The Abstruse Science: *Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*

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The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate

Charles E. Cohen*

ABSTRACT

The Fifth Amendment provides that the government may use its eminent domain power to take property only if that property will be put to a "public use." This article examines the controversial 2005 decision in Kelo v. City of New London, in which the Supreme Court held that a private economic development project could constitute such a "public use." I argue that the Kelo Court, while superficially appearing to do no more than reiterate well-established precedent requiring deference to the decisions of government actors on the public use question, actually suggested a new test for some kinds of takings. At least with respect to economic development projects, the Court indicated that it might look for the existence of a comprehensive development plan as strong evidence that a taking of property was truly for a public use and not for the impermissible end of favoring private interests. I argue that by establishing a test that inquires into the process by which takings decisions are made, the Court has adopted a representation reinforcement model of constitutional decision-making. Under the representation reinforcement model, a Court that is unable or unwilling to promulgate a precise rule for resolution of a constitutional question instead relegates the decision to the political process, but then scrutinizes the process to make sure that it operates fairly.

I further argue that Kelo provides an excellent occasion for examining the connection between modern public use jurisprudence and that of the Lochner era. During the Lochner era, according to

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conventional wisdom, the Justices substituted their own economic and political philosophies for legitimate constitutional doctrine in order to invalidate laws they disliked. I agree with the common sentiment that the Court's modern reluctance to second-guess governmental public use questions is a reaction to the perceived "judicial activism" of the *Lochner* era. But I argue that, ironically, modern public use doctrine produces results that are essentially indistinguishable from those of the *Lochner* era. Finally, I argue that the rule of *Kelo* is likely to have little impact on the use of eminent domain for economic development projects, nor will it provide much protection against abuse of the taking power.

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INTRODUCTION

Whatever happened to the "purely-private taking," and would we know one if we saw it? It has long been a truism of American eminent domain law that the Fifth Amendment prevents the government from taking property for anything but a "public use." As the courts have often stated, a "purely private taking"—that is a "taking from A to give to B" with no associated public benefit—is forbidden as beyond the legitimate power of government. Yet under the modern cases, courts generally exercise extreme deference to government assertions that a proposed use of property intends to condemn is "public." In fact, anything that government officials could conceivably believe might bestow a public benefit or advantage is considered to be a "public use" for Fifth Amendment purposes, even if private interests are also benefited. Indeed, the Supreme Court's most recent public statement on the meaning of the public use requirement, expressed in the controversial 2005 decision in *Kelo v. City of New London,* suggests, at least superficially, that it is almost impossible for an exercise of eminent domain to be considered purely private. In *Kelo,* the Court held that the indirect economic benefits expected from a private redevelopment project could constitute a public use, thus allowing the government to use its eminent domain power to assemble land for the project. This was true even though numerous private interests might also benefit. Since the government could conceivably believe that any transfer of private property from one person to another could bestow some public advantage, it follows that, at least

1. The term "purely private taking" appears in Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 80 (1937), and has been used repeatedly in U.S. Supreme Court jurisprudence. Throughout this article I will use it to refer, as the Court has, to a taking from one party followed by a transfer to another private party without a resulting public benefit or advantage. Such takings are thought to improperly favor private interests and not the public.


3. The Fifth Amendment provides in relevant part: "[N]or shall private property be taken for public use without just compensation." U.S. Const., amend. V.


as far as legal definitions go, there can be no such thing as a “purely-private” taking.

Although much scholarly commentary has asserted that the *Kelo* decision did nothing to limit the circumstances in which property can be said to be for a “public use,” I argue otherwise. Significantly, the Court suggested a change in the modern doctrine requiring near complete judicial deference to the government’s decisions regarding what constitutes a public use. Under the approach suggested in *Kelo*, the existence of a credible planning process may be a significant factor in determining whether a planned project satisfies the public use requirement. If I am correct, then the court has shifted from an “ends” test (considering what ultimate ends would be served by the project) to a process-based approach designed to flush out uses of the eminent domain power motivated by an improper desire to benefit private interests.

In adding this nuance to public use jurisprudence, the *Kelo* Court signaled that, at least within this one area of substantive law, it had moved toward the school of constitutional interpretation known as “representation reinforcement.” The representation reinforcement model holds that where the text of the Constitution is vague or silent, constitutional decision-making should be left to the political process, subject only to judicial review for signs of process failure, including the failure of groups to be adequately represented and private interest group “capture.” The *Kelo* majority, and particularly a separate concurrence by Justice Kennedy, suggested that the existence of a comprehensive development plan, presumably created with the input of numerous affected groups and governed by local planning law, would be a significant factor in drawing the line between public and private takings.

In addition to arguing that *Kelo* signified a practical and theoretical shift in the Court’s approach to interpreting the public use clause, I further contend that the case provides an excellent starting point for an important and overlooked inquiry into the impact of the so-called *Lochner* era on modern public use law. The *Lochner* era, of course, refers to a period spanning from roughly

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the 1870s through the late 1930s, when the Supreme Court employed a now-discredited interpretation of the Due Process Clause of the Fourteenth Amendment to invalidate a significant number of government economic and public welfare regulations. Many critics contend that the era was dominated by intrusive and undemocratic judicial activism by justices determined to impose their laissez faire economic philosophy on the country.

The rhetoric of *Kelo* and other modern public use cases suggest that the Court, as in other areas of constitutional law, is determined to avoid the excesses of the *Lochner* era by refusing to substitute its own judgment for that of the democratic branches of government on the "public use" question. I argue, however, that while the Court's modern approach to the public use question does not in any way resemble the "activism" with which the *Lochner* Court is sometimes associated, modern doctrine has, nonetheless, produced essentially the same results as were typical of the *Lochner* era. I further argue that this is partly because today's public use law shares some of the underlying principles of *Lochner*-era jurisprudence, and partly because it rejects others. My analysis offers what I believe are significant insights into the often unexpected and seemingly irreconcilable consequences of changes in theories of constitutional review that occur as a result of changes in society at large.

Finally, I contend that the Supreme Court's shift toward a model of representation reinforcement in adjudicating public use cases is likely to inadequately enforce the public use clause, with the result that one of the key purposes of the public use requirement—that of preventing political elites from capturing the political process and employing it to essentially appropriate some of the wealth of those property owners who are disadvantaged in the political process—may not be realized.

In Part I of this article, I describe and analyze the three significant modern public use cases, demonstrating their broad deference to legislative decision-making and explaining the new test


10. See McUsic, *supra* note 8, at 611.

suggested in *Kelo*. In Part II, I discuss the jurisprudence of the *Lochner* era as it relates to both general economic regulation and the public use clause. In Part III, I discuss the justifications for the eminent domain power and the justice and efficiency concerns that attend overuse of the power. In Part IV, I discuss the theories of constitutional decision-making applicable to modern public use doctrine and discuss how the *Kelo* decision marks a shift toward greater emphasis on a representation reinforcement model. In Part V, I analyze several state court public use decisions that employ a process-based analysis similar to that suggested by *Kelo*. I also discuss the strengths and weakness of the new *Kelo* rule. In Part VI, I conclude that while the process-based approach set forth in *Kelo* is a minor improvement over previous law, it is unlikely to significantly limit the use of eminent domain for economic development or otherwise reduce eminent domain abuse.

I. THE TWENTIETH-CENTURY PRECEDENTS—AND *KELO*

A. **Broad Deference to Political Decisions**

In this section, I briefly discuss the three significant modern public use cases: *Berman v. Parker,¹²* *Hawaii Housing Authority v. Midkiff,¹³* and *Kelo v. City of New London.¹⁴* All of these cases represent stark examples of the Supreme Court's near-complete deference to governmental decisions as to what constitutes a "public use." A nagging concern underlying all three cases is that the degree of deference demonstrated by the Court results in a virtual repeal of the Fifth Amendment's public use requirement. *Kelo*, however, suggests a slight shift by hinting that concerns regarding abuse of eminent domain and improper favoritism of private interests may be addressed by examining whether the government is acting pursuant to a comprehensive plan.

1. **Berman v. Parker**

In *Berman*, the owners of a department store challenged the District of Columbia's attempt to use the power of eminent domain to take their property in furtherance of an urban redevelopment plan to be implemented in a blighted neighborhood.¹⁵ The plan

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contemplated that some condemned property would be transferred to private entities. The property owners raised two arguments that are significant for my purposes. First, they complained that the intended transfer to private interests rendered the taking “private.” Second, they complained that because their particular property was not blighted, the government should be prevented from taking it.

The Court unanimously upheld the taking. Justice Douglas addressed the claim that the taking was not for a “public purpose” by explaining:

We deal . . . with what has traditionally been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the project of legislative determinations addressed to the purposes of government, purposes neither abstractly not historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been determined in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of public needs to be served by social legislation.

