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NOTES

EMINENT DOMAIN FOR PRIVATE DEVELOPMENT – AN IRRATIONAL BASIS FOR THE EROSION OF PROPERTY RIGHTS

INTRODUCTION

“[T]he government does not have unlimited power to redefine property rights.”¹

The city destroys a family’s home to construct luxury apartments.² To benefit the public, a widow’s property is seized for the construction of a casino’s parking garage.³ to effectuate a higher use of the land, a successful business is razed to make room for a larger one.⁴ These are but a few of the types of actions municipal governments have engaged in under the pretense of furthering the “public use.”

This Note explores the questionable exercise of the eminent domain power by municipalities in furtherance of private development projects. Part I briefly describes the historical roots and modern development of the eminent domain power in America, as well as the constitutional limitations placed upon its use. Part II examines the increasing boldness with which municipalities have exercised this power for private development and asserts that the current system fails to provide adequate protection for constitutionally guaranteed private property rights. Part III proposes a solution whereby tradi-

¹ Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982).

² V. David Sartin, *The Argument over West End: With 27 Years Invested, This Family Wants to Stay*, PLAIN DEALER, Oct. 25, 2003, at B3.

³ City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003); see also discussion *infra* Part II.A.

⁴ 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); see also discussion *infra* Part II.A.

tional uses of eminent domain would be per se valid, but takings for the purpose of conveyance to private entities would be subject to strict scrutiny. Part IV suggests that the pendulum is swinging back in favor of private property rights and that courts should endorse this movement.

I. FROM ROADS TO SHOPPING MALLS – THE EVOLUTION OF EMINENT DOMAIN

A. *Eminent Domain in the Early Republic*

The Constitution did not create or explicitly grant the power of eminent domain to the states; it assumed that such power existed as a natural attribute of the state's sovereignty and imposed limitations on its exercise.⁵ These restrictions were contained in the Fifth Amendment's Takings Clause: "nor shall private property be taken for *public use* without just compensation."⁶ Furthermore, all states either had, or would eventually adopt, state constitutional provisions requiring eminent domain to be used only for a public use and with just compensation.⁷

The protection of private property was a major concern of the founders.⁸ Specifically, the founders were afraid of what would happen if a "faction" gained the majority and sought to impose its desires upon the better-landed minority.⁹ The founders, being landowners themselves, understood that if the government had the unrestricted right to seize private property, it would be vulnerable to capture by a

⁵ See *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) ("The power of eminent domain is an attribute of sovereignty, and inheres in every independent State."); *Kohl v. United States*, 91 U.S. 367, 372 (1875) ("The right of eminent domain was ... well known when the Constitution was adopted....").

⁶ U.S. CONST. amend. V. (emphasis added).

⁷ RICHARD R. POWELL, 13 *POWELL ON REAL PROPERTY* § 79F.01(a)(iii) (noting that every state constitution, except for North Carolina's, has a public use requirement, and even the North Carolina courts have held that such a requirement exists notwithstanding its textual absence). The Fifth Amendment originally applied only to the federal government. *Baron v. Baltimore*, 32 U.S. 243, 250-51 (1833) (declaring that the Takings Clause of the Fifth Amendment contains "no expression indicating an intention to apply them to state governments"). The Supreme Court eventually required states to abide by Fifth Amendment restrictions by incorporating it into the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 238-39 (1896) ("The conclusion of the court on this question is that, since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.").

⁸ See *THE FEDERALIST* NO. 85, at 453 (Alexander Hamilton) (Carey and McClellan eds., 2001) (proposing that the Constitution would prevent government from undermining the foundation of property as a reason for its ratification).

⁹ See *THE FEDERALIST* NO. 10, at 43 (James Madison) (Carey and McClellan eds., 2001).

politically influential minority who may intend to upset the distribution of property.¹⁰

The judiciary has struggled with the interpretation of the Public Use Clause since the early days of the republic.¹¹ This struggle was not particularly important in the years following the ratification of the Fifth Amendment because the Public Use Clause was rarely litigated.¹² This lack of litigation is a result of what would come to be known as the “narrow view” of the scope of eminent domain power.¹³

The narrow view reflected the belief that public use was a relatively simple concept that allowed for the taking of land when it—quite literally—would be used by the public.¹⁴ Under this narrow view, the taking must have resulted in a facility that is physically accessible to some segment of the population.¹⁵ Works such as roads, bridges, libraries, schools, and parks were considered public uses, and the government’s right to exercise its power of eminent domain to gather land for the construction of these works was well established.¹⁶ The Supreme Court stated that a landowner whose land was taken for a purpose within this narrow view was *damnum sine injuria*—at a loss without legal recourse.¹⁷ Both state and federal¹⁸ courts employed this narrow view of the eminent domain power.¹⁹

¹⁰ Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 586 (2003) (describing the various views of the founders regarding property rights).

¹¹ POWELL, *supra* note 7, at § 79F.03(1) (outlining the “conflicting historical precedents” regarding the term “public use”).

¹² *See id.* (explaining that for nearly 40 years the government only used the power of eminent domain to build roads or construct dams).

¹³ *Id.*

¹⁴ Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV. 61, 67-68 (1986) (analyzing judicial tests for determining the meaning of “public”).

¹⁵ *Id.*

¹⁶ *Kohl v. U.S.*, 91 U.S. 367, 371 (1875) (listing examples of commonly recognized public uses justifying the use of eminent domain such as “forts, armories, and arsenals . . . navy-yards and light-houses . . . custom-houses, post-offices, and court-houses”).

¹⁷ *Smith v. Corp. of Wash.*, 61 U.S. 135, 148 (1857) (holding that removing trees from a lawn to make room for grading the road was a permissible public use).

¹⁸ The federal government itself did not actually have the power of eminent domain until 1875. Until that point, they were dependent upon states’ using their eminent domain powers and then conveying the property to the federal government. *See Kohl*, 91 U.S. at 371.

¹⁹ Prior to the Congressional grant to the federal courts of general federal question jurisdiction, and jurisdiction over actions under 42 U.S.C. § 1983 against state actors for constitutional violations, most cases involving questions of federal constitutional rights were adjudicated in state courts. *See, e.g., Gaylord v. Sanitary Dist.*, 68 N.E. 522 (Ill. 1903) (applying federal law to strike down an attempt to take land for the construction of a private mill); *Clark v. Nash*, 198 U.S. 361, 368 (1905) (stating a preference for allowing state courts to determine the validity of public use challenges).

B. *The Rise of the Public Benefit Test*

Eventually the Supreme Court began to take a less restrictive approach to the use of eminent domain that would come to replace the narrow view.²⁰ The legal landscape became more complicated as the narrow view gave way to a different test—judging public use by activity that benefits the public rather than just physical occupation of land.²¹ The Court consummated its embrace of the public benefit test, and thus its departure from the narrow view, in the landmark case of *Berman v. Parker*.²²

In *Berman*, the Supreme Court affirmed the constitutionality of Washington D.C.'s plan to use eminent domain for redeveloping an area of the city that had deteriorated into slums.²³ Congress determined that "conditions existing within the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare"²⁴

A department store owner, whose property was within the area targeted for the taking, challenged the legality of this action.²⁵ The storeowner claimed that the taking was unconstitutional because his store was not blighted like the surrounding properties and was thus outside the scope of the statute authorizing the taking.²⁶ He further claimed that the taking violated the Public Use Clause because the property would be transferred to a private party for redevelopment once it was condemned.²⁷

The Court rejected the landowner's challenge and upheld the taking, declaring that the Public Use Clause gives a great amount of deference to legislative definitions of public use. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."²⁸ If there

²⁰ See, e.g., *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (describing the requirement of physical use as inadequate).

²¹ See Merrill, *supra* note 14, at 68 (outlining the historical trends leading to the change in the view of the courts).

²² 348 U.S. 26 (1954).

²³ *Id.* at 28.

²⁴ *Id.* The rest of the examples of eminent domain used in this note involve municipalities. In this situation, Congress was acting as the legislative body in charge of the nation's capital. *Id.* at 31 (analogizing Congress' legislative power over the capital to the powers of the states). See also U.S. CONST. art. I, § 8, cl. 17 (granting Congress plenary authority over the capital).

