View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Villanova University School of Law: Digital Repository

Volume 49 | Issue 1 Article 5

2004

# Making Eminent Domain Humane

Ralph Nader

Alan Hirsch

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Property Law and Real Estate Commons

## Recommended Citation
Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207 (2004).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol49/iss1/5

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

# MAKING EMINENT DOMAIN HUMANE

RALPH NADER*
& ALAN HIRSCH**

CONSIDER an outlandish example: the United States government condemns a row of houses in the District of Columbia and transfers them to the leaders of the majority political party for use as personal residences. The prior homeowners, ordinary citizens who wish to remain in their homes, are compensated at a price dictated by the government and forced to move out.

Would anyone doubt that this naked abuse of power is unconstitutional? In fact, case law suggests that the courts would uphold this action. And while this particular measure has not been undertaken, other outrageous exercises of the eminent domain power occur regularly. This Article addresses a legal doctrine run amok and proposes a solution.

The Constitution prohibits private property from being "taken for public use, without just compensation."[1] This so-called "Takings Clause" implicitly authorizes the federal government to seize private property for public use, provided just compensation is rendered.[2] The federal government's authority of eminent domain has long been recognized.[3] The state governments also have this power, pursuant to their police powers.[4]

No one questions the need for eminent domain authority. In order to carry out their responsibilities, governments sometimes need land[5] that happens to be privately owned.[6] But the power of eminent domain is not unlimited. The Constitution speaks of takings for "public use," and it has always been understood that seizures of private property are impermissible

* Ralph Nader is a consumer advocate and founder of several citizen organizations. LL.B., with distinction, 1958, Harvard University; A.B., *magna cum laude*, 1955, Princeton University.

** Adjunct Professor, Department of Legal Studies, Williams College. J.D., 1985, Yale Law School.

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

2. *See, e.g.*, Kohl v. United States, 91 U.S. 367, 371-72 (1875) (noting that both state and federal governments may exercise power of eminent domain).

3. *See id.* (indicating that "political necessity" and "sovereignty" provide government with right to take land, unless fundamental law denies government such right).

4. *See id.* at 371 ("No one doubts the existence in the State governments of the right of eminent domain . . . .").

5. *E.g.*, to build public works infrastructure or military facilities.

6. *See Kohl*, 91 U.S. at 371 ("Such an authority is essential to [the government's] independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.").



Published by Villanova University Charles Widger School of Law Digital Repository, 2004

absent a legitimate public use.[7] People enjoy constitutionally protected property rights.[8] The government cannot seize their property unless it will be used to benefit the public.[9]

Nevertheless, the courts have come to interpret the "public use" requirement in a way that renders it meaningless,[10] essentially giving governments carte blanche to take property for any reason whatsoever, including crass political purposes or speculative, transient economic purposes.[11] Moreover, the effects of such takings on innocent parties are ignored. In other words, the power of eminent domain has become virtually absolute, in contravention of the traditional understanding of the Takings Clause[12] and the prevailing understanding of governmental power generally.[13]

In the process, the right of the American citizen to one of the most cherished possessions—the home—has been trampled.[14]

---

7. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243, 250-51 (1833) (holding that public use requirement applied only to federal government, not states). By virtue of Fourteenth Amendment incorporation, however, the public use requirement now limits the states as well. *See* U.S. CONST. amend. XIV; *see also* Chi. Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (holding that states must abide by public use requirement).

8. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

9. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 444 (1978) ("Under the classical nineteenth century approach, eminent domain power could be employed to appropriate private land for clearly public uses, such as the construction of public roads; in contrast, any attempt to take private resources for the benefit of other private parties . . . would be invalid . . . .").

10. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (comparing public use requirement to "dead letter").

11. *See generally* Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1981) (tracing history of public use requirement).

12. *See, e.g.*, West v. Kan. Natural Gas Co., 221 U.S. 229, 251 (1911) (rejecting contention that "power over highways and eminent domain [is] . . . absolute").

13. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (holding that Congress's power to enforce Fourteenth Amendment "is not unlimited") (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 309 (1981) (Rehnquist, J., concurring) (explaining that Congress's power to regulate interstate commerce is not unlimited); Knauer v. United States, 328 U.S. 654, 677 (1946) (Rutledge, J., dissenting) (explaining that Congress's power to establish conditions for citizenship is "not unlimited"); *see also* Hannah v. Larche, 363 U.S. 420, 487 (1960) (Frankfurter, J., concurring) ("Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests . . . ."); Price v. INS, 962 F.2d 836, 844 (9th Cir. 1992) (Noonan, J., dissenting) ("[E]very . . . power of government . . . is circumscribed; it is not absolute."); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 637 (1997) ("[M]ost instances of governmental power . . . must be balanced against competing constitutional values.").

14. *See* Zygmunt J.B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 663-64 (1989)

Part I of this Article describes the evisceration of the public use requirement by the Supreme Court. Part II explores situations in which the demise of a meaningful public use requirement has led to unconscionable and unconstitutional consequences. Part III offers a concrete proposal for reviving limitations on eminent domain so as to keep faith with the Constitution's limits on government power and protection of individual rights.

More specifically, this Article advocates a workable standard for limiting those situations in which the government may seize land from one private party and transfer it to another (invariably more powerful) private party.

## I. EVISCERATION OF THE PUBLIC USE REQUIREMENT

A half century ago, a commentator observed that courts had been so lax in enforcing the public use requirement in eminent domain cases that "neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications."[15] The Supreme Court has subsequently confirmed this proposition, most recently in the case of *Hawaii Housing Authority v. Midkiff.*[16]

*Midkiff* involved an effort by the Hawaii legislature to redress a longstanding land oligopoly.[17] Hawaii's Land Reform Act of 1967 effectively transferred title in real property from certain lessors to lessees, while compensating the lessors.[18] The lessors brought suit in federal court, arguing that the Act unconstitutionally violated the public use requirement of the Fifth Amendment[19] (as applied to the states via the Fourteenth Amendment).[20]

The district court rejected the challenge,[21] but the United States Court of Appeals for the Ninth Circuit reversed.[22] The Ninth Circuit held

("Eminent Domain condemnation represents one of the legal system's most drastic non-penal incursions into the rights of individuals . . . .").

15. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 614 (1949).

16. 467 U.S. 229 (1984).

17. *See id.* at 232-33 (indicating Hawaii Legislature's recognition of "concentrated land ownership was responsible for skewing the State's residential fee simple market" and redressing problem by "requiring large landowners to sell lands which they were leasing to homeowners").

18. *See* HAW. REV. STAT. § 516 (1976).

19. *See Midkiff*, 467 U.S. at 234-35 (explaining that lessors opted not to pursue arbitration, but rather to file suit in district court requesting court to declare Hawaii's Land Reform Act unconstitutional and to enjoin its enforcement).

20. *See supra* note 7 (illustrating that public use doctrine applies to both federal and state governments).

21. *See* Midkiff v. Tom, 483 F. Supp. 62, 65, 70 (D. Haw. 1979) (limiting scope of judicial review to whether plaintiffs were denied substantive due process and holding that plaintiffs were not denied due process because statute was within legislature's police power and was not arbitrary or capricious).

22. *See* Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983) (specifying that whether state's exercise of eminent domain power is for public purpose is within

that the statute lacked a sufficient public purpose; it constituted "a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit."[23] But the United States Supreme Court reversed.[24] In the process, it essentially eliminated the "public use" limitation on eminent domain.[25]

The holding itself was defensible. The Court's jurisprudence had long established that the public use requirement can be satisfied even when the government does not keep or use the property seized, but instead hands it to another private entity.[26] After all, land may serve a public use even in the hands of a private party.

The permissibility of government using eminent domain to transfer property from one party to another, however, was traditionally leavened by the understanding that this power would not be used solely as a means to redistribute wealth—to take from *X* to give to *Y* solely for the benefit of *Y*.[27] Moreover, it presumably makes some difference whose land is taken. For example, seizing a family farm on which generations have lived seems quite different from seizing an apartment building leased for profit.[28]

These distinctions were ignored by Justice O'Connor's opinion in *Midkiff.* Rather than emphasizing the justification of the public use in

scope of judicial review and holding that "provisions of the Hawaii Reform Act that provide for the condemnation of certain residential property are facially unconstitutional").

