financial injury because of benefits given his competitors or because the regulatory burden has caused petitioner's business to fail.[51] If equal protection is to be taken as a demand for reasonable classification, these requirements may not logically be necessary, although they might be implied from the historical context of the clause. They may be utilized by a court to make less easy the invalidation of legislation or may be ignored making invalidation easier.

It becomes apparent after a study of the various possible uses of due process and equal protection that the only real solution to the problem of extra-stringent judicial review is judicial self-restraint and not resort to a mode of examination which does not include evils associated with a former, now disfavored, implement of review. Equal protection, in addition to its own exclusive area of coverage, may properly be used to challenge enactments traditionally attacked by due process. It is also applicable to benefit statutes in which due process contentions may encounter difficulty because of the judicial determination that a right is not involved.

Equal protection is no nostrum for the problem of stringent judicial review; it can be manipulated with as much facility as was due process during the half century before 1937.

EMINENT DOMAIN: INTERGOVERNMENTAL CONFLICTS

Since the close of the American frontier, the country has had a constant land area while at the same time the need for land by industry and government has continued to grow. Consequently there is a growing contest for available realty, and occasionally public property will be required to meet their expanding needs.[1] It is clear that private property

be made. . . . The point is that lack of equal protection is found in the actual existence of an invidious discrimination, not in the mere possibility that there will be like or similar cases which will be treated more leniently." *But cf.* Needham v. Proffitt, 220 Ind. 265, 269, 41 N.E.2d 606, 608 (1942), where the Indiana Supreme Court allowed an undertaker, who was not permitted under a mortician's licensing statute to advertise in newspapers, to plead, as grounds for invalidation, the discrimination between newspapers and radio advertising. There was no allegation or proof of the existence of any class of undertakers using radio advertising.

51. *See* First National Bank v. Louisiana Tax Commission, 289 U.S. 60, 65 (1932). It will be found, as a practical matter, that the person attacking a statute as discriminatory will have been injured in some manner, albeit indirectly, by the statute.

1. The total federally owned land in continental United States is 455,146,726 acres or 23.89 percent of the total land area. In Nevada the federal government owns 84.71 percent of the land area while in Connecticut, Iowa, Kansas, Maine, and Ohio the

can be taken for public use, but courts are confused when the land sought is already devoted to a public use. This problem is raised in Indiana by the Toll Road Commission Act which authorizes the construction of a superhighway across the northern part of the state.[2] The Commission plans call for taking property devoted to public use.[3]

Intrasovereign Conflicts

Land already devoted to public use is not immune to the power of eminent domain.[4] This may present a conflict for judicial determination. Since the power of eminent domain is granted by legislative authority,[5] the courts search for legislative intent to ascertain the extent of the condemnor's power. If the legislature did not intend the taking, the condemnation fails.[6]

When the legislature makes a grant condemning certain land, the intent is clear, and the property can be taken although previously devoted to a public use. All condemnations, including those specifically made by the legislature, are subject to judicial review to assure that the land is put to public use.[7]

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federal holdings are less than one percent of the land. Of Indiana's total area of 23,171,200 acres the federal government owns 336,952 acres or 1.45 percent of the state's area. UNITED STATES DEP'T OF COMMERCE BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1952 163 (73d ed.).

2. IND. ANN. STAT. §§ 36-3201—36-3225 (Burns Supp. 1953).

3. "A last ditch battle will be fought by Roseland to protect itself from invasion by the Northern Indiana Toll Road. . . .

". . . [T]he town board has for several years been considering the feasibility of acquiring land . . . for development as a park and . . . recreation facility. The land is in the path of the proposed route. . . .

"The question of whose 'right of eminent domain' shall prevail is the same question that the City of East Chicago has threatened to raise. In the East Chicago situation, however, the city already owns the land which consists of school and park property." South Bend Tribune, Dec. 8, 1953, § 2, p. 1, col. 1. See note 8 *infra*.

4. Boston Water Power Co. v. Boston & W. R.R., 40 Mass. (23 Pick.) 360 (1839). See 2 NICHOLS, EMINENT DOMAIN § 351 (2d ed. 1917).

5. State v. May, 204 Minn. 564, 285 N.W. 834 (1939); Ryan v. Housing Authority, 125 N.J.L. 336, 15 A.2d 647 (1940).

6. Indianapolis & V. R.R. Co. v. Indianapolis & M. Rapid Transit Co., 33 Ind. App. 337, 67 N.E. 1013 (1903); Lafayette Plankroad Co. v. New Albany and Salem R.R., 13 Ind. 81 (1859); Twin City Power Co. v. Savannah River Electric Co., 163 S.C. 438, 161 S.E. 750 (1930).

7. Brown v. United States, 263 U.S. 78 (1923); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1922). For a compilation of cases on this point, see 29 C.J.S. Eminent Domain § 29.

