The Public-Use Requirement in Washington after
State ex rel. Washington State Convention & Trade
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Tim Benedict
THE PUBLIC-USE REQUIREMENT IN WASHINGTON
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Abstract: In State ex rel. Washington State Convention & Trade Center v. Evans, the Supreme Court of Washington held that an exercise of eminent domain for a convention center expansion project containing private developments utilizing most of the project’s developed space would not violate the Washington public-use requirement. In so doing, the court made the already confusing and contradictory Washington case law concerning public use in the context of eminent domain even more unpredictable. This Note argues that the court should have adopted a public-purpose analysis and thereby clarified the Washington public-use requirement.

The Washington State Constitution limits the State’s inherent power of eminent domain by mandating that private property may not be taken by the State for private use.1 In an eminent domain action, the Constitution charges the judiciary, not the legislature, with the task of determining whether a proposed use for condemned property is public rather than private.2 The Supreme Court of Washington has grappled for almost one hundred years with the vexing question of what qualifies as a public use. This labor has borne little fruit, and the Washington public-use doctrine has been traditionally inconsistent and difficult to apply.

The principal confusion in the Washington public-use doctrine stems from the Supreme Court of Washington’s inability to apply a single definition of public use consistently. In Washington and elsewhere, two schools of thought exist concerning the meaning of public use. The first theory, the so-called narrow approach, characterizes public use as “actual use by the public” and requires that the public have an actual right of access to the condemned property.3 The second theory, the broad approach, defines public use more expansively as a mere requirement that the condemnation be for a “public purpose.”4 The difficulty with the Washington public-use doctrine is that Washington case law includes decisions on both sides of this theoretical fence. Early Washington decisions applied the narrow definition of public use, but the Supreme

3. See infra Part I.A.
4. See infra Part I.A.
Court of Washington later appeared to adopt a public-purpose analysis.\(^5\) During the early 1980s the court seemingly reverted to the narrow standard.\(^6\)

In \textit{State ex rel. Washington State Convention \\& Trade Center v. Evans (Convention Center)},\(^7\) the Supreme Court of Washington confronted the issue of whether an exercise of eminent domain to procure land for a facility containing a mixture of public and private elements would satisfy the Washington public-use requirement. The land in question was a proposed site for the construction of a facility that would expand the exhibit space of the Washington State Convention and Trade Center (Center).\(^8\) Because the new exhibit space would be limited to the fourth-floor level of the new building, most of the space representing the three floors below the exhibit area would remain empty.\(^9\) The Center's scheme for this empty area was novel: a private company would pay fifteen million dollars to own and develop the space for parking and retail.\(^10\) The Supreme Court of Washington asserted that the inclusion of this private component in the expansion project did not compel the conclusion that condemnation would not be for public use. Instead, the court characterized the private development as "merely incidental" and held that the proposed condemnation would not violate the Washington public-use requirement.\(^11\)

This Note argues that the Supreme Court of Washington should have explicitly adopted a public-purpose analysis and thereby eliminated much of the confusion surrounding the public-use requirement in Washington. Part I of this Note examines both the Washington case law concerning public use and the approaches taken by the U.S. Supreme Court and other state supreme courts. Part II explains the facts and holding of the \textit{Convention Center} opinion. Part III argues that the \textit{Convention Center} majority's approach to public use makes the already inconsistent Washington doctrine even more unpredictable. Part IV argues that the court should have explicitly adopted a public-purpose analysis.

5. See infra Part I.C.
6. See infra Part I.C.
8. See id. at 814, 966 P.2d at 1253-54.
9. See id.
10. See id. at 815, 966 P.2d at 1254.
11. See id. at 822-23, 966 P.2d at 1258.
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I. THE PUBLIC-USE DOCTRINE

A. Competing Theories of Public Use

"Eminent domain" is the inherent power of government to take private property subject to a constitutional limitation that the taking be for public use. The U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." Most states have similar constitutional provisions. Obviously, the effect of such public-use limitations on an exercise of eminent domain depends on the definition of "public use."

Although it is generally agreed that the term "public use" is almost incapable of precise definition, two basic theories attempt to characterize its meaning. The narrow approach characterizes public use as demanding actual use by the public and requires that the public have an actual right to use the condemned property. An example of this theory is when the state condemns land and then leases or sells it to a private business. Under the narrow reading of the public-use requirement, this would be invalid because, as a matter of right, the condemned property would not be subject to access by the public.

The second theory defines public use more expansively as merely requiring a public advantage or a public purpose. Under this broad approach, condemnation for a project that advances a legitimate public purpose satisfies the public-use requirement regardless of whether the condemned property is subject to public access. An example of this

13. U.S. Const. amend. V.
16. See 2A Nichols on Eminent Domain, supra note 14, § 7.02[2], at 7-26 to 7-28.
17. See, e.g., Reed v. City of Seattle, 124 Wash. 185, 191, 213 P. 923, 925 (1923) (stating that proposed lease of condemned property to private gas station did not represent public use); Neitzel v. Spokane Int’l Ry. Co., 65 Wash. 100, 112–15, 117 P. 864, 868–69 (1911) (stating that lease of condemned property to grocery business is private, and therefore impermissible, use).
19. See generally 2A Nichols on Eminent Domain, supra note 14, § 7.02[3], at 7-28 to 7-32.
theory is an economic development program that condemns property explicitly for the use of private business. Under a narrow public-use theory, such a scheme would be invalid because it places condemned property in private hands. However, from the perspective of a public-purpose analysis, such an exercise of eminent domain could be justified. The private use of the condemned land would be seen as a part of the larger goal of strengthening the local economy.

B. The Public-Use Requirement Outside of Washington

Although the history of the interpretation of public use in the United States is one of confusion and oscillation between the two theories, most American courts now apply a broad public-purpose definition of public use. For a time after the American Revolution, courts were inclined to view public use broadly. During the middle to late nineteenth century, however, the narrow view of public use had taken hold, although the broad view was never completely eclipsed. By the middle of the twentieth century, the broad public-purpose view had regained prominence.

