COMMENTS

"PUBLIC USE" AND THE JUSTIFICATION OF TAKINGS

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INTRODUCTION

The Takings Clause of the Fifth Amendment[1] both grants power to the government and constrains its use.[2] In granting the power to take private property,[3] even over the protest of the property holder, the clause signals that individual property rights are in some sense subordinate to the good of the polity. The government has the authority to determine that a public good is better served by dispossessing a property holder of her land and putting it to a different use. But the government's power to take private property is limited in two respects by the Takings Clause. Not only must the taking be appropriately compensated,[4] but it must be *justified*, in some respect, by reference to a social benefit expected to accrue from the conversion of property ownership.[5] The public use limitation thus supplies the constitutional basis for justifying a form of treatment of a private party by the government, the dispossession of real property, that is otherwise morally and legally impermissible.

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[1] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[2] The Takings Clause of the Fifth Amendment not only applies to the federal government but has been extended to the states through the Fourteenth Amendment. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980) ("[The Takings Clause] applies against the States through the Fourteenth Amendment."); Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897) ("[I]t seems that, since [the Fourteenth] Amendment went into effect . . . the States cannot lawfully appropriate private property . . . without compensation to the owner." (quoting Scott v. Toledo, 36 F. 385, 395–96 (C.C.N.D. Ohio 1888))).

[3] No other explicit enumeration of powers in the Constitution grants this power.

[4] There are, of course, a great number of questions about the appropriate construction of the just compensation requirement, but I will not delve into those issues here. For a canonical discussion of the issue, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (exploring the courts' patterns of justifying government interference in the marketplace).

[5] I will explain some different conceptions of the notion of justification below. *See infra* Part I.A.

How does the notion of "public use" actually justify the practice of takings? This Comment undertakes a theoretical and doctrinal inquiry into the values and interests necessary to justify a practice that otherwise might be perceived as a deprivation of important rights. Part I provides a general account of some of the most important approaches to justification for different kinds of social policies and then suggests that there are aspects to the takings problem that implicate heightened demands for political justification. Part II discusses the Supreme Court's prevailing substantive doctrine on the public use limitation and how the Court conceives its role in reviewing challenges to takings that are claimed to contravene the public use requirement. Part III looks at how some state courts have interpreted the public use requirement and considers the extent to which they go beyond the minimal interpretation offered by the Supreme Court. Part IV offers suggestions, based on some plausible approaches to justification, for how the Court might develop a more robust conception of the public use requirement that more effectively justifies the use of eminent domain power to those who are harmed by it.

I. THE PROBLEM OF JUSTIFYING TAKINGS

In this preliminary Part, I propose a general account of political justification that can serve as a framework for evaluating public policies[6] and then explain why takings law raises special questions for political justification, even when the taking is accompanied by the payment of compensation.

A. The Demands of Political Justification

Political justification[7] is a matter of connecting social policies and laws to principles of political morality in a way that delineates acceptable ways of treating citizens.[8] A social policy is justified, I claim, when persons affected by it can (or should) recognize certain reasons in favor of that policy that are of sufficient moral importance that

[6] Public policies, in the general sense to which I refer to them here, are meant to encompass judicial decisions as well as legislatively or administratively imposed laws and rules.

[7] This discussion presupposes that the notion of political justification functions at a lower level of abstraction than a theory of justice concerning the design of political institutions themselves.

[8] An example of what I take to be an important principle of political morality, furnished by Sunstein, is "the prohibition of naked preferences," which, he claims, "captures the judicial understanding that the Constitution requires all government action to be justified by reference to some public value." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984).

they cannot reasonably object to them.[9] Not all public policies, of course, require the same degree of support. The demands of justification vary according to what interests are at stake, what goals the policies are meant to serve, and the extent to which individuals are burdened by them. There is judicial recognition of the varying demands for justification, for instance, in the diversity of standards that courts use to assess different kinds of public policies.[10] Not every piece of legislation should be held to the same degree of critical scrutiny. Some laws are justified by the simple fact that they do some public good. But as the social costs (whether borne individually or collectively) of a policy rise, in terms of burdens imposed or liberties constrained, the need for justification increases accordingly.[11]

In the next section I argue that takings raise difficult questions about the proper demands of justification, and throughout the remainder of this Essay I will attempt to show that the Supreme Court has not adequately confronted these demands in its public use cases. In order to frame this discussion, I will first describe three possible models of public justification currently accepted within our judicial system, each of which (we can assume) is appropriate for justifying at least some types of public policies.[12]

The first model of justification is *weak rationality justification.*[13] This means only that a public policy is supportable by the fact that it serves a public end. As a form of justification, it requires only that there is some minimal relation between a public value and a given policy. It need not be that the means chosen is the most efficacious route to the goal, only that it is a minimally rational choice. All that is necessary is that the policy as the legislature perceives it, conduces to the

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[9] This formulation is indebted to T.M. Scanlon's contractualist account of moral rightness, though my version extends the conception to an area of normative political theory with which Scanlon's theory is not directly concerned. *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 153 (1998) ("Contractualism . . . . holds that an act is wrong if [it] would be disallowed by any set of principles . . . that no one could reject as a basis for informed, unforced general agreement.").

[10] For example, when legislation under consideration implicates a racial classification, courts will engage in a much more searching review than they do for economic classifications. *Compare, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (applying minimum rationality review to an economic classification) *with* Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to racial classifications, though this was a rare case where the discriminatory classification was nevertheless upheld), *and* McLaughlin v. Florida, 379 U.S. 184, 191–94 (1964) (invalidating a state statute that prohibited cohabitation by inter-married couples).

[11] Thus, in light of this country's history, racial classifications demand a more careful examination than other sorts of classifications because much more is required to justify a law burdening a race.

[12] These models are intended to serve as touchstones for reflection upon the range of demandingness that a political justification may be expected to provide. They do not exhaust the variations that are possible or even currently accepted.

[13] This phrase is my own though it is derived from the standard idea of minimum rationality review discussed immediately below.

public benefit, and does not merely serve private interests or embody "naked preferences" for one group over others.[14]

This form of justification is exemplified by the Supreme Court's minimum rationality review of economic regulations. Since the Court's repudiation of *Lochner v. New York*[15] in the 1930s,[16] the Court has extended very limited scrutiny to legislative efforts to regulate the economy.[17] Even when it appears that a regulation imposes a "needless, wasteful requirement in many cases,"[18] the potential public benefit will be treated as sufficient to justify the policy.

A somewhat more demanding model of justification can be termed *cost-benefit rationality.* The idea here is that the public good to be served by a policy must positively outweigh the social costs.[19] This goes beyond the weak rationality approach by requiring a comparison of a policy's costs as well as benefits. It is not enough simply that some public end is served, even if it is very well served. This model holds that a policy is justifiable only when the aggregate social benefit of a policy is greater than the burdens it imposes.[20] The Supreme Court has embodied this level of justification in decisions that call for the use of balancing tests or proportionality concerns.[21] In such cases, the Court tends to undertake a more fact-intensive inquiry into

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[14] *See* Sunstein, *supra* note 8, at 1689–93 (describing the prohibition of "naked preferences" as the underlying principle for several provisions of the Constitution).

[15] Lochner v. New York, 198 U.S. 45 (1905) (striking a state labor law limiting working hours).

[16] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding a state's minimum wage law for women as consistent with the state's power to protect the health and well-being of workers); Nebbia v. New York, 291 U.S. 502, 539 (1934) (upholding a state's authority to regulate the price of milk).

[17] *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (holding that a state's decision to regulate the eyeglass industry need only have a rational connection to the legislature's goal of serving the public good).

[18] *Id.* at 487.

[19] Again, these costs can be understood to encompass a variety of things such as economic inefficiency, individual economic burdens, or constraints on liberty.

