Catholic University Law Review

Volume 54
Issue 3 *Spring 2005*

Article 7

2005

Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule

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ABSOLUTE DEFERENCE LEADS TO UNCONSTITUTIONAL GOVERNANCE: THE NEED FOR A NEW PUBLIC USE RULE

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Interpretations of the Public Use Clause[1] by the U.S. Supreme Court[2] and state supreme courts[3] have forced countless Americans to forfeit their real property to powerful private developers so those developers can put the property to a more profitable use.[4] Imagine owning a piece of property as an investment and then learning that a city-sponsored redevelopment project will help attract new development around the property. Because of the increase in property value that results from redevelopment projects,[5] this appears to be good news. But if the property is part of the redevelopment project, the joy will give way to anger if the legislature uses its "despotic power" of eminent domain[6] and

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

2. *See* Berman v. Parker, 348 U.S. 26 (1954).

3. *See* Kelo v. City of New London, 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004); City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003); Sidney Z. Searles, *The Law of Eminent Domain in the U.S.A.*, *in* EMINENT DOMAIN AND LAND VALUATION LITIGATION 333, 335-36 (Am. Law Inst., Am. Bar Ass'n Comm. on Continuing Prof'l Educ., No. C975 1995) (noting that forty-nine states have public use clauses in their constitutions, and the one state without, North Carolina, statutorily requires that takings be for a public use), *available at* WL C975 ALI-ABA 333.

4. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 2 (2003) (documenting that in the forty-one states studied between 1998 and 2002, a total of 10,282 takings were threatened or filed where the real property involved would be transferred to a private entity), *available at* http://www.castlecoalition.org/report/pdf/ED_report.pdf. Increasing property tax revenue is a primary reason why state and local legislatures authorize transferring real property from one private entity to another private entity through the exercise of eminent domain. *See Kelo*, 843 A.2d at 510 (discussing how the challenged taking, if allowed, would result in a tax revenue increase from $680,544 to $1,249,843).

5. Catherine Michel, Note, *Brother, Can You Spare a Dime: Tax Increment Financing in Indiana*, 71 IND. L.J. 457, 457-58 (1996) (discussing the rationale behind tax increment financing as a means of publicly funding redevelopment projects, and offering that "[a]s the property is redeveloped, its inherent value should rise, and property tax revenues should increase correspondingly").

6. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795). The Court stated that

takes the property for the purpose of transferring ownership to another private entity who plans to use the property for private gain.

The facts just described are those found in the case *Kelo v. City of New London*,[7] now at the center of the controversy of whether a taking for the purposes of economic development constitutes a public use,[8] which the Supreme Court will decide during its 2004-2005 Term. Until the Court's 1954 decision in *Berman v. Parker*,[9] this scenario never would have passed judicial scrutiny under the Court's Public Use Clause jurisprudence.[10] But the Court in *Berman*, for the first time, adopted a deferential approach to reviewing legislative determinations of public use by allowing for only a narrow inquiry into the public purpose of a taking,[11] even though ownership of the condemned property was transferred to a private party.[12] Such a taking is referred to as a "public-private" taking.[13] The Court reaffirmed *Berman*'s deferential approach

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> [t]he *despotic power*, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, it cannot be lodged any where with so much safety as with the Legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity.

Id. (emphasis added).

7. 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004). For a more detailed discussion of the facts, see *infra* text accompanying notes 135-37.

8. *See* Petition for a Writ of Certiorari at i, *Kelo* (No. 04-108) (stating the question presented as whether or not a public-private taking "for the sole purpose of 'economic development'" is permissible under the Public Use Clause), *available at* 2004 WL 1659558.

9. 348 U.S. 26 (1954).

10. Brown v. United States, 263 U.S. 78, 83-84 (1923) (adopting the Massachusetts Supreme Court's position "that neither the development of the private commerce of [a] city nor the incidental profit which might enure to [a] city out of such a procedure could constitute a public use authorizing condemnation").

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

12. *Id.* at 31 (presenting the undisputed argument by the condemnee that his property was "commercial, not residential property; it [was] not slum housing; [and that] it [would] be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use").

13. Jeffery W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to "Public-Private" Takings?*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 466, 466 (2003) (describing a "public-private" taking as "when the government uses its power of eminent domain to take private property to serve a public purpose but conveys actual ownership or exclusive use of the property to another private entity"). The property owner whose property is taken will hereinafter be referred to as the "condemnee," and the private entity to whom ownership or control of the property is transferred will hereinafter be referred to as the "transferee."

to reviewing legislative determinations of public use in the 1984 decision *Hawaii Housing Authority v. Midkiff*.[14]

This Comment focuses on the meaning of the term "public use" as it was conceived originally at the time of the ratification of the Bill of Rights, and, more particularly, on the public-private takings that are permissible under the Public Use Clause of the Fifth Amendment of the Federal Constitution. The U.S. Supreme Court established in *Midkiff* that the Public Use Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment,[15] thereby allowing for a universal declaration of what constitutes a public use and, more importantly, what constitutes a permissible public-private taking.[16] Unless the Supreme Court desires individuals' property rights to continue to fall prey to the interests of private developers, the Court must reconsider the deferential approach employed in *Berman* and *Midkiff* and establish a comprehensive rule declaring what constitutes a public use.

This Comment begins by exploring the original meaning of the Public Use Clause at the time of its enactment and then discusses the Supreme Court cases decided prior to *Berman* that touch upon the constitutionality of public-private condemnations. Next, this Comment sets forth the Court's deferential approach in reviewing legislative determinations. Then, this Comment touches on state court decisions that followed the deferential approach when reviewing takings for

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14. 467 U.S. 229, 244 (1984) (holding that "if 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").

15. *Id.* at 231-32.

16. *Id.* Prior to this pronouncement, the Court reviewed the constitutionality of state-initiated condemnations only under the Due Process Clause of the Fourteenth Amendment, but still required that the taking be for a public use. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897). The Court stated:

> [A] legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.

Id.; *see also* Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private party, the question of what is a public use is a judicial one."). *Vester* centered on an "excess condemnation" claim by a condemnee, which the Court defined as "the taking of more land than is needed to be occupied by the improvement directly in contemplation." *Id.* at 441. The Court struck down the condemnation as a violation of state law because the only evidence that was presented to support the taking was "a mere statement by the council that the excess condemnation [was] in furtherance of [a public] use." *Id.* at 447, 449.

economic development, including *Kelo*, and takings for blight clearance. The following Part briefs the Michigan Supreme Court's decision *County of Wayne v. Hathcock*,[17] in part because it declares public-private takings for economic development to be unconstitutional under Michigan law.[18] Next is an analysis of the *Berman* and *Midkiff* decisions' deferential level of review of public-private condemnations in light of the original meaning of the Public Use Clause and pre-*Berman* precedent, followed by an examination of alternative approaches to evaluating the constitutionality of takings actions, including the approach adopted in *Hathcock*. Ultimately, this Comment concludes that public-private takings are permissible, but only under two of the categories articulated in *Hathcock*: (1) where a "public necessity of the extreme sort"[19] requires a public-private taking, and (2) where condemned property in private hands remains subject to public oversight.

I. PRERATIFICATION THROUGH *HATHCOCK*: THE HISTORY OF THE PUBLIC USE CLAUSE

A. Original Meaning of the Public Use Clause

James Madison proposed to the House of Representatives what became the Takings Clause,[20] which provides "nor shall private property be taken for *public use*, without just compensation."[21] Madison

17. 684 N.W.2d 765 (Mich. 2004).

18. *Id.* at 784.

19. *Id.* at 783.

20. House of Representatives Debates, May-June, 1789 [hereinafter House Debates], *in* 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1012, 1026-27 (1980). Madison's original formulation of what became the Takings Clause and Public Use Clause of the Fifth Amendment was that "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Id.* at 1027. Madison authored all of the Bill of Rights. *Id.* at 1026-28. Because of Madison's central role in the ratification of the Public Use Clause, an understanding of his viewpoint on the proper role of government in relation to individual freedom and property rights is central to determine the original meaning of the Public Use Clause. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-13 (1985).

21. U.S. CONST. amend. V (emphasis added). This Clause as a whole is referred to as the Takings Clause, while the language "for public use" is referred to as the Public Use Clause. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984). Although proposed to the House of Representatives by Madison, the Takings and Public Use Clauses were not his invention; *The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772*, put forth by the Massachusetts colonists, included the following provisions: "The supreme power cannot Justly take from any man, any part of his property without his consent, in person or by his Representative." The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, *in* 1 SCHWARTZ, *supra* note 20, at 200, 203. Prior to the ratification of the Bill of Rights, states passed their own versions, including

subscribed to John Locke's social contract theory of government[22] and like Locke, he viewed the protection of property rights as one of the central purposes of government, and proposed the Public Use Clause to help further this purpose.[23] Madison hoped that the Fifth Amendment

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Massachusetts, which it called its Declaration of Rights and which specifically stated (and still does today):

> But no part of the property of any individual, can, with justice, be taken from him, or applied to *public uses* without his own consent, or that of the representative body of the people . . . . And whenever the public exigencies require, that the property of any individual should be appropriated to *public uses*, he shall receive a reasonable compensation therefor.

Massachusetts Declaration of Rights, *in* 2 SCHWARTZ, *supra* note 20, at 339, 341-42 (emphasis added). Virginia and Vermont had similar provisions in their respective Declaration of Rights. Journal of the Virginia Convention, 1776, *in* 2 SCHWARTZ, *supra* note 20, at 236, 238; Vermont Declaration of Rights, 1777, *in* 2 SCHWARTZ, *supra* note 20, at 319, 322.

22. *See* House Debates, *supra* note 20, at 1026 (including one of Madison's unadopted amendments to the Constitution which articulated "[t]hat Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety"). The following passage articulates John Locke's theory of how property rights are central to the social contract:

> *The Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. . . . Hence it is a mistake to think, that the Supream or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360-61 (Peter Laslett ed., 1988) (1690). Locke's idea that governments were created for the *benefit of the people* and the protection of individual rights is referred to as the social contract theory of government. *See, e.g.*, Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 324 (1990) ("The framers of the Constitution, following the *social contract* theory of the philosopher John Locke, saw government as a voluntary compact entered into by individuals to provide security for their rights." (emphasis added) (footnote omitted)). Thomas Jefferson also subscribed to Locke's social contract theory of government. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[T]hat all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed.*" (emphasis added)).

23. *See supra* note 22. Madison offered the Due Process Clause of the Fifth Amendment, which states that "[n]o person shall . . . be deprived of life, liberty, or *property*, without due process of law," also to further the goal of protecting property rights. U.S. CONST. amend. V (emphasis added). He believed fundamentally that "[a] government 'which [even] indirectly violates [individuals'] property in their actual possessions . . . is not a pattern for the United States.'" BERNARD H. SIEGAN, PROPERTY

would serve an even broader purpose as a "paper barrier" between the government and private property,[24] thereby impressing on all citizens, not just the Federal Government, the "sanctity of property."[25] Additionally, Madison feared that powerful factions interested in the acquisition of more property would influence the legislatures for their own benefit[26] at the expense of the less powerful, and proposed the Public Use Clause in part to control the effects of the factions' influence.[27] He assigned the responsibility of enforcing the Bill of Rights, and thus the requirement that takings be for a public use, to the courts.[28] For Madison, therefore,

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AND FREEDOM 14 (1997) (quoting NAT'L GAZETTE (Pennsylvania) Mar. 29, 1792, *reprinted in* THE COMPLETE MADISON 268-69 (Saul K. Padover ed., 1953)).

