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EMINENT DOMAIN AS A TOOL TO SET UP EMPLOYEE-OWNED BUSINESSES IN THE FACE OF SHUTDOWNS

KEITH J. SMITH*

I. INTRODUCTION

In recent years there has been a tremendous increase in the number of worker-owned businesses, with more than 2,000 in existence today.¹ Studies show that part of the reason for this increase is their success: employee-owned businesses are more productive,² create more jobs,³ and grow faster than comparable non-employee owned companies.⁴

One factor that has contributed to the growth of worker-owned businesses has been plant shutdowns. Today corporations are able to relocate around the world in order to maximize profits.⁵ As a result, the Northeast and the Midwest alone lost an estimated 900,000 jobs during the 1970s from plant shutdowns.⁶ A plant closing can have a devastating impact on a town or city. However, communities confronted by this situation are not helpless.

The doctrine of eminent domain is a legal tool that can be used by communities to address the issue of plant closings while facilitating the creation of worker-owned businesses. In this Comment I will demonstrate that the use of eminent domain to appropriate a business being shutdown so that it can be sold to its employees is an historically justified and intellectually sound exercise of statutorily authorized government power.

This Comment focuses primarily on the doctrine of eminent domain in Massachusetts for four reasons: first, eminent domain has been seriously considered in Massachusetts as a tool to prevent plant shutdowns.⁷

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¹ Rosen and Klein, *Job Creating Performances of Employee Owned Companies*, MONTHLY LABOR REVIEW, (August, 1978).

² K. Berman, *A Study of Worker Owned Plywood Companies (1967)* (published by the National Center for Employee Ownership (NCEO) in Arlington, Virginia).

³ See *supra* n. 1.

⁴ A Cohen, *Employee Ownership Companies After the Founder Retires (1985)* (available through NCEO).

⁵ Weinberg, *The Use of Eminent Domain To Prevent An Industrial Plant Shutdown: The Next Step In An Expanding Power*, 49 ALB. L. REV. 95 (1984).

⁶ Barker, *There Is A Better Way*, 32 LAB. L.J. 453, 454 (1981).

⁷ The Boston City Council voted 11-2 to use eminent domain to acquire the Colonial Meat Packing plant, in order to create a worker-owned business. Telephone interview with Gary Doterman, Aid to Boston Council Member Condras, (July 8, 1986).

Second, the economic development statutes presently in existence in Massachusetts authorize the use of eminent domain in this fashion.⁸ Third, the use of eminent domain to facilitate an employee owned business is primarily a state law question because the authority to use eminent domain arises under the state constitution,⁹ and the underlying public use that justifies the exercise of eminent domain aids the local economies.¹⁰ Fourth, state courts are becoming more active. Two factors have contributed to this development: the federal courts are not the activist courts they were twenty years ago and the present United States Supreme Court promotes states rights.¹¹ This allows state courts to be more active without interference from the federal courts.

Part II provides a historical overview of the public use aspect of eminent domain, from its initial definition of actual use by the public to its present definition of a benefit to the public.¹² United States Supreme Court cases are discussed only with respect to the deference they give to state exercises of eminent domain. Part III analyzes the controversial case of *Poletown Neighborhood Council v. City of Detroit*,¹³ in which an inner city neighborhood encompassing some 450 acres was razed to allow the General Motors Corporation to build an auto assembly plant. This case highlights the criticisms and risks associated with private transferee takings used to promote business interests. Part IV first examines the phenomenon of employee-owned businesses. Then a hypothetical worker-owned business established through the use of eminent domain is juxtaposed against the *Poletown* case.¹⁴ This will show that when an employee-owned business is promoted by eminent domain the serious problems raised by *Poletown*¹⁵ may be avoided and eminent domain can once again be used as a tool to address local economic problems as it has been in the past.¹⁶

⁸ Memorandum of Law, Power of New Bedford Massachusetts to Acquire the Morse Cutting Tools Plant Through Eminent Domain (1984) (available at the Institute for Public Representation, Georgetown University Law Center).

⁹ Mass. Const. Pt. 1, Art. 10, §§ 11.

¹⁰ Public use, in the broad view, can be equated to public advantage, that is anything that increases public resources, industrial energies, and promotes the productive power of a considerable number the inhabitants of the governmental unit exercising eminent domain. 2A *Nichols on Eminent Domain* §§ 7.02(2) (1985).

