

## Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After *Hawaii Housing Authority v. Midkiff*

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*Nor shall private property be taken for public use without just compensation.*<sup>1</sup>

### I. INTRODUCTION

On September 28, 2004, the United States Supreme Court heard the case of *Kelo v. City of New London*.<sup>2</sup> In doing so, the Court woke a giant that had been sleeping for nearly twenty-five years. In *Kelo*, the Court will address whether state and local governments can seize private property through eminent domain and then transfer that property to private parties to boost an ailing economy.<sup>3</sup> A series of bitter battles throughout the country which involved local government's taking private residential property and then transferring that property to private developers and companies in an effort to boost local economies motivated the Court to wake this sleeping giant. This issue had become a sleeping giant because state legislatures and courts across the country have rendered the public use requirement in the Takings Clause useless, making it easier than ever for local governments to take private property through eminent domain regardless of whether the intended use is public or private.

In 2002, the debate reached a fever pitch when the Institute for Justice and the Castle Coalition jointly published an Eminent Domain Report, exposing the discrepancies among the states' use of eminent domain.<sup>4</sup> In the landmark study, the organizations reviewed eminent domain takings in every state. The study noted the number of instances in which state and local governments transferred private property acquired through eminent domain to other private parties.<sup>5</sup> The Castle Coalition and the Institute for Justice reported that between

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

2. 843 A.2d 500, 507 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004). The Court heard oral arguments on Feb. 22, 2005. SUPREME COURT OF THE UNITED STATES, *October Term 2004 for the Session Beginning February 22, 2005*, at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_calendars/monthlyargumentcalfebruary2005.pdf](http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalfebruary2005.pdf) (last visited February 8, 2005).

3. *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004).

4. DANA BERLINER, CASTLE COALITION, *PUBLIC POWER, PRIVATE GAIN* (April 2003), <http://www.castlecoalition.org/report>.

5. *Id.*

1998 and 2002, there were over ten thousand takings by state and local governments which resulted in *private* parties' owning the condemned land.<sup>6</sup> The State of Kansas, in particular, received a rather dubious honor from the Institute for Justice and the Castle Coalition: The groups concluded that Kansas "is one of the worst abusers of eminent domain" in the United States.<sup>7</sup>

These studies have shown that the public use requirement has been rendered useless through the United States Supreme Court's adopting broad rules and standards for defining public use and then granting state legislatures wide deference in determining specific definitions for public use. The effect has been that public use now means almost any use.

Through key United States Supreme Court decisions in the last century, lower courts are left without the power to effectively review the standards and definitions which state legislatures establish for public use. This, in turn, has led to abuse in the practice of eminent domain takings.

This note first explores the history of eminent domain and the public use requirement of the Takings Clause. Next, it discusses how the public use requirement of the Takings Clause lost its intended force under modern eminent domain and takings law. Further, this note explores both existing and potential solutions to combat this problem. Finally, this note will discuss recent Kansas cases that demonstrate lingering problems even in light of proposed solutions.

## II. HISTORY OF EMINENT DOMAIN

### A. *Background*

Eminent domain is the government's power to acquire private property for public use.<sup>8</sup> The government's power of eminent domain was well established at common law.<sup>9</sup> Early common law defined eminent domain as a taking for a "public advantage," for "public welfare," and for "necessities of the state."<sup>10</sup> While the power of eminent domain existed at common law, the United States Constitution, as originally ratified, did not contain protections for private property interests.<sup>11</sup>

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6. *Id.* at <http://www.castlecoalition.org/report/reportStates/ExecutiveSummary.shtml>.

7. CASTLE COALITION, REPORT ON THE STATE OF KANSAS, <http://www.castlecoalition.org/report/reportStates/Kansas.shtml> (last visited Jan. 16, 2005).

8. BLACK'S LAW DICTIONARY 562-63 (8th ed. 2004). Just compensation is the additional requirement for eminent domain takings under the Takings Clause. U.S. CONST. amend V.

9. *Midkiff v. Tom*, 702 F.2d 788, 790-91 (9th Cir. 1983).

10. *Id.* at 791.

11. *Id.* at 790.

Even though the original draft of the Constitution contained no protections for private property, many of the Framers nonetheless believed that owning and being secure in one's property was synonymous with liberty.<sup>12</sup> James Madison, for example, was keenly aware of the need to protect personal property rights against government takings.<sup>13</sup> Madison wrote to Thomas Jefferson expressing his concern about the need to protect private property rights from those who would seek to take private property through legislative action.<sup>14</sup>

Alexander Hamilton also argued that additional security for liberty and property needed to be included in the Constitution.<sup>15</sup> Concerned that without protection the government could threaten individual property rights, the Framers eventually sought to include safeguards for property rights in the Constitution.<sup>16</sup> The Framers included these safeguards in the Bill of Rights.

James Madison specifically drafted the Fifth Amendment's Takings Clause to protect individual property rights.<sup>17</sup> The Takings Clause placed two limitations on the government's power to take property: First, the taking must be for a public use, and second, the landowner must receive just compensation.<sup>18</sup>

While there is historical evidence as to what the Framers believed constituted a taking, there is little, if any, discussion as to what the Framers intended by including public use. The definition of just com-

12. Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 179, 190 n.125 (2003). "Property must be secured or liberty cannot exist." *Id.* (quoting *Discourse on Davila*, 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed.) (1851)).

13. *Midkiff*, 702 F.2d at 791 (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787 136 (M. Farrand ed.) (1911)).

14. *Id.* The letter stated,

My own opinion has always been in favor of a bill of rights. . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. . . . I have not viewed it in an important light—1. because . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive [declaration] of some of the most essential rights could not be obtained in the requisite latitude. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its control is most needed . . . .

*Id.* (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 THE WRITINGS OF JAMES MADISON 271-72 (G. Hunt ed. 1904)).

15. See *id.* at 792 (discussing the history of the Takings Clause).

16. Madigan, *supra* note 12, at 190 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1782, 302 (Max Farrand ed., Yale Univ. Press Rev. ed. 1937)).

17. *Id.* at 190 n.127 (citing JAMES ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 55 (Oxford Press 1992)).

18. U.S. CONST. amend V. The original eminent domain clause read: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Midkiff*, 702 F.2d at 793. Once the states ratified the Fifth Amendment, James Madison composed an essay arguing for an interpretation of the Takings Clause that included not only physical takings, but also regulatory takings. See Madigan, *supra* note 12, at 191 n.131 (citing 14 THE PAPERS OF JAMES MADISON 204-07 (Charles F. Hobson & Robert A. Rutlands eds., Univ. Press of Vir. 1979)).

pensation is well-settled (i.e., fair market value, replacement costs), and yet there has never been a clear definition of public use.<sup>19</sup>

Indeed, for nearly a century after the amendment's adoption, the United States Supreme Court did not interpret the public use requirement of the Takings Clause.<sup>20</sup> When the Court finally addressed the definition of public use in the late nineteenth century, the Court's view of the public use requirement was quite narrow: The government could take private property only for its own use.<sup>21</sup> Thus, according to early views of public use, a government's eminent domain power was limited to condemning private property for public enterprises such as parks, sewer systems, highways, roads, hospitals, or schools.<sup>22</sup>

This narrow view, however, did not last.<sup>23</sup> Beginning with the Industrial Revolution and the development of the American economy, the United States Supreme Court gradually adopted a broader view of the public use requirement in eminent domain cases.<sup>24</sup> This shift began as early as 1896.<sup>25</sup> That year, in *United States v. Gettysburg Electric Co.*,<sup>26</sup> the United States Supreme Court held that "when the legislature has declared the use or purpose [of the eminent domain taking] to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."<sup>27</sup> Thus, if a state legislature proposed a public use for the private property and that use was legitimate according to the state or federal courts, the state typically satisfied the public use requirement.<sup>28</sup> Ultimately, in *Gettysburg*, the United States Government acquired land through eminent domain when the proposed public use was a national park.<sup>29</sup>

In the twentieth century, the United States Supreme Court began to struggle to determine the degree of judicial involvement for cases involving a state legislature's exercise of its police power, which is the

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19. See generally Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" – a Proposal to Redefine "Public Use,"* 2000 L. REV. M.S.U.-D.C.L. 639, 644 (2000) (stating that "there is no per se public use requirement").

