

A STEP BACKWARD IS NOT NECESSARILY A STEP IN THE WRONG DIRECTION

Nancy Kubasek* & Garrett Coyle**

INTRODUCTION

Thirty *thousand* jobs. Three-hundred fifty *million* dollars in tax revenue. A broader tax base. “[C]utting edge development” that “will attract national and international businesses” and produce “accelerated economic growth.”¹ In an era when all levels of government are under pressure to cinch their fiscal belts, such promised economic gains entailing thousands of jobs and hundreds of millions of dollars in tax revenue seem a boon too good to be true. Yet for Wayne County, Michigan, these benefits were exactly what the “Pinnacle Project” promised.²

After adding a new terminal and runway to its Metropolitan Airport, the County was faced with a problem: landowners near the airport would suffer from externalities from the increased air traffic.³ To fix the problem, the County developed the Pinnacle Project, a plan to purchase the surrounding land and construct a modern business and technology park abutting the airport.⁴ After attempting to purchase the property of affected landowners through voluntary transactions, the County stood short of what it deemed necessary for the Pinnacle Project by forty-six parcels of land whose owners refused to sell at the county-appraised price.⁵ In July 2000, the County invoked its power of eminent domain to acquire the remaining forty-six parcels; twenty-seven owners willingly accepted the County’s decree, but the remaining nineteen owners brought the matter to court.⁶

The property owners argued that the County’s use of eminent domain was unconstitutional because the purpose for which the property was seized was not a “public purpose.”⁷ But the trial court ruled that according to Michigan case law set forth in *Poletown Neighborhood Council v. City of Detroit*, the Pinnacle Project constituted a public purpose, and hence the

* Professor of Legal Studies, Bowling Green State University; J.D. 1981, University of Toledo College of Law; B.A. 1978, Bowling Green State University.

** J.D. candidate 2008, New York University School of Law; M.A. Economics 2005, B.A. 2004 Bowling Green State University.

1. County of Wayne v. Hathcock, 684 N.W.2d 765, 771 (Mich. 2004).

2. *Id.*

3. *Id.* at 770.

4. *Id.*

5. *Id.* at 771.

6. *Id.*

7. *Id.*

taking was constitutional.⁸ The court of appeals affirmed the decision, although several justices noted the poor reasoning in *Poletown*, foreshadowing its imminent overruling by the Michigan State Supreme Court in mid-2004.⁹

Although *Hathcock* arose relatively recently,¹⁰ the conflict of principles that underlies the case is by no means new. Writing for the majority in *Hathcock*, Michigan Supreme Court Justice Robert P. Young Jr. began the opinion by identifying the competing principles: “We are presented again with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state’s authority to condemn private property for the commonwealth.”¹¹

Four landmark cases have established two broad and closely related trends with respect to the power of eminent domain.¹² First, if a taking results in some benefit to the public, it qualifies as a “public use” under the Fifth Amendment for which no compensable taking occurs.¹³ But more importantly, the four landmark cases have established that a legislature has the authority to determine what constitutes a public use, and the judiciary has extremely limited power to review a legislature’s determinations.¹⁴

Each of these trends is problematic in our eyes. First, legislative bodies, in the name of economic development, use their power of eminent domain to condemn private individuals’ property and transfer it to corporations. The corporations, in turn, promise to add thousands of jobs to

8. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), overruled by *Hathcock*, 684 N.W.2d at 787; *Hathcock*, 684 N.W.2d at 771.

9. *Hathcock*, 684 N.W.2d at 771–72, 787.

10. *Id.* at 770 (noting that the takings at issue in *Hathcock* were initiated in April 2001).

11. *Id.* at 769.

12. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), overruled by *Hathcock*, 684 N.W.2d at 787. In some respects, these four cases are not landmark decisions because they are revolutionary; rather, they enjoy landmark status because they congeal trends occurring over time.

13. See *Kelo*, 125 S. Ct. 2665–66 (stating that there is no reason to find economic development not to be a public purpose); *Berman*, 348 U.S. at 34–35 (discussing how community redevelopment projects serve the public purpose); *Poletown*, 304 N.W.2d at 458 (finding that the taking of private property “to alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce” was a public use).

14. *Kelo*, 125 S. Ct. at 2664 (affirming the power of state legislatures to determine the breadth of the public use doctrine under the Fifth Amendment Takings Clause); *Midkiff*, 467 U.S. at 240–41 (concluding that courts must defer to a legislature’s determination as to what constitutes a public use); *Berman*, 348 U.S. at 33 (holding that Congress has the authority to determine what values to consider when exercising the power of eminent domain for community development projects); *Poletown*, 304 N.W.2d at 459 (citing *Gregory Marina, Inc. v. City of Detroit*, 144 N.W.2d 503, 516 (Mich. 1966)) (iterating that the legislature has the power to decide what constitutes a public purpose).

the local economy. Frequently, however, only a fraction of the promised opportunities ever materialize. Because the corporations face few or no consequences if they fail to satisfy their development promises, these states and municipalities have a significant moral hazard problem that leads to irreversible and suboptimal results. Moreover, although the purported goal in using eminent domain to transfer private property to corporations is economic development, the incentive structure established by this use of eminent domain promotes unintended and undesirable economic consequences.

Our second concern arises because American law is dynamic. Thus, *what* the current definition of public use is matters less than *who* decides whether a particular taking satisfies the definition of public use. Moreover, our government is founded on the premise that individuals do not handle large amounts of power well, and checks and balances are important tools to limit any one person, branch, or agency from obtaining too much power.¹⁵ Hence, consistent with this logic, the judiciary ought to have significant power to review legislative decisions about whether a particular taking satisfies the definition of public use.

In Part I, we briefly examine the history of the judicial interpretation of public use, followed by a closer look at the decisions of the four landmark cases in Part II. Part III criticizes the decisions in these cases. Finally, Part IV argues for a heightened standard of review of legislative determinations of public use.

I. A BRIEF HISTORY OF THE INTERPRETATION OF PUBLIC USE

Governments have long exercised the power of eminent domain to grant them access to land for public works such as roads, schools, and parks.¹⁶ But since the early 1970s, local governments and government agencies have used this power for projects that fit only a broad interpretation of “public use” according to the Takings Clause.¹⁷ Governments and agencies have significantly increased the frequency with which they exercise their eminent domain powers to transfer private property from the hands of one property owner to another.¹⁸ The courts

15. See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

16. Benjamin D. Cramer, Note, *Eminent Domain for Private Development – An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 411 (2004).

17. See, e.g., *Midkiff*, 467 U.S. at 233–34 (using the power of eminent domain to rectify skewed land ownership).

18. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses*

have encouraged this trend by gradually expanding the definition of public use from use by the public to any public purpose; with the courts defining “public purpose” as any purpose permitted under the legislature’s police power.¹⁹ Economic development is increasingly cited as the declared public benefit of such transfers.²⁰ One study showed that condemnation actions for the benefit of private parties were filed in at least 3722 instances and threatened in at least 6560 between 1998 and 2002.²¹

The Fifth Amendment explicitly limits the government’s power of eminent domain by declaring that all takings must be for a public use.²² The Supreme Court has reinforced this requirement, holding 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.”²³ The exact meaning of the phrase “public use,” however, remains undetermined.²⁴ The courts originally viewed the phrase very narrowly.²⁵ Under the early interpretation, the public must actually use or have the opportunity to use the property taken through eminent domain.²⁶

Court opinions as early as 1876 indicate a recognition of the potential problems associated with a broader definition of public use,²⁷ but “[t]he advent of industrialization in the nineteenth century forced the courts to

of Eminent Domain, 21 YALE L. & POL’Y REV. 1, 2–3 (2003) (discussing the history of how urban renewal became a public use).