24. *See* House Debates, *supra* note 20, at 1030. Madison stressed that "[p]aper barriers . . . have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined." *Id.*

25. Treanor, *supra* note 20, at 711-12. An underlying purpose behind all of Madison's proposed amendments was to quash the idea that the Constitution was adopted "in order to lay the foundation of an aristocracy or despotism." House Debates, *supra* note 20, at 1024.

26. THE FEDERALIST NO. 10, at 44 (James Madison) (Gideon ed., 2001) (stating that "the most common and durable source of factions, has been the various and unequal distribution of property"); *see* Treanor, *supra* note 20, at 710 (arguing that "[t]he diversity of interests that possession of property occasioned prevented tyranny"). Madison warned that "it is against the enterprising ambition of [the legislature], that the people ought to indulge all their jealousy, and exhaust all their precautions." THE FEDERALIST NO. 48, at 257 (James Madison) (Gideon ed., 2001). He further maintained that the protection afforded by his Bill of Rights was necessary because "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." *Id.* at 256-57.

27. *See* THE FEDERALIST NO. 10, *supra* note 26, at 43 (stating that one of the two methods of "curing the mischiefs of faction" is to "control[] its effects"). Madison also feared absolute majority rule and expressed concern that "[i]n all cases where a majority are united by a common interest or passion, the rights of the minority are in danger." MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY 107 (1993) (quoting JAMES MADISON, NOTES OF DEBATES OF THE FEDERAL CONSTITUTION 76 (Bicentennial ed. 1987)).

28. House Debates, *supra* note 20, at 1031 (setting forth the idea that "[i]f [the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights"). One of the earliest Supreme Court cases dealing with property rights declared such rights as fundamental to the social compact. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795). Specifically, the Court stated:

> From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the

takings under the Fifth Amendment could only be for a public use because a taking for a private use would demonstrate a failure of the courts to control the influence of factions and a violation of the social contract by depriving the condemnee of his or her property rights for the purpose of benefiting another.

*B. The Supreme Court's Pre-*Berman *Treatment of Public-Private Takings*

The earliest Supreme Court case addressing the constitutionality of public-private takings under the Public Use Clause was the 1848 decision *West River Bridge Co. v. Dix*.[29] In *Dix* the issue centered on the use of eminent domain and its constitutionality in relation to the Contracts Clause.[30] Despite this narrow question, two justices filed concurring opinions in which they countered the condemnor's argument that Vermont could condemn the land of one private entity and transfer it to another private entity with no change in the use of the property.[31] Justice McLean unequivocally stated, "[t]his the state cannot do. It would in effect be taking the property from A to convey to B."[32] Justice McLean therefore would support a prohibition of public-private takings where the transferee uses it for the same purpose as the condemnee—profit.[33] Justice Woodbury also filed a concurrence and offered what

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social compact, and, by the late Constitution of *Pennsylvania*, was made a fundamental law.

Id.

29. 47 U.S. (6 How.) 507 (1848). In this case, the taking itself involved a taking by the state of a private bridge constructed by a state-chartered corporation so that the bridge could be put to public use. *Id.* at 531.

30. *Dix*, 47 U.S. (6 How.) at 530; *see* U.S. CONST. art. I, § 10.

31. *Id.* at 537 (McLean, J., concurring); *id.* at 543-44 (Woodbury, J., concurring). The argument advanced by Vermont was that

> where a grant of a franchise comes in collision with a previous grant of a similar kind, it has been objected, that it was not competent for the legislature to take the property of one person for the use and benefit of another; yet such a proceeding has been sustained, where it is for public use, and the increased benefit to the public requires the sacrifice.

Id. at 528-29.

32. *Id.* at 537 (McLean, J., concurring). He continued, "The public purpose for which the power is exerted must be real, not pretended." *Id.* (McLean, J., concurring).

33. *See id.* at 537-38 (McLean, J., concurring). The condemnee in this case, the West River Bridge Co., owned and operated a toll bridge across the West River in Brattleboro, Vermont. *Id.* at 510. Keeping with Madison's hope that the Public Use Clause would impress upon both the states and the Federal Government the "sanctity of property," *see supra* text accompanying notes 24-25, Justice McLean proposed that his interpretation of the clause be applied universally, *Dix*, 47 U.S. (6 How.) at 538 (McLean, J., concurring) (admitting that "[t]his refers to the action of the federal government," but further stating that "a similar provision is contained in all the State constitutions").

commentators have referred to as the "narrow interpretation" of the Public Use Clause,[34] arguing that any other interpretation would be "too broad, too open to abuse."[35] Neither the concurring opinions of Justice Woodbury and Justice McLean, nor the majority opinion, stated that in public-private takings, the proper review for the court is to defer to a legislative determination of public use.[36]

The Supreme Court's majority opinion in the 1896 decision *United States v. Gettysburg Electric Railroad Co.*,[37] which involved a "public-public" taking,[38] suggested that deference to legislative determinations of public use is inappropriate when evaluating a private-private taking.[39]

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34. *Dix*, 47 U.S. (6 How.) at 545 (Woodbury, J., concurring) (stating that "the doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable"); *see* Scott, *supra* note 13, at 468 (summarizing the narrow interpretation as requiring "that the public must be entitled to some type of direct use of the particular property that is taken"). Justice Woodbury pointed out that the court findings of public uses "are confined chiefly to bridges and roads, and the incidents to war." *Dix*, 47 U.S. (6 How.) at 545 (Woodbury, J., concurring); *see* George F. Will, *Despotism in New London*, WASH. POST, Sept. 19, 2004, at B7 (adopting the narrow view by stating that "[t]he framers of the Bill of Rights used language carefully; clearly they intended the adjective 'public' to restrict government takings to uses that are directly owned or primarily used by the general public, such as roads, bridges or public buildings"); DAVID. A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 61 (1992) (synthesizing the *Berman* and *Midkiff* decisions as "finally resolv[ing] the broad-versus-narrow debate on eminent domain").

35. *Dix*, 47 U.S. (6 How.) at 545 (Woodbury, J., concurring). Clarifying what are permissible public uses, Justice Woodbury stated that

> the user [sic] must be for the people at large,—for travellers,—for all,—must also be compulsory by them, and not optional with the owners,—must be a right by the people, not a favor,—must be under public regulations as to tolls, or owned, or subject to be owned, by the State, in order to make the corporation and object public . . . ."

Id. at 546 (Woodbury, J., concurring). He admitted that property condemned for the construction of a private road held by a private entity may benefit the public, but argued that "such a benefit is not technically nor substantially a public use, unless the public has rights." *Id.* at 547 (Woodbury, J., concurring). He asked, "Who ever heard of laws to condemn private property for public use, for a marine hospital or state prison?" *Id.* at 546 (Woodbury, J., concurring). He admitted that such uses are public, but stated that "[n]o necessity seems to exist, which is sufficient to justify so strong a measure." *Id.*

36. *See generally* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848).

37. 160 U.S. 668 (1896).

38. *Id.* at 679-80. The U.S. Government, through the Secretary of War, initiated the taking of privately owned real property in Gettysburg, Pennsylvania, following the Civil War, with the intent of attaining government ownership and control over the land in order to preserve the Gettysburg battlefield. *Id.* This is referred to as a "public-public" taking, because a public body is exercising the power of eminent domain for the purpose of owning the property itself and making that property available to the public.

39. *See id.* at 680; *see also infra* text accompanying note 41. A "private-private" taking refers to a taking initiated by a corporation who, by statute, is granted the power of

The Court found that it was appropriate to follow a rule of deference when reviewing a public-public taking.[40] However, the Court also stated:

> It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself.[41]

Prior to *Berman* and *Midkiff*, the Supreme Court in *Brown v. United States*[42] approved a public-private condemnation where the public nature of the use was not as clear[43] as the takings evaluated in *Dix*[44] and *Gettysburg Electric*.[45] The condemnees in *Brown* contended "that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object can not be regarded as for a public use of the property."[46] The Court noted that it could find no Supreme Court precedent that permitted such a public-private taking,[47]

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eminent domain because its business operations are essential to the public, such as providing rail service. *See* Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 607 (1908) (upholding a condemnation initiated by a private railroad company created by the State of Virginia).

40. *Gettysburg Elec.*, 160 U.S. at 680 (stating that when a "legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation"). This deferential rule is juxtaposed with the Court's belief that "[t]he responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right." *Id.*

41. *Id.*

42. 263 U.S. 78 (1923).

43. *Id.* at 80-83. The United States desired to construct an irrigation system in an area of southeast Idaho and, as a part of that project, it needed to construct a reservoir in the city of American Falls, Idaho. *Id.* at 80. The condemnees in *Brown* were landowners of a 120-acre tract of land that was outside the threatened area of American Falls. *Id.* The private individuals who were to receive the condemned land, the transferees, were the townspeople of American Falls, whose homes were going to be destroyed by flooding caused by the construction of the reservoir in their town. *Id.* at 81. Congress chose this method of compensating the transferees by substitution over condemning their land in American Falls because "[t]he usual and ordinary method of condemnation of the lots in the old town . . . would be ill adapted to the exigency[,]" considering not only the difficulty in fixing a value to property that would be flooded, but also the inequity of eliminating almost an entire town and not assisting the people displaced in finding homes. *Id.* at 82-83.

44. *See supra* note 29 and accompanying text.

45. *See supra* note 38 and accompanying text.

46. *Brown*, 263 U.S. at 81.

47. *Id.* at 83 (stating that "it would not be surprising if no precedent could be found to aid us as an authority"). The Court did not find any of its own precedent, but it did describe an analogous case where the Maryland Court of Appeals allowed a railroad company to condemn the private land of one individual to serve as a right of way for other private individuals whose only access to a public highway had been taken by the railroad

but nonetheless held that the taking was constitutional under the Public Use Clause.[48] The Court described the circumstances of the case as "peculiar,"[49] and narrowed the scope of its holding by asserting that it did not conflict with a Massachusetts Supreme Court decision that prohibited a public-private taking undertaken for economic development purposes, further suggesting that such public-private takings are unconstitutional.[50]

C. The "Foundation" of the Modern Court's Deferential Rule

The deferential approach to congressional public use determinations seen in *Gettysburg Electric* reappeared in *Old Dominion Land Co. v. United States*.[51] In *Old Dominion*, the Court reviewed a condemnation, filed by the Secretary of War, of land containing military buildings owned by the United States in Newport News, Virginia.[52] The Court declared that "[Congress's] decision is entitled to deference until it is shown to involve an impossibility"[53] and held that the military purposes for the building constituted a public use.[54] However, this deferential approach was in the context of a public-public condemnation, because it

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company. *Id.* (discussing *Pitznogle v. Western Maryland Railway Co.*, 87 A. 917 (Md. 1913)).