23. *Id.*

24. *See Midkiff*, 467 U.S. at 231-32 (holding that "the Public Use Clause of [the Fifth] Amendment, made applicable to the States through the Fourteenth Amendment, [does not] prohibit[ ] the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce concentration of ownership of fees simple in the State").

25. *See* Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 423 (1983) (explaining that Court doctrine "so short-circuits the inquiry as to erase the public use requirement").

26. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33-34 (1954) (upholding District of Columbia's Redevelopment Act of 1945, which used eminent domain power to redevelop slum areas by selling and leasing condemned lands to private interests); *see also* Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate [in the benefit of the land for it] to constitute a public use.").

27. *See* TRIBE, *supra* note 9, at 446 (noting that none of *Lochner* cases "contradicted the proposition that it was illegitimate for a legislature to transfer resources from one citizen to another for the very purpose of making the social or economic *distribution* more just") (emphasis in original).

28. Certainly in other areas of law it is routinely assumed that the permissibility of a government's action may turn, in part, on the nature of the right or interest infringed by the action. *See infra* text accompanying notes 52-59.

question,[29] or the relatively small harm,[30] the Court swept aside virtually *any* objection to *any* exercise of eminent domain.[31]

The Court gave away the game at the outset when it grappled with the definition of "public use." The Court's definition? Whatever the government says it is. The Court, in *Midkiff*, quoted language from its seminal case of *Berman v. Parker*:[32]

> The definition [of "public use"] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject 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 . . . .[33]

The Court did go on to acknowledge that "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use."[34] This role, however, is "extremely narrow."[35] The standard the Court employed is so narrow as to be virtually nonexistent—the judgment of public use stands "'unless the use be palpably without reasonable foundation.'"[36]

The Court conceded that its cases "have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'"[37] The Court, however, clarified that the taking will be upheld as

---

29. *See Midkiff*, 467 U.S. at 232 (noting state interest in breaking up oligopolies and finding affordable housing for indigent). Both breaking up oligopolies and providing affordable housing are legitimate governmental purposes. *See, e.g.*, United Mine Workers v. Pennington, 381 U.S. 657, 674 (1965) (Douglas, J., concurring) (noting that one purpose of antitrust laws is to prevent oligopolies); *see also* United States Housing Act of 1937, 42 U.S.C. §§ 1401-36 (2000) (providing legislation for affordable housing for low-income people).

30. Wealthy landowners were deprived of some means of profit.

31. Of course, stating that *Midkiff* was defensible does not imply that it was decided correctly. For example, a leading legal libertarian has argued that the "oligopoly," which justified the condemnation and transfer, was not really an oligopoly at all. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 180-81 (1985) ("The [government] presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning.").

32. 348 U.S. 26 (1954).

33. *Midkiff*, 467 U.S. at 239 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

34. *Id.* at 240.

35. *Id.* (quoting *Berman*, 348 U.S. at 32).

36. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

37. *Id.* (quoting Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937)).

long as "the exercise of eminent domain power is "rationally related to a *conceivable* public purpose."[38] This means that the taking will be upheld as long as the means used are "not irrational."[39]

The Court denied that its opinion rendered the public use requirement a dead letter:

> [T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. 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.[40]

This qualification, however, is meaningless because it is always possible for government to concoct an ostensibly public purpose for its actions.[41] Recall the outlandish hypothetical at the outset of this Article: the United States government condemns a row of houses in the District of Columbia and transfers them to the leaders of the majority political party for personal use. Congress could argue that its overworked leaders need spacious, nearby personal space in order to clear their heads and effectively carry out their public responsibilities. However repugnant such a measure, it is surely not "irrational."[42] It cannot be said to lack a "conceivable" purpose.[43] And creating conditions for elected representatives to work effectively seems "legitimate" enough. Thus, by the terms of the Court's own jurisprudence, such an indefensible, self-serving measure would be upheld.[44] If one takes the Court's analysis seriously, virtually any

38. *Id.* (emphasis added).

39. *Id.* at 243.

40. *Id.* at 245.

41. *See* Akhil Amar & Alan Hirsch, For the People: What the Constitution Really Says About Your Rights 137-38 (1998) (noting, in context of equal protection doctrine, that "rational basis" test "essentially dooms all claimants, since the government can almost always advance some explanation" for its actions).

42. As an empirical matter, it is seldom, if ever, the case that Congress or state legislatures act in a wholly irrational manner. They may act selfishly, short-sightedly, foolishly, even maliciously, but they invariably have some reason for their action.

43. Indeed, the "conceivable purpose" criterion is particularly weak because it "suggests that the court, in its search for a 'rational basis,' can supply a purpose the legislature itself missed." Epstein, *supra* note 31, at 162.

44. *See id.* at 179 (explaining that by virtue of eminent domain jurisprudence, "the question remains whether any condemnation of land can be attacked for want of a public purpose").

exercise of the eminent domain power will be upheld.[45] And, indeed, this state of affairs has come to pass.[46]

## II. Consequences of Demised Public Use Requirement

We have seen that under *Midkiff's* policy of total deference, virtually any exercise of eminent domain will receive judicial approval.[47] While suggesting that naked redistributionism (to reward one's friends and punish one's enemies, for example) fails to meet the public use test, the Court adopted a standard so lax that anything short of that will pass the test.[48]

There is a second problem with *Midkiff*: the Court failed to come to grips with the nature of the private interest affected. The Court did not address the interests of the landowners in *Midkiff*. The implication of this silence is that the nature of the condemnee's interest in the condemnee's property makes no difference to the court reviewing the taking.[49]

As it happens, the condemnees in *Midkiff*—oligopolic landlords—were not especially sympathetic. But what happens when land is taken not from those for whom it is used solely for profit, but from people who use it as a home and community?[50] By virtue of the Court's approach, it makes no difference.[51] The sole inquiry is whether the taking produces a public

45. To the extent the Court's deference stems from the Constitution's textual authorization of government takings, the Court interprets the Constitution oddly. While reflecting the necessity of government authority to take land, the Takings Clause is clearly aimed at *limiting* takings. By treating takings as constitutionally favored, rather than permitted but disfavored, the Court perverts the spirit of the clause. *See* Plater & Norine, *supra* note 14, at 664 (noting "Alice-in-Wonderland twist").

46. *See id.* at 674 ("[D]ecisions to condemn, short of lunacy, are supported in court by a practically irrefutable presumption of validity."). The authors found "only one federal case striking down a state condemnation action on public-use grounds . . . ." *Id.* at 683 n.68 (surveying federal case law). Though there are happily some exceptions, most state courts have been equally deferential. *See id.* at 689 (surveying state case law regarding eminent domain).

47. The Court has subsequently reaffirmed this policy of extreme deference. *See* Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 422-23 (1992) (following *Midkiff* and *Berman* in upholding ICC's eminent domain proceeding to benefit Amtrak); Ruckelshaus v. Monsanto, 467 U.S. 986, 1014-16 (1984) (allowing EPA to take and disclose private information for public use).

48. *See* Plater & Norine, *supra* note 14, at 697 ("[T]he judicial insulation of eminent domain only has equivalents in the far more portentous fields of national security, international relations, and political questions.").

49. The silence echoed the Court's indifference to the condemnee's interests in *Berman*, the previous seminal case on eminent domain. *See* Berman v. Parker, 348 U.S. 26 (1954) (ignoring property interests of previous owners).

50. Needless to say, wealthy entrepreneurs and homeowners of modest means do not exhaust the class of condemnees. *See, e.g.*, Cmty. Redev. Agency v. Abrams, 543 P.2d 905, 908-09 (Cal. 1975) (allowing place of business of elderly pharmacist to be condemned and transferred as part of urban renewal program).

51. One obvious difference is that the person who uses land solely for profit can be made whole by monetary compensation. *See* U.S. Const. amend. V (prohibiting taking of private property for public use without providing just compensation to deprived party).

Published by Villanova University Charles Widger School of Law Digital Repository, 2004

benefit, with no effort to balance the alleged benefit against the harm it might cause.