[20] One could formulate the theory even more rigorously to require not only that the aggregate benefits outweigh the costs but that the policy be the course of action that *maximizes* expected social utility. This formulation comes closest to following the moral theory of utilitarianism. See JOHN STUART MILL, UTILITARIANISM 32–42 (A.D. Lindsay ed., E.P. Dutton & Co. 1951) (1863) for the classic statement of utilitarianism as an account of moral rightness within ethical theory. While Mill did not directly advocate utilitarianism as a principle for the regulation of political institutions and policies, it has frequently been marshaled in such a cause.

[21] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring "rough proportionality" between a development exaction and the expected public benefit); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–26 (1978) (holding that several factors, including the degree of economic impact and the character of government action, affect the determination of whether a regulation constitutes a taking). Although these are both regulatory takings cases, I mention them only for purposes of general illustration. I do not wish to imply that the reasoning they embody is necessarily appropriate for the logically distinct questions raised by the public use requirement, though it may turn out to be the case after more reflection.

the competing values at stake in order to settle how the social calculus works out. When the public benefit served by a given policy is deemed great enough to outweigh the costs, this will constitute sufficient justification.

The third, and most demanding, model of justification is that of *deontological justification.* This conception suggests that there are certain social values of such fundamental importance that they cannot be overridden by compensating public benefits, except perhaps for the most dangerous threats to political stability or social welfare. Many of the rights contained in the Bill of Rights, such as freedom of speech, worship, and assembly,[22] and freedom from arbitrary arrest, search, and intrusion on one's home,[23] can be seen to express this sort of a limitation on permissible government action. The point is that these interests are removed from the ordinary calculus of social utility when the government seeks to promote the public good. Only the most fundamental countervailing reasons will even be adequate to justify an abrogation of these interests. Under ordinary circumstances, the deontological constraints require protecting the inviolability of certain liberties. This model of justification is reflected, for example, in the Court's free speech jurisprudence.[24]

To be sure, there are other possible forms of justification that can, and often do, shape the judicial assessment of various social policies. These three models are merely representative of a range of demandingness in justification. In practice, courts are left to determine what degree of scrutiny ought to be applied to any given issue. But judgments by courts about the appropriate standard of justification, like their judgments about whether any given standard is met, are fallible. One role of public discourse (or even of social movements) is to call for reconsideration of the official characterizations of certain issues as needing more or less justification. The demands of political justification may become heightened for an issue as its broader moral implications become more salient.

The importance of finding the proper demands of justification for an issue is connected to the expressive functions of political institutions. In a free, democratic society not only must there be good reasons for public policies, but these reasons must be adequately conveyed to the citizens affected by them. Only when the basis for state action is transparent will an open process of political discourse func-

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[22] U.S. CONST. amend. I.

[23] U.S. CONST. amends. IV, V.

[24] The few recognized exceptions to freedom of speech involve advocacy of illegal action, libel, and obscenity. *See, e.g.*, Miller v. California, 413 U.S. 15, 23–24 (1973) (holding that obscene materials may be regulated by states and that obscenity may be defined by community values); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (per curiam) (holding that only speech likely to incite imminent lawless action may be proscribed).

tion as an effective check on the potential abuse of political power. To this end, the Supreme Court plays a vital role in the process of public justification in virtue of its role in resolving some of the most controversial questions of public policy. The Court must not only reach the correct result, but also provide an adequate explanation of its reasoning. The expressive function of public justification is especially important in cases where certain parties are asked to bear a burden that is not spread equally across the society, as, I will suggest below, is often the case with takings.

B. The Need for Justification in Takings Law

Despite its outward similarity to other kinds of land use or economic regulations, takings law raises special challenges for identifying the proper demands of justification. The first reason for this is that takings law presents a somewhat rare problem in political morality—the state deprives on an asymmetrical basis[25] goods to which private parties otherwise have legitimate entitlement.[26] Although the goals of takings are ostensibly economic, they are not pursued through general economic regulations. Rather, a taking singles out a particular, identifiable individual to bear certain costs for the sake of social welfare.[27] Even before we identify the specific demands of justification for policies that impose disproportionate burdens, we can recognize it as requiring a distinctive approach from instances of general legislation. Because only a limited number of individuals are asked to bear the burden of a taking, it is important that they be provided with adequate reasons for having to bear costs that others do not. The ba-

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[25] The deprivation is asymmetrical in the sense that only some citizens are affected by any instance of taking. Takings stand in contrast to taxation, which imposes a shared burden on society generally.

[26] The entitlement is legitimate in accordance with the ordinary rules of property in a democratic society. My view does not presuppose that claims to property are morally prior to other institutions of political society. For the classic expression of a conception of property rights as pre-existing social institutions, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

[27] A taking clearly differs from a general economic regulation in its outward form insofar as the former applies only to a specified party and the latter applies broadly to all persons. In practice, of course, there may be some general regulations that have a direct impact on only a limited set of parties. It is possible, for instance, that an environmental regulation may force the closing of a single plant, even though it is ostensibly general in form. In such cases, the burdens of the regulation may be borne by a limited set of persons, just as they are with a taking. Does this mean that the demands of justification should be the same for both kinds of policies? Not necessarily. If there is a legitimate purpose to a general regulation, there is less of a chance that specified individuals are being singled out for unfavorable treatment. Moreover, there are fewer settled expectations about the continuity of a regulatory regime than there are about the ownership of property. This does not mean that no justification is required to those who are unusually burdened by a general regulation, only that it is often less difficult to provide one. Thanks to Wendell Pritchett for raising this issue.

sic point is that the reasons must show why it is *justifiable to these persons*, and not merely good from the perspective of society. If it would be reasonable for them to reject these reasons,[28] the demands of justification will not have been met.

The second reason why takings raise a distinctive demand for justification derives from the imperfectly fungible nature of property.[29] Despite the requirement of just compensation in the Takings Clause, there are reasons to suggest that a payment for the market value of the property will not always redress the harm of dispossession. First, a taking may frustrate the economic interests or expectations that a person may have in her property, such as long-term plans for business development.[30] The market for like-kinds may have risen so much that a party who had been paid compensation for a taking may be unable to find an adequate replacement. Second, a taking may frustrate a variety of personal, intangible interests that cannot be restored through compensation. As Michelman puts it, "property may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity, status . . . and security . . . ."[31] When a person (or family) is dispossessed by a taking, the connections she has to her community may be severed in a fundamental way.[32] Moreover, if the purpose of the taking is to transform the use of the property, this use may detrimentally alter the nature of the surrounding community that remains.

Given that the exercise of the takings power involves the imposition of asymmetrical burdens that may be insusceptible to complete

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[28] *See* SCANLON, *supra* note 9, at 195 (describing how the notion of reasonable rejection can function as a basis for assessing a proposed principle of morality). On Scanlon's view, if the principle would sanction the imposition of burdens to which a person reasonably could object, this is prima facie grounds for suggesting that an act performed under that principle would be wrong.

[29] *See* MARGARET JANE RADIN, *Property and Personhood, in* REINTERPRETING PROPERTY 35, 40–43 (1993) (describing property from the perspective of its association with one's own body or being).

[30] This concern is reflected in the common law of contracts that allows specific performance of sales of real property. *See, e.g.*, Loveless v. Diehl, 364 S.W.2d 317, 320–21 (Ark. 1963) (granting specific performance to a purchaser who had already made substantial improvements to the property as a lessee); RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981).

[31] Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981).