48. *Brown*, 263 U.S. at 83. The Court justified the holding by stating that "[a] method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution." *Id.*

49. *Id.*

50. *Id.* at 83-84. The majority stated:

> Our conclusion is not in conflict with that class of cases with which the Justices of the Supreme Judicial Court of Massachusetts dealt in the Opinion of Justices, 204 Mass. 607. It was there proposed that the City of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them after the improvement was made, for the promotion of the erection of warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The Justices were of opinion that neither the development of the private commerce of the city nor the incidental profit which might enure to the city out of such a procedure could constitute a public use authorizing condemnation. The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation.

Id. at 83-84.

51. 269 U.S. 55 (1925).

52. *Id.* at 63. Prior to initiating the condemnation, Congress passed a statute authorizing the Secretary of War to condemn these sites. *Id.* at 64.

53. *Id.* at 66.

54. *Id.*

was initiated by the Federal Government so that it could own the real property underlying the military structures.[55]

The Court in *United States ex rel. Tennessee Valley Authority v. Welch*,[56] another public use centered-case involving a public-public taking,[57] quoted the deferential language found in *Old Dominion*.[58] But the Court went further and stated that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function."[59] With these words, the Court departed from one of its essential jurisprudential principles established when the Court was in its infancy: "It is emphatically the province and duty of the judicial department to say what the law is."[60] The *Welch* Court also departed from the principle that the Takings and Public Use Clauses require courts to determine whether the land taken will be devoted to a public use.[61] Moreover, two justices on the *Welch* Court disagreed over the scope of the deferential rule established in the majority opinion.[62] Accordingly, the foundation for a deferential approach toward even a

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55. *Id.* at 64 ("[The purpose of the taking was] '[s]ites for military purposes: For completion of acquisition of real estate as authorized by' [statute]: 'For quartermaster warehouses, Newport News, Virginia . . . .'" (quoting Deficiencies Appropriation Act of July, 1, 1922, ch. 258, 42 Stat. 767, 777)).

56. 327 U.S. 546 (1946).

57. *Id.* at 548-51 (summarizing that the condemnation involved the taking of land from private individuals by a congressionally created public works company because they were left without ingress and egress following flooding caused by the construction of a dam, and the subsequent transfer of that land to the National Park Service).

58. *Id.* at 552 ("'[Congress's] decision is entitled to deference until it is shown to involve an impossibility.'" (quoting Old Dominion Land Co. v. United States, 269 U.S 55, 66 (1925))).

59. *Id.* The Court continued by offering that without judicial restraint in the context of public-public condemnations, courts would be "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." *Id.*

60. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

61. Hairston v. Danville & W. Ry., 208 U.S. 598, 606 (1908) (stating that "the nature of the uses, whether public or private, is ultimately a judicial question"); *see supra* text accompanying note 28.

62. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 547, 556 (Reed, J., concurring) (stating that "[t]his taking is for a public purpose but whether it is or is not is a judicial question"). Justice Reed stated that without such a rule, "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." *Id.* at 556-57 (Reed, J., concurring). He continued by saying "[t]he former cases go no further than this." *Id.* at 557 (Reed, J., concurring). Justice Frankfurter filed a separate concurrence disagreeing with Justice Reed's interpretation of the Court's opinion. He advanced the position that when the Court cited *Old Dominion* it did so to "recognize[] the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence." Id. at 557-58 (Frankfurter, J., concurring).

public-public taking remained unstable as late as the 1946 *Welch* decision.[63]

E. Berman *and* Midkiff *Extend the Deferential Rule to Public-Private Takings*

1. Berman

Despite the dicta relating to private-private takings in *Gettysburg Electric*,[64] the precedent in *Brown*,[65] and the original meaning of the Public Use Clause,[66] the Supreme Court in *Berman* deviated from the approach that public-private takings should not be afforded deferential treatment.[67] The setting for *Berman* was Washington, D.C., in the early 1950s, where Congress had determined that the city had fallen into a general slum state.[68] Seeking to remedy this problem, Congress enacted the District of Columbia Redevelopment Act of 1945.[69] Congress determined that "'the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a *public use*.'"[70] In its implementation of the Act, the District of Columbia Redevelopment Land Agency (Agency) condemned a department store.[71] The

63. *See supra* note 62.

64. *See supra* text accompanying note 41.

65. *See supra* text accompanying notes 49-50.

66. *See supra* text accompanying notes 20-28.

67. 348 U.S. 26, 32-33 (1954).

68. *Id.* at 28 ("'[C]onditions existing in the District of Columbia with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare . . . .'" (quoting the District of Columbia Redevelopment Act of 1945, Pub. L. No. 592, § 2, 60 Stat. 790, 790)). In the redevelopment area, the following conditions existed: "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating." *Id.* at 30.

69. Pub. L. No. 592, 60 Stat. 790 (1945). The Act created a Planning Commission, which was "directed to make and, from time to time, develop a comprehensive or general plan of the District of Columbia." *Id.* § 6(a), 60 Stat. at 794. The Act also spelled out the procedures for the adoption of redevelopment plans, which were required prior to any condemnation proceedings under the Act. *Id.* § 6(b), (d), 60 Stat. at 794-95. The redevelopment plan was to include "approximate locations and extents of the land uses proposed for and within the area, such as public buildings . . . public and *private* open spaces, and other categories of public and *private uses*." *Id.* § 6(b)(2), 60 Stat. at 794 (emphasis added).

70. *Berman*, 348 U.S. at 29 (emphasis added) (quoting § 2, 60 Stat. at 791).

71. *Id.* at 28, 31. The Court summarized the role of the District of the Columbia Redevelopment Land Agency (Agency) under the Act as follows:

> After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as

landowner challenged the condemnation under the Public Use Clause, and argued that it was unconstitutional because his property was "commercial, not residential property; it [was] not slum housing; [and that] it [would] be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use."[72]

Rather than evaluating the condemnee's due process and public use claims, the Court upheld Congress's legislative scheme as a proper exercise of its police power.[73] The Court demonstrated its deferential approach to this public-private taking by stating that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[74] This leaves "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose [as] an extremely narrow one,"[75] so narrow that "[i]f those who govern the District of Columbia decide that the Nation's Capital should be beautiful . . . there is nothing in the Fifth Amendment that stands in the way."[76]

The Court next found that Congress, not the courts, has the authority to select the means by which it will carry out its police power.[77] In this case, Congress chose "the use of private enterprise for redevelopment of the area"[78] as the means. The argument advanced by the condemnee was that "this makes the project a taking from one businessman for the benefit of another businessman."[79] Rather than exploring the

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streets, utilities, recreational facilities, and schools, § 7(a), and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership. § 7(b), (f). The leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that "no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon" which does not conform to the plan. § 7(g).

Id. at 30.

72. *Id.* at 31; *see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 179 (1985) (discussing how the condition of the condemnee's land did not change after title passed to the transferee).

73. *Berman*, 348 U.S. at 31-32 (likening Congress's power over the District of Columbia to the legislative powers states may exercise as "what traditionally has been known as the police power"). The Court admitted the difficulty in defining the police power by stating that "[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Id.* at 32.

74. *Id.*

75. *Id.*

76. *Id.* at 33. The Court further declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

condemnee's argument in light of well-established precedent,[80] the Court stubbornly reiterated that "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[81]

The *Berman* Court justified its decision to allow the condemnation of the department store, which did not qualify as slum property,[82] by advancing that it would be more convenient if the Agency had the power to take every property within a designated redevelopment area, rather than actually discerning between the slum and nonslum properties.[83] The Court then established for Congress a virtually unlimited eminent domain power by stating that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the

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80. *See supra* text accompanying notes 41, 49-50.

81. *Berman*, 348 U.S. at 33 (citing Luxton v. N. River Bridge Co., 153 U.S. 525, 529-30 (1894)). The means-ends discussion within the pages cited by the Court established that "Congress . . . may create corporations as appropriate means of executing the powers of government . . . [and may] use its sovereign powers, [either] directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce." *Luxton*, 153 U.S. at 529-30 (citations omitted). Therefore, a private entity granted authority by Congress to construct a bridge may exercise the power of eminent domain to acquire land needed for the project. *See id.* To further support its decision to defer to Congress's choice of means, the *Berman* Court referenced the holding in *Highland Russel Car & Snowplow Co.*, 279 U.S. 253 (1929). *Berman*, 348 U.S. at 33. At issue in *Highland* was Congress's ability to legislatively empower the President to fix the price of coal during wartime. *Highland*, 279 U.S. at 258, 260, 262. In challenging a lower court's decision that he was required to sell coal at a price established by the President, the plaintiff asserted that the price-fixing deprived him of his liberty to contract in violation of the Due Process Clause of the Fifth Amendment, *not* the Takings Clause. *Id.* at 258. The defendant was producing snowplows for railroads during World War I and because of the railroads' extreme need for such equipment, the Court stated that "[u]nquestionably, the production of such equipment was in the state of war then prevailing a *public use* for which coal and other private property might have been taken by exertion of the power of *eminent domain*." *Id.* at 260 (emphasis added). Despite the *Berman* Court's reliance on these two cases, the facts in *Luxton* and *Highland* are inapposite to the facts in *Berman*, and accordingly, neither case should have been relied upon by the Court in *Berman*. *Compare Berman*, 348 U.S. at 31, 34, *with Highland*, 279 U.S. at 257-58, *and Luxton*, 153 U.S. at 534.

82. *Berman*, 348 U.S. at 31 (stating the undisputed claim by the condemnee that his property "is not slum housing").

83. *Id.* at 35 (stating that "[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly"). Later, the Court stated that

> [i]t is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

Id. at 36.

project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[84] Thus, even when a taking is unnecessary to improve the public health and therefore not a proper exercise of eminent domain under the police power justification,[85] and, even though property is not devoted to a public use, so long as "the public purpose" has been decided for the project as a whole, the taking does not offend the Constitution.[86] The *Berman* decision firmly established that redevelopment agencies of municipalities have unlimited leeway in how they employ eminent domain to remedy slum and blight conditions.[87]

2. Midkiff

Hawaii's legislature "concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market [and] inflating land prices,"[88] and offered the Land Reform Act of 1967 (Act) as the solution.[89] The Act "created a mechanism for condemning residential tracts and for transferring ownership" of the condemned land to those leasing the land from the owners.[90] The constitutionality of the Act was successfully challenged in the Ninth Circuit, which held that the

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84. *Id.* at 35-36 (citing Shoemaker v. United States, 147 U.S. 282, 298 (1893) (involving the condemnation of land for a national park)); United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 547, 554 (1946) (involving condemnation of land so that it may be flooded by a federally created utility company and the subsequent transfer of that land to the National Park Service); United States v. Carmack, 329 U.S. 230, 232 (1946) (involving the condemnation of land for a U.S. Post Office and U.S. Custom House).

85. *Berman*, 348 U.S. at 32 (citing public health and safety as "some of the more conspicuous examples of the traditional application of the police power to municipal affairs").

86. *Id.* at 35-36. For the Court, "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking." *Id.* at 36.

87. *Id.*

88. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984). In the 1960s Hawaii was still an oligarchical state, with forty-seven percent of the privately owned land in the state owned by seventy-two people. *Id.*

89. HAW. REV. STAT. ANN. § 516-186 (Michie 2000). The legislature passed the Act because large landowners resisted attempts by the state to persuade them to sell their land outright, citing the significant federal tax liabilities that would follow. *Midkiff*, 467 U.S. at 233. Such tax liabilities are avoided under the Act because a condemnation constitutes an involuntary conversion under the Internal Revenue Code. I.R.C. § 1033(a) provides that "[i]f property (as a result of its destruction in whole or in part, theft, seizure, or requisition or *condemnation* or threat or imminence thereof) is compulsorily or involuntarily converted—[i]nto property similar or related in service or use to the property so converted, *no gain* shall be recognized." I.R.C. § 1033(a) (2000) (emphasis added).

