussions because they confined their arguments to those acceptable to judicial formalism, namely precedent and principle. The clash therefore became a classic formalistic battle of precedent versus principle, with the mill owner pounding away with precedent and the landowner counter-punching with principle. Justice Valentine summarized the contest as one where "it is claimed that all the authorities upon this subject violate reason and principle, and therefore we should abandon the authorities and cling to reason and principle only." 70

In this struggle precedent emerged with a resounding victory. To abandon the authorities and rely entirely upon reason and principle was thought to "abrogate the very foundation of all stability in human jurisprudence, and send the courts adrift without compass or chart." 71 And to emphasize the point Justice Valentine cited 50 cases in a row where mill acts were sustained. 72 The Court's fetish for precedent stems in great part from the Court's aversion to making law. In a mild rebuke to other courts, the Kansas judges reminded their brethren:

> It is not necessary for us to say what would be our decision upon this question if the same was a new question in this country. But it is not a new question. It has been long and well settled by legislative, executive, and judicial construction, and we are not now at liberty to depart from such construction, . . . If we should do so, we should be making laws, and not merely construing them. 73

The restrictive role for the judiciary was grounded upon three
reasons. First, Valentine maintained that judges were susceptible to the same "whims and vagaries" as other men of similar education and experience and if their whims were blended into the law "it might prove disastrous in the extreme."74 While no specifics are given, the scent of previous judicial disasters is not far off. Second, to insulate the judiciary from future mistakes, he shifts the authority to make the law solely to the legislature. This is done, we are told, to help the public in what amounts to an ex post facto argument. He contends that when the legislature enacts a law "the people can regulate their conduct accordingly," but when the courts create a new legal obligation "it is impossible that the people could have regulated their conduct according to such enactment of the courts."75 While this may sound good it assumes that the public will be aware of and understand all state statutes, which is highly questionable. Additionally it raises a fundamental problem for stare decisis, because it undermines the source of many legal principles, which Valentine and his colleagues hold so dear, in that the source of those principles often was judicial decision not parliamentary or legislative enactment. Consequently the principles derived from the authorities are illegitimate according to this line of reasoning. However, this fallacy is of little historical value in that the opinion never mentions it.

The final justification given for prohibiting judge-made law was mostly parochial. If new law was made and precedent ignored, Valentine feared lawyers would no longer have "to ponder over volumes of legal lore, to ascertain what the law is upon any given subject" because the law will not be in law books "but in judges' brains."76
This situation would not be tolerated, he believed, because lawyers would not be able to advise their clients on what the law is, and so together, the lawyers and their clients would pray for "courts who could know the law only as it is to be found in the law books." In effect the Court was trying to justify not only the need for lawyers who knew the law and therefore could advise people for pay; but lawyers who were professional and scientific because they could obtain their knowledge only through long hours of specialized research.

The avoidance of law-making and reliance upon precedent are the hallmarks of this case and also judicial formalism. Another key facet of formalism represented Harding v. Funk is the avoidance of policy and while the lawyers may not have argued policy, the court in its sterile holding followed good formalistic style in purposely refraining from discussing the mill act "in all its bearings, or to even intimate when or where, or to what kinds of mills, it will apply." And without regard to public benefit the court concluded, "We simply wish now to decide that it is not unconstitutional, . . ." 78

3. More Formalism—Reasoning from Principle

There was of course more to judicial formalism than merely stare decisis. Another large part of formalism was reasoning from principles whether deduced from case law or from higher sources like natural law or the Constitution. Principles were an integral part of formalism because they allowed judges to make decisions without reference to policy, and because they made the law appear scientific and more professional. 79
When the courts turned to principle, a proposed condemnation was usually in deep water. For example, in 1859 Alabama's high court found principle so compelling that it was willing to strike a mill dam act which had been in effect since 1812. "It is," said the Court, "never too late to re-establish constitutional rights the observance of which had been silently neglected." Quoting extensively New York's Chief Justice Bronson, the Southern court stressed the primacy of principle over policy, when it wrote:

Believing, . . . that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason . . . some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined . . . My rule has ever been to follow the fundamental law as it is written, regardless of consequences.

Often times principle would be combined with precedent to create a solid formalistic bulwark against tax aid or appropriations of property. This mixing usually occurred in the popular phrase "upon principle and authority." An example of this is the Tennessee Supreme Court's statement "we are satisfied upon principle and authority, this attempt by the Legislature to exercise the right of eminent domain . . . was not warranted by the Constitution, . . ." Even the dissent would argue on the basis of principle and authority. Elsewhere principle alone would be sufficient as in Illinois where it was determined that in "light of the general principles here stated, it is clear the use for which the land is proposed to be taken . . . is not a public one."

The rationale behind this reliance on principle was best articulated
in *Healy Lumber Co. v. Morris*. The opinion written by Justice Dunbar exemplified three main characteristics of formalism. First the Court rejected the broad benefit test and adopted the formalistic right to use test. Next, in discussing why the broad benefit analysis could not be accepted, Judge Dunbar explained that "the court cannot intrude into its decrees its opinion on questions of public policy because "its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction." This then was the second formalistic trait, the refusal of the Court to make law, and instead confine itself to simply interpreting the law. Or as Dunbar exclaimed, "the court cannot invade the province of the law-making powers of government, . . . ."

But it was in regard to a third element of formalism, principle, that the opinion shines. The importance of principle arose in the context of the Court’s rejection of the broad benefit analysis. Judge Dunbar, quoting a popular New York case, wrote that when the idea of public utility or common benefit is used to define public use the judges are "governed by speculations upon the benefits that may result to localities" and this is totally reprehensible because it places judges "afloat without any certain principle to guide us." Under such a definition he warned what was legal one year would become illegal the next, because in year one a particular enterprise may be considered beneficial to the community, but in year two it may not appear to be so. Moreover he feared that under the broad benefit definition any business, be it a brewery, factory or distillery, could use the power of eminent domain and thereby destroy any distinction between public and private
uses because "the principle in one instance is the same as in the
other: the difference is only in degree."91 And this was a real fear
for a court which decided cases on the basis of principle. Such a
doctrine was repugnant to American judges because it ran afoul of per-
haps the strongest tenet held by the judiciary—the protection of pri-
vate property. Dunbar labeled this test "dangerous" since it tended
"to encroach upon private rights," the very rights which the Constitu-
tion was designed to safeguard. Consequently, courts whose duty was to
keep "inviolate the constitutional rights of the citizen" could never
tolerate the benefit test which left such rights "uncertain and varying."92

A legal doctrine, which lacked specific firm principles was simply
not acceptable to late nineteenth-century American judges. The broad
benefit analysis, lacking such principles, and allowing as it did for
popular sentiment and judicial temperament to influence what was a
public use, was understandably shunned by the majority of courts. In
its place the narrow right to use test reigned supreme because it gave the
courts what they desired so much, "a definite fixed guide for their
action."93 And perhaps even more appealing to the men in black robes
was that the right to use test invigorated the defense of private
property rights.94

C. Strict Construction

Closely related to judicial formalism was the notion of strict con-
struction. Strict construction required a court to look only to the
black-letter law of a statute in deciding its validity or whether it had
been complied with in a given fact situation. A court was not to
speculate as to what the legislature intended or what policy the legislative branch was trying to advance, rather a judge was merely to apply the law. If the statute was not complied with, then the party acting under the statute could not invoke the statute's authority. Eminent domain statutes were no exception to this legal proposition.95

In eminent domain law strict construction came to mean two things. First, that any statutes were "to be strictly construed in favor of the private owner."96 Secondly, the condemnor had the burden "to show affirmatively" a grant of power authorizing the specific taking and that the grant had been strictly complied with.97

These two teachings were often invoked to halt eminent domain proceedings. A particular harsh application of strict construction occurred in Ohio on the eve of the Civil War.98 While constructing the main road from Cincinnati to the Ohio River, the Marietta and Cincinnati Railway Company had use of a temporary track, the right of way of which had been obtained by agreement with the land owner for a set time period. When the time period expired the main line was still not finished. The company wanted to continue the use of the temporary track, but the landowner balked. Thereupon condemnation proceedings were instituted to condemn the right of way for three years or till the main line was completed.