[32] Radin claims even more broadly that property can play a role in how "we constitute ourselves as continuing personal entities in the world." RADIN, *supra* note 29, at 36. To the extent that property has this personal value, compensation for a taking still will not make a person whole. Radin's position may suggest the claim that when property is so meaningful to a person it should never be taken. RADIN, *supra* note 29, at 53, 65 (suggesting that takings of property with a more "personal," rather than "fungible," character may be less easily justified). I am making a weaker claim to the effect that the potential harm to individuals creates a heightened demand for justification, but I do not advocate a categorical bar to takings when the subjective value of a person's property is great enough.

redress, adequate justification must be provided. The importance of people's interests in their own property suggests, initially, that something more than weak rationality will be required to provide an adequate justification to those who are burdened by a taking. Because the Public Use Clause serves as the potential locus of a political justification, a great deal rests on its construction. It remains to be seen whether the prevailing public use doctrine goes far enough toward fulfilling this justificatory role.

II. THE IDEA OF "PUBLIC USE" IN TAKINGS JURISPRUDENCE

There are two dimensions to the issue of how to interpret the Public Use Clause. First, what is the proper substantive interpretation of the Fifth Amendment's "public use" limitation? Or simply, what uses are genuinely public ones? Second, what role should courts play in reviewing takings not manifestly of a public character? That is, what standard of scrutiny should they apply? The following two sections address how the Supreme Court has resolved these issues. Part II.C then evaluates the Court's prevailing approach in light of the concerns about the justification adduced above.

A. Public Use as a Substantive Standard

Historically there have been two dominant ways of construing the public use requirement that have alternately found favor with the Supreme Court.[33] The first approach interprets the requirement narrowly, meaning fairly literally "use by the public."[34] A taking satisfies this requirement only if the real property is transferred from its private owner to a public entity that uses it directly to serve some public function, such as highways or government buildings.[35] Despite the intuitive plausibility of this interpretation, it has long been repudiated in Supreme Court jurisprudence.[36] By 1916, Justice Holmes declared

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[33] *See generally* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205–16 (1978) (tracing the shifting social and judicial history of the broad and narrow interpretations of the public use requirement).

[34] *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 603 (1949) (discussing the two constructions of the public use test—the narrow "use by the public" requirement, where the property is converted to a purpose in which the public has a right of use, and a broad version involving a "purpose beneficial to the public," where the use of the property may make an "indirect contribution to the prosperity of the community" but it does not involve a general license of the public to use the property).

[35] *Id.*

[36] *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (sustaining the condemnation of a right of way for a mining company to construct an aerial bucket line for transporting ore down a mountainside); Clark v. Nash, 198 U.S. 361 (1905) (affirming a state law allowing the condemnation of a right of way to provide irrigation to adjacent parcels despite the fact that this might only benefit an individual property owner). In both of these cases the Court

for the Court that "[t]he inadequacy of use by the general public as a universal test is established."[37]

The second, currently prevailing, interpretation of the Public Use Clause construes it to require only that some kind of "public purpose" is served by the transfer of property: "one person's private property may not be taken for the benefit of another private person without a *justifying public purpose*, even though compensation be paid."[38] In principle, this requirement does not proscribe the state from effecting a transfer of property from one private person to another. The result of a taking need not be that the government subsequently holds the real property, or even that the public gains a right of use to the property.[39] The idea of public purpose is construed broadly, but the resulting boundaries of the Public Use Clause appear to be more indeterminate than under the narrow construction. It remains uncertain as to what counts as an adequate public purpose to justify the disruption of an individual's claims to her property.

In the past fifty years, two significant Supreme Court cases have affirmed this expansive interpretation of the public use requirement—*Berman v. Parker*[40] and *Hawaii Housing Authority v. Midkiff*.[41] The remainder of this section discusses these two cases in some detail in order to describe their unique factual contexts and to highlight the dramatic scope of property dispossession that occurred in both instances.

In *Berman v. Parker* the Court upheld the use of eminent domain in a large-scale redevelopment project in several neighborhoods throughout the District of Columbia.[42] Congress had established the Redevelopment Land Agency and gave it power of eminent domain to acquire and assemble land for redevelopment of slums and blighted areas according to an area-wide plan.[43] The plan called for giving preference to private enterprises, rather than public agencies, to do the groundwork of redevelopment according to the plan certi-

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indicated that the decision of whether there is an adequate justifying public use depends on a close scrutiny of the relevant facts of each case, a task that is best left to state legislatures and courts familiar with the material circumstances. *Strickley*, 200 U.S. at 531; *Clark*, 198 U.S. at 370. As the ensuing discussion will show, the Supreme Court continues to endorse such a policy of deference to legislative decisions about public use.

[37] Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) (sustaining the taking of land for the construction of a dam by a power company).

[38] Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 80 (1937) (emphasis added).

[39] Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, *supra* note 34, at 603.

[40] 348 U.S. 26 (1954).

[41] 467 U.S. 229 (1984).

[42] 348 U.S. at 28–30, 36.

[43] *Id.* at 28–29.

fied by a planning commission.[44] The owner of a department store in the target area, which was not itself blighted, challenged the proposed taking of his property as violating the public use requirement.[45] His primary objection was that his property was to be taken and simply transferred to another businessman, violating the constraint against purely private transfers.[46]

The Court found that there was an adequate justifying public purpose for the taking—the elimination of slums and blight needed to bring about a general improvement in the public welfare in the area.[47] Congress had found that the targeted areas were characterized by substandard, overcrowded housing, and unsanitary conditions.[48] The Court affirmed that Congress was generally entitled to address these sorts of social problems, given its constitutionally-delegated authority. And "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[49] The fact that the transaction involved what was effectively a private transfer did not trouble the Court, so long as it was an incidental part of the broader redevelopment plan. Provided that there is an identifiable public purpose, the Court held, such private transfers are not strictly forbidden.[50] Once it is settled that Congress has the authority to legislate in some given area, and to use the power of eminent domain to accomplish its objectives, the Court indicated that it would not second-guess the approach that Congress deemed to be most effective. "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[51]

In its most important holding, *Berman* articulated the broad standard for establishing what constitutes an acceptable public purpose. "We deal . . . 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."[52] This holding gives legislatures tremendous discretion to use the power of eminent domain to advance whatever they perceive to be within the public good. Nor was the Court equivocal about precisely how much latitude it in-

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[44] *Id.* at 30.

[45] *Id.* at 31.

[46] *Id.* at 33.

[47] *Id.* at 35.

[48] *Id.* at 28.

[49] *Id.* at 33.

[50] *Id.* at 33–34.

[51] *See id.* (remarking that Congress may conclude that the public end may be better served through private enterprise).

[52] *Id.* at 32.

tended to extend to legislative determinations of what constitutes the public good. Rather, it provided an especially expansive and colorful description of what may be involved:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.... If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[53]

Evidently, then, the *Berman* Court perceived the public use requirement not to constitute a significant constraint on the use of eminent domain to dispossess private parties of their property so long as the legislature employed the power to address any matter within its governing authority. So long as there was a legislative decision that the public welfare ought to be served in this particular manner, this was thought to be adequate justification for the taking.

Thirty years later, in *Hawaii Housing Authority v. Midkiff*, the Court reaffirmed *Berman*'s broad construction of the Takings Clause in reiterating that "[t]he 'public use' requirement is ... coterminous with the scope of a sovereign's police powers."[54] This case involved the use of eminent domain by the Hawaii legislature in its efforts to address what it found to be an excessive concentration of land ownership in the hands of a few private landowners.[55] Extending back to a feudal land tenure system from the era of island chiefs, the legislature found, ownership had become so restricted by the mid-1960s that forty-nine percent of the state's land was owned by the state and federal governments, and another forty-seven percent was owned by only seventy-two private landowners.[56] The legislature determined that this distribution "was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[57] Rather than owning the land, many people owned houses and leased the land upon which their houses sat.[58] Private landowners were resistant to selling their parcels because of the federal tax burdens likely to ensue.[59] The legislature decided to make

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[53] *Id.* at 33 (citations omitted).

[54] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[55] *Id.* at 232.

