TAKING BACK EMINENT DOMAIN: USING HEIGHTENED SCRUTINY TO STOP EMINENT DOMAIN ABUSE

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INTRODUCTION

Suppose you live in a small town that has struggled economically for decades. You live in a nice house that you adore and you do not want to move from it. You also own a small business located just around the corner from your house. A white knight has come to save your town's struggling economy in the form of a large company that will build a factory in your city. The company says it will create about one thousand jobs, which will fill the town's coffers with tax revenue. The deal sounds great until you hear the catch: the company will not build its plant if it cannot build in a certain location—your neighborhood. You do not want to sell your property for any price. Then the city sends you a notice stating that your property is to be condemned. Finally, you seek your lawyer's advice and ask if there is anything you can do to stop the eminent domain action. After all, the city cannot really take your property and give it to a private business, can they? Unfortunately, there is no clear answer.

The Fifth Amendment's Takings Clause states, "nor shall private property be taken for public use, without just compensation."[1] Some jurisdictions have determined that condemning one person's property to transfer it to another private entity satisfies the public use requirement. These jurisdictions state that "economic development" that creates jobs, increases the state's or community's tax base, or expands industry can be a valid public use. Thus, these jurisdictions have determined that what many people would consider to be a private use actually constitutes a public use.

Although the U.S. Supreme Court has long held that "a law that takes property from A, and gives it to B would be contrary to the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority,"[2] the debate over what constitutes a public use has been raging since the middle of the nineteenth century.[3] By the early 1980s the debate seemed to be resolved. In 1981, the Supreme Court of Michigan handed down its infamous decision, *Poletown Neighborhood Council v. City of Detroit*,[4] which allowed an

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1. U.S. CONST. amend. V.

2. James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 32 (2003) (internal quotation marks omitted) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion of Chase, J.)).

3. *See id.* at 33.

4. 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* County of Wayne v. Hathcock,

entire residential neighborhood to be condemned and subsequently transferred to General Motors so it could build a new assembly plant.[5] In 1984, in *Hawaii Housing Authority v. Midkiff*,[6] the United States Supreme Court implicitly resolved the question of whether the Takings Clause's Public Use Clause allows economic development to be a public use. *Midkiff* held that a legislature's determination that a taking constitutes a public use should receive the greatest degree of judicial deference.[7] Despite these rulings, the debate rages on. Courts in several jurisdictions have begun to reign in the legislature,[8] and at least one federal case has distinguished itself from *Midkiff*.[9] Also, in 2004, the Supreme Court of Michigan explicitly overruled *Poletown*,[10] and the U.S. Supreme Court affirmed a Connecticut case that fully embraced the reasoning of both *Poletown* and *Midkiff* when it interpreted federal and state constitutional issues.[11] In 2005, the U.S. Supreme Court handed down its controversial decision, *Kelo v. City of New London* (*Kelo II*).[12] In addition to the Public Use Clause, forty-nine state constitutions contain similar clauses,[13] which state courts may interpret differently than the Fifth Amendment of the U.S. Constitution.

With this ongoing debate in mind, this Note argues for a much narrower definition of what constitutes a "public use" and contends that courts should analyze problematic takings cases with heightened scrutiny. Part II examines the public use requirement and how the Supreme Court has interpreted the Fifth Amendment's Taking Clause as well as how state courts have interpreted analogous state clauses. Part III discusses problems associated with cases that give broad meaning to the public use requirement. Part IV addresses why newer cases that use a narrow meaning of public use have nonetheless not gone far

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684 N.W.2d 765 (Mich. 2004).

5. *Id.*; *see also* Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295 (2000).

6. 467 U.S. 229 (1984).

7. *See id.* at 241.

8. *See, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853 (S.C. 2003).

9. *See* 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003).

10. County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

11. Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 528 (Conn. 2004), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

12. Kelo v. City of New London (*Kelo II*), 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

13. Dana Berliner, *Public Use, Private Use—Does Anyone Know the Difference?*, SJ052 ALI-ABA 789, 791 (2004); *see also* ILL. CONST. art. I, § 15 ("Private property shall not be taken or damaged for public use without just compensation as provided by law."); MICH. CONST. art. X, § 2 ("Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."). Indiana does not have a public use clause. *See* IND. CONST. art. I, § 21.

enough. Part V proposes a solution that, if adopted, would require courts to apply heightened scrutiny to problematic public use cases. Finally, this Note concludes with a call for political action, including constitutional amendment, by the public and legislatures to narrow the scope of "public use."

II. THE PUBLIC USE REQUIREMENT AND ITS INTERPRETATION BY FEDERAL AND STATE COURTS

A. Federal Court Interpretation of the Public Use Requirement

1. Supreme Court Interpretation of the Public Use Requirement.—The Supreme Court has clearly held for over fifty years that the Fifth Amendment's Public Use Clause does not necessarily prevent the government from taking real property from one private individual and transferring it to another.[14] Also, for over twenty years, the Court has held that states possess the same power.[15] The Court has determined that the rational basis test is the proper standard to analyze the constitutionality of a taking.[16]

In *Berman v. Parker*,[17] the Court held that Congress has the power to transfer private land to another private entity to accomplish its urban renewal goals.[18] Congress allowed an agency of the District of Columbia to take property to remove blighted areas and slums from Washington, D.C. A planning commission determined that the area encompassing the appellants' department store was blighted and sought to take the land through eminent domain. The agency planned to subsequently transfer the land to other public and private entities.[19] The department store, although located in a blighted area, was not part of the slum.[20] The Court rejected the argument that the taking primarily benefited the private entity that received the land post-condemnation because the Court determined that Congress had acted within the scope of its police powers over the District of Columbia and in such a case the trial court's role "is an extremely narrow one."[21] The Court also held that Congress could authorize the transfer of sanitary and non-blighted land to private individuals because the goal of the project was to ensure that blight and slums did not reappear.[22] Thus, *Berman* represents an extremely broad interpretation of the Public Use Clause. As *Midkiff* noted thirty years later, this interpretation is "coterminous with the scope

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14. Berman v. Parker, 348 U.S. 26, 33-34 (1954).

15. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984).

16. Ralph Nader & Alan Hirsch, *Making Eminent Domain Law Humane*, 49 VILL. L. REV. 207, 211-12 (2004) (quoting *Midkiff*, 467 U.S. at 241).

17. 348 U.S. 26 (1954).

18. *See id.* at 33-34.

19. *Id.* at 29-31.

20. *Id.* at 30.

21. *Id.* at 32.

22. *Id.* at 34.

of a sovereign's police powers."[23] Indeed, the Court's reading of the Public Use Clause is so broad that it led the Court to state that the legislature, and not the courts, "is the main guardian of the public needs" in eminent domain cases.[24]

The Court further expanded its definition of public use in *Midkiff*. In *Hawaii Housing Authority v. Midkiff*, Hawaii condemned the fee simple title to certain land and sold the title to the private entity leasing the land. The State did this because almost all of Hawaii's privately owned land was owned by seventy-two landowners, thus altering the fee simple market.[25] The Court gave maximum deference to the legislature's determination of what the public use at issue was and held that a taking is constitutional if it is rationally related to a legitimate state interest.[26] To apply a greater level of scrutiny to takings, the Court thought, would put courts in the precarious position of determining what is and is not a governmental function, which the Court had found "impracticable in other fields."[27] Indeed, to the *Midkiff* Court, eminent domain is but a means to accomplishing a legislative end, that is, a public use.[28] Because the legislature rationally provided for the condemnation of the land to further the legitimate goal of decreasing an oligopoly, the statute met constitutional muster.[29] *Midkiff* also provided for a wide reading of the Public Use Clause by not requiring that the public at large, or even a large part of it, benefit from the taking.[30]

The U.S. Supreme Court expanded its interpretation of the Public Use Clause in *Kelo II*. In *Kelo II*, the plaintiffs' homes were condemned to make room for a research park designed to complement a Pfizer facility that had just opened in New London, Connecticut. New London touted the research park as a means to create over one thousand new jobs, increase tax revenue, and revitalize the city's downtown.[31] The petitioners' property, which included homes that were not blighted, were to be condemned to make way for "research and development office space," retail shops, and parking, depending on the location of the property.[32]

In an opinion by Justice Stevens, the Court held that the takings served a valid public purpose, and as such were constitutional, because the takings were part of a "carefully formulated economic development plan" that the city believed would "provide appreciable benefits to the community."[33] In arriving

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23. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

24. *Berman*, 348 U.S. at 32.

25. *Midkiff*, 467 U.S. at 232-34.

26. *Id.* at 242-43.

27. *Id.* at 241 (quoting United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946)).

28. *Id.* at 240 (quoting *Berman*, 348 U.S. at 33).

29. *Id.* at 242.

30. *Id.* at 244 (quoting Rindge Co. v. L.A. County, 262 U.S. 700, 707 (1923)).

31. Kelo v. City of New London (*Kelo II*), 125 S. Ct. 2655, 2659, *reh'g denied*, 126 S. Ct. 24 (2005).

32. *Id.* at 2659-60.