A principal example of the modern ascendancy of the public-purpose analysis is in urban renewal. The general rationale of an urban-renewal statute is to eliminate “slum” or “blighted” areas by replacing them with private business or private residential developments. Such projects would be invalid under the narrow public-use theory because they put condemned property to private use. However, the great majority of American courts have approved condemnation actions for urban-renewal projects under a broad public-use theory. For example, in Berman v.

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26. See 2A Nichols on Eminent Domain, supra note 14, § 7.06[26], at 7-168 n.265 for a complete listing of states that have approved urban-renewal projects.
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Parker, the U.S. Supreme Court held that the elimination of blight represents a public purpose, and as a result the legislatively mandated mechanics of the project—the exercise of eminent domain and the sale of the condemned properties to private developers—were irrelevant. Although not necessarily adopting the same sweeping language as Berman, most states have reached the same result and have approved condemnation for similar urban-renewal projects. Generally, state courts have held that the condemnation was for public use by reasoning that the sale of condemned lands to private interests was merely ancillary to the public purpose of eliminating slum and blighted areas.

Many American courts now also apply a public-purpose analysis for projects in circumstances outside the context of urban renewal. State courts have approved projects for industrial parks and shopping centers on the basis of a public-purpose analysis. At the federal level, the U.S. Supreme Court has also applied a public-purpose analysis in non-urban-renewal situations. In Hawaii Housing Authority v. Midkiff, the Court confronted a state land redistribution scheme that provided for the condemnation of land and immediate transfer of title to long-term tenants living on the land. Explicitly rejecting the narrow definition of public use, the Court asserted that “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” Thus, under Midkiff, if the project’s goal is within the ambit of the police power—the power to provide for the public health, safety, and welfare—then condemnation of property for such a project is for a public purpose and consequently represents a “public use.”

28. See id. at 33–34.
29. See 2A Nichols on Eminent Domain, supra note 14, § 7.06[26][a], at 7-168 n.265.
33. See id. at 233–34.
34. Id. at 244.
35. See id. at 239–42.
A minority of states have retained some form of narrow public-use analysis. Only three state supreme courts have followed this logic and invalidated urban-renewal statutes. Other state courts have also occasionally applied the narrow public-use theory to invalidate exercises of eminent domain for projects containing private elements outside the realm of urban renewal.

C. The Washington Public-Use Requirement

The Washington State Constitution mandates that property may be taken from a private property owner only for public use. The Supreme Court of Washington has struggled with the definition of public use for almost one hundred years. Early decisions narrowly interpreted public use and explicitly rejected a "public-purpose" analysis. On the other hand, during the 1960s and 1970s, the court flirted with a public-purpose definition. However, in the 1980s the court retreated and returned to the narrow definition. The result of the court's vacillation between these two interpretations is a public-use doctrine that is contradictory and difficult to apply.

1. Early Decisions

The early opinions of the Supreme Court of Washington interpreted the public-use requirement narrowly and explicitly rejected the idea that condemnation could be justified if it merely served a public purpose or

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36. See Adams v. Housing Auth., 60 So. 2d 663, 670–71 (Fla. 1952); City of Atlanta v. Johnson, 74 S.E.2d 891, 894 (Ga. 1953); Edens v. City of Columbia, 91 S.E.2d 280, 285 (S.C. 1956). However, it appears that only South Carolina has retained this position. The Supreme Court of Florida later seemingly approved urban redevelopment. See Grubstein v. Urban Renewal Agency, 115 So. 2d 745, 750–51 (Fla. 1959). In Georgia, a 1954 constitutional amendment expressly allowed urban redevelopment. See Allen v. City Council, 113 S.E.2d 621, 623–24 (Ga. 1960).

37. See, e.g., City of Little Rock v. Raines, 411 S.W.2d 486, 493–95 (Ark. 1967) (taking of agricultural land for industrial development is not public use); City of Owensboro v. McCormick, 581 S.W.2d 3, 7–8 (Ky. 1979) (taking of nonblighted land for industrial development is not public use); Opinion of the Justices, 131 A.2d 904, 906–07 (Me. 1957) (taking of nonblighted property for industrial development is not public use).

38. See Wash. Const. art. I, § 16.


40. See infra Part I.C.2–3.

41. See infra Part I.C.3.
conferr[ed] a public benefit.\textsuperscript{42} However, the court did not ban all private uses of condemned property. The court allowed a private use of condemned property if the private use could be characterized as "incidental."\textsuperscript{43} The power-plant line of cases,\textsuperscript{44} extending from 1906 until 1927, represents the court's early exposition on the meaning of its "incidental" exception to the narrow public-use doctrine. The cases arose because until 1927, the Supreme Court of Washington did not recognize the use of condemned land for the production of electrical power for private industry as a public use.\textsuperscript{45} Before that time, whenever a utility would propose to condemn property for electricity production, the question would arise whether the proposed facility would produce power for purely public uses (such as municipal lighting) or whether electricity would also be produced for private industry.\textsuperscript{46}