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

20. Charles Toutant, *Small Businesses Standing Ground Against ‘Private’ Condemnations*, N.J. L.J., Apr. 22, 2002, at 1, 14.

21. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 1–2 (2003), available at http://www.castlecoalition.org/report/pdf/ED_report.pdf.

22. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

23. *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (citations omitted).

24. See generally *Timmons v. S.C. Tricentennial Comm’n*, 175 S.E.2d 805, 812 (S.C. 1970) (“The term public use is an elastic one and must keep abreast of changing social conditions, and the question is one of fact in each particular case.” (citation omitted)); *Burger v. City of Beatrice*, 147 N.W.2d 784, 790 (Neb. 1967) (noting that it is difficult to define public use because “[t]he term is elastic and keeps pace with changing conditions”); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978) (“The precise meaning of the ‘public use’ requirement has varied over time . . .”).

25. Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940).

26. For a major reference source detailing the early history of the law of eminent domain, see generally 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.02[2] (3d ed. 2005).

27. E.g., *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410–11 (1876) (noting the absurdity that would result “[i]f public occupation and enjoyment of the object for which land [were] to be condemned furnishe[d] the only . . . test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters”).

consider whether the narrow interpretation” was appropriate.²⁸ In cases in which the proposed use of the land in question would likely result in a clear public benefit, the courts allowed the use of eminent domain to transfer property from one private owner to another.²⁹ Although a substantial panoply of early cases relied on the original narrower interpretation of public use,³⁰ when new developments confronted the courts, they expanded the meaning to encompass takings that would provide a public benefit or serve a public purpose.³¹

The broader interpretation of public use began in the early nineteenth century when the judiciary upheld the Mill Acts,³² a set of statutes that invoked the power of eminent domain to transfer property from one private owner to another in the name of economic development.³³ According to these Acts, a lower riparian owner had the right to build a dam to obtain power for a mill even if the construction of the dam would flood the land of an upper riparian owner.³⁴ Because the mills served a public purpose, the upper riparian owner could seek only just compensation for the taking.³⁵ Many courts corroborated the legislature’s broad and far-reaching definition of public use by reasoning that any purpose of “great benefit to the public”

28. See Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 55, 57 (2003) (providing a detailed examination of the judicial expansion of the definition of public use), available at <http://www.lawrecord.com>.

29. Berger, *supra* note 24, at 206–07.

30. See, e.g., *Rindge Co. v. County of L.A.*, 262 U.S. 700, 706 (1923) (highway extension); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 608 (1908) (railroad spur track construction); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896) (irrigation canal); *Minn. Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 414 (Minn. 1906) (“[B]ut a use which, by physical conditions, is restricted to a very few persons who must use it within a very restricted area, is not a public use.”); *Jacobs v. Clearview Water Supply Co.*, 69 A. 870, 872 (Pa. 1908) (“It is sufficient that the general public, or any considerable portion thereof, should have a right to the use.”).

31. As the definition of public use evolved, the courts came to recognize that a benefit to the public could even be indirect, although in such cases the purpose of the condemnation needed to be recognized by law. SACKMAN, *supra* note 26, § 7.02[3]–[4]; see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485–86 (1987) (indicating that a law authorizing a taking is more likely to be upheld if it is not meant to merely bring about a private benefit but instead is designed to further a broader public purpose).

32. See SACKMAN, *supra* note 26, § 7.07[4][f] (discussing how Massachusetts courts upheld the Mill Acts as a valid use of the police power).

33. For a detailed explanation of the development of the Mill Acts in Massachusetts, see Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248, 270–71 (1973).

34. *Id.* at 271. See generally *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16–17 (1885) (providing a complete list of the Mill Acts through 1884).

35. See Horwitz, *supra* note 33, at 271–72 (explaining that the Massachusetts Mill Act allowed affected landowners to obtain yearly damages from the mill owner but precluded them from recovering under trespass or nuisance).

could satisfy the requirement of public use.³⁶

Although the development of hydroelectric power rendered the particular issue of the Mill Acts purely academic, the fact that the majority of the courts found the Acts to be an appropriate use of the power of eminent domain is significant because of their influence on the evolution of the definition of public use.³⁷ These courts interpreted public use broadly and permitted takings that while yielding a public benefit also benefited a private party.³⁸

Although the constitutionality of the Mill Acts became a moot point, subsequent slum clearance and urban redevelopment cases demonstrated the continued gradual broadening of the courts' interpretation of benefit to the public as public use.³⁹ In the 1936 case of *New York City Housing Authority v. Muller*, the court held that condemnation of blighted property for publicly operated slum clearance and public housing programs generated a public benefit sufficient to satisfy the public use requirement.⁴⁰ Applying a broad public-advantage test, the court reasoned that the elimination of slum conditions, including juvenile delinquency, crime, and disease, would bring about benefits to the public.⁴¹ By 1943, twenty-five states' highest courts had held that the benefits resulting from the development of public housing and slum elimination satisfied the public use requirement.⁴²

Because the law is dynamic, the issue of who decides whether a particular taking satisfies the definition of public use is more important than the actual current definition of public use. Historically, the U.S. Supreme Court has arrived at varying conclusions about which branch of government should determine the meaning of public use. In *Rindge Co. v. County of Los Angeles*, the Court held that the judiciary has the power to decide

36. Berger, *supra* note 24, at 206 & n.19 (collecting cases).

37. *See id.* at 206–07 (“In recent times, of course, the importance of the Mill Acts has declined But the significance of the area lies in the early acceptance of the broad view that it was the great advantage to the public which justified the taking, even though a private individual undoubtedly received a substantial and perhaps greater benefit, and even though the public had no right to use the property.”).

38. *See* Case Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 605 (1949) (recognizing the taking of property for the benefit of private individuals under the Mill Acts and courts' sometimes reluctant upholding of such takings).

39. Pritchett, *supra* note 18, at 3.

40. *New York City Hous. Auth. v. Muller*, 1 N.E.2d 153, 153, 156 (N.Y. 1936).

41. *Id.* at 154–55.

42. Myres S. McDougal & Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 45–46 (1942). These states included Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, , Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 46 n.13.

whether a taking satisfies the Public Use Clause, ruling that “[t]he nature of a use, whether public or private, is ultimately a judicial question.”⁴³ Again, in *Cincinnati v. Vester*, the Court reserved this power for itself, albeit with qualifications, noting that “in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.”⁴⁴

But in *United States ex rel. Tennessee Valley Authority v. Welch*, the Court ceded to the legislature the power to determine whether a taking satisfies the definition of “public use” when it ruled that “it is the function of Congress to decide what type of taking is for a public use and . . . the agency authorized to do the taking may do so to the full extent of its statutory authority.”⁴⁵ Additionally, in *Old Dominion Land Co. v. United States*, the Court ruled that the judiciary must begin with the presumption that the legislature’s decision of whether a taking was for a public use is correct.⁴⁶ The Supreme Court issued a congruous ruling in *United States v. Gettysburg Electric Railway Co.*, holding 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.”⁴⁷ Thus, even the nation’s highest court has differed in its determination of who has the power to review the purpose for which the power of eminent domain was exercised.