In deciding against the railway company the Ohio Supreme Court found that the company had failed to meet its burden of exhibiting a grant of power authorizing the taking. The Court read closely the charter which gave the company the power to condemn, but discovered no mention of temporary takings, only permanent ones. Since the power for
permanent takings had already been invoked for the main line there was no authority left under which the company could act. Despite the fact that the company had used the road for a period of years, and despite the fact that the company had the power to take land permanently and now only sought a two year easement, the Ohio Court refused to yield. "By no fair, and much less by any strict construction," wrote the Court, could the powers granted the railway company include temporary appropriations."99

The strict construction maxim also took its toll of spur track takings. In Maryland a state enactment gave all railroads the right to use the Union Railway Company's tracks.100 The idea behind the statute was to allow all railroad companies access to Baltimore, without each company having to lay out and construct its own separate track to Maryland's largest city. However under this act one railroad corporation sought to build a lateral road connecting with the tracks of a company other than the named Union Railway Company. The company seeking the lateral road did not claim authority by express grant, instead it claimed the road was authorized "by necessary implication." The company's claim was rejected by the Maryland Court which determined that the statute only gave the various railroads the right to use the tracks of the Union Company and nothing more.101 Implications were not sufficient for the exercise of eminent domain in this era of strict construction.

In the Mid-West economic benefit pleas fared no better than implications had in the East. In Chicago and E.I.R. Co. v. Wiltse, where a spur track was sought to reach a major brick-works, counsel for the railroad dwelt upon the large amount of capital invested in the brick-works, the
massive volume of freight generated by the factory and the great loss which would be incurred if the bricks had to be moved by wagons to the main railroad line. "To say that appellant has no power to build a spur to the works in order to move this vast volume of freight," he argued, "is placing a narrow construction on the powers of appellant." And that's precisely what the Court did.

The Illinois justices turned their back on economics and embraced strict construction. The fact that the railroad's earnings and business might increase with the construction of the branch line was deemed insufficient to authorize a condemnation. The added fact that the brick-work company might suffer great losses was immaterial to the Court's way of thinking. The justices warned that if this taking were upheld then the railroad could build lines anywhere and at anytime their revenues were increased. But the legislature conferred no such broad power on the railroads. Citing Cooley's treatise, the Court insisted:

The taking of private property under the eminent domain statutes is in derogation of common right, and the grant of power to incorporations for its exercise will be strictly construed.

In non-railroad takings the standards were not relaxed, even where the takings was for an obvious public use like a city's water supply. In 1883 California's Supreme Court repeated the familiar tenet that the "taking of private property for public uses is in derogation of private right" and statutes authorizing "condemnation are not to be extended by inference or implication," but also added a new twist to its meaning. The ability of a corporation to appropriate private property was "limited to the real necessity which exists for the appropriation." But this necessity was not one of convenience or profit. The Court explained
that a proposed condemnation may aid the corporate objective, increase the wealth of the corporation, enhance the value of the corporation's property and still "not be reasonably necessary to the corporation in the discharge of its duty to the public." Only if the proposed project could not be continued would there be legal necessity. Quoting a Louisiana decision in regard to railroads, the California Court concluded, "the exploration should only be enforced by inches, and upon conclusive proof of the necessity upon which it rests." In many other cases strict construction and necessity played a pivotal role. But perhaps the best way to appreciate the barrier erected by strict construction against eminent domain takings would be to review this doctrine's life in one jurisdiction. By concentrating on one state, as opposed to hopping from state to state, a mosaic of the courts' devotion to this doctrine can be sketched. Texas would be an excellent testing ground because it represents a state where non-agricultural economic development was in its infancy in the second-half of the nineteenth century. For instance Texas did not get her first completed railroad until 1853 and that was only for twenty miles. By 1860 total mileage was up to 403 miles, but in 1870 the total was a very modest 591 miles. And this was in the largest geographic state in the Union! During the last three decades railroad mileage jumped dramatically so that Texas had 3,025 miles in 1880, 8,667 in 1890, and 9,838 at the turn of the century. Between 1900 and 1910 mileage was up another 4,000 miles or so. Texas therefore represents an ideal place to test Scheiber's claim that all stops were pulled out to aid economic development. After all Texas in the second half of the nineteenth
century would, at best, be in a comparable stage of economic development with that of New England, New York or Pennsylvania in the first half of the century.

Prior to 1860 judges in those states were generally lenient toward eminent domain takings because they supported economic growth. The popularity of the broad benefit definition of public use attests to this fact. But as already noted, Texas judges in the late nineteenth century rejected the broad benefit test and used the narrow right to use test to prevent the construction of a spur track designed to aid private factories. Quoting multiple authorities the Texas appeals court emphasized that grants of the power of eminent domain "are to be strictly construed." Nonetheless two inquiries are still available. One, did Texas judges loosely construe the eminent domain statutes to increase economic development in their largely unsettled and undeveloped, but beloved Lone Star State? Next, can the growth of the railroads, as reflected in their great mileage increase, be attributed to judicial construction of the same statutes?

Our voyage through Texas law begins with *Floyd v. Turner* decided by the Texas Supreme Court sitting in Galveston in 1859. This action was initiated by F.R. Floyd to prevent Orange County from constructing a road through his land. John Turner, overseer for the proposed road, was named as defendant along with the County Commissioners. Floyd sought an injunction on the grounds that the county had not complied with the procedure for condemning land as outlined in the statutes. An injunction was granted on September 16, 1857, but later was dissolved and the case dismissed. Under these facts Floyd appealed. In his decision Chief
Justice Wheeler stated that the case should not have been dismissed because Floyd's petition had properly raised the issue whether the County had complied with the law's requirement in attempting to lay out and establish a road over Floyd's farm. The court concluded if the allegations were true then Floyd "was entitled to relief, and the court erred in dismissing the petition; for which the judgment must be reversed, and the case remanded." This clearly suggests that if the statute's requirements were not adhered to, then the courts would strike down the taking.

The notion of strict compliance with the eminent domain statutes became explicit in the 1878 case of The Houston and Crt. Northern R.R. Co. v. R.G. Meador. The case was not a direct challenge to an eminent domain taking, rather it involved a suit by Meador's estate for damages done to crops on his land due to the railroad's negligent construction on land obtained from Meador through the power of eminent domain. The railroad company argued that the contractors who were building the railroad line were liable. The trial court found the railroad liable for $270.54 in damages.