²⁵ *Berman*, 348 U.S. at 31.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 32.

was any doubt left about the Court's abdication of its role in making public use determinations, the Court removed it when it stated:

[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . [t]his principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.²⁹

To prevent observers from mistaking *Berman* to stand merely for the narrow holding of expanding public use to include slum clearance or promoting health and safety, the Court justified its holding through an analysis of the "police power."³⁰ The Court wrote that protecting public safety and health are classic examples of the police power, and that "[o]nce the object is within the authority of Congress, the right to realize it through eminent domain is clear. For the power of eminent domain is merely the means to the end."³¹ States and municipalities seized upon this deference by engaging in a host of takings that almost certainly would have been deemed private rather than public before *Berman*.³²

C. *The Ambiguous Line Between Public and Private Use*

The seminal case of *Poletown Neighborhood Council v. City of Detroit*³³ is an example of what was at the time a novel interpretation of public use. In *Poletown*, General Motors threatened to close its Detroit plant if the city would not help it acquire land upon which to expand its factory.³⁴ The city yielded to General Motors' wishes and condemned a tract of 500 acres, including residential property. This act resulted in a legal challenge by several residents who claimed that the taking was nothing more than the city using its eminent domain power to allow a private corporation to generate more profit.³⁵ The residents claimed that the expansion was for a private use and thus it violated the requirements of the Public Use Clause. The city re-

²⁹ *Id.*

³⁰ *Id.* ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.")

³¹ *Id.* at 33.

³² See discussion *infra* Part II.A.

³³ 304 N.W.2d 455 (Mich. 1981).

³⁴ *Id.* at 458.

³⁵ *Id.*

sponded by arguing that retaining an industrial base, and the employment opportunities that coincided with it, constituted a public use.³⁶

Over two strongly written dissents,³⁷ the *Poletown* court ruled that the taking was a public use because the city council determined that the increased tax revenue and rise in employment would benefit the city.³⁸ The *Poletown* court, following the *Berman* court's lead, concluded that once the legislature has determined that a particular act is a public use, "[t]he Court's role after such a determination is made is limited."³⁹ Although *Poletown* was decided primarily on state constitutional grounds, the relevant language of the state constitutional provision⁴⁰ is substantially the same as the Takings Clause, and the *Poletown* decision was indicative of the direction in which much of the judiciary, both state and federal, was about to embark regarding public use.

Soon after *Poletown*, the United States Supreme Court was confronted with the task of determining whether an even more obvious transfer of property from one private party to another fell within the rubric of the Public Use Clause. In *Hawaii Housing Authority v. Midkiff*,⁴¹ the Hawaii legislature determined that 47% of the state's land was held by a mere 72 individuals, and "concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."⁴²

The Hawaii legislature's solution was to create an agency, the Hawaii Housing Authority, with the statutory authority to condemn a lessor's land and transfer it to the lessee.⁴³ Several landowners whose land was subject to such condemnation challenged the constitutionality of the statute in federal district court claiming that it violated the Public Use Clause, but they were unsuccessful.⁴⁴ The Court of Appeals for the Ninth Circuit granted the landowners a brief victory by reversing the district court and holding that the act was a "naked attempt ... to take the private property of A and transfer it to B solely

³⁶ *Id.* Even the dissent took judicial notice of Detroit's 18% unemployment rate. *Id.* at 465 (Ryan, J., dissenting).

³⁷ *Id.* at 460 (Fitzgerald, J., dissenting); *Id.* at 464 (Ryan, J., dissenting).

³⁸ *Id.* at 458-59.

³⁹ *Id.*

⁴⁰ See MICH. CONST. art. 10, § 2 ("Private property shall not be taken for public use without just compensation....").

⁴¹ 467 U.S. 229 (1984).

⁴² *Id.* at 231.

⁴³ *Id.* at 233-34.

⁴⁴ See *Midkiff v. Tom*, 483 F. Supp. 62, 70 (D. Haw. 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

for B's private use and benefit."⁴⁵ However, upon granting certiorari, the Supreme Court reversed the Ninth Circuit and reaffirmed the constitutionality of Hawaii's land condemnation regime.⁴⁶

Justice O'Connor, writing for the Court, stated, "where 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."⁴⁷ Justice O'Connor then noted that Hawaii's rational basis for taking from a lessor and giving to a lessee is "to reduce the *perceived* social and economic evils" of concentrated land ownership.⁴⁸

There can be no doubt that *Midkiff* further relaxed the protection of the Public Use Clause, yet the Court would have had no way to predict that it had opened a "Pandora's Box" of interference with individual property rights.⁴⁹ A closer examination of the aforementioned cases, and their successors, demonstrates the extent to which the modern interpretation of public use has failed to be much of a restriction upon governmental takings for private purposes.

PART II: THE CURRENT PUBLIC USE REGIME IS INSUFFICIENT TO PROTECT PROPERTY RIGHTS

A. *Examples of Eminent Domain Abuse*

Armed with the knowledge that courts will defer to their judgment about the definition of public use, municipalities have become increasingly bold in their use of eminent domain.⁵⁰ The following are just a few all too common examples of the use of eminent domain for takings that would previously have been considered private in nature rather than public.⁵¹

⁴⁵ *Midkiff v. Tom*, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd sub nom.* Haw. Housing Auth. v. *Midkiff*, 467 U.S. 229 (1984).

⁴⁶ Haw. Housing Auth. v. *Midkiff*, 467 U.S. 229, 241.

⁴⁷ *Id.*

⁴⁸ *Id.* at 241-42 (emphasis added). Whether such a concentrated land ownership creates an *actual* social and economic evil is debatable. Professor Richard A. Epstein noted that, "[n]o antitrust expert thinks 'oligopoly' because there are 'only' seventy or twenty-two or eighteen landowners in a given market." RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 181 (1985).

⁴⁹ See 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, 294 (2000) (explaining how *Berman* affected eminent domain jurisprudence).

⁵⁰ See DANA BERLINER, INSTITUTE FOR JUSTICE, *PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN* 3 (2003), available at <http://www.castlecoalition.org/report/report/shml> (last visited Oct. 9, 2004) (describing the large increase in private takings by municipalities in the last five years).

⁵¹ For other examples, see *generally id.* at 3, 10-217 (listing a state-by-state analysis of re-

The city of Las Vegas took action to condemn a widow's land upon which she relied for rental income for the allegedly "public use" of expanding a casino's parking lot.⁵² The city argued that the parking lot was a public use because it would allow greater access to downtown attractions and would revitalize the downtown economy.⁵³ Because the city agency charged with revitalization lacked the resources on its own to build the parking garage, it used its eminent domain power to seize thirty-two parcels of land, which it then transferred to a consortium of casinos for development.⁵⁴

Casino parking lots have not been the only amenity that cities have acquired for private developers. The City of Detroit failed to see the need to stop with just a parking lot and instead used its eminent domain power to make room for actual casinos.⁵⁵ The city justified its action by arguing that the casinos would generate additional tax revenue and thus benefit the public.⁵⁶

As egregious and seemingly private in nature as these two examples are, they pale in comparison to that which happened a few years ago in Merriam, Kansas. Local businessman William Gross was surprised to discover that the city had condemned his used car lot in order to make way for the expansion of a neighboring BMW dealership.⁵⁷ The city justified the action by claiming that the BMW dealership would bring in an additional \$500,000 in tax revenue.⁵⁸ In response, Mr. Gross offered to transform his business into a Mitsubishi

ported abuses over a five year period).

⁵² See *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 6-7 (Nev. 2003).

⁵³ *Id.*

⁵⁴ *Id.* at 10-11.

⁵⁵ See George Cantor, *Las Vegas Can Teach Detroit About Casino Location*, DETROIT NEWS, Mar. 11, 2000, at 8C ("If the city had put half the effort into obtaining land in the area originally discussed as the casino district as it has trying to acquire it by eminent domain on the river, the process would be much farther ahead.").

⁵⁶ See Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use In Order To Effectuate a "Public-Private Taking": A Proposal To Redefine "Public Use"*, 2000 L. REV. M.S.U.-D.C.L. 639 (2000); R.J. King, *Casinos in Detroit: City Casinos Will Draw Few Businesses: Real Estate Experts Don't Expect Much Around Temporaries*, DETROIT NEWS, Aug. 20, 1999, at 4B (reporting that the casinos will bring in \$181,000,000 in annual revenue to the city and state). It is ironic that Detroit determined that a casino fell within the *Berman* court's approval of a statute that authorized blighting for those properties that are "injurious to the public health, safety, morals, and welfare...." *Berman v. United States*, 348 U.S. 26, 28 (1954) (emphasis added). Apparently, for \$181,000,000, Detroit considered casinos to be a public use that outweighed the social costs.