In the federal courts some doubt has been cast on the existence of judicial review of public use by United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546 (1945). See Manley, *Condemnation by the United States: A Power Unlimited?*, 21 N.Y.S.B. ASS'N BULL. 436 (1949); Note, 58 YALE L.J. 599 (1949). Federal courts have continued to review the question of public use, however. United States v. 44.00 Acres of Land, 110 F. Supp. 168 (W.D. N.Y. 1953); United States v. 1,278.83 Acres of Land, 12 F.R.D. 320 (E.D. Va. 1952).

On the other hand, when the legislature couches the grant in general terms,[8] as is usually the case, determination of precise legislative intent is substantially more difficult. Courts have adopted two methods of review to ascertain the extent of the condemnor's authority.

When the grantee of the eminent domain power is a subdivision of the state or a nongovernmental body, such as a public utility, a general grant does not authorize condemnation of land already devoted to public use.[9] However, courts may still find authority to condemn public land by what they term "necessary implication."[10] If the particular land is necessary to realization of the legislative purpose expressed in the general grant,[11] then courts infer that the legislature would have intended the taking had it been able to foresee the necessity.[12] Since the courts pre-

8. Even if the statute expressly gives the general power to take land that is already devoted to public use, it is only a general power and still subject to review. An example of such a statute is the Indiana Toll Road Commission Act. IND. ANN. STAT. § 36-3205 (Burns Supp. 1953).

"The commission is hereby authorized and empowered:

"(i) To acquire in the name of the state by purchase or otherwise, . . . or by exercise of the right of condemnation in the manner hereinafter provided, such public or private lands, including public parks, playgrounds or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests, as it may deem necessary for carrying out the provisions of this act."

9. Yadkin County v. City of High Point, 217 N.C. 462, 8 S.E.2d 470 (1940); Baltimore & O. R.R. v. Pittsburg W. & Ky. R.R., 17 W.Va. 812 (1881). For a compilation of cases, see 29 C.J.S. Eminent Domain § 74.

10. Indianapolis & V. R.R. Co. v. Indianapolis & M. Rapid Transit Co., 33 Ind. App. 337, 67 N.E. 1013 (1903); Terre Haute v. Evansville & T. H. R.R., 149 Ind. 174, 46 N.E. 77 (1897); Old Colony R.R. Co. v. Framingham Water Co., 153 Mass. 561, 27 N.E. 662 (1891); Twin City Power Co. v. Savannah River Electric Co., 163 S.C. 438, 161 S.E. 750 (1930).

For a compilation of cases, see 2 LEWIS, EMINENT DOMAIN § 440 (3d ed. 1909); 2 NICHOLS, EMINENT DOMAIN § 363 (2d ed. 1917); Note, 173 A.L.R. 1363, 1379 (1948).

11. The implication occasionally arises from the words of the statute. An example of this type of implication is a New York statute empowering New York City with the general power to acquire the wharves along its harbor. "There is, however, in this statute a clear grant in terms of the power to condemn *all* wharf property in New York City to which the city has no right or title. . . ." *In re* Mayor of New York, 135 N.Y. 253, 266, 31 N.E. 1043, 1046 (1892). The court said the statute was sufficient to take property owned by a gas company or by a railroad and that it was ". . . not, therefore, necessary to show that the land proposed to be taken is required in order to carry out the building of any particular pier, or dock, or bulkhead, under the plan already spoken of." *Ibid.* Actually the court treats this as a specific grant by the legislature which it really seems to be.

12. "'A necessity, such as authorizes one railroad corporation to condemn a part of the right of way of another, does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other; and the right of condemnation is not made out, unless the petitioning company shows that the cost of acquiring and constructing its road on any other route clearly outweighs the consequent damage which may result to the older company. . . .'" Seattle & M. R.R. Co. v. Bellingham Bay & E. R.R. Co., 29 Wash. 491, 502, 69 Pac. 1107, 1111 (1902). Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S.W. 575

sume that the legislature would always intend the land put to its most efficient use, the determination of necessary implication is really a determination of the best use for the particular land.[13]

When the grantee of a general condemnation power is a state agency or home rule city, the courts take a different view.[14] Such bodies are considered as acting for the sovereign. Therefore, they have the power of the sovereign with the right to take land already devoted to public use. The courts regard such a grant as a complete delegation of the legislature's power, consequently, precluding statutory construction to determine legislative intent. Generally, judicial inquiry is limited to varying degrees of review for arbitrary or capricious action.[15] This type

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(1911) (reasonable necessity existed); Memphis State Line R.R. Co. v. Forest Hill Cemetary Co., 116 Tenn. 400, 94 S.W. 69 (1906) (no reasonable necessity).