33. *Id.* at 2665.

at this result, the court rejected any distinction between the terms "public use" and "public purpose."[34] Also, after citing *Berman*, *Midkiff*, and other cases extensively, the Court noted that its holding was necessary to give state courts and legislatures the "great respect" that they were owed as the institutions that respond to the varied and evolving needs of society.[35] Additionally, the Court stated that it reviewed state action in a case like this to ensure that the state's end was legitimate and "its means are not irrational."[36]

The Court further rejected a bright-line rule that would have provided that economic development could not be considered a public use or, in the alternative, that the condemning authority had to prove that the benefits it asserted would likely be achieved by the project for which eminent domain is used.[37] The Court held that the better approach is to review the condemning authority's plan in its entirety, and not on an individual basis, and to determine if the condemning authority has a comprehensive plan and that it "thorough[ly] deliberat[ed]" the plan prior to its adoption.[38] The Court did note that this rule was not intended to provide a condemning authority with *carte blanche* to condemn as it pleased. The Court stated that a taking occurring outside an "integrated development plan" may indicate that condemning authority was taking the property for purely private reasons.[39] Thus, *Kelo II* serves to solidify the Court's Takings Clause jurisprudence and likely will be used to justify the constitutionality of the vast majority of takings.

Berman, *Midkiff*, and *Kelo II* represent the broadest interpretations of "public use."[40] Although the Court has acknowledged a narrow role for courts reviewing eminent domain actions,[41] it is quite difficult, absent explicit and complete deference to the legislature, to find a broader interpretation of the Public Use Clause. In addition, *Berman*, *Midkiff*, and *Kelo II* represented a sea change in takings law. No longer is it impermissible to "take land from A and give it to B."[42]

This extremely broad interpretation has led inexorably to the inability of the

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34. *See id.* at 2663-64.

35. *Id.* at 2664 (internal quotation marks omitted) (quoting Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606-07 (1908)).

36. *Id.* at 2667 (internal quotation marks omitted) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984)); *see also id.* at 2269 (Kennedy, J., concurring) (noting that the standard of review under *Berman* and *Midkiff* is similar to the "rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses").

37. *Id.* at 2666-67 (majority opinion).

38. *Id.* at 2665.

39. *Id.* at 2667.

40. *See* Ely, *supra* note 2, at 34.

41. *Midkiff*, 467 U.S. at 240.

42. Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 344-45 (2001); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion of Chase, J.).

Public Use Clause to protect individual property rights.[43] Because the Court has opted to give takings cases almost the lowest level of scrutiny, and by placing the definition of "public use" within the ambit of the police power, the requirement does not limit a government's eminent domain power because the legislative body can generally always find *some* public purpose to justify a taking.[44] Indeed, when the legislature has almost exclusive control of defining what constitutes a public use, it could hardly run afoul of the Public Use Clause. Thus, absent an external limitation on the taking, such as a violation of the Equal Protection Clause of the Fourteenth Amendment, a court likely will not find the taking to be barred by the Constitution. Therefore, the Public Use Clause, in most cases, will not entitle one to a legal remedy for the wrongful taking of his land; it confines the former owner to a political remedy,[45] such as taking his grievances to the polls in the next election.

2. *Recent Lower Federal Court Interpretations of the Public Use Requirement.*—Although the Supreme Court has interpreted the Public Use Clause broadly, several lower federal courts have found some takings limited by the clause. Indeed, these courts found ways around the strict deference to the legislature that *Berman*, *Midkiff*, and *Kelo II* demanded.[46] These cases did not follow the traditional rational basis review rules, which require a court to find for the government if the asserted public use is merely conceivable.[47] In these cases, the court was not satisfied with the government's proffered public use and required the government to show that the asserted use or benefit could be achieved.[48] In one case, *Daniels v. Area Plan Commission of Allen County*,[49] the court of appeals held that an asserted public use that was "conclusory and largely unsupported" would not meet the Public Use Clause.[50]

One particular case has distinguished itself from the Supreme Court cases. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[51] the Lancaster Redevelopment Agency ("Agency") sought to condemn the leasehold interest of

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43. This is hardly a new or novel concept. Over fifty years ago it was recognized that Congress and state governments failed to see the Public Use Clause as a limitation upon the government. Nader & Hirsch, *supra* note 16, at 209 (relying upon Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 614 (1949)).

44. *See id.* at 212; *see also* Kelo v. City of New London (*Kelo II*), 125 S. Ct. 2655, 2676-77, *reh'g denied*, 126 S. Ct. 24 (2005) (O'Connor, J., dissenting).

45. For examples of political remedies, see Berliner, *supra* note 13, at 798-800 (noting, inter alia, that public pressure forced developers to give up plans to demolish one-fifth of Pittsburgh's downtown).

46. *See* Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936 (2003).

47. *Id.* at 935-36.

48. *Id.*

49. 306 F.3d 445 (7th Cir. 2002).

50. *Id.* at 463-64; Garnett, *supra* note 46, at 934.

51. 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003).

99 Cents Only Stores ("99 Cents") in a shopping center location.[52] The Agency sought condemnation to meet Costco's demands for expansion of its local store and to prevent Costco from relocating. When 99 Cents refused to sell its interest, the Agency attempted to condemn the land so it could sell it to Costco for one dollar.[53] The Agency attempted to assert as a public use the prevention of future blight that could be caused if Costco relocated.[54] The court distinguished this case from *Midkiff* by fitting its decision into the narrow role that *Midkiff* carved out for judicial review.[55] The court held that because the Agency admitted that it was only trying to appease Costco and because the goals of Costco could have been met without interfering with 99 Cents's leasehold interest, the eminent domain action would fail.[56] Also important to the *99 Cents Only Stores* court was that the Agency had not made any findings that future blight could occur, and thus did not tie the taking to these findings; the Agency merely stated the rationale once it was in court.[57] Thus, the *99 Cents Only Stores* court was unwilling to find a valid public purpose where there was no factually supported legislative determination that a public purpose would be served by the taking.[58]

Thus, some lower federal courts may be willing to use heightened level of scrutiny when the condemning authority has not set forth any findings to establish a public use. However, in light of these cases, future takings could be justified with public uses that are established beforehand by findings that are general enough to be upheld under the *Berman* and *Midkiff* standards. For example, if the Agency in *99 Cents Only Stores* had set forth findings ex ante, whether grounded in reality or not, that the taking would create x jobs and generate y tax dollars, it is more likely that a court would uphold the taking, even though the taking only benefited Costco.

B. Interpretation of Public Use Requirements in State Constitutions

Although most state constitutions include public use requirements, only about half of those jurisdictions have ever ruled on whether economic development qualifies as a public use.[59] Currently, approximately half of the states that have decided the issue have allowed transfers to private entities for the purpose of economic redevelopment, and half have not.[60] Thus, there are two basic rules from which the remaining states may choose.

1. Courts Using a Broad Interpretation of Their State's Public Use Requirement.—Many state courts have interpreted their state's public use

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52. *Id.* at 1126.
53. *Id.*
54. *Id.* at 1129.
55. *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984)).
56. *Id.*
57. *Id.* at 1130.
58. *Id.*
59. Berliner, *supra* note 13, at 794.
60. *Id.*

requirements as the Supreme Court interpreted the Fifth Amendment in *Berman*, *Midkiff*, and *Kelo II*. These states also allow for maximum deference to the legislature. These cases are a liberal variant of the public-benefit theory, which holds that a taking is permissible if it furthers a permissible legislative end.[61]

The broad interpretation of state public use requirements is best exemplified by *Poletown Neighborhood Council v. City of Detroit*.[62] Although overruled in 2004,[63] *Poletown* remains important because it has been repeatedly cited by courts outside of Michigan.[64] In *Poletown*, Detroit attempted to condemn its Poletown neighborhood so that General Motors could build an assembly plant at that location.[65] General Motors had threatened to remove approximately six thousand jobs from Detroit if it was not allowed to build on the Poletown site. Additionally, General Motors made several demands regarding the condition of the site and paid a price significantly lower than market value for the site.[66]

The *Poletown* court began its analysis by explicitly disavowing any distinction between "public use" and "public purpose."[67] Once the court extinguished that distinction, the court easily determined that in light of the state's police powers, Michigan could use eminent domain to reduce unemployment and its effects on society.[68] The court further held that although a taking for a private purpose would violate the state's public use requirement, the government can condemn the land and transfer it to a private entity when a private use is incidental to the public purpose.[69] In many ways, the *Poletown* court's conclusions became the jurisprudential model upon which *Midkiff* would be based three years later.[70] Indeed, in another parallel to *Midkiff*, the *Poletown* court gave extreme deference to the legislature, citing *Berman* approvingly and stating that after the public use is determined, the court has only a limited role in reviewing it.[71] Thus, *Poletown*'s brief per curiam opinion became the quintessential case that justified an expansive interpretation of the Public Use Clause.

Other states have followed the reasoning of cases like *Poletown*, *Berman*,

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61. Thomas J. Posey, Note, *This Land is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403, 1407 (2003). The public-benefit theory is in contrast to the actual-use theory which holds that all members of the public must have access to and enjoy the actual use of the land. *Id.*

62. 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

63. *Hathcock*, 684 N.W.2d at 787.

64. *E.g.*, Kelo v. City of New London (*Kelo I*), 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

65. *Poletown Neighborhood Council*, 304 N.W.2d at 457.

66. *Id.* at 467-70 (Ryan, J., dissenting).

67. *Id.* at 457 (majority opinion).

68. *Id.* at 458; *see also Hathcock*, 684 N.W.2d at 784-85.

69. *Poletown Neighborhood Council*, 304 N.W.2d at 458.

70. *See* Nader & Hirsch, *supra* note 16, at 218.