One explanation for the Court's approach lies in its attitude towards property rights. In the infamous *Lochner v. New York*[52] case and its progeny, the Court elevated the property rights of businessmen over the welfare of employees, striking down legislation designed to protect employees as violating the employer's "substantive due process" rights.[53] The Court eventually repudiated this line of cases,[54] but it remains a haunting memory,[55] which prevents justices from differentiating between different types of property rights.[56]

Significantly, the Court has retained the doctrine of substantive due process upon which *Lochner* and its progeny were based.[57] In its second incarnation, substantive due process did not protect the rights of businessmen to engage in unfettered capitalism, but did protect the rights of citizens to be free from governmental intervention in their most basic choices in life,[58] such as whether to have children.[59]

Put crudely, the Court came to decide that "liberty," more than "property," is a fundamental constitutional right that cannot be infringed absent a compelling governmental justification.[60] Given the historical context, this made sense. In the *Lochner* line of cases, the Court rejected attempts

52. 198 U.S. 45 (1905).

53. *See, e.g., id.* at 52-53 (striking down statute regulating number of hours baker could work); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (striking down law establishing minimum wage for women); Adair v. United States, 208 U.S. 161, 180 (1908) (striking down statute banning "yellow dog" contracts—contracts requiring workers to refrain from union membership as condition of employment).

54. *See* Day-Brite Lighting v. Missouri, 342 U.S. 421, 425 (1952) (overruling *Lochner* directly); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938) (holding that economic regulation must be upheld if merely rational).

55. *See* EPSTEIN, *supra* note 31, at 277 (noting influence of "the ghost of *Lochner*").

56. For a further discussion of courts not differentiating between different types of property rights, see *supra* text accompanying notes 50-52 (indicating Court's refusal to differentiate between homeowner property and business-owned property).

57. *See Carolene Prods.*, 304 U.S. at 152 & n.4 (1938) (implying that substantive due process, while inappropriate in cases of economic legislation, protects certain personal liberties).

58. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (providing for right to have abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (providing for right of married couples to use birth control).

59. Even before the seminal *Griswold* case, Judge Learned Hand noticed "a stiffer interpretation of the 'Due Process Clause' when the subject matter is not Property but Liberty, as that word has now come to be defined." LEARNED HAND, THE BILL OF RIGHTS 50 (1958).

60. *See, e.g.*, William W. Fisher, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1789 n.72 (1988) (noting "Supreme Court's treatment of property rights as less deserving of vigorous defense than 'civil rights'").

by the political branches to protect particularly vulnerable employees. The parties adversely affected by the legislation would have been denied only the greater profit that came from exploiting the vulnerable. In the subsequent line of cases that applied "substantive due process" in connection with liberty, rather than property, the Court protected citizens from what were perceived as powerful majorities imposing their moral standards. At least to the extent one sees a judicial role in protecting vulnerable minorities from overzealous majorities,[61] one can understand how the Court came to elevate liberty rights above property rights.[62]

The problem is that a liberty/property dichotomy is too crude. The Constitution may protect autonomy more than wealth, but these terms are not interchangeable with "liberty" and "property."[63] There are different kinds of property rights: those that are purely economic and those that more closely resemble the kind of rights and liberties we have come to regard as sacred.[64] The post-*Lochner* aversion to property rights blurs this distinction.[65]

The eminent domain jurisprudence in general, and the *Midkiff* Court's failure to address the nature of the harm to those whose land was seized, reflect the blurring of this distinction. Current eminent domain doctrine implies that everything a person owns is mere "property."[66] Government can slap a price tag on it and take it away.[67]

---

61. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 7-8 (1980) ("The tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny . . . .").

62. *See* TRIBE, *supra* note 9, at 919-90 (approving both rejection of *Lochner* and flowering of protections for liberty/privacy, noting that "[t]he point of *Lochner*'s downfall was not the rejection of human freedom as an idea, but the recognition that there was less of such freedom, in the ordinary workings of the economy, than sometimes met the eye").

63. *See generally* C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (discussing complex relationship between liberty and different forms of property).

64. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 978-1013 (1982) (discussing, in detail, different types of property rights).

65. *See* Mansnerus, *supra* note 25, at 428 (explaining that in eminent domain jurisprudence, courts assume that "all property rights may be treated alike").

66. *See* Thomas J. Loyne, Note, Hawaii Housing Authority v. Midkiff*: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME L. REV. 388, 396 (1985) ("[T]he Supreme Court has seemingly characterized all takings as economic regulatory measures which do not impinge on individual liberty interests.").

67. As it happens, that price is often inadequate because "just compensation" fails to take into account the full psychic and economic costs imposed on displaced homeowners. *See infra* note 81 (explaining inadequacy of compensation to homeowners in situations where financial or emotional loss accompanies relocation because government is only required to pay for what it gets). For present purposes, however, the more important point is that in some cases no amount of compensation is enough. We do not think we can throw a person behind bars and simply compensate that person for the deprivation of liberty. The situation is comparable when the government destroys a community and offers to compensate members of the erstwhile community.

What is sometimes taken, however, is every bit as personal and cherished as the liberty/autonomy elsewhere protected zealously.[68] In other words, courts have failed to acknowledge what commentators have had less trouble identifying: property can be a foundation for "self-determination and self-expression,"[69] and "personal property" can be inseparable from liberty.[70] When the government seeks to condemn a person's home, it threatens not the putative right of a powerful corporation to unlimited wealth, but "the right of the otherwise powerless individual to hold his dearest possession."[71] Undeniably, "[d]isplacement from one's home, however mitigated by compensation, effectively defeats" a person's autonomy.[72]

Ironically, when it comes to protecting *activities* within the home, rather than the home itself, the Court has shown great sensitivity.[73] In cases involving both the First Amendment and Fourth Amendment, the Court has attached special significance to the home[74] and struck down laws that impermissibly compromised the right to be free of government intrusion into one's home.[75] "[A] man's home is his castle," the Court once opined.[76]

Apparently, a man's home is his castle in a limited sense only. The government cannot barge in without a search warrant, and it cannot tell people what to read behind their own doors, but it can seize the entire house and kick them out.[77]

68. In a different context, the Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property." Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

69. Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV., 296, 299 (1980).

70. *See* Radin, *supra* note 64, at 959 (explaining that when certain property, such as one's wedding ring, is lost or stolen, financial compensation cannot restore status quo).

71. Plater & Norine, *supra* note 14, at 679 n.45.

72. Mansnerus, *supra* note 25, at 431.

73. To be sure, a recent counter-trend seems to be developing in all branches of government, with increased use of "sneak and peek" search warrants and recent passage of the "Patriot Act," expanding the government's leeway to search homes and monitor activity within the home.

74. The Court is correct in recognizing the special constitutional status of the home. *See* AMAR & HIRSCH, *supra* note 41, at 133 ("[T]here is an important link between the Third Amendment [prohibiting quartering of soldiers in homes] and the Fourth (which restricts searches and seizures)—both protect 'houses' from needless and dangerous intrusions by government officials.").

75. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) (striking down statute punishing possession of obscene material within one's home, noting that plaintiff "is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the *privacy of his own home*" (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)) (Brandeis, J., dissenting) (emphasis added)).

76. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

77. This is especially ironic given the fact that the Framers of the Constitution considered physical seizure of property to be much more of a concern than regula-

The deficiency in eminent domain doctrine[78] comes into focus when we look at a state court case, which, though decided pre-*Midkiff*, took the identical approach. In *Poletown Neighborhood Council v. City of Detroit*,[79] the land seized was not from wealthy landowners who rented it for profit, but from middle-class homeowners in a tight-knit neighborhood. In addition to hundreds of homes, the city seized a dozen churches, a hospital, an array of schools and many small businesses. Thus, the harm to the displaced homeowners was not lost income but "severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character."[80] The people of Poletown could not be adequately compensated[81] because they regarded their community as literally priceless.[82]

*Poletown* powerfully illustrates the fatal flaws in current eminent domain doctrine: the rubber-stamping of any proffered "public use" of con-

---

tion or limitation of its use. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (providing detailed analysis of Takings Clause).

78. Another possible explanation for this failure, apart from the legacy of *Lochner*, stems from the text of the Fifth Amendment, where "public use" and "just compensation" are the only express limitations on eminent domain. In other words, the amendment does not indicate that the nature of the interests affected by a taking should be considered. But as a defense of current eminent domain doctrine, such rigid textualism proves much too much. The notion that constitutional rights and powers are not absolute—even absent explicit textual limits—pervades constitutional law. In the oft-cited example, the right to free speech does not entail the right to falsely shout "fire" in a crowded theatre (even though the First Amendment mentions no limits on free speech). There is no reason why eminent domain should be the only power interpreted in a vacuum, impervious to competing constitutional values.