13. One of the first cases stating the necessary implication rule involved a water company taking certain land already devoted to public use by a railroad. The court found the land not to be of much importance to the railroad and necessary to the water company. The court also said: "The rights intended to be given by the Statute are not the same in reference to this land as in reference to land over which the main tracks of the railroad are laid. It may well be held that this statute does not go far enough to authorize the taking of land without which the plaintiff could not operate its railroad." Old Colony R.R. Co. v. Framingham Water Co., 153 Mass. 561, 564, 27 N.E. 662, 663 (1891). This implies that one of the decisive factors the court would consider is which use is more important to have on the particular land. The court considered the comparative necessity of the particular land to the contending uses, and the benefit to the public resulting from each use. Both factors are necessary to determine the superior use for the contested land. See p. 218 *infra*.

Similar considerations have been made in other cases. South Dakota Cent. Ry. v. Chicago, M. & St. P. Ry., 141 Fed. 578 (8th Cir. 1905); Chicago v. Sanitary Dist. of Chicago, 272 Ill. 37, 111 N.E. 491 (1916); Crossley v. O'Brien, 24 Ind. 325 (1865); *see* Yadkin County v. High Point, 217 N.C. 462, 466, 8 S.E.2d 470, 473 (1940); Snellen v. Brazoria County, 224 S.W.2d 305, 311 (Tex. 1949); Harris County Drainage Dist. v. Houston, 35 S.W.2d 118, 122 (Tex. 1931).

14. a) State agencies: Petition of Burnquist, 220 Minn. 60, 19 N.W.2d 394 (1945); City of Elizabeth v. New Jersey Turnpike Authority, 7 N.J. Super. 540, 72 A.2d 399 (1950); State Highway Comm'n v. City of Elizabeth, 102 N.J.Eq. 221, 140 Atl. 335 (1928), *aff'd*, 103 N.J.Eq. 376, 143 Atl. 916 (1928); *In re* Elimination of Highway-Railroad Crossing, 234 App. Div. 129, 254 N.Y. Supp. 578 (3d Dep't 1931), *dismissed on appeal*, 259 N.Y. 564, 182 N.E. 182 (1932); School Dist. v. Van Dyke, 85 PITTSBURG L.J. (Pa.) 709 (1937). *Contra:* Department of Public Works & Buildings v. Ryan, 357 Ill. 150, 191 N.E. 259 (1934). *See* City of Norton v. Lowden, 84 F.2d 663, 665 (10th Cir. 1936).

b) Home Rule cities: *In re* Condemnation by Duluth, 153 Minn. 122, 189 N.W. 937 (1922); City of Tyler v. Smith County, 246 S.W.2d 601 (Tex. 1952).

15. ". . . [A] court of equity will not interfere unless there has been a plain and palpable abuse of discretion." City of Elizabeth v. New Jersey Turnpike Authority, 7 N.J. Super. 540, 546, 72 A.2d 399, 401 (1950).

"Duluth is, however, governed by a home rule charter. . . .

"Whether this clause of the charter gives the power to condemn without limit property devoted to state or other municipal uses is a question not here involved. Absurd consequences may give rise to implied exceptions." *In re* Condemnation by Duluth, 153 Minn. 122, 125, 189 N.W. 937, 938-9 (1922).

In Pittsburgh, Ft. W. & C. Ry. v. Sanitary Dist. of Chicago, 218 Ill. 286, 75 N.E. 892 (1905), the Sanitary District condemned land of the railroad. The court

of review provides the courts with a means whereby the best use for the particular land can be fostered.[16]

The problems presented by the general grant of eminent domain power are complicated by this judicial distinction. There is no sound reason for holding state agencies and home rule cities to a different standard from political subdivisions and nongovernmental bodies. The basic argument in favor of substantial review when other than the legislature takes applies to all grantees of a general power.

The legislature, because of its representative nature, is responsive to the vast number of interests in the state. Courts will not upset legislative condemnations of certain land if the taking is for a public use. However, at the time a general grant is enacted, the controversy has not arisen. Obviously, the legislative process cannot resolve subsequent conflicts. The grantee of a general power, whatever its character, is not a sufficiently representative body and probably does not possess the objectivity necessary to consider all interests.

Only the courts are qualified to weigh the conflicting interests,[17] thus, it is their duty to see that the best use for the particular land pre-

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below refused to admit evidence of other available land since the statute conferred upon the District the power to condemn any and all property including that devoted to public use which was necessary for the District's purpose. The court held the judgment of the trustees of the sanitary district to be conclusive as to what land was necessary. However, the court said it would determine whether or not the power was abused by taking an excessive amount and other kindred questions which did not involve a determination of the necessity of the lands sought. It should be noted here that a determination of how much land was needed would be a substantial review of the trustees' decision as to what land was really necessary.

