

# GOVERNMENT POWER UNLEASHED: USING EMINENT DOMAIN TO ACQUIRE A PUBLIC UTILITY OR OTHER ONGOING ENTERPRISE

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## INTRODUCTION

Ask most people what they think of a municipality using its eminent domain power to acquire a privately-owned utility company and the typical response is one of disbelief and sometimes, mild outrage. This power to convert public utilities from private to public ownership, however, has historically been available to state and municipal governments to secure lower power rates for local residents.<sup>1</sup> The impetus for this Article was the City of Corona's exercise of eminent domain power to acquire Southern California Edison in order to provide less expensive rates and more reliable electricity service to residents. Although the City eventually settled with Edison, the issues remain. Municipalities across the United States are considering using eminent domain to acquire private utility companies. What then are the limits on using the eminent domain power to acquire ongoing enterprises in order to provide public goods or services? This Article identifies and discusses some of the issues and constraints involved in private enterprise condemnations, particularly those involving privately-owned public utilities.

Government has long enjoyed the power to acquire property from unwilling property owners in order to further its citizens' public needs and interests. The source of this power stemmed from both historical and constitutional roots. From its beginnings, the United States adopted the English approach of requiring land owners to "return" property to the crown when needed for the public good. Then, with the addition of the Fifth Amendment Just Compensation Clause, the people were guaranteed that the government would compensate them for any private property taken to fulfill a public purpose.

Now, in most states, the eminent domain power is delegated, along with the state's police power, to municipalities and other local government units. Local government power is constrained by state statute and constitution, but the degree of constraint varies widely by state. In reaction to situations such as the Enron mess and the electric power problems in California, municipalities recently began

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1. *See, e.g.*, *Pub. Serv. Co. of Colo. v. City of Loveland*, 245 P. 493, 498 (Colo. 1926) (holding that the city's exercise of eminent domain to acquire a privately-owned electric utility plant was properly exercised based on a 1903 ordinance and the city's fundamental power to condemn property for a public use). *See also* 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.06[40] (3d ed. 2004) (discussing New York condemnation statute, N.Y. PUB. AUTH. LAW § 1020-A, enacted "to facilitate conversion of a power company from private to public ownership").

exercising this power to acquire ongoing private utility businesses to bring supply and price stability to their citizens.<sup>2</sup> Land owners generally realize that the government has the power to condemn their real property for such purposes as expanding a highway. Yet, few business owners suspect that this power of condemnation extends to allow the local government to force a sale of their private enterprise.<sup>3</sup>

This Article examines both state and local government's use of eminent domain to acquire an ongoing utility company. The focus is on utility companies since they have experienced both public ownership and regulation, and only recently "deregulated" to allow private owners to run them competitively. However, an overriding concern remains—what is the limitation on government power after a municipality or state condemns a private business it determines can be run more efficiently as a public function?

Following this introduction, Part I discusses the history of industries that have been historically subject to public ownership or regulation and why state and local government officials have felt compelled to acquire these industries to respond to citizen needs. Part II outlines Fifth Amendment limitations and various state constitutional and statutory constraints on eminent domain power. Federal limitations such as the Dormant Commerce Clause, the Commerce Clause, the Tenth Amendment, the Supremacy Clause, antitrust laws, and the Contract Clause are explored in a forthcoming article.<sup>4</sup> The Article concludes by suggesting that people can either limit or expand this government power through legislative action, and in some cases, state constitutional amendment. Social, economic, and political pressures will combine to either prevent or enable wide-scale nationalization and what some might refer to as "creeping statism"<sup>5</sup> or "creeping economic socialism."<sup>6</sup>

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2. Rich Saskal, *The Far Reach of Enron Prompts Push for Public Power in Oregon*, BOND BUYER, Sept. 26, 2003, at 1 (discussing Oregon's public power efforts and noting that in addition to several communities in California pursuing public utilities, the city of Great Falls, Montana, is attempting to create a municipal utility).

3. See, e.g., *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 841 (Cal. 1982) (noting that "[n]o case anywhere of which we are aware has held that a municipality can acquire and operate a professional football team, although we are informed that the City of Visalia owns and operates a professional Class A baseball franchise in the California League; apparently, its right to do so never has been challenged in court").

4. Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. (forthcoming June 2005).

5. *City of Oakland*, 646 P.2d at 845-46 (Bird, C.J., concurring and dissenting); see also RICHARD F. HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RECONSTRUCTING IN THE AMERICAN ELECTRIC UTILITY SYSTEM* 41 (1999) ("In a series of advertisements run in the early 1960s, moreover, utilities implied that government operation of such power systems constituted a step 'down the road to socialism.'") (citation omitted).

6. David Schultz & David Jann, *The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings*, 16 WM. MITCHELL L. REV. 383, 426-27 (1990) (suggesting that municipalities use eminent domain to gain control of assets to prevent a

## I. THE COMPELLING CASE FOR PUBLIC OWNERSHIP AND GOVERNMENT CONTROL

### A. *The City of Corona Responds to the California Energy Crisis*

The City of Corona (“Corona”) in Riverside County, California, filed a Complaint in Eminent Domain against Southern California Edison Company (“Edison”) on December 3, 2002, to acquire Edison’s integrated electric utility system to reduce its residents’ power bills.<sup>7</sup> Edison had earlier rejected Corona’s offer to purchase the system, responding that its system was not for sale.<sup>8</sup> Corona’s Complaint in Eminent Domain alleged that in April 2001, Corona established a “municipally-owned electric, natural gas, telephone, and telecommunications utility” pursuant to its alleged authority as a municipal corporation under Article IX, Section 9(a) of the California Constitution.<sup>9</sup> This section permits a municipality to “establish, purchase and operate public works to furnish its inhabitants with light, water, power, heat.”<sup>10</sup> Corona’s electric utility, authorized by the California Public Utilities Commission, already served some of Corona’s businesses and certain Los Angeles Unified School District facilities.<sup>11</sup> Corona claimed that the restructuring of California’s electricity market in January 1998, “created significant disruptions of California’s energy market, including higher rates, power outages, and rolling blackouts.”<sup>12</sup> Additionally, Corona alleged that Edison’s excessive rates and failure to maintain a safe and reliable distribution system adversely impacted Corona’s businesses and residents.<sup>13</sup>

Corona and Edison settled this litigation on May 14, 2003, leaving open the question of whether a municipality can use its eminent domain power to acquire a privately-owned utility and in turn “municipalize” the electric utility.<sup>14</sup> Corona indicated that pending state energy legislation might make it harder to take over the electric distribution system and that Edison’s proposed rate reduction made the projected savings from municipal ownership less compelling.<sup>15</sup>

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business from closing down or leaving a community).

7. See Complaint, *City of Corona v. So. Cal. Edison Co.*, No. 385551 (Cal. Sup. Ct., County of Riverside, Dec. 3, 2002) [hereinafter Complaint], available at <http://www.discovercorona.org/depts/electric>.

8. See *SoCal Ed. Fighting City of Corona’s Efforts to Municipalize Distribution*, POWER MARKETS WK., Jan. 13, 2003, at 25.

9. Complaint, *supra* note 7, at 4.

10. *Id.*

11. *Id.*

12. *Id.* at 3.

13. *Id.* at 6.

14. *Corona Decides to Stay with SoCal Ed, Will Drop Eminent Domain Lawsuit*, ELECTRIC UTIL. WK., May 19, 2003, at 19.

15. *Id.*

Other municipalities in Southern California effectively operate their own electric utilities, offering residents and businesses reasonable rates.<sup>16</sup> The City of Glendale, for example, received an A1 rating from Moody's on its Electric Revenue Bonds because of its strong financial operations and generating capacity.<sup>17</sup> Even with the recent scandals plaguing the industry, an internal investigation of a Glendale agreement with Enron determined that "Glendale Water and Power had no improper involvement in the Enron trading ploys."<sup>18</sup> Despite this affirmation, both Glendale Water and Power and Los Angeles' city-run utility, the Department of Water and Power (DWP), are currently under investigation by federal regulators to determine whether they and other municipalities conspired to drive up power prices during "California's electricity meltdown in 2000-2001."<sup>19</sup> Although not free from criticism that municipal utilities took advantage of the situation, these city-run utilities managed to avoid blackouts and rate increases. Concerns still remain that the privately-owned energy companies and utilities were involved in schemes to manipulate California's electricity markets during the 2000-2001 energy crisis.<sup>20</sup>

As one of the first states to embrace the market enterprise approach of the Public Utility Regulatory Policies Act ("PURPA") in the late 1970s, California welcomed new independent producers of power to meet the rising electricity demand not addressed by sufficient new power plant construction.<sup>21</sup> Following the passage of the Energy Policy Act of 1992, which encouraged competition, the California Public Utilities Commission began restructuring the state's utility system, including passing legislation that deregulated the electric utilities by 1998.<sup>22</sup> Other states watched California's restructuring experience in anticipation of emulating the market enterprise approach of the Energy Policy Act.<sup>23</sup> By the

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16. See Complaint, *supra* note 7, at 6 (Corona alleged that the cities of Riverside and Anaheim offer lower rates and Riverside has used these lower rates to attract businesses to move from Corona to Riverside.).

17. Press Release, Moody's Investor Serv., Moody's Assigns A1 Rating to Electric Revenue Bonds of Glendale, California, (Jan. 21, 2003), available at 2003 WL 7902907.

18. Kelly Yamanouchi, *Los Angeles Glendale Finds No Impropriety in Its Enron Deal*, L.A. TIMES, July 13, 2002, at B4.

19. Richard Nemeč, *DWP Really Has A Lot of Explaining To Do*, L.A. DAILY NEWS, Mar. 11, 2003, at N11. See also Rebecca Smith, *Regulators Find "Epidemic" of Market Manipulation in California Energy Crisis*, WALL ST. J., Mar. 27, 2003 at A3 (noting that "[f]ederal energy regulators said they found 'epidemic' efforts to manipulate electricity and natural-gas markets during California's 18-month-long energy crisis" and that the Los Angeles Department of Water and Power is one of the companies included in the Federal Energy Regulatory Commission's staff recommendation that "some big power suppliers explain why their behavior didn't constitute illegal manipulation of Western energy markets").

20. Mark Martin, *State Hunts for Goods on Energy Firms; Lawyers Try to Show Market Manipulation*, S.F. CHRON., Jan. 20, 2003, at A1; Smith, *supra* note 19, at A3.

21. HIRSH, *supra* note 5, at 93-100.

22. *Id.* at 239.

23. *Id.* at 248 (noting that California's strong economy and the presence of large investor-

end of 1996, “four states had passed restructuring laws, and all but a few states had launched legislative or regulatory investigations as preludes to introducing utility system reforms.”<sup>24</sup>

Now recovering from the energy troubles of 2000-2001, other states and their municipalities again are watching California’s newest power utility restructuring. What went wrong with the rapid deregulation of the electric utility system? Was there a market failure that prevented the market enterprise theory from succeeding in a competitive structure? As policymakers and the courts sort through the allegations of conspiracy and the evidence of market manipulation, municipalities across the nation, and even other nations, are attempting to determine whether private ownership, public ownership, regulation, or deregulation is the appropriate model for power utilities operations.

The decision whether to “municipalize” or “privatize” a utility has historically perplexed policymakers, resulting in a variegated history of private ownership, public ownership, regulation, and deregulation or restructuring of the utilities.<sup>25</sup> Deciding whether it makes fiscal sense for a municipality to acquire a private utility company through the eminent domain process requires careful study and analysis.<sup>26</sup> However, once a city can justify to its elected officials that operating the utility will significantly benefit its citizens, the municipality has a responsibility to act in the best interests of its citizens and respond as the City of Corona did, so long as state statutory and constitutional law allow such a condemnation.<sup>27</sup>

It is not the purpose of this Article to advocate either public or private ownership of utilities or to opine regarding the efficacy of either regulating or restructuring certain industries.<sup>28</sup> Individual states and municipalities must make this determination on a case-by-case basis using past history, economic theory,

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owned utility companies and non-utility energy producers made it a good candidate for a “workable competitive market”).

24. *Id.* at 260.

25. *See, e.g., id.* at 14 (discussing the municipalization model of the late 1800s and early 1900s where “city governments purchased the assets of utility companies and operated them for the supposed benefit of the citizens”).

26. *See, e.g.,* City of Corona, Feasibility Study (Nov. 2002), available at <http://www.discovercorona.org/depts/electric> [hereinafter Feasibility Study] (the analysis performed by Corona prior to recommending action to the City Council). *See also* Schultz & Jann, *supra* note 6, at 410 (observing that “each community will have to embark on a fairly sophisticated financial analysis of a business before making the decision whether to pursue ownership of that business through eminent domain”).

27. *See* Feasibility Study, *supra* note 26, at 3 (“Corona’s municipalization of the electric utility system can be physically and logistically accomplished, would be financially viable, and would result in significant overall savings to the City’s ratepayers for all rate classes in all price scenarios under all options.”)

28. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1400-03 (1998) (discussing the debate as to whether natural monopolies should be regulated).

and political perspective. However, by exploring potential legal constraints on the government's eminent domain power and understanding the historical perspective of utility ownership and regulation, this Article will hopefully serve to guide municipalities, utilities, public officials, courts, and citizens in approaching these issues.

### *B. The Regulatory History of Utilities and Other Regulated Industries*

Much is written about public utilities' regulation, deregulation, restructuring, and, indeed, there is a multitude of specialized legislation and case law, both federal and state, dealing with utilities.<sup>29</sup> In his 1887 essays, Henry Carter Adams identified three classes of industries, two of which were adequately controlled by competition and one of which required state control because the industry type was by nature a monopoly.<sup>30</sup> For many years, there was general agreement that industries considered to be "natural monopolies" included: the water supply industry; the transportation network of waterways, roads, and railroads; the petroleum pipelines; the light and power industries; the local transit industry; and the telecommunications industry.<sup>31</sup> Recently, however, commentators question whether utility companies *are* natural monopolies in light of technological innovation making market competition possible through small-scale generating equipment.<sup>32</sup> While the individual histories of these "natural monopoly" industries differ from one another in significant ways, there are some general trends common across these industries.<sup>33</sup>

First, as presumed natural monopolies, these industries have a history of public control and are subjected to regulation through common law remedies, charter, franchise and statutory limitations.<sup>34</sup> This public control was initially

29. See, e.g., Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"); IDAHO CODE § 61-01 to 61-1508 (Michie 2002); HIRSH, *supra* note 5, at 2; Kearney & Merrill, *supra* note 28.

30. See WILLIAM K. JONES, CASES AND MATERIALS ON REGULATED INDUSTRIES 3 (1967) (citing HENRY CARTER ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION (1887), reprinted in DORFMAN, TWO ESSAYS BY HENRY CARTER ADAMS 57-133 (1954)).

31. See generally *id.* at 6-22; see also Kearney & Merrill, *supra* note 28, at 1327 (analyzing those industries included within the "classic definition of regulated industries" including "four 'common carriers'—railroads, airlines, trucks, and telecommunications companies—and two 'public utilities'—electricity and natural gas").

32. HIRSH, *supra* note 5, at 120 (observing that "[t]hrough PURPA brought the issue of natural monopoly to a head in the 1980s, academic critics had questioned the value of the principle earlier"). See also Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 452 (2002) ("PURPA stimulated a deeper rethinking of the concept of natural monopoly.").

33. See Tomain, *supra* note 32, at 443 (noting that "it is the degree of protection that distinguishes government treatment of some industries from the treatment of others" and "that the degree of government intervention changes over time").

34. JONES, *supra* note 30, at 22-31 (discussing common law rules applied to common carriers and innkeepers and limitations on industries created by state charters, municipal franchises, and

shared by state and municipal governments, which granted state charters and municipal franchises. These charters and franchises were the basis of the “regulatory contract” whereby the public’s need for utility services was satisfied by private companies. The private companies built the infrastructure and supplied nondiscriminatory service in exchange for “the opportunity to earn a competitive return.”<sup>35</sup> By the late 1800s, control shifted to municipalities since much of the need for these utilities was generated by urbanization at the city level and required use of the city streets.<sup>36</sup> However, once this “promotional stage” established service to the residents, cities and states discovered that the existing charters and franchises did not provide sufficient incentive for reduced rates and increased quality of service.<sup>37</sup>

The next trend was a move toward “encouraging competition as a means of protecting the interests of the public.”<sup>38</sup> For example, the electric industry at its beginning in the late 1800s “was an unregulated competitive industry.”<sup>39</sup> Although this trend occurred at different times for different industries, “most of the natural monopoly industries went through a second or ‘competitive stage’ in which charters and franchises were freely granted to all comers.”<sup>40</sup> This competitive stage was not terribly successful as price wars resulted in deteriorated operations and service. Additionally, companies began either consolidating or fixing prices in violation of weak antitrust regulations.<sup>41</sup> It was at this juncture in the late 1800s and early 1900s, that both the municipalization model and the regulatory model were explored as alternatives to a free market because the franchises were subject to political corruption.<sup>42</sup> A new approach was needed to respond to this corruption. Municipal power companies only constituted approximately “30 percent of the nation’s electricity suppliers” by 1907,<sup>43</sup> but the regulatory model still prevailed as economists argued that these “natural monopolies” required governmental oversight. During this time, critics

statutory restrictions).