79. 304 N.W.2d 455 (Mich. 1981).

80. *Id.* at 481 (Fitzgerald, J., dissenting).

81. Even if adequate compensation were theoretically possible, the law does not begin to provide it in cases like *Poletown*. Compensation is severely curtailed by the notion that "the government need only pay for that which it gets." EPSTEIN, *supra* note 31, at 52. As a result, "consequential damages of all sorts have been excluded" from calculations of appropriate compensation. *Id.*; *see also* Plater & Norine, *supra* note 14, at 683 ("Just compensation, even in the hands of a sympathetic jury, may fail to compensate condemned landowners for a wide range of felt losses—sentimental value, some forms of ongoing business value, the costs of relocation in financial and emotional terms—these are some of the areas of private loss that go uncompensated in eminent domain."). For example, the elderly or infirm may be able to walk to the supermarket, a luxury not necessarily available in other neighborhoods. Family and friends living in proximity may assist them with housekeeping and transportation. Such invaluable assets (among many others) of a particular location are ignored in the calculation of "just" compensation.

82. To take just one example, can a price be put on the value of seeing one's children and grandchildren grow up or continuing at the place of worship one attended as a youth? *See* EPSTEIN, *supra* note 31, at 52 (noting "associational deprivations" suffered by Poletown residents).

demned land and the indifference to the severe suffering that such seizures can impose.[83]

What brought about the destruction of this community? In 1980, General Motors informed Detroit of its plans to close two plants—unwelcome news for a city already in the midst of a major recession. General Motors offered, however, to build a new assembly complex in Detroit, capable of employing 6,500 workers if a suitable site could be found. The company set forth several criteria (*e.g.*, size, shape and access to transportation). The city conducted a study of several potential sites and concluded that only one was feasible—approximately 465 acres in Detroit. General Motors agreed to the site, but insisted that it receive title to the parcel by mid-1981. Pursuant to a "quick-take" eminent domain statute,[84] the city moved expeditiously to seize the land.

The site General Motors chose encompassed a close-knit, multi-racial residential neighborhood (called "Poletown") consisting primarily of first- and second-generation Polish Americans and African-Americans. The residents of Poletown brought suit to enjoin the condemnation, but a trial court ruled against them and the Michigan Supreme Court upheld the ruling.

The Michigan Supreme Court's opinion is a stunning instance of bloodless formalism. One reading it would never guess that the decision devastated real live human beings. The court (with five justices in the majority and two justices dissenting) upheld the exercise of eminent domain, using precisely the reasoning the Supreme Court would employ in *Midkiff* several years later.[85] The court's "analysis" was straightforward: 1) Precedent supports the notion that "public use" requires only a public purpose. A transfer of land to a private party meets that test if it serves to benefit the public. 2) The political branches make the determination and courts

---

83. For criticism of *Poletown* in its immediate aftermath, see Barry Bennett, *Eminent Domain and Redevelopment: The Return of Engine Charlie*, 31 DEPAUL L. REV. 115 (1981); Peter E. Millspaugh, *Eminent Domain: Is It Getting Out of Hand?*, 11 REAL EST. L.J. 99 (1982); Emily J. Lewis, Comment, *Corporate Prerogative, 'Public Use' and a People's Plight:* Poletown Neighborhood Council v. City of Detroit, 1982 DET. C. L. REV. 907; *see also* JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989) (describing events leading up to and following *Poletown* decision).

84. *See* MICH. COMP. LAWS ANN. § 213.57 (West 2003) (providing that if motion to review, pursuant to section 6 of Michigan Compiled Laws, is either not filed or is denied, title to property vests in agency as of date complaint is filed).

85. The court, however, based its analysis on Michigan's Constitution and cases, not the federal analogues. This was appropriate. While state courts are bound by the United States Supreme Court's interpretation of the Federal Constitution's Takings Clause, they are free to find that their state constitution or statutes give greater protection to citizens than does the Federal Constitution. *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (stressing that state courts protect not only federal constitutional rights of their citizens, but also their state constitutional rights, and latter may exceed former). Most state constitutions have an independent takings clause.

must show it extreme deference. 3) Reducing unemployment is clearly a public benefit.

There were two major problems with the court's opinion. First, it failed to take seriously the fact that it was essentially approving any transfer of land to a private party. While paying lip service to the notion that the proposed public benefit cannot be "speculative and marginal,"[86] it simply accepted, without question, Detroit's assertions about the economic benefit of the transfer.[87] Thus, the court abandoned one traditional task of an appellate court—to review the evidentiary record.[88]

Second, the court spoke as if it were looking at a mere economic regulatory measure, making no mention of the plaintiffs' painful plight. Indeed, the court casually and callously referred to their "abstract right"[89] to remain in their homes.

It was left to the dissent to raise key issues that the majority simply ignored. Unlike the majority, the dissenting judges saw fit to acknowledge the harm to plaintiffs, noting that "their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives."[90] While the majority waxed rhapsodic about the likely gain in employment and tax revenue, it never mentioned that "the dislocations and other costs of the project are also massive,"[91] including the displacement of more than 3,400 people.[92] (Indeed, while trumpeting the prospective economic benefits of the plant, the majority never mentioned that it would cost taxpayers more than $300,000,000 in federal, state and local subsidies.)

86. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 460 (Mich. 1981).

87. Indeed, the notion that this exercise of eminent domain was valuable to Detroit's economy is problematic. For one thing, it was brought about by GM's threat to relocate, which may have been a bluff. *See* Plater & Norine, *supra* note 14, at 675 n.38. Moreover, there was ample evidence that several nearby abandoned industrial sites would have sufficed for the proposed plant, even if they were not optimal from GM's standpoint. *See id.* n.37 (explaining that "[t]he Poletown environmental impact statement" identified nine potential sites for General Motor's factory but that each was rejected because none of them met GM's specific site criteria; and explaining that GM also rejected additional available sites that would not require relocating houses, churches and small businesses, because sites did not meet GM's "rectangular criterion").

88. While appellate courts are usually deferential in reviewing a trial court's fact-finding, at a minimum they ensure that such fact-finding is not plainly against the weight of the evidence. *See, e.g.*, Avita v. Metro. Club, 49 F.3d 1219, 1229 (7th Cir. 1995) ("[W]e take seriously the responsibility of an appellate court to review the sufficiency of the evidence.").

89. *Poletown*, 304 N.W.2d at 459.

90. *Id.* at 470 (Ryan, J., dissenting).

91. *Id.* at 464 n.15 (Fitzgerald, J., dissenting).

92. Actually, while GM proposed displacing 3,400 people, it turned out that more than 4,200 relocated because of the project. Relocation Unit of Neighborhood Service Organization, City of Detroit, Survey: 1981-82 Central Industrial Park Relocation Project I.

While recognizing that even strong private interests may on occasion have to yield to eminent domain authority, the dissenting justices took the court to task for its simplistic acceptance of the city's claims.

It may be replied that the offsetting costs and benefits of the transfer are for the political branches, not the courts, to weigh.[93] Even the majority, however, acknowledged that a "speculative" claim of economic gain does not suffice to support the "public use" requirement.[94] As one of the dissenting judges persuasively argued, the City of Detroit's claims were highly speculative indeed:

> [T]here are no guarantees from General Motors about employment levels at the new assembly plant. . . . [T]here will be no public control whatsoever over the management, or operation, or conduct of the plant to be built there. . . . Who knows what the automotive industry will look like in 20 years, or even 10? For that matter, who knows what cars will look like then? For all that can be known now, in light of present trends, the plant could be fully automated in 10 years.[95]

As the above suggests, there are crucial differences between traditional use of eminent domain power for a highway, railroad or canal, to be owned and used by the public in the long-term, and the exercise of eminent domain power to transfer land to a private party based on its mere unenforceable promises to employ a certain number of people. While government must tend to the plight of the unemployed, the location of an automobile plant to enhance employment and economic development is a far more contingent, speculative and transient public benefit than the building of public infrastructure.[96]

There was, indeed, no guarantee that General Motors could fulfill its prediction that it would employ 6,500 workers.[97] Even if it made good on that prediction, what would happen if economic conditions changed in a

93. *See, e.g.*, Disenos Artisticos v. Costco Wholesale Corp., 97 F.3d 377, 380 (9th Cir. 1996) ("We should not put our thumb on the legislative scale. A court construing a statute should avoid adding to or detracting from the benefits Congress accorded to any of the competing interests.").