¹¹ *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 (1984).

¹² See *supra* note 10.

¹³ 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*).

¹⁴ *Id.* at 410.

¹⁵ *Id.* at 478.

¹⁶ This issue is fully discussed *infra* at Part II.

II. THE HISTORICAL DEVELOPMENT OF EMINENT DOMAIN AND THE CONCEPT OF PUBLIC USE IN MASSACHUSETTS

Eminent domain is the power of the sovereign to appropriate private property for a public use.¹⁷ This power is limited by the Massachusetts and United States Constitutions, both of which provide that private property can only be taken for a public use and that just compensation must be paid for the property taken.¹⁸ The extent of compensation required is beyond the scope of this paper. This section traces chronologically the judicial interpretation of the concept of public use.

Massachusetts was one of the first American colonies in which the English used eminent domain. A 1639 statute authorized the county courts to appoint local citizens' committees to construct highways and roads using eminent domain if the land needed could not be purchased outright.¹⁹ When the Colonies gained their independence from England, Massachusetts provided for the use of eminent domain in its Constitution.²⁰ Initially the only use of eminent domain was for the construction of roads. This exercise of eminent domain provided for the actual use by the public of the condemned land.²¹ The definition of public use has steadily broadened from this initial narrow interpretation.

Eminent domain had another arguably less public use in the Mill Acts of 1700s and 1800s, in which it was used to promote the development of private mills. The Mill Acts allowed mill owners to flood their neighbors' property in order to build up a head, or pond, of water sufficient to operate their mills.²² Agriculture was the mainstay of most communities until the industrial revolution. The mills served a central function in local economies by providing a place for farmers to grind their grains. This was the first step in broadening the definition of public use. No longer was public use actual use by the public, as it had been when eminent domain was used to construct roads and highways. In *Stowell v. Flagg*,²³ the Massachusetts Supreme Judicial Court held that the neighbors' only remedy to the flooding was an action for damages. The exercise of eminent domain could not be prevented. This illustrates

¹⁷ 1 *Nichols on Eminent Domain*, §§ 1.13[1] (1985).

¹⁸ Mass. Const. Pt. 1, Art. 10, §§ 11.

¹⁹ Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L.J. 1, 13 (1980).

²⁰ Mass. Const. Pt. 1, Art. 10, §§ 11.

²¹ Land taken through the exercise of eminent domain is referred to as condemned after it is taken. 2 P. NICHOLS, *NICHOLS ON EMINENT DOMAIN* 1013 (2d ed. 1917).

²² Agriculture was the mainstay of most communities until the industrial revolution. The mills served a central function in local economies by providing an important service, a place for farmers to grind their grains. Bennett, *Eminent Domain and Redevelopment: The Return of Engin Charlie*, 31 DE PAUL L. REV. 115, 116 (1981).

²³ 11 Mass. 364 (1814).

the strength of even the early uses of eminent domain when its exercise clashed with private property interests.

Many states passed a version of the Mill Acts similar to that in Massachusetts. In an agrarian society, the local mill served the central function of processing grains. Without easy access to mills, towns could not have grown as they did. Even though the mills were privately owned, they were required by law to be open for public use.²⁴ The courts reasoned that the public use served by having a mill in which local farmers could process their grains outweighed the disadvantage accompanying the flooding of a few peoples' land.

Without the expansion of the milling business, farmers could not have expanded their own operations and grown more food for the community. They would either have had to travel farther to have their grain processed, or to process the grain themselves, thereby leaving less time to grow crops. Eminent domain was exercised to promote the growth of agriculture, the main business of the colonial economy.

Soon other types of mills were benefitting from the Mill Acts. In 1832, the concept of public use was expanded to allow the new growth industry, manufacturing concerns, to build dams flooding neighboring property. In *Boston and Roxbury Mill Corporation v. Newman*,²⁵ the court noted that,

[f]or more than a century the mill owner has had the right to raise a head or pond of water by flowing the lands of others [and] paying the damage . . . The owner of the land us thereby deprived of the entire dominion of his soil, because the public good required the sacrifice at his hands, for a reasonable price.²⁶

Not only did the court in *Roxbury* specifically equate public use with public good, they also equated public exigencies with economic development. Further, the court reasoned that even though private shareholders might benefit, the benefit to the state and local community promised to be even greater. Economic development was seen as one of the most important functions the state could undertake, therefore, private property could be taken for the purpose of promoting economic development.²⁷ As the Industrial Revolution took hold the courts clarified and strengthened the public use test.