90. *Midkiff*, 467 U.S. at 233. Condemnation did not occur until after a public hearing to determine whether the transfer of ownership of the land to lessees would "'effectuate the *public purposes*' of the Act." *Id.* (emphasis added).

legislative scheme resulted in 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."[91]

The Supreme Court reversed the Ninth Circuit[92] and extended *Berman*'s deferential approach to all legislative determinations of public use.[93] Providing welcome clarity, the Court began its opinion by explicitly stating that the Public Use Clause of the Fifth Amendment is "made applicable to the States through the Fourteenth Amendment."[94] In its evaluation of the Act under the Public Use Clause, the Court summarized the *Berman* decision by stating that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[95] The Court acknowledged that there is "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power,"[96] but echoed the *Berman* Court by stating that the scope of that review is "'extremely narrow.'"[97] For further support of its deferential approach to the Hawaii Legislature's public use determination, the Court noted that the *Berman* Court cited with approval *Old Dominion* and *Welch*, [98] neither of which involved a public-private taking.[99] It then offered one final case for support of the deferential approach—*Gettysburg Electric*[100]—also not a public-private taking case.[101]

The Court then continued its trend of moving away from the actual language of the Public Use Clause by replacing the term public use with the term "public purpose."[102] This linguistic trick allowed the Court to

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

92. *Midkiff*, 467 U.S. at 245.

93. *Id.* at 240-41 (following a discussion of *Berman*'s deferential approach, the Court stated that "[o]n this basis, we have no trouble concluding that the Hawaii Act is constitutional").

94. *Id.* at 231.

95. *Id.* at 239-40.

96. *Id.* at 240.

97. *Id.* (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

98. *Id.* at 240-41.

99. *See supra* text accompanying notes 52, 55; *see supra* note 57 and accompanying text.

100. *Midkiff*, 467 U.S. at 241. The Court stated "that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

101. *See supra* note 38 and accompanying text.

102. *Midkiff*, 467 U.S. at 241 (stating that "'one person's property may not be taken for the benefit of another private person without a justifying *public purpose*'" (emphasis added) (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937) (upholding a

state "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[103] The Court then subjected the Act to this rational basis review and determined that the Act survived scrutiny because the "redistribution of fees simple to correct deficiencies in the market . . . attributable to land oligopoly is a rational exercise of the eminent domain power."[104] For the Court, the fact that the taking was public-private did not automatically "condemn that taking as having only a private purpose."[105] It supported this view by errantly extending *Rindge Co. v. County of Los Angeles*,[106] a public-public taking case,[107] to public-private takings, stating that "[t]he Court long ago rejected any literal requirement that condemned property be put into use of the general public."[108] However, *Rindge* only tenuously

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regulation that limited natural gas production without evaluating any public use claim))); *see also Midkiff*, 467 U.S. at 241 (citing Cincinnati v. Vester, 281 U.S. 439, 447 (1930) (holding that the determination of public use is a judicial one); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251-52 (1905) (holding only that the question of whether a taking is for a public use is a "suit" or "controversy" and therefore removable to the federal courts under the Judiciary Act); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159 (1896) (upholding a California irrigation act that allowed for the sale of an individual's property if they did not pay their irrigation assessment). The Court then summarized the holding in *Missouri Pacific Railroad Co. v. Nebraska*, 164 U.S. 403 (1896), as "invalidat[ing] a compensated taking of property for lack of a justifying public purpose," *Midkiff*, 467 U.S. at 241. A careful analysis of the *Missouri Pacific* case reveals that the Court actually focused on the fact that the use of the property would be purely private, rather than delving into an analysis of the public purpose of the taking. *See* 164 U.S. at 417.

103. *Midkiff*, 467 U.S. at 241 (citing Berman v. Parker, 348 U.S. 26 (1954); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); Block v. Hirsh, 256 U.S. 135 (1921); Thompson v. Consol. Gas Corp., 300 U.S. 55 (1937)).

104. *Id.* at 242-43.

105. *Id.* at 243-44.

106. 262 U.S. 700 (1923).

107. *Id.* at 707-08 (holding that a taking for a public highway is for a public use). The *Rindge* Court noted that the trial court "made specific findings that the public interest and necessity required the acquisition of these public highways." *Id.* at 704. After land was taken under the Hawaii Land Reform Act, it was held by private landowners for their own residential purposes. *See Midkiff*, 467 U.S. at 233. In *Rindge*, after land was taken, it was devoted for use as a public highway, accessible to all. *Rindge*, 262 U.S. at 701. The *Midkiff* Court still maintained that "[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." *Midkiff*, 467 U.S. at 245.

108. *Midkiff*, 467 U.S. at 244. The Court goes on to quote a portion of the *Rindge* decision: "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.'" *Id.* (omission and alteration in the original) (quoting *Rindge*, 262 U.S. at 707).

supports this proposition.[109] The *Midkiff* Court made clear that the Act did not involve "purely private takings," but, unfortunately, offered no guidance as to what would constitute a purely private taking.[110] At the conclusion of the opinion, the Court summarized the deferential rule, applicable in all takings cases, as follows: "[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."[111]

F. Berman *and* Midkiff *Lead State Courts To Allow Public-Private Takings for Blight Clearance and Economic Development*

1. Blight Clearance

After *Berman* firmly established the legality of using eminent domain for slum and blight clearance,[112] cities throughout the United States quickly began redevelopment of decaying urban areas by condemning properties deemed slums or blighted.[113] Because the term "blight" is amorphous,[114] and because *Berman* and *Midkiff* allow courts to defer to legislative determinations of blight,[115] redevelopment agencies are able to condemn properties solely because they are located within an economically depressed area.[116] Several state courts, including the

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109. *Rindge*, 262 U.S. at 708 (stating that "in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use," indicating that the Court envisioned that the highway would be widely used by the public).

110. *Midkiff*, 467 U.S. at 245.

111. *Id.* at 244. Hereinafter the deferential approach to public-private takings introduced in *Berman* and solidified in *Midkiff* will be referred to as the "deferential rule."

112. *See supra* text accompanying note 87.

113. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003). Although not explicitly defining "slum," the *Berman* Court defined "substandard housing" as that which has a "lack of sanitary facilities, ventilation, or light," or housing that suffers from "dilapidation, overcrowding, [or] faulty interior arrangement." Berman v. Parker, 348 U.S. 26, 28 n.* (1954). One commentator defines "blight" as "a disease that threaten[s] to turn healthy areas into slums." Pritchett, *supra*, at 3.

114. Pritchett, *supra* note 113, at 3.

115. *See supra* text accompanying note 85; *see supra* text accompanying note 111.

116. *See* City of Las Vegas Downtown Development Auth. v. Pappas, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004). The court in *Pappas* upheld the condemnation of an individual's three commercial properties and subsequent transfer of those properties to a private developer. *Id.* at 17. The property fell within a particular area of downtown Las Vegas that was designated for redevelopment due to economic depression. *Id.* at 6-7. Professor Pritchett argues that the motivation behind "urban renewal" and blight clearance projects often is to clear areas of minorities, particularly African-Americans. He goes so far as to say that "[i]n cities across the country, urban renewal came to be known

Nevada Supreme Court in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,[117] have upheld these public-private takings even though the transferee was a private developer who intended to use the property for the same purpose as the condemnee.[118]

2. Economic Development

Once *Berman* was decided, it was unclear if *any* condemnation would violate the Public Use Clause.[119] As a result, municipalities also began using eminent domain to take nonblight property purely for economic development.[120] In Michigan, the state legislature gave municipalities the authority to create Economic Development Corporations (EDC). The EDCs were given the power of eminent domain for the purposes of combating unemployment and encouraging the retention of employers.[121] At the insistence of General Motors,[122] the city of Detroit's EDC condemned a middle-class Polish neighborhood and then transferred the

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as 'Negro removal.'" Pritchett, *supra* note 113, at 46-47. He describes the effects of these programs as "uproot[ing] hundreds of thousands of people, disrupt[ing] fragile urban neighborhoods, and help[ing] to entrench racial segregation in the inner city." *Id.* at 47.

117. 76 P.3d 1 (Nev. 2003).

118. *See id.* at 17; W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003). The commercial properties at issue in *W. 41st St.* were all in the general vicinity of Times Square in New York City and had been designated as blight for approximately twenty years. *Id.* at 124. The condemnees argued that such labeling contributed to any existing blight conditions because it hindered the attraction of new tenants. *Id.* The developer planned to construct a high-rise office building, also a commercial use, with The New York Times as the main tenant. *Id.* Nonetheless, the court upheld the condemnations and planned transfer of the properties to a private developer because "the anticipated outcomes of this project clearly serve[d] a *public purpose* by eliminating a pernicious blight which [had] impaired the economic development of a midtown Manhattan neighborhood." *Id.* at 126 (emphasis added).

119. EPSTEIN, *supra* note 72, at 179.

120. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

121. *Id.* at 458. Under Michigan's Economic Development Corporations Act, an individual may petition a municipality's governing body to request authorization to incorporate an economic development corporation (EDC). MICH. COMP. LAWS § 125.1604 (1997). If the application is approved, the municipality's chief executive officer or chairperson of the county's board of commissioners appoints the board of directors for the EDC. *Id.* After incorporation is complete, the EDC may begin its operations. *Id.* § 125.1605. An EDC's powers include the ability to condemn land and transfer it to private developers, so long as the action fulfills the purposes of the Act. *Id.* § 125.1607. The purposes of the Act, in part, are to "alleviate and prevent conditions of unemployment" and "to assist and retain local industrial and commercial enterprises." *Id.* § 125.1602.

122. *See* Scott, *supra* note 13, at 471 (discussing how the chairman of General Motors told the mayor of Detroit that the company intended to relocate its Cadillac plant outside of the Detroit area unless the city provided a larger replacement site by May 1, 1981).

land to General Motors so it could construct a new automobile manufacturing plant.[123]

In *Poletown Neighborhood Council v. City of Detroit*,[124] the Michigan Supreme Court upheld the constitutionality of the condemnation under Michigan's own public use clause[125] because the project was for a permissible public purpose.[126] The court relied in part on *Berman* for support of the public use determination.[127] This case provides a clear example of a public-private taking initiated exclusively for economic development.[128] Soon after it was decided, other states began to rely on *Poletown* for justification of the use of eminent domain for other economic development activities.[129] Once *Midkiff* established the deferential rule, states employed eminent domain to more easily

123. *Poletown*, 304 N.W.2d at 457.

124. 304 N.W.2d 455 (Mich. 1981).

125. MICH. CONST. art. 10, § 2 states that "[p]rivate property shall not be taken for public use without just compensation."

126. *Poletown*, 304 N.W.2d at 459. The court subjected the taking to heightened scrutiny and held that when "the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Id.* at 459-60. Nonetheless, the court was satisfied that the project was "warranted on the basis that its significance for the people of Detroit and the state [had] been demonstrated." *Id.* at 460. This demonstrates the possible outcome when a heightened scrutiny approach is taken without a categorical rule. *Id.* 459-60.