16. The cases cited in notes 14 and 15 *supra* are not clear as to what the courts' function includes under review for arbitrary action. This will be more fully discussed pp. 214-216 *infra.*

17. Some states have statutes clearly setting out the courts' function in condemnation proceedings. In California the statute provides that property already appropriated to public use shall not be taken except for a more necessary public use. The statute clearly sets ont certain uses that it deems to be superior to others. Thus, it would seem that if the legislature specifically condemned certain land, the new nse would be deemed more necessary. Such a legislative determination would be conclusive and not subject to judicial review.

The condemnor must also show that the land condemned is necessary to the condemnor's purpose. Under these provisions the courts are forced to determine the best use for the particular land. CAL. CODE CIV. PROC. §§ 1240, 1241 (1949); Los Angeles v. Los Angeles Pacific Co., 31 Cal.App. 100, 159 Pac. 992 (1916); Southern Pac. R.R. v. Southern Cal. Ry., 111 Cal. 221, 43 Pac. 602 (1896). Similar statutes are found in other states. IDAHO CODE ANN. § 7-704 (1947); MONT. REV. CODES § 93-9905 (1947); N.D. REV. CODE § 32-1505 (1943).

In *Los Angeles v. Los Angeles Pacific Co., supra,* the court held that the general rule of conclusiveness of the administrative decision as provided in the statutory grant of eminent domain was modified where the taking was from a previous public use. Therefore, though the administrator's decision was to be conclusive, the court required proof that the proposed use was more necessary than the existing use.

vails.[18] They do this when they infer authority from necessity. However, such a judicial function should not be exercised under the veil of statutory construction to determine the legislative intent.[19] To do this assumes that the legislature thought of the conflict and decided it. The very terms of a general grant show this was not the case.[20]

It is interesting to note that on the federal level Congress has sought to avoid any conflicts among its own agencies over the same land. Under the Public Buildings Act of 1949 the Administrator of General Services is authorized to acquire various sites for governmental agencies.[21] The Act provides for comprehensive planning and site acquisition by an officer who acts as a coordinator for the various federal agencies and thereby prevents intrafamily disputes.[22] Coordination within a state would be considerably more difficult to achieve. This is due to the complicated divisions within a state and the great number of units which can exercise the power of condemnation. The solution to the state problem does not appear to lie in this method.

18. A suggested method for determination of the best use for the particular land is discussed pp. 218-219 *infra.*

19. Consideration of public necessity for a second taking is less disguised in some states. For instance, some Colorado cases plainly attach an exception to the statutory construction rule. When reviewing the condemnation of property devoted to public use they require the customary express authority or necessary implication except where public exigency requires the second taking. The court makes it clear that it will consider the public benefit and necessity, and there is no attempt to conceal such a function under statutory construction. Denver Power & Irrigation Co. v. Denver & R. G. R.R., 30 Colo. 204, 69 Pac. 568 (1902); *accord,* Denver v. Board of Comm'rs, 113 Colo. 150, 156 P.2d 101 (1945). *But see* Beth Medrosh Hagodol v. Aurora, 126 Colo. 267, 248 P.2d 732 (1952) *semble.*

20. Some courts require a specific grant when the land is owned by the sovereign, under the theory that the state would not authorize a taking of its own property without giving its express consent. People v. Sanitary Dist. of Chicago, 210 Ill. 171, 71 N.E. 334 (1904); *In re* Quinlan, 271 N.Y. 396, 3 N.E.2d 569 (1936); *In re* Cruger Ave., 238 N.Y. 84, 143 N.E. 799 (1924). However, other courts adhere to the general rule that either an express intent or necessary implication will suffice to take property already devoted to public use. Independent School Dist. v. State, 124 Minn. 271, 144 N.W. 960 (1914); Tacoma v. State, 121 Wash. 448, 209 Pac. 700 (1922). Since the legislature should not be burdened with making specific grants in every instance, it seems that there should be no greater statutory requirement because the land sought is owned by the state. If the judicial interpretation is valid when applied to land held by cities, counties, and public service corporations—all creatures of the state and empowered by it, why should a different rule apply to land held in the name of the state? Judicial determination of any authority inferred from necessity is a finding of the best use for the contested land. A determination in the one case should be equally as valid in the other, presuming that due deference would be given to the benefit derived from the state's use of the land. Admittedly, in most cases its use would be best for the particular land, but it should be preferred only because it is the best use not because it is the state's use.

21. 44 STAT. 630 (1926), as amended, 40 U.S.C. § 341 (1946); 63 STAT. 176 (1949), 40 U.S.C. § 352 (Supp. 1952).

22. This coordination only applies to government agencies and not to all grantees of a general eminent domain power. The Act does not attempt to coordinate the various demands of nongovernmental agencies.