²⁴ 31 DE PAUL L. REV. at 115, 116 (1981).

²⁵ 29 Mass. 467 (1832). Unlike the Mill Act cases preceding it, the Roxbury mill was, in addition to a grist mill, a manufacturing mill. Where a grist mill will process grains brought in by anyone, the manufacturing mills were putting out products to be purchased. The manufacturing mill was therefore not open to the public as were the grist mills. This was a significant expansion in the term "public use."

²⁶ *Id.* at 478.

²⁷ *Id.* at 481.

In *Talbot v. Hudson*,²⁸ the Massachusetts Supreme Judicial Court distinguished the term "public use" from the term "use by the public" and adopted the broader term "public use." The Massachusetts Court pointed out that the test is not how many people will actually have access to the condemned land, but whether or not the condemnation is designed to promote the prosperity and welfare of the community.²⁹ The Court was beginning to focus on the issue of the taking rather than the subsequent use of the property. This allowed for more flexibility in how the property could subsequently be used. These early cases create a strong historical precedent for the continued use of eminent domain as a tool for economic development.

This is not to say that the 1800s saw an unabated assault on private property rights. One reaction to the expanded public use interpretation was a resurgence of the original, or narrow view, by those who feared the demise of private property rights. Under the narrow view public access to the condemned property was necessary to meet the public use test. The use of eminent domain to establish a privately owned mill would be illegal under this view because the public would not have complete access to the mill, as they would with a road.³⁰

Although other states were striking down the Mill Acts as an illegal taking, Massachusetts did not. The mills had become the main source of energy upon which Massachusetts' rapid industrialization was predicated.³¹ However, the strength of the narrow view is reflected in major legal decisions handed down in Massachusetts in the mid 1800s. In 1851, Chief Justice Shaw of the Massachusetts Supreme Judicial Court, used some intellectual sleight of hand to diffuse the proponents of the narrow view, by holding that flooding another's property under the Mill Acts did not constitute eminent domain. He rationalized that title to the property never changed hands, and the person whose land was flooded could build a dike to hold back the water and prevent the land from being flooded.³²

The influence of the narrow view can also be seen in this 1872 *Opinion of The Justices*, where the Massachusetts House of Representatives asked the Massachusetts Supreme Judicial Court to rule on the constitutionality of using eminent domain to lay out streets and side lots. The

²⁸ 82 Mass. 417 (1860).

²⁹ *Id.* at 427.

³⁰ *Ryerson v. Brown*, 35 Mich. 332, 338 (1977). Note that this case shows Michigan endorsing the narrow view that required use by the public. The *Poletown* case, in part III *infra*, shows that Michigan has abandoned the narrow view, thus underscoring my point that the analysis in this Comment can be applied to almost any state and need not be confined to Massachusetts.

³¹ Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 619-620 (1940).

³² *Murdock v. Stickney*; 62 Mass. 113, 116 (1851).

side lots would then be sold or leased to businesses.³³ The Justices held that, "it is the essential character of the direct object of the expenditure which must determine its validity. . . ." Therefore, an incidental public benefit would not be enough on which to base the use of eminent domain.³⁴

In 1885 in *Head v. Amoskeag Mfg. Co.*,³⁵ the United States Supreme Court upheld the Mill Acts as a legitimate form of eminent domain, thus endorsing the broad view of public use. At its peak, the narrow view slowed the expansion of eminent domain. Nevertheless, there were numerous instances of a private business benefitting from the use of eminent domain.³⁶

By 1930, the courts in Massachusetts were reviewing legislative acts of eminent domain with increased deference. In *Manning v. Metropolitan District Commission*,³⁷ Manning challenged the slum clearance legislation as an unconstitutional taking. The court held that a legislative act passed in accordance with the applicable procedure is presumed valid, unless it appears to violate a constitutional right.³⁸

The major use of eminent domain became slum clearance for the development of low rent housing. The New York Court of Appeals led the way in the 1936 case of *New York City Housing v. Muller*,³⁹ holding that private property taken for slum clearance was a taking for public use.⁴⁰ Many states including Massachusetts followed New York's lead. In *Allydonn Realty Corporation v. Holyoke Housing Authority*,⁴¹ the Massachusetts Supreme Judicial Court held that the primary purpose of slum clearance legislation was a public one, because it served the public welfare. The Allydonn court rejected the narrow view of use by the public once and for all.⁴²

In the Housing Act of 1949, the requirement found in early slum clearance statutes that low rent housing be built on the condemned land was omitted, although there were still some restrictions on the use of the property.⁴³ This statutory change directly benefitted private developers,

³³ *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 15 (1885).