[56] *Id.* Moreover, "on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles." *Id.*

[57] *Id.*

[58] *See id.* at 233 (observing that the law was aimed at homeowners who rented the land upon which their houses were built).

[59] *Id.*

the land sales involuntary by condemning a property and offering it for sale only to its current occupants.[60] This strategy diminished the federal tax consequences to the current owners, while still achieving the redistribution of fees simple.[61]

The Ninth Circuit had found that the transfers violated the Public Use Clause because their primary benefit accrued to the individual lessees who were enabled to purchase property.[62] It held that the Act was "a naked attempt" to redistribute private property for the private benefit and use of the transferee.[63]

The Supreme Court, however, was untroubled by Hawaii's land transfer program, despite the fact that it compelled what were essentially private transfers between individuals:

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn the taking as having only a private purpose. . . . [G]overnment does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.[64]

Once again, the Court was concerned only in finding whether the legislature had articulated a public rationale for its policies that could be said to advance the general welfare. But because the state is free to use the mechanism of eminent domain to advance any goal within its police power, the public use requirement provides weak constraints.[65] The broader legislative purpose of the Act, "[r]egulating oligopoly and the evils associated with it,"[66] was sufficiently general a goal to fall within the state's police power. Thus, "[r]edistribution 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."[67]

The Court held that the only circumstance in which even a compensated taking would be forbidden would be if the legislature had acted "for no reason other than to confer a private benefit on a particular private party."[68] Under this interpretation, the only purposes

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[60] *Id.* The state also empowered the housing authority to assist the lessees to purchase the properties by lending them up to ninety percent of the purchase price. *Id.* at 234.

[61] *Id.* The Court did not explain why an involuntary sale of the property would have "less severe" federal tax consequences, though it indicated that many owners would be more willing to sell their land if the tax burden were lessened. *Id.*

[62] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[63] *Id.*

[64] *Midkiff*, 467 U.S. at 243–44 (1984).

[65] *See id.* at 242–43 (stating that even if the law does not achieve its stated goals, as long as such goals are part of a rational exercise of eminent domain power, the law is constitutional).

[66] *Id.* at 242.

[67] *Id.* at 243.

[68] *Id.* at 245.

that the "Public Use" Clause bars are those that simply give preference to one party at the expense of another without any broader public rationale. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[69]

As *Berman* attests, however, the legitimate purposes of government are quite expansive[70] and apparently growing all the time. So long as there is a legislative determination that a policy will serve the public good in some respect, there may be no social policy or program that would fail to meet the Court's standard.[71] As a substantive constitutional standard, the public use requirement (construed in this fashion) imposes only the most limited demands on the government to justify its actions dispossessing individuals of their property interests.[72]

Berman and *Midkiff* together stand for the proposition that so long as there is *some* legitimating public benefit to the taking and transfer of land, it does not matter how important that purpose is, how severe a deprivation the taking will inflict, or if there are disproportions between public benefits and private benefits and harms. Even if private parties benefit from a taking to a far greater extent than the public welfare is improved, *Midkiff* provides no grounds for overturning the result.

Berman and *Midkiff* can be seen as clear instances of the Court applying a model of weak rationality justification, as I characterized it above.[73] The Court looks only to determine whether the taking is "rationally related to a conceivable public purpose,"[74] and if it is so related, treats this end as sufficient to justify the action. The Court thereby extends the minimum rationality standard of review applicable to questions of economic regulation to the arena of takings law. As I have also suggested above,[75] however, there are theoretical reasons for preferring a more demanding form of justification for the

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[69] *Id.*

[70] *See* Berman v. Parker, 348 U.S. 26, 33 (1954) ("The concept of public welfare is broad and indefinite.").

[71] As *Midkiff* notes, "where the exercise of 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." *Midkiff*, 467 U.S. at 241. Admittedly, the Court may accord less deference to lesser public agencies with eminent domain power that act without relying on explicit legislative findings. *See, e.g.*, Daniels v. Area Plan Comm'n, 306 F.3d 445, 464 (7th Cir. 2002) ("Because the Plan Commission has not relied on a legislative determination of public use, the traditional deference given to those determinations is not appropriate in this case.").

[72] Some scholars would even suggest that the Court's interpretation of the requirement has removed it from the practice of justification entirely. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) ("[M]ost observers today think the public use limitation is a dead letter.").

[73] *See supra* note 13 and accompanying text.

[74] *Midkiff*, 467 U.S. at 241.

[75] *See supra* Part I.B.

taking of property. A weak rationality standard does not show proper regard for the concerns of the individuals who are most burdened by a social policy.

B. The Role of the Judiciary in Scrutinizing Public Use Determinations

Along with its spare substantive interpretation of the public use requirement, the Court has also indicated a correlative policy of judicial deference toward legislative decisions over these questions.[76] Throughout public use cases over the past century, the Court has perceived its role in reviewing such determinations of public purpose to be quite limited.[77] For the most part, legislatures are left to determine the scope of their own power to affect the public good, including the use of eminent domain. "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[78] How narrow exactly? The Court frequently alludes to some early cryptic principles: a court should not substitute its judgment "unless the use be palpably without reasonable foundation"[79] and deference to the legislature is required "until [Congress's intention] is shown to involve an impossibility."[80] These explanations are not exactly edifying, though they serve as further evidence that the Court believes that only the weakest rationale is necessary to justify a taking.

The Court has tended to offer one basic type of reason for its policy of near-total judicial deference in this area: "[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[81] Presumably legislatures are better acquainted with the particular circumstances in which the taking is contemplated ("the facts surrounding the subject," in Justice Peckam's words),[82] and can assess whether a taking will be necessary to achieve the optimal solution in that case. If courts were eager to upset such determinations, they would presumably be injecting some arbitrary principle into an arena that calls for fact-specific inquiry. "Any departure from this judicial restraint would result in courts de-

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[76] *See Midkiff*, 467 U.S. at 240 (citing *Berman*, 348 U.S. at 32.).

[77] This approach, which well-preceded *Berman*, can be found in *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552 (1946), *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), and *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668 (1896). *See infra* notes 78–80 and accompanying text.

[78] Berman v. Parker, 348 U.S. 26, 32 (1954).

[79] *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680.

[80] *Old Dominion Land Co.*, 269 U.S. at 66; *see also Welch*, 327 U.S. at 552 (quoting *Old Dominion Land Co.*, 269 U.S. at 56.).

[81] *Midkiff*, 467 U.S. at 244.

[82] Clark v. Nash, 198 U.S. 361, 369 (1905).

ciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."[83]

To be sure, there have been some dissenting views on the policy of judicial deference to legislative determinations of what is an appropriate public use. In *Welch*, Justice Reed insisted that the question of whether a taking is for a public purpose is always finally a judicial question:[84]

> Of course the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen.[85]

While *Midkiff* does not wholly disavow judicial scrutiny, the Court's current policy is significantly more lenient than these dissenting views would have it.

As *Berman* explains it, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms *well-nigh conclusive.* In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[86] This stance highlights the distance the Court perceives between the set of liberties it affords great care in scrutinizing (and the lack of deference to the legislature in those instances)[87] and the interests in property that are at stake when the government exercises its takings power. The Court's policy of deference may appear perfectly reasonable if we agree with its conclusions on the substantive standard. But if there are grounds for suggesting a need for a more rigorous form of justification for instances of takings, the Court may have abdicated its role as a source of constitutional

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[83] *Welch*, 327 U.S. at 552 (sustaining the condemnation of private property by the Tennessee Valley Authority in a remote area whose access highway was flooded by the creation of a new dam reservoir).

[84] *Id.* at 556–57 (Reed, J., concurring).

[85] *Id.* See also Justice Frankfurter's concurrence:

> This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that legislative determination that the use was 'public' exceeded Constitutional bounds. But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting. . . . [W]hether a taking is for a public purpose is not a question beyond judicial competence.