He explained that the Court would not second-guess the city's assertion that the property would be put to a public use, because “[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.” Economic development clearly provided a public benefit and, therefore, it was of little consequence that private entities would ultimately hold an interest in the taken property. He explained that “the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.” Moreover, the department store owners’ contention that their own property should be spared because it was not

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16. Id.
17. Id. at 31.
18. Id.
19. Id. at 36.
20. Berman, 348 U.S. at 32. See also Thomas Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 70 (1986-87) (explaining: “Police power,' is here synonymous with the extent to which government may constitutionally regulate private activity. It defines those issues with which the government may concern itself.”).
22. Id. at 33.
blighted was unavailing because "[o]nce the question of public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."\textsuperscript{23}

2. Hawaii Housing Authority v. Midkiff

Thirty years later, in \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{24} a unanimous Supreme Court rejected a challenge to a land redistribution scheme in Hawaii. Long-entrenched land-holding patterns had left most of the state's privately-owned land in the hands of 72 owners.\textsuperscript{25} The state planned to take much of the land and sell it in fee to the tenants then in possession.\textsuperscript{26} The landowners contended that because private interests would be the ultimate transferees, the takings were not for a public use.\textsuperscript{27}

Relying on \textit{Berman}, the Court reiterated its long-held view that condemnation could be employed to advance any legitimate governmental goal.\textsuperscript{28} Justice O'Connor, writing for a unanimous court, declared: "The public use requirement is coterminous with the scope of a sovereign's police powers."\textsuperscript{29} Since "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," the land reform plan constituted a public use.\textsuperscript{30} The Court emphasized its historic disapproval of "purely private takings."\textsuperscript{31} But, it continued, "where the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."\textsuperscript{32} Referring implicitly to institutional legitimacy concerns, the Court explained that, "[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 eminent domain."\textsuperscript{33} Referring implicitly to institutional competency concerns, the Court stated that

\textsuperscript{23} Id. at 35-36.
\textsuperscript{24} Midkiff, 467 U.S. 229.
\textsuperscript{25} Id. at 232.
\textsuperscript{26} See id. at 232-34.
\textsuperscript{27} See id. at 234-35.
\textsuperscript{28} See id. at 239-40.
\textsuperscript{29} Midkiff, 467 U.S. at 240.
\textsuperscript{30} Id. at 241-42.
\textsuperscript{31} Id. at 245.
\textsuperscript{32} Id. at 241.
\textsuperscript{33} See id. at 244.
"whether in fact the provision will accomplish its objectives is not
the question: the [constitutional requirement] is satisfied if ... the
... [state] Legislature rationally could have believed that the [Act]
would promote its objective." Noting its previous reliance on Old
Dominion Co. v. United States, the Court explained that defer-
ence to governmental public use determinations was required "un-
til it is shown to involve an impossibility." While courts did have
a narrow role in reviewing government's decision to use the emi-
inent domain power, the Court declared: "[w]hen the legislature's
purpose is legitimate and its means are not irrational, our cases
make clear that 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."


In Kelo v. City of New London, property owners sued to block
the use of the eminent domain power to take their homes in order
to construct a mixed-use economic development project. They
argued that the United States Constitution prohibited the exercise
of eminent domain power to allow for economic development by
private interests. They requested a "clear, bright-line rule that
the trickle-down benefits of successful business do not make pri-
ivate business a public use." In the alternative, they argued that
even if economic development satisfied the public use test, the
planned condemnations should be prevented absent "a reasonable
certainty that the condemnations w[ould] result in [the claimed]
public benefits." Because the benefits—and even some key de-
tails—of the proposed project were uncertain, they contended that
the Court should prohibit the use of eminent domain to advance
the city's plan. Failing to put a stop to the proposed condemna-
tions would leave nothing to "stop a city from transferring citizen

34. Midkiff, 467 U.S. at 242 (emphasis added; alteration in original) (quoting W. & S.
35. 269 U.S. 55 (1925).
36. Midkiff, 467 U.S. at 240 (quoting Old Dominion Co., 269 U.S. at 66).
37. See id.
38. Id. at 247-48.
108).
40. Id.
41. Id.
42. Id.
43. Id. at 38.
A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.\textsuperscript{44}

A sharply-divided Court upheld the Connecticut Supreme Court's decision\textsuperscript{45} rejecting the property owners' arguments.\textsuperscript{46} Most of Justice Stevens' majority opinion was typical of previous Supreme Court public use cases. Promoting economic development, according to the Court, was no different from other governmental goals previously upheld as public uses.\textsuperscript{47} But without explicitly saying so, the majority opinion hinted that the proposed condemnations at issue withstood charges that they were purely private takings in large part because they would be "executed pursuant to a 'carefully considered' development plan."\textsuperscript{48}

The Court reiterated the proposition that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular party."\textsuperscript{49} It emphasized that condemnation could not be predicated on a pretextual public use. In this case, though, the development plan was "carefully considered," and showed no evidence of a pretextual motivation.\textsuperscript{50} In addition to suggesting that the existence of a "carefully considered" plan supported a conclusion that a taking was for a public use, the majority further stated that "a one-to-one transfer of property, executed outside the confines of an integrated development plan would certainly raise a suspicion that a private purpose was afoot."\textsuperscript{51} Such a transfer, however, was not before the Court and could be evaluated if it were to occur.\textsuperscript{52}

Justice Kennedy joined the 5-4 majority opinion. But he wrote a separate concurring opinion as well, setting forth his own views on how the courts should approach alleged private takings. He declared that "meaningful rational basis review . . . is required under the Public Use Clause"\textsuperscript{53} and that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Pub-

\textsuperscript{44} Kelo, 545 U.S. at 470-71.
\textsuperscript{45} Kelo v. City of New London, 843 A.2d 500 (Conn. 2004).
\textsuperscript{46} Kelo, 545 U.S. at 483-88.
\textsuperscript{47} See id. at 477.
\textsuperscript{48} Id. (quoting Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004); see also Garnett, supra note 4, at 447 (noting that planning may be "constitutionally significant").
\textsuperscript{49} Kelo, 545 U.S. at 477 (citing Midkiff, 467 U.S. at 245).
\textsuperscript{50} Id. (quoting Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004)).
\textsuperscript{51} Id. at 487.
\textsuperscript{52} Id.
\textsuperscript{53} Kelo, 545 U.S. at 491 (Kennedy, J., concurring).
lic Use Clause."\textsuperscript{54} He called on courts to thoroughly scrutinize plausible accusations of "impermissible favoritism."\textsuperscript{55} He denied that "review under Berman and Midkiff imposes no meaningful judicial limits on the government's power to condemn any property it likes."\textsuperscript{56} Rather, he continued,

a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.\textsuperscript{57}

But, he explained, the facts of the Kelo case did not raise concerns of favoritism.\textsuperscript{58} This was primarily, he explained, because extensive evidence suggested that the city had planned the project out of a sincere desire to improve economic conditions and without any particular private beneficiaries in mind.\textsuperscript{59}

\textbf{B. A New Test}

Prior to Kelo, the Court had never attempted to set forth a rule for distinguishing a permissible taking and a "purely-private taking. Kelo, though, suggests that the process by which a decision to take property is made may be a significant factor. The majority's use of such terms as "carefully considered development plan,"\textsuperscript{60} "integrated development plan,"\textsuperscript{61} and "comprehensive redevelopment plan"\textsuperscript{62} implies that a taking will generally not be considered "purely private" if undertaken pursuant to some degree of "comprehensive" planning. Conversely the \textit{absence} of a comprehensive plan may be considered "suspicious," thus, under circumstances not defined by the Court, presumably triggering a departure from the rational basis review typically employed in public use cases. Such cases might lead to, in Justice Kennedy's words, "a more

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} \textit{Id.} at 492.
\item \textsuperscript{57} \textit{Id.} at 493.
\item \textsuperscript{58} \textit{Kelo}, 545 U.S. at 493 (Kennedy, J., concurring).
\item \textsuperscript{59} \textit{See} \textit{id.} at 491-92.
\item \textsuperscript{60} \textit{Id.} at 469 (majority opinion) (quoting \textit{Kelo v. City of New London}, 843 A.2d 500, 536 (Conn. 2004)).
\item \textsuperscript{61} \textit{Id.} at 474.
\item \textsuperscript{62} \textit{Id.} at 488.
\end{itemize}
stringent standard of review," perhaps even the adoption of a "presumption (rebuttable or otherwise) of invalidity."  

II. THE STRANGE PATH FROM LOCHNER TO KELO

As already discussed, modern public use holdings have insisted on strict deference to legislative decisions. In fact, judicial deference on the public use issue has led some to complain that the public use clause is essentially dead. The Court's slavish devotion to deference frequently is seen as desire to avoid the excesses of the Lochner Court. In this section, I discuss the constitutional jurisprudence of the Lochner era, both in the realms of economic regulation and eminent domain law. I argue that the Court's treatment of the public use requirement, unlike its treatment of other economic issues, reflected a pronounced tendency to uphold governmental action and to defer to political actors.

A. Lochner and Economic Regulation

Decisions of the Lochner Court were generally characterized by a broad interpretation of the reach of the Due Process Clause, specifically its prohibition against deprivation of property without due process of law. This expanded reach was accomplished by defining "property," a term that in the past had generally been applied only to title in land, buildings, and personal property, to include a wide array of economic rights. Eventually, "property" became synonymous with "economic value," and, as McUsic has observed, "anything from a legal expectation to a 'product of the mind,' if it could possess some market value, was property for constitutional purposes." From this it followed that any economic regulation which diminished value in the hands of a regulated interest might violate the Due Process Clause.