Intersovereign Conflicts

The conflict now becomes one between two sovereigns, each deriving the power of eminent domain from its sovereign existence.[23] The law as to what one government can take from the other is not well settled since the decisions are not clear and too few in number.[24]

If it is a question of the federal government condemning land devoted to public use by state authority, Congress can best determine when state land would be better used for federal purposes. When Congress condemns specific land, it is clear that such a determination has been made. Since local interests are represented, opportunity has been given for each side to present its case concerning the comparative merits of the two uses on the particular land. It has been held by the Supreme Court that when Congress has given specific authorization for condemnation, courts will not consider the desirability of the prior use.[25]

Similar to the practice in the states, the courts use two types of review, dependent upon the character of the condemnor. When Congress merely confers upon a nongovernmental agency, such as a private utility, the power of eminent domain, the statutory construction rule is relied upon to reach a decision.[26] The authority of a general grant is

23. "Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being." Kohl v. United States, 91 U.S. 367, 372 (1875).

"Eminent domain is the power, inherent in a sovereign state, of taking or of authorizing the taking of any property within its jurisdiction for the public good." 1 NICHOLS, EMINENT DOMAIN § 1 (2d ed. 1917).

24. ROTTSCHAEFER, CONSTITUTIONAL LAW § 298 (1939).

25. ". . . [T]he suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow to the 'superior power' of Congress." Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508, 534-5 (1940).

Before the *Atkinson* case was decided a similar problem was presented when an Act of Congress authorized certain land devoted to conservation in Minnesota to be taken for an Indian reservation. The district court said it was not clear from the decisions whether or not the test of a superior public use is determinative of the question. "It would seem that there should be some limit to the powers of the United States in condemning property of a State which is already devoted to a public use. If it were otherwise, the Federal Government could arbitrarily imperil the very functions of the State itself. . . ." United States v. 4,450.72 Acres of Land, 27 F.Supp. 167, 175 (1939). However, the court's holding is based on the finding that the two uses could exist together and the new use was not inconsistent. The court shows its confusion over a general and specific grant, for the cases it cites that allowed a determination of superior use for the land involved general grants of power by Congress while the act before this court was a specific grant. On appeal the circuit court relied on the *Atkinson* case stating that it was for Congress to say whether this project was justified in the national interest. Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942).

26. "While it is well settled that the Legislature may authorize the taking of property already devoted to a public use, it is equally well established that a general delegation of the power of eminent domain does not authorize the taking of property

not sufficient to allow a nongovernmental agency to take land already devoted to public use. However, if it can be inferred that Congress intended the taking, of course, it is allowed.[27]

It appears to be better settled in the federal courts than in the states that the problem of statutory construction disappears when the condemnor acts for the sovereign itself. The problem remaining is to discover to what extent judicial review still exists. When Congress confers upon a governmental agency a general power of eminent domain, the courts no longer look for legislative intent. Although there was an instance of its application in an early case,[28] the statutory construction myth was soon discarded.[29] The court, in *United States v. City of Tiffin*,[30] abandoned the construction rule and permitted Congress to delegate its eminent domain power directly to a governmental agency. The court did not relinquish all review for the opinion was careful to point out that in the place of statutory construction the court would review for arbitrary or capricious action. The court concluded that the case should be sent back to the trial court for a determination of the comparative importance of the contending public uses involving the land, thereby implying that review for arbitrary action includes a determination of the best use for the particular land. At least this has been the interpretation subscribed to by subsequent opinions.[31]

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already devoted to a public use, *'unless it can be clearly inferred from the nature of the improvements authorized or from the impracticability of constructing them without encroaching upon such property that the legislature intended to authorize such a taking.'"* Missouri v. Union Electric Light & Power Co., 42 F.2d 692, 698 (C.D. Mo. 1930).

27. *Ibid.*

28. Certain Land in Town of New Castle, 165 Fed. 783 (C.C.D. N.H. 1908).

29. *In re* Certain Land in Lawrence, 119 Fed. 453 (D. Mass. 1902).

30. 190 Fed. 279 (C.C.N.D. Ohio 1911). The case arose when the federal government attempted to condemn certain land for a post office site in the city of Tiffin. Such a project would have destroyed the use of a public alley, and on this ground the city objected. The court was not hampered by the fact that only a general power of condemnation was authorized. To apply the statutory construction rule would have overlooked the fact that this was an act of the sovereign by its agency.

31. "We conclude, therefore, that the purpose to which the land in question is to be applied is a more necessary public use than the present use thereof, that Congress has authorized the taking of said property, and has provided for compensation to be paid. . . ." United States v. Jotham Bixby Co., 55 F.2d 317, 320 (S.D. Cal. 1932).