35. J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 898 (1996).

36. JONES, *supra* note 30, at 31-32.

37. *Id.* at 33.

38. *Id.*

39. Tomain, *supra* note 32, at 444.

40. JONES, *supra* note 30, at 33.

41. *Id.* at 33.

The result of reliance upon competing companies was frequently (a) periods of price competition and instability in operations, followed by (b) suppression of competition by agreement among the parties, resulting in (c) higher prices than previously to provide coverage for the higher costs of multiple operations and duplicated investment, setting the stage for (d) further entry as the operations of the incumbents became profitable once more.

*Id.*

42. HIRSH, *supra* note 5, at 14-15.

43. *Id.* at 15.

of municipal ownership feared corrupt political forces in city management and the end of free enterprise in favor of municipal socialism.<sup>44</sup>

The third or “regulatory” trend resulted from the failure of the competitive stage to protect the public from abuses by the natural monopoly industries.<sup>45</sup> The public utility regulation was based in contract law with the state or municipality allowing the private utility to earn a competitive rate of return in exchange for the utility submitting to regulatory restrictions.<sup>46</sup> The agreement, also called “the utility consensus,” permitted investor-owned power companies to sell electricity without competition in exchange for supplying consumers with good service at good rates.<sup>47</sup> The Interstate Commerce Act, enacted in 1887, created an administrative agency to regulate private companies through close monitoring, regulated rates, and limitations on industry entry and exit.<sup>48</sup> This regulatory model, designed to ensure “just, reasonable, and non-discriminatory rates and practices,” was subsequently imposed on the “shipping, stockyard, telephone, telegraph, trucking, electric, gas, and aviation industries.”<sup>49</sup> The regulatory stage lasted for almost a century,<sup>50</sup> but in the last few decades a return to the competitive model has occurred in an effort to improve consumer welfare by again encouraging provider competition.<sup>51</sup>

The transformation from regulation to “competition through regulation”<sup>52</sup> began in the 1960s when economic and political factors combined, creating a

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44. *Id.* at 15-26, 38, 40-41 (discussing fights in the early 1900s to prevent municipal ownership and attacks made by the power company publicists in advertising campaigns against supporters of government-run utilities, calling them “‘Bolsheviks,’ ‘reds,’ or ‘parlor pinks’”).

45. JONES, *supra* note 30, at 29.

46. Sidak & Spulber, *supra* note 35, at 887 (explaining that these restrictions included “price regulations, quality-of-service requirements, and common-carrier regulations”). This article cites *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) and *Munn v. Illinois*, 94 U.S. 113, 124 (1877) as evidence that the concept of regulatory contract has a historical lineage in contract. *Id.* at 891. See also Tomain, *supra* note 32, at 446 (describing the regulatory compact as imposing obligations on both the utility and the government where “[i]n exchange for a government-protected monopoly, the utility lets government set its prices through ratemaking”).

47. HIRSH, *supra* note 5, at 1.

48. Kearney & Merrill, *supra* note 28, at 1325 (citing Interstate Commerce Act, 24 Stat. 379 (1887)).

49. *Id.* at 1333-34 (internal citations omitted).

50. *Id.* at 1329 (observing that the dominant model of regulation which began in the late nineteenth century has been dramatically changing in the last few decades to allow “consumer choice among multiple competing providers”).

51. *Id.* at 1325-26; see also Tomain, *supra* note 32, at 449-50 (noting that there are regulatory cycles where a competitive business consolidates to reduce competition, there is a competitive failure, the government regulates to correct the failure, there is a regulatory failure, and then policymakers return to the competitive model).

52. Kearney & Merrill, *supra* note 28, at 1329 (describing the transformation from “the original paradigm of regulated industries law . . . to a new paradigm emphasizing, to the maximum degree feasible, consumer choice among multiple competing providers”).

background where critics questioned the efficacy of our traditional regulatory structures.<sup>53</sup> The three stresses of “technological stasis, the energy crisis, and the environmental movement”<sup>54</sup> brought about the end of the relatively stable regulatory phase.<sup>55</sup> In response, the Public Utility Regulatory Policies Act (PURPA)<sup>56</sup> was enacted in 1978 as part of the National Energy Act<sup>57</sup> and encouraged market-based rates for conventional fuels.<sup>58</sup> In the energy sector, the “utility consensus” was weakened as free market principles replaced the concept of natural monopoly power and traditional regulation was questioned.<sup>59</sup>

First to reject the traditional regulatory structure in favor of a market approach was the airline industry with the enactment of the Airline Deregulation Act of 1978.<sup>60</sup> Airline industry deregulation was followed by railroad deregulation in 1980 with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976,<sup>61</sup> the Staggers Rail Act of 1980,<sup>62</sup> and finally the abolishment of the Interstate Commerce Commission in 1996.<sup>63</sup>

By the 1980s, the telecommunications business transitioned to a competitive marketplace,<sup>64</sup> and the natural gas industry was well on its way. The natural gas industry unbundled its services by taking advantage of open access to interstate pipelines to allow producers to compete for industrial end-users “using the interstate pipeline as a provider of transportation service only.”<sup>65</sup> Producers could now sell natural gas without having to maintain their own pipelines. Under

53. Tomain, *supra* note 32, at 450 (discussing regulation of the electric industry and the political and economic events leading to “unsettling the electric industry and its customers”).

54. HIRSH, *supra* note 5, at 68-69 (describing the effects of these stresses as utility companies were unable to reduce prices as technological improvements were limited, the energy crisis created an unsettled market for power as consumers reduced consumption, and the growth of environmental legislation and regulation constrained the power of utility managers).

55. See Andrew P. Morriss, *Implications of Second-Best Theory for Administrative and Regulatory Law: A Case Study of Public Utility Regulation*, 73 CHI.-KENT L. REV. 135, 143 (1998) (referring to the period between World War II and 1970 as “‘an era of stability’ for both the regulators and regulated in the public utility field”).

56. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 26, 42, and 43 U.S.C.).

57. Tomain, *supra* note 32, at 451.

58. See *id.*

59. HIRSH, *supra* note 5, at 71.

60. Kearney & Merrill, *supra* note 28, at 1335; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 40101 (2000)).

61. *Id.* (citing Pub. L. No. 94-210, § 202(b), (c)(i), 90 Stat. 31, 35 (1976) (codified as amended at 49 U.S.C. § 10709(c) (1994)).

62. *Id.* at 1336 (citing Pub. L. No. 96-448, 94 Stat. 1895.)

63. *Id.* (quoting the House Committee as stating “that ‘the railroad industry has operated in an essentially deregulated environment’ since 1980”) (citing H.R. Rep. No. 104-311, at 90 (1995)).

64. *Id.* at 1341-42 (discussing the unbundling of goods and services and separating long-distance services from local services).

65. *Id.* at 1345.

this new model, the main function of the regulator “[was] to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users” rather than to oversee the industry to protect consumers.<sup>66</sup> In summarizing “the central tenets of the new paradigm in regulated industries law,”<sup>67</sup> Kearney and Merrill observed that “[i]n industries and segments where services have been bundled together through vertical and horizontal integration, this means that segments that can be provided competitively must be unbundled and opened to competition (long-distance telephony, natural gas production, electricity generation).”<sup>68</sup>

Calling this new stage of deregulation the “great transformation,” Kearney and Merrill proposed “that a wide-ranging transformation sharing many common features is taking place throughout regulated industries law.”<sup>69</sup> They also suggested that this trend “is being driven by deep-seated economic and social forces”<sup>70</sup> including an increasing perception of regulatory failure and a decreasing perception of market failure.<sup>71</sup> Hirsh noted, in his book on the history of the electric utility system, that “[b]y the 1990s, participants moved tentatively toward creation of a new consensus that sanctified the concept of competition and rejected the legitimacy of natural monopoly and regulation.”<sup>72</sup> Certainly, the push toward deregulation of electricity was preceded by the deregulation of airlines and natural gas along with a favorable economic and political perspective in the country regarding deregulation.<sup>73</sup> For the electricity industry, “[t]he cumulative failures of regulation, coupled with remarkable innovations rendering old technology inefficient or obsolete, suggested that new efficiencies could be realized by introducing competition to certain sectors of the electricity industry.”<sup>74</sup>

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66. *Id.* at 1361.

67. *Id.* at 1363.

68. *Id.* at 1363-64 (also noting that where industries compete through market transactions, “the focus of the agencies necessarily turns to those market segments that have natural monopoly characteristics”).

69. *Id.* at 1383.

70. *Id.*

71. *Id.* at 1399.

72. HIRSH, *supra* note 5, at 2. See also Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 55 n.\*, 65 (1968) (concluding that “the rivalry of the open market place disciplines more effectively than do the regulatory processes of the commission” and crediting R.H. Coase at the outset of the article “who was unconvinced by the natural monopoly argument long before this paper was written”).

73. Fred Zalzman & David Nichols, *Competition, Environment, and the Electric Industry: A Special Symposium on Restructuring at the Crossroads*, 18 PACE ENVTL. L. REV. 287, 288 (2001).

74. Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1277 (1998).

### C. *Regulatory Reform or a Return to Public Ownership?*

By the end of 2000, “twenty-four states, including most of the larger states, had decided to deregulate electricity generation.”<sup>75</sup> However, in the face of serious problems with this deregulation of electric power,<sup>76</sup> policy makers must decide whether such restructuring should continue or whether we should return to government controlled regulatory safeguards.<sup>77</sup> Perhaps market failures in a restructured utility industry will justify either regulation or municipalization as we once again face the decision of which model best addresses problems of corruption and abuse of power in a competitive environment.<sup>78</sup> Recent commentators conclude that “[t]he mistaken experiment in California and the gaffs of Enron notwithstanding, electricity restructuring is good policy and is one to which we should be committed for our energy future”<sup>79</sup> while attributing the Enron situation to failures of corporate, not regulatory law.<sup>80</sup> However, such recent events occurring with the electric utilities may change the public’s perception about the advantages of deregulation. The public might well conclude that the corporate excesses resulting from competitive greed constitute a market failure justifying more public control of utilities.

1. *The Deregulation Failure and a Call for Regulation.*—The deregulation of the electric utility industry involved unbundling electricity transmission from its generation.<sup>81</sup> This transformation from the state ownership or regulatory model of a “natural monopoly” to a privatized model of competing industry

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75. Zalcman & Nichols, *supra* note 73, at 288. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 3204 (West 2001) (Maine enacted statute to force the divestiture of general assets and generation-related activities by investor-owned electric utilities); MASS. GEN. LAWS ANN. ch. 40A, § 3 (2003); Act of Nov. 25, 1997, ch. 164, 1997 Mass. Acts § 1(f) (Massachusetts in its 1997 amending act for zoning powers stated that “the introduction of competition in the electric generation market will encourage innovation, efficiency, and improved service from all market participants, and will enable reductions in the cost of regulatory oversight.”).

76. Zalcman & Nichols, *supra* note 73, at 288-89 (discussing restructuring problems such as high unregulated generation prices, lack of consumer choice of non-utility power suppliers, and fear that environmental benefits of restructuring may not be realized).

77. Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1768-69 (2002) (observing that California as “the first state to deregulate retail power markets on a mass scale, saw repeated months of power interruptions”).

78. See HIRSH, *supra* note 5, at 227 (discussing how market failure may justify governmental oversight under the public interest theory of regulation which holds that “the proper task of economic regulation is to intervene where competitive forces are too weak to defend the public interest unaided”) (quoting Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. OF ECON. OF MGMT. SCI. 155, 335-58 (1974)).

79. Tomain, *supra* note 32, at 474.

80. Rossi, *supra* note 77, at 1768.

81. Kearney & Merrill, *supra* note 28, at 1354-5 (quoting RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES* 350 (3d ed. 1994)).

components faced major issues. Pricing must encourage investment in every segment of the industry and transmission must allow for the easy movement of electricity to consumers.<sup>82</sup> Additionally, electric utilities must deal with the “stranded costs”<sup>83</sup> of capital investments originally made with the promise of maintaining a regulated monopoly.<sup>84</sup> “It would breach the regulatory contract for the regulator to make unilateral changes in regulation that might prevent a utility from recovering the economic costs of investments that it made to discharge its regulatory obligations to serve.”<sup>85</sup> These so-called stranded costs may result when regulated industries are required to provide open access of their facilities to competing producers, who have not made the same capital investments to support the infrastructure required for distribution.

Although competition in energy production may have been a welcome development, appropriate and continuing investment in the delivery system is necessary to assure reliability and availability of electricity.<sup>86</sup> The need for state oversight or participation is also critical because of the nature of industry. Electricity cannot be stored so the consumer is dependent on the supplier and since “the industry depends overwhelmingly on public assets such as rivers, land accessibility, and mineral or petroleum resources . . . it has far-reaching impact on the environment.”<sup>87</sup>

Why has a pioneering state such as California not achieved the proper mix of competitive enterprise and state oversight to successfully transition from a regulated industry to a market-driven utility company?<sup>88</sup> One expert concluded

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82. Tomain, *supra* note 32, at 469-70 (discussing how competition requires access to the transmission system, but that congestion of the transmission system may result if investments are made in the generation segment, but not in transmission capacity).

83. Steven Ferrey, *Exit Strategy: State Legal Discretion to Environmentally Sculpt the Deregulating Electric Environment*, 26 HARV. ENVTL. L. REV. 109, 142 (2002) (proposing the use of exit and entrance fees to recover from electric consumer stranded costs, which are “the undepreciated book value of generating facilities not recovered in the price of their sale to new owners at the time of restructuring”).

84. Sidak & Spulber, *supra* note 35, at 861 (discussing the problem of recovering stranded costs when transitioning from a monopoly to competition).

85. *Id.* at 884.

86. Tomain, *supra* note 32, at 470.

87. Francis N. Botchway, *The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends*, 21 U. PA. J. INT’L ECON. L. 781, 784-85 (2000); see Tomain, *supra* note 32, at 473-74 (concluding that regulatory oversight will be required to monitor a restructured electricity market to avoid market power concentrations and that restructuring may actually result in more rather than less regulation); see also Timothy P. Duane, *Regulation’s Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 477 (2002) (noting that the “lack of storage capability increases the likelihood of both volatile prices and periodic shortages”).

88. See Zalzman & Nichols, *supra* note 73, at 290 (noting that “[u]nexpected price increases in California, New York, and elsewhere are creating huge uncertainty about the impact of electric industry restructuring on consumer interests”).

that when state, rather than federal, regulatory oversight is employed, “state politics is more likely to lead to dysfunctional markets than national approaches to restructuring.”<sup>89</sup> Instead, “[t]he law of regulatory federalism—defined broadly to include federal preemption doctrine, the dormant commerce clause, and state action immunity to antitrust enforcement—should find ways to encourage desirable participation and discourage undesirable interest group capture of the state political process.”<sup>90</sup> These federal doctrines are not within the scope of this Article, but can act as major constraints on state eminent domain power.<sup>91</sup>

One of the most thoughtful articles addressing the California energy failure was written by Dr. Timothy P. Duane, while a law student at Boalt Hall. At the time, he was also an Associate Professor of Energy and Resources at University of California, Berkeley, and had served as a senior policy consultant to the California Public Utilities Commission from 2000 to 2001. Duane analyzed California’s experience and offered guidance, based upon this experience, to other states involved in efforts to restructure the electricity industry.<sup>92</sup> According to Duane, the key features of the California system design that contributed to the 2000-2001 crisis were: 1) “a market design that required all purchases and sales to go through a single ‘transparent’ market”<sup>93</sup> that would discourage participants from monopoly abuse while allowing the benefits of competition but which in practice “seriously limited long-term contracts, and . . . was especially subject to gaming and market manipulation;”<sup>94</sup> and 2) an attempt “to recover the so-called ‘stranded costs’ of past investments by the investor-owned utilities,”<sup>95</sup> but without a provision to allow utilities to recover costs that exceeded an agreed upon rate cap and with inherent incentives to avoid long-term contracts in favor of less risky purchases through the spot market.<sup>96</sup>

California’s market system design flaws, growing demand, decreased power supply, a manipulation of natural gas prices, of physical withholding of energy generation, “decreased availability of air quality emission offsets in southern California,”<sup>97</sup> and the Federal Energy Regulatory Commission’s (FERC’s) failure to “enforce the law and discipline the anti-competitive behavior driving the

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89. Rossi, *supra* note 77, at 1769-70 (relying on “three recent books on the history of regulated industries to address what went wrong in the turn toward deregulation of electric power,” which include: CHARLES R. GEISST, *MONOPOLIES IN AMERICA: EMPIRE BUILDERS AND THEIR ENEMIES FROM JAY GOULD TO BILL GATES* (2000); HIRSH, *supra* note 5; PAUL W. MACAVOY, *THE NATURAL GAS MARKET: SIXTY YEARS OF REGULATION AND DEREGULATION* (2000)).