There were key exceptions to the Lochner Court's prohibition against regulations that would diminish the value of broadly conceived property, but these exceptions were extremely limited. The

63. Kelo, 545 U.S. at 493 (Kennedy, J., concurring).
64. Id.
65. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162 (1985) ("Scholarly commentators have rivaled each other in their efforts to read the [public use] limitation out of the Constitution.").
66. See McUsic, supra note 8, at 607, 604.
67. Id. at 614.
68. Id. at 615.
69. See id. at 618.
Court recognized only a very narrow category of legitimate governmental objectives that might justify interfering with property interests, primarily those designed to correct harms that were either attributable to a regulated interest or objectionable at common law. The government could, in keeping with common law, regulate businesses that were "affected with a public interest." Thus, in *Munn v. Illinois* the Court rejected a warehouseman's challenge to a law setting maximum charges for grain storage because

> property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

Moreover, the government was free to regulate pursuant to its police powers the sovereign's inherent authority to protect the public's safety, health and welfare. Thus, the government was free to pass laws abating common law nuisances. To ensure that the government did not stray beyond its limited authority, the Court employed rigorous means/ends analysis, testing whether the law in question was truly health and welfare legislation. The Court also applied what has been called a "cause/effect" test, inquiring into whether the regulated interest had, in fact, caused the harm that the challenged legislation was supposedly intended

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70. *See Sunstein, supra* note 8, at 877.
71. 94 U.S. 113 (1876).
73. On the police power, see generally STEVEN J. EAGLE, REGULATORY TAKINGS 217-58 (2d ed. 2001).
74. *See McUsic, supra* note 8, at 618-19.
75. *See id. at 623. See also Mugler v. Kansas, 123 U.S. 623, 665-66 (1887) (holding that state's police power extended to regulating manufacture and sale of liquors and rejecting brewery's due process claim on ground that "property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community").
76. *See, e.g., Lochner v. New York, 198 U.S. 45, 58 (1905) (rejecting law setting maximum work hours for bakery employees as "beyond the police power" because the Court saw "no reasonable foundation for holding [the law] to be necessary or appropriate to safeguard the public health, or the health of the individuals who are following the trade of a baker"). Accord *McUsic, supra* note 8, at 620.
77. *See McUsic, supra* note 8, at 620.
to ameliorate.\textsuperscript{78} Such scrutiny was intended to identify legislation that, "while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, [was], in reality, passed from other motives."\textsuperscript{79}

B. \textit{Explanations for Lochner-Era Jurisprudence}

There are two explanations for the jurisprudence of the \textit{Lochner} era that I consider particularly relevant here. Howard Gillman, in \textit{The Constitution Besieged}, rejects the view that the \textit{Lochner} Court acted out of a determination to impose the justices' personal \textit{laissez faire} economic views on the country.\textsuperscript{80} He sums up the Court's motivation as follows:

\begin{quote}
The object of the agenda was not to promote the value of market liberty per se, nor to reduce government intervention in the market to a bare minimum; rather, the goal was to prohibit the government from passing laws designed merely to promote the interests of certain classes at the expense of their competitors, to impose special burdens and benefits on particular groups without linking those burdens and benefits to the welfare of the community as a whole.\textsuperscript{81}
\end{quote}

Cass Sunstein has argued that \textit{Lochner} symbolizes "an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of common law."\textsuperscript{82} This status quo was "natural" and "neutral," essentially pre-political.\textsuperscript{83} Thus, redistributive government meas-

\textsuperscript{78} See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 558 (1923) (striking down minimum wage law in part because "the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty"). Accord McUsic, supra note 8, at 621.

\textsuperscript{79} \textit{Lochner}, 198 U.S. at 61.

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed.

\textit{Id.}

\textsuperscript{80} See HOWARD GILLMAN, THE CONSTITUTION BESIEGED 61 (1993).

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} Sunstein, supra note 8, at 875.

\textsuperscript{83} See \textit{id.} at 879.
ures, or regulations designed to afford certain individual protections, were prohibited. According to Sunstein, such measures “did not fall within the ‘police power’; the employer had committed no common law wrong, and regulatory power was largely limited to redress harms recognized at common law.” To demonstrate his concept of the neutral baseline from which, in the Lochnerian view, government could not stray, Sunstein contrasts two significant minimum wage cases. In Adkins v. Childrens Hospital, the Court described a mandatory minimum wage as “a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.”

Fourteen years later, in West Coast Hotel v. Parrish, a case widely recognized as symbolizing the demise of the Lochner era, the Court upheld a minimum wage law similar to that at issue in Adkins, essentially inverting the economic assumptions underlying the earlier case. In West Coast Hotel, the Court described workers as “defenseless against denial of a living wage” and constituting a “burden” to be born by the public. The Court continued: “What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. . . . The community is not bound to provide what is in effect a subsidy for unscrupulous employers.”

Sunstein sees the two cases as reflecting opposing “baselines.” In Adkins, the baseline is the economic status quo. In the Lochnerian view, property includes the right to be free from costs imposed to alter this status quo, the “neutral” baseline. When an employer must bear a cost to depart from this baseline, he is essentially subsidizing the public, and a regulation requiring such redistribution is essentially a “taking” of the employer’s property. This is only true, of course, if the regulated interest enjoyed “an antecedent right to the property in question.” Because Lochner

84. See id. at 877.
85. Id.
86. 261 U.S. 535 (1923).
88. 300 U.S. 379 (1937).
89. See McUsic, supra note 8, at 610 n.16; accord Sunstein, supra note 8, at 876.
90. See West Coast Hotel, 300 U.S. at 399.
91. Id.
92. Sunstein, supra note 8, at 882.
and its progeny recognized a preexisting "right" to the value which
would be taken or diminished by a regulation, upsetting such a
right violated the economic "neutrality" required by the Due Proc-
ess Clause.93

In West Coast Hotel, according to Sunstein, the baseline is a
state of distributive justice from which the employer, in the ab-
sence of wage regulation, departs.94 Now it is the public which
must "subsidize" the employer, whose conduct perpetuates what
the community may deem a departure from what should be the
appropriate state of affairs. The West Coast Hotel baseline rejects
the notion that the status quo is "neutral" or "natural," and there-
fore admits of the possibility that government is free to change
it.95 Thus, West Coast Hotel embodies principals expressed in Jus-
tice Holmes’ dissent in Lochner. There, Holmes wrote:

This case is decided upon an economic theory which a large
part of the country does not entertain. If it were a question
whether I agreed with that theory, I should desire to study it
further and long before making up my mind. But I do not
conceive that to be my duty, because I strongly believe that
my agreement or disagreement has nothing to do with the
right of a majority to embody their opinions in law. . . . The
14th Amendment does not enact Mr. Herbert Spencer's Social
Statics. . . . [A] Constitution is not intended to embody a par-
ticular economic theory, whether of paternalism and the or-
ganic relation of the citizen to the state or of laissez faire. It
is made for people of fundamentally differing views, and the
accident of our finding certain opinions natural and familiar,
or novel, and even shocking, ought not to conclude our judg-
ment upon the question whether statutes embodying them
conflict with the Constitution of the United States.96

Perhaps the most emphatic statement of post-Lochner judicial
approaches to government regulation can be found in the 1938
case of United States v. Carolene Products Co.97 There, the Court
set forth a mode of analysis for economic legislation that is now
firmly-entrenched, declaring:

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93. Id at 876, 882.
94. Id. at 876.
95. See generally id. at 881.
96. Lochner, 198 U.S. at 75-76 (Holmes, J., dissenting).
97. 304 U.S. 144 (1938).
the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

C. Lochner and "Public Use"

Modernly, some property rights activists have urged a return to greater judicial scrutiny of economic regulation, which of course includes the use of eminent domain to promote particular economic interests. They urge a return to, or at least a reconsideration of, more robust due process property protections. Applying Sunstein's rubric, they might be said to view stability of property rights as a "neutral" value, bolstered by common law, to be disturbed only with strong justifications.

Paradoxically, though, it is difficult to make the case that security of possession was well-defended by the American common law of eminent domain. It is not the case that a political or judicial consensus consistently elevated possession of property over other economic interests throughout much of our history. In the realm of eminent domain law, the most commonly litigated issue concerned whether condemned property, once taken, would be put to a public use. The resolution of the issue, in theory, at least, turned on the breadth of the meaning afforded the term "public use." As has been widely-observed, the meaning of the term "public use" is susceptible to two different definitions. Under the so-called "narrow view," a taking satisfies the public use requirement only if after the taking, the public has the right to use the property, or the property is owned by the government. Under the "broad view," the public use requirement is met if the taking produces some public advantage or benefit.

Neither view could claim dominance among the many conflicting state court decisions of the Nineteenth Century.