³⁴ *In Re Opinion of the Justices*; 204 Mass. 607, 91 N.E. 405 (1910).

³⁵ *Id.* at 611.

³⁶ Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV., 621 n. 36 (1940).

³⁷ *Manning v. Metropolitan District Comm.* 270 Mass. 348, 169 N.E. 910, (1930).

³⁸ *Id.* at 351.

³⁹ 270 N.Y. 333, 1 N.E.2d 153 (1936).

⁴⁰ *Id.* at 343.

⁴¹ 23 N.E. 2d 665 (1939).

⁴² *Id.* at 668.

⁴³ Berger, *The Public Use Requirement in Eminent Domain*; 57 OR. L. REV. 203, 214-215 (1978).

who were able to purchase large parcels of city property at below market rates, develop it, and resell it at whatever rate the market would bear.

As a result of the slum clearance statutes, judicial review narrowed and began to focus only on the taking itself. In 1954 in *Papadinis v. City of Somerville*,⁴⁴ the court found that once the public purpose of the statute had been achieved, selling the property to private developers did not invalidate the taking.⁴⁵

During the same period, what passed judicial muster as a public purpose was expanded by the courts. A valid public purpose would be found if even some of the following factors were present:⁴⁶

1. The plan promoted the growth of the community;
2. The area was beyond remedy and control of the regulatory process;
3. The ordinary operations of private enterprise could not effectively deal with the area;
4. A public exigency existed which made acquisition necessary for development;
5. The public funds were being expended for the good and welfare of the commonwealth;

As evident in the factors being considered, eminent domain was being used to solve problems that market capitalism could not adequately address.

Like the state courts, the United States Supreme Court was also reviewing legislative exercises of eminent domain with great deference. In the 1954 landmark case of *Berman v. Parker*,⁴⁷ the United States Supreme Court gave broad approval to the use of eminent domain for slum clearance. The plaintiffs' property was surrounded by blighted slum property eligible for urban renewal. However, the plaintiffs' property was neither blighted nor unprofitable. Nevertheless, the court upheld the taking stating, "the public end may be as well or better served through an agency of private enterprise than through a department of the government—or so Congress might conclude."⁴⁸

That same year, the Massachusetts Supreme Judicial Court made a similar ruling stating that its review of eminent domain legislation was an extremely narrow one.⁴⁹ That view was reaffirmed in 1968 in *Poremba v. City of Springfield*, in which the court stated that great deference is given

⁴⁴ 331 Mass. 627, 121 N.E.2d 714 (1954).

⁴⁵ *Id.* at 631.

⁴⁶ *Id.* at 630.

⁴⁷ 348 U.S. 26 (1954).

⁴⁸ *Id.* at 33-34.

⁴⁹ *Blakeley v. Gorin*; 313 N.E.2d 903 (Mass. 1934).

to public officials' determinations as to what land is important for public improvement.⁵⁰ The court will only look to the public use for which the land is taken and not to how the property is subsequently used.

In *Boston Waterfront Development Corporation v. Commonwealth*,⁵¹ the court held that, "[t]he circumstances may be such that only a relatively small portion of the inhabitants may *participate* in the benefits, but the use or service must be of such a nature that in essence it *affects them as a community* and not merely as individuals."⁵² [emphasis added.] In *Boston Waterfront*, the court clearly equated public use with a benefit to the community. Further, the community benefit only has to be found in the initial taking. The property's subsequent use is not a factor. This allowed those acquiring property through eminent domain to maximize their profits, while ostensibly serving the public use of eradicating slums.