In affirming the judgment below, the Texas Supreme Court relied heavily on the eminent domain statutes through which the railroad had secured the land. Quoting from a current treatise on master-servant relations, in response to the railroad's claim that the contractors, not the railroad, were liable, the Court observed the following principle:

Where certain privileges are granted by the legislature, the body or individual is bound at his peril, to see that the privilege is exercised in strict conformity to the letter and spirit of the act conferring it and liability attaches for all injuries consequences of a failure in that respect, although the injuries result
from the act of a contractor. . . . 115
(emphasis added)

For the Texas Court this meant that where the state authorizes a condemnation, the taking can occur only "under the conditions and liabilities which the statute attaches to the grant." 116 For the railroad it meant that under the eminent domain statute "all reliable precautions were to be taken to prevent injury to the growing crop in the field through which the road was authorized to be built." 117 This case represents a defeat for the railroads even in a non-condemnation dispute based on the strict construction doctrine.

Two years later, in 1880, a challenge to the validity of legislation delegating the power of eminent domain to cities for opening streets was before the court. In Rhine v. City of McKinney, the challenge was aimed at a statute which provided that if a city and landowner could not agree on the amount of compensation for property to be taken for a public street then the city council would appoint three disinterested freeholders to determine the amount of damages. 118 In other words the value of the property was to be decided by a commission appointed by the city. Rhine maintained that this provision, which allowed an interested party, the city, to appoint the commissioners, violated his right to a fair and impartial tribunal guaranteed by the constitution. 119

The Supreme Court agreed with Rhine's position. It noted a general rule "that no man should be judged in his own cause; and . . . that no one without the consent of the other party should appoint his own judge." 120 It then distinguished between regular courts, established by the constitution and State law to decide controversies of the public which came
within their jurisdiction, and special tribunals, chosen for special matters like the commissioners in the eminent domain statute. In regards to the latter tribunals the court announced "no presumptions will be indulged in favor of the legality of their appointment of proceedings."

In support of this negative presumption the court noted that the power exercised by the commission included two of the highest prerogatives of sovereignty—eminent domain or the power to condemn private property and taxation, or the requirement to pay the assessed value of the land taken. 121 As a result of the foregoing the court held that the process for selecting appraisors was not impartial as to both parties involved and therefore declared unconstitutional the section of the act calling upon the city to appoint appraisors for its condemnation proceedings. 122

The case exemplified a very strict construction of eminent domain proceedings. By rejecting any presumptions in favor of a taking, the court is affording more protection to the landowner. So if the condemnor makes one mistake, the proceedings will lose their legitimacy and therefore their authority to take the landowner's property. In effect the court was carrying out its perceived duty to protect the landowner. In pursuit of that duty the court warned, "the protection of the inalienable rights of life, liberty and property, should be upheld with a strong hand." Elaborating on this obligation the judges explained:

although we in any case reluctantly declare an act of the legislature unconstitutional, yet as the courts are the last resort for the legal protection of the just rights of the citizen, and as we believe that the section of the statute under consideration does not afford that protection, we feel constrained to declare it unconstitutional. 123

The first three cases examined have involved: (1) a remand to
review a taking, (2) a negligence action for improper care in constructing a railroad, and (3) a declaration that a condemnation statute was unconstitutional. None of these uses actually voided or invalidated a taking simply because the statutory provisions for condemning property were not followed. Porter v. City of Abilene involves such an invalidation. In its brief decision, barely a page long, the Court of Civil Appeals struck down Abilene’s attempted condemnation of Porter’s land for street purposes because the city failed to observe the statute’s provisions. While the specific omissions of the city are not listed the Appellate Court found that "none of the prerequisites have been complied with" and so the proceedings "are an absolute nullity and void."

In support of the decision the appellate tribunal cited Rhine v. City of McKinney for the rule that the power of eminent domain with all its "constitutional and statutory limitations and directions for the courts exercise, must be strictly pursued." (emphasis added)

A similar verdict was reached in Parker v. Fort Worth and D.C. Ry. Unlike Porter above, the Texas Supreme Court in deciding Parker described in detail the statutory requirements which were not complied with, namely description and notice. The description requirement refers to the description of the land to be condemned. The significance of the description requirement is that: (1) it allows the commissioners to know what amount of land is involved to base their compensation amount, (2) it informs the parties what land is involved so they may come prepared to the hearing, and (3) it lets the owner know how much of his land is to be taken and the boundaries of the remainder. The notice requirement is to allow the interested parties to appear before the appraisors to pre-
sent evidence as to what they believe is the true value of the land. The statute requires that written notice be sent to the parties giving the time and place of the appraisers' hearing.

In the case at bar the description requirement was found lacking because the petition "referred to no object and gave no description whereby that line might be ascertained by any person, however familiar with the land." The notice requirement was unmet because the commissioners failed to include the original notice sent to the owner in their report, even though the owner was unknown.

Recognizing that the statute had not been complied with, Chief Justice Stayton acknowledged that the validity of condemnation proceedings "must depend upon a compliance with the law authorizing it." The concept that nothing should be presumed in favor of the exercise of the power of eminent domain was repeated. Thus the burden was placed on the condemnor to show that the county court had acquired jurisdiction. Here such jurisdiction was found lacking because of insufficient notice. Overall Parker stands as a strong example of the strict construction of the power of eminent domain.

Despite the forceful restrictive tone of the Parker case, the Texas Supreme Court, only two years later, took a radically new attitude in construing the condemnation statutes. The case setting forth this new approach was Gulf, C. & S.F. Ry. Co. v Fort Worth & R.G. Ry. Co., decided in 1894. The appellant sought to have invalidated a condemnation proceeding which permitted the appellee to cross and intersect with its track. Three challenges were made against the condemnation: (1) appellant's line, already serving a public use, could not be taken or
occupied by another railroad, (2) the condemnation statute had not been followed because no prior attempt to agree on the damages or land to be taken occurred, and (3) the commissioners assessing the damages were interested parties when earlier they agreed to pay any damages for the appellee. (Evidence to support this charge may be found in that the damages were assessed at $5). The first attack was obviated by Art. 4175 of the Texas Statutes which permitted any railroad to cross, intersect or connect with the track of another railroad.¹³⁰

However, it was in regard to the second challenge that new ground was broken in Texas law. For the first time it was suggested that a condemnation statute should be construed liberally to carry out the intent of the statute, which was to allow condemnations.¹³¹ Relying heavily on Connecticut precedent, the Texas Court found that statutes providing for public highways promoted "important and beneficial public objects."¹³² Consequently the Court felt bound,

to give it a large construction, for the purpose of furthering these objects, even though the language of the statute is critically less exact than it should be, provided we can do so without doing absolute violence to its terms.¹³³

Yet the Gulf case did not spell the end for the strict construction view, for in the same year, 1894, a proposed taking was blocked because the condemning failed to proceed as required by statute.¹³⁴ While observing that condemnation proceedings "must always be conducted in strict accordance with the statute authorizing them," the Court found that both the description and notice requirements were lacking.¹³⁵ Besides these factual conclusions the decision also emphasized that nothing was to be presumed in favor of the condemnation proceeding and that the burden
rested with the condemnor to show that the statutory requirements were satisfied. 136

In Dallas County v. Plowman, 1906, the general trend of the previous century continued. 137 The suit was initiated by Plowman to have annulled the condemnation of part of his family's land for a public road by Dallas County. The county had acted under "the general law of the State to ascertain the value of the land and have the road laid out across it." Plowman argued successfully that a special county road law was in effect and that was the only law by which the county could condemn for roads. 138 Concurring with this view Justice Brown, writing for the court, declared that the county's proceedings "were without authority and void, and conferred no right upon the county to the land so taken."