20. *Kohl v. United States*, 91 U.S. 367, 371 (1876).

21. *Id.* at 373-74. Specifically, the Court said that eminent domain was "a right belonging to a sovereignty to take private property for its own public uses, and not for . . . another." *Id.*

22. See 2A NICHOLS ON EMINENT DOMAIN 7.02[3] (Julius Sackman ed., 3d ed. 1998). Courts and governments, however, have all but abandoned the rule that modern day eminent domain takings must be for the literal use of the public. See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978).

23. See Berger, *supra* note 22, at 205.

24. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

25. See *United States v. Gettysburg Elec. Co.*, 160 U.S. 668 (1896).

26. *Id.*

27. *Id.* at 680.

28. *Id.* at 681. However, the Court held that if a government delegates its power of eminent domain to a private entity, the deference would not be as strong. *Id.* at 680.

29. *Id.* at 679-80. Specifically, the Court held that creating a national park was a use of a public nature, and thus qualified under the government's eminent domain power. *Id.* at 683.

power generally involved in eminent domain cases.<sup>30</sup> For instance, in *Lochner v. New York*,<sup>31</sup> the Court struck down a New York state law regulating the number of hours bakers could work in one week.<sup>32</sup> In its opinion, the Court held that the state regulation of bakers' work hours was an improper exercise of state police power.<sup>33</sup> The *Lochner* decision received a substantial amount of criticism, however, and courts subsequently became reluctant to get involved with a state's police power and the legislative determinations flowing from that power.<sup>34</sup> This included a reluctance to review a state legislature's determination of what constitutes a valid public use for an eminent domain taking.<sup>35</sup>

In the latter half of the twentieth century, the Court affirmed its reluctance to overturn state legislative determinations of public use through two landmark eminent domain cases—*Berman v. Parker*<sup>36</sup> and *Hawaii Housing Authority v. Midkiff*.<sup>37</sup> The Court, through these two decisions, helped to shape the concept of local governments' taking property from one private party and transferring it to another *private* party—so long as state legislatures find a valid public use for doing so.<sup>38</sup>

### B. Berman—*The Giant Grows Sleepy*

In the first landmark eminent domain case, *Berman v. Parker*, the United States Supreme Court held that if a taking contributed to economic growth or enhanced public health, safety, morals, or welfare, it was constitutional under the Fifth Amendment because the land taken was blighted.<sup>39</sup> Blight is defined as property that is a slum, a breeding ground for crime, disease, and unhealthy living conditions.<sup>40</sup> Today, most states have their own definitions of blight.<sup>41</sup>

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30. Compare *Lochner v. New York*, 198 U.S. 45 (1905) (striking down legislative determinations), with *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (deferring to legislative determinations), and *Allied Structural Steele Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978) (advocating a balancing test based on “the severity of the impairment”).

31. 198 U.S. 45 (1905).

32. *Id.* at 53.

33. See *id.* at 58.

34. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963). “The doctrine that prevailed in *Lochner* . . . has long since been discarded . . .” *Id.* Indeed, in *Lochner*, the Court overturned a legislative determination—a rare instance in the twentieth century. See *id.* at 729.

35. See, e.g., *Midkiff*, 467 U.S. at 241 (holding in part that a state legislature's determination of public use need only pass a rational basis test).

36. 348 U.S. 26 (1954).

37. 467 U.S. 229 (1984).

38. See generally *Berman v. Parker*, 348 U.S. 26 (1954); see also *Midkiff*, 467 U.S. at 229.

39. *Berman*, 348 U.S. at 31.

40. Hudson Hayes Luce, Note, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 393 (2000).

41. See ALASKA STAT. § 18.55.950(2) (Michie 2002); COLO. REV. STAT. § 31-25-103(2) (2004); GA. CODE ANN. § 8-4-3(1) (2004); MICH. COMP. LAWS ANN. § 125.72(a) (West 2004); WYO. STAT. ANN. § 15-9-103(a)(iii) (Michie 2003).

In *Berman*, the Court reviewed a congressional determination that Washington, D.C.'s substandard housing and blighted areas could not be improved "by the ordinary operations of private enterprise alone without public participation."<sup>42</sup> As a result, Congress enacted the District of Columbia Redevelopment Act of 1945.<sup>43</sup> Congress intended to eliminate blighted conditions by "all means necessary and appropriate for that purpose."<sup>44</sup> The Act created the District of Columbia Redevelopment Agency and bestowed upon it eminent domain powers to reduce and ultimately eliminate blighted conditions.<sup>45</sup> The redevelopment plans included transferring blighted private property to private parties who could redevelop the area.<sup>46</sup>

After the agency's enactment, one landowner objected to the agency's plans to condemn his department store, arguing his store was not blighted.<sup>47</sup> He contended that it is one thing to take a man's property "for the purpose of ridding the area of slums[;] it is quite another, . . . to take a man's property merely to develop a better balanced, more attractive community."<sup>48</sup>

The United States Supreme Court, however, disagreed and held that the standards stated in the Act could work not only to eliminate slums, but also to eliminate "areas that tend[ed] to produce slums."<sup>49</sup> Thus, even though the department store owner's property was not itself blighted, the government could nonetheless condemn it through its eminent domain power.<sup>50</sup>

In *Berman*, the Court held that a legislature's discretion was very broad in defining public use and blight and in condemning property, while a court's role in examining public use was very narrow.<sup>51</sup> For example, in *Berman*, the Court held that when a legislature identified a public use or public purpose (e.g., making a blighted area a more attractive community), the means by which the legislature accomplished that purpose—through acquiring privately held land to transfer to private parties, for example—fell within the legislature's discretion.<sup>52</sup> Additionally, the Court held that courts must give wide deference to those determinations.<sup>53</sup> This deference caused the giant

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42. *Berman*, 348 U.S. at 29.

43. *Id.* at 28.

44. *Id.*

45. *Id.* at 29.

46. *Id.* at 30.

47. *Id.* at 31.

48. *Id.*

49. *Id.* at 35.

50. *Id.* at 36.

51. *See id.* at 32.

52. *Id.* at 30, 35-36.

53. *Id.* at 36.

issue of what constitutes a valid public use in eminent domain takings to grow sleepy in the courts.

### C. Midkiff—*The Giant Goes to Sleep*

Thirty years later, the United States Supreme Court adopted an even broader view of the public use requirement in another landmark case—*Hawaii Housing Authority v. Midkiff*—when it held in part that only purely private takings were unconstitutional.<sup>54</sup> In holding that only purely private takings were unconstitutional, the Court finally put the giant issue of what constitutes a public use to sleep for the next twenty-five years.