The general rule of the power-plant cases was a variation on the narrow public-use theory: an inclusion of a private use of condemned property in an otherwise public project would poison the entire project unless the private use could either be characterized as "incidental" or completely eliminated from the project. In \textit{State ex rel. Harris v. Superior Court},\textsuperscript{47} the court asserted that "if a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably

\begin{itemize}
  \item \textsuperscript{42} See \textit{Healy Lumber Co. v. Morris}, 33 Wash. 490, 509, 74 P. 681, 685 (1903) ("[T]he use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity or the state."); \textit{see also} \textit{Reed v. City of Seattle}, 124 Wash. 185, 191, 213 P. 923, 925 (1923) (stating that proposed lease of condemned property to private gas station did not represent public use); \textit{Neitzel v. Spokane Int'l Ry. Co.}, 65 Wash. 100, 112-15, 117 P. 864, 868-69 (1911) (stating that lease of condemned property to grocery business is private, and therefore impermissible, use).
  \item \textsuperscript{43} See, e.g., \textit{City of Tacoma v. Nisqually Power Co.}, 57 Wash. 420, 429-30, 107 P. 199, 202 (1910).
  \item \textsuperscript{45} In 1927, the Supreme Court of Washington recognized production of electricity for private industry as a public use of condemned land. \textit{See Chelan Elec. Co.}, 142 Wash. at 280-83, 253 P. at 119-20.
  \item \textsuperscript{46} See generally cases cited in supra note 42.
  \item \textsuperscript{47} 42 Wash. 660, 85 P. 666 (1906).
\end{itemize}
the right of eminent domain [cannot] be invoked to aid the enterprise.”

Thus, if the public and private uses could be separated and the private element removed, then eminent domain could be exercised to acquire property for the remaining purely public use. On the other hand, if the uses were not separable and were contained within a single facility, the private use could still survive if it were “incidental.” For example, in City of Tacoma v. Nisqually Power Co., the court held that a temporary sale of seasonally produced excess power to private industry represented an incidental private use. However, the determining factor in the power-plant definition of “incidental” was the nature of the private use: the private use was an “insignificant” and “temporary” disposal of an excess product. Furthermore, under the power-plant cases, a private use within an otherwise public project was not incidental merely because it did not require the condemnation of any additional property beyond what the public component would alone require. Instead, the court focused on the transitory quality or the insignificance of the private use.

2. Initial Modern Decisions: Hogue v. Port of Seattle and Miller v. City of Tacoma

Hogue v. Port of Seattle and Miller v. City of Tacoma represent the Supreme Court of Washington’s first significant modern foray into the public-use doctrine. In these cases, the court confronted the question of public use in the general context of industrial redevelopment and urban

48. Id. at 665, 85 P. at 667 (citing State ex rel. Tacoma Indus. Co. v. White River Power Co., 39 Wash. 648, 82 P. at 150 (1905)).

49. The Harris cases are an example of this principle in action. In State ex rel. Harris v. Superior Court, the court held invalid a condemnation for a power plant that would produce power for both private and public uses. See 42 Wash. at 668, 85 P. at 668. However, in State ex rel. Harris v. Olympia Light & Power Co., the continuation of the first Harris case, the court approved the power plant’s amended, smaller, and purely public condemnation. See 46 Wash. at 512–13, 90 P. at 656.

50. 57 Wash. 420, 107 P. 199 (1910).


52. See id. A further example of this is State ex rel. Puget Sound Power & Light v. Superior Court, 133 Wash. 308, 309–10, 233 P. 651, 651–52 (1925), in which a power plant attempted to condemn property for the production of power for both public and private uses. The court refused to apply the incidental designation to the private use and invalidated the taking because the private use would not be temporary or insignificant. See id. at 313–16, 233 P. at 653–54.

53. See Puget Power, 133 Wash. at 316–17, 233 P. at 654.


55. 54 Wash. 2d 799, 341 P.2d 171 (1959).

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renewal; however, even after both decisions the implications of the two opinions remained unclear. In *Hogue*, the legislature had granted the Port of Seattle power to condemn properties for redevelopment and resale to private industry. The Supreme Court of Washington held that the lands in question were not "blighted" or "slums," and hence the project at issue was not for urban renewal. The court squarely rejected the contention that a project designed purely for industrial development could be characterized as a public use: "In its practical operation, [the statutory scheme] amounts to no more than the taking of A’s property, . . . and then placing it in the hands of B." The court held that even though the industrial redevelopment would have been beneficial to the City of Seattle, such a resale of condemned property to private entities resulted in an impermissible private use of condemned land. Thus, the *Hogue* court’s rejection of the public-purpose analysis is consistent with prior Washington case law that narrowly interpreted the Washington public-use requirement to demand actual use of the condemned property by the public.

In *Miller v. City of Tacoma*, which came down three years after *Hogue*, the Supreme Court of Washington held that certain "blighted" lands could be condemned and resold to private entities for urban renewal. After noting that the *Hogue* decision did not apply to "blighted" lands, the court based its holding almost exclusively on other jurisdictions’ affirmation of urban-renewal statutes. The *Miller* court did not follow the rule that condemned property must be actually used by

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57. See *Hogue*, 54 Wash. 2d at 810–11, 341 P.2d at 177–78.
59. Id. at 835, 341 P.2d at 191–92.
60. See id. at 835–38, 341 P.2d at 192–93.
61. The result of *Hogue* as it specifically pertains to port districts was annulled by a later amendment to the Washington Constitution declaring that the condemnation of land for industrial development by a Port Authority is a *per se* public use. See Wash. Const. amend. 45. However, for the broader holding that the public-use requirement is not satisfied merely because a project has a public purpose and is in the public interest, *Hogue* has been subsequently cited by the Supreme Court of Washington as good law. See *In re City of Seattle*, 96 Wash. 2d 616, 627, 638 P.2d 549, 556 (1981).
63. See id. at 387–88, 378 P.2d at 472–73.
64. See id. at 377–78, 378 P.2d at 466–67.
Instead, by relying on public-purpose precedents such as *Berman v. Parker*, the court demonstrated an acceptance of a public-purpose model at least within the context of urban renewal.

3. **The Second Wave of Modern Decisions: Port of Seattle and Westlake**

In the wake of *Miller*, the Washington public-use doctrine could have proceeded in either of two directions. The *Miller* decision could have been viewed as a specific exception for urban renewal to the narrow public-use rule. Alternatively, *Miller* could have represented a watershed in the Washington public-use doctrine as the first step toward the adoption of a public-purpose analysis. Confusingly, the post-*Miller* cases vacillate between both points of view.