Id. at 557–58 (Frankfurter, J., concurring).

[86] Berman v. Parker, 348 U.S. 26, 32 (1954) (emphasis added).

[87] As in the cases where fundamental liberties of speech and political participation are implicated. *See supra* note 24.

oversight. Judicial review is precisely what is wanted when important liberties are at stake or the demands of political justification are not trivial. If, as I will show below, there are important interests to be protected, there is reason for the Court to engage itself more seriously in a consideration of these concerns.[88]

C. Raising the Demand for Justification in Takings

The results in *Berman* and *Midkiff*, suggesting that the mere presence of a conceivable public purpose is sufficient to justify a taking, conflict with the two considerations (asymmetry of burdens and imperfect fungibility of property)[89] that suggest that takings require a more rigorous form of justification. The version of weak rationality justification offered by the Court does not satisfy the more stringent demand for justification that takings seem, at least theoretically, to require.

As it stands, the weak rationality standard of justification would sanction a taking that has only slight public benefits regardless of how great its costs are. Recall the expansive construction of public purposes in *Berman*, which went so far as to prescribe virtually any legislative efforts to promote aesthetic and spiritual well-being in the community, and held that "there is nothing in the Fifth Amendment that stands in the way."[90] Suppose a legislature finds that planting flowers along highways tends to produce slight decreases in the incidence of highway traffic accidents because of the theoretically beneficial effects of flowers on stress levels. It decides that there is one neighborhood of row homes near the exit ramps that has been an especially frequent site of accidents, including one fatality several years ago. The legislature decides to condemn the entire neighborhood, raze the homes of 200 families, and turn the area into a beautiful garden.[91] There is nothing within the broad principles of *Berman* and *Midkiff* to rule out this kind of legislative initiative. There is a clear public purpose, traffic safety and public health, which no court has denied is within the purview of a state's police powers. Moreover, it is not a

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[88] What underlies this suggestion may even be characterized as a concern with ensuring the availability of procedural due process. If courts are too deferential to legislative policies that have the potential to harm discrete populations, there is a danger that these persons will be denied the chance to have their concerns fully and carefully considered in an impartial forum.

[89] *See supra* Part I.B.

[90] *Berman*, 348 U.S. at 33.

[91] This example is admittedly stylized in order to draw out the logical implications of the principle under consideration, but it is not entirely without basis in reality. The *Berman* holding has vindicated various forms of aesthetic takings, including scenic easements along highways that prevent landowners from using or altering their property in different ways. *See* Berger, *supra* note 33, at 222 (discussing cases involving highway beautification).

case of a purely private taking, as the land is not transferred for the benefit of any private party.

The intuition here, however, is that there is something deeply unjustifiable about forcing so many families out of their homes for such small improvements to the public welfare. The aggregate burden on the dispossessed residents, no doubt, far exceeds the expected benefits. Notice that this hypothetical scenario stands in contrast to the real facts in *Berman*, in which the public purpose to be served was significantly more substantial than slight increases in traffic safety. Given the weightiness of the interests at stake, it is plausible to say that *Berman*'s result was consistent with the more stringent demands for justification required by the cost-benefit rationality standard. But it does not follow from this result that absolutely any improvement to public welfare will justify the use of eminent domain. The *Berman* Court generalized its specific holding into a sweeping principle without showing why the demands of justification for a taking should be set so low. The doctrine is overly broad because the kinds of measures that would be acceptable to address *urgent* social ills would not always be equally legitimate means to address every conceivable legislative purpose directed at the public good, irrespective of the costs that these measures might impose.[92]

The underlying problems with *Berman* and *Midkiff* are not their specific results but rather their general policy of validating a taking based on only one kind of relevant consideration among many. Not all public purposes are equally important, but these two cases treat them as if they are. In doing so, the Court overlooks the fact that the justification of publicly-imposed burdens requires a more thorough assessment of the weight of all relevant interests. It is doubtful that any marginal improvement in public welfare, such as making the roads a little more safe[93] or making a neighborhood a little more

[92] We can note that *Midkiff* presents a significantly harder case on the facts. The hardships that the legislature was attempting to remedy were obviously not as dire, for there were no burdens other than the high cost of land ownership. Nevertheless, a careful accounting of the public benefits and the harms to the landowners might have supported the same result, even on this more demanding standard of justification. Again, it is plausible to say that the result was a correct one, but it is a closer call. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232–33 (1984) (highlighting the disparate proportion of landowners).

[93] This rationale was suggested in *Frustaci v. City of South Portland*, 2000 U.S. Dist. LEXIS 13635, at *17 (D. Me. 2000). This case did not actually involve the use of eminent domain, but rather involved a claimed regulatory taking. The plaintiff asserted that a municipality's decision to discontinue development of streets near his property denied him the opportunity to develop his property into a twenty-unit subdivision, effecting a regulatory taking. In sustaining motions to dismiss the plaintiff's claims, the court held that "[a] judgment that discontinuance of a road abutting a planned subdivision could advance these public purposes is not palpably lacking in reasonable foundation." *Id.* at *18.

beautiful,[94] can always justify the imposition of harms as serious as the dispossession of homes and businesses.

This argument only goes so far as to suggest that, at the very least, something closer to the cost-benefit approach to justification is required for takings. This standard would hold that an exercise of eminent domain is justified only if the public benefits are demonstrably greater than the costs imposed on the harmed parties. It is a more acceptable minimum than the weak rationality standard because it recognizes that other interests ought to be considered against the value of the intended public purpose. The weak rationality approach allows the concerns of the dispossessed parties to be disregarded entirely. Yet the recognition of non-fungible, personal interests that individuals often have in property provides an important reason for courts to engage in a more thorough inquiry. By applying the more demanding standard of cost-benefit rationality to these problems, courts would afford those potentially harmed by a taking the opportunity to demonstrate the importance of their personal interests that are threatened.

Although this argument is sufficient to show that the current public use doctrine sets the standard for justification too low, it does not settle the question of how high it should be. Even cost-benefit rationality may turn out to be an insufficient justification for a taking, at least in some cases. I will return to this question[95] after first considering some more recent lower court decisions interpreting the requirement of public use.

III. POST-*MIDKIFF* DEVELOPMENTS IN LOWER COURTS

The basic doctrine articulated in *Midkiff*, that a public use can be found whenever there is a conceivable public purpose for a taking, still leaves lower courts with some latitude to fill in the contours of the doctrine at the margins of public and private benefits. That is, there is room to invalidate a taking if it is performed "for no reason other than to confer a private benefit on a particular private party."[96] Some lower court decisions may suggest some useful ways to resolve disagreements over what is a legitimate public use. Although there is no direct resistance to the Supreme Court's minimal standard for justifying a taking, the analysis of certain cases sometimes indicates a concern to provide a more thorough evaluation of competing interests than prevailing doctrine requires. The following inquiry first

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[94] As suggested by *Berman*, 348 U.S. at 33.

[95] *See infra* Part IV.