90. Rossi, *supra* note 77, at 1770.

91. Saxer, *supra* note 4.

92. Duane, *supra* note 87, at 539-40.

93. *Id.* at 503.

94. *Id.* at 499.

95. *Id.* at 501.

96. *Id.* at 503.

97. *Id.* at 515.

[price] increases”<sup>98</sup> are all factors that contributed to the 2000-2001 crisis.<sup>99</sup> Unless these conditions are corrected, Duane concluded that this crisis might repeat itself in the future.<sup>100</sup>

Duane also pointed out that California is not alone in experiencing problems with restructuring.<sup>101</sup> He noted that other states such as Pennsylvania, New Jersey, Maryland, New York, and Texas also suffered recent price increases, physical capacity decreases, and even blackouts.<sup>102</sup> In June 2000, New York experienced a dramatic price increase of 30% in the average wholesale price of electricity following New York’s efforts to deregulate.<sup>103</sup> The expectation that competition would lead to lower prices drove New York’s move to deregulate, but policymakers also realized that issues such as stranded costs, environmental concerns, and consumer protection would need to be addressed.<sup>104</sup> Since deregulation efforts began in 1996 the electricity prices in New York have not declined.<sup>105</sup> Despite not meeting the goal of lowering prices, at least one commentator observed that it is not necessarily the concept of deregulation that is the problem, but rather, perhaps, the design of this restructuring.<sup>106</sup> Instead of full marketplace competition, New York’s structure is one of “regulated deregulation” and as such may require more time to allow an evolution from regulatory control to supervision of a competitive market.<sup>107</sup>

There is a strong argument for a return to regulation. “[T]he concerns that led to regulation in the first place—monopoly power and the threat of market manipulation—are still real issues today.”<sup>108</sup> It is especially a concern for the electric industry, which “is too susceptible to abuse to be left free of regulatory oversight.”<sup>109</sup> The August 2003 shut down of a major power grid in the Northeast, Midwest, and Canada is a stinging reminder of the dependency of

98. *Id.* at 516.

99. *Id.* at 509-23.

100. *Id.* at 524.

101. *Id.* at 494.

102. *Id.*

103. Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911, 912 (2002).

104. *Id.* at 914-15.

105. *Id.* at 923.

106. *Id.* at 912, 924-30 (noting that New York has not really deregulated electric power companies, but has instead replaced it with a different regulatory system—one still under government control).

107. *Id.* at 931 (warning that “[t]he critical challenge will be to resist efforts to move away from marketplace incentives and back towards more regulatory control”); *see also* Kearney & Merrill, *supra* note 28, at 1325 (noting that recent changes in the natural gas and electric industries do not end regulation, but instead transform the previous model of regulation, allowing competition through regulation).

108. Duane, *supra* note 87, at 535 (quoting Paul Krugman, *Enron Goes Overboard*, N.Y. TIMES, Aug. 17, 2001, at A19).

109. *Id.* at 536.

these systems on centralized equipment and the need to invest in the grid infrastructure to keep it in good operation.<sup>110</sup> Following the blackout, FERC Chairman Pat Wood spoke in favor of continuing regional oversight of the U.S. transmission system and stressed the need to ensure adequate infrastructure.<sup>111</sup> After this U.S. and Canadian blackout, even governments in Europe and Asia were re-evaluating their plans for deregulation in light of the possibility of widespread power outages.<sup>112</sup>

Another solution to some of the recent restructuring problems is to nationalize the electric utilities even though “we all ‘know’ that nationalizing industry is un-American and that governments can never run industries as cost-effectively as private enterprise.”<sup>113</sup> The eminent domain approach to nationalization may not have received serious consideration in 2001 by California’s former Governor Gray Davis at the state level during the California energy crisis, but municipalities across the nation are now poised to seize utilities as a way to stabilize supply, increase reliability, and offer reasonable rates to their citizens.<sup>114</sup>

Municipalities throughout the United States are forming public utility districts and attempting to negotiate purchases of privately-owned utility companies, with the power of eminent domain supplying a fallback position if

110. See David Hanners, *Transfer of Power, XCEL Wants to Turn over Its Transmission Lines to a New Company, but Regulators Worry About Losing Control*, ST. PAUL PIONEER PRESS, Aug. 31, 2003, at D1 (discussing concerns about the nation’s electric grid following the blackout).

111. Rob Thormeyer & Kathy Fraser, *Wood Commends Regional Grid Oversight, Says FERC Waiting for Congress to Act*, INSIDE ENERGY/WITH FEDERAL LANDS, Aug. 25, 2003, at p.10.

112. Chip Cummins et al., *A Global Journal Report: U.S. Blackout Prompts Others to Examine Power*, WALL ST. J., Aug. 18, 2003, at A9.

113. Duane, *supra* note 87, at 527-28 (explaining that California’s then Governor Davis did not treat this solution as a viable option, although “Republican CPUC [California Public Utilities Commission] Commissioner Richard Bilas, who was appointed by Governor Pete Wilson and calls himself ‘a free market economist’ (with a Ph.D. in economics), concluded in January 2001 that condemnation was necessary when the CPUC was finally forced to raise retail rates”); see also Kearney & Merrill, *supra* note 28, at 1403-04 (suggesting as one of the “three ideal-typical trajectories for future evolution” of regulated industries a reversion of the legal system “toward a system that more closely approximates the original paradigm (or perhaps even sees state ownership of public utilities)”).

114. See Duane, *supra* note 87, at 537 (“[T]he Governor should have seized the former utility power plants (all ‘in-state’ facilities owned by ‘out-of-state’ companies) under his emergency powers to stop the price gouging and rolling blackouts. If ever the use of ‘police power’ was warranted, this was it.”); see also Kevin G. Glade, *CP National Corp. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Power Systems*, 1982 UTAHL. REV. 913, 915-16 (1982) (discussing advantages of municipal power including: citizen voice in utility management and local control of an essential community service; economic benefits for the community; and lower rates based on savings from financing through tax-exempt bonds, exemptions from income taxation, and preferred governmental status from federal facilities).

negotiations fail.<sup>115</sup> Two distinct efforts are currently under way to municipalize Oregon's largest electric utility by a referendum action creating a public utility district with condemnation powers and by the City of Portland purchasing the privately-owned Portland General Electric company.<sup>116</sup> These efforts were fueled by the Enron issues and both seek to fulfill the same goal of public ownership in order to lower rates and provide service reliability.<sup>117</sup> After experiencing problems with Montana's largest provider, NorthWestern Energy, the city of Great Falls, Montana is also pursuing the idea of publicly owned power in order to provide its citizens with a stable supply of electricity at reasonable rates.<sup>118</sup> The city of Nashua in New Hampshire is negotiating with Pennichuck Corp., the owner of a local water company, to purchase the company and then transfer ownership of it to a regional water district created by neighboring New Hampshire communities.<sup>119</sup>

A final example of the current trend toward municipalization can be found in Massachusetts where cities are voting to support state law changes to clarify a town's right to municipalize.<sup>120</sup> By passing a bill that "explicitly states that the incumbent utility must sell its assets to the municipality, once a fair value has been established for the existing infrastructure" cities and towns are hoping to own their own electric companies and take over electricity distribution.<sup>121</sup> On the other hand, the privately-owned utility companies fear such government ownership<sup>122</sup> and have resisted selling their assets to cities arguing that public

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115. See, e.g., Christina Boyle, *State Waits to Grant \$7.9 Million Loan*, SANTA FE NEW MEXICAN, July 9, 2003, at E1, available at 2003 WL 57261856 (Eldorado Area Water and Sanitation District in New Mexico is attempting to purchase the water utility, but litigation which includes a claim by local developers that the district has no legal authority to condemn a public utility may make it difficult for the district to either purchase or condemn the utility); Kevin Leininger, *Need for Vote on Utility is Challenged, A Referendum Isn't Necessary to Buy Part of AquaSource, City Officials Argue*, FORT WAYNE NEWS SENTINEL, May 9, 2003, at E1 (discussing attempt by City of Fort Wayne, Indiana, to purchase part of a private utility for water and sewer service and noting that city could use its eminent domain power if a settlement on purchase price is not reached).

116. Saskal, *supra* note 2, at 1.

117. *Id.*

118. *Id.* (noting that the parent company NorthWestern Corp. filed for Chapter 11 bankruptcy on September 14, 2003); see also Mike Dennison, *Reaction to City Utility Proposal Mixed*, GREAT FALLS TRIB., Aug. 22, 2003, at 5A (discussing Great Falls' attempt to create a city-owned electric utility).

119. James Vaznis, *Water Company Purchase Talks Begin*, BOSTON GLOBE, Sept. 11, 2003, at 5.

120. Mairgreed Gray, *Oxford Selectmen Back Electric Plan*, WORCESTER TELEGRAM & GAZETTE, Oct. 23, 2003, at B2.

121. *Id.*

122. Christopher O'Leary, *Picking Enron's Bones Clean: Could Upcoming Bankruptcy Auction Shake Up Proposed Purchases?*, INVESTMENT DEALERS DIGEST, Oct. 27, 2003, available at 2003 WL 7572518 (noting that Portland General Electric Corp., owned by Enron, is seeking a

ownership will not provide the promised reliability, adequate customer service, and reduced prices.<sup>123</sup>

2. *Using Eminent Domain to Take Control of Businesses for the Public Good.*—As far back as 1848, the Supreme Court in *West River Bridge Co. v. Dix*<sup>124</sup> allowed the government to use its eminent domain power to acquire an ongoing franchise to operate a toll bridge.<sup>125</sup> The toll bridge story began in 1795 when the Vermont state legislature granted to a private company the right to erect and operate a bridge.<sup>126</sup> However, in 1839 the legislature subjected this privilege to a town's eminent domain power and the franchise was terminated by the payment of compensation when the toll-bridge was converted to a free public highway.<sup>127</sup> The Court held that not only did the exercise of power not impair the obligation of contract in violation of the United States Constitution,<sup>128</sup> but also that the franchise grant to operate the toll bridge was property subject to condemnation.<sup>129</sup>

One hundred years later in *Kimball Laundry Co. v. United States*,<sup>130</sup> the Court again allowed the use of eminent domain, this time by the United States, to temporarily condemn a private laundry plant to be used by the Army.<sup>131</sup> As early as 1928, a *California Law Review* article discussed California's acquisition of

buyer and that "its biggest fear is that it might wind up being state property").

123. See, e.g., Saskal, *supra* note 2, at 1 (Portland General Electric's public relations materials opposing a public utility district state that "[n]ot only would the reliability of your electrical service be in doubt, your prices are likely to go up"); James Vaznis, *Rebuffed, City Seeks To Seize Waterworks*, BOSTON GLOBE, Mar. 30, 2003, at 6 (quoting Pennichuck's president and CEO as saying "I do not believe that the city or any political entity will be able to provide the level of customer service or meet the extensive capital and operational needs of such a system as successfully as Pennichuck has done over the decades"); see also Dennison, *supra* note 118, at 5A (discussing Great Falls' attempt to create a city-owned electric utility and NorthWestern's response that it "has no plans to sell any of its electric distribution system in Great Falls and would resist any attempt by the city to obtain it through condemnation").

124. 47 U.S. 507 (1848).

125. *Id.* at 536.

126. *Id.* at 530.

127. *Id.* at 530-31.

128. *Id.* at 532-33.

It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity.

*Id.* at 531.

129. *Id.* at 534 ("We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property.").

130. 338 U.S. 1 (1949).

131. *Id.* at 16.

public utility property by municipal eminent domain power.<sup>132</sup> Specifically, the article addressed the issue of whether such a condemnation would be valid if the private utility also served citizens of a neighboring municipality who would be adversely impacted by the action.<sup>133</sup>

A municipality's condemnation of a privately-owned power plant in order to achieve public ownership is a valid public use.<sup>134</sup> Utilities subject to such condemnation have received just compensation, including "'going concern' value."<sup>135</sup> In *City of Omaha v. Omaha Water Co.*, the Court recognized that under Nebraska's charter of 1897, the city "was given, among other things, 'power to appropriate any waterworks system, plant, or property already constructed, to supply the city and the inhabitants thereof with water.'"<sup>136</sup> Over the water company's objections, the City of Omaha acquired municipal ownership of the water supply system as required by the Nebraska legislature in 1903.<sup>137</sup>

Similarly, in 1963, the City of North Sacramento acquired a private water system using its eminent domain power under the California Public Utilities Code.<sup>138</sup> In *Citizens Utilities Co. of California v. Superior Court of Santa Cruz County*,<sup>139</sup> the California Supreme Court supported eminent domain action against utilities by holding that a privately-owned utility company may be compensated for involuntary and compulsory improvements made before an

132. Thomas H. Breeze, *Limitations on the Right of a Municipality in California to Condemn a Public Utility*, 16 CAL. L. REV. 105 (1928).

133. *Id.* at 107-10.

134. 2A SACKMAN, *supra* note 1, § 7.06[40], at 188 (citing *Pub. Serv. Co. of Colo. v. City of Loveland*, 245 P. 493 (Colo. 1926)).

135. *City of Denver v. Denver Union Water Co.*, 246 U.S. 178, 184 (1918) (discussing valuation of a water company and noting that allowance for "going concern" value was based "upon the ground that the company had 'an assembled and established plant doing business and earning money'"). See also *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 202-03 (1910) (stating that "[t]he difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers"); *Pac. Gas & Elec. Co. v. Devlin*, 203 P. 1058, 1059, 1063-64 (Cal. 1922) (reviewing the compensation to be paid to Pacific Gas and Electric Company by the city of Auburn for acquiring a water plant owned and operated by the private company); *Marin Mun. Water Dist. v. Marin Water & Power Co.*, 173 P. 469, 469 (Cal. 1918) (reviewing proceeding by which municipally-owned water company acquired property already devoted to a public use by private company). See also 2 SACKMAN, *supra* note 1, § 5.03[6][h] ("When a business is directly taken over by the public, such as when the plant of a public service corporation is acquired by a city or town and is set to be operated under municipal control, the plant is valued as a going concern and the good-will, so far as it adds value to the franchise and other property, is included in the award of compensation.").

136. 218 U.S. 180, 199 (1910) (quoting 1897 NEB. LAWS 27, ch. 10).

137. *Id.* at 193.

138. *City of N. Sacramento v. Citizens Util. Co.*, 32 Cal. Rptr. 308, 310 (Ct. App. 1963) (citing CAL. PUB. UTIL. CODE §§1401-1421).

139. 382 P.2d 356 (Cal. 1963).

eminent domain trial proceeding, but after the date of the condemnation action summons.<sup>140</sup>

The state of New York, in a 1986 condemnation statute, legislatively encouraged the conversion of privately-owned power companies to public control to promote the economic well-being of the Long Island area by reducing power rates.<sup>141</sup> In Oregon, the Oregon Supreme Court in *Emerald People's Utility District v. Pacific Power & Light Co.*,<sup>142</sup> limited a "people's utility district's" (PUD's) right to obtain special pricing benefits by determining it did not qualify under the legislation as a municipality or state.<sup>143</sup> However, it did uphold the public entity's right to acquire through eminent domain a privately-held hydroelectric facility, already producing energy for the public.<sup>144</sup>

Some states have balked at municipal attempts to acquire utilities.<sup>145</sup> The Utah Supreme Court, for example, upheld the dismissal of a condemnation action by a group of municipalities attempting to acquire an investor-owned power system.<sup>146</sup> The court held that under the Utah eminent domain statute, municipalities were allowed to condemn real property interests only and that "[t]he taking of an ongoing public utility business is more than the taking of real or even tangible personal property and is therefore, . . . not contemplated within" the state's eminent domain statute.<sup>147</sup> There is additional controversy over whether condemnation power can be used to acquire property already serving a public purpose.<sup>148</sup> Nevertheless, the preeminent eminent domain treatise clearly

140. *Id.* at 365.