71. *Poletown Neighborhood Council*, 304 N.W.2d at 458-59.

and *Midkiff*. Most recently, in *Kelo v. City of New London* (*Kelo I*), the Supreme Court of Connecticut simultaneously accepted the reasoning of *Poletown* and applied *Midkiff*'s rational basis test.[72] The *Kelo I* court based its decision not only on the federal grounds that were affirmed by the U.S. Supreme Court in *Kelo II*, but also on open state constitutional grounds. In so holding, the *Kelo I* court determined, in light of the deference owed the legislature, that economic development is a valid public purpose, similar to slum clearance.[73] In addition, the *Kelo I* court, like the *Poletown* court, rejected the argument that transferring the land to private parties for economic development primarily benefited the private entities.[74] The court reasoned that because New London's goal was economic redevelopment, private entities and transfers of this type *had* to be involved.[75] Additionally, the court more clearly articulated the standard of review that a court should use in these types of cases. The court determined that courts are to look at whether the taking primarily benefits the public or a private entity.[76] However, despite this judicial role, the *Kelo I* court left the issue to the trier of fact, and thus reviewed the issue under the "clearly erroneous" standard.[77] Perhaps this formulation is a clear articulation of the judicial role the *Berman* and *Midkiff* Courts provided.[78]

Several other states have read their public use clauses broadly and approved takings similar to those in *Berman*, *Poletown*, and *Kelo I*. The Supreme Court of Kansas approved the taking of two businesses for the creation of an industrial park that would be held by private owners after the court determined that economic development is a legitimate public use.[79] In *City of Duluth v. State*,[80] the Supreme Court of Minnesota gave Minnesota's public use clause an even broader interpretation than those used in *Poletown* and *Kelo I*.[81] The *Duluth* court held that if the trial court can marshal *any* evidence to support a finding of public purpose, then the court must uphold the taking unless to do so would be "manifestly arbitrary or unreasonable."[82] These additional cases demonstrate that jurisdictions adopting the broader interpretation of "public use" use more or less the same deferential rational basis review. Absent arbitrariness and abuse, courts

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72. 843 A.2d 500, 528 (Conn. 2004), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

73. *Id.* at 532.

74. *Id.* at 536-37.

75. *See id.*

76. *See id.* at 541.

77. *See id.*

78. *See supra* notes 24, 42 and accompanying text.

79. Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 882-83 (Kan. 2003).

80. 390 N.W.2d 757 (Minn. 1986).

81. *See id.* at 763; *see also* Jennifer J. Kruckeberg, Note, *Can the Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 556 (2002).

82. *Duluth*, 390 N.W.2d at 763.

in these jurisdictions will validate the legislature's determination of what constitutes a public use.

2. Courts Using a Narrow Interpretation of Their State's Public Use Requirement.—Some jurisdictions read their respective public use clauses more narrowly than their aforementioned counterparts. These jurisdictions tend not to view economic development as a public use, or at least give the legislature less deference when deciding if the primary beneficiary of the taking is the private recipient of the condemned land. Also, as the *Kelo I* court noted, it is possible to harmonize some of the following cases with the holdings of cases such as *Berman*, *Midkiff*, and *Poletown*.[83]

One of the states that recently adopted a narrower view of the definition of "public use" was Michigan. In *County of Wayne v. Hathcock*, the Supreme Court of Michigan explicitly overruled *Poletown* and forbade the taking of the defendants' property to create a business and technology park near Metropolitan Airport.[84] The *Hathcock* court held that the term "public use" is a legal term of art that is a "positive limit on the state's power of eminent domain."[85] Also, the court stated it would not be as deferential to the legislature as it was under *Poletown*.[86] The court also held that there is a distinction between "public purpose" and "public use."[87] Under the *Hathcock* scheme, the former is not a limit on the eminent domain power; on the other hand, the latter is a substantial limit. Thus, the limitation gives the court a larger role in reviewing eminent domain cases. The court asserted its independence by holding that notwithstanding any legislative findings, it could determine if the legislature's asserted public use was constitutional.[88]

The *Hathcock* court also drew on Justice Ryan's *Poletown* dissent to hold that although Michigan's public use clause is "not an absolute bar against the transfer of condemned property to private entities," there are only three circumstances justifying the transfer of condemned property to a private party.[89] The first such situation is when the taking is required to satisfy a "public necessity of the extreme sort otherwise impracticable" unless the condemned land was transferred to a private entity.[90] To the court, this situation includes canals, railroads, highways and "other instrumentalities of commerce."[91] In these

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83. *See* Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 535 (Conn. 2004), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

84. County of Wayne v. Hathcock, 684 N.W.2d 765, 770, 787 (Mich. 2004).

85. *Id.* at 780.

86. *See id.* at 785.

87. *Id.* at 784.

88. *Id.* at 785.

89. *Id.* at 781.

90. *Id.* (internal quotation marks omitted) (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 676 (Mich. 1981) (Ryan, J., dissenting), *overruled by Hathcock*, 684 N.W.2d 765)).

91. *Id.* (internal quotation marks omitted) (quoting *Poletown Neighborhood Council*, 304 N.W.2d at 675 (Ryan, J., dissenting)).

situations, eminent domain is allowed because the construction of a private railroad could be halted by a single landowner who refused to sell an easement to his property for anything less than a price above market value.[92]

Hathcock's second justification for transferring condemned land to private entities is when the private grantee remains responsible to the public.[93] This situation allows for entities such as private utility companies to condemn land. The overriding concern is that the private entity will use the condemned property to benefit the public, and that the public controls the land "*independent of the will of the corporation taking it.*"[94] Finally, the court held that condemned land can be transferred to private entities "when the selection of the land to be condemned is itself based on public concern."[95] This situation covers cases such as slum clearance where a reviewing court looks at the reason that the condemning authority sought condemnation, instead of the land's post-condemnation use, to determine if the public use requirement is met.[96] In cases like slum clearance, the public use is the removal of unfit and unsanitary housing; the subsequent transfer to private parties is ancillary to the overriding use of removing the unfit housing.[97]

Based on this scheme, the court held that economic development to increase public revenues and employment does not justify the use of eminent domain.[98] The court held that these benefits are only incidental to the taking.[99] They are incidental because all lawful businesses contribute to the economy through employment and taxes.[100]

The Supreme Court of Illinois also recently proclaimed a narrower view of Illinois's public use clause in *Southwestern Illinois Development Authority v. National City Environmental L.L.C.*[101] The Southwestern Illinois Development Authority ("SWIDA") had instituted condemnation proceedings against National City Environmental ("NCE") so that NCE's land could be conveyed to a local racetrack. The racetrack wanted to use the land as its parking lot. NCE initially refused to sell its land to the racetrack. Eventually, the track convinced SWIDA to condemn the land.[102] SWIDA asserted the prevention and elimination of blight, promotion of public safety by alleviating traffic, and the economic redevelopment of the region as public uses.[103]

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92. *Id.* at 781-82.

93. *Id.* at 782.

94. *Id.* (internal quotation marks omitted) (quoting *Poletown Neighborhood Council*, 304 N.W.2d at 675 (Ryan, J., dissenting)).

95. *Id.* at 782-83.

96. *Id.* at 783.

97. *Id.*

98. *Id.* at 786-87.

99. *Id.* at 786.

100. *Id.*

101. 768 N.E.2d 1 (Ill. 2002).

102. *Id.* at 5-6.

103. *Id.* at 8.

The court began its analysis by noting that although the terms "public use" and "public purpose" are similar in meaning, the terms are distinguishable and not interchangeable.[104] The court also noted that although all three asserted public uses could be valid in certain cases, they were inapplicable to the instant case because the racetrack was a private entity and only a "mere benefit to the public [would] flow from the contemplated improvement."[105] By rejecting SWIDA's taking despite SWIDA's findings of public use, the court played a larger judicial role in public use cases. Thus, the court did not give the taking the same deferential review that jurisdictions following the *Poletown* and *Kelo I* models would have used. Also, the court indicated that it was willing to reverse a taking designed merely to assist private entities in "accomplishing their goals in a swift, economical, and profitable manner."[106] The court in *National City Environmental* inferred that SWIDA was interested in helping the racetrack accomplish its goals because SWIDA advertised that it would condemn land for private developers upon application and also from SWIDA's lack of an economic plan encompassing the racetrack.[107] Thus, the court showed that it would not uphold a taking designed to help a private entity reap profits, even if the taking resulted in an incidental public benefit.[108]

National City Environmental represents a substantial break from the analysis used in more deferential jurisdictions. However, as the *Kelo I* court noted, it is possible to harmonize the *National City Environmental* court's analysis with the analyses used in cases such as *Kelo I*, *Kelo II*, *Poletown*, and *Midkiff*.[109] The *Kelo I* court stated that *National City Environmental* perhaps represents "the far outer limit of the use of the eminent domain power for economic development."[110] However, although the *Kelo I* court thought that the nature of *National City Environmental*'s facts rationalized the court's analysis,[111] one could argue that the facts presented in *Kelo I* are just as, if not more, egregious than the facts presented in *National City Environmental*.[112] In *Kelo I*, many private homes were taken,[113] while in *National City Environmental*, the condemned land was used by commercial enterprises.[114]

Other jurisdictions have also given their public use requirements narrow

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104. *Id.*

105. *Id.* at 9 (quoting Gaylord v. Sanitary Dist. of Chicago, 68 N.E. 522 (1903)).

106. *Id.* at 10.

107. *Id.*

108. *Id.* at 9-10.

109. Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 535 (Conn. 2004) (dictum), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

110. *Id.* (dictum).

111. *Id.* (dictum).

112. *See* discussion *supra* Part II.B.1.

113. *Kelo I*, 843 A.2d at 511.