94. *See supra* text accompanying notes 86, 91 (indicating that Michigan Supreme Court stated that speculative benefits to public are not sufficient to satisfy public use criteria, but then used potential employment and tax benefits to justify upholding city's taking of Poletown homeowners' property).

95. *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting).

96. Indeed, the dissent's claim that one could not reliably foresee trends in the automobile industry was borne out. *See* Donald W. Nauss, *GM Workers Fear What's Down the Road; Outsourcing Is Threat to All in Industry, They Say*, L.A. TIMES, Mar. 15, 1996, at D-1 (noting precarious state of automobile industry in Poletown and elsewhere). It must also be noted that the seizing of Poletown *cost* many jobs, as scores of small businesses were forced to uproot.

97. In fact, GM eventually reduced its goal of employment to three thousand, "economic conditions permitting." Gary Blonston, *Poletown: The Profits, the Loss*, DETROIT FREE PRESS, Nov. 21, 1981 (Magazine), at 8. In the end, more people were displaced than employed.

year? These same workers could be laid off.[98] Worse still, General Motors might decide to relocate yet again.[99] Or the economy might take a turn for the better (as indeed happened), making the "rescue" effort unnecessary.[100] Should these things happen, those who lost their homes, as well as the taxpayers that footed the bill for their compensation, would have no recourse.[101] And surely there are other ways for Detroit to combat unemployment than providing a huge taxpayer subsidy to one particular corporation and transferring this particular land to it.[102]

Amidst all the uncertainties inherent in the transfer, one thing was all too certain: the residents of Poletown lost their homes and neighborhoods to General Motors. They are not alone—increasingly, eminent domain power is used not for some great public undertaking, but instead to reward a private business.[103] DaimlerChrysler recently prevailed upon Toledo, Ohio, to obtain the land of eighty-three homeowners and several

---

98. *See* EPSTEIN, *supra* note 31, at 167 (suggesting that when government takes property and places it into hands of private parties, benefits of eminent domain will less likely be "divided among the public at large"). According to Epstein:

> [T]he taking of a piece of land for a lighthouse or a naval shore installation cannot give rise to the abuse in which one individual calls upon the state to do something he is unable to do himself. The property taken remains in the control of the United States, and no private party subsequently obtains an undivided interest in the condemned property.

*Id.*

99. *See* Kevin L. Cooney, *A Profit for the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use*, 74 WASH. U. L.Q. 751, 752 (1996) (stating that condemnor "may take property in fee simple for an 'alleged' public use, while actually engaging in a form of real estate speculation, and later reap a profit from the sale of the property").

100. *See generally id.* (discussing transient and contingent nature of benefits of land transferred to private parties via eminent domain).

101. Under current law, when a party granted land by eminent domain fails to make good on its promise to use the land for the public benefit, there is generally no recourse. *See, e.g.*, Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir. 1958) (stating that public use is "judged solely by the conditions existing at the time of the taking"); Mainer v. Canal Auth. of State, 467 So. 2d 989, 992-93 (Fla. 1985) (holding that abandoning public use does not impair party's title, rejecting collateral attack on taking and holding that such challenges must be made at condemnation proceeding, not subsequently). One way to deal with the problem is a statutory "claw back" provision requiring a corporation to pay back abated benefits when it fails to deliver on the promise(s) that induced the benefits. There was no such provision to protect the people of Poletown.

102. For a further discussion of ways Detroit could combat unemployment, see *infra* notes 144-46, 157 and accompanying text.

103. *See* Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 (discussing state and local governments' increased use of eminent domain); *see also Unnecessary Business Subsidies: Hearing Before the House Comm. on the Budget*, 106th Cong. 6-212 (1999) (statement of Ralph Nader, consumer advocate), *available at* http://www.nader.org/releases/63099.html (June 30, 1999) [hereinafter Nader's Testimony] (noting "trend whereby state and localities abuse their eminent domain powers to serve private parties" and bring about "the literal destruction of longstanding homes, neighborhoods and communities").

small businesses and transfer it to the automobile company for use as a truck planting and staging area.[104] As it happens, the government did not need to condemn the land; the mere threat of doing so induced the residents to accept a dubious agreement.[105]

Similarly, in Hurst, Texas, a developer prevailed upon the city to buy out or force out 137 homeowners to provide additional parking space and access roads for a shopping mall.[106] So too, land may be seized from homeowners and small businesses to build gambling casinos,[107] athletic stadiums[108] and for other trivial purposes such as landscaping.[109]

Under the courts' hands-off approach to eminent domain, these reverse Robin Hood actions are rubber-stamped, regardless of the magnitude of the human cost, the triviality of the public benefit or the availability of feasible alternatives.[110] As one of the dissenting judges in *Poletown* stated:

---

104. That, at any rate, was the ostensible purpose of the transfer. But in the company's own mapped plan, the area in question was designated for landscaping. *See* Nader's Testimony, *supra* note 103, at 30 (discussing DaimlerChrysler's intended use of land obtained by eminent domain).

105. As this episode illustrates, the mere threat of eminent domain sometimes exacts costs even greater than would the actual exercise of the power. By making it known that homes will be condemned unless a settlement is reached, the government elicits settlements quickly and at low cost. There is an obvious element of duress in these vastly imbalanced bargaining situations, resulting in settlements more unfavorable to residents than what might result from an eminent domain action. (The few homeowners who did not sign off on the settlement, and hired attorneys instead, ended up with far greater compensation.)

106. *See* Jim Schutze, *Landmark Dispute; Texas Homeowners Forced Out for Mall Expansion*, HOUS. CHRON., June 4, 1997, at A1 (discussing use of eminent domain to expand shopping mall in Hurst, Texas).

107. *See generally* Casino Reinv. Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998) (discussing eminent domain power to build gambling casino). In that case, regulators sought to condemn land adjacent to tycoon Donald Trump's casino, so Trump could build a parking lot and limousine-waiting station. In a rare instance of the "public use" requirement being taken seriously, the superior court struck down this exercise of eminent domain. *See id.* at 111 (finding that primary interest served by taking was private interest rather than public interest).

108. *See* Pamela Edwards, *How Much Does That $8.00 Yankee Ticket Really Cost? An Analysis of Local Governments' Expenditure of Public Funds to Maintain, Improve or Acquire an Athletic Stadium for the Use of Professional Sports Teams*, 18 FORDHAM URB. L.J. 695, 705-13 (1991) (discussing eminent domain power to acquire land to build sports stadiums).

109. In *Poletown*, General Motors needed less than half of the allotted space for its factory and parking—the rest was used for landscaping.

110. *See* Nader's Testimony, *supra* note 103, at 29-30. Nader noted that in the case of Toledo's transfer to DaimlerChrysler:

> There is virtually no binding reciprocal obligation on DaimlerChrysler in the agreement—to create jobs, maintain a certain job level or to agree to set wage levels or working conditions. In exchange for no binding commitments and no share of the profits, Toledo has agreed to put up huge sums of money, much of it borrowed.

*Id.*

The decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently "public" to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses.[111]

As a result, no home "is immune from condemnation for the benefit of other private [commercial] interests."[112]

Not surprisingly, *Poletown*'s critics have spanned the political spectrum.[113] Conservatives object to government coercion and disrespect for private property in service of speculative claims about the public good.[114] Liberals object to the exercise of government authority on behalf of the powerful and at the expense of the powerless.[115] But the courts regard as acceptable the use of eminent domain witnessed in *Poletown*.[116]

And yet, the dissenting opinions in *Poletown* were not altogether satisfactory either. The dissenting judges implied that the transfer of land to a private party should *never* satisfy the public use requirement.[117] Such a

111. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464 (1981) (Fitzgerald, J., dissenting).

112. *Id.*

113. To take prominent examples, progressive consumer activist Ralph Nader organized resistance to the land condemnation, and conservative legal scholar Richard Epstein is among its critics.

114. *See* EPSTEIN, *supra* note 31, at 83 (stating that in *Poletown*, "the state's use of force is too obvious . . . to be denied").

