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# Eminent Domain: Judicial Interpretation Abridges a Constitutional Guarantee

## I. INTRODUCTION

*And Ahab [King of Samaria] spake unto Naboth, saying, Give me thy vineyard, that I may have it for a garden of herbs, because it is near unto my house. . . .*<sup>1</sup>

As the above scripture indicates, the sovereign's desire for the land of its citizens is of ancient origin.<sup>2</sup> However, the landowner's desire to temper his sovereign's appetite was undoubtedly activated at the same instant resulting (in the United States at least) in certain constitutional limitations.

The fifth amendment to the United States Constitution guarantees that "private property [shall not] be taken for a public use, without just compensation."<sup>3</sup> While this clause clearly imposes limitations upon the sovereign's ability to take private property, the provision also bestows the power of eminent domain upon the federal government,<sup>4</sup> and upon the states through application of the fourteenth amendment.<sup>5</sup> This comment will attempt to discern the impact which judicial interpretation of this constitutional provision, particularly the "for public use" clause, continues to have on the sovereign's exercise of the power of eminent domain.

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1. 1 *Kings* 21:2 (King James, Scofield Reference ed. 1980). This chronicle is considered the earliest known exercise of a sovereign's power of eminent domain. See 1 NICHOL, *LAW OF EMINENT DOMAIN* [hereinafter 1 NICHOL] § 1.2[1] (1981).

2. 1 NICHOL, *supra* note 1, at § 2.12[1].

3. U.S. CONST. amend. V.

4. See *Kohl v. United States*, 91 U.S. 449 (1876). In *Kohl*, the Supreme Court upheld the federal government's exercise of its taking power. In discussing the constitutional grant of eminent domain, Justice Strong stated that "[t]he fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?" *Id.* at 451.

5. See *Missouri Pacific Ry. v. Bradley*, 164 U.S. 403 (1896) (taking of railroad's private property, without its consent, for the private use of another violates the fourteenth amendment's Due Process Clause). See also Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 *YALE L.J.* 599, 599 n.4 (1949) (Eminent Domain Clause of fifth amendment not directly applicable to the states, but the Due Process Clause of the fourteenth amendment incorporates the same requirements).

## II. HISTORICAL ANALYSIS OF EMINENT DOMAIN

The term "eminent domain" was totally unknown at common law, and it was not until 1625 that Hugo Grotius coined the phrase *dominium emineus* (eminent domain).<sup>6</sup> Grotius wrote that "the property of subjects is under the eminent domain of the state, so that the state . . . may use and . . . destroy such property . . . for ends of public utility . . . [b]ut . . . when this is done the state is bound to make good the loss to those who lose their property . . . ."<sup>7</sup> Thus, eminent domain, as defined by Grotius, encompasses: (1) the sovereign's power (whether exercised directly or indirectly) to take private property; (2) if such taking is for public use; and (3) if just compensation is given. This trichotomy continues to survive and indeed was adopted into the federal and various state constitutions.<sup>8</sup>

In the early period of American history, the government's need for privately-owned land was rare, due, not only to the relatively minor role it played, but, also because of the huge tracts of public domain at the government's disposal.<sup>9</sup> With the age of industrialism came the active participation by the government, or its representative, in the exercise of its power of eminent domain.<sup>10</sup> It was not until the period after the Civil War, however, that the Supreme Court, in *Kohl v. United States*,<sup>11</sup> declared the legitimacy of the federal government's power of eminent domain under the fifth amendment.<sup>12</sup> In the 1897 decision of *Chicago, Burlington & Quincy v. Chicago*,<sup>13</sup> the Court held the fourteenth amendment's

6. 1 NICHOL, *supra* note 1, at § 1.12[1].

7. *Id.*

8. See *supra* note 3 and accompanying text. Some state constitutions essentially parrot the federal constitutional provision. The Pennsylvania constitution provides that "private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10. The constitution of New York provides that "private property shall not be taken for public use without just compensation." N.Y. CONST. art. I, § 7(a).

9. See Comment, *supra* note 5, at 600. The author notes that because a vast quantity of land was available to the various governments, there rarely arose questions concerning the proposed use of the land. Rather, "the only significant limitation imposed . . . was the payment of just compensation." *Id.*

10. *Id.* at 602. Delegation of the power of eminent domain by the sovereign is allowable if authorized by statute. *California v. Pacific R.R.*, 127 U.S. 1, 40 (1887).

11. 91 U.S. 449 (1876) (authorizing federal government to take lands within a state for the purpose of erecting a court house and post office).

12. *Id.* at 453.