141. 2A SACKMAN, *supra* note 1, § 7.06[40] (citing N.Y. PUB. AUTH. LAW § 1020-A).

142. 729 P.2d 552 (Or. 1986).

143. *Id.* at 557 (upholding lower court's determination that "a PUD is not a 'municipality' under ORS 543.610 and thus could not receive the benefit of the pricing scheme of ORS 543.610").

144. *Id.* at 556-57.

145. *See, e.g.,* *City of Pryor Creek v. Pub. Serv. Co. of Okla.*, 536 P.2d 343, 346 (Okla. 1975) (finding eminent domain power not broad enough to allow municipal condemnation of a utility already dedicated to public use); *Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799, 805 (Tex. Comm'n App. 1936) (holding that legislature did not intend to allow city to condemn an existing utility company).

146. *See* Kevin G. Glade, *CP National Corp. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Power Systems*, 1982 UTAH L. REV. 913 (1982) (analyzing *CP Nat'l Corp. v. Pub. Serv. Comm'n*, 638 P.2d 519 (Utah 1981)).

147. *CP Nat'l Corp.*, 638 P.2d at 523 (citing the Interlocal Co-Operation Act, UTAH CODE ANN. § 78-34-1(3) (1953)).

148. *See, e.g.,* *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 332 (1958) (citing a state court holding that "though the State Legislature has given the City the right to construct and operate facilities for the production and distribution of electric power and a general power of condemnation for those purposes, 'the legislature has (not) expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 577 (Wash. 1957)). *But see* *Emerald People's Util. Dist. v. Pac. Power & Light Co.*, 729 P.2d 552, 556 (Or. 1986) (disagreeing with lower court's holding that public utility districts did not have "authority to condemn a private utility's

states that so long as this condemnation power is expressly stated to apply to existing public uses, it may be used with respect to a property already dedicated to a public use.<sup>149</sup>

Precedent for the use of eminent domain power to acquire a going concern is not limited to situations involving privately-owned public utilities.<sup>150</sup> “[I]nto the Nineteenth Century, because of local droughts, the importance of a specific local industry, or other needs, courts gave legislatures wide discretion to use eminent domain to promote a wide variety of economic projects that would stimulate commerce and the general welfare.”<sup>151</sup> More recently, one of the most notable cases where eminent domain was used to acquire an ongoing enterprise involved the move of the Raiders football team from Oakland, California, to Los Angeles in the early 1980s.<sup>152</sup> In response to the City of Oakland’s attempted acquisition of the team to keep the franchise from moving to Los Angeles,<sup>153</sup> the California Supreme Court concluded that acquiring and operating a sports franchise could be an “appropriate municipal function.”<sup>154</sup> Therefore, the City would have the authority under California’s eminent domain statutes to acquire

hydroelectric facility already devoted to public use”).

149. 1A SACKMAN, *supra* note 1, § 2.2.

150. For other eminent domain decisions involving public utilities see for example: *City of Stilwell v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038, 1046 (10th Cir. 1996) (deciding the municipality’s attempt to use eminent domain to obtain a rural electric co-op is not preempted by the federal legislation, the Rural Electrification Act); *City of Morgan City v. South Louisiana Electric Cooperative Ass’n*, 31 F.3d 319, 324 (5th Cir. 1994) (holding “that the proposed state-law condemnation would frustrate the purpose” of the REA and therefore the municipalities’ condemnation action is “preempted under the Supremacy Clause”); *City of Madison v. Bear Creek Water Ass’n*, 816 F.2d 1057, 1060-61 (5th Cir. 1987) (rejecting the municipality’s condemnation of the water association financed by federal Farmers Home Administration (FmHA) loans as proscribed by congressional mandate forbidding such encroachment by local governments while an entity is indebted to FmHA); *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601, 603 (9th Cir. 1980) (holding that the “[s]tate municipal public utility [can]not condemn property owned by a federally subsidized public utility where the condemnation would interfere with the federal purpose of the Rural Electrification Act”); *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 202 (9th Cir. 1969) (finding the state’s use of eminent domain frustrated the purpose of the federal Rural Electrification Act by stating the “state law so written that a state-favored utility can by its unilateral action interfere with the federal purpose cannot stand under the supremacy clause of the constitution of the United States”).

151. 2A SACKMAN, *supra* note 1, § 7.07[3].

152. *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982); see also David Kravets, *Raiders Lead League in Lawsuits*, DAILY NEWS (Los Angeles), Apr. 24, 2003, at 7 (noting that “[t]he Oakland Raiders led the NFL in offense last year and are No.1 in the league in litigation”).

153. Kravets, *supra* note 152, at 7 (The team agreed to move back to Oakland in 1995 “after its Los Angeles Memorial Coliseum Commission contract expired and after several scuttled deals to move elsewhere.”)

154. *Oakland Raiders*, 646 P.2d at 843.

“any property necessary to accomplish that use.”<sup>155</sup> The Court noted that although “some statutes do explicitly prohibit the acquisition of an ongoing enterprise, there is no provision in present law which would preclude the taking contemplated by [sic] City.”<sup>156</sup>

In addition to the well-reported<sup>157</sup> but unsuccessful<sup>158</sup> attempt by the City of Oakland to use eminent domain to keep the Raiders in Oakland, other cities have tried to keep sports franchises from relocating by using eminent domain or other tactics.<sup>159</sup> In *Mayor of Baltimore v. Baltimore Football Club, Inc.*,<sup>160</sup> the court recognized the Baltimore Colts NFL franchise as “intangible property [that] is properly the subject of condemnation proceedings.”<sup>161</sup> However, deciding the case based on a jurisdictional issue, the court held that under Maryland law, Baltimore City did not have the power to condemn the team once the Colts had left the state.<sup>162</sup>

Various government entities have attempted to use the eminent domain power for other public goals such as providing public housing<sup>163</sup> or preventing

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155. *Id.*

156. *Id.*

157. Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocation*, 96 YALE L.J. 1343, 1345 (1987) (discussing local authorities' use of eminent domain, including the City of Oakland, to condemn businesses contemplating a relocation); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 62 (1986) (noting that the Oakland Raiders case “sustained an even more unconventional exercise of eminent domain”); Charles Gray, Comment, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329 (1986); Katherine C. Leone, Note, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 506 (1997) (discussing Oakland's use of eminent domain to take title to the football team); Ellen Z. Mufson, Note, *Jurisdictional Limitations on Intangible Property In Eminent Domain: Focus on the Indianapolis Colts*, 60 IND. L.J. 389, 393 (1985) (reporting that in the Oakland Raiders case “the California Supreme Court did determine that, subject to requirements of public use, a sports franchise, as intangible property, is condemnable”) (internal citation omitted); Lisa J. Tobin-Rubio, Casenote, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185 (1987).

158. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 158 (Ct. App. 1985) (holding that “burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise”).

159. See, e.g., *Mayor of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 289 (D. Md. 1986) (holding city was unable to condemn professional football franchise). See also Gray, *supra* note 157; Leone, *supra* note 157.

160. 624 F. Supp. 278 (D. Md. 1985).

161. *Id.* at 282.

162. *Id.* at 287 (resolving the dispute in favor of the football franchise as to the timing of the condemnation action and the location of the intangible property outside Maryland's jurisdiction at the time the power was exercised by the city).

163. 2A SACKMAN, *supra* note 1, § 7.06[25] (explaining that eminent domain may be used to provide housing to eliminate slums, provide low-rent or senior citizen housing, emergency housing for war or veterans, and that in some cases “[c]ourts have even upheld the power of the United

local industrial plants from closing or relocating.<sup>164</sup> Legal commentators have proposed that eminent domain be used to purchase “avigation easements” over land surrounding airports in order to resolve the issue of noise sensitivity when residential developments are located within the “noise footprint” of a local airport.<sup>165</sup> It has even been suggested that eminent domain power be used for acquiring cultural property from private owners to be returned to another nation making a claim for cultural repatriation.<sup>166</sup>

Finally, with the potential for terrorism and biochemical warfare in this country, municipalities may need to consider using eminent domain to acquire government ownership of sensitive uses such as the water or power supply. The United States federal government enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 to protect the public from potential terrorism.<sup>167</sup> Among other requirements, this legislation requires water districts to assess the vulnerability of water treatment systems and reservoirs to terrorist activity.<sup>168</sup> In response to this act, some local water districts have taken serious steps to protect public water supplies from access by spending millions of dollars on fencing and security systems.<sup>169</sup>

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States to take the title of existing mortgages . . . so long as there is statutory authorization and just compensation is paid”).

164. See 2A *id.* § 7.06[29] (discussing “Prevention of Plant Facility Closings or Relocations”); 8A PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS ON EMINENT DOMAIN*, § 22.02 (3d ed. 2004) (“Expansion of the ‘Public Use’ Doctrine in Eminent Domain to Prevent Plant Closings or Relocations”); see also Michael H. Abbey, Note, *State Plant Closing Legislation: A Modern Justification For the Use of the Dormant Commerce Clause As a Bulwark of National Free Trade*, 75 VA. L. REV. 845 (1989); Lazarus, *supra* note 157; Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 138-39 (1995) (noting that if a company refuses to repay subsidies granted by the city as an incentive to prevent relocation, “it could be subject to takeover proceedings using the theory of eminent domain”); Schultz & Jann, *supra* note 6, at 387-410.

165. See Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1, 41-42 (2002) (citing J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource*, 22 TRANSP. L.J. 251, 266 (1994)); Scott Hamilton, *Planning for Noise Compatibility*, in *AIRPORT REGULATION, LAW, & PUBLIC POLICY* 85, 85-86 (Richard M. Hardaway ed., 1991); Luis G. Zambrano, Comment, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 469 (2000)).

166. Sean R. Odendahl, Note, *Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership*, 2001 U. ILL. L. REV. 475, 498 (2001) (suggesting that “the U.S. or state government can exercise its power of eminent domain and seize the cultural patrimony” to return an artifact to another nation based on a valid claim for repatriation).

167. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

168. 42 U.S.C. § 300i-2 (Supp. I 2002).

169. See, e.g., Northern Kentucky Citizens for Open Reservoirs, *Save the Reservoir: Petition of Northern Kentucky Citizens for Open Reservoirs to the Northern Kentucky Water Service District* (n.d.) (requesting that “means other than fencing and restrictions to access” be used to

Although these extreme actions may not be warranted,<sup>170</sup> municipalities might justifiably be concerned about the security of privatized utility companies, which may be foreign-owned. Municipalities at some point may be compelled to use their eminent domain power to acquire key public utilities, such as a privately-held water company, if the utility is owned by a foreign company based in a country unfriendly to the United States. As the trend toward more international business connections develops, utilities such as electricity or water may be considered a national security concern requiring national policy guidance not only for assessment of risk,<sup>171</sup> but for control of ownership.<sup>172</sup>

If the above scenarios make sense as valid uses of government power, why then could not a state university system use its eminent domain power to acquire a privately-owned university if doing so would increase the educational opportunities available to its residents?<sup>173</sup> Or why not allow the state to use its eminent domain power to acquire a car manufacturer to produce electric cars to assist the state in meeting its emission standards? Clearly, unless we are willing to unleash government power to control private enterprise for the public good, there must be conscious limits placed on the eminent domain power to prevent such overreaching. Although limiting the definition of what constitutes a public use may serve to restrain some government action, this is not a sufficient restraint since many of the above uses, such as supplying water, electricity, housing, or education, are unquestionably in the public good. Part II addresses several theories under which the government's power to acquire private enterprise for the public good can be restrained.

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provide security in order to balance the “needs of the citizens to have access to an aesthetically pleasing green space and to preserve the quality of life and the property values in that part of the community, and the community as a whole”) (on file with author).

170. See, e.g., Brock N. Meeks, *U.S. Water Supply Vulnerable: Risks Were Known, But Ignored, Before Sept. 11* (Jan. 14, 2002), MSNBC, at <http://www.msnbc.msn.com/id/3340643> (“Experts agree that introducing a toxin into the raw water reservoir would have little impact owing to the dilution effect several million gallons of water would have on any biohazard.”).

171. See Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

172. Botchway, *supra* note 87, at 826 (noting that “[a]n increasing emphasis on the international dimensions of the business is one of the new characteristics of the electricity industry”).

173. This thought could not help but cross my mind as I sat in a recent Land Use Conference at Chapman School of Law and listened to Professor Tony Arnold joke about how his alma mater, Stanford, was referred to by one out-of-town visitor as the “University of California at Stanford.” However, the idea did not seem quite so far-fetched when my research revealed that California Education Code section 92040 provides that “[t]he Regents of the University of California may acquire by eminent domain any property necessary to carry out any of the powers or functions of the University of California.” CAL. EDUC. CODE § 92040 (West 2002).

## II. THE EMINENT DOMAIN POWER & ITS CONSTRAINTS

The eminent domain power in the United States has its roots in English law and although we are not sure of its precise origins, some argue that the concept dates back to the Romans.<sup>174</sup> The Fifth Amendment to the United States Constitution makes this power available to the federal government and to the states through the Fourteenth Amendment and in turn “as an inherent attribute of sovereignty, subject to limitations found in each state’s constitution or statutory law.”<sup>175</sup> According to Richard Epstein, this power demonstrates the “social limitations upon the private rights of ownership. . . . [by authorizing] at the constitutional level the forced exchanges found in the laws of necessity and nuisance.”<sup>176</sup> However, if the sovereign controls these social limitations, the exercise of this power must be restrained by some public purpose requirement that finds its sources in either societal necessity or nuisance control.<sup>177</sup> Part II of this Article examines the various ways by which the government’s eminent domain power is currently constrained or can be controlled in the future.

### A. *The Fifth Amendment*

The Fifth Amendment of the U.S. Constitution provides in part, “nor shall private property be taken for public use, without just compensation.”<sup>178</sup> Although it is one of the most important constitutional protections of property rights, some feel that the protection of the Fifth Amendment has been greatly weakened by a “relaxed public use standard.”<sup>179</sup> One of the major constraints on the eminent domain power is that the government may only use its power to condemn

174. Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1249 (2002).

175. 2A SACKMAN, *supra* note 1, § 7.01[1] (internal citation omitted).

176. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN ix (1985). See also Timothy Sandefur, *A Natural Rights Perspective On Eminent Domain In California: A Rationale For Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 584-85 (2003) (explaining that a natural rights view considers eminent domain to be “a collective state of necessity” as compared to “the case of an individual emergency” which would be called “a private necessity”).

177. See Harrington, *supra* note 174, at 1252 (explaining that “courts and commentators have attempted to counter the obvious harshness” of allowing the sovereign’s superior right to a citizen’s property by “imposing a ‘public purpose’ limitation on the use of eminent domain”); see also *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting) (“The power of eminent domain claimed by the City in this case is not only novel but virtually without limit.”).

178. U.S. CONST. amend. V.

179. Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 51-52 (1998) (observing that “the beneficiaries of a relaxed public use standard are often powerful and wealthy special interests capable of convincing the state to use its power to displace residents from their homes and businesses”).

property that will be used to further a public purpose.<sup>180</sup> However, even with the “public purpose” limitation on the eminent domain power under the Fifth Amendment,<sup>181</sup> the government in its judicial or legislative capacity determines what constitutes a public purpose and has interpreted this requirement quite broadly<sup>182</sup> to be “coterminous with the scope of a sovereign’s police powers.”<sup>183</sup>

The initial determination of what constitutes a public purpose is a legislative decision. However, the courts have the final authority to decide the extent of control over private property based on whether the legislative determination of public use is permitted. This final authority is exercised with great deference to the legislature, resulting in extensive legislative power to condemn private property for various purposes.<sup>184</sup> Consistent with the U.S. Supreme Court’s broad interpretation of what constitutes a public use in *Berman v. Parker*<sup>185</sup> and *Hawaii Housing Authority v. Midkiff*,<sup>186</sup> recent state court decisions have allowed the use of eminent domain “to support many types of urban renewal activities, including acquisition of private businesses . . . as valid public uses.”<sup>187</sup> Generally, the courts will not interfere with the government’s determination of public use and “the Fifth Amendment’s public use clause provides little or no protection to property owners.”<sup>188</sup>

Many have expressed concern that this broad interpretation of public use allows the government to abuse its power to take property without an owner’s

180. Harrington, *supra* note 174, at 1255 (quoting Senator Tracy’s concurring opinion in *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 56-62 (N.Y. 1837) that “the use of the phrase ‘public use’ in the Fifth Amendment was ‘designed to be as well a limitation as a definition of the right of the [federal government] as sovereign . . . to interfere with the otherwise absolute right of the citizen to the undisturbed possession and enjoyment of his own property’”). *But see id.* at 1300 (concluding that “the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not”).