⁵⁷ DANA BERLINER, CASTLE COALITION, GOVERNMENT THEFT: THE TOP 10 ABUSES OF EMINENT DOMAIN (2002), available at http://www.castlecoalition.com/top_10_abuses/top_10_report.pdf, at 5 (last visited Oct. 9, 2004).

⁵⁸ *Id.*

dealership, which would have generated \$150,000 more in tax revenue than what his used car lot produced, but the city refused.⁵⁹ "It wanted the BMWs."⁶⁰ How this could be seen as anything other than taking from A for the sole benefit of B⁶¹ is a conclusion that only the Merriam City Council could divine.

Relying upon the *Berman* model, many takings with a questionable public use were executed under the guise of clearing away "blight."⁶² Blight came to represent more than just unseemly or dilapidated property; it was instead used as a term of art to represent property that the city intended to seize for redevelopment. As a mayor of a city which had employed this tactic explained, "it really doesn't have a lot to do with whether or not your home is painted . . . The question is whether or not that area can be used for a higher and better use."⁶³

The desire for a "higher and better" use is frequently a justification for taking private property for the purpose of private development.⁶⁴ The argument is that if a "higher" use is available for a piece of property, then the government can use eminent domain as the instrumentality to effectuate such a use.⁶⁵ The flaw with this rationale is that it is difficult for one to imagine a scenario in which a large corporation, or other organized entity favoring the taking, does not win so long as the property in question is owned by an individual, or any entity less organized or influential than the proposed takers. This rule weighs heavily against the individual property owner because "[e]verybody's home would produce more tax revenue as an office building."⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ An early Supreme Court case, *Calder v. Bull*, 3 U.S. 386 (1798), cited the taking of property from A and giving it to B as an example of a law "against all reason and justice . . ." *Id.* at 388.

⁶² See generally BERLINER, *supra* note 50. Eradicating "blight" has been a frequent excuse for using eminent domain for private development, even though the *Midkiff* court made it clear that the Public Use Clause is not limited to clearing blight, but expands to the full boundaries of the state's police power. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

⁶³ *60 Minutes: Eminent Domain: Being Abused?* (CBS television broadcast, Dec. 28, 2003), transcript available at <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml> (last visited Oct. 9, 2004) [hereinafter *60 Minutes*] (quoting then-mayor Madeline Cain of Lakewood, Ohio).

⁶⁴ Linda A. Sharp, Annotation, *Construction and Application of Rule Requiring Public Use For Which Property Is Condemned To Be "More Necessary" Or "Higher Use" Than Public Use To Which Property Is Already Appropriated - State Takings*, 49 A.L.R.5TH 769, 769 (1997).

⁶⁵ *Id.*; *Midkiff*, 467 U.S. at 240.

⁶⁶ Blaine Harden, *In Ohio, a Test for Eminent Domain: Rights vs. Renewal at Stake in Case*, THE WASHINGTON POST, June 22, 2003, at A03 (quoting Dana Berliner of the Institute for Justice, a public interest law firm which has litigated a number of public use challenges).

Perhaps such a transformation from a supposedly lower use to a higher one would be more palatable if there were some objective test for ensuring fairness; however, the law as it exists now entrusts the decision about whether property has a higher use to the very agency that is proposing the taking. This fox-guarding-the-henhouse policy disregards the constitutional and historical protections afforded by the concept of separation of powers.⁶⁷

B. *Municipal-Corporate Abuse*

Why have citizens, who ultimately have the power to control the legislature's membership, allowed the government to grant special privileges to General Motors, BMW, and casinos when it ultimately results in the erosion of property rights? Public-choice theory reveals some answers.⁶⁸

The current state of eminent domain jurisprudence is a manifestation of the Madisonian warning against the dangers of factions.⁶⁹ By allowing a locally elected body to make determinations about which uses are public enough to justify the use of eminent domain, an incentive exists for developers to pursue their goals through the political process rather than through free exchange.⁷⁰ One observer summarized the situation by writing that "modern government has a lot to offer, and its constituents are increasingly all too eager to pursue it."⁷¹

This problem, described in economics literature as rent-seeking,⁷² reduces the transaction costs that a developer must undertake because they are no longer dependent upon negotiating the sale of property with the landowner.⁷³ Yet the gains in efficiency are offset by the

⁶⁷ See *infra* Part III.B.1.

⁶⁸ See JAMES D. GWARTNEY & RICHARD L. STROUP, *ECONOMICS: PRIVATE AND PUBLIC CHOICE* 100 (1995) (defining public-choice theory as "[t]he study of decision making as it affects the formulation and operation of collective organizations such as governments . . . the principles and methodology of economics are applied to political science").

⁶⁹ Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 *CHAP. L. REV.* 173, 174-75 (2003).

⁷⁰ Professor Thomas Merrill suggests that judicial deference is due to a focus on the *ends* of the acquisition of property rather than the *means* used to acquire it. See Merrill, *supra* note 14, at 64-65. Even an outright prohibition on the use of eminent domain would not require government to abandon its land use policies; it would merely require them to be pursued in the marketplace through negotiation rather than through coercion. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1105-06 (1972) (describing various levels of protection available for securing entitlements such as property).

⁷¹ Simpson, *supra* note 69, at 173.

⁷² Rent-seeking describes actions taken to acquire wealth by using the political process to plunder others rather than investing in positive-sum production. GWARTNEY & STROUP, *supra* note 68, at 842.

⁷³ EPSTEIN *supra* note 48, at 5.

loss of property rights. The notion of free alienability is a fundamental property right;⁷⁴ transfers of land through rent-seeking activities rather than market forces rob the landowner of her alienability rights and create market inefficiency by removing decisions from the marketplace and inserting them into the political sphere.⁷⁵

The political process provides an incentive for the legislative body to seek favor from organized interest groups in order to raise money and gain votes, even if it is at the expense of individual landowners.⁷⁶ This state of affairs led one scholar to write, "one could conclude that such exercises of the eminent domain power are nothing more than a form of welfare for corporations and a source of votes for politicians."⁷⁷

Justice Ryan of the Michigan Supreme Court predicted this eventuality in his *Poletown* dissent when he warned that, "[w]ith this case the Court has subordinated a constitutional right to private corporate interests."⁷⁸ Justice Ryan was particularly concerned with the power that his court's decision would grant to corporate interests. "[W]hen the private corporation to be aided by eminent domain is as large and influential as General Motors, the power of eminent domain, for all practical purposes, is in the hands of the private corporation. The municipality is merely the conduit."⁷⁹

Corporations have seized upon the opportunity to use municipalities as their own personal real estate agents.⁸⁰ In Lakewood, Ohio, a property owner was told that his home was "blighted" because it lacked central air conditioning and an attached two-car garage, and thus would be seized to make room for the construction of a shopping mall and luxury apartments. The property owner summarized the threat that these actions pose to individual property rights as follows: "I thought I bought this place. But I guess I just leased it, until the city wants it."⁸¹

The examples described above suggest that municipalities have become mere conduits for corporate transactions. Indeed, it is difficult to imagine that the Detroit City Council would decide on its own

⁷⁴ *Id.* at 74; 63C AM. JUR. 2d *Property* § 35 ("One of the principal and most important rights incident to ownership is alienability, or the right to disposition.").

⁷⁵ See GWARTNEY & STROUP, *supra* note 68, at 842.

⁷⁶ See *id.* at 836-37.

⁷⁷ Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC. L. REV. 49, 50 (1999).

⁷⁸ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 482 (Mich. 1981) (Ryan, J., dissenting).

⁷⁹ *Id.* at 481 (Ryan, J., dissenting).

⁸⁰ Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 543 (2002).

⁸¹ 60 Minutes, *supra* note 63 (quoting Lakewood resident Jim Saleet).

to construct a casino without the prodding of the casino owners. Likewise, it is doubtful that Merriam, Kansas would spontaneously decide to recruit a BMW dealership, or that Las Vegas would courteously build a parking garage just in case someone needed it. All of these actions were taken in response to corporate requests. The strength of special interest influence over the eminent domain process raises the issue of whether holding property is a "right" at all,⁸² or merely a convenience that a citizen is allowed to enjoy until the government realizes that there could be a "higher use."

How have property rights come to exist only at the whim of government? The answer lies in the level of scrutiny that modern courts applied following *Poletown* and *Midkiff*.