In *In re Port of Seattle*, the Supreme Court of Washington applied a public-purpose analysis. In that case, the legislature authorized the condemnation of land for the construction of air cargo facilities at Seattle-Tacoma International Airport. However, the proposed facilities were to be leased to private air cargo companies. Citing *Miller*, the court stated that “[a]s long as the object sought to be accomplished is for a public purpose, it is for the legislature to determine the means to accomplish it.” In addition to noting that air cargo facilities are an integral part of the operation of an airport, the court characterized the private leasing of such facilities as “incidental”—“The fact that private enterprise may be selected to effectuate the plan for providing air cargo facilities does not make the purpose of providing those facilities a private one. The subsequent lease of the facilities to private enterprise is incidental to the main public purpose.”

69. 80 Wash. 2d 392, 495 P.2d 327 (1972).
70. See *id.* at 393–94, 495 P.2d at 329.
71. See *id*.
72. *Id.* at 396, 495 P.2d at 330.
73. *Id.*
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In *In re City of Seattle (Westlake)*, which came down nine years after *Port of Seattle*, the Supreme Court of Washington refused to apply the public-purpose analysis of *Miller* and *Port of Seattle*. In *Westlake*, the City of Seattle proposed to condemn property for a downtown project that would include public spaces, an art museum, parking facilities, and a retail shopping center. As a result, a portion of the condemned property was to be leased to private tenants for retail purposes. Citing *Hogue*, the *Westlake* court specifically stated that an exercise of eminent domain may not be characterized as for public use unless the use is "really public" and that it is insufficient if the condemnation is merely in the public interest. Furthermore, the *Westlake* court treated *Miller* as an exception, and dismissed it from the analysis by noting that the *Westlake* project was not for urban renewal.

The power-plant cases provided primary support for the *Westlake* holding, resurrected by the *Westlake* court after fifty years of slumber. Citing *State ex rel. Puget Sound Power & Light Co. v. Superior Court*, the *Westlake* court reasoned:

> If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked.

Therefore, where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.

Applying this power-plant standard, the *Westlake* court noted that the trial court had found that the private retail elements of the project represented "a substantial element of the project, essential to its functioning." The *Westlake* court concluded that the project was not a public use: "Were the retailing functions only incidental to those [public]..."
uses, a different question would be presented. However, the evidence shows, as the trial court found, that the primary purpose of the undertaking was to promote the retail goal. In dissent, two justices attacked the majority’s opinion for its reliance on the power-plant cases and stated that the court had silently overruled *Miller* and *Port of Seattle*.

II. *STATE ex rel. WASHINGTON STATE CONVENTION & TRADE CENTER v. EVANS*

A. Facts and Procedural History

In 1995, the Washington State Legislature approved $111.7 million for expansion of the exhibit space of the Washington State Convention and Trade Center (the Center) in downtown Seattle. The Legislature conditioned these funds on the Center’s securing fifteen million dollars in private or outside governmental funding. The Center considered two principal alternatives for the site of the expansion. The first involved an expansion to the east that would have required the closure of the Center’s operations for at least six months. The second alternative, an expansion northward, held intriguing possibilities. The north end of the existing exhibit space sits four stories above street level. Because an expansion would necessarily be at the same elevation as the existing exhibit area, the three stories underneath the proposed northward expansion would be surplus space. This creation of surplus space was decisive: the Center chose the north alternative and planned to sell the surplus to a private developer and thus raise the fifteen million dollars required by the Legislature.

After examining private development proposals, the Center settled on an agreement with the R.C. Hedreen Company (Hedreen). Under the

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82. *Id.* at 629, 638 P.2d at 557.
85. *See id.*
86. *See id.* at 814, 966 P.2d at 1254.
87. *See id.*
89. *See id.*
90. *See id.*
agreement, Hedreen would build the outer shell of the entire structure and develop the surplus space for retail and parking facilities. Hedreen would also contribute the required fifteen million dollars for the development rights and in return take fee simple title to the lower three stories of the new structure.

Acting in accord with the Hedreen agreement, the Center began condemnation proceedings to acquire the land in the north expansion area. The property owners resisted, arguing that the condemnation violated the public-use requirement for an exercise of eminent domain. But trial court ruled in favor of the Center, finding the expansion a public use. The property owners appealed and were granted direct review by the Supreme Court of Washington.

B. The Majority's Public-Use Analysis

The Supreme Court of Washington, in a seven-to-two decision, affirmed the trial court, holding that the condemnation of properties for the north expansion satisfied the public-use requirement for an exercise of eminent domain. The court characterized the private development of the surplus space as "merely incidental" and therefore not a violation of the constitutional prohibition against taking property for private use.

Citing power-plant cases, the Convention Center majority asserted that the constitutional prohibition against the taking of land for private use is not applicable if the private use does not "corrupt" the project's public nature but is instead "merely incidental." They distinguished Westlake by holding that unlike Westlake, the Hedreen development would not represent a "primary purpose" of the project. The majority also distinguished Westlake by focusing on the independence of the

91. See id.
92. See id.
93. See id. at 815, 966 P.2d at 1254.
94. See id.
95. See id. at 816, 966 P.2d at 1254.
96. See id. at 816, 966 P.2d at 1255.
97. See id. at 824–25, 966 P.2d at 1259. The court also analyzed the requirement of necessity in a condemnation action. See id. at 823–24, 966 P.2d at 1258–59. This Note focuses on the court's public-use analysis and does not consider the question of necessity.
98. See id. at 822–23, 966 P.2d at 1258.
99. See id. at 817, 966 P.2d at 1255.
100. See id. at 819–21, 966 P.2d at 1256–57.
public exhibit space in the Convention Center expansion from the private Hedreen development. The court stated that the "retail development of the floors beneath the expansion in no way affects its functioning as an exhibit space." The court reasoned that absent the private development the expansion could still be built and the exhibit space would not be altered—the only result would be that the lower three stories would lie vacant.