13. 166 U.S. 226 (1897) (construing fourteenth amendment's Due Process Clause as requiring city to pay just compensation to railroad for land taken). See also *supra* notes 4 & 5 and accompanying text.

due process clause<sup>14</sup> applicable to a state's taking of private property for purely private ends; thereby subjecting the states to the limitations found within the fifth amendment.<sup>15</sup> Having thus established the fifth amendment's applicability to federal and state takings, the Supreme Court, has attempted to interpret the terms of this constitutional provision throughout the 20th century.<sup>16</sup>

Since both the federal and state governments are subject to restrictions upon the exercise of the power of eminent domain, the question becomes: what constitutes a taking; or just compensation; or public use? This tripartite question continues to plague not only the government and property owner, but also the judiciary and practitioner.

### III. TAKING AND JUST COMPENSATION

*[And King Ahab spake unto Naboth saying] I will give thee for [thy vineyard] a better vineyard than it; or, if it seem good to thee, I will give thee the worth of it in money.<sup>17</sup>*

While it is relatively clear that actual dispossession of a property owner, by the sovereign, will amount to a taking, there remains a massive gray area in which restrictions upon the property may or may not, depending on degree, constitute a compensable taking.<sup>18</sup> The Supreme Court has recently stated that "[a]s was recently pointed out, this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'"<sup>19</sup> Since no "set formula" is available, it is generally agreed that whether or not a compensable taking has

14. U.S. CONST. amend. XIV.

15. 166 U.S. at 241. Justice Harlan, writing for the Court, stated:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

*Id.*

16. See *infra* notes 17-114 and accompanying text.

17. 1 Kings 21:1 (King James, Scofield Reference ed. 1980).

18. See generally J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

19. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

occurred is an "essentially ad hoc, factual inquiry . . . ." <sup>20</sup> However, some guidelines can be gleaned from various cases decided by the Supreme Court regarding this question.

One of the prominent cases in which the Supreme Court provided some guidance is *Penn Central Transportation Co. v. New York City*.<sup>21</sup> The plaintiff, owner of the historic Pennsylvania Railroad Station in New York City, failed to establish his claim that the Landmark Preservation Law,<sup>22</sup> which limited his ability to change the structure of his building, constituted a taking of property under the fifth amendment.<sup>23</sup> The Court stated that, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."<sup>24</sup> However, even without physical invasion by the state, the Court indicated in *Penn Central* that a compensable taking may occur when the interference is too great.<sup>25</sup>

In considering the degree of interference necessary to constitute a taking, the *Penn Central* Court concentrated primarily on the diminution of value of the property and the reasonable investment-backed expectations of the property owner.<sup>26</sup> In *Penn Central*, the Court found that the regulation, aimed at preserving the railroad station, did not diminish the property value of the building and that other reasonable, beneficial uses could be exploited.<sup>27</sup> Thus, there was insufficient interference with investment-backed expectations.<sup>28</sup>

Interference with private property by the state is accomplished

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20. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)

21. *Id.*

22. Landmark Pres. Law. N.Y. GEN. MUN. LAW, § 96-9 (McKinney 1977).

23. 328 U.S. at 124.

24. *Id.* (citations omitted). See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which a land owner dug an inlet through his beach property to provide access to the bay from a pond located on his property. The government contended that the pond became part of the navigable waterways and, therefore, had to be made available for public use. Finding that such action imposed a servitude upon the property, the Court held that an actual physical invasion had occurred which constituted a compensable taking. *Id.* at 180.

25. 438 U.S. at 127.

26. *Id.* at 124. See also *Golblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (ordinance prohibiting excavation found to be a constitutional exercise of police power to insure safety of citizens).

27. 438 U.S. at 138.

28. *Id.* The Court noted that diminution of value and reasonable investment-backed expectations depend upon the facts of the individual case to determine the degree of interference necessary to constitute a taking. *Id.*

through its regulatory police powers.<sup>29</sup> Since a state's police powers are extremely broad and used to promote the health, safety, morals, or general welfare of the public, the judiciary affords the state wide deference regarding such regulations.<sup>30</sup> As noted previously,<sup>31</sup> the regulation may, however, so diminish the value of the property and frustrate the investment-backed expectations of the landowner as to constitute a taking.<sup>32</sup> One of the earliest cases establishing this principal was *Pennsylvania Coal Co. v. Mahon*.<sup>33</sup> Justice Holmes, writing for the majority, held that a state statute, forbidding removal of certain amounts of coal by the defendant coal company, from beneath the plaintiff's house, was an unconstitutional taking of property without just compensation.<sup>34</sup> As to diminution of value and investment-backed expectations, Justice Holmes stated that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>35</sup> The Court was apparently not persuaded that the statute in question was authorized by the state's police power for the protection of the general public welfare.<sup>36</sup>