114. *See* Sw. Ill. Dev. Auth v. Nat'l City Envtl., L.L.C., 769 N.E.2d 1, 4 (Ill. 2002); *see also* Nader & Hirsch, *supra* note 16, at 225 (noting that the taking of a home is different than taking property used for primarily economic purposes).

readings. For example, in *Georgia Department of Transportation v. Jasper County*,[115] the Supreme Court of South Carolina refused to allow property owned by the Georgia Department of Transportation to be condemned to make way for a stevedoring operation.[116] The court took one of the strongest possible positions regarding transfers to private entities. The court stated that it would not allow transfers of land to private entities "unless the property is taken for public use—a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property."[117] The court took this approach because the eminent domain power is in "derogation of the right to acquire, possess, and defend property."[118]

III. Problems Associated with Deferential and Broad Interpretations of "Public Use"

The broad, deferential standards announced in cases such as *Berman*, *Midkiff*, *Kelo*, and *Poletown* present four distinct problems. First, by giving a large amount of deference to the legislature, a broad reading of the Public Use Clause fails to protect individual private property rights. It also alters the takings incentive structure, making it much more likely that the government will exercise its eminent domain power. Additionally, the broad interpretations that allow condemned property to be transferred to private entities encourage private entities to engage in rent-seeking behavior. Finally, a broad interpretation fails to assure that the asserted public use is actually achieved.

A. Broad, Deferential Interpretations of "Public Use" Fail to Protect Private Property Rights

Although the Federal Constitution was established to protect individual rights to life and liberty, it was also created to protect private property rights.[119] Courts adopting a broad interpretation of the public use requirement have failed to give effect to this fundamental purpose. This overarching purpose receives textual support from several provisions of the Constitution aside from the Takings Clause. For example, the Fourth Amendment guarantees that all persons shall "be secure in their . . . houses, papers, and effects, against unreasonable searches and seizures."[120] The Third Amendment also protects private property by placing great restrictions on the government's ability to quarter troops in private residences.[121] The Due Process Clauses of the Fifth and Fourteenth Amendments protect against deprivations of property "without due process of

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115. 586 S.E.2d 853 (S.C. 2003).
116. *Id.* at 857.
117. *Id.*
118. *Id.* at 856.
119. Nader & Hirsch, *supra* note 16, at 208.
120. U.S. CONST. amend. IV.
121. *See* U.S. CONST. amend. III.

law."[122]

In addition to the aforementioned explicit protections of private property, the U.S. government was structured in part to protect individual private property rights. Indeed, the Framers believed that protecting private property rights was essential to protect personal liberty.[123] James Madison believed that, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals . . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."[124] Additionally Madison believed that disparities in property ownership created the factions that government was instituted to control.[125] He believed that the Constitution was necessary to control "[a] rage for . . . an abolition of debts, for an equal division of property, or for any other improper or wicked project."[126] Thus, although courts have focused on the provisions of the Constitution guaranteeing individual liberties, the Framers were also intensely concerned with protecting private property rights.

Despite the Framers' intent to protect property rights, the broad, deferential interpretation of the Public Use Clause has failed to effectuate that intent. The U.S. Supreme Court has been quite unwilling to impose any standard that allows courts a meaningful role in determining what qualifies as a public use. The *Midkiff* Court did recognize that a successful taking requires a condemning authority to stipulate a public purpose; however, it provided that this requirement is satisfied when the condemnation is "rationally related to a conceivable public purpose."[127] A right is hardly protected when the only limit on the government's ability to derogate the right is that the act be within the broad bounds of rationality, i.e., the act must not be arbitrary.[128] Thus, without a meaningful check on the legislature, the legislature could conceivably accomplish the factional redistribution of wealth that the Framers feared.[129]

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122. U.S. CONST. amend. V (providing that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 (prohibiting states from making deprivations "without due process of law").

123. *See* Ely, *supra* note 2, at 35.

124. Timothy J. Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569, 580 n.58 (2003) (internal quotation marks omitted) (quoting JAMES MADISON, MADISON: WRITINGS 515 (J. Rakove ed., 1999)).

125. THE FEDERALIST No. 10, at 73-79 (James Madison) (Clinton Rossiter ed., 2003).

126. *Id.* at 79.

127. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

128. *See* discussion *supra* Part II.A.1.

129. Madison was concerned with mitigating the power of factions that would arise because of wealth inequalities. *See* THE FEDERALIST No. 10, *supra* note 125, at 73. Although he regarded the operation of a legislature as a way to maintain liberty, *see* THE FEDERALIST No. 49, at 313 (James Madison) (Clinton Rossiter ed., 2003), he believed that legislators were "advocates and parties to the causes which they determine," THE FEDERALIST No. 10, *supra* note 125, at 74. Using a bill regarding private debt as an example, Madison stated:

Thus, despite the conclusions reached in *Midkiff*, *Poletown*, and *Kelo II*, many courts seem to believe the Public Use Clause is a limitation on federal and state action. This conclusion is inconsistent with their analyses regarding what constitutes a public use for two reasons. First, even if the concept of public use is coterminous with police power,[130] the legislature can still abuse police power.[131] Thus, the limitation would not protect against the mischief the Framers feared. Second, if a citizen has the right not to have her land taken for anything but a public use, then the government has a corresponding duty to effectuate that right. However, the rational basis standard of review allows the government to fulfill its duty by stating a pretextual public purpose that may arise because of the taking, like increased tax and employment bases.[132] Thus, under these courts' analyses, a taking only would be unconstitutional if the legislature does not make an attempt to fit the taking into the current body of case law. Such a rule is problematic because it allows the general rule, that the government cannot take private property, to be swallowed by the exception, that private property may be taken for a public use. In a different context, the Supreme Court has stated that the Takings Clause requires more than this type of pretextual justification.[133]

The analysis employed by courts using the rational basis standard of review is also inconsistent with the standards these courts use to protect individual liberty. This inconsistency leads to the conclusion that courts have chosen not to use the clause to protect individual property rights. As Ralph Nader and Alan Hirsch note, although courts use heightened scrutiny to protect liberty and autonomy interests, the courts have not protected the property rights essential to meaningfully exercise these rights.[134] For example, the Supreme Court has consistently protected private and intimate activities inside the home, but has done little to protect the home itself.[135] However, although Nader and Hirsch

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> It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail.

Id.

130. *Midkiff*, 467 U.S. at 240.

131. *See* Jeffrey W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to "Public-Private" Takings?*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 466, 473 (2003).

132. *See* Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 520 (Conn. 2004), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

133. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12 (1992) (stating that simply requiring a recitation of a "harm-preventing" rationale is ineffectual for regulatory takings "[s]ince such a justification can be formulated in practically every case [and] amounts to a test of whether the legislature has a stupid staff"); *see also* Kelo v. City of New London (*Kelo II*), 125 S. Ct. 2655, 2675, *reh'g denied*, 126 S. Ct. 24 (2005) (O'Connor, J., dissenting).

134. *See* Nader & Hirsch, *supra* note 16, at 216.

135. *See id.*; *see also Kelo II*, 125 S. Ct. at 2685 (O'Connor, J., dissenting). Several Supreme Court cases have protected individual liberties as they relate to private conduct in one's home. *See,*

limit the type of property that makes the exercise of liberty interests meaningful to intimately personal property like one's home,[136] private property rights in general are necessary for individuals to be autonomous. Even investment and commercial property can enable personal autonomy. For example, the First Amendment's guarantees of freedom of speech and freedom of the press are nearly meaningless if individuals are not allowed to own the means necessary to communicate and publish information and opinions.

Ultimately, when courts such as the *Midkiff* and *Kelo II* courts analyze property rights cases differently from liberty rights cases, one could conclude that these courts do not view the Public Use requirement as a limitation on the government. For example, the Supreme Court has employed heightened scrutiny in many cases reviewed under the Fifth and Fourteenth Amendments where deprivations of liberty rights were at issue. This type of analysis provides that a government can abrogate liberty to a certain point, at which point it can go no further.[137] However, the Court has refused to recognize such a limitation with regard to property rights; the legislature's action must be only within the bounds of rationality.[138] However, the limitation of rationality is illusory[139] because the right to hold a particular piece of property is practically protected only to the extent that the condemning authority does not want to take it. Thus, the right practically exists only if the condemning authority chooses to recognize it. The Just Compensation Clause mitigates many effects of the taking by requiring that the property owner be reimbursed for his loss.[140] However, it may be impossible to completely compensate someone for the loss of his property.[141] Additionally, other burdens are usually visited upon the owner of condemned property, such as the necessity of looking for a new home and establishing ties to a new neighborhood.[142]

B. The Broad Interpretation of "Public Use" Alters the Takings Incentive Structure

The broad interpretation of the Public Use Clause makes takings of private

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e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (protecting the right of adult homosexuals to engage in private, consensual intimate conduct); Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the right of married couples to use contraception).

136. *See* Nader & Hirsch, *supra* note 16, at 216.

137. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (stating that the Constitution promises "a realm of personal liberty which the government may not enter").

138. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

139. *See supra* text accompanying notes 132-33.

140. *See* U.S. CONST. amend. V.

141. Nader & Hirsch, *supra* note 16, at 217 (noting that in *Poletown*, the owners of the condemned property did not lose merely income, but also the non-pecuniary attachment they had to their home and neighborhood).