181. *See id.* at 1252 (noting that “the so-called ‘public use’ requirement is really a rather late innovation in the law of eminent domain and is found mainly in nineteenth and twentieth century American cases”).

182. *See, e.g.,* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

183. 2A SACKMAN, *supra* note 1, § 7.01[1] (quoting *Hawaii Hous. Auth.*, 467 U.S. at 240).

184. 2A *id.* § 7.03[11][b]; *see also* Kochan, *supra* note 179, at 52 (expressing concern that special interest groups will not be constrained by constitutional doctrine because “[t]he judiciary has failed to take a guardianship role in relation to the Public Use Clause [and] [a] public use is now whatever the legislature says is public”); Merrill, *supra* note 157, at 63 (observing that “cases suggest that modern courts are exceedingly deferential to legislative definitions of a permissible public use”); Mufson, *supra* note 157, at 389 (noting that “[t]he Supreme Court has effectively eliminated public use as a check against condemnation by directing the judiciary to defer to the legislature on this issue”).

185. 348 U.S. 26 (1954).

186. 467 U.S. 229 (1984).

187. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c].

188. Sandefur, *supra* note 176, at 595.

consent and may “benefit the politically powerful at the expense of the underprivileged.”<sup>189</sup> However, the eminent domain acquisition of privately-owned utilities for purposes of municipalization can easily be considered a valid public use, even without this broad interpretation.<sup>190</sup> Condemning private property to benefit other private interests, such as with urban redevelopment, requires broad interpretation, while condemning private property so that the government may take it over and operate it keeps the property in the hands of the government for public use. Thus, restricting the public use definition would seemingly not have much impact on how eminent domain power may be used to acquire privately-owned utilities or businesses to convert them to municipal ownership and operation. Even if the government’s power to use eminent domain to transfer condemned property to private developers is restricted, some argue that local governments might decide to own the shopping or office centers rather than turn the condemned property over to private developers.<sup>191</sup>

Instead of using the public use definition to fight condemnation actions, property owners must look to other constitutional limitations to curb the government’s eminent domain power. Within the Fifth Amendment itself, the definition of property can operate as a restraint on government power, depending upon the jurisdictional approach.<sup>192</sup> Although some state statutory provisions require that the property subject to eminent domain be real property,<sup>193</sup> many states interpret property broadly to include all types of both real and personal interests.<sup>194</sup> Eminent domain power may also be limited by requiring the government to show necessity, either based upon a statutory requirement or by court interpretation of what constitutes a valid public use.<sup>195</sup> Finally, some

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189. *Id.* at 675.

190. *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) (“Public utility facilities such as power plants [and] water treatment facilities also have the traditional public use character, as does the construction of government buildings.”).

191. *See* Sam Staley, *Wrecking Property Rights*, REASON, Feb. 1, 2003, at 32 (citing Jeff Finkle, president of the International Economic Development Council).

192. *See infra* Part II.B.3 (discussion of state issues).

193. *See infra* Part II.B.5 (discussing the definition of property); *see, e.g.*, IND. CODE ANN. § 32-24-4-1(a) (West 2002) (authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added); S.C. CODE ANN. § 28-2-60 (Law Co-op 2002) (eminent domain power appears to be limited to real property based on statutory language that “condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose”).

194. *See, e.g.*, CAL. CIV. PROC. CODE § 1235.170 (West 2003) (stating “‘property’ includes real and personal property and any interest therein”); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (stating “we conclude that our eminent domain law authorizes the taking of intangible property”).

195. *See infra* Part II.B.4 (discussing necessity); *see, e.g.*, *Stearns v. City of Barre*, 50 A. 1086, 1092 (Vt. 1901) (“The sovereign remains the judge of the necessity, but ultimately determines it through the judicial branch of its government, instead of the legislative branch.”); *Oakland Raiders*, 646 P.2d at 846 (Bird, C.J., concurring and dissenting).

jurisdictions limit the government's condemnation authority where a privately-held property interest is already being devoted to a public purpose, such as is the case with many public utility functions.<sup>196</sup>

### B. State Statutory and Constitutional Limitations

The eminent domain power is available to the federal government through the Fifth Amendment and to the states "as an inherent attribute of sovereignty, subject to limitations found in each state's constitution or statutory law."<sup>197</sup> Since the eminent domain power may be defined in either statutory or constitutional provisions, or both, these sources should be explored before state or municipal power is exercised to condemn privately-owned enterprises. "To establish that a state or municipality's eminent domain power may be used" for the proposed purpose, it must first be established that the "particular state's constitutional or statutory eminent domain provisions . . . permit broad legislative discretion within which eminent domain may be employed for a wide variety of 'public uses.'"<sup>198</sup> However, some "jurisdictions have interpreted their eminent domain authority as an inherent attribute of (state) sovereignty, subject only to constitutional limitation, and thus not requiring constitutional specification."<sup>199</sup>

196. See *infra* Part II.B.6 (discussing the prior public use doctrine); see, e.g., NEV. REV. STAT. § 37.040(3) (2003) (before a judgment of condemnation is entered in Nevada, the court must first find that "[i]f the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use").

197. 2A SACKMAN, *supra* note 1, § 7.01[1] (internal citation omitted).

198. 8A ROHAN & RESKIN, *supra* note 164, § 22.01[1] (acknowledging that the use of eminent domain to prevent plant closings or the relocation of an existing sports franchise is a valid public use).

199. 8A *id.* § 22.02[3][c]; see also *Gohld Realty Co. v. Hartford*, 104 A.2d 365, 368 (Conn. 1954) ("It is fundamental that, as an attribute of sovereignty, the state government or any properly designated agency thereof may take private property under its power of eminent domain if the taking is for a public use and if just compensation is paid therefor[sic]."); *Dep't of Pub. Works & Bldgs. v. Kirkendall*, 112 N.E.2d 611, 613 (Ill. 1953) ("The power and right of eminent domain is inherent in the sovereign State, existing independently of written constitutions or statutory laws thereof, regulated by appropriate legislation, limited only by the constitutional provision for compensation, and extending to every kind of property.") (citing *South Park Comm'rs v. Montgomery Ward & Co.*, 93 N.E. 910 (Ill. 1911); *Litchfield & Madison Ry. Co. v. Alton & So. R.R. Co.*, 137 N.E. 248 (Ill. 1922)); *Riden v. Philadelphia, B. & W.R.R.*, 35 A.2d 99, 100 (Md. 1943) ("It is a fundamental principle of constitutional law that the power of eminent domain is a prerogative of sovereignty and does not require the sanction of the Constitution for its existence in the State.") (citing *Moale v. City of Balt.*, 5 Md. 314 (Ct. App. 1854); *United States v. Jones*, 109 U.S. 513 (1883); 29 C.J.S., *Eminent Domain*, § 2); *Town of Morganton v. Hutton & Bourbonnais Co.*, 112 S.E.2d 111, 113 (N.C. 1960) ("The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty. Our Constitution, art. I, sec. 17, requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking."). *But see Harwell v. Ga. Power Co.*, 267 S.E.2d 769, 774 (Ga.

Therefore, eminent domain power can be used to acquire a private business for a public use unless such a use has been expressly precluded.<sup>200</sup> The remainder of this section will examine state and municipal constitutional and statutory authority to acquire an ongoing business enterprise by condemnation.

1. *Delegation of Power.*—As is done with state police power to regulate for the health, safety, welfare, and morals of its citizens, a state may delegate its eminent domain power to local governmental entities. This delegation is accomplished through express legislation granting power to municipalities and public services corporations, such as privately-owned utility companies which provide services or products to the community.<sup>201</sup> For example, legislation in Delaware declares that municipal operation of electric utility systems is in the public interest and that such municipal ownership will promote the welfare of state residents.<sup>202</sup>

In addition to allowing government condemnation, state statutory provisions may authorize property condemnation by a privately-owned public utility to serve “a specific provable public need,”<sup>203</sup> such as erecting an electric power line to supply electricity to a community.<sup>204</sup> A prime example of delegating this authority to a public service corporation is the eminent domain power given to the railroads. Eminent domain power was delegated to allow the corporate railroads to obtain rail beds for the establishment of a railroad.<sup>205</sup> Thus private companies may possess eminent domain power through legislative delegation to condemn private property for a use that benefits the public.

State constitutions may also specifically authorize delegation of the eminent domain power. In some states, the state constitution will “authorize the taking of property for purposes not ordinarily considered public.”<sup>206</sup> For example, Michigan’s constitution provides that “[t]he Regents of the University of

Ct. App. 1980), *aff’d*, 269 S.E.2d 464 (Ga. 1984) (“The power of eminent domain is inherent in the sovereign state, but lies dormant until granted by act of the legislature.”).

200. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3]. See also *Hendershott v. Rogers*, 211 N.W. 905, 905 (Mich. 1927) (“The power of eminent domain is inherent in sovereignty. It is in the state without recognition in the Constitution, but its exercise is subject to any restrictions or limitations found therein.”) (citing *Loomis v. Hartz*, 131 N.W. 85 (Mich. 1911)).

201. 2A SACKMAN, *supra* note 1, § 7.01[1].

202. DEL. CODE ANN. tit. 22, § 1301 (2002).

203. 2A SACKMAN, *supra* note 1, § 7.04[1][b] (discussing the parameters for condemnation by a public service corporation).

204. 2A *id.* § 7.05[4][a]. See, e.g., MICH. COMP. LAWS § 486.254 (West 2002) (Michigan gives corporations involved in the gas and electric business as a public utility “the right to condemn private property”); WIS. STAT. § 66.0825(6) (2002) (“The general powers of an electric company include the power to . . . [e]xercise the powers of eminent domain granted to public utility corporations under ch. 32.”).

205. 2A SACKMAN, *supra* note 1, § 7.05[3].

206. 2A *id.* § 7.03[10][c] (listing several state constitutional provisions specifically authorizing condemnation for things such as diverting “the unappropriated water of any natural stream to beneficial uses”).

Michigan shall have the power to take private property for the use of the university, in the manner prescribed by law.”<sup>207</sup> Although this provision was probably intended to allow the university to acquire real property for campus development, an attempt by the Regents to condemn an ongoing private enterprise—for example, a privately-owned campus food service operation—might test the extent of this power.<sup>208</sup>

The state legislature may determine that the eminent domain power should be used to acquire an ongoing business in order to serve the public good. Explicit statutory authorization for use of such power encourages and facilitates the condemnation process. For example, in the Baltimore Colts case mentioned above,<sup>209</sup> the Maryland state legislature enacted an emergency bill to authorize Baltimore City to condemn the Colts, a professional football franchise, to keep it from relocating.<sup>210</sup> Although this legislation authorized the city to use eminent domain over a sports franchise, Baltimore’s attempt to exercise this power was procedurally defeated. A federal court determined that Baltimore did not have the jurisdiction to use this power since the franchise relocated outside the city limits prior to the city’s filing of the condemnation action.<sup>211</sup>

2. *Home Rule Cities*.—The home rule concept was created to recognize local government autonomy and came into being in 1875 when St. Louis, Missouri, became the first city to receive home rule power based on an amendment to the Missouri Constitution.<sup>212</sup> This amendment allowed the city to establish its own government document or charter and define its own powers.<sup>213</sup> Professor David Barron, in discussing the historical background of the different approaches to home rule and municipal reform, points out that “[s]ocial home rulers also sought to implement a program of municipalization to free cities from their long dependence upon private businessmen for services” such as the provision of gas and electricity and even streetcars, bathhouses, and newspapers.<sup>214</sup> This particular view of home rule argued for giving cities local control over taxing rather than limiting their tax authority in order to allow them to finance projects such as municipal utilities.<sup>215</sup>

Professor Barron explained that the social city home rulers “advanced their general view that the city was a vanguard site for social interdependence in

207. 2A *id.* § 7.03[10][c](quoting MICH. CONST. art. XIII, § 4).

208. 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c] (“Unless explicitly expressed, state eminent [sic] authority does not preclude the acquisition of a private business, even in cases to prevent their closing or relocation.”) (internal citation omitted).

209. *See supra* notes 157-60 and accompanying text.

210. *Mayor of Balt. v. Balt. Football Club Inc.*, 624 F. Supp. 278, 280-81 (D. Md. 1986) (noting that the condemnation power was also authorized by an emergency ordinance enacted by the Mayor and City Council of Baltimore).

211. *Id.* at 284.

212. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2289-90 (2003).

213. *Id.* at 2290.

214. *Id.* at 2315-16.

215. *Id.* at 2313.

support of the quite specific view that cities should have the right to pursue municipal ownership.”<sup>216</sup> This view encouraged states to allow an expanded local condemnation power in order to enable cities to achieve city planning through actual purchase of privately-held land, not just by exercise of zoning power.<sup>217</sup> Observing that “[n]o single home rule vision won a clear victory”<sup>218</sup> in the historical development of the home rule concept, Professor Barron recognizes that these visions are traceable in some form in our modern local government model.<sup>219</sup>

Today, under a majority of state constitutional schemes, home rule cities are traditionally given the power to legislate matters of local concern without the need for specific state legislative authority or delegation.<sup>220</sup> So long as the home rule city is legislating a local concern, any conflicting state statute will be superseded by the home rule provision.<sup>221</sup> Determining what constitutes a “local concern,” however, may be troublesome when a municipalization effort affects surrounding communities or even a state or federal interest such as a power distribution system within an electrical grid.<sup>222</sup> Home rule cities, not otherwise constrained by state legislative power, may be thwarted in their efforts to municipalize through condemnation by a strict construction of the phrase “local concern.” Home rule also provides that when a municipality is dealing with a mixed local and state concern, any conflict between a state and local provision will be resolved in favor of the state.<sup>223</sup>

A home rule city’s attempt to municipalize an ongoing enterprise through eminent domain will be restrained by state legislation if the targeted enterprise is determined to involve a matter of mixed local and state concern<sup>224</sup> or if it is not sufficiently “local” in nature, based on a strict construction of what constitutes a “local” concern. Thus, if a state wishes to limit the local authority of home rule cities to municipalize, this may be achieved judicially through the interpretation of what constitutes a “local” concern. Otherwise, a state constitutional amendment will be required to override local authority to prevent local condemnation actions authorized under a home rule grant. Such a constitutional amendment might also be necessary if a state wishes to promote municipalization

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216. *Id.* at 2317 (citing Delos F. Wilcox, *Fundamental Planks in a Public Utility Program*, 57 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 18 (1915)).

217. *Id.* at 2318-19.

218. *Id.* at 2322.

219. *Id.*

220. DANIEL R. MANDELKER, *LAND USE LAW* § 4.24 (5th ed. 2003).

221. *See, e.g.*, *U.S. WEST Communications, Inc. v. City of Longmont*, 948 P.2d 509, 515 (Colo. 1997).

222. *See Barron, supra* note 212, at 2350-52 (discussing how urban sprawl may not be considered a purely “local” concern and thus home rule grants may actually be construed to limit local efforts to combat this sprawl).

223. *U.S. WEST Communications, Inc.*, 948 P.2d at 515.

224. *See id.* at 515-18 (discussing how to determine whether the issue regarding relocation of utility facilities was a matter of mixed local and state concern).

efforts through the use of eminent domain by home rule cities since conflicting state legislation would not override “local” concern authority by home rule cities.<sup>225</sup>

3. *Public Use*.—As in Fifth Amendment jurisprudence, the concept of public use for purposes of interpreting state eminent domain authority is very broad.<sup>226</sup> Some jurisdictions attempt to list every possible public use for which the eminent domain can be exercised, while others use broad language similar to the Fifth Amendment. This broad language allows the courts significant discretion in deciding what constitutes a public use.

Although many states have a broad interpretation of public use, some states, such as Arizona, specifically identify the public uses subject to the condemnation, including canals, roads, wharves, bridges, telephone lines, aviation fields and petroleum pipe lines.<sup>227</sup> An Arizona decision involving a city’s attempt to use its power to acquire property for a public cemetery expansion restricted municipal power to only those public uses expressly authorized by statute.<sup>228</sup> The Arizona court held that because the public cemetery use was not specifically listed, the city did not have the power to use condemnation for the expansion.<sup>229</sup> However, if the public use the city is attempting to municipalize is specifically listed, the Arizona Constitution grants municipalities “the right to engage in industrial pursuits”<sup>230</sup> and courts interpreting this provision have held that it “confers on municipalities the right to engage in industry ‘without specifying any limitation whatever as to kind or character.’”<sup>231</sup> Given that there is a requirement that the public use to be condemned be specifically listed, Arizona municipalities and municipalities in other states using the same approach<sup>232</sup> will need to check statutory provisions

225. See Barron, *supra* note 212, at 2366-27 (suggesting that state constitutional grants of home rule be expanded to “include matters of greater-than-local concern” to facilitate interlocal efforts to reduce sprawl).