43. *Rindge Co. v. County of L.A.*, 262 U.S. 700, 705 (1923). The Court also held that “the determination of [whether a taking is for a public use] is influenced by local conditions; and this Court . . . should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State.” *Id.* at 705–06 (emphasis added).

44. *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). The Court, however, noted that when considering whether a taking was for the purpose of public use, “the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies.” *Id.* Nevertheless, the Court reaffirmed that “the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.” *Id.* (footnote omitted).

45. *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551–52 (1946) (citation omitted).

46. *See Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925) (stating that Congress’s “decision is entitled to deference until it is shown to involve an impossibility”).

47. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

II. FOUR LANDMARK CASES

A. *Berman v. Parker*

In the case of *Berman v. Parker*, the U.S. Supreme Court unequivocally ruled on who decides what constitutes a public use.⁴⁸ *Berman* arose when the District of Columbia moved to clear a blighted area south of the Capitol because it deemed the area “injurious to the public health, safety, morals, and welfare.”⁴⁹ Appellant, Sam Berman, the owner of a department store located in the blighted area, sued to block the condemnation.⁵⁰ The District of Columbia argued that the taking was a valid exercise of their authority under the District of Columbia Redevelopment Act, which permitted the District of Columbia Redevelopment Land Agency to acquire land for redevelopment through eminent domain.⁵¹ The U.S. Supreme Court agreed with the District’s argument.⁵² Writing for a unanimous Court, Justice William O. Douglas wrote that promoting public welfare falls under the legislature’s police power.⁵³ Moreover, the Court held that “[t]he concept of the public welfare is broad and inclusive.”⁵⁴ The Court recognized that private ownership of the redeveloped areas might exclude the public from the project but nevertheless held that “[t]he public end may be as well or better served through an agency of private enterprise.”⁵⁵ Thus, *Berman* effectively ruled that the definition of public use does not require the use of the property by

48. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (providing that it is up to the legislature to decide what constitutes a public use and not the judiciary).

49. *Id.* at 28, 30. In the blighted area, “64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating.” *Id.* at 30. More than 97% of the population of the area was black. *Id.*

50. *Id.* at 31.

51. See *id.* at 28–29 (“[In] § 2 of the Act, Congress made a ‘legislative determination’ that ‘owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.’ . . . Congress . . . [concluded] that ‘the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use.’” (last alteration in original) (quoting D.C. CODE § 6-301.01 (2001))).

52. *Id.* at 36.

53. *Id.* at 28, 31–32.

54. *Id.* at 33.

55. *Id.* at 33–34.

the public, thereby promoting the expanded definition of public use.⁵⁶

The primary significance of *Berman*, however, is the judiciary's deferral to the legislature in the execution of the power of eminent domain.⁵⁷ The Court ruled that if an object is within the authority of the legislature, the legislature can determine the means by which that object will be obtained.⁵⁸ The power of eminent domain is simply one of the means at the legislature's disposal.⁵⁹ Moreover, whether the legislative goal of community redevelopment is assigned to private enterprise is a legislative and not a judicial issue.⁶⁰ The *Berman* decision reflects the Court's implicit agreement with the early state-court-Mill Act decisions construing public use to mean "benefit to the public,"⁶¹ but more importantly, it ceded much of the power of review to the legislature.

56. Jonathon N. Portner, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542, 544 (1988).

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

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

. . . .

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.

. . . .

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of 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.

Id. at 32–33, 35–36.

58. *Id.* at 33.

59. *Id.*

60. *Id.*

61. Berger, *supra* note 24, at 206.

B. Hawaii Housing Authority v. Midkiff

In a second landmark case, *Hawaii Housing Authority v. Midkiff*, the U.S. Supreme Court reinforced its broad interpretation of public use as public benefit.⁶² The Court upheld a land reform act that was designed to break up the oligopolistic real estate market that had existed on the Hawaiian Islands for centuries and that the legislature had determined was responsible for inflated land prices.⁶³ The law allowed the Hawaii Housing Authority (HHA) to condemn the fees simple of certain properties that the oligopoly leased to tenants.⁶⁴ The HHA would then hold a hearing to determine whether the transfer of these fees simple to the tenants would serve a public purpose.⁶⁵ If the HHA found that the transfer would serve a public purpose, then the lessees would pay the owners the fair market value of the land.⁶⁶

The Court addressed, *inter alia*, the question of whether the HHA takings satisfied the Public Use Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment.⁶⁷ Quoting *Berman*, the Court held that a taking is consistent with the Public Use Clause if it falls within the authority of the legislature's police power.⁶⁸ The Court reasoned that "[r]egulating [an] oligopoly and the evils associated with it is a classic exercise of a State's police powers."⁶⁹ Furthermore, the Court noted that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."⁷⁰

Moreover, the Court concluded that condemned property does not have to be held by the public to satisfy the Public Use Clause because the "government does not itself have to use property to legitimate the taking; it

62. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). See generally Russel A. Brine, Note, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 CORNELL L. REV. 428 (1986) (discussing the potential impact of the deferential rational basis standard of review the Supreme Court used in *Hawaii Housing Authority v. Midkiff* on future eminent domain cases).

63. *Midkiff*, 467 U.S. at 232–33, 245. In the mid 1960s, the Hawaiian legislature determined that the state and federal government owned 49% of the land in Hawaii and seventy-two private citizens owned another 47%. *Id.* at 232.

64. *Id.* at 233 (citing HAW. REV. STAT. § 516-23 (1993 & Supp. 2004)).

65. *Id.* (citing § 516-22).

66. *Id.* at 233, 234 & n.2 (citing § 516-1).

67. *Id.* at 239.

68. *Id.* at 239–40 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). The Court also stated that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240.

69. *Id.* at 242.

70. *Id.* at 241.

is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”⁷¹

Regarding the judicial power to review legislative determinations of public use, the Court cited a number of precedents and ruled that “[i]n short, the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”⁷² The Court explained, albeit *ipse dixit*, its reasoning for deferring to the legislature about what constitutes a public use:

Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . Thus, if a legislature . . . determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.⁷³

Further, the Court stated:

“[T]he [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective.” When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.⁷⁴

Thus, *Midkiff* stripped courts of their power to review not only whether the purpose of a particular taking satisfies the definition of public use but also whether the public purpose is likely to be achieved.

71. *Id.* at 244. “It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.” *Id.* (alterations in original) (quoting *Rindge Co. v. County of L.A.*, 262 U.S. 700, 707 (1923)). “[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.” *Id.* (alterations in original) (quoting *Block v. Hirsch*, 256 U.S. 135, 155 (1921)).