The *Midkiff* decision reversed a Ninth Circuit opinion that held that the Hawaii Land Reform Act of 1967 (Land Reform Act) was unconstitutional.<sup>55</sup> Unlike in *Berman*, the Hawaii legislature in *Midkiff* made no finding of blight, and instead claimed public welfare alone as its authority to condemn the property at issue in the Land Reform Act.<sup>56</sup> The land at issue consisted of privately owned residential tracts which the legislature condemned in order to transfer title of the land in fee simple to private individuals who had merely been leasing the land from the private owners.<sup>57</sup> The Hawaii legislature sought to condemn the land in order to break up what the legislature believed was a land oligopoly.<sup>58</sup> The legislature identified the need to redistribute the land to a greater number of citizens as a valid public use to guard against price inflation and protect public welfare.<sup>59</sup>

In determining whether Hawaii condemned the property for a valid public use, the United States Supreme Court concluded that a state legislature should be the main guardian of public needs and not the courts.<sup>60</sup> The Court then deferred to the Hawaii legislature and held that all courts must defer to their respective state legislatures unless deferring to the legislature “is shown to involve an impossibility.”<sup>61</sup>

According to the Court, once a legislature determined a legitimate public use for an eminent domain taking, judicial restraint required the courts to defer to the state legislatures.<sup>62</sup> The legislature

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54. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

55. *Id.* at 236.

56. *See id.* at 233.

57. *Id.*

58. *Id.*

59. *See id.* at 232.

60. *Id.* at 239.

61. *Id.* at 240 (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925)).

62. *Id.*

can then choose the means by which to accomplish the project, including transferring land from one private party to another.<sup>63</sup>

The Court in *Midkiff*, however, *did* hold that there is a small role courts may play in reviewing whether the government is taking private property for a public use.<sup>64</sup> The Court held that while courts must generally defer to legislative determinations of public use, purely private takings (i.e., those *not* related to a conceivable public purpose) would *not* satisfy constitutional requirements.<sup>65</sup>

Thus, under *Berman* and *Midkiff*, reviewing courts now have two main tests for determining whether a taking is for a public use—the blight test under *Berman*, and the not purely private or rational basis test under *Midkiff*.<sup>66</sup> Under *Berman*, a local government’s use of eminent domain to improve blight is a valid public use.<sup>67</sup> According to *Midkiff*, nearly any state legislature’s definition of public use will be valid for an eminent domain taking so long as the taking is not purely private.<sup>68</sup>

D. *While the Giant Slept—Takings Post-Berman and Midkiff: The Emergence of Economic Revitalization as a Valid Public Use*

Today, under the guidance of *Berman* and *Midkiff*, courts interpret the public use requirement of the Takings Clause broadly.<sup>69</sup> Under the *Berman* and *Midkiff* tests, only a rational suggestion of general welfare by a state legislature is needed for a finding of public use.<sup>70</sup>

After the *Berman* and *Midkiff* decisions, some of the most glaring examples of the broad interpretation of public use arose in cases involving state legislatures condemning private property in order to transfer the property to private individuals or corporations.<sup>71</sup> Under the *Berman* and *Midkiff* precedents, state legislatures and local governments may not only condemn private property to remove blight or

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63. *Id.*

64. *Id.*

65. *Id.* at 245.

66. *See Midkiff*, 467 U.S. at 229; *Berman v. Parker*, 348 U.S. 26 (1954).

67. *Berman*, 348 U.S. at 35.

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

69. *Id.* at 245; *Berman*, 348 U.S. at 35; *Kelo v. City of New London*, 843 A.2d 500, 520-21 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004) (citing the broad standards of *Berman* and *Midkiff*).

70. *Midkiff*, 467 U.S. at 242.

71. *See, e.g.*, *Kelo*, 843 S.2d at 509; *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962, 973 (La. Ct. App. 2001); *Prince George’s County v. Collington Crossroads, Inc.*, 339 A.2d 278, 279 (Md. 1975); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981); *City of Duluth v. State*, 390 N.W.2d 757, 760, 762-64 (Minn. 1986).

break up land oligopolies but may also condemn property to promote the economic revitalization of a community.<sup>72</sup>

Economic revitalization cases typically begin with a state legislature's enacting a statute that declares public use to include takings that contribute to economic growth, eliminate blight, or otherwise foster the growth of industry or business.<sup>73</sup> In *Poletown Neighborhood Council v. Detroit*,<sup>74</sup> for example, the Michigan Supreme Court upheld eminent domain takings through Michigan's Economic Development Corporations Act.<sup>75</sup> The Michigan Act provided for the health, safety, and welfare of the state and its citizens by authorizing condemnations that alleviated unemployment, that provided for economic assistance to industries, and that generally fostered urban redevelopment.<sup>76</sup>

Courts in Louisiana, Maryland, Minnesota, and Missouri have given deferential treatment to state legislative determinations in economic revitalization cases similar to *Poletown*.<sup>77</sup> Economic revitalization as a valid public use has led to the construction of new hotels, convention centers, industrial parks, privately owned paper mills, avi-

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72. See, e.g., *Kelo*, 843 S.2d at 509; *Shreveport*, 794 So. 2d at 973; *Prince George's County*, 339 A.2d at 279; *Poletown*, 304 N.W.2d at 457; *Duluth*, 390 N.W.2d at 760, 762-64.

73. See *Kelo*, 843 A.2d at 512-13 (permitting takings to promote economic and industrial growth when the legislature determined that economic and industrial growth is a valid public use); *Midkiff*, 467 U.S. at 232 (permitting takings because the legislature found that reducing the land oligopoly promoted the general welfare of the community); *Berman*, 348 U.S. at 26 (permitting takings after findings of blight constitutional when the property was taken to promote the general health and welfare of the community).

74. 304 N.W.2d 455 (Mich. 1981).

75. *Id.* at 459.

76. *Id.* The general language of the Michigan Act provided:

There 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 and commercial enterprises to strengthen and revitalize the economy of this state and its municipalities; that accordingly it is necessary to provide means and methods for the encouragement and assistance of industrial and commercial enterprises in locating, purchasing, constructing, reconstructing, modernizing, improving, maintaining, repairing, furnishing, equipping, and expanding in this state and in its municipalities; and that it is also necessary to encourage the location and expansion of commercial enterprises to more conveniently provide needed services and facilities of the commercial enterprises to municipalities and the residents thereof. *Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.*

*Id.* at 458 (quoting MICH. COMP. LAWS §§ 125.1602, 5.3520(2) (1981)) (emphasis added by the court).

77. *City of Shreveport v. Chasse Gas Corp.*, 794 So. 2d 962, 971-73 (La. Ct. App. 2001) (relying in part on *Berman*, *Midkiff*, and relevant legislative declarations to conclude that "economic development, in the form of a convention center and headquarters hotel, satisfies the public [use requirement] . . ."); *Prince George's County*, 339 A.2d at 289 (concluding in condemnation proceedings for an industrial park that "projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses . . ."); *Duluth*, 390 N.W.2d at 762-63 (relying on *Midkiff* and deferring to the city council determination that construction of a large privately operated paper mill which would alleviate unemployment and contribute to the city's economic revitalization was a public purpose justifying the use of eminent domain); *City of Kansas City v. Hon.*, 972 S.W.2d 407, 414 (Mo. Ct. App. 1998) (holding that airport expansion is a public use that will be furthered by a subsequent transfer of land to a private aviation related corporation).

ation centers, and a racetrack.<sup>78</sup> Additionally, the State of Kansas has even recently used economic revitalization as a means to condemn private property.