On appeal the decision was affirmed. The court said ". . . we then turn to the evidence to ascertain whether the government has acted arbitrarily and unnecessarily in proceeding to condemn the site involved. The construction of the post office and custom house seems necessary for governmental purposes in providing a post office and custom house where the government can transact governmental business with the general public, and the site involved possesses special and superior advantages as regards the government departments and the general public which no other available site affords. . . ." C. M. Patten & Co. v. United States, 61 F.2d 970, 972 (9th Cir. 1932). See Notes, 21 GEO. L.J. 367 (1933); 19 VA. L. REV. 519 (1933).

The rule of the *Tiffin* case also has been followed in United States v. Certain

The Supreme Court last spoke on this subject in *United States v. Carmack*.[32] An administrative agency, under general power of eminent domain conferred by Congress, condemned for a post office land held by a city in trust for public use. The city originally agreed to convey the land to the federal government, and not until it was decided that the city did not have the power to convey did the government bring condemnation proceedings.[33] A single individual whose ancestor had given the land to the city objected. The Court's decision was probably influenced by this fact, and Mr. Justice Douglas in a concurring opinion reserved judgment as to what would have happened had the city objected.

The District Court had admitted considerable evidence to the effect that other sites were available for the post office.[34] The government's own expert witness had rated the site of the old post office as the first preference for a new one.[35] The District Court, therefore, held that there was no necessity for taking the particular land and that the condemnation was arbitrary. The Circuit Court affirmed on the ground that there was no statutory authority for such action causing ". . . possible unfortunate and unnecessary conflicts between State and Federal authority."[36]

Parcels of Land in Town of Denton, 30 F.Supp. 372 (D. Md. 1939); United States v. Sixty Acres of Land, 28 F.Supp. 368, 373 (E.D. Ill. 1939).

United States v. Southern Power Co., 31 F.2d 852 (4th Cir. 1929) added a limitation to the *Tiffin* rule. The court held that the statutory construction rule requiring express authority or a necessary implication could be applied against the sovereign where the prior public use would not reasonably interfere with the purpose of the proposed condemnation. In the case, the Southern Power Co. held certain rights of way over land sought to be condemned by the United States for forestry purposes. Since the government's purpose could be carried out without condemning the rights of way, the court required specific authority to destroy the power company's interest. It can be seen that the limitation is logical and that it really does not weaken the major purpose of the *Tiffin* rule.

32. 329 U.S. 230 (1946).

33. The city did not have the power to convey because it held the land in trust. The District Court stated: "The lack of power on the part of the city to sell or exchange the property in question has been passed on by the Supreme Court of Missouri. See Board of Regents et al. v. Painter, 102 Mo. 464, 14 S.W. 938, 940, 10 L.R.A. 493. The Supreme Court of Missouri was passing upon the right of the city to dispose of a parcel of the same land, described in the deed by which the park was conveyed and dedicated to public use. In part the Court said: 'This being so, the city had no right or power to convey the lot to the plaintiff. It could no more convey the lot to plaintiff than it could the other parcel called a "public square."'" United States v. Certain Land, 55 F.Supp. 555, 560 (D. Mo. 1944).

34. *Ibid.*

35. "'For First Choice I recommend that the present government-owned site be retained. . . .

"'This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction.

"'For Second Choice I have selected Site No. 1, the city-owned park. . . .'" *Id.* at 559; United States v. Carmack, 329 U.S. 230, 245 n.16 (1946).

36. United States v. Carmack, 151 F.2d 881, 883 (8th Cir. 1945).

The Supreme Court overruled the lower courts and said "[t]he comparative desirability and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding."[37] The Court agreed with the government's contentions that if the designated officials exercised judgment in good faith in selecting the site, that in spite of conflicting local public uses, the administrator had express authority to condemn it.

The Court specifically indicated that it was unnecessary to determine whether courts could set the selection aside as unauthorized if the officials acted arbitrarily since the record presented no such issue. Although this does not preclude judicial review for arbitrary action, the issue was specifically left open.[38] The administrator had taken all the procedural steps necessary to make a valid choice. It is interesting to note that the Court went to additional lengths to avoid the issue when it could more easily have settled it. If the Court had simply held that it could not exercise review for arbitrary action, it would not have had to determine that the defendant's action was not arbitrary, a determination which required review of a considerable body of evidence.[39] Several cases since the *Carmack* decision have exercised review for arbitrary or capricious action.[40]

It is important to notice what, in the Supreme Court's view, constitutes an arbitrary administrative decision. The Court itself states that the federal use is always a superior use for the land.[41] Thus, the agency is not expected to weigh the comparative importance of the two uses. Rather, it seems that all the Court requires is that the best land be taken for federal use.[42] If the administrator has taken proper steps

37. United States v. Carmack, 329 U.S. 230, 247 (1946).

38. United States v. 40.75 Acres of Land, 76 F.Supp. 239, 247 (N.D. Ill. 1948). Though this case said the *Carmack* case left the question open, the court exercised review for arbitrary action under authority of United States v. Meyer, 113 F.2d 387 (7th Cir. 1940).