C. Rational Basis Test

In *Hawaii Housing Authority v. Midkiff*,⁸³ the Supreme Court reiterated that it would apply the rational basis test when reviewing challenges brought under the Public Use Clause.⁸⁴ The Court has developed other standards over the years for reviewing the constitutionality of statutes,⁸⁵ but rational basis is the most deferential to the legislature. The rational basis test is not uniquely required by the Fifth Amendment; it is used whenever any police power action is challenged, not just a taking. By relying on the rational basis test, the courts fail to recognize whether the Fifth Amendment provides any *additional* restriction on government action than would exist without it. This realization has led several commentators to describe the Public Use Clause as constitutional dead letter.⁸⁶

⁸² See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972) ("It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948))).

⁸³ 467 U.S. 229 (1984).

⁸⁴ *Id.* at 243 ("Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.").

⁸⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (applying strict scrutiny to a law school admissions program that gave preferential treatment to certain racial groups over others); *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997) (stating that strict scrutiny applies to government infringement upon fundamental rights); *United States v. Virginia*, 518 U.S. 515, 524 (1996) (applying intermediate scrutiny to a state educational program that treated students differently based upon gender).

⁸⁶ See, e.g., *Lazzarotti*, *supra* note 77, at 59 ("Considering the judiciary's all but complete and total deference to legislative determinations of what constitutes a public use, a court's ability to review these cases is almost non-existent."); Jennifer M. Klemestrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 784 (1999) (noting that "virtually any acquisition meets the criteria of serving the public interest or contributing to a public purpose. The public use limitation is thus generally meaningless . . .").

The rational basis test simply asks whether “the statute is rationally related to a legitimate state interest.”⁸⁷ If the question can be answered in the affirmative, which it almost always can,⁸⁸ then courts refuse to interfere. It is only in the rare circumstance when the government cannot justify its action as rationally related whatsoever that the court will nullify the statute.⁸⁹ Specifically, the *Midkiff* court used the phrase “rationally related to a *conceivable* public purpose”⁹⁰ This language suggests that “in its search for a ‘rational basis,’ courts can supply a purpose the legislature itself missed.”⁹¹ Thus, if the legislature itself is unable to justify the taking, it need not worry; the court will try to come up with a justification for them.

The *Midkiff* court insisted that purely private takings were still prohibited under the Public Use Clause,⁹² but given the deferential nature of the rational basis test, it is difficult to imagine a scenario in which an eminent domain action could not rationally be justified as a public use. If the city were to condemn person A’s land for the sole purpose of transferring it to person B for her private use, there could still arguably be a rational explanation. Perhaps person B would put the property to a “higher use,” or generate more tax revenue.⁹³ If not, then perhaps the government decided that A owned too much land and that this could conceivably affect real estate prices.⁹⁴ Even if the government wanted to play Robin Hood and take from rich person A to give to poor person B, it could argue that its actions were rational by claiming that it is reducing homelessness, reducing crime or promoting health. If all of the above justifications fail, the government could simply claim to be clearing out “blight.”

There needs to be a change in order to protect property rights and breathe life back into the Public Use Clause. Yet the question remains whether it is possible to reconcile individual property rights with the power of the state by any means other than complete defer-

⁸⁷ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

⁸⁸ *But see id.* (striking down a Texas statute criminalizing sodomy under the rational basis test); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (striking down a zoning ordinance that prohibited mentally handicapped people from living within a flood zone but allowed a hospital to be constructed in the same location).

⁸⁹ *See Vance v. Bradley*, 440 U.S. 93, 97 (1979) (stating that the court will not overturn a statute unless it is “so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.”).

⁹⁰ *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 230 (1984) (emphasis added).

⁹¹ EPSTEIN, *supra* note 48, at 162.

⁹² *Midkiff*, 467 U.S. at 241.

⁹³ *See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003).

⁹⁴ *See, e.g., Midkiff*, 467 U.S. at 229.

ence to the legislature through the rational basis test.⁹⁵ The next section of this Note offers a solution that recognizes the historical concept of eminent domain as a sovereign prerogative while still protecting the rights of property owners.

III. COURTS SHOULD APPLY A BIFURCATED TEST TO DETERMINE WHETHER A PROPOSED USE IS ACTUALLY PUBLIC

A. *Suggested Approach*

Courts need to make an actual determination of whether or not a use is public. Those deemed public are permitted,⁹⁶ whereas the Public Use Clause would bar those held to be private. The difficult question with which the judiciary has struggled is how to determine whether a use is sufficiently public enough to meet the Fifth Amendment's requirements. To make this determination, there must be judicially manageable standards for courts to follow. There are a number of constitutional provisions that courts have refused to enforce due to lack of standards.⁹⁷ Yet in the case of the Public Use Clause, there are standards available if the Court would just be willing to use them.

The simplest standard to apply is the old "narrow view" requiring physical accessibility to the public. Because the uses contemplated by this view are historically accepted as public, if a taking is within it then it is a per se public use and the courts should not interfere. In these narrow situations, the rational basis test should apply and grant the same deference to the legislature that the *Midkiff* standard currently does. It is the remaining class of cases that pose a greater challenge and require a higher level of scrutiny. In those cases where the taking in question does not fall within the narrow view, there is a greater risk of legislative abuse and thus a heightened level of scrutiny is necessary to protect individual property rights.⁹⁸

⁹⁵ See Simpson, *supra* note 69, at 197-98 (noting that "[i]n a country whose founders fought a revolution in large part to prevent arbitrary seizures of property, it is no small irony that today state and local governments regularly take land from private owners and sell it to well-connected developers and private businesses...").

⁹⁶ This assumes, of course, that the constitutionally required "just compensation" is paid. U.S. CONST. amend. V.

⁹⁷ See *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 77 (1872) (stating that the boundaries of the Fourteenth Amendment's Privileges and Immunities Clause, U.S. CONST. amend. XIV § 1, are for the States to determine); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (holding that the Guarantee Clause, U.S. CONST. art. IV, § 4, is nonjusticiable).

⁹⁸ See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (1981) ("[A] court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.").

One solution to the challenge of determining whether a particular taking has violated the Public Use Clause is to create the same rebuttable presumption against the government action as would be used in any other case involving a fundamental right.⁹⁹ This is not to suggest that the Constitution positively grants the right to own property; it does not. What the constitution does fundamentally guarantee is that if one does own property, it can only be taken for a public use. The text of the Constitution in no way suggests that this right, even though phrased in the negative, is in any way less fundamental than that of freedom of speech, religion or the press.¹⁰⁰

In order to treat the Public Use Clause as being protective of a fundamental right it needs to receive the same level of scrutiny as other fundamental rights. It is well settled that when a government action infringes upon a fundamental right, such action is subject to strict scrutiny analysis.¹⁰¹ Strict scrutiny requires the governmental action to be narrowly tailored to a compelling state interest.¹⁰² Because of the high threshold required by this standard, most government actions do not pass constitutional muster once the Court determines that this standard applies.¹⁰³ If a taking passes this test, only then should its boundaries be coterminous with those of the police power.¹⁰⁴ This approach would not require judicial micromanagement. For example, if a taking to construct an apartment complex survived strict scrutiny analysis, the court would not need to approve every wallpaper design or carpet pattern as these could be left to the legislature's police power. If the ends are legitimate and compelling and the means constitutional (meaning that the taking has survived this test), then the court need not micromanage the details of the execution as it has already determined that the action is within the gov-

⁹⁹ *E.g.* *Groh v. Ramirez*, 124 S.Ct. 1284, 1294 (2004) (“[A]bsent consent or exigency, a warrantless search of a home is presumptively unconstitutional.”); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (“It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.”).

¹⁰⁰ These First Amendment guarantees are also phrased in the negative. “Congress shall make no law . . .” U.S. CONST. amend. I. *See also* *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (reiterating that “the Constitution is a charter of negative rather than positive liberties.”).

¹⁰¹ *United States v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting).

¹⁰² *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

¹⁰³ *See, e.g., Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (stating “we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact,’” yet still striking down the statute in question by applying strict scrutiny). *But see* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding that a law school admissions policy which gave preferences to certain racial groups was compelling enough to withstand strict scrutiny).

¹⁰⁴ *Cf. Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (describing the breadth of eminent domain as coterminous with the police power).

ernment's police power and thus within the government's discretion for its implementation.