In 1998, the Kansas Supreme Court held that condemning one hundred fifty residential homes in Kansas City, Kansas, to make way for a racetrack was a valid public use.<sup>79</sup> The use was valid, because the Kansas legislature had included in its urban redevelopment statute a provision stating that redeveloping land into a “major tourism area” was a valid public purpose.<sup>80</sup> While the one hundred fifty homeowners reportedly received 125% of their homes’ value, they were angered that the government took their property to build a privately owned racetrack.<sup>81</sup>

In 1998, the City of Merriam, Kansas, condemned William Gross’s land, on which sat Mr. Gross’s used car dealership.<sup>82</sup> Following the condemnation, the city sold the property to “Gross’s neighbor, a BMW dealership,” so that it could expand onto Gross’s property.<sup>83</sup> The Merriam city council claimed the project served the public interest since the city would make five hundred thousand dollars a year in tax revenues from the expanded dealership.<sup>84</sup> Interestingly, Mr. Gross previously offered to bring a Mitsubishi dealership to occupy the land, but the city refused.<sup>85</sup>

Finally, when Target proposed a new distribution center in Kansas, several towns eagerly competed for the coveted role as host to the corporation.<sup>86</sup> Target ultimately chose Topeka, in no small part because of Topeka’s promise to spend nearly two million dollars to help Target acquire several privately held parcels of land needed to build the center.<sup>87</sup> Eleven privately owned parcels of land were involved in the deal, and most landowners willingly sold to the government to

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78. See cases cited *supra* note 77.

79. State *ex rel.* Tomasic v. Unified Gov’t of Wyandotte County, 962 P.2d 543, 554 (Kan. 1998). The racetrack eventually became the Kansas Speedway NASCAR Track. See CASTLE COALITION, REPORT ON THE STATE OF KANSAS <http://www.castlecoalition.org/report/report-States/Kansas.shtml> (last visited Jan. 16, 2005).

80. *Tomasic*, 963 P.2d at 550.

81. CASTLE COALITION, *supra* note 7 (citing John T. Dauner & Steve Nicely, *Speedway Wins High-Court Test; Ruling Approves Condemnation Powers, 125 Percent Valuation*, THE KANSAS CITY STAR, July 11, 1998, at A1).

82. *Id.* (citing Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1).

83. *Id.*

84. *Id.* (citing Tim Baxter, *Court Sets Pace on Baron Case*, THE KANSAS CITY STAR, Sept. 5, 1998, at Zone 1).

85. *Id.* As a result of the City Council’s actions against Mr. Gross, Merriam voters ousted half the City Council at the next election. *Id.* (citing Martin Wooster, *Government as Land-Grabber*, THE AMERICAN ENTERPRISE, June 1, 2001 at 57).

86. *Id.*

87. *Id.* (citing Steve Fry et al., *Sliver of Land Focus of Fight*, TOPEKA CAP.-J., Apr. 20, 2002).

make way for the center.<sup>88</sup> Four property owners, however, refused to sell.<sup>89</sup> As a result, the Shawnee County District Court held that the County could condemn the remaining four properties through its eminent domain powers.<sup>90</sup>

Beyond Kansas, however, in a sizeable majority of cases courts *have* found eminent domain takings unconstitutional. One recent California case, for example, found a taking violated the public use provision of the Takings Clause.<sup>91</sup> Specifically, the United States District Court for the Central District of California in *99 Cents Only Stores v. Lancaster Redevelopment Agency*<sup>92</sup> held that a city redevelopment agency violated the public use requirement of the Takings Clause when it began condemnation proceedings against a 99 Cents Only store with the intent of transferring the property to Costco.<sup>93</sup>

The city of Lancaster in *99 Cents Only* began a revitalization plan in 1983 which included condemning and revitalizing private property through eminent domain.<sup>94</sup> Under California law, in order to revitalize the area, Lancaster had to establish parameters for the redevelopment area and a plan for redevelopment.<sup>95</sup> The city followed the proper procedure and found that the area was blighted.<sup>96</sup>

To revitalize the area, the redevelopment plan gave the city eminent domain power to condemn the blighted property.<sup>97</sup> Lancaster condemned the property and developed a shopping center.<sup>98</sup> The anchor of the shopping center was Costco Wholesale Corporation.<sup>99</sup> A few years later, a 99 Cents Only store moved into the space next door to Costco.<sup>100</sup>

A short time after 99 Cents signed a new lease, Costco decided it wanted to expand.<sup>101</sup> Costco's owners felt "that 'the most efficient use of [Costco's] property would be an expansion'" into the space occupied by 99 Cents.<sup>102</sup> Fearing Costco would vacate the shopping center if the city did not meet its demands, the city drew up an agreement

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88. *Id.*

89. *Id.* (citing *Judge Rules for County in Land Deal*, TOPEKA CAP.-J., Apr. 27, 2002).

90. *Id.*

91. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001).

92. *Id.* at 1123.

93. *Id.* at 1130. The court found that the sole motive for the taking was so Costco could expand its store. *Id.*

94. *Id.* at 1125.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1126. 99 Cents was a successful store, and the shopping center as a whole became quite popular in the years leading up to the lawsuit. *Id.*

101. *Id.*

102. *Id.*

with Costco.<sup>103</sup> The agreement stipulated that the city would condemn 99 Cents' property through eminent domain and then sell the property to Costco for one dollar.<sup>104</sup> The parties made the agreement without any input from 99 Cents.<sup>105</sup> Subsequently, the city initiated condemnation proceedings and offered to buy 99 Cents' leasehold interests and pay relocation costs.<sup>106</sup> 99 Cents rejected the offer, and sued after the city began eminent domain proceedings.<sup>107</sup>

The district court held that the city of Lancaster's attempt to use eminent domain to acquire 99 Cents' property violated the public use requirement of the Takings Clause.<sup>108</sup> The district court found that the city's condemnation actions failed both the blight test under *Berman* and the rational basis test under *Midkiff*.<sup>109</sup> Applying *Midkiff*'s broader rational basis test, the district court held that the city condemned 99 Cents not for a valid public use, but to satisfy the private demands of Costco—a prohibited purely private taking under *Midkiff*.<sup>110</sup> In other words, the district court reasoned that satisfying Costco's private demands for expansion were not rationally related to a public use or purpose to satisfy the public use requirement of the Takings Clause.<sup>111</sup>

Cases like *99 Cents Only*, while notable, are not typical under modern eminent domain law. In fact, the Institute for Justice and the Castle Coalition estimate that from 1998 to 2002, local governments condemned over ten thousand privately held properties in favor of other private parties.<sup>112</sup> However, cases like *99 Cents Only* do comprise a "sizable minority" of cases where courts have found purely private takings are unconstitutional.<sup>113</sup>

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1126-27. The city made no findings of blight when it commenced its eminent domain proceedings. *Id.* at 1127.

108. *Id.* at 1131.

109. *Id.* The court also addressed mootness and timeliness issues, which are not addressed in this note.

110. *Id.* at 1129-30.

111. *Id.* at 1129. The city made a last ditch argument that the taking satisfied *Berman*'s blight test—namely, that Costco, as an anchor business in the shopping center, would reduce the shopping center to a blighted state were Costco to vacate as a result of being unable to expand. *Id.* at 1130. The court rejected this future blight argument and held that a failure to show existing blight indicated that the city lacked a valid public use within the meaning of the Takings Clause. *Id.* at 1131.