39. The Court set out several pages of footnotes describing the various steps taken prior to instituting the condemnation proceedings. United States v. Carmack, 329 U.S. 230, 244-6 nn.15, 16, 17 (1946).

40. United States v. New York, 160 F.2d 479 (2d Cir. 1947); United States v. 1,278.83 Acres of Land, 12 F.R.D. 320 (E.D. Va. 1952); United States v. 1,096.84 Acres in Marion County, 99 F.Supp. 544 (W.D. Ark. 1951); United States *ex rel.* T.V.A. v. Dugger, 89 F.Supp. 877 (E.D. Tenn. 1948); United States v. 40.75 Acres of Land, 76 F.Supp. 239 (N.D. Ill. 1948).

41. "The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices." United States v. Carmack, 329 U.S. 230, 242 (1946).

42. "The procedure followed in making the selection of the site showed extraordinary effort to arrive at a fair and reasoned conclusion." *Id.* at 244. The Court in a footnote to the above sentence set out the steps followed by the government in seleeting the land. All of the steps taken went to determine where a post office should

to determine that this is the best land for his purposes, the action is not arbitrary.

Here, then, is the remaining vestige of the *Tiffin* case weakened to the point of nonrecognition. What has happened to a consideration of the importance of contending uses for the particular land? The *Carmack* case leaves nothing but a slightly insecure review for arbitrary and capricious action which has, nevertheless, been recognized in subsequent opinions.[43] What is included in this type of review becomes the most important immediate consideration.

The second circuit has held that it would not review action by the Secretary of War as to his determination of the necessity of a certain condemnation.[44] The court found that the Secretary had not acted arbitrarily. Judge Learned Hand dissented from the court's decision on the ground that the record did not disclose enough evidence to show whether or not the Secretary of War had acted arbitrarily. Judge Hand asserted that the disparity between the "contrasted values" must not be shockingly against the proposed action. In order to determine such values the court must appraise the two interests. Thus, the dissenting judge incorporated the weighing of interests in review for arbitrary action. He stated that evidence should be developed at trial which would inform the court of the interests involved. If there was no determination of such interests, the court could not determine whether or not the action was arbitrary.

The review of arbitrary action as proposed by Judge Hand is considerably broader than that used by the Supreme Court in the *Carmack* case. Indeed, it would appear that there should be a consideration of the existing public use to determine the best use for the particular land. The Court's rule, that the federal use is always the superior use for the land, ignores reality for the sake of expediency. To ascertain the best use for the land by means of such a conclusive presumption disallows any consideration as to the merits of the interests involved. Judge Hand's position, allowing a development of the interests at trial, gives greater assurance that the public interest will be protected by a determination on the merits. If the courts do not perform this function, it remains undone and the public interest, unprotected.

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be situated and ignored the damage done to the town by the loss of its city hall and park.

43. See note 40 *supra*.

44. United States v. New York, 160 F.2d 479 (2d Cir. 1947). The federal government condemned state forest land for a railroad right of way during the war in order to transport needed ore. The condemnation was for the duration of the war plus fifteen years. No objection was raised at the time the land was condemned during the war, but the objection was later raised in regard to the fifteen years after the war. The extra fifteen years were for "winding up" the government's investment

When the determination is made by an administrative agency, there is no assurance that any consideration is given to the prior use. The agency's only function and interest is to perform its delegated purpose and that need not include weighing the benefit to be derived from the land's present use. The agency, though a creature of the sovereign, is seldom subjected to the pressure of local interests.

Since courts will not subject Congress' decisions to the stricter review imposed on an administrative agency's decisions, it seems clear that they view the two bodies as being substantially different. Certainly the fact that the administrative agency cannot represent the interests on both sides of the controversy is reason alone for the difference in treatment. Because the agency cannot impartially weigh conflicting uses, its action should be more fully reviewed.

Grantees of a general eminent domain power other than agencies of the sovereign must prove that they propose a better use for the particular land because of the courts' demand for "necessary implication." The governmental agency, when exercising eminent domain power, resembles these nongovernmental agencies much more than it resembles Congress. Consequently, the two kinds of grantees should be held to the same standard when they seek to condemn land already devoted to public use. Some of our public utilities, such as American Telephone and Telegraph, perform services perhaps as important or more important than certain governmental agencies. There is no sound reason for reviewing the two differently.

Every condemnation obviously cannot be remanded to Congress for approval when it seems to require taking property already devoted to a public use. The only solution is to submit the administrative action to judicial review whereby the courts would determine which use of the particular land will yield the maximum public benefit.