[96] *Midkiff*, 467 U.S. at 244.

looks at cases where courts have found no violation of a public use standard and then those where they have found such a violation.[97]

A. *Affirmation of Public Uses and Purposes*

Courts consistently recognize certain social policies to fall squarely within the boundaries of the public use requirement. Primary among these policies are programs to eliminate slums and blight, where there is manifest deterioration of a neighborhood and limited prospects for economic revitalization without significant intervention. The redevelopment of Times Square in New York City, for instance, gave rise to a recent takings challenge on public use grounds.[98] A public redevelopment authority intended to condemn privately owned land and lease it to the New York Times, which would build a new office tower for its headquarters.[99] The redevelopment scheme would benefit the public by adding needed office and commercial space, increasing retail revenue, revitalizing the economic prospects of the area and driving out blight and crime.[100] In affirming the use of eminent domain, the appeals court held that "[v]irtually all of the anticipated outcomes of this project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood."[101] The court validated the exercise of eminent domain as being rationally related to the conceivable public purpose of reducing blight in the area, despite the benefits to private parties that it would confer.[102] A similar rationale is typically offered in other urban renewal cases involving the use of eminent domain.[103]

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[97] Note that the cases discussed in this section are all state cases, and as such are primarily concerned with the version of the public use clause found in their respective state constitutions. Although the content of the state and federal takings clauses are often "substantially similar," *see* Tolksdorf v. Griffith, 626 N.W.2d 163, 165 (Mich. 2001), state courts will have the prerogative to interpret the state public use requirement as they see fit. Their results do not directly follow from *Midkiff*'s interpretation of the federal public use clause. My purpose in discussing these various cases is not to show how the Federal Constitution has been construed, but rather different variations of how it might be so construed.

[98] W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

[99] *Id.* at 124.

[100] *Id.*

[101] *Id.* at 126.

[102] *Id.* Note that in this case, similar to the situation in *Berman*, the city's approach to redevelopment explicitly relied on an approach "that affords maximum participation by private enterprise." *Id.* at 124.

[103] *See, e.g.*, Crompton Corp. v. City of Dubuque, 2001 U.S. Dist. LEXIS 10653, at *9 (N.D. Iowa 2001) (dismissing on the pleadings a public use challenge to an urban renewal taking); City of Dayton v. Kuntz, 1988 Ohio App. LEXIS 747, at *17 (Ohio Ct. App. 1988) ("[A] city's decision to appropriate blighted or deteriorating land for an urban renewal project intended to

Other public purposes found sufficient to justify the use of eminent domain include concerns for public safety and traffic regulation because they "fall within the scope of sovereign police power."[104] A public purpose has also been found in the condemnation of a right of way to obtain access to a landlocked parcel.[105] Despite the appearance that the benefit of such a taking accrues only to a particular individual, the court found the public purposes to include "'preserving and enhancing the value, promoting the owner's full and lawful use and enjoyment of his property, and serving the public interest by putting the citizen in the position to perform public services.'"[106] In this fashion, lower courts often follow the broad mandate of the Supreme Court's public use doctrine, allowing the use of eminent domain whenever there is a nexus with a conceivable public purpose, even if there is a distant relationship between the good to be served (such as traffic safety or public service) and the mechanism of dispossessing individuals from their real property.

B. Violations of the Public Use Limitation

There are a number of instances where courts have found a taking actually to violate the Public Use Clause, even when the reasons proffered are quite similar to those endorsed in other cases. *Berman* and *Midkiff*, of course, did not advocate total deference to all uses of eminent domain, prescribing only a "narrow" scope of judicial scrutiny to overturn takings that effect purely private transfers.[107] Although *Midkiff* did not make perfectly clear what constitutes such a narrow scope, some subsequent cases purport to fall within this area. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[108] the court found that the proposed taking would be a purely private transfer motivated by pressure from a large store threatening to leave the municipality.[109] Costco, the anchor store in a shopping center, wanted to expand its operations into the commercial space adjacent to it rather than construct a separate addition.[110] The city attempted to justify the transfer in terms of the economic benefits of protecting the existing center, but the court rejected the city's explanation as being "demonstrably

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rejuvenate a downtown area is conducive to the public welfare and constitutes a 'public use'. . . .").

[104] *See* Frustaci v. City of S. Portland, 2000 U.S. Dist. LEXIS 13635, at *17 (D. Me. 2000) (suggesting that concerns for traffic safety could justify a decision not to extend a road to undeveloped property).

[105] Lockridge v. Adrian, 638 So. 2d 766 (Ala. 1994).

[106] *Id.* at 771 (quoting Steele v. County Comm'rs, 3 So. 761, 763 (Ala. 1887)).

[107] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1983).

[108] 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

[109] *Id.* at 1129.

[110] *Id.* at 1126.

pretextual," and found that its worries about the possibility of "future blight" if Costco were to leave the shopping center to be an implausible public concern.[111] The court characterized this case as falling squarely within the narrow scope of judicial scrutiny, left uncertain by *Midkiff*, to protect property owners from purely private transfers.[112]

Nevertheless, not every case in which the Public Use Clause is held to be violated is quite so clear a case of purely private benefit. Even when there is some plausibility to the proffered rationale of the benefits of economic development, courts are not always persuaded that a public interest is being served to an appropriate extent. Cases indicate that courts are sometimes inclined to apply a higher standard of justification than the minimal rationality scrutiny of *Midkiff*. In *Southwestern Illinois Development Authority v. National City Environmental*,[113] a case with some factual resemblances to *Berman* and *Midkiff*, the Illinois Supreme Court addressed a proposed taking that would have transferred land from a private recycling business to an adjacent racetrack so the business could expand its parking capacity.[114] The recycling center was not at the time using the land proposed to be transferred, but had long-term business plans to do so as other portions of its property were used up as a landfill.[115] One rationale offered in support of the transfer was that the development would increase the tax base and generate more revenues, which in turn could be used to enhance public health, safety, morals, and general welfare.[116] Another was that the new parking lot would improve traffic patterns on nearby highways during high-volume race days, decreasing the safety hazard caused by congestion.[117]

Despite "acknowledg[ing] that a public use or purpose may be satisfied in light of public safety concerns"[118] and "recogniz[ing] that economic development is an important public purpose,"[119] the court nevertheless found that the transfer was primarily of a private character, whose principal benefit would accrue to the racetrack and to its customers. Because the racetrack did have the alternative, albeit a more expensive one, of building a parking garage on property it already owned, "[t]his condemnation clearly was intended to assist [the

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[111] *Id.* at 1129, 1130.

[112] *Id.* at 1129.

[113] 768 N.E.2d 1 (Ill. 2002).

[114] *Id.* at 4. It is noteworthy that the racetrack was initially built in an area targeted for economic revitalization and was expressly chosen as a method of increasing revenues in the area. The track turned out to be even more popular than anticipated.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 9.

[119] *Id.*

racetrack] in accomplishing [its] goals in a swift, economical, and profitable manner."[120] In the end, the potential gains to the public welfare simply were not compelling enough to warrant the taking. "While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government."[121]

The practice of condemnation of land for providing rights of way to landlocked parcels has also come under question as a legitimate public use. In *Tolksdorf v. Griffith*[122] the Michigan Supreme Court struck down a state law allowing the compulsion of such private transfers.[123] It held that when a taking benefits private interests, "a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced."[124] If there are "speculative or marginal" benefits to the public from this policy, but the interest served is predominantly a private one, the taking is impermissible.[125] Here, the policy of promoting the beneficial use of land did not outweigh the fact that primarily private interests were being served.[126]

By characterizing a proposed taking as having primarily private benefits, these cases effectively raise the demands of justification. This is possible because of the logical connection between public and private benefits, and the lack of any sharp distinction between them. The good of the public is, logically, some form of aggregation of private good. Private benefits rarely work in total opposition to the public good. So even if something, such as an easement for a landlocked parcel, appears to benefit exactly one person, it may have effects on the productive use and overall value of land that can be characterized in more broadly public terms. The judgment of whether something constitutes a purely private transfer thus is able to bring in considerations of the sort required by cost-benefit rationality without explicitly acknowledging as much. In this fashion, at least some lower courts indicate a willingness to engage in a more thorough balancing of competing considerations than that required by *Midkiff*'s weak rationality approach. This involves not only identifying a conceivable

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[120] *Id.* at 10.

[121] *Id.* at 10–11.

[122] 626 N.W.2d 163 (Mich. 2001).

[123] *Id.* at 169.

[124] *Id.* at 168 (quoting Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981).