Of course, just using the strict scrutiny buzzwords "narrowly tailored" and "compelling governmental interest" fails to give much guidance to a court as a practical matter.¹⁰⁵ But surely finding standards for adjudicating Public Use claims is no more difficult than finding standards to determine whether a search and seizure was unreasonable,¹⁰⁶ or a whether a particular punishment was cruel and unusual.¹⁰⁷ In fact, there are states that have developed their own standards to assist in making this determination, and have clearly articulated that the courts rather than the legislature are responsible for determining public use.

For example, North Carolina devised a system whereby the courts seek to determine whether the "paramount reason for taking of the land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether... the private interests are paramount and controlling and the public interests merely incidental."¹⁰⁸

In *Stout v. City of Durham*,¹⁰⁹ landowners challenged the city of Durham's quest to acquire land through eminent domain in order to expand its sewer system to accommodate a proposed shopping center.¹¹⁰ Although the property owners lost their challenge,¹¹¹ the relevant consideration is that the court adjudicated the merits of whether the proposed taking fit within the public use requirement, rather than merely leaving the decision to the legislature.

The test proffered by this Note would have produced the same result. Because the issue involved the *physical* expansion of a sewer system, the facts of the case fit within the *per se* exclusion for narrow view takings and the analysis would end without having to conduct a strict scrutiny inquiry.

Washington is another example of a state that has developed specific standards for judicial determination of public use. In *Washington v. Evans*,¹¹² the Washington Supreme Court reiterated these standards: "This court has developed a three-part test to evaluate eminent domain cases. For a proposed condemnation to be lawful, the State

¹⁰⁵ *United States v. Virginia*, 518 U.S. 515, 567 (1996) ("These tests are no more scientific than their names suggest . . .").

¹⁰⁶ *See* U.S. CONST. amend. IV.

¹⁰⁷ *See* U.S. CONST. amend. VIII.

¹⁰⁸ *Stout v. City of Durham*, 468 S.E.2d 254, 257 (N.C. Ct. App. 1996).

¹⁰⁹ 468 S.E. 2d 254.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 757-58.

¹¹² 966 P.2d 1252 (Wash. 1998).

must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose."¹¹³

In *Evans*, a convention center sought to condemn land in order to expand.¹¹⁴ Because the proposed expansion included private shops, the landowner whose land was in question objected because the taking would primarily benefit a private party. The Washington Supreme Court applied its three-part test and determined that the taking was permissible.

The strict scrutiny test would require only that the governmental interest be "compelling," rather than having to be "required" or "necessary." However, the *Evans* court would have come to the same conclusion had it been decided under the strict scrutiny test because it too falls within the per se exclusion for physical occupation, in this case a physical expansion of the convention center.

While the two aforementioned cases are illustrative of the development of judicially manageable standards, they admittedly do not offer much help to a federal court trying to tread upon the new ground of public use adjudication because both involve the relatively easy issue of physical use. An example of a state that has developed standards to determine whether takings for private development are permissible is Arizona.

In *Bailey v. Myers*,¹¹⁵ the city of Mesa, Arizona sought to condemn land currently occupied by a small family business, "Bailey's Brake Service," and transfer it to Ace Hardware to make room for Ace to expand.¹¹⁶ The Baileys challenged this action, claiming that it was an illegal taking for private use.¹¹⁷ The City of Mesa gave the now familiar response of seeking to increase property values, employment and tax revenue.¹¹⁸

However, in contrast to all of the cases reviewed thus far in this Note, the Arizona Court of Appeals agreed with the petitioner and invalidated the taking as being private rather than public.¹¹⁹ Although the court based much of its decision on the Arizona Constitution,¹²⁰ the underlying reasoning could apply to the Public Use Clause as well.

¹¹³ *Id.* at 1255.

¹¹⁴ *Id.* at 1253-54.

¹¹⁵ 76 P.3d 898 (Ariz. Ct. App. 2003).

¹¹⁶ *Id.* at 900.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 901.

¹¹⁹ *Id.* at 904.

¹²⁰ The court specifically relied upon ARIZ. CONST. art. II, § 17, cl. 1 ("Private property shall not be taken for private use, except for private ways of necessity . . .").

The *Bailey* court applied a two-part test to determine whether a specific taking was permissible or not. The first question the court asked was whether the public would physically use the property.¹²¹ If so, then the taking is “unquestionably public” and is permitted.¹²² The court also allows takings that are “essential for the provision of public services or for reasons of public safety or health.”¹²³ Although this appears to provide an exception that would allow the uses in *Berman*, such as slum clearance or the promotion of health, to pass the test, it qualifies the exception by requiring it to be “essential.” Thus, whereas Arizona considers takings that result in physical use to be coterminous with the police power, those actions that can only be justified as promoting public safety or health are subjected to a heightened level of scrutiny in that they are required to be “essential.”

If the proposed taking does not fit within those categories and instead “the government proposes to take property and then convey it to private developers for private commercial use, a significant question is presented because of the intended disposition of the property.”¹²⁴ The court answered this “significant question” by applying a “substantially outweighs” test requiring that the proposed public use substantially outweigh the private nature of the use.¹²⁵ While the court listed a number of factors to consider in determining whether a public use substantially outweighs a private one,¹²⁶ the court stressed that this list is not exhaustive.¹²⁷

Applying this test to the facts before it, the *Bailey* court held that the taking was a prohibited taking of property for private use.¹²⁸ The test proposed in this Note would have reached the same result. Both tests begin by asking about physical use by the public. In *Bailey*, the expansion of a hardware store did not meet this criterion so the court proceeded to the next question. It is at this stage of the analysis that these two tests differ. In Arizona, the next question would be whether

¹²¹ *Bailey*, 76 P.3d at 902 (permitting takings “[w]hen the government proposes to take a person’s property to build streets, jails, government buildings, libraries or public parks that the government will own or operate...”).

¹²² *Id.*

¹²³ *Id.* at 904.

¹²⁴ *Id.* at 902.

¹²⁵ *Id.* at 904.

¹²⁶ *Id.* (listing such factors as: whether title to the property would be held by a public entity; whether the property will be used for private, non-profit, or public purposes; the amount of control the condemning agency will retain over the property; the ratio of public to private funds used for the development of the property; whether a private party or a public entity would benefit most; whether private developers are the primary motivation for the taking; whether the taking would result in harm, loss, or detriment to members of the community; and the necessity of the taking for the achievement of public purposes).

¹²⁷ *Id.* at 904, n. 5.

¹²⁸ *Id.* at 904.

the public use behind the proposed taking substantially outweighs the private nature of the use. The *Bailey* court found that it did not. Under the strict scrutiny test, the next question would be whether the taking was narrowly tailored toward a compelling governmental interest. As with other strict scrutiny applications, there is a rebuttable presumption that the answer to this question is in the negative.¹²⁹

It is difficult to map the contours of these tests to determine if they would overlap each other or not because neither the Supreme Court nor the Arizona courts have ever been able to give an objective definition of what constitutes a "compelling interest" or what exactly "substantially outweighs" means. In fact, both courts have stated that there is no objective definition and that the test applies differently depending upon the specific facts of the case.¹³⁰

The most important aspect of *Bailey* is that the Arizona Court of Appeals made a judicial determination of whether a taking was public or private rather than simply yielding such judgment to the legislature, as the Supreme Court had done in *Berman* and *Midkiff*.¹³¹ This shows that it is possible for courts to make such a determination and develop standards for doing so. Phrases such as "compelling interest" and "narrowly tailored" may be somewhat obscure and beyond precise definition, yet they are apparently concrete enough for the judiciary to have applied them countless times in other cases involving fundamental rights. The court cannot abdicate its role as guardian of individual rights merely because the task is a difficult one.¹³²

B. Counterarguments Considered

A number of justifications have been presented in support of allowing the legislature to determine public use without fear of judicial intervention. This section will explore the failings of such counterarguments insofar as they argue against strict scrutiny analysis. Specifically, this section will dispel the myths that the legislature is best

¹²⁹ See *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (describing government actions which infringe upon fundamental rights as presumptively unconstitutional).

¹³⁰ See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (describing the application of heightened scrutiny as less than scientific and used whenever the Court decides that it "seems like a good idea to load the dice"); *Bailey v. Myers*, 76 P.3d 898, 902 (Ariz. Ct. App. 2003) (stating that the issue of public use must be decided "on a case-by-case basis").