The majority's public-use analysis then addressed the Westlake statement that public and private uses may not be "combined . . . in such a way that the two cannot be separated." After noting that this requirement originated in the power-plant cases, the court held that unlike those decisions, the expansion project did not contain inseparably combined public and private uses in a single facility. The Convention Center court focused on how the private and public uses in the expansion project would be physically separated and asserted that the uses would inhabit "distinct facilities" and thus would not be commingled. According to the court, "[t]he expansion project contemplates a wholly public facility stacked above a wholly private development." Thus, the expansion would not be a single facility, but rather, "two entirely separate facilities, one wholly public, the other wholly private."

The majority's public-use analysis finally turned to the question of whether the Hedreen development could be characterized as "merely incidental." The court reasoned that "[i]f the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental." Applying this test to the facts, the court concluded that the Hedreen development would be incidental because the "footprint" of the new exhibit space—the public use—"spans the entire property to be condemned." The majority deemed the Hedreen

101. See id. at 820–21, 966 P.2d at 1256–57.
102. Id. at 820, 966 P.2d at 1256.
103. Id.
104. Id. at 820–23, 966 P.2d at 1257–58 (quoting In re City of Seattle, 96 Wash. 2d 616, 627, P.2d 549, 556 (1981)).
105. See id. at 820–21, 966 P.2d at 1257.
106. See id. at 822, 966 P.2d at 1258.
107. Id.
108. Id. at 821, 966 P.2d at 1257.
109. Id. at 822, 966 P.2d at 1258.
110. Id. at 822–23, 966 P.2d at 1258.
development incidental because without it the expansion would require taking no less property than if the Hedreen development were included. As a consequence, the majority held that the inclusion of the Hedreen development would not invalidate an exercise of eminent domain on behalf of the project.

C. Justice Sanders' Dissent

In a lengthy dissent joined by Justice Madsen, Justice Sanders attacked the majority's characterization of the Hedreen development as an incidental use and argued that the expansion project represents an example of excess condemnation. According to Justice Sanders, the teaching of the power-plant cases is not limited to single-facility situations. Instead, he asserted that the power-plant cases held that an incidental use must be ancillary and dependent on the principal public use. Applying this rule to the Hedreen development in the expansion project, he wrote that "the private use at issue here is not 'incidental' to the convention hall use in the sense that the private use is in any way ancillary to, the product of, or otherwise related to the public use of the exhibit hall facility above it."

III. THE CONVENTION CENTER COURT FURTHER CONFUSED THE WASHINGTON PUBLIC-USE DOCTRINE

After the Convention Center opinion, the Washington public-use requirement is more unpredictable than ever. The Convention Center outcome is inconsistent with narrow public-use concepts from both the power-plant decisions and the Westlake decision. Furthermore, although the specific result of Convention Center is consistent with the public-purpose approach of Miller and Port of Seattle, aspects of the Convention Center court's reasoning conflict with the basic precepts of a public-purpose analysis. The result is a public-use doctrine that is extremely difficult to apply.

111. See id.
112. See id; see also id. at 824–25, 966 P.2d at 1259.
113. See id. at 825–45, 966 P.2d at 1259–69 (Sanders, J., dissenting). See also Part IV.C for discussion of Justice Sanders' contentions concerning excess condemnation.
114. See generally id. at 833–36, 966 P.2d at 1263–65 (Sanders, J., dissenting).
115. See id. at 834–35, 966 P.2d at 1263–64 (Sanders, J., dissenting).
116. Id. at 835, 966 P.2d at 1264 (Sanders, J., dissenting).
A. **The Convention Center Decision Is at Odds with the Narrow Public-Use Doctrine of the Power-Plant and Westlake Decisions**

I. **The Convention Center Opinion Misconstrues the Meaning of the Power-Plant Decisions and Contravenes Their Logic**

The *Convention Center* majority borrowed from the power-plant cases the essential tenet of its decision: an exercise of eminent domain for an otherwise-public project that contains an "incidental" private use does not violate the Washington public-use requirement.\(^\text{117}\) The *Convention Center* majority also analyzed the power-plant cases in the context of the *Westlake* statement that eminent domain may not be exercised for a project in which public and private uses are "combined... in such a way that the two cannot be separated."\(^\text{118}\) This analysis resulted from the *Convention Center* court's recognition that the *Westlake* court borrowed this "separation test" from the power-plant decisions.\(^\text{119}\) However, the *Convention Center* majority's reasoning and its application of the power-plant cases was flawed because the majority misconstrued the separation test and applied a definition of "incidental" that is inconsistent with the power-plant approach.

The majority's application of the power-plant test—that private and public uses cannot be "combined... in such a way that they cannot be separated"—was inconsistent with the test's meaning in the power-plant decisions. In *Convention Center*, the majority reasoned that the expansion project would not violate this separation test because, unlike the situation in the power-plant cases, the public and private uses in the expansion project would inhabit distinct spaces.\(^\text{120}\) However, in the power-plant cases the Supreme Court of Washington applied the separation test in a different manner. In those decisions, if the public and private uses were separable, then condemnation for the project failed unless the private use was stricken from the project.\(^\text{121}\) Under a true power-plant analysis, the *Convention Center* majority's finding that the private and public uses in the expansion project were "separable" should

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\(^{117}\) See id. at 817, 966 P.2d at 1255.  
\(^{118}\) Id. at 820–23, 966 P.2d at 1257–58.  
\(^{119}\) See id. at 820, 966 P.2d at 1257.  
\(^{120}\) See id. at 822, 966 P.2d at 1258.  
\(^{121}\) See supra Part I.C.1.
have resulted in condemnation’s being approved only on the condition of
the Hedreen development’s removal.