In *Ballantine v. Town of Falmouth*,⁵³ the town used eminent domain to acquire a privately owned parking lot. The lot was then leased to a private party who would continue to operate it as a parking lot. This was done to maintain the lot for its previous use.⁵⁴ The court held that "off street parking is a public purpose for which land may be taken by a municipality, even if that land is being operated as a for profit business by its private owner."⁵⁵

Eminent domain in Massachusetts has long been used by communities to address pressing economic problems. When mills were the main source of power needed to fuel the growth of industry, eminent domain was invoked to promote the development of the mills.⁵⁶ The mills were arguably open to public use. In the 1900s, eminent domain was used in an attempt to rid America's cities of slums.⁵⁷ At the same time the term "public use" was expanding to include benefit to the public and the narrow view of use by the public was relegated to history.⁵⁸ Finally, the courts limited the scope of review, in deference to the legislature, to the purpose of the taking only.⁵⁹ The most recent use of eminent domain has been to take private property for the benefit of a local business.⁶⁰

⁵⁰ 238 N.E.2d 43, 45 (1968).

⁵¹ 378 Mass. 629 (1979).

⁵² *Id.* at 647 citing, *Opinion of the Justices*; 297 Mass. 567, 571 (1937).

⁵³ 298 N.E.2d 695 (1973).

⁵⁴ *Id.* at 697.

⁵⁵ *Id.* at 698.

⁵⁶ See *supra* note 22.

⁵⁷ See *supra* note 40.

⁵⁸ See *supra* note 42.

⁵⁹ See *supra* note 50.

⁶⁰ See *infra* note 62.

III PRIVATE TRANSFEREE TAKING TO PROMOTE A REGULAR BUSINESS: A CRITICAL ANALYSIS OF *Poletown Neighborhood Council v. City of Detroit*

In *Poletown Neighborhood Council v. City of Detroit*,⁶¹ the city of Detroit used eminent domain to raze a neighborhood known as Poletown so that the General Motors Corporation (G.M.C.) could build an auto assembly plant. Poletown can be distinguished from other uses of eminent domain since Poletown was not a blighted neighborhood but rather an active and diverse ethnic community.⁶²

When eminent domain is used to take private property from one party involuntarily and transfer title to another private party, it is known as a private transferee taking. A public transferee taking, on the other hand, would vest title to the appropriated property in a governmental unit. The *Poletown* case is an example of a private transferee taking on a vast scale. Legal scholars level more criticism at private transferee takings because the public use is suspect when the property ends up in private hands. By taking a closer look at *Poletown* we can begin to see why private transferee takings are criticized.

In the Spring of 1980, G.M.C. gave notice to the city of Detroit that it was closing its outdated Cadillac/Fisher body plant and would move out of the city by the Spring of 1983, unless Detroit could procure a site between 450 and 500 acres with rail and highway access.⁶³ Detroit had already been seeking ways to stem the flow of jobs from the city before G.M.C. announced the closing of this major plant with the potential loss of over 6,000 jobs.⁶⁴

The city of Detroit, working closely with G.M.C.,⁶⁵ decided to raze the inner city neighborhood of Poletown which was home to 4,200 people. Unlike blighted property condemned under the slum clearance statutes, however, Poletown was a stable, working class neighborhood. These factors set the *Poletown* case apart from all previous uses of eminent domain. A precedent has now been set whereby productive private property can be condemned for the benefit of a private business.

In upholding this unprecedented use of eminent domain, the Michigan Supreme Court found that preventing the loss of jobs, as well as other beneficial economic consequences of the new plant, constituted a

⁶¹ 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*).

⁶² *Id.* at 461.

⁶³ *Id.* at 460. These requirements reveal the detail which G.M.C. required of the city. This implies that the use of eminent domain was for G.M.C.'s benefit with an incidental public benefit.

⁶⁴ *Id.* at 467.

⁶⁵ *Id.* at 467, 469.

valid public use.⁶⁶ Citing *Berman*, the Court noted that the legislature's determination of what is in the public interest must be given great deference.⁶⁷

The *Poletown* case epitomizes the drawbacks of a private transferee taking. Aside from the psychological trauma to the thousands of people whose homes and neighborhood were taken from them, numerous legal issues were raised. Justice Fitzgerald discussed several of them in his dissenting opinion in *Poletown*.⁶⁸

First, Justice Fitzgerald argued that eminent domain was used to meet a private purpose, and that eminent domain should only be used for a private corporation when that enterprise generates a public benefit that would not exist but for the government's use of eminent domain.⁶⁹ In *Poletown* the primary benefit was to G.M.C. who received a site for its new plant. The G.M.C. plant would not exist in Detroit unless the city first met G.M.C.'s criteria by using eminent domain. It is true that a subsequent benefit of the G.M.C. plant would be the retention of jobs, but jobs could be generated by promoting another corporation whose requirements would be less intrusive.⁷⁰