¹³¹ Such determination is required by the Arizona Constitution. See ARIZ. CONST. art. II § 17, cl. 3 (requiring that courts determine public use regardless of the legislature's determination).

¹³² See *Cohens v. Virginia*, 19 U.S. 264, 404 (1824) (noting that, "[t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We [the Supreme Court] cannot pass it by because it is doubtful."). However, this is precisely what courts have done by yielding their role of protecting Fifth Amendment rights to the legislatures.

suites to make public use determinations, the political process provides relief from legislative abuse, and that the just compensation requirement provides enough protection for individual property rights.

1. The Legislature is in the Best Position to Determine Public Use

Some have argued that courts should defer to the legislature because the legislature, as the elected representatives of the people, is in a better position to determine whether an action is an appropriate public use.¹³³ Such a scenario would certainly be more efficient, but the Constitution does not exist to promote efficiency; it exists to defend liberty.

The legislature, of course, is charged with the task of acting in the public's interest. However, creating public uses and being the ultimate arbiter of the legality of those uses are two distinct functions. Allowing the legislature to determine the legality of its own actions is comparable to allowing a man to be a judge in his own case.¹³⁴ Madison reiterated a common law maxim when he declared, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."¹³⁵ Judicial review of public use designations is necessary to ensure compliance with constitutional limitations on government action. Removing the possibility of meaningful judicial review removes the guarantee that these constitutional limitations will be enforced.

The maintenance of separation of powers requires the various branches of the federal government to act as a check on each other.¹³⁶ As coordinate branches of government, neither can abuse its authority without raising the ire of another.¹³⁷ Removing the courts from this necessary tension allows legislative power to go unchecked; leading to many of the abuses described in Part II.

The only way to ensure that legislative authority remains within its limits is to allow outside influence to serve as a check on its power. Some argue that the political process provides such a check, but a closer examination reveals that this argument is also flawed.

¹³³ *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) ("[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.").

¹³⁴ THE FEDERALIST NO. 10, at 44 (Madison) (Carey and McClellan ed., 2001).

¹³⁵ *Id.*

¹³⁶ *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (stating that the system of "checks and balances established in the Constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

¹³⁷ *See id.*

2. *The Political Process Provides Enough Protection for Property Rights*

Some have argued that judicial intervention is not needed because the political process will protect property owners since they could reverse any governmental action by replacing their representatives at the next election.¹³⁸ This may be true if the governmental action involved acts against the interests of the majority.¹³⁹ However, if the intrusion is upon the liberty of a minority of citizens, then “the form of popular government . . . enables [the majority] to sacrifice to its ruling passion or interest, both the public good, and private rights”¹⁴⁰

Applying this rationale to the eminent domain context, when the government seeks to condemn an individual’s property, the majoritarian protections of the political process are not available. For this reason, the Bill of Rights provides counter-majoritarian protections by specifically prohibiting the government from engaging in certain behavior. Allowing the political process to govern property rights strips property owners of these rights and thus frustrates the Constitution’s special protection for minority interests. If constitutional rights are dependant upon a majority vote, one must wonder why the founders went to the trouble of adding the Fifth Amendment.

3. *The Just Compensation Requirement Provides Enough Protection for Property Rights*

Some have suggested that the restrictions of the takings clause are satisfied once the government pays “just compensation” to the landowner.¹⁴¹ The notion that government could take whatever property it wishes so long as it paid for it has led one observer to declare, “Whether you know it or not, your house is for sale”¹⁴²

Simply allowing a governmental entity to seize land by compensating the landowner fails to protect property rights in two ways: (1) it

¹³⁸ See *e.g.* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“For protection against abuses by legislatures . . . the people must resort to the polls, not to the courts.” (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877))).

¹³⁹ See THE FEDERALIST NO. 10, at 45 (Madison) (Carey and McClellan ed. 2001) (referring to the majority’s insulation from government intrusion upon their liberties as the “republican principle”).

¹⁴⁰ *Id.*

¹⁴¹ See James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1301 (1985) (noting that “[m]any of the causes of inefficient and inequitable eminent domain actions could be eliminated by requiring governments to compensate owners and the public . . .”).

¹⁴² Kruckeberg, *supra* note 80, at 543.

fails to give meaning to the constitutional text, and (2) it produces inequitable results.

Merely requiring just compensation without a public use limitation ignores the plain text of the Fifth Amendment. There is nothing in the text to suggest that the Public Use and Just Compensation Clauses are a mere tautology.¹⁴³ Furthermore, "there is something deeply troubling about a constitutional provision that has been effectively rendered a nullity by judicial interpretation."¹⁴⁴ Courts should not reject their role as the defenders of citizens' constitutional rights.¹⁴⁵

Relying solely upon the Just Compensation Clause can create inequitable results that fail to protect a landowner's property rights. "Just" compensation has been defined as the current market value at which a willing seller would sell the land in question to a willing buyer;¹⁴⁶ it does not take into account the amount of money that the landowner will need to purchase a comparable property as a replacement.¹⁴⁷

Presumably, if the landowner were willing to sell at the market price she would have done so. In many cases, the landowner may have sought to retain the land because of subjective sentimental value. While the Constitution does not require that the government take into account the landowner's subjective value, it does require that it only be invaded for a public use. Without such use it is hardly fair to claim that the compensation is "just."

C. *The Strict Scrutiny Test Is Not Completely Incompatible with Current Takings Jurisprudence.*

Adopting the strict scrutiny approach suggested in this note does not require a total abandonment of current eminent domain jurisprudence. In fact, it is quite possible that some of the major cases could have survived strict scrutiny and reached the same conclusion.

It is conceivable that *Berman* could have had the same outcome under the strict scrutiny test as it did under the rational basis test. If

¹⁴³See *id.* at 566-67 (noting that the common law canon *expressio unius est exclusio alterius* – the inclusion of one is the exclusion of another – suggests that because there are two clauses, each must have a separate meaning).

¹⁴⁴Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 850 (1994).

¹⁴⁵See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 464 (2003) (stating that, "[a] primary function of the federal courts is to provide relief against governments and government officers for their violations of the Constitution...").

¹⁴⁶*Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 471 (1973).

¹⁴⁷See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("We have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use." (internal citations omitted)).

the District of Columbia could have shown that the taking would have actually helped decrease crime or promote health then perhaps it could have overcome the presumption that the use is private in nature. Promoting health and reducing crime are unquestionably compelling interests; the only question remaining would be whether the action was narrowly tailored towards furthering those interests, or whether the government's actual intent was to benefit a private entity. Because the legislative description of the act is not dispositive under the strict scrutiny test, there would not be the problem of arbitrary declarations of blight, and a municipality could not simply declare any act to be a promotion of public health. Determining whether a proposed action will promote health or reduce crime would be a triable issue of fact that the courts are well equipped to resolve.

Perhaps the State of Hawaii could have shown that concentrated land ownership really did have an effect on the residential fee simple market and that reducing this concentration was a compelling interest. If such a finding could have been made then the taking could have proceeded; if not then the taking should have been prohibited as being private in nature, and thus running contrary to the protections of the Public Use Clause.

Regardless of how these major cases would have been decided, it seems clear that under a strict scrutiny analysis, much of the abuse described above in Part II would not have happened. For example, it is unlikely that Merriam, Kansas would have been able to convince a court that having a BMW dealership rather than a used car dealership rose to the level of being a compelling interest. Fortunately, as described in the next section, a few courts have been brave enough to strike down some of the most blatant of eminent domain abuses.

PART IV: THE PENDULUM IS SWINGING BACK IN FAVOR OF PROPERTY RIGHTS

In spite of the proliferation of eminent domain abuse described in Part II of this Note, cases such as *Bailey* suggest that the tide may be turning back in favor of protecting property rights. Recent cases reveal that there have been an increasing number of courts willing to adjudicate the merits of public use claims.

A. *Public Use Comes Full Circle: The Fall of Poletown*

In a recently decided case, *County of Wayne v. Hathcock*,¹⁴⁸ the Michigan Supreme Court reviewed the legality of a taking proposed

¹⁴⁸ 684 N.W.2d 765 (2004).

by the county to make room for the development of a business and technology park dubbed the "Pinnacle Project."¹⁴⁹ While there is nothing particularly novel about the factual setting in *Hathcock*, the decision itself has the potential to cause a fundamental shift in public use jurisprudence.