Moreover, the Convention Center majority’s analysis of the power-
plant decisions was flawed in its characterization of what private uses of
condemned land the power-plant courts would have found acceptable as
“incidental.” The majority asserted that the power-plant decisions
“attempted to discern whether the project was of a predominantly public
or private nature”122 and that in the power-plant cases “some private use
of condemned land [was] permissible as long as the private use [was] not
itself the impetus for the condemnation.”123 The majority stated that “[i]n
effect, the [power-plant] court[s] examined whether the public use alone
was sufficient to justify the condemnation.”124 However, the power-plant
courts were not as permissive as these statements would suggest. If an
exercise of eminent domain for a project that contained a private use was
to survive in the power-plant cases, the private use in question was
required to be either insignificant or, more importantly, temporary.125 For
a power-plant court, the issue was not the primary use or the “impetus.”
Instead, the question was whether the particular sale of excess power was
only a small, short-lived expedient. In the power-plant cases, the Supreme
Court of Washington specifically rejected arguments that a permanent
private use was acceptable merely because it required no extra condem-
nation beyond what the project’s public use would alone require.126

Applying this analysis, the private use in the Convention Center
expansion project would not have been seen by a power-plant court as an
acceptable “incidental” use of condemned property. The Hedreen
development is neither insignificant nor short-lived, and the court’s
belief that the inclusion of the Hedreen development required the
condemnation of no additional property would not have saved the
development. Thus, the majority’s interpretation of the power-plant cases
represents yet another level of confusion in the Washington public-use
requirement because the very cases on which the Convention Center
majority relies for the essential concept of “incidental” would have
approached that concept in a fundamentally different manner.

122. Convention Center, 136 Wash. 2d at 821, 966 P.2d at 1257.
123. Id.
124. Id.
125. See supra Part I.C.1.
126. See supra Part I.C.1.
2. **Distinguishing Convention Center from Westlake Is Problematic and Creates Much Confusion**

The *Westlake* and *Convention Center* projects had much in common, and as a result the divergent outcomes of the two cases create more confusion in the Washington public-use doctrine. The *Westlake* court applied a variety of formulae in deciding that the private elements in the *Westlake* project were not “incidental” and would thus cause condemnation for the project to violate the public-use requirement. For example, the *Westlake* court noted that the trial court had found that the retail element in *Westlake* represented a “substantial element” of the project that was “essential to [the project’s] functioning.”\(^{127}\) Moreover, the *Westlake* court concluded that the *Westlake* project was “predominantly private” and that the private use represented the project’s “primary purpose.”\(^{128}\) The *Westlake* court stated that when “the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.”\(^{129}\)

Because the *Convention Center* project has many of the same fundamental characteristics as the *Westlake* project, it is difficult to distinguish the two. Just as the *Convention Center* project concerns a public and private facility in a single structure,\(^{130}\) the *Westlake* scheme included, among other things, the construction of a new structure that would have contained public museum space in its upper floors and private retail and parking facilities in its lower floors.\(^{131}\) If in *Westlake* the use of only a “portion,” rather than all, of the property for “truly public” uses poisoned the project, a similar result should have followed in *Convention Center*. Moreover, the private development in the *Convention Center* project would occupy a majority of the project’s developed space.\(^{132}\) Thus, it is difficult to argue that the *Convention Center* private development should not be considered a “substantial element” of the overall project.

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128. *Id.* at 629, 638 P.2d at 557.
129. *Id.* at 627–28, 638 P.2d at 556.
132. See *Convention Center*, 136 Wash. 2d at 824, 966 P.2d at 1258.
The **Convention Center** court's attempts to distinguish *Westlake* are strained. The **Convention Center** majority asserted that, unlike the situation in *Westlake*, the Hedreen development would be an independent, "separable component" that does not affect the functioning of the exhibit hall expansion. This is unpersuasive, especially considering that the entire project is dependent on Hedreen's contribution of the legislatively required fifteen million dollars. Additionally, the **Convention Center** court's statement that the Hedreen development is merely "a means to an end" is not compelling: the private retail development in *Westlake* could also be seen as merely a "means" to the public "end" of creating a downtown focal point.

The inconsistency between *Westlake* and **Convention Center** creates bewildering complexity in the Washington public-use doctrine. Because these decisions represent the court's two most recent opinions on the subject, future public-use questions will presumably be litigated primarily on the basis of their reasoning. When viewed together, *Westlake* and **Convention Center** present a confusing array of tests for deciding when a private element poisons an exercise of eminent domain for a project: "primary purpose," "essential to the functioning," "separable component," "means to an end," "independence," "not affect the functioning," "predominantly private," "not combined so they cannot be separated," and so on. The combination of these ideas represents an unpredictable doctrine that yields different results depending on which catchphrase one happens to emphasize. Moreover, the **Convention Center** decision does not help in balancing the formulae when they are in conflict: we have no idea which concepts are most important.

B. The **Convention Center** Opinion's Mixed Signals Regarding Miller and Port of Seattle Create Even More Confusion

The Supreme Court of Washington's decisions in *Port of Seattle* and *Miller* applied a public-purpose analysis. As such, they represent a different approach from the power-plant decisions and the *Westlake* opinion, each of which used a narrow public-use approach. However, just as **Convention Center** is in tension with the narrow public-use cases,

133. See id. at 820, 966 P.2d at 1256–57.
134. Id. at 820, 966 P.2d at 1257.
136. See supra Part I.C.1, 3.
difficulties also arise when comparing *Convention Center* with the public-purpose decisions of *Miller* and *Port of Seattle*.

Some aspects of the *Convention Center* opinion are inconsistent with a public-purpose analysis. In *Convention Center*, the court repeatedly based its reasoning on the independence of the public use—the exhibit hall—from the private retail development and on the idea that the two uses represent physically separate, dual facilities. These ideas of independence and physical separation are inconsistent with a public-purpose analysis that justifies private uses as long as they are a part of a broader public goal. In *Port of Seattle*, the air cargo facilities were an integral part of the airport operation, and private redevelopment is an essential element of urban-renewal projects such as the one adjudicated in *Miller*. Therefore, when the *Convention Center* majority justifies the private element in the expansion project because it will be independent and physically separate from the public element, the court is applying a concept that is alien to a public-purpose analysis.