112. BERLINER, *supra* note 6, at <http://www.castlecoalition.org/report/reportStates/ExecutiveSummary.shtml>.

113. *Id.* The Institute for Justice reported that between 1998 and 2002, courts have "rejected condemnations for private use or overturned blight designations," permitting condemnation thirty-seven times out of a total of ninety-one opportunities, or 40% of the time. *Id.*

E. *Kelo v. City of New London—The Case That Woke the Giant*

On September 28, 2004, the United States Supreme Court broke nearly twenty-five years of silence on the public use requirement of eminent domain when it agreed to hear the case of *Kelo v. City of New London*.<sup>114</sup> In *Kelo*, the Court will decide whether the condemnation of non-blighted private property in favor of other private parties to revitalize local economies is constitutional.<sup>115</sup>

The ten plaintiffs in *Kelo* all owned private land in New London, Connecticut, that the city condemned through its eminent domain powers.<sup>116</sup> New London and its redevelopment agency acquired its eminent domain power through a Connecticut statute which permitted eminent domain condemnations to further a significant economic development plan.<sup>117</sup>

*Kelo*'s redevelopment plan was "to create a commercial development that would complement [a new Pfizer global research facility], create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city . . . ."<sup>118</sup>

Plans for the redevelopment included a waterfront hotel, conference center, and marinas for tourist boats and commercial fishing vessels.<sup>119</sup> The redevelopment plan expected to create over one thousand new jobs and bring in over \$1.2 million in property tax revenues for a city which the State of Connecticut had previously declared a "distressed municipality."<sup>120</sup>

In addition, the redevelopment plan authorized the City of New London to use its eminent domain power to acquire parcels of land

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114. *Kelo v. City of New London*, 125 S. Ct. 27, 1 (2004).

115. *See Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

116. *Id.*

117. *Id.* at 515. The Connecticut statute at issue in *Kelo* provides:

It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

*Id.* (quoting CONN. GEN. STAT. § 8-186 (2004)).

118. *Id.* at 509.

119. *Id.* The plan also called for the construction of eighty new residences, a United States Coast Guard Museum, a health club, office space, and parking. *Id.*

120. *Id.* at 510.

from owners who were unwilling to sell.<sup>121</sup> In *Kelo*, the plaintiffs did not want to sell. Each plaintiff testified that they wanted to stay in their respective residences for personal reasons—they loved their homes, their families had lived in the homes for decades, and they had put a lot of work into their homes.<sup>122</sup>

The City of New London made no findings of blight for any of the acquired property and instead argued the takings were justified under a series of Connecticut statutes which declared that Connecticut's "economic welfare" was dependent on the "growth of industry and business."<sup>123</sup> The statutes further declared that taking and acquiring private property for "industrial and business purposes" was a valid public use in order to promote the "economic welfare" of the community.<sup>124</sup>

The plaintiffs in *Kelo* argued that the taking of their property was unconstitutional.<sup>125</sup> Specifically, the plaintiffs contended that economic development alone, without a showing of blight, was not a valid public use under the Connecticut and United States constitutions.<sup>126</sup>

The Connecticut Supreme Court ultimately disagreed with the plaintiffs and, relying chiefly on *Berman* and *Midkiff*, held that the trial court properly deferred to the legislative determinations of public use and that the condemnations were constitutional.<sup>127</sup>

The *Kelo* plaintiffs appealed to the United States Supreme Court, which granted a *writ of certiorari*.<sup>128</sup> Thus, for the first time since *Midkiff*, the Court will address whether a public use as broad as economic revitalization falls within the deferential standard of review *Berman* and *Midkiff* originally set forth.<sup>129</sup>

### III. ANALYSIS—PROBLEMS WITH THE MODERN TREND AND REASONS WHY WE MUST WAKE THE GIANT

Modern case law on the public use requirement of the Takings Clause yields several problems which warrant attention. One problem is that the text of the Fifth Amendment does not support a broad interpretation of the Takings Clause.<sup>130</sup> Additionally, *Berman*, *Midkiff*,

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121. *Id.* at 510-11.

122. *Id.* at 511.

123. *Id.* at 513; CONN. GEN. STAT. §§ 8-186, 8-187 (2003).

124. CONN. GEN. STAT. § 8-186.

125. *Kelo*, 843 A.2d at 519.

126. *Id.*

127. *Id.* at 520, 526-30.

128. *Kelo v. City of New London*, 125 S. Ct. 27 (2004). The Court heard oral arguments on Feb. 22, 2005. SUPREME COURT OF THE UNITED STATES, *October Term 2004 for the Session Beginning February 22, 2005*, at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_calendars/monthlyargumentcalfebruary2005.pdf](http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalfebruary2005.pdf) (last visited February 8, 2005).

129. *See id.*

130. *See infra* notes 133-42 and accompanying text.

and the cases that have followed highlight the lack of a judicial check on eminent domain powers of local governments, and takings can now be for almost any purpose, public or private.<sup>131</sup> Finally, continued deference to state legislatures, which continually broaden the definition of public use, has led to an impossibility in enforcing the public use requirement, and courts must intervene.<sup>132</sup>

A. *The Text of the Takings Clause in the Fifth Amendment Does Not Support Overly Broad Interpretations of the Public Use Requirement*

According to strict textualists, one problem with modern interpretations of the Takings Clause is that the text itself does not support a broad interpretation of the public use requirement. The text of the Fifth Amendment is clear that there are two limitations on taking private property: The government must provide just compensation *and* the taking must be for public use.<sup>133</sup>

Legal scholars have struggled to determine the scope of the public use requirement as envisioned by the Framers.<sup>134</sup> This struggle has occurred due to the lack of evidence as to what the Framers intended by implementing the public use language of the Fifth Amendment.<sup>135</sup> According to strict textualists, the three words “for public use,” located just after “taken” but before “without just compensation,” imply that private property *must* be taken for a “public use.”<sup>136</sup>

Additionally, textualists argue that the phrase “for public use” is narrowing rather than broadening the public use requirement under the Takings Clause.<sup>137</sup> For example, the preposition “for” appears only two other times in the Fifth Amendment, and both times, there is little doubt that the phrases are seen as narrowing the scope of the Amendment.<sup>138</sup>

Finally, if the Framers intended a broad interpretation of “for public use,” the Framers would have used such a phrase.<sup>139</sup> For exam-

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131. See *infra* notes 143-56 and accompanying text.

132. See *infra* notes 157-63 and accompanying text; see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925)) (explaining that courts are to defer to state legislative determinations of public use unless “it is shown to involve an impossibility”).

133. U.S. CONST. amend. V.

134. Kulick, *supra* note 19, at 644.

135. Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 536 (1995).

136. Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077, 1079 (1993); U.S. CONST. amend. V.