*Mahon*, however, has become the clear exception to the rule in that more recently the judiciary is giving greater deference to the legislature while showing less concern with the diminution of value and investment-backed expectations of affected property owners.<sup>37</sup> *Penn Central* is an example of the deference shown to legislative enactments as is *Goldblatt v. Town of Hempstead*.<sup>38</sup> In *Goldblatt*, the Court upheld an ordinance prohibiting excavation as a constitutional regulation within the town's police power.<sup>39</sup> The Court

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29. *Id.* at 125. For a further discussion regarding the state's police power and its relationship to the Public Use Clause, see *infra* notes 65 & 66 and accompanying text.

30. 438 U.S. at 125.

31. See *supra* notes 27 & 28 and accompanying text.

32. 438 U.S. at 125.

33. 260 U.S. 393 (1922).

34. *Id.* at 413-14.

35. *Id.* at 414. See also *Penn Central Transp. Co.*, 438 U.S. at 127. The Court, in discussing *Mahon*, stated that the case stood for the proposition that a state statute may so frustrate distinct investment backed expectations as to amount to a taking. *Id.*

36. 260 U.S. at 413-14. *But cf.* *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), where the Court upheld similar legislation on the grounds that the regulation was needed to protect coal miners. *Id.*

37. See *infra* notes 59 & 69 and accompanying text.

38. 369 U.S. 590 (1962).

39. *Id.* at 594.

made this determination even though the ordinance effectively destroyed the plaintiff's excavation business.<sup>40</sup> After finding insufficient evidence to conclude that the ordinance would so reduce the value of the plaintiff's property as to constitute a taking, the Court applied a rational basis test to the legislation in question.<sup>41</sup> The Court stated that "[t]o justify the State in . . . interposing its authority in behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose. . . ."<sup>42</sup>

Thus, in most situations, the state's action is clearly a taking if there is physical invasion by the state.<sup>43</sup> If, however, there is no physical invasion then the facts of the case determine whether there has been a significant diminution in the value of the property or whether the reasonable investment-backed expectations of the parties have been thwarted to a substantial degree by the legislation in question.<sup>44</sup> If the facts of the case do not support these elements, there will likely be no compensable taking, due to the deference given by the judiciary to a legislative enactment based upon the state's police power.<sup>45</sup> Finding a compensable taking presupposes that the taking meets the requirement of the "for public use"<sup>46</sup> limitation of the fifth amendment. However, what constitutes a public use and, indeed, whether the clause itself is a dead letter has been frequently debated in the courts.

#### IV. PUBLIC USE: LIMITATION OR FICTION

*Jezebel [King Ahab's wife] said unto him, dost thou not govern the kingdom . . . ? I will give thee the vineyard of Naboth. . . . And it came to pass, when Ahab heard that Naboth was dead [at the hands of Jezebel], that Ahab rose up to go down to the vineyard . . . to take possession of it.*<sup>47</sup>

One of the earliest Supreme Court cases to grapple with the public use limitation was *United States v. Gettysburg Electric Railway*.<sup>48</sup> *Gettysburg* involved the taking of land by congressional

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40. *Id.* at 592.

41. *Id.* at 594.

42. *Id.* at 594-95 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

43. See *supra* note 24 and accompanying text.

44. See *supra* notes 26-28 and accompanying text.

45. See *supra* note 30 and accompanying text.

46. U.S. CONST. amend. V.

47. 1 *Kings* 21:7 (King James, Scofield Reference ed. 1980).

48. 160 U.S. 668 (1896).

act, for the construction of a national park to commemorate the Civil War battle that had occurred there.<sup>49</sup> Justice Pickham, writing for the Court, stated that “when the legislature has declared the use of purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.”<sup>50</sup> The Court concluded that Congress’ taking authority derived from the powers expressly and implicitly given to it by the Constitution.<sup>51</sup> Any abuse of such power, Justice Pickham stated, would be checked by Congress’ responsibility to the people.<sup>52</sup>

Thus, the mold was cast for according deferential treatment to a decision of the legislature in determining what constitutes a public use.<sup>53</sup> A clear statement affording extreme deferential treatment by the judiciary to Congress in defining “public use” may be found in the 1954 case of *Berman v. Parker*.<sup>54</sup> That case involved the redevelopment of the District of Columbia.<sup>55</sup> The plaintiffs sought to have a congressional act, allowing redevelopment of blighted areas, declared unconstitutional because, they contended: their properties were not blighted, the redevelopment would be under private not public management, and the redeveloped land would then be available for private individuals.<sup>56</sup> The Court, speaking through Justice Douglas, held that the redevelopment of the District of Columbia was indeed a public purpose that could be accomplished through Congress’ police power.<sup>57</sup> Justice Douglas stated that once “the leg-

49. *Id.*

50. *Id.* at 680.