142. *See generally* Garnett, *supra* note 46, at 951-61 (describing negative consequences of condemning land that can result even when compensation is made).

property much more likely because it virtually eliminates one of the limitations on the eminent domain power. This problem is exacerbated in situations where the condemned property will be transferred to a private party. In such a situation, the other limitation, the requirement of just compensation, is likely removed. The U.S. Constitution and most state constitutions have two provisions that deter the government from exercising its eminent domain power: the Public Use Clause and the Just Compensation Clause.[143] The Just Compensation Clause requires that the condemned property's owner be paid for the taking.[144] Thus, when a broad interpretation of the Public Use Clause is used, and the private party receiving the condemned land pays all of the expenses related to the condemnation, the government will not be easily deterred from using eminent domain because it will not have to expend its own resources.[145]

The theory behind the incentive structure of the Takings Clause is that even if a government can justify a legitimate public use, it will still be reluctant to abuse its power to take the property because it will have to pay just compensation and other expenses such as legal fees.[146] The lower the cost to the condemning authority, the more likely the condemning authority is to exercise the taking power, especially when a public purpose can be assumed. Indeed, in some cases, the condemning authority may actually have *incentive* to condemn private property for transfer to another private entity if the entity seeking the condemnation not only pays for the taking, but also pays a fee for the privilege.[147] This incentive structure is incompatible with the rational basis standard of review applied in Public Use cases. If the legislature is the sole institution charged with protecting people from improper uses of its eminent domain power,[148] it must surmount a tremendous conflict of interest before doing so. This conflict will be difficult to overcome, especially in cases where the land could be put to "more productive" uses and generate revenue that exceeds current tax revenue. Although some condemning authorities will resist the conflict of interest, others will not.[149] Thus, in many cases, the broad interpretation of the Public Use requirement is inconsistent with its justification for deference to the legislature.

In addition, many transfers of condemned property to private entities alter the takings incentive structure because they change the political equation the condemning authority must balance before declaring eminent domain. In a traditional exercise of the eminent domain power, such as condemning land to build a highway, the government has to weigh the political consequences of the

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143. *See* U.S. CONST. amend. V; *see also* Berliner, *supra* note 13, at 793.

144. *See* Berliner, *supra* note 13, at 793.

145. *See id.*

146. *See id.*

147. *See, e.g.*, Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 4 (Ill. 2002) (stating that SWIDA required a fee of six to ten percent of the acquisition fee of the property to be paid for the service of condemning the property).

148. *See supra* text accompanying note 24.

149. *See, e.g.*, *Nat'l City Envtl.*, 768 N.E.2d at 10 (noting that SWIDA advertised that it would condemn land for private entities for a fee).

taking. To finance the taking, the government will have to impose the costs of the taking on all of its citizens. When faced with either increased taxes or decreased services to finance the taking, taxpayers may be likely to bring political pressure to bear on the government's officials. Presumably, the officials will have to weigh the costs and benefits of expending their political capital before affecting the taking. However, when the government sells property to a private party that pays all the condemnation costs, the government officials do not have to expend as much political capital because they have placed almost all of the community's costs squarely on the owners of the condemned property and the private transferee.[150] In such a situation, the community as a whole will be less likely to oppose the taking because the vast majority of people will feel no negative effect from the taking. Thus, if the condemning authority selects the "right" individual or group on which to impose the costs of the taking, it will suffer little or no opposition. The "right" group may sometimes be a group of poor and politically powerless individuals,[151] but it could also be a commercial enterprise, which although fairly successful, is largely unsympathetic.[152]

C. A Broad, Deferential Interpretation of "Public Use" Encourages Rent-Seeking Behavior

A rational basis standard for reviewing eminent domain actions encourages rent-seeking behavior because property value is generally greater post-condemnation.[153] The current eminent domain system gives this "surplus" value entirely to the post-condemnation owner.[154] This is done to promote the efficient use of resources and to discourage pre-condemnation owners from engaging in rent-seeking behavior themselves—that is, charging a greater price than their "opportunity cost."[155] This efficiency is generally necessary because the pre-condemnation owners' rent-seeking behavior can add substantial costs to the public project.[156] Thus, in a traditional takings case, the efficiency helps taxpayers because taxes will not be increased and services will not be decreased.

However, when condemned property is transferred to a private, profit-seeking entity, this rationale partly disappears. Of course, if the government

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150. Professor Garnett notes that one of the reasons that compensation for takings is required is because it prevents the government from "singling out" and "exploiting politically unorganized and vulnerable persons." Garnett, *supra* note 46, at 949 (internal quotation marks omitted) (citing Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344-45 (1991)).

151. *See* Nader & Hirsch, *supra* note 16, at 223.

152. *See, e.g.*, 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003); *Nat'l City Envtl.*, 768 N.E.2d at 4.

153. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 85 (1986).

154. *See id.* at 86.

155. *Id.* at 76, 86.

156. *See id.* at 85.

gratuitously transfers the property to a private entity, it is better economically to pay a lower price for the property. However, when a private owner pays the condemnation costs, it makes much less sense to give the private entity the surplus. In such a case, one hundred percent of the costs are imposed on a private entity that has actively sought out the condemned land. Thus, the taxpayers do not benefit from the financial savings that eminent domain provides.

In addition, the surplus created also encourages private parties to engage in rent-seeking behavior.[157] Eminent domain is attractive for private entities because they can obtain the land they want at prices below market value.[158] For this reason, private entities compete with each other in order to gain this economic surplus.[159] These competition costs can eliminate any surplus and lead to the inefficiency that eminent domain originally addressed.[160] Even if entities are not competing for the surplus, if the private entity has to make expenditures to defend the taking, then the surplus begins to disappear.[161]

Rent-seeking behavior by private entities is undesirable because it gives one entity a windfall at the expense of another. In a traditional eminent domain case, where the government will ultimately possess the land, the condemnee will at least receive the right to use a new or improved highway as a benefit. However, in cases where the condemned land is given or sold to a private entity, the pre-condemnation owner is involuntarily supplying land for a new use[162] and must surrender the surplus without being compensated for it. Thus, the new owner of the land receives a windfall that it did nothing to earn, and it owes no service or right of use to the pre-condemnation owner. This windfall is one of the key reasons that private entities keep seeking to use eminent domain. As long as governments are willing and able to provide for-profit entities with a windfall, the private parties will continue to seek it. The broad, deferential interpretation of "public use" promotes rent-seeking behavior because a profit-seeking entity can use almost any reason to justify its request to the condemning authority.

D. The Current Interpretation of "Public Use" Fails to Assure That the Asserted Use Is Achievable

Frequently, when a government asserts economic redevelopment, increased taxes, or increased employment as a public use, it fails to require that the asserted use actually benefit the community.[163] Several jurisdictions have legislatively and contractually created "clawback" provisions that give the condemning authority the right to take back some or all of its investment costs if the

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157. *Id.* at 86.
158. *See* Garnett, *supra* note 46, at 958.
159. Merrill, *supra* note 153, at 86.
160. *Id.*
161. *See id.*
162. *Id.*
163. *See* Garnett, *supra* note 46, at 978.

contemplated benefit is not received.[164] Because these measures are legislative or contractual, the legislature is not obligated to make use of them in future takings. Thus, the provisions are not a substantial protection against legislative action. Under the rational basis standard, the state has no constitutional requirement to assure that the public benefit is actually achieved. In *Midkiff*, the Court stated, "[W]here the exercise of the eminent domain power is rationally related to a *conceivable* public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[165] Thus, when analyzing a taking ex ante, as long as the asserted public use *could* happen, the taking is constitutional. There is no requirement that the public *actually* benefit from the taking.

When the condemning authority does not hold the private transferee of the condemned property accountable for not creating the asserted public use, the public suffers harm because it does not receive the anticipated use. Additionally, the pre-condemnation owner suffers a greater harm than he would have otherwise. In this case, the pre-condemnation owner not only suffers the loss of his property, he also does not share in the anticipated benefit.

In other cases, the taking's costs outweigh any possible benefit that could result from the taking. For example, in *Poletown*, Detroit paid $200 million for all of the condemned land. It sold the land to General Motors for eight million dollars.[166] In such a case, for a net economic benefit to accrue to the city and its residents, the benefits of economic redevelopment would have to exceeded at least $192 million. In addition, the social and political costs imposed by the taking, which in *Poletown* included displacement of the neighborhood's residents,[167] must be balanced against the social and political benefits that actually do result from the taking. Such a social or political benefit could include increased employment in the area. However, considering the combination of economic, political, and social costs and benefits, one is hard pressed to find that overall a net benefit actually accrued from the taking.

Under the broad interpretation of the Public Use Clause, the courts have little ability to determine if the public will actually benefit from the asserted use. The legislature is likely the only entity able to completely weigh the costs against the benefits. The legislature is not required to follow many of the procedural and evidence rules that courts use and it does not have to afford fact-finders any deference as courts exercising appellate review must. Indeed, the Supreme Court has found that determining what constitutes a public use can be "impracticable."[168] However, there are cases where the asserted benefits are

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164. *Id.* at 978-79.

165. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (emphasis added).

166. Jones, *supra* note 5, at 295.

167. *See* Garnett, *supra* note 46, at 953-55.