In 1907 the Texas Supreme Court struck down as unconstitutional part of a city charter dealing with eminent domain proceedings. 139 In its charter the City of Paris had provided that the mayor should preside over the commissioners and instruct them in matters of law. The justices commented that this made the mayor both attorney and judge in the same case. Since the city was an involved party, and the mayor was an officer of the city, it was presumed the mayor would act adversely to the owner. This situation violated the principle that "owners cannot be deprived of their property without an assessment of damages by an impartial tribunal." As a result the offending section of city charter was struck down. 140

What this excursion through Texas case law exhibits is a strong belief that eminent domain statutes and proceedings should be strictly
construed to protect the private landowner. In the single exception to this trend, the competing parties were both railroads with one trying to intersect the other. As such the case reflects not a private individual versus a corporation or municipality armed with the power of eminent domain, but rather two entities, both endowed with eminent domain, battling on essentially equal footing. Thus the answer to each of the inquiries set forth at the beginning of this journey must be in the negative. For it appears that the Texas courts were unwilling to bend statutory requirements where to do so would harm a private individual. This same concern for private rights no doubt explains why other states maintained a strict surveillance of the eminent domain statutes and appropriations.\textsuperscript{141}

\textbf{D. Protection of Private Property Rights: The Policy of Judicial Formalism}

The last two topics discussed, reasoning from principle and strict construction, are tied together by one theme—the protection of private property rights. Decisions had to be based on fixed principles so that private rights would not be encroached.\textsuperscript{142} Furthermore, eminent domain statutes had to be strictly pursued because the taking of private property was "in derogation of common right."\textsuperscript{143} This theme can be found in every type of eminent domain case as well as the tax cases. Its cornerstone was the clause found in all constitutions, State or Federal, that private property could not be taken for a public use without just compensation. Whatever the precise language all courts interpreted this phrase as a mandate calling upon them to protect the private property of each citizen. In blocking a proposed tax, the Kentucky Supreme Court
characterized this clause "as the great conservative principle of the
constitution, by which the rights of private property are to be pre-
served from violation under public authori'ty." 144

It was upon this "great conservative principle" that American
judges disavowed the broad benefit definition. In denying a mill taking
one court found that "mere convenience and advantage in private business
must yeild to the property rights of citizens sacredly guarded by the
Constitution." 145 In a market case the broad benefit definition was
repelled because if accepted "any man's property might be taken upon
the shallowest pretense of a public use." 146 In short it was thought
that, "no deadlier blow could be dealt the private rights of the
citizen," than the courts adopting the broad benefit test. 147

This principle also remained preeminent in non-public use litigation.

In a consequential damage case the Illinois Supreme Court declared:

In our opinion, the theory that private rights are
ever to be sacrificed to public convenience or neces-
sity without full compensation, is fraught with danger,
and should find no lodgment in American jurisprudence.
To prevent this was the object of some of the most
important of our constitutional guarantees. 148

And the United States Supreme Court understood the limitations on eminent
domain as being for the protection and security of individual rights
149

Professor Nelson in his work on judicial formalism suggests that
judges turned to "fundamental principles of republican government as
a source of American law." 150 This certainly is verified by the heavy
emphasis placed upon private rights in the eminent domain cases. West
Virginia, always a citadel for private rights, illustrates vividly the
connection between such rights and government power. "To secure the possession and enjoyment of private property is one of the chief ends of all free governments," announced Judge Pauil, and he continued, that to destroy or weaken the constitutional provision aimed at safeguarding these rights "would be to subvert one of the pillars on which rests the fabric of our civil society." He reminded his audience,

There stands the poor man's cottage; the rains of summer and the snows of winter may enter its crevices, but the King of England with all his forces, dare not enter that poor man's cottage.

He then finished by saying that in America "the citizen should be equally safe in his person and property under the shield of our constitutions," and that the state should never needlessly "interfere with the private rights of the highest or the lowest in the land." Others expounded a similar theme.

In this chapter we have traced the rise of judicial formalism and its conquest of eminent domain law. Where aid to private business was permitted it was not upon the basis of economic growth but upon past precedent. In other cases, particularly those allowing railroad takings, the right to use test was passed. Where stare decisis did not control the courts might turn to principle, which usually meant no condemnation. Or, they might choose to apply the strict construction orthodoxy with equally bad results for the condemnor. Finally we saw that underlying much of this antagonism toward eminent domain takings and the broad benefit analysis, which encouraged such takings, was a sincere desire by American Judges to protect private property rights. A representative statement of the relationship between economic growth and private
property rights as understood by late nineteenth century judges would be as follows:

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. All that to which the corporations are entitled under a proper construction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use.
FOOTNOTES


4. What judges were doing was following Bentham's plan to test all law by its ability to serve current needs, and if the law did not serve those needs it should be discarded. John Herman Randall, The Career of Philosophy, vol. II (New York: Columbia University Press, 1965), p. 590-91. Jurisprudence for Bentham was "the science by which law is applied to the production of felicity." Ibid., p. 644. And for American judges the way to secure the greatest pleasure for the greatest number was through economic development. It should not be forgotten that the driving force behind Bentham's philosophy was his desire to reform "all social institutions, especially the law." Ibid., p. 538. (emphasis added). At the very least then, the connection between legal philosophy and judicial decisions needs more study.


14. *Ibid.*, p. 548, 565. White, *The American Judicial Tradition*, p. 107 also has observed "a de-emphasis on policy considerations and a professed return to immutable guiding axioms of the law, axioms that the judge applied merely to the facts before him to reach a sound result."


21. Here is just a sampling of the treatises published between 1870 and 1910. Also listed are their chapters discussing eminent domain law.


26. Friedman, *A History of American Law*, p. 576. By Friedman's count there were 15 law schools in 1850, 21 in 1860, 31 in 1870, 51 in 1880, 61 in 1890, and 102 in the year 1900. Moreover three-fourths of the law schools were associated with a college or university by 1890.


34. Ibid., p. 467.

35. Ibid., p. 474.

36. Ibid., p. 469. His full statement is that history "is a part of the rationale study, because it is the first step toward an enlightened scepticism, that is toward a deliberate reconsideration of the worth of those rules." He continues: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."


38. Ibid., p. 622.


40. Ibid.

41. In regard to use of juries see p. 112-113. text with notes 68-73, chap. 4 and for taking concept see p. 108. text with notes 52-53 chap. 4.

42. 68 U.S. (1 Wall) 175 (1864). See text accompanying note 39 chap 1.

43. Ibid., p. 205-6.

44. Ibid., p. 206-7. J. Miller's dissent stated the old policy rationale of comity and respect for state decisions concerning state law see pp. 208-209.