51. *Id.* at 681.

52. *Id.* at 680. The Court noted, however, that when the taking power is delegated to private corporations, the presumption of no abuse is not quite as strong.

The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right. 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 is 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.

*Id.*

53. See *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925), which upheld a federal taking of land for military purposes. The Supreme Court stated that a decision of the federal legislature “is entitled to deference until it is shown to involve an impossibility.” *Id.* at 66. See also *United States ex rel. Tennessee Valley Auth. v. Welsh*, 327 U.S. 546 (1946) (extreme deference given to a congressional act authorizing the taking of private land for the construction of power dam for war production).

54. 348 U.S. 26 (1954).

55. *Id.*

56. *Id.* at 31-32.

57. *Id.* The Court noted that through its police power, a government may control

islature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs . . . ."<sup>58</sup> Clearly the Court delineated a rational basis test to be applied to a congressional decision as to what constitutes a public use in the exercise of eminent domain.<sup>59</sup>

Perhaps the epitome of judicial deference to a state, as opposed to a federal statute, is found in the recent Supreme Court decision of *Hawaii Housing Authority v. Midkiff*.<sup>60</sup> *Midkiff* involved the exercise of Hawaii's power of eminent domain to divest title to real property from certain lessors, and then to vest the title in certain lessees, without the state ever taking possession.<sup>61</sup> The lessors of the property contended that the statute amounted to a taking of private property for purely private use thereby violating the fifth amendment's public use limitation.<sup>62</sup> Justice O'Connor, borrowing from Justice Douglas' logic in *Berman*, held the statute constitutional, stating that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, a . . . compensated taking . . . [is not] proscribed by the Public Use Clause."<sup>63</sup> Nor did it matter that the statute in question was formulated by a state legislature, for the Court took the position that state legislative bodies are just as competent as Congress to decide the issue of public use.<sup>64</sup> Justice O'Connor determined that the state legislature through its broad police powers could constitu-

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public safety, public health, morality, peace and quiet, and law and order. In this instance, the Court indicated that the public welfare is broad enough to include physical, spiritual, aesthetic and monetary values. Therefore, the Court refused to reappraise the weight given to those values by the legislature. *Id.*

58. *Id.* at 32.

59. See Note, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?* 60 NOTRE DAME LAW. 388, 399 (1985).

60. 104 S. Ct. 2321 (1984).

61. *Id.* at 2325. The controlling statute in the case was HAWAII REV. STAT. §§ 516-1 - 83 (1976 & Supp. 1982).

62. 104 S. Ct. at 2324. A source of contention was the statute's provision for the taken property to go directly from the lessor to the lessees without the state ever taking possession. While the circuit court agreed with the plaintiffs, the Supreme Court rejected the argument and stated that "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Id.* at 2331.

63. *Id.* at 2329-30. See also *Ringe v. Los Angeles*, 262 U.S. 700 (1923); *Block v. Hirsh*, 256 U.S. 135 (1921) (discussion of whether a compensated taking by the legislature negates the public use limitation). See Note, *supra* note 59, at 397.

64. 104 S. Ct. at 2331. Prior to this time, the Supreme Court had dealt only with federal legislation regarding the public use limitation. See *supra* notes 49 & 56 and accompanying text.

tionally break up land oligopolies by the exercise of its power of eminent domain.<sup>65</sup> Indeed, the Court equated the public use requirement with the scope of a sovereign's police powers.<sup>66</sup> Justice O'Connor in discussing the lack of actual state possession of the taken property, stated that "government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."<sup>67</sup> *Midkiff* is, therefore, a clear illustration of the outer limitation (or non-limitation) of the Public Use Clause.<sup>68</sup> Thus, once the legislature, be it federal or state, has determined certain property is needed for public use, the judiciary must defer to this determination, so long as a rational relationship exists between the taking and the public purpose.<sup>69</sup> Furthermore, *Midkiff* represents the Court's decision that private property can be taken and then given to private individuals, without the state ever taking possession, so long as the legislature has approved such a scheme for the public good.<sup>70</sup>

Only one exception is found in *Midkiff*, namely, purely private takings, which Justice O'Connor roughly defined as a "taking of property . . . for no reason other than to confer a private benefit on a particular private party."<sup>71</sup> However, as *Midkiff* demonstrates, what may appear to be a purely private taking to some, passes constitutional muster if the legislature authorizes the seizure.<sup>72</sup>

## V. THE IMPACT OF MIDKIFF

*Thus saith the Lord, [unto King Ahab]. Hast thou killed, and also taken possession [of Naboth's vineyard]? [Since thou hast done so] in the place where dogs licked the blood of Naboth shall the dogs lick thy blood. . . . And . . . the dogs shall eat Jezebel by the wall of Jezreel.*<sup>73</sup>

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65. 104 S. Ct. at 2336.