226. See 8A ROHAN & RESKIN, *supra* note 164, § 22.02[3][c] (noting that “in numerous jurisdictions, the public use requirements for eminent domain have been interpreted in very broad terms”); see also *supra* Part II.A (discussing Fifth Amendment).

227. ARIZ. REV. STAT. § 12-1111 (2002) (discussing “[p]urposes for which eminent domain may be exercised”).

228. *City of Mesa v. Smith Co. of Ariz., Inc.*, 816 P.2d 939, 940 (Ariz. Ct. App. 1991).

229. *Id.* at 941 (“We interpret the statutes narrowly because the power of eminent domain belongs to the state, and it is for the legislature to decide when that power should be delegated to another body.”).

230. See ARIZ. CONST. art. 2, § 34.

231. *Hohokam Irrigation & Drainage Dist. v. Ariz. Pub. Serv. Co.*, 64 P.3d 836, 839 (Ariz. 2003) (quoting *Crandall v. Town of Safford*, 56 P.2d 660, 663 (Ariz. 1936) (allowing an irrigation district to sell electricity to customers outside district boundaries)).

232. See, e.g., N.C. GEN. STAT. § 40A-3 (2003) (listing specific public uses); *Dep’t of Transp. v. Rowe*, 549 S.E.2d 203, 211 (N.C. 2001) (referring to the eminent domain statute in stating “[e]ach section also lists with some specificity the types of public uses that these condemners can undertake through the use of eminent domain”).

before attempting to municipalize a particular utility, even if the municipality has the constitutional authority to engage in such a pursuit once it has been acquired.<sup>233</sup>

Some jurisdictions may list uses that qualify as public, but these statutory declarations of public use are not necessarily exhaustive. For example, Washington state lists a myriad of public uses subject to condemnation,<sup>234</sup> but a general grant of power authorizes eminent domain over a use not enumerated so long as a court determines that the use is a public one “of the same kind” as those specifically listed.<sup>235</sup> In California, the statutory scheme was changed in 1975<sup>236</sup> from one using a specific list of uses for which eminent domain could be applied to one with a general provision allowing a city to “acquire by eminent domain any property necessary to carry out any of its powers or functions.”<sup>237</sup>

Regardless of whether the allowed use is specifically stated or freely interpreted from a broad grant of sovereignty, jurisdictions vary as to who makes the final determination of public use.<sup>238</sup> Arizona, in its constitution, specifically reserves this decision for the judiciary.<sup>239</sup> Similarly, in the Washington Constitution, “the question whether the proposed acquisition is for such a use is a judicial question, although a legislative declaration will be accorded great weight.”<sup>240</sup> However, in California, case law indicates that “decisions as to the proper scope of the power of eminent domain generally have been considered legislative, rather than judicial, in nature”<sup>241</sup> and thus the judiciary cannot act to constrain this power without legislative authority.<sup>242</sup> Case law in Connecticut and Hawaii also establishes that the legislature, not the judiciary, is responsible

233. See ARIZ. REV. STAT. § 12-1111(10) (2003) (listing the following public uses: “[e]lectric light and power transmission lines, pipe lines used for supplying gas, and all transportation, transmission and intercommunication facilities of public service agencies”).

234. WASH. REV. CODE § 8.12.030 (2002).

235. *In re City of Seattle*, 638 P.2d at 559 (“the general language of RCW 8.12.030—‘for any other public use’—is restricted to uses which are of the same kind as those enumerated in the section or which are specifically authorized by the legislature”).

236. See CAL. CIV. PROC. CODE § 1240.010 (Deering 2003) (stating, in the Law Revision Commission Comment, that the new language was intended “to avoid the need to state in each condemnation authorization statute that the taking by eminent domain under that statute is a taking for public use”).

237. CAL. GOV’T CODE § 37350.5 (Deering 2003).

238. See *In re City of Seattle*, 638 P.2d at 556 (“Only the constitutions of Arizona, Colorado and Missouri have provisions similar to the Washington State Constitution. Like the Washington Constitution, the question whether the contemplated use be really a public use shall be a judicial question and determined as such without regard to any legislative assertion.”).

239. *Id.*

240. *Id.* at 555 (citing *Des Moines v. Hemenway*, 437 P.2d 171, 175 (Wash. 1968)).

241. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting).

242. *Id.*

for the determination of what constitutes public use.<sup>243</sup> Therefore, states wishing to encourage municipalization may legislatively revise their statutory provisions to delegate this sovereign power, but the final decision as to whether an attempt to use the power in this way is a valid public use may be reserved for the judiciary.<sup>244</sup>

4. *Necessity*.—Another limitation on the government’s eminent domain power is that it can only be used to acquire property that is necessary for the public good.<sup>245</sup> Similar to the determination of what constitutes a public use, jurisdictions vary in approach as to whether the necessity determination is made by the legislature or the judiciary. In a few states, the judiciary determines whether or not the condemnation is necessary.<sup>246</sup> In Alabama, for example, the court in *Southern Electric Generating Co. v. Leibacher*, held that the judge determines the right to condemn, not the jury, and stated “[w]hether or not the property is necessary or advisable, or whether more property is taken than necessary, and whether or not it is ever paid for or who pays for it, are not questions for the jury to consider nor to be brought before it in any way.”<sup>247</sup> By statute, Nevada requires that before a condemnation of judgment is entered, the court must first find that “[t]he property is necessary to such public use.”<sup>248</sup>

Other states require judicial deference to the legislature’s necessity

243. See, e.g., *Bugryn v. City of Bristol*, 774 A.2d 1042, 1049 (Conn. App. Ct. 2001) (quoting *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 371 (Conn. 1954)).

It is well settled that “[t]he determination of what property is necessary to be taken in any given case in order to effectuate the public purpose is, under our constitution, a matter for the exercise of the legislative power. When the legislature delegates the making of that determination to another agency, the decision of that agency is conclusive; it is open to judicial review only to discover if it was unreasonable or in bad faith or was an abuse of the power conferred.”

*Id.* at 1049; *Small Landowners of Oahu v. City of Honolulu*, 832 F. Supp. 1404, 1408 (D. Haw. 1993) (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”).

244. See, e.g., ARIZ. CONST. art. 2, § 17 (The Arizona Constitution states that “the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”).

245. See, e.g., FLA. STAT. ch. 73.021 (2003) (“[W]hich petition shall set forth: (1) The authority under which and the use for which the property is to be acquired, and that the property is *necessary* for that use . . .”) (emphasis added); *Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 165 P. 1128, 1128 (Idaho 1916) (“If a reasonable, although not an absolute, necessity exists to take property for a public use, it is sufficient.”).

246. See, e.g., *S. Elec. Generating Co. v. Leibacher*, 110 So. 2d 308 (Ala. 1959); see also *Stearns v. City of Barre*, 50 A. 1086, 1092 (Vt. 1901) (“The sovereign remains the judge of the necessity, but ultimately determines it through the judicial branch of its government, instead of the legislative branch.”).

247. 110 So. 2d at 313.

248. NEV. REV. STAT. § 37.040(2) (2003).

determination. In California, “courts have traditionally refused to examine whether the taking of a particular piece of property is *necessary* for an asserted public purpose.”<sup>249</sup> The “[l]egislature has narrowly defined court review in this area”<sup>250</sup> such that there is no judicial relief unless it can be shown that “the City’s decision to use its power of eminent domain in this fashion was completely irrational.”<sup>251</sup> When the determination of necessity is reviewed, the degree of necessity required for condemnation is generally considered to be “reasonable,” not “absolute,” necessity.<sup>252</sup> Several other jurisdictions limit judicial intervention or investigation into the determination of whether a government’s exercise of eminent domain is necessary.<sup>253</sup> Only when the condemning authority abuses its discretion or acts irrationally may the court review the necessity determination.<sup>254</sup>

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249. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 846 (Cal. 1982) (Bird, C.J., concurring and dissenting).

250. *Id.*

251. *Id.*; see also *Sandefur*, *supra* note 176, at 669-70 (“The distinction between public use and public necessity remains viable in California law; courts defer in almost every case to a legislative finding of necessity, but will review to at least some extent whether the use is in fact public.”).

252. See, e.g., *Mich. State Highway Comm’n v. Vanderkloot*, 204 N.W.2d 22, 25 (Mich. Ct. App. 1972), *aff’d*, 220 N.W. 2d 416 (Mich. 1974) (“The taking, however, need not be an absolute necessity; it is sufficient that it is reasonably necessary for public convenience or advantage.”); *In re R.I. Suburban Ry. Co.*, 48 A. 591, 592 (R.I. 1901) (“We do not question that the term ‘necessary,’ as used in the statute, does not mean an absolute necessity, in the sense that the particular land is indispensable, but, rather, that the land, or other similarly situated, is reasonably required for a public purpose.”).

253. See, e.g., *Miles v. Brown*, 156 S.E.2d 898, 900 (Ga. 1967) (“The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under the due process clause of the Fourteenth Amendment and the same clause of the Constitution of this state.”) (quoting *Tift v. Atl. Coast Line R.R. Co.*, 131 S.E. 46, 52 (Ga. 1925)); *Indianapolis Power & Light Co. v. Barnard*, 371 N.E.2d 408, 411 (Ind. Ct. App. 1978) (“Significantly the courts are not to infringe upon the administrative act of determining the necessity or reasonableness of the decision to appropriate and take land. Rather they are only to determine whether there is legislatively delegated legal authority which would allow the exercise of the power of eminent domain to acquire the land.”) (citing *Cemetery Co. v. Warren Sch. Twp.*, 139 N.E.2d 538 (Ind. 1957)); *Louisville & N. R. v. City of Louisville*, 114 S.W. 743, 747 (Ky. Ct. App. 1908) (“The necessity for the taking is a matter to be determined by the legislative department, state, or municipal, as the case may be, and the question whether it is taken for a public use is for the judiciary.”); *City of Bristol v. Horter*, 43 N.W.2d 543, 546 (S.D. 1950) (“The question of the existence of the necessity for exercising the right of eminent domain, where it is first shown that the use is public, is not open to judicial investigation and determination, but that the body having power to exercise the right of eminent domain is also invested with power to determine the existence of the necessity.”).

254. See, e.g., *Emerald People’s Util. Dist. v. Pacificorp*, 784 P.2d 1112, 1117 (Or. Ct. App. 1990) (involving a “judicial application of a state statute that requires the courts to determine whether a condemnor has abused its discretion through a taking that is not compatible with the

Even where this power is delegated to a private corporation, some jurisdictions provide that “the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the right.”<sup>255</sup>

5. *Property*.—Many states use the broad term “property” to identify what may be subject to eminent domain,<sup>256</sup> but some jurisdictions use more specific terms such as “real property,”<sup>257</sup> “land,”<sup>258</sup> “real or personal property,”<sup>259</sup> or even

greatest public good and least private injury”); *Town of Perry v. Thomas*, 22 P.2d 343, 345 (Utah 1933) (“Under powers thus delegated to municipal boards the necessity, expediency, or propriety of opening a public street or way is a political question, and in the absence of fraud, bad faith, or abuse of discretion the action of such board will not be disturbed by the courts.”).

255. *Zurn v. City of Chicago*, 59 N.E.2d 18, 25 (Ill. 1945) (“[W]hile the question whether the use for which the appropriation of property by eminent domain is sought is public in its nature is a judicial question which the court may determine, yet when it is determined that the proposed use is public the court cannot inquire into the necessity of [sic] propriety of exercising the right of eminent domain.”) (citing *Chicago, Milwaukee & St. Paul Ry. Co. v. Franzen*, 122 N.E. 492, 496 (Ill. 1919)). See also *City of Newport v. Newport Water Corp.*, 189 A. 843, 846 (R.I. 1937) (finding that legislative power can be delegated to a private corporation and stating that “[t]he necessity and expediency of the taking, as distinguished from the nature of the use to which the property taken is to be devoted, is purely a legislative question with which the courts have nothing to do. If it is admitted that the use for which the property is taken is public, there is nothing left for judicial determination.”); *Atkinson v. Carolina Power & Light Co.*, 121 S.E.2d 743, 746 (S.C. 1961) (“[T]he Legislature of South Carolina has expressly delegated to the defendant company, and all others similarly engaged, the power of eminent domain. In the exercise of that power those to whom it has been delegated represent the sovereignty of the state, and are empowered to decide, subject only to supervision of the courts to avoid fraudulent or capricious abuse, what and how much land of the citizens they will condemn for their purposes.”).

256. See, e.g., FLA. CONST. art. X, § 6(a) (“No *private property* shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”) (emphasis added); GA. CONST. art. I, § I, ¶ I (“No person shall be deprived of life, liberty, or property except by due process of law.”); ILL. CONST. art. 1, § 15 (“Private property shall not be taken or damaged for public use without just compensation as provided by law.”).

257. See, e.g., IND. CODE ANN. § 32-24-4-1(a) (West 2002) (stating authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added); S.C. CODE ANN. § 28-2-60 (Law. Co-op. 2002) (The eminent domain power appears to be limited to real property based on the statutory language that a “condemnor may commence an action under this chapter for the acquisition of an interest in any real property necessary for any public purpose.”).

258. See, e.g., IND. CODE ANN. § 32-24-4-1(a) (West 2002) (stating authorized entity “may take, acquire, condemn, and appropriate *land, real estate*, or any interest in the *land or real estate*”) (emphasis added).

259. See, e.g., GA. CODE ANN. § 46-3-126 (2003) (“The authority shall have all powers necessary or convenient . . . including, but without limiting the generality of the foregoing, the power: . . . (3) To acquire in its own name real property or rights and easements therein and

“rights of way,”<sup>260</sup> “water gates,”<sup>261</sup> or “easements.”<sup>262</sup> The general term, “property,” sometimes is construed to refer only to real property,<sup>263</sup> but in many jurisdictions judicial decisions have construed the term broadly to cover both real and personal property of all kinds.<sup>264</sup> Judicial decisions awarding just compensation for personal property impacted by condemnation proceedings involving real property may also indicate the jurisdiction’s willingness to allow the government to condemn personal property directly.

Some courts will not require the government to compensate the property

franchises and personal property necessary or convenient for its corporate purposes. . . .”).

260. *See, e.g.*, GA. CODE ANN. § 22-3-20 (2002) (“Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others . . . .”); N.D. CONST. art. 1, § 16 (“[N]o right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner. . . .”).

261. NEV. REV. STAT. § 37.010 (2003) (listing the public purposes for which the right of eminent domain may be exercised).

262. *See, e.g.*, KY. REV. STAT. ANN. § 96.590 (Michie 2002) (“Any board proceeding under KRS 96.550 to 96.900 shall have the right to acquire by the exercise of the power of eminent domain, all lands, *easements*, rights of way, either upon or under or above the ground . . . .”) (emphasis added).

263. *See, e.g.*, *Mr. Klean Car Wash, Inc. v. Ritchie*, 244 S.E.2d 553, 557 (W. Va. 1978) (“It was pointed out that our eminent domain statutes relate only to interests in real property.”).