98. On the history of the public use requirement generally, see Cohen, supra note 4, at 500-516.
100. See generally Cohen, supra note 4, at 493-94.
101. See id. at 504-08; see also Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 OR. L. REV. 203, 209 (1978) (stating that "[t]he two doctrines competed,
hand, adoption of the broad view allowed liberal use of the eminent domain power to spur economic development. On the other hand, many courts grew concerned that widespread adoption of the broad view threatened the security of property, or that private interests had co-opted state legislatures. Thus, in the mid-Nineteenth Century, the narrow view grew in prevalence. But even where courts putatively adopted the narrow view, according to Erroll Meidinger, many "developed elaborate methods of evading its implications." Ultimately, whether explicitly stated or otherwise, the broad view came to dominate.

Even during the Lochner era, when the Court was reluctant to permit political consensus to override economic rights, the U.S. Supreme Court did not consistently apply either the broad or narrow view of public use. It is worth recalling that although the federal government's power to take property is governed by the Fifth Amendment's Takings Clause, in actual practice most of the eminent domain cases decided by the Court prior to the Twentieth Century were decided under the Due Process Clause of the Fourteenth Amendment. This was because until the late Nineteenth Century, most eminent domain cases began in the state courts, where state governments would condemn under their own initiative or as proxies for the United States. Because the Fifth Amendment Takings Clause was not incorporated against the states until 1897, the Fourteenth Amendment Due Process Clause provided the best federal constitutional basis on which to

leaving the commentators in hopeless confusion"); Errol E. Meidinger, The "Public Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1, 24 (1980) (stating that "two separate positions, the 'broad' public benefit view and the 'narrow' use-by-the-public view, began to grow up beside each other").


103. See Berger, supra note 101, at 208.


106. Meidinger, supra note 101, at 24. Accord Nichols, supra note 105, at 619 (arguing that many courts adopted "loopholes, . . . limitations, . . . and . . . evasions . . . in order to avoid bringing [the narrow] view into irreconcilable conflict with the expanding industrialism of the times, and the quick exploitation of natural resources which was felt to be necessary").

107. See Meidinger, supra note 101, at 28.


challenge a condemnation. In the absence of a justifying public use (however broadly defined), an act of condemnation would be held to violate the Fourteenth, not the Fifth, Amendment.\textsuperscript{110}

In that sense, eminent domain law might be thought to fit neatly within the jurisprudence of economic regulation developed by the \textit{Lochner} Court under the Due Process Clause. One might expect, then, to find a clear tendency toward restraint of the eminent domain power, which, after all, could severely interfere with property rights, among \textit{Lochner}-era cases. But a close examination of these cases shows a marked tendency to uphold proposed takings. A few patterns are clear. First, the Court was extremely willing to accept a broad view of the term “public use.” Second, the justices evinced a marked tendency to defer to the judgments of state courts regarding whether a taking was permissible. The Court justified this deference based on a belief that local courts were in a better position to judge the public needs of their own states.

An example of the Court’s willingness to stretch the term “public use” to encompass what might be considered private takings is the case of \textit{Head v. Amoskeag Manufacturing Co.}\textsuperscript{111} That case involved a challenge to the New Hampshire Mill Act. Like similar acts that had at one time existed in virtually every state,\textsuperscript{112} the New Hampshire law limited the damages recoverable by an upper riparian neighbor whose lands were flooded following construction of a mill dam.\textsuperscript{113} The \textit{Head} Court noted that the common-law remedy for such flooding might have included successive lawsuits or removal of the dam.\textsuperscript{114} Thus, prior to the mill acts, a manufacturer could not construct a mill dam without first obtaining consent of his upriver neighbors. Under the acts, though, the remedy was reduced to a single payment or annual damages assessed in a single proceeding.\textsuperscript{115} The effect of this statutory adjustment of remedies, according to Lawrence Berger, was that the mill owner obtained “the right to condemn the lands of his upper neighbor by

\begin{itemize}
\item \textsuperscript{110} See, \textit{e.g.}, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (holding that “[t]he taking by a state of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States”).
\item \textsuperscript{111} 113 U.S. 9 (1885).
\item \textsuperscript{112} \textit{Head}, 113 U.S. at 16-20.
\item \textsuperscript{113} \textit{Id.} at 12.
\item \textsuperscript{114} \textit{Id.} at 24.
\item \textsuperscript{115} \textit{Id.}
\end{itemize}
flooding.”\textsuperscript{116} The aggrieved property owner in \textit{Head} claimed that by enacting the law and thus enabling the owner of the mill to flood his lands with minimal legal exposure, the state had taken his land for a private use.\textsuperscript{117} The Court, however, side-stepped the public use issue, declining to see the controversy as involving the eminent domain power at all.\textsuperscript{118} Instead, the Court cast the case as confronting what was essentially a land use regulation designed to reconcile conflicting demands. The law, according to Justice Gray, was clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water-power of running streams, which without some such regulation could not be beneficially used.\textsuperscript{119}

Soon after deciding \textit{Head}, the Court made one of its most emphatic statements regarding deference to the legislature. In \textit{United States v. Gettysburg Electric Railway Co.},\textsuperscript{120} the Court upheld a decision by the federal government to condemn land for creation of a Civil War historical park.\textsuperscript{121} Justice Peckham first asserted the general principle that the Court should defer to congressional decisions regarding whether the property would be put to a public use. He explained:

\begin{quote}
It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th Ed. § 600) that, when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.\textsuperscript{122}
\end{quote}

Indeed, Congress's authority in this area was so broad that, according to the Court, it was not necessary to identify a particular

\begin{footnotes}
\item[116] Berger, \textit{supra} note 101, at 206.
\item[117] See \textit{Head}, 113 U.S. at 16.
\item[118] See \textit{id.} at 21.
\item[119] \textit{Id.} at 26.
\item[120] 160 U.S. 668 (1896).
\item[121] \textit{Gettysburg Elec.}, 160 U.S. at 682.
\item[122] \textit{Id.} at 680.
\end{footnotes}
Constitutional provision to justify the use of eminent domain. It explained:

It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war, and to create and equip armies and navies. It has the great power of taxation, to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by congress, must be valid.123

Still, there were limits. In one of the few times the Court struck down a taking as a public use occurred in 1896, with the decision in Missouri Pacific Railway v. Nebraska.124 There, the court held that a Nebraska order requiring a railroad to permit private individuals to build a grain elevator on its land was an unconstitutional taking of private property for private use.125 This decision, however, was an anomaly.

In Fallbrook Irrigation District v. Bradley,126 plaintiff Bradley challenged on Fourteenth Amendment Due Process grounds an assessment levied against her property to fund an irrigation district on the theory that the ditches that would be built by the district would not be for a public use.127 The Court noted that the

123. Id. at 681.
124. 164 U.S. 403 (1896). The Court incorporated the Fifth Amendment in its entirety against the states in Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 228 (1897).
126. 164 U.S. 112 (1896).
127. Bradley, 164 U.S. at 154, 156. The plaintiff claimed, among other things, []that the use for which the water is to be procured is not in any sense a public one, because it is limited to the landowners who may be such at the time when the water is to be apportioned, and the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the state.
public use question had, "in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the state government." Nonetheless, the Court went on to conduct its own independent analysis of whether the irrigation district would, in fact, constitute a "public use." After discussing various state constitutional provisions, state legislation and state court rulings, Justice Peckham explained: "[w]e do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use." Nonetheless, he noted that the Court would afford "great respect" to the views of the "people and legislature and courts of California." He concluded: "[v]iewing the subject for ourselves, and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California."

A few years later, the Court again deferred to local decision-making, but further elaborated upon its reasons for doing so. In Clark v. Nash, a property owner challenged a law permitting a neighbor to enlarge and use an irrigation ditch running over his neighbor's property. The Court explained:

In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are al-

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128. Id. at 156.
129. Id. at 158-59.
130. Id. at 160.
131. Id.
132. 198 U.S. 361, 368 (1905).
ways, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.\textsuperscript{133}

The next year, the Court applied similar deference to local officials’ determinations regarding the particular needs of their jurisdiction in \textit{Strickley v. Highland Boy Gold Mining Co.}\textsuperscript{134} In \textit{Strickley}, the Court upheld a Utah statute under which a mining company had condemned an aerial right of way over the property of another to run a bucket line. Again, the Court deferred to local officials’ judgment concerning what rules were necessary to advance a public use. It explained:

\begin{quote}
In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.\textsuperscript{135}
\end{quote}

Still, the Court, theoretically, at least, had not abandoned its duty to make an independent determination of whether a public use was served by a taking. In \textit{Hairston v. Danville and Western Railway Co.},\textsuperscript{136} the Court again emphasized that the public use question could depend a great deal on the particular circumstances prevailing in a jurisdiction. There, the Court declared “the propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what

\begin{footnotes}
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\item \textsuperscript{133} Clark, 198 U.S. at 367-68.
\item \textsuperscript{134} 200 U.S. 527 (1906).
\item \textsuperscript{135} Strickley, 200 U.S. at 531.
\item \textsuperscript{136} 208 U.S. 598 (1908).
\end{itemize}
\end{footnotes}
should be deemed public uses in that state."\footnote{137} But, the Court continued:

We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state Constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States.\footnote{138}

In \textit{Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.},\footnote{139} the Court confronted a local law that permitted a power company to condemn land water land and water rights in order to produce and sell hydroelectric power. The Court again stressed the influence of local officials while making its own determination:

The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that

\footnotesize{137. Hairston, 208 U.S. at 607.}
\footnotesize{138. Id.}
\footnotesize{139. 240 U.S. 30 (1916).}
purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. The respect due to the judgment of the state would have great weight if there were a doubt. But there is none.\textsuperscript{140}

As the \textit{Lochner} era wore on and eventually ended, the rhetoric of public use cases shifted, stating more frankly why the Court would not interfere with legislative decisions. In \textit{United States ex rel. Tennessee Valley Authority v. Welch},\textsuperscript{141} the Court explained that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."\textsuperscript{142} The Court cited \textit{Case v. Bowles},\textsuperscript{143} a decision rejecting an argument that, in interpreting the scope of Congress's war power where it intruded on state powers, a relevant consideration was "whether these [state powers] were 'essential' to the state government."\textsuperscript{144} \textit{Welch} also relied on \textit{New York v. United States},\textsuperscript{145} which presented the question of how the Court should determine when states, as economic actors, should be immune from federal taxation. There, the Court stated that:

\begin{quote}
The science of government is the most abstruse of all sciences; if, indeed that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.\textsuperscript{146}
\end{quote}

\textbf{D. Reconciling \textit{Lochner} Public Use Cases}

As has been shown, the \emph{Lochner} Court rarely vindicated a challenge that a taking violated the public use clause. Although this tendency seems intuitively at odds with other \emph{Lochner}-era jurisprudence, the Court's public use jurisprudence is reconcilable with the Court's economic regulation cases. One key principle guiding

\begin{footnotesize}
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\item \textsuperscript{140} \textit{Mt. Vernon-Woodberry}, 240 U.S. at 32 (citations omitted).
\item \textsuperscript{141} 327 U.S. 546 (1946).
\item \textsuperscript{142} \textit{Welch}, 327 U.S. at 552 (citations omitted).
\item \textsuperscript{143} 327 U.S. 92 (1946).
\item \textsuperscript{144} \textit{Case}, 327 U.S. at 101.
\item \textsuperscript{145} 326 U.S. 572 (1946).
\item \textsuperscript{146} \textit{New York}, 326 U.S. at 579-80 (quoting Anderson v. Dunn, 19 U.S. 204, 226 (1821)).
\end{itemize}
\end{footnotesize}
the *Lochner* Court was that the common law offered a neutral baseline from which the government should not depart. In the case of the public use requirement, American common law evidenced a pronounced tendency to favor acts of eminent domain, to find public uses liberally, and to permit diminution of property rights in favor of a broadly defined public interest. Thus, government takings did not threaten to deviate from a common law baseline—if anything, they were consistent with it. Moreover, takings did not resemble the kind of class legislation the *Lochner* Court disfavored. Rarely could a taking be seen as favoring one political class or faction over another. Finally, although the Court frequently spoke of the desirability of deferring to local authorities, it did so because the takings at issue were essentially local in nature and motivated by local geographical and economic concerns. Individual state takings laws rarely threatened the kind of wholesale, national economic consequences that other economic regulations did. Moreover, even in stating its commitment to deference, the Court always maintained that its ultimate holding was based on its own, independent review of the challenged taking. Thus, *Lochner*-era deference really meant that the Court afforded “great weight” to the opinions of local legislatures and courts, not that it followed them blindly. In that sense, the major twentieth century cases were a great deal more deferential than were *Lochner*-era cases.

Still, just as *Lochner*-era cases tended to uphold takings, so do modern decisions. They are the same but different. They are the same because both *Lochner*-era and modern cases hew to common law principles that allow the government great latitude in determining what is, or is not, a public use. But they are different in the nature of deference they apply. Modern cases like *Berman, Midkiff,* and *Kelo* speak in terms of the importance of avoiding meddling with socioeconomic decisions—a direct reaction to the perceived abuses of the *Lochner* era. In the modern cases, there is a sense that it would be illegitimate for the Court to make a decision that properly belongs to the legislature. *Lochner*-era deference was different. It did not assume that the Court lacked legitimacy in making public use decisions, only expertise. It maintained that it was making the final call, but acknowledged that local decisions should be afforded great respect because local officials had more reliable knowledge of the facts bearing on what the public needed.
III. THE PROBLEM OF EMINENT DOMAIN

It is useful at this point to address a foundational question: why does it matter if courts liberally allow the use of eminent domain, given the fact that property cannot be taken without just compensation?\footnote{147} In this section, I discuss the justifications for the eminent domain power and explain why it must be subject to some limits notwithstanding the compensation requirement.

A. An Essential Power of Government

No one doubts that government often needs to acquire land for beneficial projects. To do so, it may, like any other entity, purchase the land on the open market.\footnote{148} In fact, the government is usually required by law to attempt to buy targeted property before invoking its eminent domain power.\footnote{149} But, the government may feel compelled to invoke the eminent domain power when it is attempting to acquire property in a "thin market." A market is thin when the particular property the government needs is "scarce," usually because it is the only suitable land for the project.\footnote{150} In thin markets, the government may encounter what is called an "assembly problem," which refers to the practical difficulties associated with obtaining title to all of the property required for a project.\footnote{151} Assembly problems arise when the government must acquire a very specific set of parcels because, for example, it is building a highway that must traverse a particular path.\footnote{152} Assembly problems also arise when a lot of land is required in the specific area identified for the project.\footnote{153} Thin markets are a challenge for the government because they provide prime opportunities for "holdouts."\footnote{154} A holdout may be

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151. See Merrill, supra note 150, at 75.

152. See id. at 74-76.


154. See Fennell, supra note 150, at 971.
sincerely-motivated—she may simply not wish to sell for a variety of subjective reasons, or because the government's pre-condemnation offer is less than what the property is worth to her—or she may wish to capitalize on her monopolistic position. A monopoly exists when sellers are able, in Thomas Merrill's words, to "seek economic rents, that is, to charge a price higher than the property's opportunity cost." Erroll Meidinger describes the "holdout problem" this way:

Stated in lay terms it is the possibility that an owner of property necessary to the completion of a substantial project either will refuse to sell and thus entirely thwart the project's possible benefits, or will hold out for an exorbitant price and thereby "blackmail" society for a higher than fair price. In economic terms the problem is defined as a seller holding out for a higher price from a buyer known to be "assembling" properties for a particular configuration (e.g., a railroad right-of-way) than the seller would ask from a buyer not suspected of planning such an assembly. Where hold-out behavior occurs, fewer projects requiring assembly will be carried out than if sellers sold at their true—"atomistic"—prices, and the net production available to society will be lower than if goods were compared, bought and sold at their true opportunity costs. Production is thus expected to be sub- or at least nonoptimal.

Eminent domain solves the problem of holdouts clearing the way for beneficial projects that might otherwise be derailed.

**B. The Importance of Limiting Eminent Domain**

But, there are moral as well as efficiency concerns associated with the use of eminent domain. Condemnation "is effectively a

155. See Fischel, supra note 153, at 931 (discussing people who "do not wish to sell because they have personal attachments to the land that cannot be assuaged by mere dollars").

156. See Fennell, supra note 150, at 971-72 (discussing strategic holdouts); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 49 (6th ed. 2003) (discussing monopoly).

157. See Merrill, supra note 150, at 76. Opportunity cost is the "the benefit forgone by employing a resource in a way that denies its use to someone else." POSNER, supra note 156, at 6.

158. Meidinger, supra note 101, at 49. See also Munch, supra note 149, at 476 n.7 (defining "atomistic reservation price" as "the reservation price of a seller to a buyer whom he did not suspect of planning an assembly").

159. See Merrill, supra note 150, at 82.
reassignment of property rights: the seller is deprived of his right to refuse to sell and constrained in his right to bargain over price.” 160 This inherently coercive nature—necessary for eminent domain to provide any social utility at all—is also the source of potential injustice. When the unfairness of eminent domain is addressed at all, it is typically explained away by reference to the “just compensation” requirement. 161 But the compensation required by eminent domain case law is widely seen as undercompensatory. 162 The former owner of condemned property is constitutionally entitled to be paid “fair market value,” which the Supreme Court has defined as “what a willing buyer would pay in cash to a willing seller at the time of the taking.” 163 But one needs only the simplest understanding of economics to see the problem here. Owners of targeted property are not willing to sell—at least not at “fair market value”—or they would already have sold. 164 This unwillingness may be due to a variety of factors, including sentimental reasons or a desire to hold onto the property in the hope of realizing long-term economic gains. 165

Legal scholars have identified several types of “value” that are excluded from “fair market value.” 166 One is the so-called “subjective premium,” also known as “consumer surplus,” which consists of the difference between the value an owner places on his property and what the market is willing to pay for it. 167 Commonly recognized elements of the subjective premium include sentimental value, special suitability of the property to the owner, community and personal ties, and avoidance of relocation costs (economic and otherwise). 168 Although few people would doubt that these elements may be of legitimate value to an owner and would explain an owner’s unwillingness to sell at market price, the Supreme Court has specifically excluded the subjective premium