66. *Id.* at 2329. See *supra* note 57 and accompanying text for a discussion concerning the broad scope encompassed by a state's police powers.

67. 104 S. Ct. at 2331.

68. See Note, *supra* note 59, at 404. The Court in *Midkiff* also noted that since the Public Use Clause of the fifth amendment is applicable to the states through its incorporation in the fourteenth amendment, state legislation with respect to eminent domain is subject to the same scrutiny as congressional legislation concerning eminent domain. 104 S. Ct. at 2331 n.7.

69. 104 S. Ct. at 2329.

70. *Id.* at 2330-31.

71. *Id.* at 2331.

72. See generally *supra* notes 60-69 and accompanying text.

73. 1 Kings 22:19 & 23 (King James, Scofield Reference ed. 1980).

The affected property owner is faced with the difficult task of overcoming *Midkiff's* directions that, unless unreasonable or a "purely private taking," the courts must defer to the legislature's decision to exercise the state's power of eminent domain. It is interesting to note the theories upon which many of the owner's claims have attempted to avoid the effects of such extreme judicial deference. For the most part, affected property owners have sought to either fall within *Midkiff's* narrowly drawn exception,<sup>74</sup> or to cast their claims as violations of specific constitutional guarantees.<sup>75</sup>

In *Rosenthal & Rosenthal v. N.Y. State Urban Development Corp.*,<sup>76</sup> *G. & A. Books, Inc. v. Stern*,<sup>77</sup> and *Forty-Second Street Co. v. Koch*,<sup>78</sup> a trio of cases emanating from New York City's attempt to upgrade the Times Square area [hereinafter Project], plaintiff property owners and lessees tested the scope of the *Midkiff* decision. In *Rosenthal*, the plaintiffs brought a section 1983<sup>79</sup> action to enjoin the condemnation of their office building which was not blighted, was structurally sound, and was fully occupied.<sup>80</sup> Plaintiffs averred that the Project was enlarged to include their building for the sole purpose of generating income for the developer of the Project, a supposed political supporter of the Mayor of New York City.<sup>81</sup> In essence, the plaintiffs were contending that the taking was for a "purely private" purpose, thus placing plaintiffs within the narrow exception provided by *Midkiff*.<sup>82</sup>

The court was not persuaded by the plaintiffs' assertion that the motivation behind the taking of *their* building was for purely private reasons.<sup>83</sup> The court found that, since the legitimate public

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74. See *supra* note 71 and accompanying text.

75. The first amendment's Freedom of Speech Clause and the Equal Protection Clause of the fourteenth amendment have been used by affected property owners to elicit greater judicial scrutiny in this area. See *infra* notes 95-97.

76. 605 F. Supp. 612 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985).

77. 604 F. Supp. 898 (S.D.N.Y. 1985).

78. 613 F. Supp. 1416 (S.D.N.Y. 1985).

79. 42 U.S.C. § 1983. An action brought under this statute allows plaintiffs to sue or enjoin certain defendants acting under color of state law for violation of their rights. *Id.*

80. 605 F. Supp. at 614.

81. *Id.* at 616. The plaintiffs asserted that a "white paper" had been prepared by attorneys for a rival developer which indicated that the City of New York had threatened to withdraw from the redevelopment unless Klein, a political supporter of the mayor, were granted one-half of the job. *Id.*

82. See *supra* note 71 and accompanying text.

83. 605 F. Supp. at 617. The court indicated that determinations of public use are properly within the discretion of the political branches. "Even if this court were to conclude that this Project is a mammoth boondoggle, socially and architecturally ill-advised, it would

purpose of the Project as a whole was to eradicate blight, the redevelopment was rationally related to that purpose.<sup>84</sup> Perhaps the most astonishing part of the court's opinion was Judge Motley's statement that:

It is not enough that the Project planners were *partially* motivated by the desire to make money for private developers. Such mixed motivations seem politically inevitable and perhaps are necessary to the success of this kind of project. To constitute a purely private taking and thus fit within the narrow exception of *Midkiff*, plaintiffs must demonstrate that *no* public purpose exists for the Project.<sup>85</sup>