137. Clegg, *supra* note 135, at 537.

138. *Id.* “No person shall be held to answer *for* a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . , nor shall any person be subject *for* the same offense to be twice put in jeopardy of life or limb.” *Id.* (quoting U.S. CONST. amend. V: (emphasis added)). Clegg specifically contended that there is “no doubt” that the other two uses of “for” in the Fifth Amendment are narrowing the scope of the Fifth Amendment rather than broadening it. *Id.*

139. *Id.*

ple, the Takings Clause does not state “nor shall private property be taken, unless for public use” or “taken for legitimate public purpose.”<sup>140</sup>

The strict textualists’ analysis (namely that the public use requirement should be more narrowly construed) is in conflict with much of the eminent domain law upon which cases like *Berman* and *Midkiff* were decided. After all, condemnations based on findings of blight (*Berman*) or condemnations that are constitutional so long as they are not purely private (*Midkiff*) do not necessarily lead to property being taken for a public use, as the plain text of the Fifth Amendment suggests.<sup>141</sup> Thus, modern courts’ broad interpretations of public use are arguably not what the drafters of the Takings Clause originally intended, and they should not stand.<sup>142</sup>

B. *The Landmark Twentieth Century United States Supreme Court Cases Have Functionally Eliminated Judicial Checks on the Public Use Requirement, and Eminent Domain Takings Can Now Be for Almost Any Purpose*

The United States Supreme Court’s decisions in *Berman* and *Midkiff* removed vital judicial checks on eminent domain condemnations.<sup>143</sup> Consequently, takings can now be for almost any purpose.<sup>144</sup> In *Berman*, the Court gave state legislatures wide deference to determine what constitutes blight for purposes of fulfilling the public use requirement.<sup>145</sup> Thirty years later, in *Midkiff*, the Court created an even broader standard for public use when it held that only purely private takings were unconstitutional.<sup>146</sup>

By directing courts to defer to state legislative definitions of blight and public use, states can now condemn private property and transfer that property to private parties for almost any use or purpose. For example, the eminent domain condemnations in *Kelo* eventually led to other private entities’ receiving the land to build privately owned hotels, conference centers, marinas, and a health club.<sup>147</sup> In addition, eminent domain condemnations in other states have pro-

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140. *Id.*

141. David Sartin, *Lakewood Moves to Revitalize*, THE PLAIN DEALER Dec. 17, 2002, at B4. The property taken in Lakewood would eventually be used to build privately owned condominiums. *Id.* For example, under modern case law determinations of valid public uses, the public does not even have to have actual access to the acquired property. See James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1280 (1985).

142. Durham, *supra* note 141, at 1278.

143. Madigan, *supra* note 12, at 182-85.

144. *Id.* at 181.

145. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

146. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding that purely private takings were unconstitutional).

147. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004).

duced a new privately owned General Motors Assembly plant,<sup>148</sup> a privately owned racetrack,<sup>149</sup> a paper mill,<sup>150</sup> and a privately owned aviation corporation.<sup>151</sup> Thus, the Court through *Berman* and *Midkiff* created a pattern whereby just about any type of use—public or private—meets the public use requirement of the Fifth Amendment.<sup>152</sup>

This modern trend came about when the Court in *Berman* and *Midkiff* directed courts to defer to state legislative judgment in part because the legislature is the branch of government charged with protecting the general welfare, or police power.<sup>153</sup> This, in turn, spurred many state legislatures to adopt broad definitions of public use that encompassed nearly any type of taking.<sup>154</sup> The end result has been that eminent domain takings can now be for just about any use, public or private.<sup>155</sup> Consequently, the expansive definitions of public use under modern law, along with great judicial deference the United States Supreme Court requires, have functionally eliminated the Fifth Amendment safeguards for property rights.<sup>156</sup>

C. *Because Takings Can Essentially Be for Any Purpose,  
Continued Deference to State Legislatures Involves an  
“Impossibility” Under Midkiff, and the Courts  
Must Intervene*

The Court in *Midkiff* held that a court’s role in reviewing a legislative judgment is very narrow and courts must defer to legislative determinations of public use in most cases.<sup>157</sup> However, the Court in *Midkiff* noted a restriction on this rule: Courts are to defer to state legislatures *unless* deference “is shown to involve an impossibility.”<sup>158</sup>

Cases like *Kelo* involving economic revitalization as a valid public use have exposed such an impossibility under *Midkiff*—namely, that courts’ continued deference to a state legislature’s determination of a

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148. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981).

149. *State ex rel. Tomasic v. Wyandotte County*, 962 P.2d 543, 549 (Kan. 1998).

150. *City of Duluth v. State*, 390 N.W.2d 757, 760 (Minn. 1986).

151. *City of Kansas City v. Hon*, 972 S.W.2d 407, 409 (Mo. Ct. App. 1998).

152. *See supra* notes 143-56 and accompanying text.

153. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984); *Berman v. Parker*, 348 U.S. 26, 32 (1954).

154. *See, e.g., Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004) (stating that condemnations were in part for new commercial buildings to compliment a new Pfizer research facility); *Prince George’s County v. Collington Crossroads, Inc.*, 339 A.2d 278, 279 (Md. 1975) (stating that condemnations were for an industrial park); *Duluth*, 390 N.W.2d at 760 (stating that condemnations were for a large privately operated paper mill); *Hon*, 972 S.W.2d at 414 (stating that condemnations were for an airport expansion and subsequent transfer of land to a private aviation related corporation).

155. *See Madigan, supra* note 12, at 182.

156. Stephen Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 286-87 (2000).

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

158. *Id.* (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925)).

valid public use has made it impossible for courts to find an eminent domain condemnation to be *unconstitutional* in any case.<sup>159</sup> After all, any commercial business is going to bring more jobs, produce more revenue, generate more tax dollars, and revitalize an economy better than a residential home.<sup>160</sup>

In *Kelo*, for example, the development corporation estimated that condemning the residential homes in favor of commercial development would generate over one thousand new jobs for the community and produce over \$1 million in property tax revenue for a community that the state office of policy and management had deemed a “distressed municipality.”<sup>161</sup> In *Poletown*, the numbers were even more impressive—6,150 new jobs and a potential \$15 million in new property tax revenues.<sup>162</sup>

Thus, economic revitalization as a valid public use or purpose has evolved into an impossibility that courts finally need to address—namely, that so long as state legislatures determine that increased revenues, jobs, and other economic revitalization tactics are valid public uses, nearly any use, public or private, will continue to qualify under the public use requirement.<sup>163</sup>

#### IV. SOLUTIONS—KEEPING THE GIANT IN CHECK

Solutions to the growing problems involving eminent domain and the public use requirement should begin with individual state legislatures.<sup>164</sup> States can self-regulate with regard to eminent domain without court intervention, and several already have.<sup>165</sup> Additionally, the United States Supreme Court should recognize that individual property rights are fundamental, and thus trigger a heightened scrutiny standard of review for eminent domain takings cases involving trans-

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159. See, e.g., *Kelo*, 843 A.2d at 509, 520 (deferring to the state legislature for condemnations that were for new commercial buildings to compliment a new Pfizer research facility); *State ex rel. Tomasic v. Unified Gov't*, 962 P.2d 543, 554 (Kan. 1998) (deferring to the state legislature in favor of condemnations for the construction of a privately owned racetrack); *Collington Crossroads, Inc.*, 339 A.2d at 282-83 (deferring to the state legislatures for condemnations in favor of a privately owned industrial park); *Duluth*, 390 N.W.2d at 763 (deferring to the state legislature for condemnations going toward construction of a large privately operated paper mill); *Hon*, 972 S.W.2d at 414 (deferring to the state legislature for condemnations to transfer land to private aviation related corporation).

160. See CASTLE COALITION, *Private power, Public gain*, at <http://www.castlecoalition.org/report/reportStates/Introduction.shtml> (last visited Feb. 5, 2005) (“Practically any home in the United States would generate more tax dollars as a Costco.”).

161. *Kelo*, 843 A.2d at 510.

162. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting).

163. *Midkiff*, 467 U.S. at 240 (citing *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925)) (holding that courts must defer to legislative determinations of public use unless such deference “involves an impossibility”).