On the other hand, some elements of the *Convention Center* opinion are entirely consistent with the public-purpose view of *Miller* and *Port of Seattle*. For example, the *Convention Center* court states that "Hedreen's participation is a means to an end, but it is not an end in and of itself." This sentence summarizes the public-purpose analysis in a nutshell: public ends justify private means. Furthermore, the *Convention Center* court made no effort to repudiate either *Miller* or *Port of Seattle*—although the *Port of Seattle* decision was ignored, the first citation in the court's public-use analysis was to *Miller*.

The result is that *Convention Center* neither adopted nor repudiated the public-purpose analysis of *Miller* and *Port of Seattle*. Thus, not only is the *Convention Center* opinion in conflict with the narrow public-use ideas of the power-plant decisions and *Westlake*, it also does not resolve how *Miller* and *Port of Seattle* fit into the court's concept of public use.

137. See, e.g., *Convention Center*, 136 Wash. 2d at 820, 822, 966 P.2d at 1256, 1258.
138. See supra Part I.A.
139. *See In re Port of Seattle*, 80 Wash. 2d 392, 397, 495 P.2d 327, 331 (1972).
140. *Convention Center*, 136 Wash. 2d at 820, 966 P.2d at 1257.
141. *See id.* at 816, 966 P.2d at 1255.
IV. THE CONVENTION CENTER COURT SHOULD HAVE EXPLICITLY ADOPTED A PUBLIC-PURPOSE ANALYSIS

In Convention Center, the court should have adopted a public-purpose analysis for the Washington public-use requirement. Had the court done so, it could have reached the same specific result and adopted a predictable public-use doctrine that would be consistent with that of the majority of states and the U.S. Supreme Court. Furthermore, a public-purpose analysis would conform with the language of the Washington Constitution. In particular, the Washington Constitution states:

Private property shall not be taken for private use .... Whenever an attempt is made to take private property for a use alleged to be public, 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. 142

This statement does not define “public use.” Therefore, if the Supreme Court of Washington wishes to define “public use” as “public purpose,” the court is free to do so. 143

A. Public-Purpose Analysis Would Be More Predictable, Consistent with the View Taken by Other Jurisdictions, and Responsive to Public Needs

1. A Public-Purpose Analysis Would Be More Predictable

In the wake of Convention Center, practical application of the Washington public-use requirement will be difficult. The court’s various formulae make it problematic to predict how the court will view the next case that concerns a project involving both public and private uses. 144 The court’s explicit adoption of a public-purpose analysis would have significantly enhanced the predictability of its future decisions. The question of public use, rather than being a nearly metaphysical weighing of numerous tests and formulae, would instead focus on a single issue: whether the goal of the condemnation in question represents a public purpose. This does not mean that a public-purpose analysis could be used

143. See Stoebuck, supra note 18, § 9.20, at 589.
144. See supra Part III.A–B.
mechanically; however, it would at least enable judges and attorneys to grasp and think intelligently about the basic theory.

The adoption of a public-purpose analysis would be consistent with the court’s approach in Miller and Port of Seattle. Consequently, adopting such an analysis would not introduce a new test, but rather would ground Washington’s eminent domain law on the foundation established by those decisions. Furthermore, an explicit adoption of a public-purpose analysis would be beneficial because it would require overruling the court’s narrow public-use decisions—Westlake and the power-plant cases that supported the Westlake decision. The power-plant cases are over seventy years old and represent a unique situation concerning disposal of excess electricity in the context of Washington’s early hydropower industry. In the twenty-first century, the Supreme Court of Washington should not be beholden in its analysis to such unique, aged decisions.

In Miller and Port of Seattle, the court had evinced an acceptance of the public-purpose analysis, a trend that mirrored the rest of the nation. The Westlake decision, by reaching back to the early 1900s and resurrecting the power-plant cases, was a retreat from that progress. Fundamentally, the Convention Center court should have stopped the confusion created by Westlake. Instead of merely distinguishing Westlake and clouding the meaning of the underlying power-plant decisions, the court simply should have recognized that Westlake was a mistake, reestablished the analysis of Miller and Port of Seattle, and moved on.

2. A Public-Purpose Analysis Would Be Consistent with That of Other Jurisdictions

Had the Supreme Court of Washington adopted a public-purpose analysis in Convention Center, it would have brought Washington in line with the approach taken by the U.S. Supreme Court and most other state supreme courts concerning the issue of public use. This would have had the salutary effect of allowing the Supreme Court of Washington to consider input from similar cases from other jurisdictions, rather than being stuck with managing a distinctive doctrine only by reference to Washington decisions. Significantly, neither the Convention Center majority nor the Westlake majority cited a single non-Washington case in

145. See supra Part I.C.1.
146. See supra Part I.B.
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their public-use analyses. In some legal areas, this isolation may be satisfactory because the court has opportunities to continually revisit a particular doctrine and fully develop it. However, in the realm of the public-use doctrine, the Supreme Court of Washington on average hears one major case every ten years.\[147\] Therefore, it would be helpful to the court (and to practicing lawyers) if, when a particular public-use question is under consideration, a broader range of authorities could be meaningfully surveyed rather than the few scattered Washington decisions.