48. 30 Iowa 9 (1870). This case did not involve a debt repudiation instead it was an attempt by Stewart to prevent the county officials from collecting a tax, the proceeds of which were to aid the construction of railroads.

49. Ibid., p. 30.

50. Ibid., p. 29-30.

51. Ibid., p. 43 (J. Beck dissenting).

53. Stockton & Visalia R.R. Co. v. City of Stockton, 41 Cal. 147 (1871) (J. Sprague concurring at 201, J. Temple concurring at 202, and J. Crockett concurring at 199); Commissioners of Leavensworth Cty. v. Miller, 7 Kan. 479, 499, 509, 540 (1871); Walker v. Cincinnati, 21 Ohio St. 15, 43-44 (1871); Williams v. Town of Duanesburgh, 66 N.Y. 129 (1876), (J. Allen concurring at 138-9).

54. Walker v. Cincinnati, 21 Ohio St. at 43.

55. Stockton & Visalia R.R. Co. v. City of Stockton, 41 Cal. at 197 (J. Crockett concurring); The Ohio Court, quoting Redfield's treatise on railway law, found "the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate." 21 Ohio St. at 44.

56. Williams v. Town of Duanesburgh, 66 N.Y. at 133. J. Folger, at 138, concurred "upon the principle, stare decisis." Others who specifically mentioned the ill effects resulting from tax aid include J. Allen Ibid., p. 138-9 (concurring), and J. Crockett concurring in the Stockton case, 41 Cal. 147 at 201, where he noted the tax power has "been frequently and grossly abused "creating great debts and popular discontent leading to constitutional amendments which he believed to be "the only security against such abuses. . . ." And as seen in chapter four, text accompanying note 13, many states followed this advice.

57. Ibid.


59. Ibid.

60. Ibid., p. 324.

61. Ibid., p. 323.

62. Newcomb v. Smith, 1 Chand. 71, 2 Pin. 131, 141 (1849). To the same effect are pages 136-139.


64. Ibid., p. 354, 355. Other courts sensitive to this problem were the Maine Court in Jordan v. Woodward, 40 Me. at 324; Williams, et. al. v. Town of Duanesburgh, 66 N.Y. at 133, "the court cannot at this time, without doing the greatest injustice, overrule The Bank of Rome v. The Village of Rome."

65. Ibid., p. 353. In Wisconsin the only justification for mill takings was that they were "a great public convenience, almost a necessity; and that every person or corporation which avails itself of the
franchise given by the act must take it with the resultant duty of operating the mill for the public, or any individual." (emphasis added).

66. The Atty. Gen. v. The City of Eau Claire, 37 Wis. 400, 435 (1875). The hostility of the court toward eminent domain takings generally is revealed in the judges' statement "the court has never been disposed to extend the doctrine or authority of that case; probably never will."

67. Miller v. Troost, 14 Minn. 365, 369 (1869).

68. Ibid.

69. Harding v. Funk, 8 Kan. 217, 218-219 (1871); Fleming v. Hull, 73 Iowa 598, 35 N.W. 673, 675 (1887), where the court suggested "if such statutes were enacted for the first time, it is possible, if not probable such statutes could not be sustained; Rockingham County Light & Pwr. Co., v. Hobbs, 72 N.H. 431, 58 Atl. 464, 47 (1904) quoting Salisbury Mills v. Forsaith, 57 N.H. 124, 129 (1876) where Judge Ladd wrote "but for the authorities . . . I should find great difficulty in sustaining it."

70. 8 Kan. 217, 218.

71. Ibid., p. 218-219.

72. Ibid., p. 220-221. The total would rise to 51 if a Kansas case which ended the preceding paragraph is counted.

73. Ibid., p. 221. Judge Valentine totally rejected the idea that courts could make law. He conceded the "temptation to startle the world with the announcement of some hitherto undiscovered truth would be almost irresistible," but he insisted "such attempted grasp for new principles, or the announcement of them would not come within the legitimate province of the judiciary." Ibid., at 219.

74. Ibid., p. 219

75. Ibid.

76. Ibid., p. 219.

77. Ibid., p. 220. In other words "a government of laws, and not a government merely of men."

78. Ibid., p. 223.

79. The science used by the law was not the modern scientific method based upon empiricism, with first the gathering of data, then the formulation of an hypothesis, next the testing of that hypothesis, which
if proven becomes a "law" if it stands the test of time and continued challenges. The science of nineteenth century law was one of a priori reasoning, principles were assumed, not tested for their effect or validity, and all else was deduced from these principles. It was this type of science that led Roscoe Pound to observe: "Jurisprudence is last in the march of the sciences away from the method of deduction from predetermined conceptions." "Mechanical Jurisprudence," 8 Col. L. Rev. at 610. On the desire to appear scientific Pound wrote:

there is the special tendency of the lawyer to regard artificiality in law as an end, to hold science something to be pursued for its own sake, ... to judge rules and doctrines by their conformity to a supposed science and not by the results to which they lead. Ibid., p. 607-608.

80. Sadler v. Langham, 34 Ala. 311 (1859).

81. Ibid., p. 334.

82. Ibid., p. 335 quoting Oakley v. Aspinwall, 3 N.Y. 547,568 (1850). (Chief Justice Bronson dissenting).

83. Memphis Freight Co. v. Mayor & Alderman of Memphis, 44 Tenn. (4 Cold) 419, 430 (1867). For a tax case see People ex rel. D. etc. R.R. Co. v. Batcheller, 53 N.Y. 128, 143 (1873).

84. Minnesota Canal & Pwr. Co. v. Koochiching Co., 107 N.W. 405, 414 (Minn. 1906). (J. Lewis dissenting). Lewis dissented from the majority's decision which permitted takings for electricity but not for water power because "No authority cited and no principle of law supports such distinction. The majority opinion is discussed in the text accompanying notes 87-91, chapter 2.

85. Scholl v. German Coal Co., 118 Ill 427, 10 N.E. 199, 201 (1887).

86. 33 Wash. 490, 74 Pac. 681 (1903).

87. Ibid., p.972. See generally text with notes 83 & 85 chap. 3.

88. Ibid., p. 682. This wording also reveals formalism, the avoidance of policy in judicial decisions.

89. Ibid.


91. Ibid., p. 684.
92. Ibid.

93. Armesperger v. Crawford, 61 Atl. 413, 415 (Md. 1905). As Lewis explained in his treatise, Eminent Domain, 2d ed. l:418, "Whether the public will have the use of property taken under a particular statute is a question which may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion merely, about which men may differ, and which cannot be referred to any definite criterion."

94. This theme is developed in section C infra of this chapter.

95. The leading treatise in this field, Sutherland on Statutory Construction, (Chicago: Callaghan and Co. 1891), p. 495, says "It is accordingly held that statutes providing for such a taking under the exercise of the power of eminent domain must be strictly construed . . . ." Cases from New York, California, Pennsylvania and Illinois are listed.


97. Ibid., in this case the grant was strictly construed so as to deny a power company permission to build a spur track in order to receive its supplies by rail as opposed to horse drawn wagons. See text with notes 97-99 chap. 2 and text of note 99.


100. Ibid., p. 232.

101. 116 Ill. 149, 6 N.E. 49, 60 (1886).

103. Ibid.

104. Ibid., p. 51, Cooley, Constitutional Limitations, p. 530-1. The case thus represents an application of both the narrow right to use test and strict construction.