164. See *infra* notes 168-75 and accompanying text.

165. See *infra* notes 168-75 and accompanying text.

fers to other private parties.<sup>166</sup> Finally, the Court should find that economic revitalization, in particular, requires a heightened review standard, since nearly any taking could fall under a legislature's broad determination of economic welfare or revitalization.<sup>167</sup>

A. *State Legislatures Should Self-Regulate and Add Restrictions to Eminent Domain*

Because the Court in *Berman* and *Midkiff* granted state legislatures wide deference to define public use for purposes of eminent domain, state legislatures should assume some of the responsibility in correcting the over-expansive definitions of public use.<sup>168</sup> A handful of resourceful states have already taken such steps.<sup>169</sup>

Missouri, for example, recently proposed a senate bill that would require local governments to hold a public hearing before acquiring farmland through eminent domain.<sup>170</sup> South Carolina recently amended its constitution to protect private property owners from a local government's eminent domain proceedings against them.<sup>171</sup> Under the South Carolina Constitution, if the state condemns private property and then reuses it for private purposes, the state must first give the condemnee the opportunity to re-purchase the land when it is sold.<sup>172</sup> Finally, the Colorado legislature proposed several bills which would place restraints on eminent domain.<sup>173</sup> Colorado's House Bill No. 1203, for example, would prohibit the government from transferring land to private developers.<sup>174</sup> Additionally, Colorado House Bill No. 1209 would restrict how the government may define blight.<sup>175</sup>

Because the United States Supreme Court granted state legislatures such great deference in regard to eminent domain, more states

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166. See *infra* notes 176-93 and accompanying text.

167. See *infra* notes 194-202 and accompanying text.

168. See *infra* notes 170-75 and accompanying text.

169. See S.C. CONST. art. XIV; H. 1203, 1209, 64th Gen. Assem., 2d Reg. Sess., (Colo. 2004); S. 505, 92d Gen. Assem., Reg. Sess. (Mo. 2003), available at <http://www.senate.state.mo.us/03info/billtext/intro/sb505.htm> (last visited Feb. 5, 2005).

170. See S. 505, 92d Gen. Assem., Reg. Sess. (Mo. 2003), available at <http://www.senate.state.mo.us/03info/billtext/intro/sb505.htm> (last visited Feb. 5, 2005). The Bill provides in pertinent part that "[p]roperty subject to the farmland protection act shall not be taken in whole or in part by any political subdivision of this state by eminent domain except after a public hearing pursuant to chapter 610, RSMo." *Id.*

171. See S.C. CONST. art. XIV.

172. *Id.*

173. See H. 1203, 1209, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004); Katharhynn Heidelberg, *Council Spars Over Eminent Domain Bills*, CORTEZ JOURNAL (Feb. 12, 2004), available at [http://www.propertyrightsresearch.org/2004/articles2/council\\_spars\\_over\\_eminent\\_domai.htm](http://www.propertyrightsresearch.org/2004/articles2/council_spars_over_eminent_domai.htm).

174. H. 1203, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

175. H. 1209, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004); Colorado House Bill No. 1209 would prohibit the government from labeling agricultural land as blighted. *Id.* Interestingly, in March 2004, the Kansas legislature defeated a bill that would have barred government entities from using eminent domain for the purpose of economic development. *This Week in Topeka* (Mar. 22-26, 2004), at [http://www.opks.org/govt\\_relations/This%20Week%20in%20Topeka/This\\_Week\\_Mar26.htm](http://www.opks.org/govt_relations/This%20Week%20in%20Topeka/This_Week_Mar26.htm).

should move in the direction of Missouri, South Carolina, and Colorado and provide safeguards for individual property rights involved in eminent domain takings.

B. *The Supreme Court Should Declare Private Property Rights Fundamental Rights and Invoke a Heightened Scrutiny Standard for Eminent Domain Takings Cases*

It is well established that courts review a violation of a fundamental right using a heightened scrutiny standard that requires a compelling government interest and legislation narrowly tailored to further that interest.<sup>176</sup> It is also well established that the Framers of our Constitution, including James Madison, viewed individual property rights as synonymous with liberty.<sup>177</sup> In fact, the Framers of our Constitution drafted the first twelve amendments to provide “additional guards in favor of liberty.”<sup>178</sup> Additionally, a state’s police power cannot interfere with an individual’s fundamental rights unless the interference passes a heightened review standard.<sup>179</sup>

Since the Takings Clause falls within the Fifth Amendment, and since the amendments are safeguards of liberty, then the Takings Clause of the Fifth Amendment should be viewed as a protection of a fundamental right, namely, the right to own property free from government interference.<sup>180</sup>

Because private property ownership is arguably a fundamental right under the Fifth Amendment, courts should in turn review legislative determinations of public use under a heightened or strict scrutiny standard.<sup>181</sup> Heightened or strict scrutiny requires that a state show a compelling interest for a regulation or determination and that the means to further that compelling interest (such as legislation, for example) be narrowly tailored to further that interest.<sup>182</sup> In short, states should not be able to evade the constitutional protections of the Takings Clause by making broad declarations that a use is public, when on its face the use is private.<sup>183</sup>

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176. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

177. Madigan, *supra* note 12 (citing *Discourse on Davila*, 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851)). “Property must be secured or liberty cannot exist.” *Id.* (quoting *Discourse on Davila*, 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851)).

178. *Midkiff v. Tom*, 702 F.2d 788, 793 (9th Cir. 1983) (quoting letter from James Madison to George Eve (Jan. 2, 1789) (citations omitted)).

179. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

180. See *supra* notes 177-78 and accompanying text (arguing that the Framers were concerned with government interfering with private property rights when they drafted the Fifth Amendment).

181. See *Glucksberg*, 521 U.S. at 721 (noting that fundamental rights are analyzed under a strict scrutiny standard).

182. *Id.*

183. See, e.g., *Midkiff*, 702 F.2d at 805.

*Midkiff* is a good example of a legislative determination's meeting the parameters of strict scrutiny. In *Midkiff*, the legislation at issue was the Hawaii Land Reform Act of 1967.<sup>184</sup> The Hawaii legislature identified a compelling interest in passing the Land Reform Act—that only seventy-two individuals owned almost all of the available land in Hawaii and this created an unfair land oligopoly that needed to be broken up.<sup>185</sup> The severely concentrated land ownership, the legislature found, was the result of early settlers' developing a feudal land tenure system in Hawaii, the effects of which were still felt by Hawaii's ordinary citizens in the twentieth century.<sup>186</sup> The Hawaii legislature concluded that this concentrated land ownership skewed the state's residential land market, inflated prices, and generally injured the public's tranquility and welfare.<sup>187</sup> Thus, under a strict scrutiny review standard, Hawaii found a compelling state interest in breaking up the land oligopoly and furthered that compelling interest by passing the Land Reform Act.

Furthermore, under strict scrutiny, the Land Reform Act itself was narrowly tailored to further Hawaii's compelling interest in breaking up the land oligopoly.<sup>188</sup> For example, as enacted, the Land Reform Act created a mechanism by which the large residential tracts were condemned and then transferred to existing lessees.<sup>189</sup> The sole reach of the Land Reform Act was the concentrated ownership of residential tracts.<sup>190</sup> Therefore, the Hawaii legislature identified its compelling interest in breaking up the land ownership oligopoly and then created a narrowly tailored statute to further that interest.<sup>191</sup> Thus, even though the Court in *Midkiff* implemented a rational basis test, the Land Reform Act would likely have survived a strict scrutiny review standard and thus provides a good example of the type of eminent domain legislation that should be drafted today.

On the other hand, legislative determinations like those in *Kelo* would likely fail a strict scrutiny review standard. For instance, the Connecticut legislature did not find a specific compelling state interest in *Kelo*. Instead, the Connecticut legislature made a generalized find-

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184. Haw. Hous. Auth. v. *Midkiff*, 467 U.S. 229, 233-34 (1984).