3. **A Public-Purpose Analysis Would Be Responsive to Public Needs and Would Not Threaten Private Property**

A public-purpose analysis would be sensitive to public needs and would not endanger private property. The analysis would permit public-private partnerships in major projects that involve condemnation. This flexibility is particularly important in urban areas where public and private entities inhabit the same downtown space. Moreover, the public-purpose approach does not unduly threaten private property because the private landowner is still entitled to compensation for his condemned property.\[148\] For example, in the *Convention Center* situation, a jury awarded the contesting property owners almost thirty-seven million dollars for the condemned property at issue.\[149\] This is almost twice what the properties owners were originally offered.\[150\] This compensation, especially when set by a citizen jury, is a powerful disincentive against abuse of the eminent domain power.

**B. An Exercise of Eminent Domain for the Convention Center Project Would Have Been Consistent with a Public-Purpose Analysis**

In *Convention Center*, the Hedreen development’s revenue generation was its only connection with the expansion project. By the majority’s own analysis, the Hedreen development represented a separate facility

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150. See id.
that would not affect the functioning of the exhibit hall.\textsuperscript{151} Furthermore, the majority specifically stated that the project could be physically built and operated without the inclusion of the Hedreen development.\textsuperscript{152} Thus, the Hedreen development's only contribution toward the project was revenue generation. In all other respects, the Hedreen development represented a distinct entity.

Under a public-purpose analysis, private use of condemned land may be justified if it furthers a public purpose.\textsuperscript{153} Therefore, the issue in \textit{Convention Center} under a public-purpose analysis would be whether a private use within a physical structure that otherwise contains public uses can be justified if the private use's exclusive contribution is revenue generation for the project as a whole. A leading case on this issue is \textit{Courtesy Sandwich Shop, Inc. v. Port of New York Authority}.\textsuperscript{154} Operating under a broad public-purpose analysis, the New York Court of Appeals confronted the specific question of the effect of the lease of "portions" of the World Trade Center to businesses solely for the purpose of generating income to finance the project.\textsuperscript{155} The court held that just as the World Trade Center itself represented a public purpose, activities that generated income for the World Trade Center also represented a public purpose.\textsuperscript{156}

A \textit{Courtesy Sandwich Shop} public-purpose analysis could easily apply to the \textit{Convention Center} problem. The expansion of the \textit{Convention Center} represents a public purpose, and as a result the Hedreen development also represents a public purpose because it generates revenue for the expansion and is a part of the facility built for the otherwise-public expansion. Thus, condemnation for the project would be justified under a public-purpose analysis because both the public and private elements in the project would represent public purposes.

\textsuperscript{151} \textit{See Convention Center}, 136 Wash. 2d at 820, 966 P.2d at 1256–57.
\textsuperscript{152} \textit{See id.}
\textsuperscript{153} \textit{See supra} Part I.A.
\textsuperscript{154} 190 N.E.2d 402 (N.Y. 1963).
\textsuperscript{155} \textit{See id.} at 405–06.
\textsuperscript{156} \textit{See id.} at 405. However, a \textit{Courtesy Sandwich Shop} analysis extends only to a private, revenue-producing use that is a part of a larger public facility. Thus, condemnation of additional land for revenue production beyond what the public use requires alone would probably not be justified under the \textit{Courtesy Sandwich Shop} analysis. \textit{See id.}
C. A Public-Purpose Analysis Would Have Allowed the Majority to Respond to Justice Sanders’ Excess-Condemnation Arguments

In his dissent, Justice Sanders argued that the Convention Center situation was an example of excess condemnation.\(^{157}\) Essentially, Justice Sanders reasoned that the Convention Center project did not require the taking of the entire fee interest.\(^{158}\) Instead, the public element of the project—the exhibit hall expansion—would merely require the condemnation of the space the exhibit hall would actually inhabit along with any necessary easements.\(^{159}\) The condemnation of the space underneath, which would not be needed for public use, thus represented a taking in excess of what the public exhibit hall needed.\(^{160}\)

Justice Sanders’ argument derives power from the majority’s insistence that the Hedreen development is an independent entity. In the majority’s analysis, the entire project is a “wholly public facility stacked above a wholly private development”\(^ {161}\) and the Hedreen development does not “affect [the] . . . functioning” of the exhibit hall.\(^ {162}\) The result is an enormously difficult question concerning whether the taking of a fee interest for a structure that contains an independent, private entity represents excess condemnation.

A public-purpose approach would avoid the issue of excess condemnation. Under a Courtesy Sandwich Shop analysis, a private use within a facility containing both public and private elements itself represents a public purpose because it generates revenue for the facility’s


\(^{158}\) See Convention Center, 136 Wash. 2d at 841, 966 P.2d at 1267 (Sanders, J., dissenting).

\(^{159}\) See id. (Sanders, J., dissenting).

\(^{160}\) See id. (Sanders, J., dissenting).

\(^{161}\) Id. at 822, 966 P.2d at 1256.

\(^{162}\) Id. at 820, 966 P.2d at 1256–57.
Overall public purpose. Therefore, under the public-purpose analysis, the condemnation of the entire fee interest may be justified because the condemnation of both the space for the exhibit hall and the space for the Hedreen development would be for public use. Condemnation for the former would be for public use because an exhibit hall serves a public purpose, and condemnation for the latter would be for public use because generating revenue for the exhibit hall also serves a public purpose. Thus, excess condemnation would not enter the equation because the entire property would have been taken for a public purpose.

V. CONCLUSION

In the wake of Convention Center, the Washington public-use requirement is in chaos because it contains a perplexing array of tests for deciding when a private element poisons an exercise of eminent domain for a project: “primary purpose,” “essential to the functioning,” “separable component,” “means to an end,” “independence,” “not affect [the] functioning,” “predominantly private,” and “not combined so they cannot be separated.” As a result, the Washington public-use requirement remains unpredictable and impossible to apply consistently. In Convention Center, the Supreme Court of Washington missed an opportunity to return to the public-purpose definition of public use that it had previously embraced in Miller and Port of Seattle. Had the court done so, it could have reached the same result and adopted a predictable theory consistent with that applied in other U.S. jurisdictions. Instead, the Washington public-use requirement remains in disarray.