168. *See Midkiff*, 467 U.S. at 240-41 (quoting United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946)); *see also* Berman v. Parker, 348 U.S. 26, 32 (1954) (noting that in some cases the "purposes of government[] . . . [are] neither abstractly nor historically capable of complete definition").

hardly likely to match the costs imposed upon society and upon the former owners of the condemned land. Under the standard of review used in cases like *Midkiff* and *Kelo II*, the public use asserted by the legislature as a public use must merely be conceivable.[169] In such a case, the court will only be able to strike down takings where the costs could not possibly match the benefits of the taking, i.e., where there is no conceivable public purpose. The legislature generally has free reign to determine what is a legitimate government activity or public use. However, if it appears likely that the social, political, and economic costs of the taking will exceed its actual or asserted benefits, a presumption arises that the taking was really designed for private benefit and that the public use was only incidental.[170] The rational basis standard of review precludes courts from looking behind the asserted public use, even when the "red flag" of the costs obviously outweighing the benefits is waved.[171]

IV. Recent Cases Offering a Narrower Interpretation of "Public Use" Do Not Adequately Protect Individual Property Rights

Although many recent cases have taken a narrower view of what constitutes a "public use" than *Berman*, *Midkiff*, and *Kelo II*, they have not gone far enough to protect private property rights. In many respects, these cases still allow a condemning authority to take a fairly broad view of what constitutes a "public use" when using eminent domain. The cases have not gone far enough to protect individual property rights because they do not establish a comprehensive standard that can be applied consistently by trial and appellate courts.

These cases undoubtedly use some form of heightened scrutiny and usually state a general test or definition of public use. However, in many cases, the court's analysis provides little guidance for courts facing different sets of facts. Even in *Georgia Department of Transportation v. Jasper County*, which offers the narrowest definition of "public use,"[172] the court's analysis is thin. Although the case stated that "a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property" is necessary to meet South Carolina's public use clause, it provided little analysis as to what factors courts should look to in determining whether the taking contemplated "a fixed,

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169. *See Midkiff*, 467 U.S. at 241; Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 528 (Conn. 2004) (stating that analyzing takings under the federal and Connecticut public use provisions requires a "deferential and purposive approach"), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

170. Many courts have held that if the taking is primarily to benefit a private party, the taking is unconstitutional. *See, e.g.*, Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 883 (Kan. 2003).

171. *See Midkiff*, 467 U.S. at 243 (stating that federal courts are not to engage in "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation").

172. *See* Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 857 (S.C. 2003).

definite, and enforceable right of use."[173] However, this statement is not as comprehensive as it seems. Without elaboration, the standard leaves open the question whether a private entity such as a utility or a railroad could use eminent domain to accomplish its goals.[174] Thus, although the general standard reads well, it creates many practical difficulties that a comprehensive standard would remedy.

Hathcock follows the pattern of *Georgia Department of Transportation*. Although the *Hathcock* court set out three circumstances that could justify condemning property and transferring it to a private entity,[175] the court did not set a comprehensive standard that would prevent a condemning authority from abusing its eminent domain power. For example, one circumstance justifying transferring condemned land to a private party is slum clearance.[176] In such a case, the public use is the very selection of the land to be condemned and not its post-condemnation use. This circumstance is problematic as it allows a condemning authority to assert a "public concern"[177] that is similar to slum clearance and then justify the taking by noting the importance of the taking relative to its police powers and the putative public concern. For example, a condemning authority could assert that the taking is necessary to effectuate city or county planning purposes. Such a justification could supplant the justifications of increased taxes, increased employment, and economic redevelopment as the fallback "public use" to be asserted when no other justification seems to fit. Indeed, the principal problem is that if the taking itself and not its subsequent use can be justified by an exercise of a power derivative of the condemning authority's police power, then this limitation is virtually indistinguishable from *Midkiff*'s holding that the public use requirement is "coterminous with the scope of a sovereign's police powers."[178]

In other cases, the courts examine the facts without reference to any clearly annunciated standard of review when determining if the asserted use is constitutional. For example, in *National City Environmental*, the court stated that "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."[179] However, the court did little to analyze the case in light of this standard. The court merely made the conclusory statement that the "condemnation clearly was intended to assist [the racetrack] in accomplishing their goals in a swift, economical, and

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173. *See id.* at 856-57.

174. *See id.* at 856 (stating that the phrase "public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies" (citing Edens v. City of Columbia, 91 S.E.2d 280, 283 (S.C. 1956))).

175. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 781-83 (Mich. 2004); *see also supra* notes 89-97 and accompanying text.

176. *See Hathcock*, 684 N.W.2d at 782-83.

177. *Id.* at 783.

178. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

179. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002) (alteration in original) (internal quotation marks omitted).

profitable manner."[180] It also noted that SWIDA was acting in an overtly *ultra vires* manner.[181] This analysis is unfortunate because although it reaches a desirable result, it does little to help future courts decide takings cases. Because the analysis centered in large part around the facts presented, the decisions are easily distinguishable in future cases.[182]

V. A Proposed Heightened Scrutiny Test for Analyzing Problematic Eminent Domain Cases

The overarching purpose of any test that analyzes takings should be to protect private property from being condemned to advance the ends of other private entities. To this end, with the exception of a narrow range of cases, any proposed taking where the land will subsequently be transferred to a private entity should be automatically suspect and subjected to heightened scrutiny. The purpose of the standard of review delineated below is to set forth the type of heightened scrutiny that should be used in such a case. In addition, the main purpose of this standard of review is to prevent condemning authorities from using increased revenue, increased employment, or economic redevelopment as a mere pretext to meet the Public Use Clause. This is not to say that it is impermissible to take account of these asserted uses or benefits when assessing a taking's constitutionality. In addition, the proposed standard of review recognizes that a bright-line test is simply impracticable because it is impossible to determine all problematic takings. As times change, new problematic takings will arise. This impracticability occurs whether the bright-line test is phrased as "condemned land may be transferred to a private entity in any case with the following exceptions" or "condemned land may never be transferred to a private entity except in the following circumstances."

Before using the test, a threshold question must be answered. The court must first determine whether the possessory interest in the land, be it freehold or leasehold, will inhere in the sovereign or its agencies, a political subdivision or its agencies, a railroad, or a state-regulated public utility company, such as electric, gas, or water companies.[183] If one of these entities will hold the ultimate possessory interest in the land, then the court should analyze the case according to traditional principles of eminent domain jurisprudence. These cases should be analyzed under traditional principles because the public uses in these cases have generally been uncontroversial.[184] If the taking does not meet one of the

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180. *Id.* at 10.

181. *See id.*

182. *See supra* notes 109-11 and accompanying text.

183. *See* Scott, *supra* note 131, at 475 (noting that, as a factor of his proposed test, the property must be owned or leased by a private entity, because that is the "essential element of a public-private taking").

184. *See* Berliner, *supra* note 13, at 791; *see also* Scott, *supra* note 131, at 466 (noting that, in the past, condemned land transferred to private individuals has led to benefits such as electrical lines and railroads).

conditions set forth in the threshold question, the court should proceed with the following test. In these cases, the property's taking and subsequent transfer to a private entity raise an issue that is neither routine nor well-settled.

A. Three-Prong Analysis for Using Heightened Scrutiny

If a taking does not satisfy the threshold question posed above, then the condemning authority must defend the taking by passing the following three-pronged test by clear and convincing evidence.[185] The first prong requires the condemning authority to show that transferring the land to a private entity is the only practicable way of accomplishing a legitimate objective. The second prong requires the condemning authority to demonstrate before taking the property that the asserted public use will accrue to the public in a reasonable period of time. Finally, the condemning authority must also prove that the private transferee of the land will not receive the benefit of the surplus value that condemning the land creates.

1. Prong One: Only Practicable Method of Accomplishing a Legitimate Objective.—The first prong requires the condemning authority to show that transferring the condemned property from one private entity to another is the only practicable method of accomplishing a legitimate objective.[186] This prong is worded similarly to the first circumstance stated in *Hathcock* that justifies transferring condemned property to a private entity.[187] However, this prong is not intended just to cover cases involving "highways, railroads . . . and other instrumentalities of commerce,"[188] but rather may be used in all cases that involve a legitimate objective. A legitimate objective is a goal that the

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185. This burden of proof and level of persuasion requirement is a loose adaptation of Professor Ely's proposals regarding the type of takings at issue in this Note. *See* Ely, *supra* note 2, at 36. Specifically, Professor Ely believed that people should not have their property rights coercively abrogated "without a compelling justification" and that the "courts should place the burden on the condemnor to make a convincing case for the acquisition." *Id.*; *see also* Kelo v. City of New London (*Kelo I*), 843 A.2d 500, 587-88 (Conn. 2004) (Carella, J., dissenting), *aff'd*, 125 S. Ct. 2655, *reh'g denied*, 126 S. Ct. 24 (2005).

186. Thomas Posey argues that a feasibility test should be used when "the government is highly unlikely to use the condemned land to complete the necessity project." Posey, *supra* note 61, at 1417. His "highly unlikely" standard differs from this prong because it is a threshold question that determines how the burden of persuasion is allocated. *See id.* Additionally, under his test the government needs only a rational basis to meet its burden of proof. *Id.* at 1418. Rational basis review is inconsistent with the underlying rationale of the test proposed in this Note.

187. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 781 (Mich. 2004) (dictum) (stating that condemned land may be transferred to a private entity when the case "involve[s] 'public necessity of the extreme sort otherwise impracticable'" (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 675 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004))).

188. *See Hathcock*, 684 N.W.2d at 781 (internal quotation marks omitted) (quoting *Poletown Neighborhood Council*, 304 N.W.2d at 675 (Ryan, J., dissenting)).

condemning authority has the power to bring about, notwithstanding any takings issues. For example, in the case of Congress, the prong only allows a taking when it exercises one of its enumerated powers.