The court noted that, in order to state a constitutional claim, plaintiffs would have to aver that the plan was a sham and a fraud on the public and that the very *existence* of the project was for the sole purpose of private gain.<sup>86</sup>

The plaintiffs' second argument, while ingenious was indeed interesting, in that they attempted, in vain, to use *Midkiff* offensively. Contending that, since *Midkiff* validated Hawaii's land scheme to break up a land oligopoly, the City of New York was prohibited from using the Project to concentrate ownership of land, in the Times Square vicinity, in the hands of fewer individuals.<sup>87</sup> Judge Motley rejected this interpretation, finding instead that *Midkiff* affords states broad discretion in deciding what constitutes a public use.<sup>88</sup> The court reiterated that a purely private taking will not pass judicial scrutiny, and concluded by asserting that the political process will check abuses by legislative bodies in the exercise of their power of eminent domain.<sup>89</sup>

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still be a question for the political process, not a federal court." *Id.* at 617.

84. *Id.* at 617-18.

85. *Id.* at 618 (emphasis in original).

86. *Id.* See also *Pastan v. City of Melrose*, 601 F. Supp. 201 (D. Mass. 1985). In *Pastan*, the court dismissed the plaintiff property owner's section 1983 complaint which had averred that the taking was motivated to protect private interest. The district court stated that *Midkiff* "stands for the proposition that, as long as property taken by eminent domain is dedicated to a public purpose, the motives of the taking authority are irrelevant." *Id.* at 203. *But cf.* *United States v. 416.81 Acres of Land*, 514 F.2d 627, 632 (7th Cir. 1975) (egregious bad faith may negate public use).

87. 605 F. Supp. at 618.

88. *Id.*

89. *Id.* at 619. See also *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1895), wherein the Court first stated that "there is not much ground to fear any abuse of the [power of eminent domain]. The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right." *Id.* at 680. The *Rosenthal* court did indicate that, even if favoritism is given to a particular developer over another, such action violates state law with the appropriate remedy being a new selection, not a declaration that the legislative act is unconstitutional. 605 F. Supp. at 618.

A per curiam opinion by the Second Circuit in *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Development Corp.*<sup>90</sup> affirmed the district court's decision dismissing plaintiffs' complaint.<sup>91</sup> The court noted that the appellants (plaintiffs) did not petition to enjoin the redevelopment entirely, merely that part which affected their property.<sup>92</sup> The Second Circuit rejected the notion of piecemeal takings and, relying on *Midkiff*, stated that "[w]hen the legislature's purpose is legitimate and its means are not irrational . . . empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."<sup>93</sup>

In *G. & A. Books, Inc. v. Stern*,<sup>94</sup> the plaintiffs, proprietors of a business engaged in selling and exhibiting sexually explicit books, films, and performances, employed a different approach to circumvent *Midkiff*. The plaintiffs sought an injunction, to prevent condemnation of their buildings, on the grounds that the Project constituted prior restraint; classified speech on the basis of content; and burdened speech with overly restrictive regulations.<sup>95</sup> This argument attempted to persuade the court to abandon *Midkiff*'s rational basis test and instead apply the strict scrutiny test afforded first amendment claims.<sup>96</sup> The court, mindful of *Berman* and *Midkiff*, asserted that "traditional deference which federal courts must accord to legislative and executive judgments regarding land use . . . is inappropriate when First Amendment values are implicated."<sup>97</sup> Judge Motley found, however, that plaintiffs' prior restraint argument failed, because the plaintiffs were not singled out for special treatment, but were part of a plan that shut down business across the board in a mutual fashion.<sup>98</sup>

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90. 771 F.2d 44 (2d Cir. 1985).

91. *Id.*

92. *Id.* at 46.

93. *Id.* (quoting *Hawaii Housing Auth. v. Midkiff*, 104 S. Ct. 2321, 2330 (1984)).

94. 604 F. Supp. 898 (S.D.N.Y. 1985).

95. *Id.* at 900.

96. This case is not the first instance in which affected property owners have brought first amendment claims. Compare *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (holding that the first and fourteenth amendments protect a wide range of entertainment, including nude dancing, and thus an ordinance forbidding such entertainment was unconstitutional) with *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (holding a zoning ordinance valid, under first and fourteenth amendment).

97. 604 F. Supp. at 908.