106. Ibid., and on the following page, 450, the Court announced:

necessity is therefore not made out by proof of great convenience, nor of enhancement of values, nor of accumulation of properties of the same kind for the same use.
107. *Ibid.*, p. 450, quoting *Jefferson v. Hazour*, 7 La. Ann. 182 (1852). In the case at bar no necessity for the taking was proven because the condemnor's own evidence indicated that its resources, both developed and undeveloped, were more than adequate to meet the public's demand. *Ibid.*

108. For example in *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235, 73 S.W. 495, 597-498 (1903), the word "mill" was interpreted to mean what it did in 1825 and not 1903 when the case was decided. This case is discussed notes 75 ch. 2. For the necessity requirement see *Byerson v. Brown*, 35 Mich. 333. (1877) n.34 chap. 2; *Varner v. Martin*, 21 W. Va. 534, 556 (1883), text with notes 37-41, ch. 2.


111. *Ibid.*, p. 278. Quoting both Cooley and Wood. The text of the quotations may be found in note 52 chap. 2.

112. 23 Tex. 288 (1859).


114. 50 Tex. 77 (1878).


117. *Ibid.*, at 86, The statute involved required a railroad company whose railway passes through a field to place a cattle guard at the entrances to such fields. See Paschal's Digest, art 4925. Though the statute only required construction of cattle guards, the Court construed it "to preserve the inclosure unimpaired."

118. 53 Tex. 354 (1880). The statute under attack was sec. 130 of the general incorporation act, approved March 15, 1875, Laws second session 14th Leg. 150, re-enacted as art. 478 of the Revised Statutes of 1876.

119. Though the Court did not list the provisions, they are most probably art. 1 17 and 19 of the Tex. Const. of 1876, which forbid the taking of private property except by due process of law and which prohibit a taking unless fair compensation is made.

120. 53 Tex. at 360.
121. Ibid., at 361.
122. Ibid., at 363.
123. Ibid.
125. Ibid.
126. 84 Tex. 333, 19 S.W. 518 (1892).
127. The railroad statute was first passed in 1860, Gen. Laws. 8th Leg. 1860 p. 60. Prior to that each railroad received a specific grant to condemn through its corporate chapter. Under the railroad condemnation statute, if a railroad and landowner cannot agree on a price for the transfer of the land the railroad may petition the county court to appoint appraisors to establish the value of the land sought to be condemned. And upon payment of that amount, there being no objection by either side within 10 days, the railroad can take possession of the land and the appraisors' report goes to the county judge who makes that report his judgment or decree by which title is transferred from the owner to the railroad.
128. 84 Tex. 333, 19 S.W. at 520.
129. 86 Tex. 537, 26 S.W. 54 (1894).
130. Ibid., p. 58.
131. The Court observed at page 59 that the articles involving railroad companies and the power of eminent domain, must be liberally construed for the purpose of attaining the object intended to be secured. The object to be attained by the proceedings was to secure relief from the failure of the plaintiff to co-operate with the defendant (condemnor) as well as from any other cause of disagreement.
132. Ibid., p. 59 citing Sanford v. Hayes, 19 Conn. 596 (1849).
133. Ibid.
135. Ibid., at 165. According to the Court the description was too indefinite it did apprise the property owner, nor the condemnor of the amount of land to be condemned. The notice requirement was also failed because the record did not show that the owner had ever been notified as to the time and place the commissioners would meet to
assess damages. Without such notice the county court had no jurisdiction to enter a taking decree. Statements and conclusions by the commissioner that sufficient notice was given was held irrelevant to prove compliance with the statute. Ibid., p. 166.

136. Ibid., p. 166. The Court also claimed that the record must show that the commissioners were disinterested freeholders, and were sworn as required by statute.

137. 99 Tex. 509, 91 S.W. 221 (1906).

138. The specific road law was C. 132 Acts 24th Leg. Laws 1895, p. 213.


140. Ibid., at 101, Sect. 32 of the Paris city charter was the section held unconstitutional.

141. In addition to those already cited, California, Illinois, Indiana, Louisiana, Maryland, Michigan, Missouri, Ohio, Texas and W. Virginia; should be added Arkansas, St. Louis & S.F. Ry. Co. v. Tapp, 64 Ark. 357, 42 S.W. 667, 668 (1897), and Washington, State v. Superior Court, 78 Wash. 1011, 1012 (Wash. 1904).

142. See text with notes 92.

143. See text with notes 104 and 123, supra.

144. Cypress Pond Draining Co. v. Hooper, 59 Ky. (2Me.) 350, 354 (1859). Due to its importance the court felt compelled to give this clause "a liberal construction."


148. Nevins v. City of Peoria, 41 Ill. 502, 511 (1866).


151. Salt Co. v. Brown, 7 W. Va. 191, 200 (1874). J. Paull had support for his statements. Quoting Judge Green of Virginia Paull stressed that "this security of private property is one of the primary objects of civil government, which our ancestors in passing our Constitution intended to secure to themselves and their posterity, effectually and forever." No citation except to volume 66 Randolph was given.

152. Ibid., p. 200-201. The author of the quotation is not given.

153. Ibid., p. 201.

154. In his Yale Commencement Address, Mr. Justice Brewer told his audience that pursuit of happiness, as guaranteed by the Constitution, means the right to acquire, possess and enjoy property, and that government cannot forbid or destroy this right except in limited circumstances. See also Harvard Law Review’s favorable comment on the Supreme Court’s decision in Mo. Pac. Ry. Co. v. Nebraska, (see text with note 65 chap. 2) which struck down a regulatory action which allowed the property of railroad companies to be handed over to grain elevator operators to increase competition. 10 Harv. L. Rev. 451 (1897).

VI.

THE HERETOFORE SILENT MAJORITY

As previously noted the greatest difficulty confronting America's judiciary in the late nineteenth century was the concept of public use.\(^1\) Judges had ample opportunity to wrestle with this problem because of the flood of litigation it engendered. So voluminous and diverse were the cases that one court thought it "probably impossible to reconcile all the authorities, . . ."\(^2\) Even Judge Cooley conceded "we find ourselves somewhat at sea, . . . when we undertake to define in the light of judicial decisions what constitutes a public use."\(^3\)

With the benefit of hindsight, I now propose to design a ship capable of navigating this sometimes turbulent sea and especially its seemingly contradictory crosscurrents. In so doing I hope to chart the main currents of eminent domain law and to highlight the dangerous waters which have led others astray.

A. The Silent Majority Defined and Discovered

Fundamental to a proper understanding of the public use concept and eminent domain law is the fact that there were two entirely different meanings given to the words "public use." Under the first definition the term, the words public use referred to a right on behalf of the public to use the property condemned or at least regulate its use extensively.\(^4\) Under this view takings by railroads open to the public and grist mills, which had an obligation to serve anyone who called upon them, were upheld as being for a public use. This definition has been labeled the right to
use test.