The prong requires a state's action to be within the bounds of its police powers and its constitution. In addition, when something is the only practicable method of accomplishing a goal, it is the only feasible method of accomplishing the goal.[189] This does not necessarily mean that the taking is the only *possible* method that could accomplish the goal, but that it is the only method that could *reasonably be considered* when accomplishing its goal. Thus, it is similar to the concept of narrow-tailoring that is used to analyze cases under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[190]

This prong of the test offers several advantages. First, it partially follows *Berman*, *Midkiff*, and *Kelo II* by allowing the legislature, and not the courts, to generally determine what is a legitimate use of its powers.[191] This assuages the courts' fears that they will be meddling in the affairs traditionally allocated to the legislative branch. A related advantage is that in many cases, the courts can easily review whether the asserted purpose or use of the contemplated taking is even within the condemning authority's power. For example, in a case such as *National City Environmental*, where the condemning authority was not a sovereign or one of its political subdivisions, but rather a municipal corporation with limited purpose,[192] the court can very easily test if an entity such as this is acting *ultra vires*.

This prong also has several advantages with regard to protecting individual property rights. First, it drastically limits the number of circumstances that allow a condemning authority to transfer one person's land to another private party because the post-condemnation transfer will only occur in cases where it would be nearly impossible to accomplish the legislative objective otherwise. Second, the prong provides more protection than the traditional rational basis standard. This prong guarantees that the courts will thoroughly examine the rationale underlying the taking before granting its approval. Thus, it lessens the judicial deference to the legislature because the condemning authority will have to justify the taking and show how condemning the property and then transferring it to another private entity will fulfill that justification. It must also show that virtually no other means can accomplish the goal. The condemning authority will not be able to merely state as a pretext that increased taxes, increased employment, or economic redevelopment may arise from transferring the

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189. BLACK'S LAW DICTIONARY 1210 (8th ed. 2004).

190. For a discussion of narrow-tailoring, see generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (discussing narrow-tailoring with regard to affirmative action). In addition, although this prong is similar to the narrow-tailoring portion of strict scrutiny analysis, it does not require a compelling state interest.

191. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (stating that "[t]he definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition").

192. *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 3 (Ill. 2002).

property to a private entity. This prong changes the question from "Can a legitimate legislative end rationally result from the taking?" to "Is the taking the only reasonable way that the legislature can accomplish its goal?" The questions are distinct and the latter greatly mitigates undue judicial deference that the former allows.[193]

This prong also provides for strong protection of property rights. The prong rebalances the takings equation by emphasizing the individual's right to own the private property and by deemphasizing the condemning authority's power to take private property. This reemphasis on private property rights attempts to bring eminent domain jurisprudence in line with the other provisions of the Constitution that protect private property and the Framers' view that the Constitution was designed to protect private property rights.[194]

In addition to increasing the protection of private property rights, the first prong also enables courts to substantively treat derogations of property rights similarly to derogations of "fundamental" liberty interests.[195] This prong may provide for different protection for private property rights than substantive due process analysis provides for "fundamental" liberty interests. However, the prong sets discernable boundaries that represent the extent of the state's ability to derogate private property rights.[196]

The high standard that the proposed test's first prong sets will undoubtedly have many detractors. Many legislators, governors, mayors, and officials heading entities with eminent domain power believe that they need the ability to take land cheaply and easily to accomplish their state or city's redevelopment and economic goals.[197] Some courts and judges undoubtedly find this view persuasive. For example, Justice Freeman expressed concern in his *National City Environmental* dissent that the Supreme Court of Illinois's enhanced standard of review would be the death knell of "legislation in furtherance of economic development and revitalization."[198] Indeed, many states and cities believe that economic redevelopment is necessary to increase tax revenues that are needed to pay for government services.[199] These critics could claim that this prong would eliminate a state or city's ability to redevelop and revitalize because any other practicable option must be unavailable or exhausted before eminent domain can be used to affect the legislative goal.

The potential fears of these critics would be misplaced. Underlying this

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193. *See* discussion *supra* Parts II.A.1, II.B.1, III.

194. *See* discussion *supra* Part III.A.

195. *See* discussion *supra* Part III.A.

196. *See supra* text accompanying note 137.

197. *See* Matthew Tully, *House OKs Higher Price for Eminent Domain*, INDIANAPOLIS STAR, Feb. 22, 2005, at B4.

198. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 26 (Ill. 2002) (Freeman, J., dissenting).

199. *See, e.g.*, *id.* at 20-21 (noting that unemployment has increased state needs to pay for public assistance programs and that if the unemployed residents leave to find employment, tax revenues will be reduced to pay for these obligations).

prong is the assumption that in most cases there will be another feasible way to accomplish the legislative goal. Thus, economic redevelopment can still be accomplished. This prong simply forces a condemning authority to change some of the methods by which it accomplishes its goals. For example, if a city wanted to revitalize, it could alter its plans, focusing on takings requiring a lesser standard of review, enticing the current owners of the land to move through increased payouts or tax incentives. The condemning authority would be required to exhaust *reasonable* alternatives before exercising its eminent domain powers.

In addition, instead of foreclosing the possibility of economic redevelopment, the prong assures that economic redevelopment is the true issue and not merely pretextual. The more a condemning authority insists on condemning a certain parcel of land that a private entity desires, the more reasonable is the inference that a taking is only "to achieve the naked transfer of property from one private party to another."[200] Such an inference militates against calling a taking a "public use."

2. Prong 2: Assuring that the Asserted Public Use Will Accrue in a Reasonable Time.—The second prong of the three prong test requires a reviewing court to determine if an asserted public use has a reasonable chance of accruing in a reasonable amount of time.[201] For example, if a state or city wishes to condemn property for the construction of a shopping mall, it will have to justify how the construction is a public use and what the use's benefits are. Once the court determines the end being pursued by the legislature, this prong is used to determine if the taking and the subsequent transfer to a private entity can actually fulfill the asserted public use in a reasonable period of time. Thus, if the aforementioned shopping mall's purpose is to stimulate other economic growth in the area, that reviewing court must determine that the shopping mall's construction could reasonably accomplish that goal.

This prong remedies cases where land is condemned and transferred to a private entity and the benefit to be derived from the asserted use does not accrue to the public at all or at least within a reasonable time.[202] Additionally, this prong is designed to deter a condemning authority from asserting a pretextual public use. Pretextual assertions will be decreased because if the condemning authority is able to produce only minimal evidence that a benefit could accrue, it will be easier for the trier of fact to conclude that the taking was actually designed to benefit a private party when analyzing this prong.

To give complete effect to this prong, a reviewing court should require the

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200. 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (explaining that the only reason that eminent domain was declared was to satisfy Costco's expansion demands), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003).

201. Brief for Petitioner at 36, Kelo v. City of New London (*Kelo II*), 125 S. Ct. 2655 (No. 04-108), *reh'g denied*, 126 S. Ct. 24 (2005) (arguing that use of eminent domain to achieve "economic redevelopment" should only be authorized if "there is reasonable certainty" that public benefits will accrue).

202. *See* discussion *supra* Part III.D.

condemning authority to present statistics and other relevant data to support its assertions. This is a noted departure from the rational basis test offered by *Berman* and *Midkiff*. This prong requires a court to look at the taking ex ante to determine if the asserted benefits are likely to occur. This is in stark contrast to the *Midkiff* approach which only requires that the condemning authority "rationally *could have* believed that the [Act] would promote its objective."[203] By requiring the condemning authority to provide evidence that the benefit from the use is likely to accrue, this prong substantially limits the deference given to legislative findings and their determinations regarding what constitutes a public use.

Furthermore, because the court will require evidence that the public use will result from the taking, the public at-large will also have access to detailed information regarding the proposed taking and subsequent transfer to a private entity. This also enables increased media scrutiny of the taking, which is especially valuable if the taking is controversial. Additional access to information will allow the pre-condemnation owners of the land and other members of the public to seek not only legal, but political redress against the government. Because political redress will be more effectively sought, the takings incentive structure will be altered so that it is more in line with the incentive structure for a traditional taking, such as a highway.[204] The information allows the incentive structure to be altered because the media and other interested parties will have access to the information necessary to engage the public at-large. The incentive structure will also be changed because the interested parties have the burden of proving that the asserted benefit will likely not accrue or that the taking is a poor policy choice. Inertia or lack of resources will likely prevent the interested parties from proving these matters. If interested parties do not have access to the requisite information, they will never persuade the public at-large.

This prong can also be fulfilled through the use of contractual or legislative "clawback" provisions that take title back from the private transferee if the new owner fails to effectuate the asserted public use.[205] Although these provisions alone will not fulfill prong two in most cases, they can provide evidence that a measurable benefit will accrue to the public. It is reasonable to assume that if a private entity will be penalized for not bringing about a certain result, then that private entity will likely put forth effort to achieve the result. Additional incentives and disincentives may be used to supplement proof of the likelihood that the benefit will be achieved.

This prong could result in a condemning authority being reluctant to condemn property if there is a risk that a benefit will not occur. Thus, this prong could result in opportunities that could provide a high return on the social, economic, and political capital being lost because the condemning authority

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203. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (emphasis added) (alteration in original) (internal quotations omitted) (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

204. *See* discussion *supra* Part III.B.

205. *See supra* notes 163-64 and accompanying text.

refuses to take the risk. Although it is true that a condemning authority might not take advantage of some potentially high-yield transactions, the prong does not require the condemning authority to absolutely convince the court that the asserted benefit will definitely occur or is extremely likely to occur; such a level of proof would be difficult or impossible to meet. A condemning authority would only need to prove that it is *likely* that the asserted benefit will occur. The purpose of this prong is to prevent the condemning authority from declaring eminent domain based on a public purpose that is merely speculative and from asserting the public use only when litigation ensues from a challenged taking.