127. *Id.* at 459 (summarizing *Berman* as setting forth the rule "that when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive'" (quoting Berman v. Parker, 348 U.S. 26, 32 (1954))).

128. *Id.* at 458. The Act authorizing the taking included a statement that "'[t]here exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and that it is accordingly necessary to assist and retain local industries.'" *Id.* (quoting MICH. COMP. LAWS § 125.1602). The purpose of the Act was accomplished by takings like the one involved in this case. *Id.* The *Poletown* decision has been cited by commentators as an example of a taking for economic development that went too far, resulting in the decimation of an entire middle class neighborhood. *See, e.g.*, Scott, *supra* note 13, at 470 (describing *Poletown* as the "largest, most controversial, and most socially disruptive public-private taking to date [that] resulted in the destruction of an entire city neighborhood for the benefit of a single large corporation").

129. *See, e.g.*, City of Duluth v. State, 390 N.W.2d 757, 763 n.2 (Minn. 1986). In *City of Duluth*, the Minnesota Supreme Court upheld as constitutional under both the state and Federal Public Use Clauses the condemnation of a food processing plant and transfer of that property to a private entity for the construction of a paper mill. *Id.* at 760, 764. As a part of its justification, the court stated "[a]ppellate courts in other jurisdictions have also determined that proposals to condemn and transfer property from one private owner to another are justified on the ground that the economic benefit that results is 'public' in nature." *Id.* at 763 n.2 (citing Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278 (Md. 1975); *Poletown*, 304 N.W.2d 455(Mich. 1981)).

assemble land for private developers, all in the name of economic development.[130]

The Connecticut Supreme Court decision *Kelo v. City of New London*[131] is now at the center of the Public Use Clause debate;[132] the Supreme Court heard oral arguments in the case on February 22, 2005.[133] In the lower courts, the central issue was whether the Connecticut and Federal Constitutions authorized a public-private taking of nonblight property, albeit in an economically underperforming area, in the name of economic development.[134] Two of the properties targeted for condemnation were apartments held by the condemnees as investments,[135] and the transferee in the case planned to construct commercial office buildings.[136] Curiously, an adjacent property that is part of the redevelopment plan will "provide for approximately eighty new residences."[137] The Connecticut Supreme Court noted that it has, in the past, deferred to legislative determinations of public use,[138] and that

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130. *See, e.g.*, Sun Co. v. City of Syracuse Indus. Dev. Agency, 625 N.Y.S.2d 371, 377-78 (App. Div. 1995) (upholding the condemnation of land and subsequent transfer to a retail mall developer as being for a public purpose).

131. 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

132. *Id.* at 511; *see* Will, *supra* note 34 (summarizing the impact of the case by posing the question: "what home or business will be safe from grasping governments pursuing their own convenience").

133. Oral Argument, Kelo v. City of New London (No. 04-108), 2005 WL 529436.

134. *Kelo*, 843 A.2d at 507. The trial court determined that one of the motivating factors behind the development plan was to "benefit the distressed city," further complicating any rational distinction between this case and the *Pappas* case. *Compare id.* at 540, *with* City of Las Vegas Downtown Development Auth. v. Pappas, 76 P.3d 1, 6-7 (2003) (discussing the reasons for the blight designation), *cert. denied*, 124 S. Ct. 1603 (2004). The wrinkle in *Kelo* is that the transfer of the property interest to the private entity comes in the form of a ninety-nine year ground lease, where a statutorily created development corporation retains title to the property while the ultimate transferee will be a private entity. 843 A.2d at 510.

135. *Kelo*, 843 A.2d at 511.

136. *Id.* at 509 (describing the proposed use as "90,000 square feet of high technology research and development office space and parking").

137. *Id.* Because the property is presently used to provide rental housing, and the adjacent property in the redevelopment plan will include rental housing, the taking not only seems unnecessary, but also in violation of Justice McLean's position in *Dix* that the new use for the property must be different from the prior use. *See supra* text accompanying note 33.

138. *See Kelo*, 843 A.2d at 523-25. The court noted that the development plan would generate construction jobs, direct jobs, indirect jobs, and additional property tax revenues by stating:

> The development plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes.

the U.S. Supreme Court in *Berman* and *Midkiff* gave deferential treatment in those cases to legislative public use determinations.[139] Ultimately, the Connecticut Supreme Court held, relying in part on *Poletown*, that the economic development projects and the coinciding condemnations "satisfy the public use clauses of the state and federal constitutions."[140]

G. A Return to Reason: The Michigan Supreme Court Overturns Poletown

In July of 2004, Michigan returned to the ranks of states like Illinois, which disallows public-private takings purely for economic development,[141] by overturning its *Poletown* decision in *County of Wayne v. Hathcock*.[142] In *Hathcock*, Wayne County was attempting to acquire land by eminent domain and then transfer that land to a private

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Id. at 510.

139. *Id.* at 525-26.

140. *Id.* at 520, 528. The Connecticut Supreme Court, in its discussion of its "sister states'" decisions upholding as public uses public-private takings for economic development, makes a point to discuss what it views as the positive attributes of the *Poletown* decision. *Id.* at 528. The court describes the case as "[a] landmark case relying on legislative and redevelopment agency declarations and upholding, under the state constitution, the taking of private homes for the construction of a major manufacturing assembly plant." *Id.* It went so far as to devote a lengthy footnote to discussing the merits of the case which included a statement that "*Poletown* warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit." *Id.* n.39.

141. *See, e.g.*, Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9-11 (Ill. 2002) (declaring unconstitutional a taking with economic development and benefits inuring exclusively to a private party, in part because the public would not be guaranteed the right of enjoying and using the property). The Illinois Supreme Court specifically stated that "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government." *Id.* at 10-11. Worth noting is the fact that the Southwestern Illinois Development Authority had a rather unscientific way of determining which properties it would condemn: it created a Quick-Take Application Packet, and once it was completed and the required fees were paid, it submitted the application to the governing body which held one hearing on the matter; the condemnation proceedings began soon thereafter. *Id.* at 4-5. Illinois and Michigan are not alone in declaring takings unconstitutional because of an insufficient public use. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986) (discussing his 1986 study, which determined that 16.2% of state court decisions evaluating public use claims determined that no public use existed); *see also* Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (declaring unconstitutional the public-private taking for the purpose of expanding a casino parking lot).

142. 684 N.W.2d 765, 787 (Mich. 2004).

developer so that the developer could build a business park.[143] Several condemnees filed motions to review the necessity of the proposed condemnations, arguing that *Poletown* should be overruled because its public purpose test was an incorrect interpretation of the Michigan Constitution's public use clause.[144]

The Michigan Supreme Court systematically analyzed the original meaning of the Michigan constitution's public use clause[145] and established a new categorical rule for determining the constitutionality of public-private takings.[146] The new rule states that public-private takings are constitutional only

> (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.[147]

Category (1) would include "'highways, railroads, canals, and other instrumentalities of commerce.'"[148] Category (2) would include condemnations undertaken by privately owned utility companies or private-private takings,[149] where the company is subject to state

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143. *Id.* at 770-71. The parcels of land at issue were adjacent to the recently renovated and expanded Metropolitan Airport. *Id.* at 770. The Federal Aviation Administration (FAA) provided funds to Wayne County to help it purchase property adjacent to the airport in order to abate the noise effects of the expansion. *Id.* The FAA required that the land acquired "be put to economically productive use." *Id.* The county conceived of the business park in order to meet this requirement. *Id.*

144. Defendants-Appellants' Brief on Appeal at 36-46, County of Wayne v. Hathcock (No. 124070). In other words, the condemnees argued "that the Pinnacle Project would not serve a public purpose." *Hathcock*, 684 N.W.2d at 771.

145. *Hathcock*, 684 N.W.2d at 781-83. The Michigan Supreme Court reviewed its pre-*Poletown* jurisprudence to arrive at the three-category rule. *Id.* It soundly justified this approach by recognizing that "[t]he primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers." *Id.* at 779. Because the constitutional provision at issue in *Hathcock* dated back to 1850, the court analyzed case law existing prior to 1963 to determine the provision's original meaning. *Id.* at 780-81 (explaining that this approach would reveal the "'common understanding' among those sophisticated in the law at the time of the Constitution's ratification"). The Michigan Supreme Court, in establishing a categorical rule, must have drawn from its experience in *Poletown*, where it upheld a public-private taking for economic development even under heightened scrutiny. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981).

146. *Id.* at 783.

147. *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478-79 (Ryan, J., dissenting)). This was the rule urged by Justice Ryan in his *Poletown* dissent. *Id.* at 781.

148. *Id.* (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

149. *See supra* note 39 (describing the qualities of a private-private taking).

regulation.[150] Category (3) would include condemnations where the "*controlling purpose* in condemning the properties [is] to remove unfit housing and thereby advance public health and safety," and the "subsequent resale of the land cleared of blight [is] 'incidental' to this goal."[151] The court determined that this three-category rule accurately captures the public-private takings that are constitutional under the original meaning of the Michigan public use clause.[152] It thereby adopted Justice Ryan's dissent in *Poletown*[153] and overturned *Poletown* itself.[154]

II. CRACKS IN THE FOUNDATION OF THE DEFERENTIAL RULE

A. Berman *and* Midkiff*'s Deferential Rules Were Improper*

In order to return meaning to the Public Use Clause, the Supreme Court's decision in *Berman* should be overturned for three reasons. First, *Berman* allows legislatures to exercise the police power, through eminent domain, irrespective of the restraint of the Fifth Amendment.[155] Second, its deferential rule is a departure from the Supreme Court's prior approach to public-private takings.[156] And third, because it allows for a public-private taking when no change in the character of the land is intended, it conflicts with Justice McLean's concurrence in *West River Bridge Co. v. Dix*[157] and the original meaning of the Public Use Clause.[158]

The first and most pressing reason to overturn *Berman* is that it expressly permits legislatures to exercise the police power, through eminent domain,[159] to take property without having to consider the rights of the individual guaranteed by the Fifth Amendment.[160] This unconstrained power is permissible under *Berman* when, for example, the legislature has decided that its governed land area "should be

150. *Hathcock*, 684 N.W.2d at 782 (discussing *Lakehead Pipe Line Co. v Dehn*, 64 N.W.2d 903 (Mich. 1954), in which the state court upheld a condemnation and transfer of property to a private entity for the construction of a petroleum pipeline because the state required that the pipeline be used to further intrastate commerce, and would be able to enforce directives from the Michigan Public Service Commission).

151. *Hathcock*, 684 N.W.2d at 783.

152. *Id.* at 780-81, 783.

153. *Id.* at 781 (stating that "Justice Ryan's *Poletown* dissent accurately describes the factors that distinguish" permissible and impermissible public-private takings).

154. *Id.* at 787.

155. *See infra* text accompanying notes 159-67.

156. *See infra* text accompanying notes 168-71.

157. 47 U.S. (6 How.) 507, 537 (1848); *see supra* text accompanying note 33.

158. *See infra* text accompanying notes 173-76.