Second, *Poletown* upheld an exercise of eminent domain which realigned the relationship between private property owners, business, and government. Never before had a business interest been allowed to deny so many property holders their right of ownership. In the traditional use of eminent domain, private property would be lost for an immediate public benefit such as slum clearance. In *Poletown*, the taking was on such a large scale that the victims lost not only their property, but were also denied the ability to relocate within their neighborhood. This wholesale condemnation of *Poletown* indicates that the Detroit government valued the rights of a business much more than the rights of the individual property owners.⁷¹

Third, the public use is no longer sought in the taking itself as it was, for example, in slum clearance legislation.⁷² Benefit to the public is relegated to a position inferior to the benefit derived by the corporation. Eminent domain was used primarily to benefit G.M.C. by helping them obtain their new plant, in the hope that the new plant would furnish new jobs, or even save jobs for Detroit. Then speculative and incidental benefit will be enough to meet the public use test.

⁶⁶ *Id.* at 459.

⁶⁷ *Id.*

⁶⁸ *Id.* at 464.

⁶⁹ *Id.* at 478-480.

⁷⁰ *Id.* at 478.

⁷¹ *Id.*

⁷² *Id.* at 480.

Additional drawbacks to a *Poletown*-type taking are raised by Professor Thomas Ross in his law review article *Transferring Land to Private Entities by the Power of Eminent Domain*.⁷³ First, a private transferee taking is more likely to be the result of an improper motive than is a public transferee taking because the potential for private gain is much higher. Second, private transferee takings do not necessarily provide adequate public accountability to insure that the property continues to be used for the public benefit. Third, private transferee takings have a demoralizing effect on those directly affected and on the surrounding community. Fourth, each private transferee taking is a precedent for future takings.

The first criticism addresses the motive behind the taking. When the appropriated property is transferred to a private entity, it is easier to use eminent domain to reward or punish a particular person or business. For example, in a city that has a critical shortage of parking, property could be taken from a political enemy and sold or leased to a political or business ally, under the guise of addressing the city's parking crisis.⁷⁴

The second criticism concerns accountability. Once the state transfers the property to a private party, it loses much of the leverage that could have assured that the desired public use was met.⁷⁵ For instance, in the *Poletown* situation, Detroit transferred the property to G.M.C. under the rationale that eminent domain was being used to retain jobs without assurances that the company would not switch to a less labor-intensive method of auto assembly. There is nothing to prevent G.M.C. from automating the new plant to the point where the work force is much lower than the 6,000 that G.M.C. had forecast in their bid to acquire the land.

The third criticism is what Ross terms the demoralizing effect.⁷⁶ In *Poletown* there were thousands of involuntary transferees. The psychological effect on these former property owners and the surrounding neighborhoods could certainly be demoralizing. In addition the fear that other neighborhoods might suffer the same fate as *Poletown* could drive property values down.⁷⁷

Fourth, *Poletown* has so expanded the scope of eminent domain in

⁷³ Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983).

⁷⁴ *Id.* at 370.

⁷⁵ *Id.* at 374.

⁷⁶ *Id.* at 376.

⁷⁷ Ross defines the "demoralizing cost" as an unfairness in the use of eminent domain. This may lead to an unwillingness to invest in property at least in certain areas. *Id.* at 377. For a more detailed analysis of the demoralizing cost in monetary terms, see *id.* at 377, n. 68.

Michigan that there are few if any limitations left on its use.⁷⁸ The test of public use has been made so nebulous that it is completely meaningless. Virtually any business can claim to save or create jobs. If only large corporations with thousands of employees can meet Michigan's new public use test, then perhaps only large scale uses of eminent domain, like that in *Poletown*, are valid takings. This is certainly a dangerous precedent, because large scale takings are more intrusive and therefore more detrimental to the community. The Michigan Supreme Court not only set bad precedent with *Poletown*, it also made the idea of using eminent domain to promote a business interest a politically unpalatable one. A more politically acceptable use of eminent domain may prove to be the promotion of employee owned business.