The second definition took a broader view finding a public use in whatever benefited the general community, without regard to any public right to use or regulate the land taken. According to this definition a railroad line, designed only to serve a mine or factory would be a public use because the corporation involved was seen as important to the local economy, providing jobs, bringing in capital, and otherwise promoting the prosperity of the community.\(^5\) Throughout this essay, this definition has been referred to as the broad benefit test. (or analysis). The difference between these two definitions was clearly recognized by the courts.\(^6\)

As Chapters two and three demonstrated, the narrow right to use test was preferred by the great majority of courts. The adoption of this test was not a placebo intended to sound tough and pacify the public, yet still allow aid to business. Instead this test, was used as a powerful sword to strike down takings for any type of private enterprises, be it a dam for a manufacturing plant, a private railroad for a mining operation, a ditch to increase agricultural production, or a right of way for a lumber camp. The right to use test struck all equally. This denial of assistance to business extended to tax support, except for railroads, as seen in chapter one. Together the evidence adduced in these chapters shows that the courts were not friends of business when it came to the use of public power in their behalf, either in the form of eminent domain condemnation or forced taxation. And to halt such aid the courts routinely used the narrow right to use test and renounced the broad benefit alternative.
Furthermore the preeminence of the right to use test is consistent with both the general public's attitude toward big business and this attitude's impact on eminent domain law generally. There are many examples of the public's new skepticism toward business. Probably the best example is the process promotion, repudiation and regulation which occurred in regard to the railroads. Before 1850 all communities desired economic development and what was thought to be the surest way to obtain that development was to get railroad service. In order to promote railroad construction many municipal governments would trade their bonds, supported by special taxes, for railroad stock. Often the railroads were never built or else didn't bring prosperity. Consequently many local communities would find themselves saddled with a tax burden but nothing in return and so they tried to repudiate these debts. These repudiation efforts against the railroads were prohibited by the Supreme Court. While the railroads were in the forefront of much litigation it cannot be overlooked that tax aid to any other industry was universally denied as not being for a public use.

At the same time the repudiation efforts were in full swing 1862-1874, a new problem arose in those areas where successful railroads had been built, and this was rate discrimination. Small farmers and businessmen found themselves increasingly at the mercy of the railroads and grain elevator operators. To curb the power of these corporations the public turned to regulation. Thus what was once considered to be a forerunner of prosperity now became a potential threat, always in need of supervision.

This new attitude affected eminent domain law greatly. Beginning in the 1850's and spreading rapidly after the Civil War the compensation
procedures were reformed so as to guarantee jury assessments of damages, as opposed to appointed appraisors who were usually sympathetic to the corporation seeking the condemnation. And starting in 1870 the taking concept was broadened. Both these reforms ensured greater protection to the landowner and greater costs to the condemnor. The increasing popularity of the right to use test reflects the same attitude.

But disenchantment with business growth was not the only reason why the right to use test came to dominate the years 1870-1910. A new approach in judicial thinking, judicial formalism, was capturing the minds of American judges. This formalism consisted of the three P's: principle, precedent and the avoidance of policy. The ante-bellum utilitarian approach of Taney and Shaw was discarded because of the undesirable results it led to, not only in terms of the slavery question but also on economic questions, such as upholding tax aid to railroads on the grounds of economic benefit, or giving a narrow definition of the word taking. Judicial formalism, which considered policy analysis an anathema, and rested its decisions on principle and precedent, fit the temper of the public and judges alike.

Thus while some takings were upheld it was now on the grounds of precedent, not policy. Where there was no past precedent the courts would turn to principle and strike takings down. Closely aligned to this formalism was the well accepted notion that all eminent domain statutes and taking should be strictly construed in favor of the landowner. Both the right to use test, and strict construction, flourished in the opinions between 1870 and 1910 because of the courts' announced bias in favor of private rights. This bias controlled even when strong
economic arguments were used in support of the takings. In sum, the right to use test dominated the period 1870-1910 because of its ability to correspond to both the public's mood and the judges' thinking. This then was the general practice of the period. A practice left silent in recent scholarship.

B. The Vocal Minority

But not all takings were stopped, and those which were permitted can be explained in one of three ways: (1) unique geographic and climatic conditions; (2) special broad state constitutional provisions, or (3) stare decisis. A review of the cases finds that eminent domain takings were strongly supported in only two areas of the country—New England, namely Massachusetts and Connecticut, and the Western Mountain states. In each region peculiar local conditions were controlling. In New England mill dam acts were upheld when transportation was poor and the public grist mill not just a public benefit "but also a practical necessity." Later such acts were sustained only on the basis of stare decisis, with the courts suggesting a new result might occur if the issue were a new one.

In the West takings were upheld for a variety of enterprises including mining, lumbering and irrigation. But as discussed earlier, so unique were the physical conditions of this region that a separate theory of property law was recognized. And it was here that the broad benefit definition held sway.

The local state constitutions directly reflected these unusual conditions. They declared as a public use many private enterprises like mining and lumbering. The difference in constitutional language was
not lost on the courts. The Vermont Supreme Court, long a foe of the broad benefit test, acknowledged "that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision."\textsuperscript{13} The Western courts, too, admitted their constitutional provisions were not in the mainstream of American law, but since they were in the state constitution the courts had no choice in the matter. The Colorado Supreme Court confessed:

\begin{quote}
It is apparent from the foregoing provisions that our Constitution is, in certain particulars touching the right to take private property for private use, exceptional; and, for certain enumerated uses changes the accepted rule that the use to which private property may be condemned must be public.\textsuperscript{14}
\end{quote}

The Court went on to add that such a provision "affirmatively confers the right for particular users," to take land without judicial hindrance.\textsuperscript{15}

The presence of these broad constitutional provisions explains in large part the takings approved in the West. In regards to mining Arizona, Colorado, Idaho and Wyoming all made it a public use.\textsuperscript{16} Thus, in those states the judges in permitting mining related takings were not bending the constitution, they were just following it! A striking illustration of this relationship is provided by the irrigation cases. Scheiber lists Nevada, Montana, Colorado, Idaho, Washington, New Mexico and Arizona as states where courts upheld irrigation takings.\textsuperscript{17} But in five of these seven states irrigation was declared to be a public use by the state constitution!\textsuperscript{18}

In the rest of the country when takings were upheld it was because of either \textit{stare decisis} or that the taking passed the narrow
right to use test. The important point here is not that takings occurred, but rather they occurred for reasons other than economic growth.

C. The Errors of the Past

When an explorer first ventures into unknown waters it is all too easy to mistake a cross current as the main current and allow himself to be swept away in it. This is even more likely when the cross current confirms the explorer’s own preconceived notions. For example, when Hudson Bay was discovered many people considered it to be the illusive "Northwest Passage" connecting the Atlantic and Pacific Oceans. This was not unusual because Henry Hudson was searching for such a passage when he entered the great bay. While not being the "Northwest Passage" the discovery was important cause it broadened man’s knowledge. Scheiber’s work while not proving what he claims is likewise important because it has spurred further research in the vast field of legal history.

Many consider the study of history valuable so that the mistakes of the past will not be repeated. In this spirit, with respect for Professor Scheiber, I shall endeavor to set the record straight. Scheiber’s main two points are: (1) that eminent domain condemnations went unchecked, especially between 1870 and 1910, in an effort to aid business and economic development, and (2) the public use requirement became insignificant because of the broad benefit definition was adopted. Both of these are clearly erroneous.