160. Munch, supra note 149, at 474.
162. See Cohen, supra note 4, at 537 & n.314.
164. See Fennell, supra note 150, at 963 (“Most property owners value their property above fair market value . . . .”).
165. See id. at 966 (discussing property owner’s desire to “hold onto the property in the hopes that some later transaction will generate even more surplus for her”).
166. See id. at 962 (employing the term “uncompensated increment”).
167. See id. at 963-64; Merrill, supra note 150, at 83; Cohen, supra note 4, at 538-39.
168. See Michael DeBow, Unjust Compensation: The Continuing Need for Reform, 46 S.C. L. REV. 579, 582-83 (1995); Durham, supra note 161, at 1305; Fennell, supra note 150, at 963-64; Merrill, supra note 150, at 83.
from the constitutionally required just compensation. The Court justified this exclusion based on the "serious practical difficulties in assessing the worth an individual places on particular property at a given time." Another type of value routinely excluded from "just compensation" is a share of the increased value resulting from the transfer of the property to a new owner. This so-called "surplus from transfer" may occur when a single property is added to a larger parcel for the government's project, with the result that the value of each component of the parcel increases. Yet the constitutionally required "fair market value" makes no provision for transfer surplus. As a result, all of the surplus ends up in the hands of the condemnor. Put more concretely, a property owner faced with the coercive power of eminent domain is denied what she might otherwise enjoy in an open-market transaction: the chance to negotiate a higher price because she is selling to someone with a higher valuation.

Even though the exercise of eminent domain essentially confis-
cates significant value elements from owners of condemned prop-
erty, some theorists seek to justify this confiscation on the basis

169. See 564.54 Acres, 441 U.S. 506.
170. See id. at 511.
171. See Fennell, supra note 150, at 965.
172. See id. at 965-66; Krier & Serkin, supra note 147, at 870 ("Assembling property should create a surplus, because the value of each individual parcel is likely less than its value as part of a larger whole put together by the government."); Garnett, supra note 148, at 948 (stating "[a]n exercise of eminent domain almost always raises the value of the property").
173. See, e.g., Miller, 317 U.S. at 377 (stating that property's "special value to the con-
demnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value"); Olson v. United States, 292 U.S. 246, 255-256 (1934) (stating that compensation "is the market value of the property at the time of the taking" and does not include "any element resulting subsequently to or because of the taking").
174. See Merrill, supra note 150, at 85.
175. See Fennell, supra note 150, at 966. Merrill observes that in many cases, the property owner should not be "entitled" to the transfer surplus because "[t]he active agent, the supplier of the idea and the initiative is the condemnor... [A]s between a condemnor and a condemnee, the condemnor is typically more responsible for, and hence arguably deserving of, the surplus generated by the project." Merrill, supra note 150, at 86. How one resolves this question of entitlement depends on one's assumptions about the inherent rights of property ownership. Owning property is speculative. Ordinarily, a property owner is entitled to realize increased value resulting from the behavior of other market participants, in much the same way that she is generally not protected from erosion in value resulting from local market conditions. Accord Fennell, supra note 150, at 991 (stating "perhaps one valuable attribute of property is its potential to be in high demand by someone else and to at some point generate a shareable surplus").
176. See Fennell, supra note 150, at 962; see also Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988), cited in Fennell, supra, at 958 n.6.
of "average reciprocity of advantage." This term, used most famously by Justice Holmes in Pennsylvania Coal v. Mahon, refers to the possibility that imposing a concentrated burden on individual property owners may not be unjust if those owners also somehow benefit indirectly from the taking. Reciprocity may occur in two ways. A property owner whose property has been condemned may derive some benefit from the particular government project at issue. Or, he might benefit from the overall scheme of eminent domain, even if he doesn't benefit from the particular project at issue, if the scheme generally applied increases societal wealth.

The problem with the reciprocity of advantage theory, particularly as applied to private-private takings, is that it only works as justification if the project for which property is taken, or the overall eminent domain regime, actually produces benefits that can either be enjoyed by the condemnee or enhance overall wealth. With private-private takings, there is a grave risk that no reciprocity of advantage will result.

There are several reasons for this. As James Krier and Christopher Serkin note, a condemnee may not partake of any benefits generated by a particular project if, as a result of being dispossessed of his property, he must relocate out of the region the project is supposed to benefit. Moreover, even if he were to remain situated so as to be able to enjoy any benefits that might be generated, there is always a risk that there will be few or no public benefits. Because courts are generally so deferential to government's public use determinations—refusing, for example, to consider whether projected benefits are likely to materialize—there is a significant risk that any gain resulting from an economic development project, if it results at all, will be "merely incidental" to benefits enjoyed primarily and exclusively by the private interest involved. The risk that predicted benefits for the public will never occur is greater when taken property is trans-

178. 260 U.S. 393, 415 (1922).
179. See Dagan, supra note 177, at 744.
180. Id. at 769.
181. Id.
182. See Krier & Serkin, supra note 147, at 867.
184. See Krier & Serkin, supra note 147, at 863.
ferred to a private entity than when the government takes and retains title itself. As James Krier and Christopher Serkin observe, some public benefit is more certain "in the case of classic public uses, precisely because the benefits so clearly accrue to the public at large (and not to private interests for their own sake) in such forms as access and services." 

As I stated earlier, even if the particular project for which property is taken produces no benefit for the aggrieved property owner, there may still be reciprocity of advantage if general eminent domain practices increase wealth for society as a whole. Here, too, such a result is highly suspect. Because of the undercompensatory nature of "just compensation," there is a serious risk that government's use of the eminent domain power will actually destroy more wealth than it produces. Because government doesn't have to pay the full value of property it takes, it may proceed under a "fiscal illusion" that undervalues property. Local planners balancing the cost of eminent domain against the projected gain from a project are likely to disregard those value increments that are not compensated. Since they can ignore the subjective value of property, local officials may approve or implement plans which produce much less value for society than existed in the hands of owners of property taken for the plan. Because subjective value exists only in the hands of the transferring property owner, it evaporates when the property changes hands. Planners who are free to disregard subjective value in determining the cost of their project may actually cause a net decline in social wealth. Perhaps most important, the practice of assigning all transfer surplus to the transferee creates the danger of manipulation of the political process for the gain of politically powerful special interests.

185. See id. at 867.
186. See id. at 866.
187. Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CAL. L. REV. 569, 621 ("Fiscal illusion arises because the costs of governmental actions are generally discounted by the decision-making body unless they explicitly appear as a budgetary expense.").
189. Fennell, supra note 150, at 964; Merrill, supra note 150, at 83.
190. See Fennell, supra note 150, at 964.
191. See id.
192. Id. at 964-65.
IV. PUBLIC USE AND CONSTITUTIONAL DECISION MAKING

In this section, I discuss ways in which the Supreme Court’s modern approach to the public use question reflects a larger problem in Constitutional decision-making: how best to formulate rules when the text is vague or subject to multiple interpretations. The Court’s broad deference reflects what Lawrence Gene Sager would call underenforcement. But the fact that a substantive provision of the constitution is not fully enforced by the Supreme Court’s rules does not mean that that provision cannot be more broadly enforced by other means, perhaps, in the case of the public use clause, by a cleaner, more representative decision-making process.

A. Constitutional Underenforcement

Ill-defined or controversial Constitutional norms like the “public use” requirement exemplify a recurring problem in the enforcement of Constitutional ideals: the difficulty of translating an underlying constitutional principle into an applicable rule of law that can be relied upon to vindicate that principle. There is, according to Lawrence Gene Sager, “an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.” This difficulty has placed the Supreme Court—and, by extension, other federal courts—in a quandary, producing “situations in which the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries.” Thus, without rejecting the meaning or historical understanding of a constitutional value, a court might nonetheless promulgate a rule of law or judicial construct that falls short of “exhausting” the full scope of a constitutional protection.

Sager cites as one example modern equal protection jurisprudence as it relates to economic regulation. A claim that a given

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194. See id.
195. Id.
196. See id.
197. Id. at 1213-14.
198. Sager, supra note 193, at 1215-18.
economic regulation rests upon an unfair classification will elicit no more than "rational basis" review, and the challenged regulation will be upheld if a court finds (as it almost always will) that the law is "rationally related to a legitimate government purpose." The test is so deferential to the legislative process that a challenged law will be upheld if it could be rationally interpreted as advancing any conceivable legitimate public purpose, even if there is nothing other than judicial speculation to suggest that the government was, in fact, attempting to advance that purpose in enacting the law. Moreover, the question whether the legislature has, in fact, chosen a rational means to accomplish a public purpose is subject to "the most relaxed and tolerant form of judicial scrutiny." As a result, a claim that the government has created illegitimate classifications in enacting socioeconomic legislation is virtually certain to be denied judicial relief. Similar results obtain when economic regulations are challenged under the due process clause. Such laws will be upheld if found to be "rationally related to serve a legitimate government purpose."