185. *Id.* at 232. At the time the Hawaii legislature passed the Land Reform Act, the government owned 49% of the state's land. *Id.* Only seventy-two people owned 47% of the remaining land. *Id.* Furthermore, the legislature determined that only eighteen people owned tracts of land that were 21,000 acres or more, and on Oahu (the most urbanized of the islands), only twenty-two landowners held over 72% of the fee simple titles. *Id.*

186. *Id.*

187. *Id.*

188. *See id.* (holding state action must be narrowly tailored to further a state's compelling interest).

189. *Id.* at 233-34. (describing the Land Reform Act).

190. *See id.*

191. *See id.*

ing that the economic welfare of Connecticut depended on “the continued growth of industry and business.”<sup>192</sup>

Furthermore, the Connecticut legislature did not narrowly tailor the statute in *Kelo* to further any compelling interest. Instead, the statute stated that general industry and business growth could be accomplished by “permitting and assisting” local governments in acquiring land and funds to expand industry and business.<sup>193</sup> Thus, *Kelo* provides a good example of legislation that, unlike the legislation in *Midkiff*, would fail a strict scrutiny standard.

C. *The United States Supreme Court Should Find That Economic Revitalization in Particular Requires a Heightened Review Standard*

Yet another potential solution to this growing problem is for the United States Supreme Court to find that economic revitalization schemes in particular (such as the one at issue in *Kelo*) require heightened scrutiny when the legislation “on its face . . . [falls] within a specific prohibition of the Constitution.”<sup>194</sup>

In the past, the Court cautioned that deference to a legislature may not be appropriate in every case.<sup>195</sup> In *United States v. Carolene Products Co.*,<sup>196</sup> for example, Justice Stone wrote that there may be a heightened review standard necessary when legislation appears to be within a specific prohibition of the Constitution, such as the first ten amendments.<sup>197</sup> Under this rule, if a state legislature passes an act or a bill relating to eminent domain that specifically authorizes transfers of private property to other private parties, for example, a heightened scrutiny standard would be triggered.<sup>198</sup>

Under this analysis, legislation like that in *Midkiff* would indeed fall under and pass a heightened standard, since the statute on its face authorized the government condemnation of land in favor of other private landowners.<sup>199</sup> Legislation like that in *Kelo* would also fall under this standard, as the argument could be made that the statute on its face authorizes government condemnations in favor of business and industry.<sup>200</sup> However, two different results may be reached under

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192. CONN. GEN. STAT. § 8-186 (2004).

193. *Id.*

194. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

195. *Id.*

196. *Id.*

197. *Id.*

198. *See, e.g., id.*

199. *See generally Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233-34 (1984) (describing the Land Reform Act).

200. *See generally* CONN. GEN. STAT. § 8-186 (2004) (declaring that the economic welfare of the state depends on the growth of private business and industry).

this standard—while the *Midkiff* legislation would likely pass strict scrutiny review, the *Kelo* legislation would not.<sup>201</sup>

This is not to say that every government condemnation merits strict scrutiny. It is merely proposed that courts should be able to exercise discretion, depending on the circumstances of each case, in order to arrive at the appropriate standard of review. The bottom line is that one should not have to question whether a valid public use exists in eminent domain cases.<sup>202</sup>

#### V. RECENT KANSAS CASES: A LINGERING CONCERN IN LIGHT OF THE PROPOSED SOLUTIONS

Operating on a heightened scrutiny review standard, as proposed by this note, the condemnations for the Kansas Speedway NASCAR track, BMW dealership, and Target distribution center would probably not pass a heightened judicial review.

Unlike the Hawaii legislature in *Midkiff*, the Kansas legislature made no independent findings of a compelling state interest in building the NASCAR track.<sup>203</sup> In fact, what the government in *Tomasic* did was exactly the reverse of *Midkiff*—an interested private party first approached the government about acquiring the land, and only *then* did the government (interested in the revenues and other incentives the new development would create for the community) make the requisite legislative determinations that the condemnations fit within the eminent domain policy of the state government.<sup>204</sup> This process is unlike *Midkiff*, where the impulse to create the legislation at issue came from within the legislature itself rather than from interested outside parties.<sup>205</sup>

It is this opposite process for eminent domain takings and legislative determinations of public use that creates some lingering concerns for the future of eminent domain law. For example, if private corpo-

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201. *See supra* notes 184-93 and accompanying text. The key distinction between the two outcomes is how narrowly tailored the legislation at issue is to further the state's compelling interest.

202. *Midkiff v. Tom*, 702 F.2d 788, 806 (9th Cir. 1983).

203. *Compare Midkiff*, 467 U.S. at 234-37 (describing how the Hawaii legislature independently and extensively studied the land oligopoly in Hawaii and then on its own found a compelling need to redistribute the land to guard against price inflation and to protect public welfare), *with State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 543, 549-50 (Kan. 1998) (describing how the private International Speedway Corporation first approached the city of Kansas City to express an interest in building a racetrack, and then describing how the Kansas legislature amended its "urban redevelopment" statutes to include development of a major tourism area as a valid public use in order to acquire the requisite land through eminent domain).

204. *Tomasic*, 962 P.2d at 549 (describing the process by which the Kansas legislature amended its urban redevelopment statutes in order to have a valid public purpose in condemning the property at issue).

205. *Compare Midkiff*, 467 U.S. at 233 (stating that the Hawaii legislature first made the findings itself), *with Tomasic*, 962 P.2d at 549 (stating that the International Speedway Corporation approached the local government).

rations and industries approach a legislature to persuade the legislature to begin eminent domain condemnations, the question arises whether a state legislature is making public use determinations based on its own findings or under the advice of others.

Existing precedent does not offer much guidance to this lingering dilemma. The Court in *Berman*, for example, simply held that when a legislature identifies a public use or public purpose, the means by which the legislature accomplishes that purpose fall within its discretion.<sup>206</sup> However, the Court in *Berman* left open the question of whether a legislature must make its own findings or can make findings based upon the urging of outside interested parties. It is this latter type of scenario where potential for abuse might occur. This is a problem that remains until, as this note proposes, courts have the power to play a more active role in evaluating whether a valid public use exists.

## VI. CONCLUSION

The United States Supreme Court in *Kelo* has awoken a sleeping giant as to whether eminent domain condemnations can be used by local governments to condemn non-blighted land in favor of other private parties, all in an effort to revitalize local economies.

This issue has become a sleeping giant largely because the public use requirement has been rendered useless though modern case law adopting overly broad standards for the public use requirement of the Fifth Amendment. The problem is then compounded by courts granting wide deference to state legislatures who continue to expand the definition of public use. The effect of this is that public use now can mean any use, including the increasingly popular public use of economic revitalization of both blighted and non-blighted private property.

One solution to this problem is for state legislatures to become more active in passing legislation that will protect individual property rights. Additionally, the United States Supreme Court should recognize private property rights as fundamental rights and thus require a heightened scrutiny standard of review rather than the rational basis tests courts currently employ. Finally, the Court should hold that economic revitalization as a valid public use specifically requires a heightened level of scrutiny.

Although these proposed solutions are not exhaustive, they could go a long way towards reaffirming and upholding the long-established Fifth Amendment protection: that private property shall not be taken for public use without just compensation. Some potential for abuse

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206. *Berman v. Parker*, 348 U.S. 26, 35-36 (1954).

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may still remain, however, such as when interested private parties persuade a legislature to find a valid public use rather than a legislature making independent findings of public use. These giant issues will likely remain until the courts are given a more meaningful role in ensuring that private property is taken, not only for just compensation, but also for *public use*.