To start, Scheiber completely ignores one of the two competing definitions of public use, the right to use test. Worse yet, the definition he ignores is in reality the majority position. (See Table 2).
Moreover, the courts became increasingly active in stopping eminent domain takings, not in allowing them. This error alone casts serious dispersions on the rest of his work.

Next he fails to properly understand the legal framework in which takings were upheld. Two things, which are very important to lawyers and judges alike, are precedent and constitutions. Judges are conservative by nature and don't like to make waves. "The late 19th century judges stressed very strongly that they did not make law," writes Lawrence Friedman, "Precedent, the Constitution, principles of common law—these were the rulers..."19 That takings were upheld cause of precedent in the East and constitutional provision in the West is never properly addressed by Scheiber. But these things are most important in the legal process and any legal scholar must be sensitive to their presence or absence. A prime example of this sensitivity is the Colorado Supreme Court's admission that its broad constitutional public use provision was "exceptional."20

For those takings which were upheld without precedent, the extreme physical conditions which affected property law in general controlled. The fact that the Supreme Court noted these conditions does not constitute a vote for economic development, but an acknowledgement of a special exception.21

At the risk of being chastised for my overly lawyer-like concern for detail, I feel compelled to point out one serious evidentiary flaw. Scheiber relies on two cases from New England to prove his assertions concerning the years 1870-1910.22 It's not that important that both cases were decided before 1870, what is important is that later cases,
in these same two states, and in the actual period under discussion, rejected the broad benefit test expounded in those earlier cases.\textsuperscript{23}

By now it should be clear that economic development was not the controlling factor in eminent domain law. In his efforts to support the Hurst thesis Scheiber overlooked many things. In terms of evidence, he omitted the right to use test and the fact that this test was clearly preferred by American judges. The great number of takings denied to manufacturers, miners, farmers and loggers emphasizes the low priority given economic development.

From an analysis viewpoint Scheiber fails to grasp the new trend of public opinion which now held business growth in much lower esteem than it had in the first half of the century. The impact of judicial formalism, which explains why many takings were allowed, is totally ignored. Perhaps the greatest analytical error is in his treatment of the Western States and their decisions. The unique topography and climate coupled with the broad constitutional provisions made the West atypical in terms of eminent domain law. His inability to note these distinctions erodes his whole position.

I do not wish to be understood to be saying that economic development was totally unimportant to American law in the late nineteenth century. Rather my claim is that in eminent domain law, the Hurst thesis does not stand. In short, it was strongly believed that "one man cannot have another's property simply because it would be worth more in his hands."\textsuperscript{24} Instead my research may well fall into the distinction drawn by Horwitz and McCurdy between public and private law. In regards
to the former, the courts took a narrow view, disregarding policy ramifications, but as for the latter, shaping the law to achieve beneficial results for business and society.

In 1710 the Massachusetts House of Representatives requested an advisory opinion from the Supreme Judicial Court in regards to a proposed eminent domain taking. In essence the representatives wanted to know that if the commercial and general prosperity of the Commonwealth and the city of Boston were dependent upon trade and commerce might the legislature delegate the power of eminent domain to the city for the purpose of building a wide thoroughfare with room enough for warehouses, buildings and other facilities to promote such trade and commerce. The sole purpose of the legislation was "to induce and promote a use of it by merchants or traders." The Court understood that the desired facilities could be secured only by taking the land of private owners then situated along the proposed route. According to Scheiber's analysis one would expect the taking to be approved because, after all, it affected a great industry in the state, and to do so would no doubt aid the state's prosperity. But this is not what happened.

In an opinion which marks not the end of the broad taking period, but which symbolizes what had been occurring for the past forty or more years the Justices declared:

An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds.
FOOTNOTES

1. Text and notes 5-6, chap. 1 and note 2 chap. 2.


4. In Chesapeake Stone Co. v. Moreland 104 S.W. at 764, the Kentucky Supreme Court explained: "Numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or public agencies, or the public must have the right to use in some way the property appropriated."

5. For examples of this definition see text with note 29 chap. 3 and text of note 40, chap. 3.

6. A list of cases recognizing this difference may be found in column two, of table one. Maryland's Supreme Court has stated the distinction most succinctly:

   There will be found two different views . . . which have been taken by the courts—one, that there must be a use, or right of use by the public . . . the other, that they are equivalent to public utility or advantage." 61 Atl. 413, 415 (1905).

7. In the Salem case, 452 Mich. 452, 493 (1870), Judge Cooley in striking down tax aid to a railroad exclaimed: "We are embarrassed by no decision in this state, and are at liberty to consider this question on principle; . . ." In the eminent domain area courts in Illinois and Texas both noted the lack of controlling precedent before going on to strike two proposed takings. Scholl v. German Coal Co., 118 Ill. 427, 10 N.E. 199 (1887); and Kyle v. Texas and New Orleans R.R. Co., 3 Tex. App. Civ. Cas. 3436, 4 L.R.A. 275, 278 (1889).

8. See text with notes 142-155 (sect. c. chap. 5) supra.

9. See text with notes 44-48, chap. 3 in regard to mining. See text with notes 82-87 chap. 3 in regard to lumber.


position was taken up in the midwest. Fleming v. Hull, 73 Iowa 598, 35 N.W. 674, 675 (1887), and in Wisconsin, Fisher v. Horicon Iron & Manuf. Co., 10 Wis. 351, 353 (1860); and The Att'y General v. The City of Eau Claire, 37 Wis. 400, 436 (1875).

12. Text and note 43 chap. 3.


14. Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 990 (1893). This case is significant for two reasons. One, that a strict construction of the eminent domain statute was applied to block the taking for irrigation, a purpose which the constitution declared to be public. So even in the West strict construction to block takings occurred. Second, and more importantly, this admission by the Colorado court undermines Scheiber's whole position because he relies so heavily on the Colorado Constitution as the forerunner of broad takings. Scheiber "Property Law," p. 244-245. If Scheier had confined his remarks to the mountain states, he would've been correct, but by arguing that these states reflected a national trend he outdistanced his evidence. See Grover Irrig. and Land Co. v. Louella Ditch R. and Irrig. Co., 131 Pac. 43, 56 (Wyo, 1913).

15. Ibid.

16. Arizona Const. art. II § 17, Colorado " art. II § 14; Idaho " art. I § 14; Wyoming " art. I § 32; (see generally Nichols, Eminent Domain, 1:255 n. 90).


Constit.

18. Montana art. II §15 Colorado " art. II §14 Idaho " art. I § 14 Washington " art. I §16 Arizona " art. II §17 (see generally Nichols, Eminent Domain 1:250, n. 76.)


20. Text with notes 13, supra.


23. In regards to the New Hampshire repudiation of this reasoning see Rockingham County Light and Power Co. v. Hobbs, notes 95-98 chap. 3. The key Massachusetts case is Opinion of the Justices, 204 Mass. 607 (1910), discussed below at notes 25-26.

24. In Re Bare Water Co., 62 Vt. 27, 20 Atl. 108, 111 (1890). Later the same Court would become long-winded like in Avery v. Vermont Elec. Co. 75 Vt. 235, 54 Atl. 179, 179-180 (1903) when the court, in writing about the broad benefit test, held that it "comes dangerously near the argument that it is for the public benefit to have property ... in the hands of those who will put it to the best use, and that the refusal of an obstinate ... owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the constitution of this state."


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