72. *Id.* at 240–41 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

73. *Id.* at 244.

74. *Id.* at 242–43 (first and last alterations added) (citations omitted) (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 672 (1981)).

C. Poletown Neighborhood Council v. City of Detroit

In *Poletown Neighborhood Council v. City of Detroit*, the Supreme Court of Michigan addressed the issue of whether “a municipality [can] use the power of eminent domain . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state.”⁷⁵ In early 1980, General Motors (GM) informed the city of Detroit that it would close two of its plants three years hence but offered to build another factory if the city could offer the corporation a suitable site.⁷⁶ GM predicted that the new factory would generate about 6150 jobs and multiply industry, commerce, and tax revenues in the area.⁷⁷

The city proposed a 465-acre site and GM accepted.⁷⁸ The Detroit Economic Development Corporation advanced the plan to take the property pursuant to authority granted to them under the Economic Development Corporations Act.⁷⁹ The city then invoked Michigan’s “quick take” statute, The Uniform Condemnation Procedures Act, to acquire some of the residences and businesses in Poletown through eminent domain.⁸⁰ Thereafter, several of the owners of the property proposed for condemnation filed suit against the city.⁸¹

75. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

76. *Id.* at 460 (Fitzgerald, J., dissenting). General Motors requested: (1) an area of between 450 and 500 acres; (2) a rectangular shape; (3) access to a railroad line; and (4) access to a freeway system. *Id.*

77. *Id.* at 464 n.15.

78. *Id.* at 460.

79. *Id.* at 457 (per curiam). The Economic Development Corporations Act provides: There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises . . . to strengthen and revitalize the economy of this state and its municipalities; that accordingly it is necessary to provide means and methods for the encouragement and assistance of industrial and commercial enterprises

Economic Development Corporations Act § 2, MICH. COMP. LAWS SERV. § 125.1602 (LexisNexis 2001).

80. *Poletown*, 304 N.W.2d at 461 (Fitzgerald, J., dissenting); *see* Uniform Condemnation Procedures Act § 2, MICH. COMP. LAWS SERV. § 213.52 (LexisNexis 2004) (providing the proper procedure to be used by an agency when acquiring property under its eminent domain power). Prior to the Uniform Condemnation Procedures Act, settlement on compensation was required before the city could claim title to the land. Projects were delayed for years because agreements on compensation could not be reached. The new law did not contain this requirement. If a price settlement could not be reached, the circuit court would be asked to determine “just compensation.” *Id.* § 213.55. Without the “quick take” law, the *Poletown* taking could have been delayed several years and Detroit would not have been able to meet GM’s deadline for acquiring the property.

81. *Poletown*, 304 N.W.2d at 461 (Fitzgerald, J., dissenting).

The Michigan Supreme Court addressed the same two questions that the U.S. Supreme Court had in the two previous landmark cases: (1) what constitutes a public use and (2) who has the power to determine what constitutes a public use.⁸² Regarding the first question, the court ruled that economic development is a legitimate public purpose because “[t]he power of eminent domain [was] to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community.”⁸³

Concerning the power to review legislative determinations of what constitutes a public use, the court stated:

The Court's role after such a [legislative] determination is made is limited.

“The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.”⁸⁴

82. *See id.* at 457–59 (per curiam) (discussing the definition of “public use” and how it is interpreted by the courts).

83. *Id.* at 459. But the court qualified this determination:

Our determination that this project falls within the public purpose . . . does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited.

Id. Thus the public use test established in *Poletown* requires “substantial proof” that the primary benefit of the taking accrues to the public.

The court relied on evidence presented by the city detailing Detroit’s dismal economic condition and showing that industrial development was necessary to revitalize local industries. The unemployment rate in Michigan was 14.2%, in Detroit it was 18%, and among blacks it was 30%. *Id.* at 465 (Ryan, J., dissenting). The court held:

In the instant case the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto.

Id. at 459 (per curiam).

84. *Id.* at 458–59 (quoting *Gregory Marina, Inc. v. City of Detroit*, 144 N.W.2d 503, 516 (Mich. 1966)).

As in *Berman*, the Michigan Supreme Court reasoned that “the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need.”⁸⁵ In other words, the legislature has the power to determine what constitutes a public use and it can use any means at its disposal, including condemnation under eminent domain, to pursue that public purpose.

But the court noted, contra *Berman* and *Midkiff*, that the judicial power of review is broader when a significant benefit accrues to a particular private party as a result of the taking.⁸⁶ In such a case, the judiciary can review the legislature’s judgment to determine whether the benefit to the public is “clear and significant.”⁸⁷ Although *Poletown* was recently overturned by *Hathcock*,⁸⁸ this line of reasoning remains persuasive.⁸⁹

D. *Kelo v. City of New London*

In the final landmark case, *Kelo v. City of New London*, the U.S. Supreme Court confirmed the trends visible in the previous three landmark cases.⁹⁰ The U.S. Supreme Court ruled that the city of New London, Connecticut, could exercise its power of eminent domain to take private property and turn it over to a development corporation for the purpose of constructing a state park, new residences, research and development facilities, office space, and retail space.⁹¹

85. *Id.* at 459 (alteration in original) (quoting *People ex rel. Detroit & Howell R.R. Co. v. Twp. Bd. of Salem*, 20 Mich. 452, 480–81 (1870)).

86. *See id.* at 459–60 (“Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.”).

87. *See id.* at 460 (“Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.”).

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

89. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2685 (2005) (Thomas, J., dissenting) (criticizing “the almost complete deference” that the majority opinion gives to legislatures concerning what constitutes a public use).

90. *See id.* at 2663–64 (majority opinion) (mentioning the deference the Court has given to legislative judgments in this field while discussing *Berman* and *Midkiff*).

91. *Id.* at 2659, 2668. The development project was proposed to complement an adjacent new plant built by the Pfizer Corporation. *Id.* at 2659.

Several Congressional Republicans, however, unhappy with the Court’s ruling in *Kelo*, quickly moved to negate the outcome of the case. Mike Allen & Charles Babington, *House Votes to Undercut 5-4 Ruling on Property*, WASH. POST, July 1, 2005, at A1. House Judiciary Committee Chairman F. James Sensenbrenner Jr. introduced a bill that would prohibit state and local legislatures from using federal funds for any project in which economic development is the justification for using eminent domain. *Id.*

Moreover, almost sarcastically, a citizen has proposed that a local legislature exercise its

The Fort Trumbull area of New London had recently fallen on hard economic times.⁹² Unemployment was a formidable obstacle; the area recently lost approximately 1900 government sector jobs and the relocation of the U.S. Naval Undersea Warfare Center sent 1000 positions to Rhode Island.⁹³ The New London Development Corporation (NLDC) promised that its proposed development plan “would have a significant socioeconomic impact on the New London region.”⁹⁴ Specifically, the development corporation predicted the plan would create between 1736 and 3169 new jobs and generate between \$680,544 and \$1,249,843 in property tax revenues for the City.⁹⁵

The U.S. Supreme Court addressed the issue of whether this development plan served a public purpose.⁹⁶ Justice Stevens, writing for the majority, held that “[p]romoting economic development is a traditional and long accepted function of government.”⁹⁷ Moreover, the Court reasoned that “[i]t is only the taking's purpose, and not its mechanics, . . . that matters in determining public use.”⁹⁸ Thus, the Court held that so long as a legislature pursues a legitimate public purpose, it can use its eminent domain power in any way it sees fit.⁹⁹

eminent domain power to condemn Justice Souter's home and transfer it to him so that he can construct a hotel on the property. Press Release, Logan Darrow Clements, Freestar Media, L.L.C. (June 27, 2005), <http://www.freestarmedia.com/hotellostliberty2.html>.