The dispute in *Hathcock* centered around forty-six parcels of land directly south of the area's primary airport.¹⁵⁰ The county began purchasing land surrounding the airport from those who were willing to sell. All but nineteen land owners sold their land to the county, but these remaining properties were "distributed in a checkerboard fashion throughout the project area."¹⁵¹ "The county apparently determined that further efforts to negotiate additional voluntary sales would be futile and decided instead to invoke the power of eminent domain."¹⁵² Thus, "the Wayne County Commission adopted a Resolution of Necessity and Declaration of Taking" authorizing the county to seize the remaining nineteen parcels desired for the project.¹⁵³

The county claimed that the land was needed because, by developing the park, the landowners' properties would create the following public benefits:

- (1) the creation of jobs for its citizens, (2) the stimulation of private investment and redevelopment in the county to insure a healthy and growing tax base so that the county can fund and deliver critical public services, (3) stemming the tide of disinvestment and population loss, and (4) supporting development opportunities which would otherwise remain unrealized.¹⁵⁴

The county initiated condemnation actions and each of the landowners challenged the constitutionality of the taking, claiming that it did not serve a public purpose as required by the Michigan Constitution.¹⁵⁵ Relying primarily on the Michigan Supreme Court's decision in *Poletown*, the trial court affirmed the county's Takings Resolution,

¹⁴⁹ *Id.* at 770.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 771.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 775-76 (quoting city's complaint for condemnation).

¹⁵⁵ Because of the broad delegation of authority to the state in *Midkiff*, there was little room to claim protection under the United States Constitution. *But see* discussion *infra* at Part IV.B.2; thus, the primary avenue of relief available to landowners was through state constitutions. *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (suggesting that parties turn to state constitutions for liberties beyond those guaranteed by the United States Constitution).

and the trial court's opinion was itself affirmed on appeal. However, Judges Murray and Fitzgerald of the Michigan Court of Appeals wrote separately, concurring in the judgment, but stating that in their opinion, "*Poletown* was poorly reasoned, wrongly decided, and ripe for reversal by [the Michigan Supreme Court]."¹⁵⁶ The Michigan Supreme Court agreed to hear the case and ordered the parties to discuss the following three issues:

(1) whether [the county] has the authority, pursuant to [the Michigan takings statute] or otherwise, to take [the landowners'] properties; (2) whether the proposed taking, which are at least partly intended to result in later transfers to private entities, are for a "public purpose," pursuant to *Poletown Neighborhood Council v. Detroit*; and (3) whether the "public purpose" test set forth in *Poletown*, is consistent with [the Michigan Constitution] and, if not, whether this test should be overruled.¹⁵⁷

Considering each of these issues in turn, the Michigan Supreme Court first held that the taking was within the confines of the state takings statute. The statute grants the county the authority to make such a taking if it follows the procedures established by statute. The court held that the county did follow these procedures.¹⁵⁸

Next, the court considered whether the taking was for a "public purpose." The court also answered this question in the affirmative.¹⁵⁹ "A 'public purpose' has been defined as that which 'has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose.'"¹⁶⁰ Yet while the court rules that the taking is a public purpose, they emphasize that, "[this] is not to say, of course, that the exercise of eminent domain in this case passes constitutional muster . . . it must also be determined whether these condemnations pass the more narrow requirements of our Constitution."¹⁶¹

The court concluded that the taking did not meet constitutional requirements for three reasons. First, it noted that the project is not one

¹⁵⁶ *Hathcock*, 684 N.W.2d at 772.

¹⁵⁷ *Id.* (internal citations omitted).

¹⁵⁸ *Id.* at 772-74.

¹⁵⁹ *Id.* at 773-76.

¹⁶⁰ *Id.* at 776 (internal citations omitted).

¹⁶¹ *Id.*

in which the particular pieces of property in question are needed for completion:

To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and [the county] does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.¹⁶²

Second, the court stated that the project is not subject to public oversight to ensure that it continues to be used for the public benefit after transfer to the private entities. "No formal mechanisms exist to ensure that the businesses that would occupy what are now [the landowners'] properties will continue to contribute to the health of the local economy."¹⁶³ Finally, the court noted that "there is nothing in the *act* of condemning defendants' properties that serves the public good in this case. The only public benefits cited by [the county] arise after the lands are acquired by the government and put to private use."¹⁶⁴ The court distinguishes this from takings which are made in order to actually promote public health or safety, such as slum clearance.

The court acknowledged that the *only* support for the county's position was the majority opinion in *Poletown*. The court criticized that decision, stating, "the majority opinion in *Poletown* is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence."¹⁶⁵ The *Hathcock* court criticized the *Poletown* court for basing its opinion on:

. . . a *plurality* opinion of this Court and . . . an opinion of the United States Supreme Court concerning judicial review of congressional acts under the Fifth Amendment of the federal constitution. Neither case, of course, is binding on this Court in construing the takings clause of our state Constitution, and neither is persuasive authority for the use to which they were put by the *Poletown* majority.¹⁶⁶

The *Hathcock* court then directed its criticism to the real problem in *Poletown*:

¹⁶² *Id.* at 783-84.

¹⁶³ *Id.* at 784.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 785.

[T]he *Poletown* majority concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under [the Michigan Constitution] to justify the transfer of condemned property to a private entity. Before *Poletown*, we had never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy.¹⁶⁷ . . . Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled.¹⁶⁸

By overruling *Poletown*, the Michigan Supreme Court removed the foundation upon which the concept of takings for private development was built. Now that *Poletown* has fallen, will *Midkiff* be next? Even before *Hathcock* was decided, some state—and even a few federal—courts were beginning to reclaim their right to adjudicate public use claims.

B. *Examples of Other Courts Refusing to Defer Public Use Determinations to the Legislature*

I. *State Cases*

A number of states have begun to consider the merits of whether a taking is public or private in nature, rather than yielding to legislative determinations.

The New Jersey Superior Court made such a determination in *Casino Reinvestment Development Authority v. Banin*.¹⁶⁹ The case arose from a proposed eminent domain action to condemn a hotel and transfer the property to Donald Trump for redevelopment.¹⁷⁰ Interestingly, the *Banin* court did not base its decision on either the state or federal constitution, and did not doubt the ability of the government to condemn the property for its purported use.¹⁷¹ What did concern the

¹⁶⁷ *Id.* at 786.

¹⁶⁸ *Id.* at 787.

¹⁶⁹ 727 A.2d 102 (N.J. Super. 1998).

¹⁷⁰ *Id.* at 103-04.

¹⁷¹ *See id.* at 103 (framing the issue in the case as whether the government entity is "vested with the power of eminent domain and has appropriately exercised the power").

court was that there was no guarantee that Trump would continue to use the property for the purpose proffered by the government.¹⁷²

The *Banin* case is significant because it shows the willingness of a court to require that the government actually follow through on its alleged public purpose. Because the city claimed that building a hotel was a public use, the court wanted assurance that a hotel would actually be built; otherwise, “the asserted public benefits are illusory.”¹⁷³ While *Banin* is a step in the right direction because the court recognized a limitation on the eminent domain power, it failed to provide anything other than a formalistic requirement upon the taker, rather than a defense of the original property owner’s rights. It appears that the court would have had no objection had there been a contract requiring Trump to use the property for the stated redevelopment purpose with greater specificity than a mere requirement that it conform to its stated purpose for a “reasonable time.”

The Illinois Supreme Court used a different rationale when striking down a proposed taking in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*¹⁷⁴ *National City* involved the Southwestern Illinois Development Authority (“SWIDA”), which was a municipal corporation charged with the task of promoting “industrial, commercial, residential, service, transportation and recreational activities and facilities.”¹⁷⁵ A local racetrack, which had become extremely popular, contacted SWIDA about expanding its parking facilities.¹⁷⁶ The racetrack’s proposed solution was for SWIDA to condemn the land of a neighboring recycling plant so the racetrack could expand its parking lot.¹⁷⁷ The racetrack had explored the possibility of constructing a parking garage on its own property, but determined that acquiring the neighboring property through SWIDA’s eminent domain power would be cheaper.¹⁷⁸ SWIDA sued to initiate an eminent domain action, and the recycling plant defended by claiming that the taking was not for a public use.¹⁷⁹ The county circuit court held for SWIDA, but the appellate court reversed, holding that SWIDA exceeded its constitutional authority.¹⁸⁰ The Illinois

¹⁷² *Id.* (“Although [the government] claims that there are adequate safeguards to prevent Trump from changing the use of the properties, . . . the vague language merely states that Trump must maintain the use for a ‘reasonable time.’” (internal citation omitted)).