98. *Id.* at 909. Judge Motley stated that had the government condemned only the plaintiffs' buildings and replaced them with other businesses, this would have constituted a prior restraint and would have called for strict scrutiny. *Id.* at 909-10. Therefore, although the court acknowledged that there would be some impact upon the plaintiffs' first amend-

It is interesting to note that the court's analysis did not stop at this point but went on to declare that the Project's takings had to pass the somewhat less rigorous scrutiny provided in *United States v. O'Brien*,<sup>99</sup> which prohibited an excessive impact on protected speech.<sup>100</sup> While the court held that the Project passed the *O'Brien* test,<sup>101</sup> use of the somewhat stricter standard is itself important, considering the court's rejection of the plaintiff's first amendment prior restraint argument.<sup>102</sup> The court was constrained to evaluate the plaintiff's claim instead of mechanically applying the rational relationship test. However, for the above reasons, the city's motion for summary judgment was granted.<sup>103</sup>

*Forty-Second Street Co. v. Koch*<sup>104</sup> was the final case decided by Chief Judge Motley regarding the Project. Plaintiffs, affected lease holders of low-budget motion picture theatres, claimed the condemnation of their buildings was motivated by prejudice toward the content of the movies shown and the racial makeup of the audience.<sup>105</sup> Judge Motley disposed of the first amendment "content" based argument in accord with his opinion in *G. & A. Books*.<sup>106</sup> As

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ment rights, especially if they could not relocate, this burden was not enough to make out a prior restraint. To find a prior restraint "would give businesses engaging in protected speech virtual immunity from land use changes." *Id.* at 909.

99. 391 U.S. 367 (1968)

100. 604 F. Supp. at 910-11. The test in *O'Brien* consisted of four parts. The plan must be approved: (1) if it is within the constitutional power of the government; (2) if it serves an important governmental interest; (3) if the interest is unrelated to freedom of expression; and (4) if the suppression of speech is no greater than necessary. 391 U.S. at 377.

101. 604 F. Supp. at 910-11. Utilizing the four-part *O'Brien* test, the court found: (1) the project was within the constitutional power of the government because urban renewal is part and parcel of local government's exercise of police power; (2) the project served an important governmental interest as it eliminated physical and social blight; (3) the project was unrelated to suppression of free speech regardless of state motives; and, (4) a less restrictive plan would not have accomplished the intended goals and other sexually explicit material was available within the area.

102. See *supra* notes 97 & 98 and accompanying text.

103. 604 F. Supp. at 914. The plaintiff had asserted that the United States Supreme Court decision of *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), which had allowed a zoning ordinance restricting the location of new adult theatres, but which had not shut down any existing adult theatres, stood for the proposition that the closing of existing adult theatres and book stores would amount to a retroactive restrictive zoning. The court disagreed. *Young*, the court noted, was acceptable "because the overall availability of sexually explicit movies would not [have been] . . . significantly curtailed." 604 F. Supp. at 911 (citing *Young*, 427 U.S. at 62). The *G. & A. Books* court also noted that the overall availability of sexually explicit materials would not be suppressed. Because the Project was undertaken pursuant to "content-neutral" goals, the "incidental economic impact" upon the theatre owners did not make the condemnation suppressive of speech. 604 F. Supp. at 911.

104. 613 F. Supp. 1416 (S.D.N.Y. 1985).

105. *Id.* at 1418.

106. *Id.* at 1423-28. See also *supra* notes 94-103 and accompanying text.

to the plaintiffs' equal protection claim, the court found that, since the Project did not contain an explicit racial classification and plaintiffs were unable to show a discriminatory purpose, their claim failed.<sup>107</sup> The court also found that the plan was undeniably class-biased but that it did not exclude plaintiffs' audience simply because they belonged to a particular race.<sup>108</sup>

This triad of cases exemplifies the profound impact that judicial deference to legislative enactments has had on the public use limitation of the fifth amendment. While the courts must use more than a rational basis test to evaluate a claim which alleges that the taking violates first amendment rights, such claims are available to relatively few property owners.<sup>109</sup> Nor, judging from *Rosenthal*, does *Midkiff's* "purely private" taking exception provide much comfort to an affected property owner, especially since the motives behind the taking are irrelevant if a public purpose can be found.<sup>110</sup>

## VI. CONCLUSION

*So they threw [Jezebel] down; and . . . trod her under foot. And they went to bury her; but they found no more of her than the skull, and the feet, and the palms of her hand.*<sup>111</sup>

Just as Biblical sovereigns could not exercise the power of eminent domain with impunity, the fifth amendment was designed to limit the sovereign's power in a less drastic way.<sup>112</sup> While it provides that private property cannot be taken for public use without just compensation, judicial interpretation has substantially diluted its potency. By classifying the exercise of eminent domain as socio-economic legislation,<sup>113</sup> the judiciary places this constitutional pro-

107. 613 F. Supp. at 1423.