92. See *Kelo*, 125 S. Ct. at 2658 (describing how economic decline had led a state agency to designate New London as a “distressed municipality”). Despite the hard times, many of the New London property owners expressed a sincere attachment to their homes:

“[E]ach of the plaintiffs testified [at trial] and said they wished to remain in their homes for a variety of personal reasons. Two of the people referred to the fact that their families have lived in their homes for decades. They all testified that they loved their homes and the Fort Trumbull area. Several have put a lot of work into their property and all of them appeared . . . to be sincerely attached to their homes. One owner, [Susette] Kelo, loved the view her house afforded her and the fact that it was close to the water. All testified that they were not opposed to new development in the Fort Trumbull area. Also, two of the plaintiffs own their property as business investments—the rental of apartments. These two people have put much time, money and effort into renovating their properties, one has owned his property for seventeen years, the other for about eight years.”

Kelo v. City of New London, 843 A.2d 500, 511 (Conn. 2004) (first two alterations added) (quoting *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *3 (Conn. Super. Ct. Mar. 13, 2002)).

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

94. *Id.* at 508, 510.

95. *Id.* at 510. The revenue estimates did not include over half of the land to be used for the development project, which had been ruled exempt as an incentive in the development project. *Id.*

96. *Kelo*, 125 S. Ct. at 2661.

97. *Id.* at 2658, 2665.

98. *Id.* at 2664 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

99. See *id.* at 2664, 2668 (giving broad deference to legislatures to determine what public needs justify the takings power).

The Court also addressed the issue of whether the judiciary had the power to review a legislature's determination of what constitutes a public purpose.¹⁰⁰ Arguing out of tradition, the Court wrote that "[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."¹⁰¹ Moreover, the majority held that local legislatures are better equipped to determine the needs of the local public than federal courts are.¹⁰²

III. CRITICISMS OF THE FOUR LANDMARK CASES

We are not alone in finding problems with the decisions in the four landmark cases discussed above. For a number of reasons, many legal scholars have seen the subtle but constantly broadening interpretation of public use in industrial and economic development cases since *Berman* as inconsistent with the purpose of the Takings Clause and unfair to property owners.¹⁰³ We agree with their conclusions, although at times for different reasons, which we outline below.

A. Moral Hazard

The central problem is that the broad interpretation of public use employed in the four landmark cases creates a moral hazard. This problem occurs when municipalities, facing abysmal economic indicators, ask corporations how many jobs they will create and how much tax revenue they will generate if offered a suitable site for a new plant.¹⁰⁴ The corporations understand that as they report higher numbers for both

100. *Id.* at 2663–64.

101. *Id.* at 2663.

102. *Id.* at 2664–65 (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power. . . . Those who govern [New London] were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”).

103. *See, e.g.*, M. Robert Goldstein & Michael Rikon, *Condemnation and Tax Certiorari: ‘Kelo’: ‘Economic Benefit to the Community’ and ‘Public Use,’* N.Y. L.J., Oct. 28, 2004, at 3 (commenting that using “the power of eminent domain to acquire property and turn it over to private developers in the name of economic benefit to the community . . . is not a ‘public use’”); Scott Bullock, *Narrow ‘Public Use,’* N.J. L.J., Aug. 23, 2004, at 1, 1 (“[T]he U.S. Supreme Court [has gone] seriously off track in interpreting the public use clause of the Fifth Amendment.”).

104. Clearly, the municipalities must rely to some extent on job-creation estimates from the corporations that will construct plants on the condemned property; only the corporations know the manufacturing processes they will use, the level of automation in the production process, and the capacity at which the plant will run.

estimates the taking becomes more justifiable for the legislature because it promises to reduce unemployment by a greater amount and assuages the fiscal problems to a greater degree. But the corporations also know that they are not accountable to the public after the condemnation occurs and the transfer is made.¹⁰⁵ Frequently, municipalities cannot hold the corporations responsible if the job creation and tax revenue promises are never realized.

In 1998, the Poletown GM plant employed only approximately 3200 people, only slightly more than half of the number the corporation predicted when asked by the city of Detroit.¹⁰⁶ For example, in 1984, GM promised to maintain 4500 jobs at its Willow Run plant in Ypsilanti, Michigan, for twelve years in exchange for tax abatements pursuant to the Michigan Plant Rehabilitation and Industrial Development Districts Act.¹⁰⁷ In 1992, however, GM announced that it would close the Willow Run plant by 1995.¹⁰⁸ The Township of Ypsilanti sought an injunction to keep GM from leaving, and the injunction was granted at the circuit court level.¹⁰⁹ The

105. *See Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 480 (Mich. 1981) (Ryan, J., dissenting) (“[T]here are no guarantees from General Motors about employment levels at the new assembly plant. General Motors has made *representations* about the number of employees who will work at the new plant. . . . [T]he fact of the matter is that once [the Poletown property] is sold to General Motors, there will be no public control whatsoever over the management, or operation, or conduct of the plant to be built there. General Motors will be accountable not to the public, but to its stockholders. . . . The level of employment at the new GM plant will be determined by private corporate managers primarily with reference, not to the rate of regional unemployment, but to profit. By permitting the condemnation in this case, this Court has allowed the use of the public power of eminent domain without concomitant public accountability.”), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

106. Carla D. Main, *How Eminent Domain Ran Amok*, POL’Y REV., Oct.–Nov. 2005, at 3, 18.

107. *Charter Twp. of Ypsilanti v. Gen. Motors Corp.*, No. 92-43075-CK, 1993 WL 132385, at *2, *5 (Mich. Cir. Ct. Feb. 9, 1993), *rev’d*, 506 N.W.2d 556 (Mich. Ct. App. 1993); Michigan Plant Rehabilitation and Industrial Development Districts Act §§ 4–5, 9, MICH. COMP. LAWS SERV. §§ 207.554–.555, .558–.559 (LexisNexis 2003) (authorizing municipalities to create industrial development districts and grant tax abatements).

108. WILLIAM SCHWEKE ET AL., CORP. FOR ENTER. DEV., *BIDDING FOR BUSINESS: ARE CITIES AND STATES SELLING THEMSELVES SHORT?* 26 (1994); Linda Kanamine, *Fear and Anger in GM Towns: ‘Sitting on Edge’ in Texas*, USA TODAY, Feb. 24, 1992, at 3A; *see also* Stephen Franklin, *GM Tale One of Many Twists, Uncertainties*, CHI. TRIB., Mar. 2, 1992, at C1 (discussing how GM is choosing to shut down plants); Paul Hoversten, *‘Real People, Real Blood’ in Mich.*, USA TODAY, Feb. 24, 1992, at 3A (illustrating the extent to which the Ypsilanti community depends on Willow Run); Jim Kise, *Struggle Begins for Auto Plant*, YPSILANTI PRESS, May 13, 1992, at 1A (summarizing the contractual argument the Township of Ypsilanti used to keep the Willow Run Assembly plant open); Jolie Solomon et al., *Can GM Fix Itself?*, NEWSWEEK, Nov. 9, 1992, at 54, 55 (acknowledging that Ypsilanti may feel the deepest impact from a plant closing).