159. Berman v. Parker, 348 U.S. 26, 32-33 (1954).

160. *See id.*

beautiful as well as sanitary."[161] When eminent domain is exercised for these purposes, under the express language of *Berman*, the property owner is no longer guaranteed due process[162] or that the property will be devoted to a public use.[163] The Court further broadened the scope of this unconstrained power of eminent domain to all circumstances where the "object is within the authority of Congress," making "eminent domain . . . merely the means to the end."[164] This implies that so long as Congress is exercising an enumerated power, it can do so without considering the Bill of Rights. Because state legislative bodies possess the police power, the *Berman* decision permits them to exercise eminent domain without constraint by the Fifth Amendment as well, with the only constraint being judicial review under state law.[165] *Berman*'s dismissal of individual rights in favor of legislative power is a stunning departure from the Supreme Court's treatment of other individual rights,[166] and has led to many ill-conceived urban renewal programs.[167] Therefore, *Berman* should be overturned.

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161. *Id.* at 33.

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

163. *See id.*

164. *Berman*, 348 U.S. at 33.

165. *Id.* at 32. The Court stated that "[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. We deal, in other words, with what traditionally has been known as the police power." *Id.* at 31-32. Therefore, if the *Berman* Court does seek to control Congress's use of eminent domain through the Public Use Clause, and states also possess the power of eminent domain, this must mean that the Public Use Clause also does not serve as a restraint on the states.

166. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that nondiscriminatory time, place, and manner restrictions on First Amendment free speech rights are subject to an intermediate level of scrutiny).

167. *See* Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal To Reform HUD Displacement Policy*, 2001 L. REV. MICH. ST. U. DETROIT C.L. 901, 936-37 (discussing studies documenting the inhumane nature of "forced dislocation" caused by urban renewal projects sponsored by the Department of Housing and Urban Development (HUD), and faulting the programs for "destroying people's lives and killing their neighborhoods with badly planned social engineering"). The impact of urban renewal projects during the 1950s and 1960s on the availability of low-cost housing was staggering. These projects demolished 126,000 housing units and erected only 28,000 in their place, the majority of which commanded higher rent. *Id.* at 938. This inevitably led to an affordable housing crisis in the cities where the urban renewal projects took place. *Id.* at 939-40. The author points out the problem with assessing the true cost of the displacement of residents by stating that "a displaced community's most valuable asset loss may be its most unmeasurable: the destruction of the community itself." *Id.* at 941. This makes just compensation practically impossible because the legislative schemes "do not take into account citywide displacement costs, or 'loss of amenities and neighborhood.'" *Id.* at 942 (quoting Richard A. Epstein, *The Takings Jurisprudence of the Warren Court*, 31 TULSA L.J. 643, 674 (1996)). The author states that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. §§ 4601-4655

The second reason to overturn *Berman* is because its deferential rule departs from prior public-private takings decisions, which established that these types of takings should be closely scrutinized.[168] The Supreme Court's express language in both *Gettysburg Electric* and *Brown* indicates that the constitutional evaluation of public-private takings under the Public Use Clause requires, at the very least, a heightened scrutiny analysis.[169] Additionally, considering that the condemnee's property in *Berman* was not slum property,[170] the taking can only be classified as a public-private taking for economic development, which the *Brown* Court strongly disfavored.[171]

The third reason to overturn *Berman* concerns the use of the condemnee's land—it did not change after the taking, which Justice McClean's concurrence in *Dix* counsels against,[172] and which runs afoul of the original meaning of the Public Use Clause.[173] In *Berman*, the condemnee used his property for commercial purposes and, after the condemnation, the new owner of the property also held the property for commercial purposes.[174] As such, the use of the property is no more public than it was before.[175] Further, by not requiring a change in the use of the property in a public-private taking, Madison's hope that the Public Use Clause would serve as a "paper barrier" between the government and private property is torn to pieces.[176]

The deferential rule established in *Midkiff*[177] also must be overturned because *Midkiff* relied on *Berman* for its support.[178] As established

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(2000), which aimed to minimize the impact of displacement, "does not push agencies to consider displacement's more general effects, nor does it require that federal financial assistance providers, like HUD, consider the costs of displacement when evaluating a project's viability and cost-effectiveness," *id.* at 948-49.

168. Brown v. United States, 263 U.S. 78, 83 (1923); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896). For the quoted text in *Gettysburg Electric* and *Brown*, see *supra* text accompanying note 41 and *supra* note 50, respectively.

169. *Cf.* Scott, *supra* note 13, at 474-78 (identifying six elements that should trigger heightened scrutiny when present in public-private condemnations: "[p]roperty [o]wned or [l]eased by a [s]ingle [p]rivate [e]ntity," "[n]o [d]irect [p]ublic [b]enefits by [r]ight," "[u]se of [q]uick-[t]ake [c]ondemnation [p]rocedure," "[p]roposed [b]eneficiary [r]equests [i]nitiation of [c]ondemnation [p]rocess, [e]xercises [s]ignificant [i]nfluence, or [b]oth," "[p]roposed [b]eneficiary [m]akes [n]o [g]uarantee [a]bout [c]ontinued [p]ublic [u]se," and "[p]rior [e]xisting [land use] [p]lanning [d]ocuments [f]ail to [a]ddress [p]roposed [u]se").

170. *See supra* text accompanying note 73.

171. *Brown*, 263 U.S. at 84; *see supra* note 50.

172. *See supra* text accompanying note 33.

173. *See supra* text accompanying notes 24-25.

174. *See* EPSTEIN, *supra* note 72, at 179 (stating that "*Berman* is in a sense an extreme case, because the condemned property was left in its original condition").

175. *See supra* note 35.

176. *See supra* notes 24-25 and accompanying text.

177. *See supra* text accompanying note 111.

above, *Berman*'s deferential review of a public-private taking was a departure from earlier Supreme Court precedent and ran afoul of the original meaning of the Public Use Clause.[179] Therefore, the *Midkiff* Court's reliance on *Berman* for support of the deferential rule was flawed.[180] Thus, the *Midkiff* Court should not have afforded deference to the Hawaii legislature's public use determination.

Additionally, *Midkiff*'s deferential rule should be overturned because the cases cited in *Midkiff* did not involve public-private takings,[181] further weakening the Court's decision. When the Court applied a rational basis test to the Hawaii Land Reform Act, it supported this approach to reviewing the statute again by citing cases that did not involve public-private takings.[182] And when the Court confidently asserted that it "long ago rejected any literal requirement that condemned property be put into use for the general public,"[183] it cited to *Rindge Co. v. County of Los Angeles*,[184] a *public-public* taking case that does not support that proposition.[185] Because the *Midkiff* Court used *Berman*[186] and cases that

178. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239-41 (1984).

179. *See supra* text accompanying notes 168-76.

180. *See supra* text accompanying notes 168-76.

181. *Midkiff*, 467 U.S. at 240-41. The Court cited *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1946), which was a *public-public* taking, *Midkiff*, 467 U.S. at 240 ("'[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 the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.'" (quoting *Welch*, 327 U.S. at 552)). See *supra* note 57, for the facts of the case. The Court also cited *Gettysburg Electric* for support and, again, that case did not involve a public-private taking. *Midkiff*, 467 U.S. at 241 ("In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896))). See *supra* note 38, for the facts of *Gettysburg Electric*.

182. *Midkiff*, 467 U.S. at 241 ("But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." (citing Berman v. Parker, 348 U.S. 26, 32 (1954); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (holding that a taking of land for a public highway constituted a permissible *public-public* taking); Block v. Hirsh, 256 U.S. 135 (1921) (rejecting on the basis of a wartime exigency—a housing crisis in Washington, D.C., caused by World War I—a due process and public use claim); Thompson v. Consol. Gas Corp., 300 U.S. 55 (1937) (upholding a regulation that limited natural gas production, without evaluating any public use claim)).

183. *Midkiff*, 467 U.S. at 244. The Court further stated that "'[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.'" *Id.* (omission and second alteration in original) (quoting Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923)).

184. 262 U.S. 700 (1923).

185. *See supra* notes 107, 109. The Court in *Rindge* did not defer to the judgment of the condemning authority that the taking constituted a public use, but instead believed it

were not on point[187] to support its deviation from Supreme Court precedent establishing that public-private takings shall be subject to at least a heightened level of review,[188] its deferential rule must be overturned.[189]

B. Proposed Alternatives to the Deferential Rule

The decisions in *Berman* and *Midkiff* sparked an outcry from the academic community, with protest centered on the Court's deferential review.[190] Of the various alternate levels of review advanced by commentators, the most restrictive commentator advocates a rule where *all* public-private takings undergo a strict-scrutiny analysis, even when the condemning authority is a public utility.[191] If state courts or the

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"should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state." *Rindge*, 262 U.S. at 705-06. This allows *state courts* to defer to legislative determinations of public use, but in the Court's express words, it only allows the Supreme Court to "regard with great respect the judgments of state courts." *Id.* at 706.

186. *See supra* text accompanying notes 178.

187. *See supra* text accompanying notes 181-85.

188. *See supra* text accompanying notes 49-50.

189. *See* EPSTEIN, *supra* note 72, at 180-81 (discussing the *Midkiff* and the Hawaii Land Reform Act, and declaring that "[l]and reform . . . runs afoul of the public use limitation").

190. *See id.* at 178-81; POLLOT, *supra* note 27, at 110-12 (criticizing the deferential rule of *Berman* and *Midkiff* because making public use determinations "is precisely the role of the courts under the provisions of the Constitution and the Bill of Rights"); SCHULTZ, *supra* note 34, at 60-61. Schultz states that

> [i]n affirming the expanding scope of eminent domain power, and in giving to Congress the final say to determine a valid public use, the Court [in *Berman* and *Midkiff*] has stated that property rights pose no substantive limit on the legislatures as long as laws authorizing the acquisition of the property exist and just compensation is paid for the property.

Id. at 61; Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 67-70 (1999) (citing the Court-packing scandal surrounding the New Deal as a possible reason for the relaxed judicial role and advocating for an increased judicial role in public use determinations); Merrill, *supra* note 141, at 90; Stephen J. Jones, Note, Trumping *Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285 (2000).

191. *See* Jones, *supra* note 190, at 305-12. *But cf.* SCHULTZ, *supra* note 34, at 196 (advocating the "principles of *Midkiff*—that is, that the state should have broad discretion to use eminent domain to achieve important social welfare goals" in addition to narrowing "the implications of *Poletown*, which supported the use of eminent domain to the advantage of corporate or majority interests at the expense of individual liberty, minority interests, and genuine democratic decision making"); Thomas J. Posey, Note, *This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403, 1417 (2003) (advocating "judicial review of the feasibility of proposed necessity projects . . . where the government is highly unlikely to use the condemned land to complete the necessity project").