The broad deference afforded legislative enactments under rational basis review, whether in the context of equal protection or due process, is justified on the grounds of three well-known "institutional concerns." First, it is argued that adjusting socioeconomic policy depends upon subjective value judgments that are properly the province of democratically-elected legislatures, and not of unelected judges. In the words of Justice Hugo Black: "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Thus, the government is generally given free rein under the federal constitution in enacting socioeconomic legislation. Second, courts are said to lack the institutional competence to interpret and apply the kind of information—such as empirical data, knowledge of local conditions, and other exigencies—that necessarily shapes legislative decisions. Third, as Richard

203. Id. at 625.
204. Id.
205. See Sager, supra note 193, at 1217.
207. Ferguson, 372 U.S. at 729.
208. See Sager, supra note 193, at 1217.
H. Fallon, Jr. has observed, "[m]any constitutional questions lack answers that can be proved correct by straightforward chains of rationally irresistible arguments."\textsuperscript{209} Allowing the federal courts to independently review regulatory classifications would produce confused and irreconcilable results.\textsuperscript{210} Confronted with such questions, the Supreme Court is frequently inclined to prescribe judicial deference.\textsuperscript{211} The ultimate result, according to Sager, is that "only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand."\textsuperscript{212}

Sager goes on to set forth indicators that a particular Constitutional norm may be underenforced, including "a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives . . . [and] the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct."\textsuperscript{213} He believes the Fifth Amendment Takings Clause is a "likely candidate[] for characterization as underenforced."\textsuperscript{214} And, he argues, when a constitutional norm is underenforced, the underlying principle is nonetheless valid.\textsuperscript{215} The constitutional rule has been adopted for reasons other than a determination of the full scope of protection actually embodied in the constitution.\textsuperscript{216} He explains:

The unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins. Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.\textsuperscript{217}

\textsuperscript{210} See Sager, supra note 193, at 1213.
\textsuperscript{211} See Fallon, supra note 209, at 57-58.
\textsuperscript{212} Sager, supra note 193, at 1216.
\textsuperscript{213} Id. at 1218-19.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 1221.
\textsuperscript{216} See id.
\textsuperscript{217} Sager, supra note 193, at 1221.
B. Constitutional Theory and Public Use

The observations of Sager and Fallon go part way toward providing at least some theoretical explanation for the Court's frustrating and seemingly contradictory approach to the public use question. On the one hand, the Court has frequently stated that the question whether a taking is for a public use is a judicial one and that purely private takings are forbidden. Thus, the Court has suggested, there is a constitutional norm to be vindicated in the public use requirement. Yet, the court has fashioned a modern doctrine which, at least until *Kelo*, seemed completely ineffectual at identifying and preventing the types of condemnations forbidden by that norm. Put another way, the public use requirement has not been, as some observers contend, "written out of the Constitution." It is merely underenforced by federal courts because of the Supreme Court's well-entrenched reluctance to evaluate socioeconomic legislation and the difficulty of formulating a workable public use test.

Indeed, the Court acknowledged some of the institutional considerations underlying its public use jurisprudence in *Kelo*. In addition to reiterating its concerns regarding the propriety of evaluating socioeconomic legislation, the Court elaborated on its historical inability to fashion a workable public use test. Justice Stevens even went so far as to invite fuller enforcement of the public use requirement in his remarkable acknowledgement that state courts and legislatures were free to adopt a more rigorous approach than adopted by the Court's decision. In a sense, he was inviting the political process to enforce the public use clause more fully than the Court has been able to. Indeed, since *Kelo* was decided, most of the states have, by judicial decision or legislation, tightened their rules for use of the eminent domain power.

The suggestion that a "comprehensive development plan" might help distinguish permissible from impermissible takings embodies an invitation to fully enforce the public use clause. A thorough and open planning process characterized by careful studies and adherence to applicable statutes could, in theory, allow for better protection of property rights. It could also produce an end result

reflective of the citizenry's conception of the protections embodied in the public use clause.

V. WHAT PROCESS SCRUTINY MIGHT MEAN

Where the government seeks to condemn property for a use that will provide significant benefits to a private party, whether or not the property is also transferred to the private party, process concerns abound. Donald Kochan has written that

[a] public use is now whatever the legislature says is public. Legislators can sell the eminent domain power to special interests for almost any use, promising durability in the deal given the low probability that the judiciary will invalidate it on the grounds that the condemnation is private in nature.220

Commenting on the specific instance of "economic development" takings, Ilya Somin has explained that such condemnations allow politically powerful interest groups to "capture" the condemnation process for the purpose of enriching themselves at the expense of the poor and politically weak. While economic development takings are not the only type of condemnation subject to this kind of abuse, they are especially vulnerable to it because "economic development" can justify almost any condemnation that transfers property to a commercial enterprise.221

The Kelo Court's "comprehensive plan" test goes some way, at least, toward reducing the risk of eminent domain abuse. The test suggests that a "pretexual taking" exists if a court, plumbing the record, concludes that the process by which a decision to invoke the eminent domain power was reached bears the stench of procedural irregularities or indicia of improper influence. In other words, for the first time, the Supreme Court has hinted that the inquiry is not to be focused on the proposed end use of a property, but whether the political process has fallen victim to the very dangers that the Fifth Amendment public use clause was intended to prevent.

A. Process Scrutiny in the State Courts

Scrutiny of the process as opposed to the result, while not common, is not unprecedented in the state courts. In *Southwestern Illinois Development Authority v. National City Environmental (SWIDA)*,222 the Supreme Court of Illinois considered whether a regional development authority had violated the state's public use clause by using the power of eminent domain to take private property in order to transfer it to a privately owned racetrack, for the expansion of its parking facilities.223 The court acknowledged that the proposed use of the land to be taken might indirectly benefit the public by generating additional revenue for the racetrack, which "could potentially trickle down and bring corresponding revenue increases to the region."224 The court also stopped short of rejecting the development authority's contention that expanded parking would enhance public safety by reducing traffic congestion on nearby interstates and eliminating the need for some racetrack spectators to cross a highway from existing parking areas.225 Yet the court held that the takings were not for a public use because "members of the public are not the primary intended beneficiaries of this taking."226 Pointing to the process by which the development authority had decided to use its condemnation power, the court concluded that the authority was merely acting at the bidding of private economic interests. The court explained:

While the activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack. SWIDA advertised that, for a fee, it would condemn land at the request of "private developers" for the "private use" of developers. In addition, SWIDA entered into a contract with Gateway to condemn whatever land "may be desired by Gateway." Clearly, the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged.

222. 768 N.E.2d 1 (Ill. 2002).
224. *Id.* at 10.
225. *Id.* at 9, 5-6.
226. *Id.* at 10.
Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.\textsuperscript{227}

Similarly, in \textit{99 Cents Only Stores v. Lancaster Redevelopment Agency},\textsuperscript{228} the court concluded that a development authority's process demonstrated that it was motivated primarily by fear that a large retailer would relocate out of the development district if land was not condemned for the retailer's use.\textsuperscript{229} There, the redevelopment agency, under the auspices of a regional revitalization plan, threatened to condemn a leasehold interest in shopping center space occupied by plaintiff 99 Cents Only Stores in order to transfer the space to Costco Wholesale.\textsuperscript{230} Costco had explicitly warned that it might move to a nearby community unless permitted to take over the space occupied by 99 Cents.\textsuperscript{231} The redevelopment agency relied on a fifteen-year-old determination that the targeted property was blighted, even though since the original blight determination had been made, the property had been developed and the state legislature had amended the definition of blight.\textsuperscript{232} The original delegation of the power of eminent domain to the redevelopment agency had been for the purpose of condemning blighted property.\textsuperscript{233}

In enjoining the redevelopment agency from initiating eminent domain proceedings, the court stated:

\begin{quote}
In this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the \textit{only} reason it enacted the Resolutions of Necessity [a procedural step authorizing the use of eminent domain] was to satisfy the private expansion demands of Costco. It is equally undisputed that Costco could have easily expanded within the
\end{quote}

\begin{footnotes}
\item[227] \textit{Id.}
\item[228] 237 F. Supp. 2d 1123 (C.D. Cal. 2001), \textit{dismissed as moot}, 60 Fed. App'x 123 (9th Cir. 2003).
\item[229] \textit{99 Cents Only}, 237 F. Supp. 2d at 1126.
\item[230] \textit{Id.}
\item[231] \textit{Id.}
\item[232] \textit{Id.}
\item[233] \textit{Id.} at 1125, 1127.
\end{footnotes}
[shopping center] without displacing 99 Cents at all but refused to do so. Finally, by Lancaster's own admissions, it was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries. In short, the very reason that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.234

Similarly, the Supreme Court of Florida, in Baycol, Inc. v. City of Fort Lauderdale,235 overturned the trial court's approval of a taking of land for the purpose of constructing a parking garage that would be leased to a private developer.236 There, the court took notice of trial court testimony by the executive director of the condemning development authority suggesting that he was uncertain of the purpose of the parking garage and his further testimony that the construction of the garage would produce an excess of parking capacity until private development occurred in the area.237 The court explained:

Thus it appears that without the private development there would be no public need for the parking cited as the sole basis for condemnation. This is a very dangerous precedent that would allow a total departure from the basic requirement that there must first be a showing of a public necessity or public use, in order for eminent domain to be utilized against private ownership as protected in our constitutions.238