109. *Gen. Motors Corp.*, 1993 WL 132385, at *13 (holding that General Motors had breached its agreement with Ypsilanti and reasoning that the court would be allowing injustice “if General Motors, having lulled the people of the Ypsilanti area into giving up millions of tax dollars . . . is allowed to simply decide that it will desert 4500 workers and their families because it thinks it can make these same cars a little cheaper somewhere else”).

decision was reversed on appeal, and GM closed the plant at Willow Run.¹¹⁰

In another instance, the City of Toledo, Ohio, condemned eighty-three houses and sixteen small businesses in the Stickney Avenue area and transferred the property to DaimlerChrysler for a plant expansion.¹¹¹ Following *Berman*, the City was able to declare the area a slum and confer the land to the corporation for development.¹¹² But according to the transfer agreement, DaimlerChrysler was not required to create or maintain any certain number of jobs at the plant.¹¹³

Because corporations do not face consequences if their estimates to the legislature differ from reality, a moral hazard problem is present: corporations have an incentive to overstate the number of jobs and the amount of tax revenue they will create given a suitable site. Moreover, as we noted above, the *Midkiff* decision established that the judiciary cannot review the likelihood that the public benefit targeted by the taking will be achieved.¹¹⁴ The logical corollary of this moral hazard problem is that legislatures may press for eminent domain condemnations to which they would never have consented had they known the actual or even likely

110. *Charter Twp. of Ypsilanti v. Gen. Motors Corp.*, 506 N.W.2d 556, 562 (Mich. Ct. App. 1993). We wish to echo Justice Ryan's sentiments in his dissent in *Poletown*:

What is reported here is not meant to denigrate either the role or the good faith of General Motors Corporation. It is a private, profit-making enterprise. Its managers are answerable to a demanding board of directors who, in turn, have a fiduciary obligation to the corporation's shareholders. It is struggling to compete worldwide in a depressed economy. It is a corporation having a history, especially in recent years, of a responsible, even admirable, 'social conscience'. In fact, this project may well entail compromises of sound business dictates and concomitant financial sacrifices to avoid the worsening unemployment and economic depression which would result if General Motors were to move from the state of Michigan as other major employers have. The point here is not to criticize General Motors, but to relate accurately the facts which attended the city's decision to condemn private property to enable General Motors to build a new plant in Detroit and to 'set the scene' in which, as will be seen hereafter, broad-based support for the project was orchestrated in the state, fostering a sense of inevitability and dire consequence if the plan was not approved by all concerned. General Motors is not the villain of the piece.

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 470 n.9 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). Instead of condemning GM in particular or corporations in general, our aim is to demonstrate that certain public policies with respect to eminent domain proceedings offer perverse incentives about which citizens ought to be wary.

111. Jim West, *Neighborhood Rolled for Jeep Plant*, THE PROGRESSIVE, April 1999, at 14, 14.

112. *Id.*

113. Robert Weissman, *Corporate Welfare Challenge*, MULTINATIONAL MONITOR, Jan.–Feb. 2000, at 7, 7.

114. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984) (noting that judicial bodies should not question a legislature's rational determination that a taking will serve a public use).

outcomes.

B. Dynamic Inconsistency

In *Poletown*, one of the dissenting justices criticizing the majority for overlooking an unintended consequence of the broad interpretation of public use noted: “By its decision, the Court has . . . seriously jeopardized the security of all private property ownership.”¹¹⁵ Indeed, the uncertainty of property rights is a major problem with the *Poletown* decision.¹¹⁶

One of today’s leading macroeconomic growth theories offers an immanent criticism of the broad interpretation of public use for economic stimulation.¹¹⁷ According to this theory, strong and well-defined property rights are the key to and cause of economic growth.¹¹⁸ University of California at Berkeley economist Charles Jones explains this theory:

[T]here is a great deal of variation in the costs of setting up a business and in the ability of investors to reap returns from their investments. Such variation arises in large part from differences in government policies and institutions—what we might call *social infrastructure*. A good government provides the institutions and social infrastructure that minimize[s] [the one-time setup cost of launching the business subsidiary] and maximize[s] [the expected present discounted value of the profit stream], thereby encouraging investment.¹¹⁹

115. *Poletown*, 304 N.W.2d at 464–65 (Ryan, J., dissenting).

116. See Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 378–80 (1983) (arguing that the security of property rights was threatened by existing governmental practices and use restrictions even before *Poletown*).

117. See generally CHARLES I. JONES, INTRODUCTION TO ECONOMIC GROWTH 138 (2d ed. 2002) (explaining that a stable social infrastructure will help encourage investment and foster a nation’s economic development); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY 1 (1973) (arguing that Western affluence is most attributable to the development of an efficient economic organization that results in a sustained rise in per capita income); William Easterly & Ross Levine, *Tropics, Germs, and Crops: How Endowments Influence Economic Development*, 50 J. MONETARY ECON. 3, 5 (2003) (discussing the “geography/endowment hypothesis” and how the “environment directly influences the quality of land, labor, and production technologies”); Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others?*, 64 Q. J. ECON. 83, 84 (1999) (addressing how a nation’s capital accumulations, productivity, government institutions, and policies impact worker output).

118. NORTH & THOMAS, *supra* note 117, at 1 (“Efficient economic organization is the key to growth . . . Efficient organization entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return close to the social rate of return.”).

119. JONES, *supra* note 117, at 137–38; see NORTH & THOMAS, *supra* note 117, at 1–3, 7 (“[I]f a society does not grow it is because no incentives are provided for economic initiative. . . . In the absence of such property rights, few would risk private resources for social gains. . . . However, there is no

But if the government has the power to transfer property from one private owner to another in the name of economic development, it faces a dynamic inconsistency problem: (1) the government promises secure property rights to potential entrepreneurs and developers; (2) the entrepreneurs and developers deem the government's promise credible and engage in entrepreneurial and developmental activities; (3) legislatures exercise their eminent domain power to take the developed property and transfer it to corporations; and (4) entrepreneurs and developers, anxious not to be "fooled" again, view governmental promises of secure property rights more skeptically and are more averse to engage in developmental activities.¹²⁰ Thus, while the government's intent in exercising its eminent domain power in a manner like that in *Poletown* is to promote economic development, because of the dynamic inconsistency problem, such a taking may actually discourage economic development.

C. Distortion of Market Forces

The power of eminent domain allows the government to condemn private property against the will of the property owner so long as it pays the owner "just compensation."¹²¹ Furthermore, the four landmark cases outlined above permit the government to transfer condemned property to another private party if the private party will use the property for public

guarantee that the government will find it to be in its interest to protect those property rights which encourage efficiency . . . as against those in which the property rights protected may thwart growth altogether.").