In addition, although some high-yield transactions will be foregone, one must remember that many high-yield transactions will be high-yield not because the benefits to the condemning authority will be exceedingly high, but rather because the costs to the city will be exceedingly low.[206] In many cases, the cost is so low because the condemning authority has singled out the condemned property owner and because the authority has passed on the economic costs to the private transferee.[207] Thus, in such a case, many of the high-yield transactions do not require the condemning authority to subject itself to much risk.

3. Prong 3: Private Transferee Does Not Receive the Surplus Created by the Taking.—The final prong of the proposed test requires the government to show that the private transferee of the land will not receive gratuitously the surplus value that represents the difference between the pre-condemnation and post-condemnation values. This prong is needed to prevent much of the rent-seeking behavior engaged in by many private entities.[208] To achieve this purpose, it is necessary for the private transferee of the land to pay the post-condemnation market value of the land. This is not to say that the pre-condemnation owner of the land will receive this total amount as part of his compensation for the land.[209] Rather, the post-condemnation transferee will be required to pay the fair market value for the land and pay to make the necessary improvements to the land.

Successful implementation of this prong will help repair the incentive structure that has been harmed by the current abuse of the Public Use Clause. By subjecting the private transferees to market pressures, they will be less likely to seek eminent domain as a means to accomplish their ends. Eminent domain is currently attractive to corporations because they could get the land that they want at substantial savings;[210] thus, it follows that these corporations will be much less likely to seek eminent domain to take the land if they face increased economic and political costs. Thus, if private parties are less willing to seek out eminent domain as a means to achieve their ends, the government will be less likely to use it as well, even if the costs imposed on it remain low.

In addition, the takings incentive structure is repaired because it reduces the

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206. *See supra* notes 146-47 and accompanying text.

207. *See supra* note 150 and accompanying text.

208. *See* discussion *supra* Part III.C.

209. It should be noted that this prong of the test is not designed to alter the analysis of what constitutes just compensation. *See* U.S. CONST. amend. V.

210. *See* Berliner, *supra* note 13, at 793.

likelihood that property owners will be singled out.[211] The pre-condemnation owners of land will be less likely to be singled out because the condemning authority will be less likely to use eminent domain. In addition, because private entities will seek eminent domain less often, the government will attempt to use other incentives to accomplish its redevelopment objectives. For example, a state or local government could use property tax abatements to further its goals. However, to some extent eminent domain will always result in some singling out because only a finite group of people will have their land taken in any given case. This prong is designed, in part, to mitigate the singling out.

Unfortunately, it is nearly impossible to design an incentive scheme that simultaneously decreases the desire of the government and of a private entity to use eminent domain. This is because increased cost to one increases the desire of the other to use eminent domain. However, it is likely best for the test to subject private entities to greater economic costs because those costs are more likely to deter them from seeking eminent domain. As Professor Garnett notes, "compensation alone may underdeter the government from exercising the power of eminent domain."[212] Professor Garnett states that this is true "[b]ecause government actors respond to political, not market, incentives."[213] As a matter of policy, it is better to place the financial costs on the party that will be most deterred by their imposition.

This prong still makes it possible for governments to accomplish their redevelopment goals despite the imposition of greater costs on the private transferee. First, fair market value for the property may still be a good deal. A private developer can realize gains even by paying fair market value. In addition, because the market value of the property should be measured in light of the new use, the private transferee could realize gain if the development does better than expected or if new businesses and development are attracted to the area as a result of the redevelopment.

In addition, this prong does not foreclose the possible use of other incentives. Incentives such as tax increment financing or offering to buy a certain quantity of the business's products can be used to entice businesses to come into an area and redevelop it.[214] Many of these incentives could still be used in conjunction with eminent domain or by themselves.

B. Defending the Test

The test as a whole will undoubtedly be criticized. It will likely face two

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211. *See supra* note 150 and accompanying text.

212. Garnett, *supra* note 46, at 956.

213. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000)).

214. Professor Garnett provides a partial list of additional incentives that have been used to entice corporations to relocate and includes some extreme examples. *Id.* at 958. She also notes that there is evidence that these incentives do not accomplish their purpose because of competition. *Id.*

principle criticisms. Some will argue that strict scrutiny or another form of heightened review should be used to analyze these types of cases. Others will contend that the test does not go far enough in protecting private property rights because property rights are not given the same protection as liberty rights.

Many commentators who have analyzed the problem posed by the broad, deferential standard of review offered by cases such as *Berman* and *Kelo II* have argued that the strict scrutiny used to analyze violations of Due Process and Equal Protection rights should be used to analyze eminent domain cases.[215] Others have argued that heightened scrutiny should be applied when certain elements or factors are present.[216] Although strict scrutiny or a general form of heightened scrutiny would be successful in limiting the occurrence of problematic takings,[217] these methods of review do not specifically address the problems occasioned when private transferees receive condemned property. Thus, the proposed test attempts to eliminate the problems caused by problematic takings rather than simply looking for problematic takings and applying a one-size-fits-all test. Additionally, the test proposed provides a predetermined framework so condemning authorities can analyze their actions ex ante. In contrast, under strict scrutiny and some heightened standards, absent prior precedent, the condemning authority will never be certain whether or not a court will deem a taking's justification "compelling."[218]

Some critics could argue that this test does not go far enough in preventing abuses of property rights because the protection it provides is not the same protection afforded to liberty rights. It is true that the above test does not provide protection identical to that of liberty rights. However, property rights are different than liberty rights, and therefore merit different, although equal, kinds of protection. Different problems arise with property rights as opposed to liberty rights. The test and its implications provide a high level of protection for cases where one private party will be forced to sell his land to another private entity. This is principally accomplished by the requirement that there be no other practicable method of achieving the legislative interest. The requirement erects a substantial barrier to transferring condemned property to private entities after the taking occurs.

In addition, property rights merit a different type of protection than liberty rights because of the ability of the government to take property for public use. The United States has a long history of taking private land to be given to another private individual.[219] The justifications for some of these takings have been long

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215. *See, e.g.*, Nader & Hirsch, *supra* note 16, at 224.

216. *See, e.g.*, Scott, *supra* note 131, at 474-79.

217. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (stating that strict scrutiny has been accused of being "strict in theory, but fatal in fact" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment))).

218. *See id.* (noting that the strict scrutiny test is satisfied when action is "necessary to further a compelling interest" and satisfies "the 'narrow tailoring' test").

219. Scott, *supra* note 131, at 468.

established.[220] As time moves forward and technology changes, it is important to have a standard, that while vigorously protecting private property rights, also permits the establishment of new public uses that allow the government to accomplish its tasks more effectively.

CONCLUSION

There is substantial disagreement among jurisdictions regarding where the line between public use and private use is drawn and which branch of government is the appropriate one to draw it. Thus, it truly matters which jurisdiction's law controls when determining if a post-condemnation transfer of land to a private developer is constitutional. Many jurisdictions have taken the view that the legislature gets to determine what the public use is and can use eminent domain in any rational way to affect that goal. Other jurisdictions have used a variety of approaches that take a much narrower view of what the Public Use Clause demands.

The jurisdictions that have adopted a broad interpretation of "public use" have done so in error. The deferential interpretation primarily fails to give effect to the Framers' intent that individual private property rights should be protected. These jurisdictions fail to give effect to the Framers' intent by not treating property rights as equivalent to liberty rights. The broad interpretation of the Public Use Clause is bad public policy because it makes the government more likely to take private property because the interpretation alters the takings incentive structure and encourages private entities to engage in rent-seeking behavior. Also, it is bad public policy to allow a private person's land to be taken and transferred to another private entity when the government has not shown that any benefit is likely to accrue.

Additionally, jurisdictions that utilize a narrower interpretation of "public use" and apply some level of heightened scrutiny have not gone far enough in protecting private property rights. Although the cases discussed above may represent the beginning of a movement to use heightened scrutiny in public use cases, such a movement has not fully materialized. Many of these cases contain language that future courts could abuse in future takings cases or do not provide clear standards for reviewing courts to utilize. Also, in some cases, it is possible to harmonize the courts' holding with cases like *Berman* and *Midkiff*, which allowed for a broad interpretation of "public use."

Courts should go farther and adopt a comprehensive test that provides for heightened scrutiny of takings when the condemned property is to be subsequently transferred to a private entity. Such a test should remedy the problems that the broad, deferential standard of review has created. At the same time, the standard should be flexible enough to allow for changes in society and technology that the legislature will have to meet. However, the standard should in every case assure that property rights are held on an equal, although not identical, plane as liberty rights.

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220. *See id.* at 475.

This Note has proposed a change in the jurisprudence interpreting existing provisions. To the extent that a jurisdiction finds its courts unwilling to affect a doctrinal shift, legislative or constitutional changes may be required to bring about change.[221] Such a change will undoubtedly require active engagement of the legislature and, in many cases, the public. Such changes may be difficult to accomplish, but, if faced with a court that will not change its jurisprudential position, it may the be the only option available if a person's right to own private property is to be adequately protected.

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221. As of this writing, a bill is pending in Congress that would deny federal funding to projects that utilize eminent domain for economic development. H.R. 3135, 109th Cong. § 2 (2005). The bill also forbids the U.S. government from using economic development as a justification for its exercise of eminent domain. *Id.*