Supreme Court were to adopt this approach, condemnation trials would be lengthened because of the additional proof requirements needed to pass a strict scrutiny analysis.[192] Such additional proof and strict scrutiny review is inappropriate in cases where the private entity condemning and then holding the property is a public utility because the Supreme Court prior to *Berman* declared such a taking to be for a public use.[193]

Property law scholar Richard A. Epstein proposes a requirement that a taking only be declared a public use if it constitutes a "public good" in an economic sense.[194] In order for something to be deemed a public good, there must be no exclusivity to its enjoyment[195] and the cost of an additional unit of production must be marginal.[196] Additionally, the benefit derived from the taking itself should be shared equally by the public[197]—no one party should enjoy more than their pro rata share of the "surplus" generated by the taking.[198] Epstein uses national defense as an example of a public good because the benefits derived from this government service are enjoyed by all while the cost of protecting one additional individual is minute.[199] Epstein does not advocate that courts undergo such an economic analysis in public-public takings for highways or parks where "individuals have the *right* to use the facility."[200] But, because he only offers highways and public parks as permissible public uses under his pro rata share approach, he offers little guidance to help courts streamline the process of determining which public-private takings lead to the transferee enjoying more than his pro rata share.[201] Without any guidance, this approach would overburden courts by requiring them

192. *See* Jones, *supra* note 190, at 311-12. The author advocates that "[u]nder strict scrutiny analysis, the condemning authority must demonstrate a compelling public need. . . . [T]he means chosen must be necessary to achieve the compelling objective[,] . . . [and] the state must show that benefiting third party [sic] exhausted every avenue of purchase on the open market." *Id.*

193. *See* Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 607 (1908) (holding that deference to state court determinations that a public utility serves a public purpose is appropriate).

194. EPSTEIN, *supra* note 72, at 166-69.

195. *Id.* at 166 (stating that "the element of exclusivity . . . cannot be satisfied in the provision of any public good").

196. *Id.*

197. *Id.* at 174 ("The public use requirement is satisfied only when efforts are made to replicate in the transfer situation the same distribution of costs and benefits that is found with normal public goods.").

198. *Id.* at 164.

199. *Id.* at 166.

200. *Id.* at 166-68.

201. *Id.* at 167-68.

to undergo an economic analysis in every public-private condemnation.[202] Epstein's approach requires more refinement before it can become incorporated into a workable rule.

Legal scholar Thomas W. Merrill offers a rule that requires a heightened scrutiny analysis of condemnation decisions when one or more of the following conditions is met: "high subjective value, potential for secondary rent seeking, and intentional or negligent thick market bypass."[203] This proposal proves unworkable for several reasons. First, every condemnee could easily satisfy the condition of high subjective value by offering convincing testimony about emotional attachment to the subject property, leading to unnecessarily exorbitant condemnation awards.[204] Second, Merrill's definition of secondary rent—"where one or a small number of persons will capture a taking's surplus,"[205]—is very similar to Epstein's public goods formula,[206] and would, therefore, prove as unworkable as Epstein's approach.[207] Third, most state eminent domain statutes do not allow for "intentional or negligent thick market bypass,"[208] defined as using eminent domain to deliberately and unnecessarily bypass a free-market exchange to acquire property.[209] In most states, prior to initiating condemnation proceedings, the condemning authority must make a good faith offer to purchase the property,[210] thereby addressing Merrill's concern that condemning authorities will abuse eminent domain by using it to bypass a free-market exchange.[211]

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202. *See, e.g.*, John J. Delaney, *Avoiding Regulatory Wipe-Outs: Proposed Model Legislation for a Local Mechanism*, *in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 453, 457 (Am. Law Inst., Am. Bar Ass'n Continuing Legal Educ. 1999) (1998), WL SE18 ALI-ABA (stating that "public sector spokespersons . . . claim that performing economic analyses in advance of regulatory actions would be too burdensome and time consuming [when required by condemnation legislative schemes]").

203. *See* Merrill, *supra* note 141, at 90.

204. *See id.* at 83-84 (mentioning "sentimental attachment" as one of the determining factors of subjective value, while later admitting that "subjective value is inherently difficult to measure").

205. *Id.* at 87. The "surplus" is the added economic benefit resulting from the condemnation which comes about because "a resource's value after condemnation is almost always higher than before." *Id.* at 85.

206. *See supra* text accompanying notes 194-98.

207. *See supra* text accompanying note 202.

208. Merrill, *supra* note 141, at 90; 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.13[1][a] (3d ed. 2002).

209. Merrill, *supra* note 141, at 88.

210. 6 SACKMAN, *supra* note 208, § 24.13[1][a].

211. *See supra* text accompanying notes 208-09.

C. The Strengths and Weaknesses of Hathcock's Three-Category Rule

The most workable public use rule offered to date is the three-category rule found in the Michigan case, *County of Wayne v. Hathcock*.[212] By only requiring courts to determine whether a taking fits within one of the three categories, Michigan courts do not have to undergo an economic analysis for every challenged taking,[213] making the rule more workable than Epstein's public goods rule[214] and Merrill's secondary rent seeking analysis.[215] Another benefit is that the holding itself indicates clearly that public-private takings for economic development are impermissible.[216] The advantages of the *Hathcock* rule make it far more favorable than *Berman* and *Midkiff*'s deferential rule because rather than simply deferring to legislative determinations of public use, the rule actually attempts to define what is and what is not a public use when the transferee is a private entity.[217]

Despite its strengths, *Hathcock*'s three-category rule needs refinement to align it with the original meaning of the Public Use Clause and the Supreme Court's pre-*Berman* Public Use Clause jurisprudence.[218] The first characteristic of the rule requiring refinement is category (3),[219] because it still permits condemnations "to remedy urban blight" without defining the term blight.[220] The taking in *Berman*, although discouraged under pre-*Berman* Supreme Court jurisprudence,[221] would remain permissible under *Hathcock*'s category (3) so long as "the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred."[222]

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212. *See supra* text accompanying note 147-51.

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

214. *See supra* text accompanying notes 194-202.

215. *See supra* text accompanying notes 205-07.

216. *Hathcock*, 684 N.W.2d at 786-87.

217. *Id.* at 781-83 (articulating the three-category rule and applying it to common condemnation scenarios).

218. *See infra* text accompanying notes 219-25.

219. *Hathcock*, 684 N.W.2d at 783 (defining category (3) as "where the property is selected because of 'facts of independent significance,' rather than the interests of the private entity to which the property is eventually transferred" (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 480 (Mich. 1981) (Ryan, J., dissenting))).

220. *Id.*

221. *See supra* text accompanying notes 168-71.

222. *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). The Supreme Court in *Berman* did not find that the taking was initiated at the insistence of a private developer, but rather that the property was taken because it fell within a "project area redevelopment plan." Berman v. Parker, 348 U.S. 26, 29 (1954). Ironically, almost anticipating the *Hathcock* decision, the court in *Kelo* fit a taking for

The second problematic characteristic of the *Hathcock* rule is its failure to require heightened scrutiny for "non-traditional" takings that fall within category (1) or category (2).[223] This is inappropriate because, prior to *Berman*, the *Brown* Court required a thorough investigation of the public nature of nontraditional public uses.[224] Also, considering the importance the founders, and particularly Madison, placed on property rights, it would be inappropriate to allow legislatures to deprive landowners of their property for newly contrived public uses without first evaluating under heightened scrutiny analysis whether the use actually would be "public."[225] *Hathcock* provides a starting point for a

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economic development purposes into category (3) by stating that "municipal economic development can be, in and of itself, a constitutionally valid public use under the well established broad, purposive approach that we take on this issue under both the federal and state constitutions." Kelo v. City of New London, 843 A.2d 500, 532 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004). The court continued, "[The] private benefit from such economic development is, just as in the blight and substandard housing clearance cases, secondary to the public benefit that results from significant economic growth and revitalized financial stability in a community." *Id.*

223. *See Hathcock*, 684 N.W.2d at 783. The text of the three-category rule does not suggest a particular level of review to determine if takings fall within the permissible categories. *See id.* The term "non-traditional" refers to newly declared public uses, as opposed to uses long recognized as public, such as railroad tracks. *See infra* note 224 and accompanying text.

224. *See* Brown v. United States, 263 U.S. 78, 81-84 (1923). Without a heightened level of review, land reform actions like the one undertaken by the Hawaii Legislature in *Midkiff* could fall within *Hathcock*'s category (1) after only a rational basis review. The argument would be that the need for an improved fee simple market constituted a "'public necessity of the extreme sort'" and the Land Reform Act of 1967 constituted a "collective action." *See Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). Nonetheless, takings for these purposes cannot be considered traditional in the same sense that takings for a highway or the construction of railroad tracks are traditional because of the long history of using eminent domain for these purposes. *See* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 547 (1848) (McLean, J., concurring) (listing turnpikes or roads as permissible public uses). The lack of a similar history in Hawaii, prior to the Land Reform Act, of using eminent domain to improve a fee simple market makes this a nontraditional use because there was no previous legislation offering eminent domain as a solution to the fee simple concentration problem. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232-34 (1984) (summarizing the history of the Land Reform Act of 1967). A rational basis review of the Act therefore would be inappropriate because standing in the way of this taking is the need to determine if the new use of the property is "public." *See* U.S. CONST. art. V. Without a prior decision that land reform constitutes a public use, such a determination should be made only after strict scrutiny analysis because of the original meaning of the Public Use Clause, *see supra* text accompanying notes 20-28, and the Supreme Court's pre-*Berman* public-private condemnation precedent, *see supra* text accompanying notes 168-71.

225. *See supra* text accompanying notes 20-28; *cf.* Jones, *supra* note 190, at 305-06 ("Since the right to own property is a paramount right of a free republic, courts should subject a third-party acquisition[, a public-private taking,] posed as a public taking to strict scrutiny analysis.").

comprehensive public-private taking rule. But, it requires more refinement in order to once and for all create a universal rule for determining a proper public use.

III. A WORKABLE SOLUTION TO DETERMINING A PUBLIC USE

A. The Test for Evaluating Public-Public Takings

When evaluating public-public takings, courts should generally employ deferential review, best articulated by the Supreme Court in *United States v. Gettysburg Electric Railway Co.*[226] In a public-public taking, deference is appropriate "when the legislature has declared the use or purpose to be a public one . . . unless the use be palpably without reasonable foundation."[227] This deference is appropriate because, when the government will own the property after the condemnation, the risk is much lower that the taking will not involve a public good.[228]

A necessary exception to this rule of deference exists when the use of the property does not involve a public good, that is, when a small set of private parties will enjoy more than their pro rata share of the benefits created by the taking.[229] Prior to triggering a public goods analysis, a party challenging the taking must first advance a cognizable claim that the government intends to hold the land primarily for the benefit of a private party.[230] Only then is it appropriate for the court to perform an economic analysis to determine whether a private party will be the primary beneficiary of the taking.[231] This exception to the rule of deference prevents governments from circumventing the public-private takings prohibited by the rule, proposed below, by retaining ownership of the land but entering into long-term ground leases with private parties for non public uses, as New London is attempting to do in *Kelo*.[232]

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226. 160 U.S. 668 (1896).

227. *Id.* at 680.

228. *See* EPSTEIN, *supra* note 72, at 167 (providing an example of a pure public good and arguing that when property is taken by the United States for use as a "lighthouse or a naval shore installation," there is a lower risk that a private party will enjoy more than its pro rata share because no private party subsequently obtains an undivided interest in the condemned property).

229. *See supra* text accompanying notes 197-98.

230. *See id.*

231. *But cf.* Merrill, *supra* note 141 (advocating an economic analysis for all public-private takings).

232. *See* Kelo v. City of New London, 843 A.2d 500, 510 (Conn.) *cert. granted*, 125 S. Ct. 27 (2004).