115. *See* Plater & Norine, *supra* note 14, at 680 (indicating that in *Poletown* "the largest American corporation accurately presumed that it could enlist the powers of government in its behalf to override the . . . claims of lower-income landowners").

116. Just a few years after *Poletown*, the Supreme Court endorsed the approach of the Michigan Supreme Court, reinforcing its earlier holdings that courts must essentially rubber-stamp exercises of eminent domain, even when they involve a transfer of land to a private party. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."). For a further discussion of how courts rubber-stamp exercises of eminent domain, see *supra* notes 10-11, 15-16, and 21 and accompanying text.

117. *See Poletown*, 304 N.W.2d at 464 (Fitzgerald, J., dissenting) (stating that condemnation went "beyond the scope of the power of eminent domain [to] take[ ] private property for private use"); *id.* at 465 (Ryan, J., dissenting) (opposing "condemnation of private property for private use"). To be sure, the dissenting judges went out of their way to distinguish cases involving eminent domain transfers to private parties as part of "slum clearance." *See id.* at 462 (Fitzgerald, J., dissenting) (distinguishing slum clearance cases—where ultimate disposition of land to private interests is incidental to primary purpose of promoting public health and welfare through removal of existing plight—from cases like *Poletown*, where disposition of property to General Motors was not incidental to public purpose of taking). They seemed to do so only because they had no choice (lest they contradict established Michigan law), and they provided no clear criteria for demarcating appropriate transfers to private parties.

rule, which has been rejected by the United States Supreme Court[118] and most states,[119] may be overbroad. After all, one can imagine circumstances where the condemnation and transfer produce a direct and important public benefit that simply could not otherwise be achieved.[120] By positing the issue in all-or-nothing terms (whereby transfers of land to private parties are either rubber-stamped or automatically prohibited), both the majority and the dissent painted with too broad a brush.[121]

Is it possible to find a workable middle ground that does not give the courts too much power and too little guidance and that protects both the rights of individuals and the important prerogatives of the state?

## III. Proposal for Reviving Eminent Domain Limitations

Consistent with the analysis in the previous sections, courts should subject eminent domain takings to strict scrutiny where three conditions are present: 1) the land is transferred to another private party rather than held by the public; 2) the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and 3) the party whose land is taken is relatively powerless politically. Under such circumstances, the state should have to demonstrate a compelling need for the transfer, one which cannot be met by other less harmful alternatives.[122] Wholly speculative or transient benefits should not suffice.[123]

Where the first condition is present, but the second or third conditions are not, the transfer should still be subject to heightened scrutiny, but not to the same extent. Specifically, where the condemned land is given to a private party, but the aggrieved party suffers primarily economic loss (which can be compensated), or the party is not politically powerless,

118. For a further discussion of instances in which transfers to private parties involved valid public uses, see *supra* note 24 and accompanying text.

119. *See* Mansnerus, *supra* note 25, at 415 (noting that in a series of slum-clearance cases in the 1940s and 1950s, "[v]irtually every state court was forced to decide the constitutionality of government initiatives that, contrary to the traditional view [of eminent domain], took land from A and gave it to B . . . [a]nd with few exceptions the courts" validated such actions).

120. Suppose, for example, some undeveloped land, owned by a developer, abuts a private hospital. For the sake of public health, the land is needed to add a wing to the dangerously overcrowded hospital. Few would doubt that a condemnation and transfer would be appropriate in that circumstance.

121. To be sure, the dissent's approach at least comports with the text of the Takings Clause because there is no public "use" (only a public "benefit") when land is transferred to a private party.

122. A few state courts have taken into account the availability of alternative means of achieving the alleged public purpose. *See, e.g.*, Madison County v. Elford, 661 P.2d 1266, 1271 (Mont. 1983) (holding condemnation improper because of failure to consider alternative highway route); State v. Superior Court, 222 P.2d 208, 210 (Wash. 1924) (holding alternate zone would be less harmful to private interests).

123. A reasonable application of this standard would surely prevent the kind of manifest injustice that took place at Poletown.

the action should be upheld if it is substantially connected to an important government purpose.[124]

The first obvious benefit of the proposed approach is that it distinguishes between the traditional taking, in which the public retains the condemned land, and the taking that transfers land to another private party. The latter would be subject to greater scrutiny because, as one commentator observed, "when the government plans to transfer title, acting not as owner but as site-acquisition agent, the term 'public use' is a legal conclusion. A public use must be shown to exist, not merely declared to exist."[125]

The two-tiered approach is consistent with the Supreme Court's approach to other infringements on individual rights.[126] The notion that the state's justification for an action must be proportionately stronger when the infringed right or interest is strong is well settled in other parts of constitutional law.[127] It makes perfect sense to import this principle to the law of eminent domain.[128] It is one thing to take title of land from wealthy landlords, but quite another to take away people's homes. The right to be secure in one's home, made explicit in the Fourth Amendment, surely ought to protect against removal of that home absent a compelling governmental justification.[129]

---

124. This second tier scrutiny would apply in a case like *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Whether it would have resulted in rejection of the land transfer is unclear because the Court's analysis of the facts was skimpy. *See id.* at 234-36 (stating facts). Given the Court's standard of extreme deference, it saw no need to describe the underlying facts in any detail.

125. Mansnerus, *supra* note 25, at 425.

126. At the federal level, adoption of the proposed new approach to eminent domain would require the Supreme Court to reinterpret the Takings Clause (or Congress to take an improbable action and reduce its own power). State courts, however, need not mimic the Supreme Court's approach to eminent domain. Most states have their own constitutional or statutory "public use" requirement, and they are free to find that their own law gives greater protection to citizens than does its federal counterpart. For a further discussion of state legislation relating to eminent domain, see *supra* note 4. In the case of eminent domain, a few states have done that. *See* Plater & Norine, *supra* note 14, at 689-97 (discussing state condemnation cases).

127. *See, e.g.*, Fed. Election Comm'n v. Mass. Citizens For Life, 479 U.S. 238, 263 (1986) ("*[C]ompelling* state interest is necessary to justify any infringement on First Amendment freedom." (emphasis in original)).

128. *See* Plater & Norine, *supra* note 14, at 680-89 (observing that under current doctrine, challenges to condemnations focus almost exclusively—and with futility—on whether proposed use of land serves public purpose). The authors lament that this focus neglects the relative benefits of the condemnation and the harms it imposes. *See id.* (suggesting that courts, both state and federal, do not provide adequate review of substantive merits of condemnation). The approach proposed in the present essay would redirect the inquiry so as to confront these critical questions.

129. Needless to say, the fact that displaced homeowners receive compensation hardly alleviates the problem. *See supra* notes 71-72, 80-82 and accompanying text. *See also* Donald J. Kochan, *'Public Use' and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 55 (1998) (noting that

The idea of subjecting actions to higher scrutiny where the transfer is to a private party, and special scrutiny when those whose land is seized are relatively powerless, dovetails perfectly with equal protection doctrine. Under equal protection law, stricter scrutiny is required when certain powerless groups are affected, in part because the groups cannot protect themselves[130] and in part because we question the motives of the government when it takes actions that adversely affect groups that have been historically subjected to unfavorable treatment.[131]

Both of these factors—suspicion of government motive and imbalance of power—come into play when government transfers land from one group to another private (and invariably more powerful) group.[132] Consider the description by the dissent (not disputed by the majority) in *Poletown* of the political realities underlying the eminent domain transfer in that case.

First, the dissent noted, in the choice of location for the General Motors plant, "[t]he fundamental consideration . . . was the corporation's enlightened self-interest as a private, profit-making enterprise."[133] General Motors gave Detroit an ultimatum, which sparked a "frenzy of official activity" driven by "the unmistakable guiding and sustaining, indeed controlling, hand of the General Motors Corporation."[134] The city's eagerness to oblige reflected "the withering economic clout of the country's largest auto firm."[135] Clearly, "what General Motors wanted, General Motors got."[136] Detroit "chose to march in fast lock-step with General Motors"[137] at the expense of powerless citizens with "limited power to protect themselves."[138]

A political tussle pitting General Motors against the elderly, unwealthy citizens of Poletown is like a football game between Penn State

founding fathers were concerned with "protection" and "preservation" of private property, not merely compensation).

130. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (citing political powerlessness as criterion in equal protection cases that plays role in triggering heightened judicial scrutiny).

131. *See* Ely, *supra* note 61, at 136-48 (discussing relevance of government motivation in equal protection analysis).

132. *See* Kochan, *supra* note 129, at 52 ("[T]he beneficiaries of a relaxed public use standard are often powerful and wealthy special interests capable of convincing the state to use its power to displace residents from their homes and businesses."); *see also* Richard A. Posner, Economic Analysis of Law 682 (5th ed. 1998) (noting that democratic legislative process frequently results in "unprincipled redistribution of wealth in favor of some politically effective interest group").

133. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 466 (Mich. 1981) (Ryan, J., dissenting).

134. *Id.* at 468.

135. *Id.* at 469.

136. *Id.* at 470.

137. *Id.*

138. *Id.* at 463 (Fitzgerald, J., dissenting).

and a junior college.[139] It is precisely when such an imbalance exists[140] that courts should be *most* willing to scrutinize government action.[141]

To be sure, it is not as though the Detroit officeholders responded exclusively to a threat of withheld campaign contributions (though that dynamic obviously may come into play).[142] They responded to, *inter alia*, an economic crisis. And this side of eminent domain cannot be ignored—the power to seize lands stems from a very real need for government to provide for the people at large. But this does not mean that courts should rubber-stamp any and all means that a government chooses—no matter how oppressive towards groups that cannot protect themselves.[143]

It is not as though Detroit, or the state of Michigan, had to choose between destroying a community and acquiescing in a harmful recession. Even apart from available alternative sites, cities and states always have numerous means to revive a slumping economy.[144] Targeted or across-the-board tax credits, loans and public works programs have often had success in this regard. Such measures are not free of cost,[145] but the burden is

139. For a detailed discussion of the ability of powerful special interest groups to prevail upon municipalities to exercise eminent domain on their behalf, see generally Kochan, *supra* note 129.

140. "Quick take" statutes, which enable exercises of eminent domain to occur before compensation is even offered (much less decided) and before a community has the opportunity to organize and protest, exacerbate this imbalance. *See generally* Mansnerus, *supra* note 25, at 435 (discussing efficiency and disputes regarding "quick take" statutes); *see also* Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocating Business*, 96 YALE L.J. 1343, 1343 (1987) (discussing condemning businesses on verge of relocation as unconstitutional).

141. *See* ELY, *supra* note 61, at 75-77 (suggesting that courts engage in stricter scrutiny of legislation that is targeted at religious, national or racial minorities).

142. *See* Kochan, *supra* note 129, at 82 ("[T]he special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators.").

143. *See* Radin, *supra* note 64, at 1005-06 (expressing surprise that taking of family home is not subjected to stricter scrutiny).

144. Some state courts have raised the question of "necessity" in evaluating certain condemnations. *See* Plater & Norine, *supra* note 14, at 690-91 (discussing state interpretations of "necessity" and citing cases). The inquiry has taken the form of "whether legislative purposes could have been better accomplished by different governmental means." *Id.* at 691; *see also* Meidinger, *supra* note 11, at 47 (recommending necessity test).

145. But, then again, neither was the $350 million subsidy package for General Motors. Such money could have been put to many uses to help the economy. Note that we are not advocating that courts intervene in policymaking, *i.e.*, requiring the government to undertake a particular means to achieve its end. Rather, consideration of feasible alternatives would simply be germane to whether the exercise of eminent domain is justified. Indeed, some enterprising state courts have undertaken such an analysis. *See* Plater & Norine, *supra* note 14, at 692 (discussing occasional state substantive eminent domain review). By analogy, courts strike down legislation that infringes on the right to free speech when they find that less restrictive alternatives were available. *See, e.g.*, United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2311 (2003) (discussing legitimacy of statute's objective and less restrictive alternatives). The courts do not, however, order the government to im-

spread across the tax-paying population, not imposed on a single group whose lives are forever altered.[146]

Quite simply, not all exercises of eminent domain are created equal. But under current doctrine, all are treated equally, which is to say that all are deemed permissible.[147] Take two opposite scenarios. In one case, the government seizes the land of a General Motors plant (and compensates the company accordingly) to build a government-owned railroad, deemed critical for interstate commerce over the next one hundred years. In the other case, the government seizes the homes of hundreds of elderly Polish and African-American residents and hands it to General Motors, with the hope that jobs will be created and the economy improved. Now consider some of the critical differences between the two scenarios:

1) In the first, the effected party has a monetary interest only. In the second, the effected parties lose their homes and community.

2) In the first, the transferred land remains in the hands of the public, where it will presumably serve the public indefinitely. In the second, the transfer clearly serves to enhance the wealth of an already wealthy private party and will presumably enhance the short-term benefit of the public. Longer-term effects involve many variables, making them difficult to predict.

3) In the first, the effected party has powerful political options and allies to resist the seizure and to seek redress (at the ballot box) if it fails. In the second, the effected parties have little influence.[148]

Does it make any sense to treat these situations identically?[149] Or is there not an overwhelming case to be made for subjecting the second to

---

plement any particular alternative. *See* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (requiring "narrowly tailored" but not necessarily least restrictive means).

146. The Takings Clause "was designed to bar 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." Armstrong v. United States, 364 U.S. 40, 49 (1960).

147. *See, e.g.*, Kochan, *supra* note 129, at 51-52 (noting that "public use provision . . . retains little meaning today" because courts will approve eminent domain power "for almost any use").

148. *See* Mansnerus, *supra* note 25, at 435-36. According to Mansnerus:

> While burdened property owners are not "discrete and insular minorities" within the meaning suggested in *Carolene Products* and developed by constitutional scholars, they are nonetheless isolated. Even the 4,200 residents of Poletown . . . could at most influence one or two of the city council members who voted on the plan, and the individual owner in such a situation is all but unrepresented.

*Id.* (citations omitted).

149. Of course, not all cases of eminent domain fit either of these two scenarios. The second tier of our proposed two-tiered approach recognizes a third possibility—the condemned land is transferred to a private party, but those from whom the land is taken are not politically powerless and/or suffer primarily economic (and therefore compensable) loss. The land ends up in the hands of a private party, with all the attendant uncertainty and suspicion of governmental motives. For this reason, such transfers warrant greater scrutiny than when the

stricter scrutiny to ensure that it takes place only if truly necessary?[150] Sound public policy, respect for individual rights, analogy to other areas of law and recognition of the courts' proper role in our society all point to differential treatment.[151]

Another advantage to importing the fundamental rights and antidiscrimination approach to eminent domain law becomes apparent when we consider one of the Supreme Court's early justifications for its policy of near-total deference to governmental takings. Writing for the Court in a 1946 case, Justice Hugo Black argued that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on [that] basis . . . a practice which has proved impracticable in other fields."[152]

In fact, the standard proposed above does not require such a determination. Courts would rarely invalidate a taking on the basis that the proffered public use was not a government function. Rather, they would evaluate whether the government function was so compelling, and the exclusive action taken in service of it so necessary, that it trumps the rights of those whose land is seized.[153] The well-developed and reasonably stable

property remains in public hands, but less scrutiny than when the aggrieved party is powerless and suffers severe damages largely unameliorated by financial compensation. Thus, we subject the second-tier cases to intermediate scrutiny. Our use of these two tiers of heightened scrutiny obviously mirrors the Court's approach in antidiscrimination cases where strict scrutiny is reserved for particularly suspicious actions and intermediate scrutiny applies in situations provoking less—but still some—suspicion. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 519 (2d ed. 2002) (discussing levels of scrutiny in discrimination cases).

150. A few state courts seem in accord that heightened judicial scrutiny is justified when title is transferred to a private party. *See, e.g.*, Denihan Enters. v. O'Dwyer, 99 N.E.2d 235, 238 (N.Y. 1951) (finding judicial scrutiny "less critical . . . where the state itself is to be vested with the property"). Of course, even where the condemned land remains publicly owned, it does not necessarily follow that the governmental purpose is legitimate—*some* judicial scrutiny remains appropriate. The government may, for example, condemn land and convert it to a railroad, not because such a railroad serves the public, but because it benefits a particularly influential corporate contributor. Or the government may convert the land into a public highway because doing so enhances access to a casino owned by a tycoon.