IV. A PRIVATE TRANSFEREE TAKING TO PROMOTE AN EMPLOYEE-OWNED BUSINESS IS HISTORICALLY JUSTIFIED

The use of eminent domain to establish a worker-owned business in the face of a company closing down is historically justified and not susceptible to the criticisms raised *supra*. Therefore, it may prove to be politically more practical. Worker owned businesses are usually set up under employee stock ownership plans (ESOPs). ESOPs can vary tremendously but, generally speaking, workers become worker/owners by buying stock, or receiving shares in the company as an employee benefit. Since 1974, the number of companies whose stock is substantially employee-owned has quadrupled from 500 to approximately 2,000.⁷⁹

Various studies have indicated that one reason for the rapid increase in employee-owned businesses is their success. A study by Alan Cohen found that companies sold to the employees when the owner retired had a 30% faster growth rate in sales than comparably sized companies in their surrounding area.⁸⁰ A study by Corey Rosen and Katherine Klein found that the majority of employee-owned companies generated three times as many jobs per year as did comparable non-employee owned firms.⁸¹ Katrina Berman found that employee-owned plywood firms were 30% more productive than comparable conventional firms.⁸² In studying buyouts of financially troubled companies, Samuel Wessinger and Corey Rosen found that 80% of the buyouts that have taken place since 1974 are still in business.⁸³

⁷⁸ *Poletown, supra*, at 378 (1983).

⁷⁹ *See supra* note 1.

⁸⁰ *See supra* note 4.

⁸¹ *See supra* note 3.

⁸² *See supra* note 2.

⁸³ *See supra* n.1 at 17.

These factors clearly place the use of eminent domain to establish an employee-owned business within the public use test. An employee-owned business is more of a public benefit and is more accountable to the community in which it is established than is a regular business. An employee-owned business is also a nonintrusive way to foster economic development. Whereas *Poletown* resulted in the uprooting of thousands of families and the destruction of a neighborhood, the transfer of ownership of a business to an employee-owned business would not dislocate anyone. Therefore, the concerns outlined *supra* are greatly diminished when the party receiving condemned property is a company owned by its employees.

To address the first of Justice Fitzgerald's three criticisms, eminent domain would initially be used to save jobs—clearly a public use—and not to meet a corporation's private purpose as was true in *Poletown*. The employee-owned business scenario necessitates a pre-existing business. Therefore, the direct benefit to the community of using eminent domain would be to save the jobs in the business being condemned. Any benefit the employees or company received in the employee-owned business would be secondary to saving jobs and would come over a period of time if the business were successful. In *Poletown*, the initial benefit went to G.M.C. since it was able to build a new plant in Detroit. Any jobs retained for the community would be secondary, since they would flow from the completion of G.M.C.'s new plant.

Second, the use of eminent domain to establish an employee-owned business does not affect the relationship between private property owners, business interests and the government. As Justice Fitzgerald pointed out, this relationship was altered in *Poletown*. In the employee-owned business scenario, the property being condemned is a business about to be closed, and the party receiving the condemned property is a new employee-owned business. The only parties involved are businesses and the only property involved is commercial property. As was pointed out in Part II, eminent domain has promoted business interests primarily at the expense of private property owners. A more equitable promotion of business interests would be at the expense of business property owners because it does not upset the relationship between private property owners, business interests and the government.

Justice Fitzgerald's third concern that the initial beneficiary would be the transferee, is also addressed by a worker-owned business. In a worker-owned business, the public use can be found in the initial taking and the public benefit is twofold. Specific jobs are saved and the business continues, thus preventing the property from standing vacant and possibly becoming blighted. This meets the public use test before any benefit

is received by the employee-owned business. Therefore, the benefit to the public is not speculative and incidental to the benefit to the transferee, as was the case in *Poletown*.

In analyzing Professor Ross' four concerns about private transferee takings, the benefits of an employee-owned business are clear. First, the issue of an improper motive, while always a concern, is far less likely to arise when eminent domain is used in conjunction with an employee-owned business. Since the business would be created as a result of the exercise of eminent domain, it is unlikely that it would be the beneficiary of an improper motive. Generally the recipient of an improperly motivated act was involved prior to the act being carried out.