120. See Stanley Fischer, *Rules Versus Discretion in Monetary Policy*, in 2 HANDBOOK OF MONETARY ECONOMICS 1156, 1169–70 (Benjamin M. Friedman & Frank H. Hahn eds., 1990) ("Dynamic inconsistency occurs when a future policy decision that forms part of an optimal plan formulated at an initial date is no longer optimal from the viewpoint of a later date, even though no new information has appeared in the meantime. An example of dynamic inconsistency . . . is that of optimal taxation in a system with capital. Under rational expectations the solution gives tax rates that are optimal conditional on their being expected by private agents. But once capital is in place, its supply is inelastic and a government acting to maximize the welfare of the representative individual would tax capital more heavily. The problem is that if the public expected the government to violate its announcement, economic welfare would be lower than if the government could commit itself to following through on its promised tax rate."); cf. Stanley Fischer, *Dynamic Inconsistency, Cooperation and the Benevolent Dissembling Government*, 2 J. ECON. DYNAMICS & CONTROL 93, 93–94 (1980) (identifying situations that contribute to dynamic inconsistency, such as government spending on public goods using proportional taxes, and how to calculate optimal and consistent solutions to the optimal tax problem). See generally Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 473–90 (1977) (discussing the optimal control theory and concluding that policy rules are preferable to discretion because discretionary decisions based on current conditions lead to suboptimal economic planning).

121. U.S. CONST. amend. V.

benefit. Thus, so long as the property is used for public benefit, the power of eminent domain permits involuntary transfers of property thereby distorting market forces.¹²²

Consider the hypothetical situation in which a corporation unsuccessfully attempts to purchase property from a private citizen. After the corporation's negotiations with the private citizen fail, suppose the local legislature exercises its eminent domain power to condemn the property and transfers it to the corporation. In this situation, the corporation (buyer) is attempting to gain possession of the homeowner's (seller's) house. In most market situations, a buyer can gain possession of the house only by offering the seller a price high enough to convince her to sell it voluntarily. In those situations, the transaction is mutually beneficial: because both parties engaged in the transaction voluntarily, they must have done it because they anticipated it would make them better off. But in the eminent domain hypothetical, the corporation and homeowner were unable to reach a price at which they were willing to make the transaction voluntarily. In other words, the corporation did not value the property highly enough to pay the homeowner a price that would make her better off than she would be by keeping the home. Only by government imposition did the seller give up her home. Clearly, the property owner in this case was unwilling to sell to the corporation because she valued the property above the corporation's offer. Moreover, she did not voluntarily sell her property to the State because she valued the property at a price greater than that deemed by the State to be the fair market value. The government, however, compensated her with only the fair market value, thereby using extra-market forces to acquire her property at a price below her reservation price.¹²³

Because the transaction was not made voluntarily, the transaction must result in a negative total surplus between the two parties.¹²⁴ This result is

122. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 64 (1986) ("From an economic perspective, the extreme deference to legislative eminent domain decisions in [*Poletown* and *Midkiff*] is puzzling. After all, eminent domain entails coerced appropriation of private property by the state, and there is an important difference between coerced and consensual exchange.")

123. In fact, determining the fair market value is difficult and in some cases the government may provide compensation below other market offers. See Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 298 (2000) (noting that in the case of *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998), the CRDA offered to compensate pawn shop owners \$174,000 after they made a \$500,000 purchase and compensate a homeowner \$251,250 when another casino operator offered her \$1,000,000).

124. A seller's economic surplus is the difference between the lowest price for which she would have sold her house and the price for which she actually sells it. ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MICROECONOMICS* 169 (2001). Similarly, the buyer's (the corporation's) economic surplus is the difference between the price it was willing to pay for the house and the price it actually pays for the house. *Id.* It is useful to conceptualize the government not as a party to the

exacerbated, moreover, because the use of government to transfer the property from the homeowner to the corporation increases the transaction costs of the sale. Thus, to result in a net social benefit, the transfer must produce a public benefit large enough to outweigh the loss in total surplus of the two parties directly affected by the transaction.¹²⁵

What variables should the legislature include when determining whether such a net social benefit occurred (or will occur)? A reduction in the local unemployment rate, in and of itself, cannot be counted as public benefit, for the public does not enjoy the benefit of the new jobs; rather, the individuals who are hired at the factory benefit in a separate market transaction with the corporation.¹²⁶ Employment effects can be counted in the public benefit only to the extent that they lead to *public* benefits: lower crime rates, increased tax revenue, etc.

But the market is distorted in another way. When a private corporation receives property from the government (to build a plant) for less than the market price, it is effectively receiving a subsidy for constructing its plant at that location. In *Poletown*, for example, the public cost of the acquisition and development of the site was more than \$200 million; however, GM paid the city only \$8 million for the developed site.¹²⁷ As a result of the city's concessions, GM obtained the property at a price below the market value and enjoyed an advantage over its competitors. If the market is to reward the most efficient producers, the government cannot give some firms an upper hand by subsidizing their purchase of land.

How, we wonder, are governments to decide which corporations are to

transaction, but rather as a broker who facilitates (albeit abrasively) the transaction. *See generally id.* at 169–72 (explaining “economic surplus”).

125. The net social benefit is the sum of the benefits to each individual member of society. As suggested *supra* note 124 if there exists no price at which the parties are willing to make the transaction voluntarily, the total surplus between the state and the (former) property owner is negative. In other words, together, the state and the (former) property owner are worse off than they were before the taking. Hence, if society as a whole is to be better off as a result of the taking, the benefit to other members of society must outweigh the detriment suffered together by the state and the (former) property owner.

126. We frequently observe an analogous situation when university administrators erroneously argue for increasing state contributions to public universities because college graduates earn far more than similar individuals without a college degree. *Private individuals* enjoy the higher salaries resulting from higher education; thus, it is entirely unclear why the state should subsidize public universities solely on the grounds that college graduates earn higher salaries.

127. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 469 (Mich. 1981) (noting that not only was GM able to purchase the site at a drastically discounted price, but significant tax abatements also further reduced the cost of building and operating the plant), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004); *cf.* Todd A. Rogers, Note, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145, 171–72 (1998) (discussing the problems of tax increment financing and how it does not meet the public use requirement of eminent domain).

receive property condemned under eminent domain for economic development? As we noted above, corporations are not accountable to the government for their job-creation promises.¹²⁸ Thus, awarding the property to the highest bidder is as logically consistent as awarding an Olympic gold medal to the competitor who *claims* to run the 100-meter dash in the fastest time.

D. Checks and Balances

American government is founded on the premise that individuals do not handle large amounts of power well.¹²⁹ In defense of this premise, James Madison, the fourth U.S. President, wrote: “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”¹³⁰ More specifically, Madison warned that the legislature is the branch of government most likely to amass dangerous amounts of power.¹³¹ Thus, separation of power, and

128. See *supra* Part III.A.

129. See MONTESQUIEU, *THE SPIRIT OF LAWS* 200 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (“[C]onstant experience shews [sic] us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit.”)

130. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961). “[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.” *Id.* at 325–26 (emphasis in original).