[125] *Id.*

[126] The court did note that its holding did not preclude common law principles of prescriptive easements or easements by necessity from applying. It simply rejected a statutory mechanism for achieving this result. *Id.*

public purpose but looking to the relationship between the asserted public purpose, the importance of eminent domain to that end, and the private interests at stake. This kind of approach embodies a more demanding standard for the justification of takings.

IV. JUSTIFYING THE BURDENS OF TAKING

In this final Part, I examine some alternative proposals for construing the public use requirement and identify some fundamental considerations to be employed in an adequate justification of takings. The various proposals each have some connection to the different abstract models of political justification described in Part I, though I now try to develop them with specific reference to the actual problems of takings. Each of the following proposals looks to give a more stringent content to the public use requirement, and calls for the invalidation of more than only the most blatant private transfers. Accepting any of these approaches calls for a correspondingly more rigorous judicial inquiry than the Supreme Court now advises for takings claims, though the nature of the inquiry will vary significantly with each.

A. Some Approaches to Heightened Justification

One approach toward refining the public use requirement might attempt to amplify the distinction between takings that serve *predominantly public* or *predominantly private* ends.[127] It would suggest that a taking is justified whenever public benefits can be said to predominate over private ones. If the primary good to be achieved is broad-based, but it happens also to confer private benefits on certain parties, this will not disqualify the taking as long as achieving the public benefit was not a pretext for a private goal. This approach is a closer variant of weak rationality than cost-benefit rationality, because it seeks only to compare the possible benefits of a taking, while still disregarding the burdens imposed on those who are dispossessed. It calls upon courts merely to make factual inquiries about the likely consequences of the taking to those who stand to benefit from it. Where there are dual public and private benefits expected, courts are to ensure that the public benefits are not merely "speculative or marginal"[128] relative to the private interest served. The primary motiva-

[127] This approach would basically attempt to impart more substantive content to *Midkiff*'s proscription of "purely private takings" by expanding the notion of what "purely private" means.

[128] *Poletown*, 304 N.W.2d at 460 ("[P]ublic benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature."), *overruled on other grounds by* County of Wayne v. Hatcock, 684 N.W.2d 765 (Mich. 2004). *Poletown* was a very significant state public use case in the period before *Midkiff*, confronting a proposed

tion of this approach is to avoid using public power for largely private gain. While this approach represents an advance over the weak rationality doctrine in *Midkiff*, it similarly fails to take into account the significance of the burdens on the dispossessed occupants of property. It is to those whom are harmed by a policy that a justification should be addressed. While it is important to avoid using government power for the private benefit of certain individuals, this is not the most fundamental moral concern at stake.

A second approach might suggest that courts attempt to articulate a limited, but paradigmatic set of public purposes for which the use of eminent domain is categorically permitted.[129] For instance, the goal of eliminating slums and blight might always legitimate the use of takings power.[130] *Southwestern Illinois* suggested something along these lines in maintaining that "[c]learly, the taking of slums and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property,"[131] even when it rejected a more general economic benefit rationale. Economic revitalization to combat circumstances of deterioration would be acceptable; but the mere possibility of general economic growth will not be a sufficiently defined goal to justify a taking.[132] This approach would rest on a presumption that the social benefits of slum clearance and blight removal almost certainly outweigh the particular harms created by a taking. In relying on such a presumption, this approach does not guarantee that courts will always carefully consider the interests at stake to be certain that the benefits are substantial enough to vindicate the taking of property. It would be a form of cost-benefit rationality only as a higher-order principle that will usually, though not necessarily, achieve the correct cost-benefit result. This approach is even more demanding than the cost-benefit rationality model because it restricts the set of social benefits that can justify a taking only to a few kinds of public benefits. It would not consider

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taking that would assemble land for the development of a new General Motors plant. It exemplifies the "predominance of the public interest" approach described here and upheld the proposed taking in light of the significant expected public benefit of "alleviating unemployment and revitalizing the economic base of the community." *Id.* at 459.

[129] This list would extend beyond those uses that fall under the original "use by the public" criterion, such as road building and public facilities, to encompass some but not all previously recognized public purposes.

[130] I will return to consider whether this strategy raises special concerns about the possibly disproportionate impact it may have on racial minorities or other disadvantaged populations. Thanks to Mandara Meyers for suggesting this important concern.

[131] S.W. Ill. Dev. Auth. v. Nat'l City Envtl., LLC, 768 N.E.2d 1, 9 (Ill. 2002).

[132] The fact that there will be some commercial development, by itself, would be insufficient to justify a taking from one business to give to another. *Southwestern Illinois* notes that every lawful business contributes to economic growth, in some sense, so a harm to one lawful business cannot be justified on this ground. *Id.*

a taking to be justified if it accomplished entirely different social objectives. This fact is the main drawback to the viability of this approach as a guiding principle of constitutional adjudication. There is no reason to narrow the concept of public use so greatly, nor is there any textual or judicial basis for supposing that the use of takings be limited to achieving one form of public benefit (removing slums and blight), but no others.

A third approach could be formulated as a straightforward application of the cost-benefit rationality standard. This would entail comparing the intended public benefits against the burdens that a taking would impose on the dispossessed party and require, at the least, that the benefits to the public not be disproportionate to the harms imposed on the party whose property is taken.[133] This approach comes closer than the others to recognizing the interests of those harmed. Because it only counts public benefits toward justifying a taking, this approach is able to rule out purely private transfers by not including gains to private parties in the calculus of interests. In practice, however, it will be difficult to disentangle the public from the private benefits given the logical interdependence between the two. Nevertheless, a cost-benefit standard has some intuitive plausibility as an account of the minimal requirements for justification. It remains to be considered, as I will in the next section, whether there are further reasons to make the demands of justification even more rigorous.

A fourth approach would construe the Public Use Clause to require an assessment of a proposed taking in terms of abstract deontological considerations of fairness and justice.[134] This assessment would rest upon a presumption that the value of preserving possessory interests is paramount, and that only very weighty social considerations could override it. This approach does not specify a systematic procedure to be followed; it simply requires the type of careful reflection characteristic of a deontological approach to moral reasoning.[135] What it might mean in practice is that a court would deliberate

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[133] This approach is not specifically endorsed in any public use case, but it is inspired by recent dicta from a regulatory takings case: "in a general sense concerns for proportionality animate the Takings Clause." City of Monterrey v. Del Monte Dunes, 526 U.S. 687, 702 (1999) (holding, however, that its "rough proportionality" standard for exactions did not apply to the instant case).

[134] This approach is judicially grounded in a suggestion from *Armstrong v. United States*: "The Fifth Amendment's guarantee . . . was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

[135] The standard could be made somewhat more specific, for instance, by incorporating something like Scanlon's notion of reasonable rejection: the policy is justifiable if it would be unreasonable for the person who is affected by it to reject it. SCANLON, *supra* note 9, at 195. This does not mean that the taking must be done with the actual approval of those affected by

about the competing interests involved (the public benefits and individual burdens) and reach a conclusion based on the overall force of reasons. There is no predetermined formula for weighing interests against one another. It is simply a matter of reasoned judgment. The justification of a taking, on this view, depends on its being judged to serve a public purpose of such substantial weight that it is morally acceptable to disturb otherwise legitimate property interests. The underlying concern of the judicial scrutiny will be to ensure that individuals are not arbitrarily singled out for disfavorable treatment by the government.[136] It should be clear that the use of the takings power does not result in arbitrary mistreatment. As a general precept, social costs should be spread across the society as a whole.[137] Thus, situations in which certain individuals are asked to bear disproportionate social costs raise heightened concerns for justification. Because takings directly involve the unequal distribution of public burdens, they implicate a concern to ensure not only that they serve some public good, but that this good is sufficiently important to justify the harm on particular parties.

These last two approaches to construing the public use requirement are both plausible frameworks for satisfying the demands of political justification of the use of the takings power. The remaining issue to resolve, then, is how to decide between them.