Second, an employee-owned business poses far fewer problems of accountability. Where a case like *Poletown* provides for little or no accountability, a worker-owned business can be organized so as to assure the community that the public benefit actually materializes. In the *Poletown* case, the single method of accountability was zoning the area for business use only.⁸⁴ This method can also be applied to an employee-owned business. Moreover, with a worker-owned business, other measures can be taken to assure accountability. For example, the deed from the state or municipality into the employee-owned business could include the right of re-entry, or reverter, should the business cease to be at least 75% employee-owned.

As Justice Fitzgerald suggests, restrictions should be placed on condemned property to insure that the public use is fixed and permanent.⁸⁵ An employee-owned business is, by its very nature, a form of public accountability or local public control, since the owners of the business are local residents. Like their neighbors, they have a vested interest in assuring that the public use is carried out, since the existence of the business will directly affect the community in which they live.

Professor Ross' third criticism of private transferee takings is the demoralizing effect on the forced transferees. In the case of an employee-owned business, the only party that could possibly be demoralized is the previous owner. There is, however, little left to demoralize, since the owner was already closing the business. Eminent domain in this case would only be making productive use of what might have become unproductive property. This keeps the exercise of eminent domain closely related to its historical use as a means to achieve slum clearance.

The effects on the demoralized owner are more than offset by the boost in morale that a worker takeover of an enterprise has on a commu-

⁸⁴ *Supra*. 51 GEO. WASH. L. REV. 355, 376 (1983).

⁸⁵ *Poletown, supra*, at 478.

nity. While thousands of people lose their jobs and are displaced every year, a worker takeover signifies that the employees are not helpless. Worker-owned businesses are more productive than ordinary businesses.⁸⁶ A fundamental reason for this is that the workers have gone from helpless pawns to part owners, and it shows in their morale and productivity.

Fourth, the use of eminent domain in *Poletown* was not only bad precedent because it allowed a whole neighborhood to be razed, it was bad precedent because it blurred the definition of what is a public use. As Justice Fitzgerald pointed out, the *Poletown* decision has rendered the term public use uncertain. If eminent domain were used to form an employee-owned business, the public use test would be clarified because specific elements could be required. Eminent domain would have to be used to preserve property for its present use. The business must be scheduled to close down or move out of state and the owner must have unreasonably refused to sell the business to the workers. When used within these guidelines, eminent domain serves the valid public purpose of preserving jobs and stabilizing the local economy, without having the negative drawbacks of *Poletown* discussed in Part III.

Eminent domain is, of course, only indicated in those cases where the owner refuses to sell the business to the employees. This prerequisite can be used to make the use of eminent domain to help establish an employee-owned business more politically acceptable. When a business shuts down it is an obvious hardship for the entire community. If the owner then fights the use of eminent domain to keep the business open as employee-owned, the owner is portraying himself or herself as not only someone who is letting the community down by closing the business, but as someone seeking to further injure the community by preventing the establishment of a new business.

The use of eminent domain to save jobs and address local economic problems falls within the traditional definition of public use, and when eminent domain is used to establish an employee-owned business, few if any of the detrimental side effects of a *Poletown*-type exercise of eminent domain arise.

V. CONCLUSION

The use of eminent domain in Massachusetts to acquire a business about to be shut down would be within the historical definition of public use. Historically, eminent domain has been used to solve local economic problems if the benefit to the public was found in the initial taking. To-

⁸⁶ See *supra* note 2.

day's serious economic problem of plants closings can be addressed through the use of eminent domain. The promotion of employee-owned businesses through the use of eminent domain provides the initial benefit to the public while staying clearly within the historical definition of public use.

Unlike Detroit's appropriation of property in the *Poletown* case, the use of eminent domain to promote an employee-owned business can save jobs without the concomitant problems of *Poletown*. Employee-owned businesses are nonintrusive: they boost morale; they serve the public interest while clarifying the definition of a public use; they are easily held accountable; they do not upset the balance between the rights of private property ownership, business interests and the government; and they have a proven record of success.

Instead of setting questionable precedent like *Poletown*, using eminent domain to establish employee-owned businesses would maintain the status quo with regard to the nature of property use and the number of jobs available in the community. This is one of the functions of local government. Cities and municipalities should use eminent domain to establish employee-owned business when faced with a plant shutdown. With the increasing conservatism and states' rights stance of the United States Supreme Court, state courts will be on the cutting edge of innovative and progressive law. Since the public use served is a local one and the authority to use eminent domain to take over a failing business is derived from state constitutions, the state courts can be a viable avenue for relief to the problem of plant closings.