108. *Id.* Judge Motley, in discussing class bias, stated that "[d]iscrimination based on wealth, however, does not pose the same sort of constitutional problems as does discrimination based on suspect classifications such as race or alienage." *Id.*

109. See *supra* notes 94-98 and accompanying text.

110. See *supra* notes 85 & 86 and accompanying text.

111. 2 *Kings* 9:33 & 35 (King James, Scofield Reference ed. 1980).

112. Indeed, the fifth amendment requires both a public use and just compensation. U.S. CONST. amend. V.

113. See *supra* text accompanying note 93. It is interesting to note that by classifying the power of eminent domain as socioeconomic legislation, the courts feel obliged to defer to the discretion of the legislature. This, however, may more be a judicial recognition of its own objectiveness and its duty not to bend to public pressure. As the Court in *Hawaii Housing Auth. v. Midkiff*, 104 S. Ct. 2321 (1984), stated, "[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id.* at 2331. Toward that end, if either a

tection in the hands of the legislature. To be sure, the government must be allowed to redevelop blighted areas and act for the public good; such governmental projects should not be held up in court for years. However, to abridge constitutional guarantees in the process is clearly not the answer. Perhaps a happy medium could be reached in the form of a balancing of interest analysis.<sup>114</sup> In this

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state or federal legislature determines substantial reasons for the taking, the courts will defer to the legislature in order to promote the serving of a public interest. *Id.*

114. Some commentators have suggested this approach for determining public use. See Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Professor Radin proposes that property be viewed in terms of the personhood. That is, certain property, both real and personal, is so entwined with one's *raison d'être* that it is literally a means by which one operates as a personal entity in the world. Accordingly, "[o]ne's expectations may crystallize around certain 'things,' the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth." *Id.* at 1004. Therefore, the loss of a certain sofa may be more devastating than discovering that one's house has slightly decreased in market value. Therefore, suggests Professor Radin, certain classes of property such as the family home, should be protected from taking unless the government be able to show a compelling state interest, and that the taking is the least intrusive alternative. *Id.* at 1006.

Citing *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973), the author notes that group property rights have at times been given greater protection. For instance, in *Pillar of Fire*, the court did not allow the state to take certain land sacred to a religious sect unless no adequate alternative could be shown. Nevertheless, the concept of the personhood of property has not found much judicial support. Professor Radin suggests that this may be based upon the government's need to appear even-handed and to reduce administrative costs. Therefore, courts will not presume that all single family homes are personal, as many are held solely for investment purposes, and a case-by-case inquiry by the government would be too cumbersome. 34 STAN. L. REV. at 1006. Professor Radin concludes that just as the right to privacy, though not specifically named in the Constitution, exists, so to should the personhood of property exist. Similarly, once a given property right is deemed personal, there should arise a *prima facie* case that the right to that property, to some extent, should be protected against governmental invasion. *Id.* at 1014-15.

See also Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978). Professor Berger proposes a three-pronged test for private takings. First, the party whose land is sought to be condemned, the condemnee, must have or nearly have a monopoly of the rights sought by the condemnor. Second, the total values of the properties involved after the change in resources is higher than the total values before the change. Third, the intensity of the objective need for the condemnor's taking in connection with the beneficial use of his property clearly outweighs the degree of impingement upon the interests of the condemnee. *Id.* at 235. This third requirement would make it unfair to allow an involuntary taking for frivolous reasons. Also, even if the taking were based upon sound reasoning, it could not be justified simply to make one individual, the condemnor, better off than the other, the condemnee. *Id.* at 242.

Public takings, while not so stringently examined, should be subject to similar standards. A less strict condemnee monopoly should be required. An increase in market value, when meaningful, should be used. It should be shown that the public benefit outweighs the harm to the condemnee. This latter requirement, however, should balance the amount of public taking against the harm to the condemnee. Thus, if the benefit to the public is insubstantial, such as building a public golf course, and the harm to the private owner is great, such as a farm owner whose property is sought for the public golf course, then the taking should yield to the private interest. The author likens the absolute right of a government to take prop-

vein, cases involving the exercise of the power of eminent domain could be given preference in judicial scheduling. Since the state's interest in resolving the dispute in a timely fashion would thereby be achieved, the judge hearing the matter would have the time to scrutinize the affected property owner's complaint. While this approach is far from being a cure-all, it is a plausible first step. However, until some type of corrective measure is taken, the private property owner is left with a steadily eroding constitutional protection.

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erty for the public good to the doctrine of sovereign immunity. Just as sovereign immunity is weakening as a judicial concept, so too should the absolute right to take. *Id.* Professor Berger concludes, however, that in the final analysis, this rule would forbid only the more frivolous and arbitrary public takings. *Id.* at 243.