264. *See, e.g.*, ALASKA CONST. art. I, § 18 (“Private property shall not be taken or damaged for public use without just compensation.”); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993). “Nothing in the notion of ‘property,’ whether as used in the due process clause of the Fourteenth Amendment, which has been held (by incorporation of the just-compensation clause of the Fifth Amendment) to require just compensation when state government takes private property for a public use, or in the constitutional and statutory provisions of Illinois governing condemnation, limits condemnation and inverse condemnation to real property.” *Stroh v. Alaska State Hous. Auth.*, 459 P.2d 480, 485 (Alaska 1968) (“finding no clear legislative intent [manifesting] that personal property taken or damaged by public use should not be justly compensated”); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (“For eminent domain purposes, neither the federal nor the state Constitution distinguishes between property which is real or personal, tangible or intangible.”); *Superior Coal & Builders Supply Co. v. Bd. of Educ.*, 83 S.W.2d 875, 876 (Ky. Ct. App. 1935) (“The Constitution was written to protect the citizen from the improper acts of the state, its arms and its officers; nor does it make any difference that a portion of the plaintiff’s property was personal property, as sections 13 and 242, Ky. Const., apply to both real and personal property.”); *State Highway Comm’n v. Rollings*, 471 P.2d 324, 328 (Wyo. 1970) (“[I]t is well settled that the word ‘property’ as contained in the Fifth Amendment to the Constitution of the United States, in [section] 33, Art. I, of the Wyoming Constitution, and in [section] 1-775, for which an owner must receive ‘just compensation’ when taken or damaged by a condemnor, ‘is treated as a word of most general import and is liberally construed.”) (citation omitted). *See also* *Tobin-Rubio*, *supra* note 157, at 1191-92 (discussing property interests subject to condemnation and citing various statutes and judicial decisions, some which allow condemnation of intangible property and some which do not).

owner for personal property interests when real property is condemned since a business interest such as a lease or license is arguably transferable to another location.<sup>265</sup> In *Michigan State Highway Commission v. L & L Concession Co.*,<sup>266</sup> a Michigan court observed that “[o]rdinarily no compensation is allowed for the goodwill or going-concern value of a business operated on the real estate being condemned.”<sup>267</sup> Nevertheless, the court also noted that “since the state but rarely intends to operate the business, the courts have been unwilling to award compensation unless the destruction of the business was a necessary consequence of the condemnation.”<sup>268</sup> While some jurisdictions will not require compensation for personal property associated with a real property condemnation, the Michigan court at least considered the possibility of using eminent domain power to acquire property with the intent to operate an ongoing business.<sup>269</sup>

In some states, legislative or constitutional language expressly declares that private property in the form of an ongoing enterprise may be subject to eminent domain. Statutory language in Alabama dealing with supplying electricity to the public provides that the county and municipal condemnation power applies to “all the property, tangible and intangible”<sup>270</sup> and allows a municipal corporation or county to acquire “[a]ll or any part of any existing power plant.”<sup>271</sup> The Texas Constitution also allows an existing business operation to be acquired by the government for purposes of servicing the public. The Texas Constitution provides that the legislature may create Airport Authorities composed of one or more counties that have the power to exercise eminent domain to acquire “any airport or airports, landing fields and runways, airport buildings, hangars, facilities, equipment, fixtures, and any and all property, real or personal, necessary to operate, equip and maintain an airport” and “shall authorize the purchase or acquisition by the Authority of any existing airport facility publicly owned and financed and served by certificated airlines, . . . through the exercise of the power of eminent domain.”<sup>272</sup> Although Virginia allows a municipality to

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265. *Mich. State Highway Comm’n v. L & L Concession Co.*, 187 N.W.2d 465, 469 n.10 (Mich. Ct. App. 1971) (“The loss of good will is not an element of compensation where the business is not taken for use as a going concern. . . . A good plumber should be able to continue his business in almost any location and do as well as he formerly did.”) (quoting *In re Edward J. Jeffries Homes Housing Project*, 11 N.W.2d 272, 276 (Mich. 1943)). *But see* OKLA. STAT. tit. 11, § 22-104-3 (2003) (“Any business or profession which is affected by the right of eminent domain as exercised pursuant to the provisions of this section shall be considered as a property right of the owner thereof and proper allowance therefor shall be made.”).

266. 187 N.W.2d 465 (1971).

267. *Id.* at 468.

268. *Id.* at 469.

269. *See also* N.M. STAT. ANN. § 3-18-10(c) (1999) (stating a municipality may “acquire by eminent domain any *existing* cemeteries, mausoleums or both, or combinations thereof”) (emphasis added).

270. ALA. CODE § 11-81-200(a) (2002).

271. *Id.*

272. TEXAS CONST. art. 9, § 12(a) & (e).

condemn electrical utility distribution facilities to serve a public purpose, the city or town must first obtain permission from the State Corporation Commission upon demonstrating “that a public necessity or that an essential public convenience shall so require” such a condemnation.<sup>273</sup>

The use of eminent domain power to provide for public utilities such as light, heat, water, and power is also authorized in some states.<sup>274</sup> Although it is not always clear from the statutory language that eminent domain can be used to acquire an ongoing utility,<sup>275</sup> some states specifically authorize the use of eminent

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273. *Town of Blackstone v. Southside Elec. Coop.*, 506 S.E.2d 773, 777 (Va. 1998) (quoting VA. ANN. CODE § 25-233) (finding that evidence did not support a finding that “the public would benefit under the entire circumstances of the proposed condemnation”).

274. *See, e.g.*, OR. CONST. art. XI, § 12 (Peoples’ Utility Districts have authority to exercise the power of eminent domain); ARK. CODE § 14-54-701(a)(1) (2002) (“Municipal corporations shall have power to provide for, or construct, or acquire works for lighting the streets, alleys, parks, and other public places by gas, electricity, or otherwise . . . .”); ARK. CODE § 23-18-307(14) (2002) (describing corporate power to provide electric power and energy, including “the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary or useful in the construction or operation of its properties”); *Niegocki v. Dennison*, 219 N.Y.S.2d 109, 111 (Sup. Ct. 1961) (“The Suffolk County Water Authority is specifically empowered to purchase water supply systems, by condemnation or direct purchase (§ 1078, Public Authorities Law.)”); *Emerald People’s Util. Dist. v. Pacificorp*, 784 P.2d 1112, 1116 (Or. Ct. App. 1990) (stating Peoples’ Utility Districts may use eminent domain to acquire existing hydroelectric power plants under ORS section 35.235(2) provided there is “public necessity for the use, necessity for the property and compatibility with the greatest public good and least private injury”). *But see* N.Y. PUB. AUTH. LAW § 1020-a (2003) and 98 N.Y. Op. Att’y Gen. (Inf.) 13 (1998) (finding that legislature establishes Long Island Power Authority to replace investor owned utility with a publicly owned power authority, but Attorney General opinion precludes municipalities from condemning facilities or assets in this service area to operate a municipal utility); OR. REV. STAT. § 262.075(3) (2001) (A joint operating agency is considered to be a municipal corporation with the power of eminent domain “however, a joint operating agency shall not condemn any properties owned by a publicly or privately owned utility which are being used for the generation or transmission of electric energy or power.”).

275. *See, e.g.*, OHIO CONST. art. XVIII, § 5 (“Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage.”); MINN. STAT. § 216B.47 (2002) (providing that a municipality may acquire the property of a public utility by eminent domain proceedings provided that the damages “include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors,” but it is not clear from the language that the municipality would be acquiring the utility as an ongoing concern); N.D. CENT. CODE § 32-15-02 (2002) (“[R]ight of eminent domain may be exercised in behalf of the following public uses: . . . electric light plants and power transmission lines . . . [o]il, gas, coal, and carbon dioxide pipelines and works and plants for supplying or conducting gas, oil, coal, carbon dioxide, heat, refrigeration, or power . . . .”); TENN. CODE ANN. § 65-22-101 (2002) (empowering utility corporations “to condemn and take upon paying or securing payment thereof, to purchase or otherwise acquire, such

domain to acquire a plant and facilities from a public or private utility so long as it is within the city limits.<sup>276</sup> Nebraska's statutory scheme provides that a power district can use eminent domain "to acquire from any person, firm, association, or private corporation any and all property owned, used or operated, or useful for operation, in the generation, transmission, or distribution of electrical energy,

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*lands and interests in and by whomsoever owned as may be necessary or advisable in the construction, maintenance, and operation of either its gas or electric plants or both*") (emphasis added); *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697, 701 n.3 (Utah 1990) (finding that under Utah Constitution article I, section 22, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation," city must pay just compensation to acquire title to public utility facilities).

276. See, e.g., KY. REV. STAT. ANN. § 96.590 (Michie 2002) (authorizing eminent domain to acquire an electric plant from a public or private utility so long as the property acquired is located within the area to be served by the municipal plant); LA. REV. STAT. ANN. § 33:4175(c)(1) (West 2002) (authorizing public power authorities to "finance, *acquire*, construct, operate, and maintain facilities and to engage in the generation, production, transmission, distribution, and sale, at wholesale or retail, of electric power and energy and gas.") (emphasis added); MD. CODE ANN. PUB. UTIL. CO. § 7-210 (e)(1) (2002) ("A municipal corporation that acquires the exclusive right under subsection (d) of this section to supply electricity within an area annexed by the municipal corporation may exercise the right of eminent domain to acquire the existing installed facilities of each electric company within the annexed area . . ."); MISS. CODE ANN. § 77-3-17 (2004) ("Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality. . ."); N.M. STAT. ANN. § 3-24-1 (2003) (Certain municipalities "may acquire, maintain, contract for and condemn for use as a municipal utility privately owned electric facilities used or to be used for the furnishing and supply of electricity to the municipality or inhabitants within its service area."); VT. STAT. ANN. tit. 30, § 2910 (2002) ("[T]he municipality . . . may take such private plant and property by the exercise of the right of eminent domain."); WASH. REV. CODE § 35.92.050 (2002) ("A city or town may also construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting . . ."). *But see* WASH. REV. CODE § 43.52.300 (2002) (stating "an operating agency shall not be authorized to acquire by condemnation any plants, works and facilities owned and operated by any city or district, or by a privately owned public utility"). See also *City of Thornton v. Public Util. Comm'n*, 195, 402 P.2d 194, 197 (Colo. 1965) (holding Colorado statutory provisions also "give full power to the municipality, subject only to the electorate, to *purchase* or acquire by condemnation *at the fair market value thereof* any water works or system and appurtenances necessary to the works or system") (emphasis in original); *In re Town of Springfield*, 469 A.2d 375, 377 (Vt. 1983) ("Where the utility currently serving the municipality refuses to sell its facilities, [section] 2910 provides that the municipality, after appropriate vote, may: take such private plant and property by the exercise of the right of eminent domain, paying therefor just compensation. . ."). *But see* MO. REV. STAT. § 523.0104 (2003) (stating public utility or electric cooperative does *not* have "the power to condemn property which is currently used by another provider of public utility service, including a municipality or a special purpose district" if the condemnor plans to use the property for the same or a substantially similar purpose).

including an existing electric utility system or any part thereof.”<sup>277</sup> In 2003, the city of Fort Wayne, Indiana, tried to acquire part of a private water and sewer utility, arguing that state legislation expressly allowed the purchase of a public utility’s assets without a government showing of necessity for such a taking.<sup>278</sup> Finally, California judicially recognized a municipal power to acquire an ongoing utility or business enterprise in the *City of Oakland v. Oakland Raiders*,<sup>279</sup> discussed above.<sup>280</sup> In the Raiders’ case, the California Supreme Court allowed the city’s eminent domain action over the sports franchise, concluding that state “eminent domain law authorized the taking of intangible property”<sup>281</sup> since “the applicable statutes authorized a city to take ‘any property,’ real or personal, to carry out appropriate municipal functions.”<sup>282</sup> The court pointed to specific legislation prohibiting the condemnation of an existing golf course, as evidence that the state legislature “has recognized a municipality’s broad eminent domain power to acquire an existing business unless expressly forbidden to do so.”<sup>283</sup> Nevertheless, subsequent litigation in this case precluded Oakland from using eminent domain to acquire the Raiders because the action was found to violate the dormant Commerce Clause.<sup>284</sup>

Defining what constitutes property subject to condemnation is just one of the ways eminent domain power can be limited to avoid government abuse. Express legislative statements defining property will assist the courts in determining when private interests must yield to government necessity and will either prohibit, permit, or encourage condemnation activity. Conversely, when the legislature uses broad terminology, such as the term “property,” government abuse is more likely to occur since “property” can encompass all kinds of private rights—real and personal; tangible and intangible.

6. *Prior Public Use Doctrine.*—Many states limit the power to condemn property by scrutinizing eminent domain actions over property that is already being devoted to a public use.<sup>285</sup> This limitation is referred to as the “prior public

277. NEB. REV. STAT. § 70-670 (2002) (emphasis added).

278. Leininger, *supra* note 115.

279. 646 P.2d 835, 836 (Cal. 1982).

280. *See supra* notes 153-59 and accompanying text.

281. *Oakland Raiders*, 646 P.2d at 840.

282. *Id.* at 843.

283. *Id.* (citing Government Code section 37353(c) which “provides that while a municipality may condemn land for use as a golf course, an existing golf course may not be acquired by eminent domain”).

284. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 154 (Ct. App. 1985); *see also* Saxer, *supra* note 4.

285. *See* NEV. REV. STAT. § 37.040 (2003) (Before a judgment of condemnation is entered in Nevada, the court must first find that “[i]f the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use.”). *But see* State *ex rel.* Mo. Cities Water Co. v. Hodge, 878 S.W.2d 819, 823 (Mo. 1994) (“The majority of decisions have allowed the condemnation of public utilities by municipalities, even though they had already been devoted to a public use.”). *See generally* Ralph W. Dau, *Problems In Condemnation of Property*

use doctrine” and has been described as follows:

[When a] condemnor to whom the power of eminent domain has been delegated, such as a municipality or a private corporation, seeks to exercise the power with respect to property already devoted to public use, the general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the legislature has authorized the acquisition either expressly or by necessary implication.<sup>286</sup>

The purpose of this doctrine is to ensure that state legislative intent is properly executed so that one public use does not destroy a public use previously authorized by the state, in order to avoid “circular, recriminatory, or serial condemnations.”<sup>287</sup> Additionally, if the property is already devoted to a public use, a condemnation for the same use would probably not be considered a necessity.<sup>288</sup> However, under the “compatible use theory,” this doctrine will not be applied to restrict the condemnation “if the proposed use ‘will not materially impair or interfere with or is not inconsistent with the use already existing.’”<sup>289</sup>

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*Devoted to Public Use*, 44 TEX. L. REV. 1517 (1966).

286. Mark S. Arena, Comment, *The Accommodation of “Occupation” and “Social Utility” in Prior Public Use Jurisprudence*, 137 U. PA. L. REV. 233, 234 (1988) (quoting *Greater Clark County Sch. Corp. v. Pub. Serv. Co.*, 385 N.E.2d 952, 954 (Ind. App. 1979) (citations omitted)); see also *City of St. Marys v. Dayton Power & Light Co.*, 607 N.E.2d 881, 886 (Ohio Ct. App. 1992) (“As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient regardless of whether the property was acquired by condemnation or purchase.”) (quoting *Richmond Hts. v. Bd. Of County Comm’rs*, 166 N.E.2d 143, 145 (Ohio Ct. App. 1960)).

287. Arena, *supra* note 286, at 238; see also *Hodge*, 878 S.W.2d at 824 (en banc) (holding that requirement that there be express legislative authorization for eminent domain over an existing public use property “might also avoid an endless chain of one public entity after another condemning out the prior owner of the same property”).

288. *Hodge*, 878 S.W.2d at 821 (deciding whether “a waterworks system already dedicated to a public use [may] be condemned by a municipality for the very same use”).

289. Arena, *supra* note 286, at 244-45 (quoting *Georgia S. & Fla. Ry. v. State Rd. Dep’t*, 176 So.2d 111, 112 (Fla. Dist. Ct. App. 1965)). Arena also observed that “[t]his exception has been characterized as one of the means by which a court can circumvent the potentially excessive inhibitory effect of the rule—its ‘frightening inflexibility’—while preserving the rule’s policy justification ‘that an important public use should be protected.’” *Id.* at 245 (quoting Robert Phay, *The Municipal Corporation and Conflicts Over Extraterritorial Acquisitions: The Need for Land Planning*, 17 VAND. L. REV. 347, 367 (1964); Craig B. Willis, Case Comment, *Prior Public Use Doctrine: New Judicial Criteria—Florida East Coast Railway v. City of Miami*, 5 FLA. ST. U. L. REV. 505, 509 (1977)). See also *Hodge*, 878 S.W.2d at 822 (noting that the “consistent thread of

A Kentucky court recognized the need to limit the power to prevent a new public use that will destroy a previous public use without explicit authority.<sup>290</sup> Nevertheless, in applying the “compatible use theory” the court explained that it is

a necessary consequence of the power to condemn, that this power may be exercised, not only upon private property, but upon property devoted to a public use, especially when the new use does not destroy the previous use, and when both of the uses may be enjoyed at the same time without the unreasonable impairment of either.<sup>291</sup>

Thus, it appears that a city’s attempt to condemn a utility plant already devoted to a public use will not likely be restricted by this doctrine since the “compatible use theory” can be applied to argue that new ownership by the city will not destroy or interfere with the use of the plant for the general public welfare.

Some jurisdictions weigh the degree of necessity for each of the potentially conflicting public uses to determine whether eminent domain should be employed to acquire property already being devoted to public use. This weighing requires that the proposed public use be “more necessary” than the original public use.<sup>292</sup> For example, in Idaho, the condemnor must propose to put a property currently used for public purposes to a “more necessary public use,” but the “condemnor need not demonstrate a ‘more necessary public use’ when condemning only the right to the common use of an existing right of way previously appropriated for public use.”<sup>293</sup> Thus, just like with the “compatible use” exception to the “prior public use doctrine,” the “more necessary public use” requirement is probably only applicable when the proposed use conflicts with the existing public use.