¹⁷³ *Id.*

¹⁷⁴ 768 N.E.2d 1 (Ill. 2002).

¹⁷⁵ *Id.* at 3 (internal citations omitted).

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 6.

¹⁷⁹ *Id.* at 5-6.

¹⁸⁰ *Id.* at 6-7.

Supreme Court agreed to hear SWIDA's appeal and affirmed the appellate court's ruling that that SWIDA's proposed taking was unconstitutional.¹⁸¹

The Illinois Supreme Court held that SWIDA's action was barred by both the Illinois and the United States Constitutions.¹⁸² While other courts, such as the court in *Bailey*, had used state constitutional provisions to invalidate takings, the *National City* court appears to be the first to hold that an action violates the United States Constitution. The *National City* court conducted an analysis of the facts to determine whether the action in question was a legitimate use of the police power, as authorized by *Berman*,¹⁸³ and not a purely private taking as prohibited by *Midkiff*.¹⁸⁴

In declaring SWIDA's actions to be unconstitutional, the court first noted that in order for the taking to be considered a "public use," the public must be allowed to use the land by right, not merely by permission of the owners as the case would be with a private parking lot.¹⁸⁵ The court then rejected SWIDA's determination that the land in question was "blighted."¹⁸⁶

Unfortunately, the court did not provide guidance or a specific test to apply to future cases. Instead, it apparently did not need such a test, stating that "[w]e do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose."¹⁸⁷ The court clearly did not object to all takings,¹⁸⁸ but it is unclear how it would determine the boundaries of the eminent domain power and where it would draw the line between public and private use. What is significant is that it was willing to draw such a line rather than acquiesce to the legislature.

2. Federal Cases

Twenty years after *Hawaii Housing Authority v. Midkiff*,¹⁸⁹ a few federal courts have begun to express an interest in reclaiming their authority to make public use determinations.

¹⁸¹ *Id.* at 7.

¹⁸² *Id.* at 7-11.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Id.* (internal citations omitted).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 10.

¹⁸⁸ *See id.* at 11 ("We do not question the legislature's discretion in allowing for the exercise of eminent domain power . . .").

¹⁸⁹ 467 U.S. 229 (1984).

*99 Cents Only Stores v. Lancaster Development Agency*¹⁹⁰ involved a dispute regarding a shopping center in Lancaster, California. The shopping center had several anchor stores such as Costco, Wal-Mart, and Circuit City.¹⁹¹ The controversy began when a 99 Cents Only Store ("99 Cents") moved into a vacant lot next to Costco.¹⁹² Almost immediately after 99 Cents moved in, Costco threatened that unless Lancaster provided additional space for Costco to expand, it would relocate to another city.¹⁹³ The owners of the shopping center determined that the most efficient manner in which Costco could expand would be to develop the land bordering the south side of their store, which ran behind 99 Cents.¹⁹⁴ Costco refused and demanded to expand into the space actually occupied by 99 Cents.¹⁹⁵ Because the shopping center considered Costco to be an "anchor tenant," and feared that Costco would relocate, the city began condemnation proceedings against 99 Cents to make way for Costco's expansion.¹⁹⁶ 99 Cents responded by filing a § 1983 action in the United States District Court for the Central District of California, claiming that the private nature of the taking violated the Public Use Clause.¹⁹⁷

The district court ruled in favor of 99 Cents, stating that the taking was purely private:

[T]he evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the *only* reason it enacted the [condemnation resolution] was to satisfy the private expansion demands of Costco.¹⁹⁸

The court then attacked the city's justification for claiming that the use was public. The city argued that it had the power to condemn the land in order to prevent future blight. The court rejected this argument, and proclaimed that the eminent domain power would be without limit if cities could use it to prevent the prospect of some future unforeseen problem.¹⁹⁹

¹⁹⁰ 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

¹⁹¹ *Id.* at 1125.

¹⁹² *Id.* at 1126.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1125.

¹⁹⁸ *Id.* at 1129.

¹⁹⁹ *Id.* at 1130-31.

Another federal case testing the outer boundaries of public use determinations was *Daniels v. Area Planning Commission of Allen County*.²⁰⁰ In *Daniels*, a county agency sought to condemn a restrictive covenant preventing the plaintiffs' land, and surrounding properties, from being used for commercial development in order to build a shopping center.²⁰¹ Plaintiffs filed a § 1983 complaint in district court to enjoin the taking and obtain a declaratory judgment that the taking was unconstitutional under the Public Use Clause.²⁰² The district court issued the injunction, granted the declaratory judgment, and struck down the statute authorizing the county agency to condemn the land since it allowed the government to take land for private uses.²⁰³

On appeal, the Seventh Circuit agreed with much of the district court's logic, but narrowed the decision's effect to the facts of the case. The appeals court held that while the statute was unconstitutional as applied to the plaintiffs, it had "potential constitutional applications," and thus was not facially unconstitutional.²⁰⁴ The court then brainstormed potential constitutional applications:

[T]he . . . commission could find that the [taking] would substantially advance the health, safety and welfare of the community. For example if the commission found that an area was under-served by doctors' or dentists' offices, or day care facilities, and the [taking] would substantially serve to fill that need, then the [taking] could be found to be in the public interest.²⁰⁵

While it certainly seems odd that the possibility of a future shortage of day care facilities could save a statute from being unconstitutional, this is consistent with the "conceivable public purpose" language of *Midkiff*.²⁰⁶ A constitutional right does not seem to provide much protection if it is based on the creativity and brainstorming abilities of the court rather than an independent test, and *Daniels* goes no further in providing such a test than the other cases have. However, at least a federal court was willing to admit that the Public Use Clause could be exceeded by a municipality, even if it was only limited to the specific facts at bar.²⁰⁷

²⁰⁰ 306 F.3d 445 (7th Cir. 2002).

²⁰¹ *Id.* at 450-51.

²⁰² *Id.* at 449.

²⁰³ *Id.* at 451.

²⁰⁴ *Id.* at 468-69.

²⁰⁵ *Id.* at 469.

²⁰⁶ *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (emphasis added).

²⁰⁷ The Supreme Court heard a case this Term that directly challenges the use of eminent

C. Courts Need to Apply a Consistent Test

The cases described above are significant examples of courts adjudicating the merits of public use challenges rather than abdicating that role to the legislature. While this is a step forward for property rights, these cases fail to create a consistent test that future courts could use when confronted with a similar scenario. The test proposed in this Note would enable the construction of a consistent body of case law for interpreting the Public Use Clause. While such a test would undoubtedly encroach somewhat upon the sovereign power that the state may otherwise hold, it has been written that "State Legislatures retain all the powers of legislation, delegated to them by the State Constitutions; which are *not expressly taken away by the Constitution of the United States*."²⁰⁸ The Fifth Amendment removes the power to take property for a private purpose, just as the First Amendment removes the government's ability to block speech. The test proffered in this Note requires the judiciary to guard this constitutional safeguard rather than yield such responsibility to the legislature.

CONCLUSION

The current state of eminent domain jurisprudence fails to protect the rights of the individual property owner from the despotic power of the state.²⁰⁹ Alexander Hamilton wrote that limitations placed upon the legislature could only be preserved "through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."²¹⁰

In order to give meaning to the Public Use Clause it is imperative that courts exercise their role as the interpreters and defenders of the Constitution; leaving the matter to the legislature creates too strong an incentive for abuse. Blight should mean blight, and public use should mean only those uses that are actually public. When a case or controversy presents itself, the courts have a duty to resolve the issue; deferring this responsibility to the legislature carries the risk that our

domain for private development. As of the time this Note was written the Court had not yet issued its opinion, but the decision has the potential to either completely resolve this issue in favor of property owners, or endorse the status quo actions of municipalities and perhaps encourage even bolder private development efforts. *See Kelo v. City of New London*, 125 S.Ct. 27 (2004).

²⁰⁸ *Calder v. Bull*, 3 U.S. (3 Wall.) 386, 387 (1798) (emphasis added).

²⁰⁹ *See Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 312 (1795) (describing the taking power as a "despotic power" of the state).

²¹⁰ THE FEDERALIST NO. 78, at 403 (Alexander Hamilton) (Carey and McClellan ed. 2001).

constitutional rights themselves will be “blighted”—whatever that means.

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