In Wilmington Parking Authority v. 227 West 8th St.,239 the Supreme Court of Delaware upheld the trial court's finding that a taking of land for the construction of a parking garage was not for a public purpose.240 The plan called for transfer of the taken land to the city's main newspaper, the Wilmington News-Journal, which would then expand its existing facilities into 35 feet of surface space underneath the elevated garage.241 The trial court record indicated that the City of Wilmington had been attempting to

234. 99 Cents Only, 237 F. Supp. 2d at 1129.
235. 315 So.2d 451, 458, 459 (Fla. 1975).
236. Baycol, 315 So.2d at 458, 459.
237. Id. at 458.
238. Id.
239. 521 A.2d 227 (Del. 1987).
240. Wilmington, 521 A.2d at 234.
241. Id. at 227.
accommodate the News-Journal's expansion desires within the city for several years and feared it would exercise an option on land outside the city.242 The Supreme Court pointed to evidence in the record that the city's liaison to the parking authority had written to the News-Journal "on behalf of the WPA" promising to "accommodate all your needs."243 The court further noted that at the same time the parking authority was seeking to condemn the land at issue, it was eliminating 500 public parking spaces in the area.244 The court explained that "a reviewing court should not unduly limit its inquiry in determining whether the primary purpose of a proposed project falls within an agency's statutory authority"—in this case, acquisition of land for public parking—and could consider evidence that a taking was driven by motivations outside the agency's mandate.245 Thus, it was proper for the trial court to consider the process undertaken by the parking authority in selecting property for condemnation as well as communications and other evidence suggesting that the process may have been influenced by the desire to benefit a private interest.246 Even though the trial court found that the project would produce some public benefit—a net gain of 350 parking spaces—evidence of process failure, coupled with the trial court's finding that the News-Journal was the primary beneficiary of the project, supported a finding that the taking was not for a public use.247

B. What Kelo May Mean for Future Public Use Cases

These cases suggest an important, and potentially radical, implication underlying the Kelo decision: a proposed taking may be struck down as lacking a justifying "public use" even if the project for which the targeted land is intended will, or conceivably could, produce a public benefit.248 Thus, the new test abandons the historically vexing question whether a use can be considered "public," and whether such a use, if public, will in fact occur, in favor of an inquiry into the adequacy of the process by which the decision to take is reached.

242. Id. at 230.
243. Id. at 233.
244. Id.
245. Wilmington, 521 A.2d at 233.
246. Id.
247. Id. at 233-34.
248. See Garnett, supra note 4, at 457-58.
Such a shift has several significant implications for eminent domain law. First, it arguably dispenses with the requirement of a public use entirely, instead requiring a kind of procedural due process. Second, as a consequence of a new process-based standard, eminent domain law continues to potentially "underenforce" the constitutional requirement of a public use in cases where a flawless process nonetheless produces a speculative, attenuated, or non-existent public advantage. This danger is increased by the possibility, suggested by Nicole Garnett, that planning will come to serve as a public use "safe harbor." Third, as Garnett elaborates, it underscores and, to some extent, reconciles an uneasy fit between rational basis review as it exists generally in constitutional law and as it has existed in the context of "public use" determinations.

This last implication—reconciliation between rational basis review generally and as applied in the context of eminent domain—adds an element of coherence to eminent domain law by potentially eliminating two doctrinal inconsistencies. Recall that under rational basis review, a law is upheld if it advances any conceivable legitimate public purpose, even if the reviewing court must hypothesize a legitimate public purpose that could be advanced by the law. In other words, the actual purpose behind the government's action is irrelevant, as long as there could be a legitimate purpose. But, as Garnett notes, "conceivability review" is not easily reconciled with actual eminent domain practice. She notes that in most states, the government cannot initiate a judicial condemnation proceeding without pleading its justifying public purpose. Yet pre-\textit{Kelo} eminent domain case law evidenced no requirement that a reviewing court consider the plausibility of the government's stated justification, requiring instead a simple finding that "the exercise of eminent domain power is rationally related to a conceivable public purpose." Garnett asks: why consider whether a taking is rationally related to any conceivable public purpose when the government is required to plead an actual public purpose before it can condemn property? Elsewhere in constitutional law, when the government asserts an im-

249. See Sager, supra note 193.
250. See Garnett, supra note 4, at 454.
251. See id. at 449-54.
254. See Garnett, supra note 4, at 451.
plausible justification for its actions, a court may not uphold the government’s action by hypothesizing another justification. 255

The improperly motivated taking test brings eminent domain rational basis review into line with rational basis review in other situations where the government actually asserts a justification for its actions. The true purpose of the government’s decision to take is a key inquiry. Where the process suggests an improper motive, a taking will be invalidated even if an actual public advantage seems clearly established. Extending to eminent domain law the requirement that the government’s stated motivation be its actual motivation eliminates a logical anomaly unique to pre- *Kelo* eminent domain law. 256

The second doctrinal inconsistency eliminated by a motivation-based test involves the truism that "one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 257 Despite this supposed "bedrock principle," 258 the Court has steadfastly refused to consider whether a given taking will actually produce the benefit the government claims it is attempting to achieve. 259 Such refusal to consider whether the government’s chosen means for effectuating policy—the exercise of eminent domain—is likely to achieve the government’s policy goals tolerates a grave danger that the stated reason for condemnation is a pretext for an improperly motivated taking. 260 Reviewing the process by which the government has decided to initiate condemnation will in many cases require consideration of whether the government actually evaluated the likelihood of success, considered alternatives, and even commissioned independent studies. Indications that the government’s actions are logically inconsistent with its own findings—or that the government has failed to conduct a serious inquiry into the need for, or consequences of, its planned course of action—will, as Justice Stevens indicated in *Kelo*, "raise a suspicion that a private purpose [is] afoot." 261

255. See id.
256. Id. at 447, 451.
259. See, e.g., *Midkiff*, 467 U.S. at 242 ("When 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.")., quoted in *Kelo*, 545 U.S. at 488.
260. See Garnett, supra note 4, at 453.
This, of course, assumes that *Kelo* will be read to require an evaluation of the quality of the planning process. To be sure, nowhere does the majority instruct reviewing courts to scrutinize whether the outcome of a process flows logically or fairly from the inputs considered by the process or whether the process demonstrates an absence of "impermissible favoritism." It is conceivable that under *Kelo* the mere existence of a planning process, without more, serves as a proxy for fairness, even if the outcome of the process is arguably illogical and unfair. It certainly seems possible that local officials could easily engineer what appears to be a comprehensive plan derived from an open process, and still make decisions that are, in fact, motivated by a desire to favor private interests. There will always be cases where the inputs, testimony, evidence, studies, and hearings could reasonably support more than one course of action. If there were an objectively correct answer to every planning problem, then the courts could engage in less deferential review.

Clayton Gillette has argued that the existence of a plan will necessarily imply the presence of certain factors which minimize, without eliminating, some of the risks the public use requirement is intended to control.\(^{262}\) For example, a comprehensive plan suggests that numerous stakeholders with conflicting interests will participate in an open process.\(^{263}\) This, he contends, reduces the risk that a small but powerful group will be able to hijack the political process for its own gain.\(^{264}\) In addition, he suggests that a plan, by definition, suggests a project of sufficient magnitude to impact a significant number of potential condemnees.\(^{265}\) Although the affected landowners may constitute a minority of all residents within the jurisdiction, they will have more at stake than most of their fellow citizens and therefore "sufficient incentive to become involved that even moderate numbers of them can swamp the political process by which a final decision is made."\(^{266}\) Thus, the "comprehensive plan" rule insures an opportunity for open dissent and conditions under which affected landowners will have a fair chance of being heard, even if not heeded.\(^{267}\) Gillette does not read the *Kelo* decision as implying that reviewing courts must

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263. See id.
264. Id.
265. Id.
266. Id.
consider whether the process was fair or produced a tainted result. Nor does he believe that the *Kelo* Court expected that comprehensive plans would eradicate the risk of political capture or self-interested behavior by policy-makers. He argues that

the capacity of the judiciary to make inquiries into the process, to reverse engineer the political decision to determine whether it was tainted or whether the same decision would have been reached on objective grounds, is minimal. Thus, perhaps the best that a court can do is to define the conditions under which the probability of abuse is minimal and defer to the political process when those criteria are satisfied.  

VI. CONCLUSION

The public use question presents some of the most challenging and controversial questions concerning constitutional protections of property rights. After many decades of prescribing almost complete judicial deference to the elected decision-makers on the issue of what constitutes a public use, the Supreme Court in *Kelo* finally provided at least one guidepost. The existence of a “comprehensive development plan,” according to the Court, may be a strong indication that an economic development taking is actually for a “public use.” The Court’s shift in some senses improves the state of public use law. Having relegated the public use decision to the political process, the Court has now provided one means for determining if the political process is working fairly. But the new approach remains highly deferential. Ironically, although modern judicial deference on the public use question is a response to the perceived abuses of the *Lochner* era, the contemporary approach produces approximately the same results as were obtained in the *Lochner* era. In the end, while *Kelo* represents an improvement over earlier decisions, it is likely to provide little protection against abuse of the eminent domain power.

268. *Id.* at 19.