When property is already devoted to a public use and the “compatible use” exception does not apply, the eminent domain power must be conferred in express terms by specific legislative delegation and strictly followed.<sup>294</sup> “The

law running through these cases is that if an existing public use will not be harmed by a new and different public use, condemnation will be allowed under a general form of authority”).

290. *Louisville & N. R. Co. v. City of Louisville*, 114 S.W. 743, 746 (Ky. 1908).

291. *Id.*

292. *See, e.g., Kern River Gas Transmission Co. v. Clark Co.*, 757 F. Supp. 1110, 1118 (D. Nev. 1990) (according to Nevada law “condemnation shall not be entered if the property is already appropriated for public use unless the property sought has a ‘more necessary’ public use”) (citing NEV. REV. STAT. § 37.040(3)); *see also* *Arena*, *supra* note 286, at 236 (“Some courts embrace a ‘more necessary use’ test, weighing the benefits to the public of the competing uses . . . .”); *Dau*, *supra* note 285, at 1525 (noting in 1966 that “[a]t least seven states [Arizona, California, Idaho, Montana, Nevada, Oregon, and Utah] have statutory requirements that before property already appropriated to some public use can be taken by eminent domain, it must appear that the public use to which it is to be applied is a more necessary public use”).

293. *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 619 P.2d 122, 126 (Idaho 1980).

294. *See State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 822 (Mo. 1994). *But see* *City of Newport v. Newport Water Corp.*, 189 A. 843, 847 (R.I. 1937) (“Another principle as

rationale being that the legislature, not the subsequent condemning authority, is the proper entity to decide between mutually conflicting or destructive uses of public property.”<sup>295</sup> Assuming that the “compatible use” exception is not applicable because the proposed use will result in a destruction or material impairment of the existing use, the court in a condemnation action must find express authorization for the use of eminent domain.<sup>296</sup> Courts have strictly construed the specificity required for this authorization by requiring “the express use of the terms ‘the right to condemn’ or ‘the right to acquire by eminent domain’” rather than by “allowing the condemnation of public utilities under a more general statute.”<sup>297</sup> Additionally, even home rule cities will not be allowed to rely on their general powers of condemnation under a state constitution because such provisions do “not constitute express statutory authority nor authority by necessary implication.”<sup>298</sup>

An excellent example of the prior public use doctrine being judicially applied and the legislative response to this judicial resolution is found in the litigation surrounding a New Mexico city’s attempt to condemn an electric utility system to introduce a municipally-operated utility.<sup>299</sup> In *City of Las Cruces v. El Paso Electric Co.*,<sup>300</sup> the city adopted a resolution to condemn an electric utility operated by a privately-owned Texas corporation.<sup>301</sup> The private utility company argued that since the property was already devoted to a public use, the prior public use doctrine applied, and “the legislative intent must be expressed in ‘clear and express terms, or must appear from necessary implication.’”<sup>302</sup> The court reviewed three New Mexico statutes dealing with municipal acquisition of an electric utility and determined that language such as “acquire,” “construct,” and the phrase “property may also be condemned [by any municipality] for . . . electric lines” was too vague and not sufficient to “rise to the standard of express

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well settled as those above discussed is that the Legislature, in the absence of constitutional limitations to the contrary, has the right to take, from one, property already devoted to a public use and to give it to another to be devoted to the same identical public use . . . . The necessity and expediency of such a transfer are matters of legislative policy with which the courts have nothing to do. Where the Legislature clearly designates the property to be taken, it is conclusive, as such exercise of power is political . . . .”); *see also* Dau, *supra* note 285, at 1521 (“A state legislature may unquestionably validly authorize the taking of land devoted to one public use for a different public use in the absence of a constitutional prohibition.”).

295. *Hodge*, 878 S.W.2d at 822.

296. *Id.* at 823 (noting that “all of the cases holding that a municipality can condemn a public utility for its same use have required specific and express authorization from the legislature”).

297. *Id.* at 824.

298. *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238, 1251 (D. N.M. 1995).

299. *City of Las Cruces v. El Paso Elec. Co.*, 954 P.2d 72 (N.M. 1998).

300. 904 F. Supp. at 1238.

301. *Id.* at 1243-44.

302. *Id.* at 1249 (reviewing an earlier New Mexico decision, *City of Albuquerque v. Garcia*, 130 P. 118, 124 (N.M. 1913) (discussing the prior public use doctrine)).

statutory language nor authority by necessary implication.”<sup>303</sup>

The federal court in the *City of Las Cruces* litigation explained that the prior public use doctrine “cannot be invoked against a condemnor municipality if there is no destruction, obliteration or material impairment of the existing use” because of the “compatible use” exception to the doctrine.<sup>304</sup> The court refused to certify the issue of “a municipality’s authority to condemn an existing electric utility system”<sup>305</sup> to the New Mexico Supreme Court until it resolved the factual determination of whether the City’s condemnation action constituted “destruction, obliteration or material impairment” of the existing use.<sup>306</sup> Upon resolving the evidentiary issue of “compatible use” against the City because “the City failed to meet its burden of showing that there would be no material impairment,”<sup>307</sup> the federal court certified the condemnation issue to the New Mexico Supreme Court.<sup>308</sup> The state supreme court interpreted the certified question to be “whether the City’s showing justified application of the compatible use exception, permitting condemnation, or required application of the prior public use doctrine, precluding condemnation.”<sup>309</sup>

After the federal court decision in 1995, but before the 1998 New Mexico Supreme Court decision dealing with the certified question, “[t]he New Mexico Legislature acted in the 1997 session to provide express authority to the City.”<sup>310</sup> The Legislature amended several statutes, including Section 3-24-1(e), which now provides that municipalities of a particular population have the right to “acquire, maintain, contract for and condemn for use as a municipal utility privately owned electric facilities.”<sup>311</sup> Finding that the Legislature acted to give the City specific authority to condemn the private electric utility before the court answered the certified question, the New Mexico Supreme Court concluded that the case was moot.<sup>312</sup>

Ideally, the state legislature should decide whether or not it wants to allow municipalization of utilities or other ongoing business enterprises. Since a municipality will be required to show it is using its condemnation power for a

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303. *Id.* at 1250-51 (reading the three electric utility condemnation statutes together and finding that “the City does not have the necessary legislative authority under New Mexico statutes to condemn EPEC’s electric utility system”).

304. *Id.* at 1252.

305. *Id.* at 1256.

306. *Id.* at 1252-55 (noting that “[i]t is not enough, however, that some inconvenience may occur to the prior user; to constitute destruction, obliteration or material impairment, there must be strong evidence that the new use will eradicate or materially impair the prior use” and that “this question must be analyzed from the perspective of the user public”).

307. *City of Las Cruces v. El Paso Elec. Co.*, 954 P.2d 72, 76 (N.M. 1998).

308. *Id.* at 74.

309. *Id.* at 76 (construing the certified question narrowly so as not to conduct an appellate review of the federal court’s written opinion and order).

310. *Id.* at 76.

311. *Id.* at 76-77.

312. *Id.* at 77.

public purpose, it is likely that any ongoing enterprise it seeks to acquire will already be devoted to a public use, as in the case of a privately-owned public utility. Therefore, to avoid the limitations of the “prior public use” doctrine, state legislative provisions promoting municipalization should expressly authorize the use of eminent domain power to acquire any “prior public uses.”<sup>313</sup> The New Mexico Legislature, as described in the litigation above, did just that, resulting in the municipality being allowed to use its power to acquire a privately-owned public utility.

It may be that the “compatible use” exception to the prior “public use” doctrine will allow municipalization which does not interfere with or destroy the public’s use. Express legislative authority will avoid the potential problem that occurred in New Mexico where the City was unable to meet its burden of proof that its proposed use was compatible. Kentucky addresses the problem of duplicate or conflicting public uses by legislatively requiring that a municipality acquire an existing public utility plant or facility by purchase or by eminent domain rather than by constructing a similar plant or facility.<sup>314</sup> However, since home rule cities will not be affected by state legislative pronouncements concerning only local concerns,<sup>315</sup> home rule cities wishing to use eminent domain to acquire property previously devoted to a public use may need to establish express local legislative authority.

7. *Additional Constraints on Eminent Domain Power.*—A final state constraint over a municipality’s exercise of eminent domain to acquire a privately-owned public utility exists in some states which require the approval of a state public utilities commission.<sup>316</sup> Requiring approval at the state level by

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313. See Gray, *supra* note 120, at B2 (discussing Massachusetts communities attempting to municipalize electric companies and explaining that “the state law, as it now reads, needs clarification if municipalization is to become feasible for a city or town at this time”).

314. KY. REV. STAT. § 96.045(1).

No municipality, in which there is located an existing electric, water or gas public utility plant or facility shall construct or cause to be constructed any similar utility plant or any similar public utility facility duplicating such existing plant or facility or to obtain or acquire any similar public utility plant or facility other than by the purchase of the existing plant or facility or by the acquisition of such existing plant or facility by the exercise of the power of eminent domain.

315. See, e.g., *City of New York v. Patrolmen’s Benevolent v. Ass’n of City of New York, Inc.*, 642 N.Y.S.2d 1003, 1009 (Sup. Ct.) (“[W]hile the Home Rule provision grants the City significant power and authority to act with respect to local matters nothing in the Home Rule provision is intended to impair the power of the Legislature to act in relation to matters of State concern notwithstanding the fact that the State’s concern may also touch upon the City’s property, affairs or government.”), *aff’d*, 647 N.Y.S.2d 728 (App. Div.), *aff’d*, 676 N.E.2d 847 (N.Y. 1996).

316. See, e.g., James Vaznis, *Water Takeover on Ballot*, BOSTON GLOBE, Mar. 9, 2003, at 1 (discussing a group of New Hampshire communities attempting to buy a publicly traded water utility and stating that “New Hampshire law allows a municipality to take a utility by eminent domain; the state Public Utilities Commission must approve any resulting deal”); James Vaznis, *Pennichuck Deal Opens Taps on Two Fronts*, BOSTON GLOBE, Aug. 14, 2003, at 1.

a public utilities commission will help prevent government abuse of the condemnation power at the local level. State concerns about the impact of municipalization, particularly when it affects surrounding communities, will more readily be addressed when state approval is part of the municipalization process.

While it is beyond the scope of this article to explore federal constitutional constraints on eminent domain power,<sup>317</sup> local and state government power to condemn may be limited by federal constitutional and statutory law. As discussed above,<sup>318</sup> the California Court of Appeal in *City of Oakland v. Oakland Raiders*,<sup>319</sup> prohibited Oakland from using its eminent domain power to acquire the Raiders football team because the action was found to violate the dormant Commerce Clause.<sup>320</sup> Additionally, state and local power may be limited by the Supremacy Clause and federal pre-emption, the Contracts Clause,<sup>321</sup> and federal antitrust legislation.<sup>322</sup> The federal government's power to condemn may be limited by the Commerce Clause and state sovereignty under the Tenth Amendment.<sup>323</sup>

#### CONCLUSION

Municipal officials seeking to promote the general welfare of their communities may consider the municipalization of public utilities to be an appropriate response to increasing service costs, decreasing reliability, and corporate abuse. Events such as the California energy crisis in 2001, followed by the Northeast blackout in August 2003,<sup>324</sup> have increased the public's awareness of its susceptibility to situations where market manipulation or skewed economic incentives may result in unstable and costly public utility service.<sup>325</sup>

Public utilities have historically alternated between private and public ownership, public regulatory control, and deregulation with market competition. Following the unregulated and competitive stage of the later 1800s, the

317. See Saxer, *supra* note 4.

318. See *supra* notes 150-56, 277-82 and accompanying text.

319. 220 Cal. Rptr. 153 (Ct. App. 1982).

320. *Id.*; see also Saxer, *supra* note 4.

321. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . .").

322. See Rossi, *supra* note 77, at 1786-89 (discussing "regulatory federalism doctrines" such as federal preemption, the Supremacy Clause, the dormant Commerce Clause, and antitrust laws).

323. See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 769-70 (1982) (upholding Titles I and II of the Public Utility Regulatory Policies Act (PURPA) against a Tenth Amendment challenge to congressional activity).

324. Nancy Gibbs, *Lights Out*, TIME, Aug. 25, 2003, at 30, 37 (noting that "the blackout of 2003 affected eight states and 50 million people and could cost up to \$5 billion").

325. See Duane, *supra* note 87, at 529-30 (discussing the impact of public versus private ownership of the public power system in California and noting that "the public simply provides the money while the private sector provides the monopoly power to keep the lights on").

municipalization and public regulatory models for utilities were proposed because of deteriorating operations and services, antitrust violations, and political corruption in the granting of private charters and franchises. The regulatory model prevailed over municipalization because of concerns about political corruption in city management and the fear of socialism. This regulatory state lasted for almost a century, but is being replaced by a market approach, evident in the 1978 Public Utility Regulatory Policies Act (PURPA), which encourages market-based rates for conventional fuels.

Recent abuses by the electricity industry have resulted in decreased service and increased rates, leading consumers and city officials to question the wisdom of reducing regulatory control to allow competition. Some municipalities are responding to these concerns by establishing municipal services instead of attempting to regulate or control investor-owned public utilities. As part of this municipalization process, cities attempted to acquire part or all of these investor-owned utilities through voluntary purchase or eminent domain. Utilities have resisted these efforts by refusing to sell and forcefully litigating the resulting condemnation suits.

Allowing local government to force the sale of private ongoing enterprise opens the door to a myriad of condemnation actions converting private free enterprise to municipal ownership. A fear of piecemeal socialization through the use of eminent domain power requires that we examine how this potential for government abuse should be managed using existing or revised federal, state, and local statutory and constitutional provisions. This Article reviewed current state statutory and constitutional guidelines to constrain the eminent domain power and concludes by suggesting that each state must decide whether it wishes to encourage or discourage the municipalization of utilities and other public services and expressly declare this intent in statutory and/or constitutional provisions.

Although local governments will need to conduct extensive assessments to decide whether or not to municipalize for the benefit of its citizens, lawmakers at the state level should ensure that the eminent domain power is appropriately restricted to avoid government abuse. It will likely not be helpful to restrict the definition of what constitutes a “public use” under the Fifth Amendment or the state eminent domain declaration since municipalization of a public function, under even a restrictive or narrow definition, will probably qualify as a “public use.” Alternatively, the state could restrict its delegation of the state’s eminent domain power so that local government entities do not have the power to condemn certain activities unless the state has decided it wants to encourage municipalization of services such as utilities. Home rule cities will be allowed to determine their own approach toward municipalization unless such efforts are viewed as a matter of mixed local and state concern and are not sufficiently local in nature to assure local autonomy over matters controlled by conflicting state legislation.

Other state restrictions on local government eminent domain require that the power only be used to acquire property “necessary” for the public good. Jurisdictions vary as to whether this “necessary” determination is made judicially or legislatively. If the property is already being used for a public purpose, the

eminent domain power may restrict condemnations to facilitate municipal ownership since it may not be "necessary" for the public good to municipalize a function already being performed by private enterprise. Indeed, in some jurisdictions the "prior public use doctrine" precludes the government from condemning property already devoted to public use unless the proposed use will not interfere or conflict with the existing use under the "compatible use theory." State and local governments can avoid these restrictions by expressly conferring eminent domain power to condemn property already devoted to a public use or support these limitations by legislatively enacting a "prior public use" restriction.

Finally, expressly defining what "property" is subject to condemnation is an effective way for the state to restrict the government's eminent domain power over private enterprise. The definition of "property" can be legislatively or constitutionally restricted to "real property" or can specifically preclude the condemnation of an ongoing private enterprise, even if a valid public purpose will be served.

Ultimately, state and local citizens will need to decide whether controlling government abuses of the eminent domain power by legislatively or constitutionally restricting the extent of this power against ongoing private enterprise will unduly limit the government's flexibility and power to promote the best interests of the public. While judicial review of government eminent domain action may be an effective way to curb abuse, eminent domain legislation and constitutional interpretations have historically been broad and deferential to an expanded use of this power. Although the extent and scope of the condemnation power varies by jurisdiction, each state should discern the limits and structure of this power as it applies to ongoing enterprises. Citizens should intentionally choose to either legislatively expand this power to promote the flexibility needed by government to municipalize or to legislatively prevent the government from acquiring an ongoing enterprise.