B. "Public Use" as a Deontological Principle?

There are contexts in which the collective good appears to warrant limitations on the pursuit of individual well-being. Much economic and environmental regulation is supportable on this principle. But there are also some interests so important that they may not be sacrificed even when doing so would serve the end of social utility. Thus we find constitutional guarantees for certain fundamental liberties.[138] The problem of takings tests our principles. Are interests in property closer to the fundamental liberties in a democratic community or to more limited rights to economic participation?[139] No doubt,

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it, who will naturally have grounds for being upset. The idea of reasonableness is an objective one.

[136] This concern can also be expressed by its corollary, that private individuals should not receive arbitrary preference from government policies. *See* Sunstein, *supra* note 8, at 1689 (characterizing this concern of preference as underlying most of the major constitutional tests).

[137] *See Armstrong*, 364 U.S. at 49 (stating that the public use requirement was intended to prevent the few from bearing public burdens).

[138] The First Amendment is readily understood in this way.

[139] I speak of interests in property rather than rights because it is unclear that there is a right to property in the same way as a right to free speech. Although all rights admit of some limitation at the margins, in general, individual rights function as trumps over social utility. Our constitutional system does not accord this level of protection to interests in property. On the con-

we share a conviction that interests in property are deeply important for many reasons.[140] Property interests, however, are widely perceived to have less of a claim to inviolability than political liberties. The best characterization may be that property interests occupy a nebulous middle ground. But this does not settle the question of which model of political justification is most appropriate for resolving the conflict of interests between the public and private individuals that a taking raises.

This final section provides two arguments for preferring a deontological standard of justification to resolving disputes over the scope of public use. Applying this standard, however, does not entail according the same degree of substantive protections to property interests as it does to political liberties. Such a heightened standard of justification simply requires a more deliberative judicial inquiry. It asks that careful attention be paid to the nature and extent of the burdens imposed on individuals for the benefit of the public as a whole to ensure that the proposed taking is not an arbitrary imposition of government power.

The first argument is a negative one against the viability of cost-benefit rationality as a sufficient form of justification. Cost-benefit rationality, being a close cousin of utilitarianism, is vulnerable to one of the most important criticisms of utilitarianism: that it fails to respect the distinctness of persons.[141] Because cost-benefit rationality looks only to the *aggregate* balance of benefits and burdens, it is insensitive to the moral difference between a distribution that concentrates burdens on a few people and one which spreads them across many persons. The value of fairness dictates a concern with the distribution of burdens, not merely their sum total. When confronted with an asymmetrically burdensome public policy, as the use of takings power is, it is important to consider whether the benefit to be achieved really can justify the unfair manner in which it is to be brought about.

What matters, then, is not simply the aggregate benefit to be achieved, but also the kind of benefit. Only very important social goals that cannot be brought about in another manner should be eligible for consideration as appropriate ends of a taking. In principle, cost-benefit rationality would sanction imposing extraordinary burdens on some persons so that others (as long as there are enough of

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ception of rights as trumps, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (1977). But for an argument that property rights are fundamental, inviolable rights, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[140] They contribute to the satisfaction of our basic needs, they provide for physical and economic security, they enable a free market in goods and services, they comprise constituents of our moral personality, and they connect us to community. On these points see, for example, RADIN, *supra* note 29, at 38–43; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 3–5 (1988).

[141] This argument is the one famously made by JOHN RAWLS, A THEORY OF JUSTICE 27 (1971).

them) would enjoy merely trivial improvements in their well-being. But there is a strong intuition that trivial improvements to the welfare of many people cannot justify imposing a significant burden on one person.[142] In practice, concededly, there may not be a great difference between the two approaches if either were adopted by the courts. There may be political constraints that limit the abuses of eminent domain. To be sure, cost-benefit rationality is an advance over the meager standard of justification contained in prevailing public use doctrine. But in theoretical terms, it does not go far enough toward realizing an interpersonal form of justification, which requires that the individual who is burdened be capable of recognizing the reasonableness of the cost imposed on her.

The second argument in favor of a deontological model of justification for public use rests on its ability to accommodate a special concern with protecting the interests of socially and politically disadvantaged populations that may be most vulnerable to being harmed through the use of eminent domain. Not only do takings involve an asymmetry of burdens, but in reality, these burdens are most likely to be imposed on politically ineffective constituencies. While it seems intuitively plausible that a taking for the purpose of eliminating slums and blight will generally be justifiable, it is not always certain whether the net social benefit achieved will actually benefit the population that is directly burdened by the taking.

The context of slum and blight removal provides an apt scenario for illustrating the contrast between the cost-benefit and deontological approaches. A development plan involving condemnation and taking might do an effective job at improving the physical infrastructure of an area. From the perspective of a cost-benefit assessment, there might be substantial economic gains that far outweigh the costs imposed on the dispossessed residents. All the same, the project could leave the residents as badly off, or worse off, as they were before.[143] Cost-benefit rationality makes a wholly impartial calculation of benefits and harms. But what is often warranted is an approach that specifically attends to the concerns of those who are most burdened. A deontological approach to the justification of a taking focuses on the interests of those persons who are most relevantly affected by it. A taking is justified if it treats these persons fairly, not merely if it improves aggregate social welfare.[144]

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[142] *Id.* at 28.

[143] Even if they find comparable or better housing, they may be worse off in terms of being separated from their work, schools, family, or community ties.

[144] It cannot be settled theoretically what fair treatment entails in every circumstance. But in some cases it may mean that a development plan makes some allowance for the dispossessed residents directly to benefit from the revitalization of an area, or that there are assurances that they will be relocated to a better area than the one they are compelled to leave.

Takings possess the possibility for imposing arbitrary harms on a powerless political constituency. Given this possibility, it is important that courts be sensitive to these kinds of concerns when they allow an asymmetrically burdensome social policy to proceed. Judicial deliberations will often have to stand in for the full participation of all viewpoints in the political process. Thus, to say that the demands of justification ought to be heightened is to suggest that courts have a special duty to attend to the possibility of harm to a population that is less capable of defending its interests in the political and legal arena. By applying a deontological method of justification to the scrutiny of takings, our judicial system will come closer to protecting these interests.

CONCLUSION

The use of takings power should occur when there are special circumstances providing a distinctive rationale for this use of public authority. As Justice Holmes once noted:

> [T]here might be *exceptional times and places in which the very foundations of public welfare could not be laid* without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such *unusual* cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions.[145]

This suggests giving far less latitude to the idea of a justifying public purpose than "any conceivable public purpose" allowed in the later cases. Rather, the justification for a taking depends on there being distinctively important social concerns, ostensibly ones that outweigh the harm imposed.[146] The burden should rest on legislatures to show exceptional need, not ordinary legislative business, to justify a taking. The justifying circumstances must be truly compelling to ask individuals to bear unusual social costs. It will be unreasonable for individual property owners to refuse to give up their claims to property if serious harm to others in society is likely to ensue, but it is reasonable for them to object when the moral urgency at stake does not rise to requisite level.

As it stands, the interpretation of the public use limitation currently endorsed by the Supreme Court in *Midkiff* and *Berman* does not articulate an adequate justification for the taking of property. The substantive standard it applies does not require a full consideration of interests, especially the interests of those who are harmed by the taking. By requiring courts only to go so far as to inquire whether there

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[145] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (emphasis added).

[146] *Id.*

is some public purpose, without considering the proportional significance of the purpose relative to harms, the standard fails to ensure that adequate reasons are offered to the party who bears the burden. The policy will not be justifiable to that person unless she can recognize the validity of this social choice in light of the public significance of the interests it serves. When something as important as the involuntary dispossession of property is at stake, careful reflection upon its justifiability is warranted. The Supreme Court's current position on the demands of the public use limitation does not provide it.