B. The "Two-Category Rule" and the Appropriate Level of Review for Nontraditional Public Uses

In light of the original meaning of the Public Use Clause and the Supreme Court's pre-*Berman* public-private takings jurisprudence, public-private takings are permissible *only* "(1) where 'public necessity of the extreme sort' requires collective action," and "(2) where the property remains subject to public oversight after transfer to a private entity."[233] Additionally, takings under either category must result in a significant change in the character of the use of the land.[234] Again, category (1) takings traditionally are for uses like highways, bridges, and canals.[235] Category (2) includes takings initiated by public utilities for uses such as power lines, power plants, and water plants.[236]

To determine whether the proposed use of the land falls within one of these two categories, courts must first determine if the use constitutes a traditional or nontraditional use.[237] This determination of traditional or nontraditional use requires courts to look to the original meaning of what constituted a public use at the time of enactment of their respective public use clauses, just as the Michigan Supreme Court did in

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233. County of Wayne v. Hathcock, 684 N.W.2d at 781 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

234. *See supra* text accompanying notes 172-76. This rule will hereinafter be referred to as the "Two-Category Rule." This rule adopts *only* category (1) and category (2) of the rule set forth by the Michigan Supreme Court in *Hathcock*. A categorical rule will be more effective in determining what is a public use than simply requiring heightened scrutiny when a private individual reaps more than his pro rata share of the benefits from the taking. *See supra* note 145 (discussing the Michigan Supreme Court's abandonment of a heightened scrutiny analysis in favor of a categorical rule in the context of public-private takings).

235. *Hathcock*, 684 N.W.2d at 781.

236. *Id.* at 782. Takings by public utilities do not violate Epstein's public goods theory so long as the service is available to all, allowing all to share in the benefits created by the taking. EPSTEIN, *supra* note 72, at 168-69.

237. *See supra* notes 223-24.

Hathcock.[238] In the spirit of stare decisis, courts should only review a taking for a traditional public use under a rational basis analysis.[239]

Where a use does not qualify as a traditional public use, Courts should subject the legislative public use determination to strict scrutiny analysis.[240] After the adoption of this rule, uses that at first may not have been expressly understood as traditional public uses may become so after the passage of time and changes in circumstances. This will happen, however, only after first undergoing a strict scrutiny analysis.[241] Only if the states utilize this rule to review public use determinations should appellate courts defer to their determinations.[242]

The final determination under the rule is whether or not the character of the use will change significantly after the taking.[243] A significant change in the character of the use prevents the type of taking Justice McClean abhorred in his *Dix* concurrence.[244] It also would prevent the condemnation reviewed in the *Berman* decision as well as condemnations for slum clearance cases where the property use does not change.[245] This will help prevent factions from improperly influencing legislatures for their own private benefit, which was one of Madison's primary purposes

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238. *See supra* text accompanying note 145. For those states that enacted a public use clause very early in their history, the inquiry should focus on the early eminent domain court decisions and their declarations of what constitutes a public use. *See id.* For example, in arid climates, takings for the construction of an irrigation infrastructure would be classified as traditional because in that particular area irrigation has been deemed a public use. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (upholding a California irrigation act that allowed for the sale of an individual's property if the individual did not pay his or her irrigation assessment).

239. *Cf.* Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 599, 608 (1908) (upholding a taking by a railroad company of land for a "spur track" by deferring to the state court's determination that the taking was for a public use).

240. *Cf.* Jones, *supra* note 190, at 305-14; *see supra* text accompanying note 223-25. This proposal contemplates the traditional strict scrutiny analysis which requires a showing of a compelling government interest, and a showing that the means of addressing this interest are narrowly tailored. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). This level of scrutiny considers the importance the Framers placed on the protection of property rights. *See supra* text accompanying notes 23-28.

241. *Cf.* Jones, *supra* note 190, at 305-14; *see supra* text accompanying notes 223-25.

242. *But see Hairston*, 208 U.S. at 607 (holding that it is appropriate to defer to a state court determination that a taking was for a public use without determining whether the use was traditional or nontraditional); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 705-06 (1923) (stating that the Supreme Court "should keep in view the diversity of [local] conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any state").

243. *See supra* text accompanying note 234.

244. *See supra* text accompanying note 33.

245. *See supra* text accompanying note 174.

for proposing a Bill of Rights.[246] An easy way of determining whether there would be a change in the character of the use is to look to the applicable zoning code, and then determine if the property's proposed use would result in a change of the land use classification.

Note that not all takings purely for economic development are doomed to fail the Two-Category test.[247] For example, because railroad tracks can

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246. *See supra* text accompanying notes 26-27. Applying this rule to the *Midkiff* facts, the public use determination involved a nontraditional public use falling under category (1). Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984) (summarizing the taking as "a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees"). Therefore, the taking should have undergone a strict scrutiny analysis in the Hawaii courts. *Cf.* EPSTEIN, *supra* note 72, at 180-81. Rather than subjecting the Hawaii Land Reform Act to a strict scrutiny analysis, Epstein argues that "[l]and reform . . . runs afoul of the public use limitation" because the property is not used for a public good and there is no "universal right of access." *Id.* at 181. The Hawaii Land Reform Act would likely have failed a strict scrutiny analysis because other less restrictive means were available to accomplish the legislature's goal of improving the fee simple market, namely, by providing property tax relief to those landowners who sold their property to the lessees. The landowners resisted compulsion by the legislature to sell their land, "pointing out the significant federal tax liabilities they would incur. . . . [T]he landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands." *Midkiff*, 467 U.S. at 233. Hawaii could have abated real property taxes on the property that remained in the hands of the landowners after they sold their property, by creating a formula that sought to "compensate" the landowner for the federal tax liability incurred as a result of the sale of their property. This scheme would leave the option to sell in the hands of the landowner, where it belongs. As for the character of the use analysis, it would be difficult for a court to find that the character of the use changed simply because a new person owns the property, especially considering the land use classification remained residential. *Id.* Therefore under the "Two-Category Rule" proposed by this Comment, the Hawaii Land Reform Act of 1967 would be declared unconstitutional.

247. *See infra* text accompanying notes 248-50. However, a taking purely for economic development like the one involved in *Kelo* would require an analysis under category (1) of the Two-Category Rule, but only if the economic development constituted a "public necessity of the extreme sort." *See supra* text accompanying note 233. The *Hathcock* decision did not review the taking involved in the case under its own category (1), however a shrewd litigator or legislator could argue that a taking for only economic development purposes fits within category (1). County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004) ("The exercise of eminent domain at issue here—the condemnation of defendants' properties for the Pinnacle Project and the subsequent transfer of those properties to private entities—implicates none of the saving elements noted by our pre-1963 eminent domain jurisprudence."). The Michigan Supreme Court was persuaded by Justice Ryan's dissent in *Poletown* and earlier precedent which narrowed category (1) condemnations to takings for "'highways, railroads, canals, and other instrumentalities of commerce.'" *Id.* at 781 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)). Nonetheless, most litigators or legislators would find it difficult to argue that condemning and razing an apartment building in order to build a larger one right next door constitutes a "public necessity of the extreme sort." *See supra* text accompanying notes 135-37. These are the facts presented in *Kelo*. *See supra* text accompanying notes 135-37. Any honest legislator knows that private developers or corporations prefer the government to acquire the land through

only be laid in a certain way, condemnations for this reason generally will have no problem passing the test under category (1) because, not only are they traditional public uses,[248] but also because without condemnation, it would be cost-prohibitive for railroad companies to assemble the land necessary to lay the tracks. Additionally, these takings also fall within the purview of category (2) because railroad companies are subject to rigorous government oversight.[249] Therefore, one cannot declare categorically that public-private or private-private takings for economic development do not constitute a public use, because otherwise condemnations for instrumentalities of commerce, such as railroad tracks, would be prohibited.[250] Courts require more guidance to distinguish between constitutional and unconstitutional takings for economic development[251] and blight clearance,[252] which is what the Two-Category Rule provides.

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condemnation because it is much less costly and time-consuming than if they did it on their own. *See* Scott, *supra* note 13, at 470. Because saving a private developer time and money does not constitute a "public necessity of the extreme sort," the taking at the center of *Kelo* does not constitute a public use, and therefore should be declared unconstitutional.

248. *See, e.g.*, Hairston v. Danville & W. Ry. Co., 208 U.S. 598 (1908).

249. See generally title 45 of the United States Code, which is devoted exclusively to the regulation of railroads.

250. *See supra* note 248.

251. Petition for a Writ of Certiorari at 11, Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) (No. 04-108), *available at* 2004 WL 1659558. The petitioner stated that "[s]even states, now including Connecticut, definitely allow condemnations for private business development alone. Eight definitely forbid the use of eminent domain to transfer property to private parties when the purpose is not the elimination of slums or blight. Another three have indicated they probably will find such condemnations unconstitutional." *Id.*

252. *See, e.g.*, City of Las Vegas Downtown Dev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004); *see supra* note 116. The only difference between the takings in *Kelo* and the taking in *Pappas* is that the city of Las Vegas had declared the area surrounding the condemnee's property blight prior to initiating the condemnation, which should make for an interesting discussion for the Supreme Court should it decide to distinguish the two cases. *See Pappas*, 76 P.3d at 6. Because takings to remedy slum clearance and blight did not begin until the late 1800s, *see* Pritchett, *supra* note 113, at 7, these takings could not be considered traditional under the Federal Constitution's Public Use Clause and therefore a strict scrutiny analysis of the legislative determination that the taking falls within category (1) or category (2) would be proper should a similar case emerge. Under a strict scrutiny analysis, *Pappas* would fail because the economic conditions and the crime were not so problematic that the only solution to problems was to develop a semi-indoor entertainment district owned by one developer. *See Pappas*, 76 P.3d at 6 (describing the blight designation as "increased crime rates and requests for police assistance, business flight from the downtown area, decline in tourism, lack of parking, visitor and residents' perception of lack of safety in the area, and increases in vacant and aging buildings").

CONCLUSION

The Supreme Court began its interpretation of the Public Use Clause with an understanding that property rights are fundamental.[253] But, in *Midkiff*, the Court declared that legislative determinations of public use trump individual property rights.[254] The Michigan Supreme Court's decision in *Hathcock* offers the Supreme Court some guidance on the proper approach for discovering the original meaning of the Public Use Clause.[255] The Court should adopt this approach and find that deference is inappropriate in reviewing most public-private takings, particularly takings for economic development and blight clearance, and when the taking has the following characteristics: there is no public necessity of an extreme sort, the transferee will not be subject to government oversight, and there is no change in the character of the property.[256] The Court should restore the original meaning of the Public Use Clause[257] and adopt the test proposed by this Comment for reviewing public-public takings,[258] and the Two-Category Rule for reviewing public-private condemnations.[259] The Court can begin adopting the rule by declaring unconstitutional the taking involved in *Kelo v. City of New London*.[260]

253. *See* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795). See *supra* note 28, for the Court's statement.

254. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

255. County of Wayne v. Hathcock, 684 N.W.2d 765, 781-84 (Mich. 2004).

256. *See supra* text accompanying notes 233-34.

257. *Cf.* EPSTEIN, *supra* note 72, at 181 (declaring that the Public Use Clause "deserve[s] more respectful treatment than it receives today").

258. *See supra* text accompanying notes 226-31.

259. *See supra* text accompanying notes 233-404.

260. 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004). See *supra* note 247, for an application of the rule to the facts in *Kelo*.