151. In addition to all of the above, our proposed approach may dovetail perfectly with the Framers' intent. According to one scholarly account, the rationale behind the "just compensation" clause was protection of government confiscation of the property of the powerless. *See generally* Treanor, *supra* note 77 (explaining history of and reasons for Takings Clause). Translating this understanding to modern day reality, Treanor proposes "interpret[ing] the Takings Clause to provide heightened protection to the property interests of those who have been singled out and the property interests of discrete and insular minorities." *Id.* at 856. While he focuses on securing persons' compensation in various situations that courts traditionally have not considered "takings," his analysis is consistent with the goal of preventing takings that destroy powerless communities.

152. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946).

153. This would reverse the disturbing anomaly, under current doctrine, in which "[c]ondemnation takings, with their drastic effects on private interests, are

body of fundamental rights and antidiscrimination law (which undertake just such an inquiry) belies the notion that such an approach is inherently impracticable.[154]

Indeed, given the courts' track record in eminent domain cases, the real risk is not that heightened scrutiny would unleash wanton judicial activism, but that even the higher standard will not provide sufficient protection: judges may still be overly reluctant to find relative powerlessness and overly willing to credit speculative economic benefits.[155] To guard against this risk, thought should be given to objective guidelines that facilitate the application of the proposed criteria. For example, where eminent domain proceedings transfer land to a corporation that promises to create economic benefits, the corporation could be required to demonstrate the certainty of those benefits to the satisfaction of neutral experts. And the corporation's representations could be treated as contractually binding, with a "claw back" provision[156] serving as a remedy for a violation. If the corporation can convince a municipality and a court that it will create *X* number of jobs within *Y* years, it should be held to the promise.[157]

Likewise, when farmland or residential land is seized and transferred to a profitable corporation, courts can assume relative powerlessness,[158] or at least employ a rebuttable presumption. Where the displaced party (or parties) is a business (or businesses), perhaps the Department of Commerce's definition of "small" business can be used as a yardstick to indicate what constitutes a relatively powerless economic enterprise.[159]

---

even less scrutinized than governmental actions generally." Plater & Norine, *supra* note 14, at 697.

154. Although some state courts have shown a willingness to subject condemnations to stricter scrutiny, this "has apparently not caused major problems between the tripartite divisions of state government." *Id.* at 692.

155. For a discussion of judges' ruling-class bias, see Ely, *supra* note 61, at 58-60.

156. For a further discussion of "claw back" provisions, see *supra* note 101 and accompanying text.

157. This may seem unduly stringent, but it is actually consistent with the kind of binding contracts into which parties often enter. Here, the exercise of eminent domain would amount to such a contract: the corporation is given land in consideration for a pledge to produce a certain number of jobs. There are several possible remedies for breach of this contract, *e.g.*, forfeiture of the land or a stiff monetary payment (perhaps to be distributed among those displaced by transfer).

158. This, too, is consistent with equal protection doctrine. Not all blacks, for example, are politically powerless, but any legislation targeting blacks for unfavorable treatment (even in locales where blacks have significant political clout) receives heightened scrutiny.

159. This would be valuable because not all exercises of eminent domain that transfer land from a powerless private party to a relatively powerful private party involve homeowners. There are instances of land taken from a "mom and pop" business and given to a more economically and politically powerful business. Note, too, that the "mom and pop" shop, like the homeowner, may have a strong, noncompensable interest in remaining in a particular location.

As with every legal doctrine, contours and guidelines will emerge. The examples above show how courts can put meat on the bones of the proposed criteria for evaluating eminent domain transfers from one private party to another. Whatever precise model emerges, the case for heightened scrutiny of such actions is compelling.[160]

Giving meaning to the constitutional phrase "public use" and ensuring that application of the Takings Clause does not run roughshod over other constitutional values are perfectly legitimate exercises of the judicial role. The judiciary, however, need not exclusively undertake the approach proposed herein. Enlightened legislatures should be eager to develop guidelines for courts to apply in evaluating exercises of eminent domain.

There is, however, a regrettable disincentive for state legislatures to adopt such steps.[161] Adoption of a federal legislative standard could prevent state governments from a "race to the bottom"[162] in their eagerness to please corporate benefactors by using eminent domain without any meaningful public use.

## IV. CONCLUSION

The courts cannot undo every legal doctrine that defeats the public interest or contravenes society's norms. It might be, for example, that a doctrine derives from the Constitution and therefore should not be changed except through amendment. Alternatively, the doctrine may derive from legislation and should be changed only through the political process. And, even if the doctrine could be modified without usurping the authority of the Founding Fathers or any legislature, it may be that its

160. It is especially compelling because persons whose land is taken may be too intimidated to bring suit. *See* Treanor, *supra* note 77, at 873-75 (explaining difficulties minorities have in effectuating legislative process). The case can also be made to permit taxpayers to challenge exercises of eminent domain. *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 413 (1996) ("[C]itizens who depend on government services and who pay nonbusiness taxes have a stake in raising constitutional challenges to business tax breaks, a stake that may be sufficient to motivate advocacy groups representing such interests to take the issue to court."). Enrich notes that "[m]ost states have recognized, either by statute or by case law, a right of state taxpayers to bring suit in state court to challenge allegedly illegal or unconstitutional state activities." *Id.* at 414. In the case of eminent domain, the bill to compensate those displaced is ultimately footed by taxpayers. They should be given standing to sue and to argue that the exercise of eminent domain (or the threatened exercise that results in a buy-out) is unconstitutional. *See id.* at 413-18 (arguing in favor of taxpayer standing to challenge state tax incentives, noting that "[i]n several states that have confronted this issue, the answer has favored taxpayer standing," and collecting cases). Another suitable measure is repealing statutes that permit "quick take" exercises of eminent domain.

161. *See* Enrich, *supra* note 160, at 380 (noting phenomenon "in which competitive pressures compel [states] to adopt measures contrary to their citizens' interests").

162. *See id.* (discussing unhealthy interstate competition).

modification cannot be achieved by the courts without undoing a settled body of law and creating chaos as courts wrestle with cases absent appropriate guidance or constraints.

In the case of current eminent domain doctrine, none of these circumstances is present—nor any other circumstance that counsels in favor of continuing the status quo. The notion that government can use its eminent domain power to transfer land from powerless individuals to powerful private parties, for virtually any purpose whatsoever, in no way derives from the Constitution or any statute. If there is a reason for courts to avoid a more searching scrutiny of the exercise of eminent domain power, it must be because doing so would involve them in an *ad hoc* exercise lacking clear standards.[163] But, as we have seen, this is not the case.

Considerations of public policy support importing the approach used in fundamental rights law and antidiscrimination law to the law of eminent domain. By doing so, the courts can make eminent domain law humane and fulfill their promise to restrain the other branches of government and protect the rights of American citizens.[164]

---

163. *See* Plater & Norine, *supra* note 14, at 698 (indicating that there is no basis in text of Constitution or original intent of Framers for insulating eminent domain from judicial review; evidence suggests Framers intended active judicial protection of property rights against eminent domain power).

164. *See generally* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED (1997) (arguing eloquently for recognition of broad corpus of constitutional rights beyond those currently respected by courts). Professor Black specifically argues for the constitutional rights that enable the most vulnerable members of society to live with a modicum of dignity.

Black sees such rights as grounded in the Declaration of Independence, the Ninth Amendment and the Privileges and Immunities Clause of the Constitution. *See id.* at 5 (listing these doctrines as United States government's highest level of commitment to "reasoned constitutional law of human rights"). By making the case that new rights spring from venerable sources, his book is a useful corrective to the trend of disparaging claims of new rights as the product of an illegitimate adventurism. Our argument for limiting the exercise of eminent domain fits within and modestly applies Black's broad perspective. The approach we have propounded would confer a new degree of protection for citizens against the reaches of governmental power. Does this mean that judges who adopt our proposed approach would be guilty of "judicial activism"? Quite the contrary. It is a form of judicial activism (that is, a departure from the text and traditional understanding) for courts to treat the power of eminent domain as absolute. In demanding that courts give meaning to the requirement of "public use," our approach is doctrinally conservative. And in seeking guidance by analogy to settled bodies of law (especially the law of equal protection) and reference to established constitutional values (*e.g.*, the sacred status of the home), we proceeded in a fashion commended by Professor Black and consistent with time-honored tools of interpretation. *See generally id.*