The other phase of the federal-state conflict is state attempts to condemn federal land. An early case recognized state authority to take federal land stating in a dictum that when the United States held land as a proprietor, it had no greater immunity than that of other proprietors.[45] The Court was careful to point out that the taking must be for a clearly superior public object. A subsequent case actually allowed a state to take lands of the federal government which were being held in a mere proprietory capacity and were unappropriated.[46]

45. United States v. Chicago, 7 How. 185, 194 (U.S. 1849).

46. United States v. Railroad Bridge Co., 27 Fed. Cas. 686, No. 16,114 (N.D. Ill. 1855).

The Supreme Court later repudiated this line of reasoning.[47] It did not assent to the idea that the land of the federal government, when held for other than a governmental purpose, could be taken like the lands of other proprietors. But, rather, the Court followed the theory that federal ownership of land precluded state interference without express or clearly implied permission.

Here seems to be an area where the state's power of eminent domain is a nullity since there is a conclusive presumption that the federal use is always superior. This may frequently be true; but there are exceptions. The state should have the opportunity to show greater benefit from its ownership and use. The state's power of eminent domain is also an inherent power of its sovereignty, and permission, either express or implied, from the federal government should not be a prerequisite to its exercise. When public benefit is the criterion, conflicts would be resolved by determination of the superior public use for particular land. The power of eminent domain would then be employed so as to fulfill its basic purpose.

Determination of the Best Use for Particular Land

The problem posed by exercises of the general power of eminent domain against land already devoted to public use involves two questions: to which agency (governmental or nongovernmental) is the land more important; which agency is of greater benefit to the public. These two considerations must be weighed together because the determination of the best use for specific land is the result of their interaction.

When a condemnor decides certain land already devoted to public use is necessary for its purposes, that determination should be only *prima facie* evidence that the taking is necessary. Though the court cannot decide what land the condemnor should take, part of its task of determining the best use for the land is to discover whether or not other land is available.[48] The burden of showing other available land should be on the property owner, and the burden of showing its unsatisfactoriness should be on the condemnor.

47. Utah Power and Light Co. v. United States, 243 U.S. 389 (1916). See ROTTSCHAEFER, CONSTITUTIONAL LAW § 298 (1939).

48. Though the question of what land is necessary for the new use is an administrative one when the condemnation concerns private land, this is not the case when the condemnation concerns land already devoted to public use. Then, the existence of other available land has an important bearing. The public will benefit most if both uses exist, and if the second condemnor can take other available land without injury to his purpose, a better result will be obtained. Indeed in the *Carmack* case the other available land was rated higher in desirability by the government's own expert, and yet the Court approved the destruction of an existing public use because it accepted the administrator's decision as conclusive.

The court also must determine whether or not the land devoted to the new use will greater benefit the public. The burden of proving that the proposed use would render greater benefit should be on the condemnor. However, if the statute grants the general power to condemn property already devoted to public use, then the burden of proof should shift to the property owner, for it seems the legislature has thereby created a presumption that the new use is superior. The power of eminent domain exists to promote the general welfare; the burden of safeguarding this purpose is on the courts.

DISESTABLISHMENT: NLRB'S WANING REMEDY AND THE INTERNATIONAL UNIONS

Triumph for the local union affiliated with an organized labor movement independent of employers was not an historical inevitability. Varied and subtle forces, among which governmental policy has played a much disputed role, have conspired to defeat its rival, the company union.[1] That rival's "wayward cousin," the company-dominated union, has long been the object of statutory prohibition, but many critics have believed that prior to 1947 the National Labor Relations Board did not sufficiently distinguish between the two.[2] Congress, in 1948, demanded that unions affiliated with national organizations be treated as harshly or as lightly as their independent competitors; the Board has since attempted to be nondiscriminatory. Nevertheless, the considerations introduced by affiliation with a national union change the nature of the problem, and, unless past endeavors to cope with employer domination are correctly understood, present efforts may cause more difficulties than they resolve.

While the origin of company unionism in the United States can be attributed to several factors,[3] periods of expansion were undeniably due

1. The term "company union" is used to denote an organization of employees existing for the purpose of dealing with management and confined to one company or one plant of a company. It is not to be confused with the term "company-dominated" union.

2. Hereafter referred to as the "Board" or as "NLRB".

3. "One of these was a growing demand that something should be done to provide in large-scale industry a substitute for the immediate personal contact between worker and employer which existed in the days of small establishments. Employers felt the need of some machinery for the adjustment of grievances and complaints and for collective discussion about work and working conditions. Some adopted the company union, believing this provided the avenue for better understanding between management and employees, which would bring benefits not only to the workers but also to the employer in improved morale.

"Another important factor contributing toward the movement was the insistent