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

MONTESQUIEU, *supra* note 129, at 202.

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly [sic] administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

THE FEDERALIST NO. 48 (James Madison), *supra*, at 332.

131. See THE FEDERALIST NO. 48 (James Madison), *supra* note 130, at 333–34 (“The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . [I]n a representative republic, where the executive magistracy is carefully limited both in the extent and the

particularly the system of checks and balances, is paramount to ensuring that the government serves the interests of the people.¹³²

Most states have granted power to the judicial branch to review the use of eminent domain.¹³³ Yet if the courts defer to the legislatures' determinations of whether a taking satisfies the Public Use Clause, the judiciary has forfeited much of its power under the system of checks and balances.¹³⁴

What consequences are likely to arise if a legislature's eminent domain power enjoys immunity from judicial review? Corporations that cannot acquire desired property through the market may pressure local legislative bodies to acquire the property through eminent domain.¹³⁵ Moreover, *Poletown* suggests the extent of the persuasive power with which private firms can influence government action.¹³⁶

IV. A PROPOSAL FOR A HEIGHTENED STANDARD OF REVIEW

Legislative use of eminent domain to transfer property from one private individual to another in the name of public use is especially problematic when the private individual to whom the property stands to be transferred conceives the idea of the taking. Moreover, the present level of scrutiny gives the legislature an inordinate amount of power without a corresponding check, creates uncertainty about property rights, and perhaps

duration of its power; and where the legislative power is exercised by and assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.”)

132. See MONTESQUIEU, *supra* note 129, at 200 (“To prevent the abuse of power, 'tis necessary that by the very disposition of things power should be a check to power.”); see also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.” (citing *City of Boerne v. Flores*, 521 U.S. 507, 519–24 (1997))).

133. Jones, *supra* note 123, at 301 (citing Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 424 (1983)).

134. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“[T]he Court . . . will not substitute its judgment for a legislature's judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’” (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896))).

135. See, e.g., *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102, 107 (N.J. Super. Ct. Law Div. 1998) (noting that eminent domain proceedings were requested after developer was unable to obtain all of the parcels within the project area through negotiated purchases); *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365, 368 (N.D. 1996) (same).

136. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 470 (Ryan, J., dissenting) (“[W]hat General Motors wanted, General Motors got.”), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

most importantly, provides no recourse of action for cases in which the alleged benefit to the public never materializes. Taken cumulatively, these problems suggest the need for a reappraisal of recent legal trends.

Indeed, such a reappraisal has already begun in several more recent cases. In the 1998 case *Casino Reinvestment Development Authority (CRDA) v. Banin*, the New Jersey Superior Court asserted its power to examine the probability of the realization of the purported public benefit.¹³⁷ The CRDA initiated condemnation proceedings to take private property adjacent to the Trump Plaza Hotel and Casino and sell the property to the casino for parking and landscaping purposes.¹³⁸ Though CRDA showed a myriad of “public benefits” associated with the taking,¹³⁹ the Superior Court ultimately ruled that the taking primarily served private, not public, interests.¹⁴⁰ After conducting its examination, the court disallowed the taking because once he received the property, the transferee was in no way obligated to use the property for the public purpose on which grounds the taking was rationalized; in fact, according to the terms of the taking, the transferee could use the land for expanding the casino and adding slot machines to generate more private revenue.¹⁴¹

137. *Banin*, 727 A.2d at 104 (“[W]hen the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, ‘a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced.’ In determining whether projects with substantial benefit to private parties are for a public purpose . . . the trial court must examine the ‘underlying purpose’ of the condemning authority in proposing a project as well as the purpose of the project itself.” (quoting *City of Atlantic City v. Cynwyd Invs.*, 689 A.2d 712, 721 (N.J. 1997))).

138. *Id.* at 104–05, 110.

139. *See id.* at 104–05 (listing the project’s benefits as identified by the legislature as including “the development of additional hotel rooms in Atlantic City dedicated to housing conventioners using the new Convention Center[;] redevelopment of a portion of the Corridor Area[;] the construction of additional parking[;] the alleviation of traffic congestion in the Corridor Area[;] establishment of a park—green space—in Atlantic City[;] creation of new permanent hospitality industry and short-term construction industry jobs[; and] promotion of the tourist and convention industries”). *But see* Laura Mansnerus, *What Public? Whose Use?*, N.Y. TIMES, Mar. 22, 1998, § 14, at 1 (“Even with a broad interpretation of government power, this case falls beyond it,” said Dana Berliner, a lawyer for the Institute for Justice . . . ‘I’m hoping this causes the New Jersey courts to draw the line. It’s really hard to argue with a straight face that taking a woman’s home of nearly 40 years to give it to Donald Trump for a limousine waiting area is a public use.’”).

140. *See Banin*, 727 A.2d at 105 (“If the consequences and effects of condemning the Banin, Coking and Sabatini properties are simply to allow for the acquisition and assemblage of land by Trump for future private development purposes, then the asserted public benefits are illusory.”). “[W]hen the court considers the consequences and effects of these three condemnation actions it must conclude that the primary interest served here is a private rather than a public one and as such the actions cannot be justified under the law.” *Id.* at 111.

141. *Id.* at 110–11.

Other courts, too, have recently reconsidered this broad expansion of what constitutes a public use.¹⁴² In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, Illinois's highest court found unconstitutional a regional development authority's effort to take an automobile-recycling facility's property and sell it to an automobile-racetrack owner so that the track could build a parking lot.¹⁴³ The court held that the taking would not achieve a legitimate public use because its primary purpose was to bolster the racetrack's profits, not to promote economic development.¹⁴⁴

A related development emerged in *City of Chattanooga v. Classic Refinery, Inc.*¹⁴⁵ Contrary to the trend in case law at that time,¹⁴⁶ the Tennessee Court of Appeals asserted the judiciary's power to review the legislature's determination of the necessity of a taking to achieve the purported objective.¹⁴⁷ The city attempted to take private property for a proposed stadium project.¹⁴⁸ During the lengthy taking-litigation process, however, the stadium was completed.¹⁴⁹ The court found that because the city built the stadium without possession of the property in question, the taking was not necessary for the stadium project.¹⁵⁰ More importantly, however, the court established a two-pronged test that must be satisfied

142. See, e.g., *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 466 (7th Cir. 2002) ("The public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if a landowner chooses to use his property in a beneficial, but not mandated, manner.")

143. *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 6 (Ill. 2002). The defendant presented testimony "that development of a parking facility on the property was necessary to promote economic development, as the number of spectators, development and expansion of neighboring businesses, and other economic spin-off, all had exceeded initial expectations" when the racetrack had expanded previously. *Id.* at 6.

144. *Id.* at 10–11. The defendant also failed in his argument that replacing the recycling facility was going to eliminate urban blight. *Id.* at 9.

145. *City of Chattanooga v. Classic Refinery, Inc.*, No. 03A01-9712-CV-00552 (Tenn. Ct. App. Dec. 17, 1998), available at 1998 WL 881862.

146. See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one."); *Duck River Elec. Membership Corp. v. City of Manchester*, 529 S.W.2d 202, 204 (Tenn. 1975) ("The determination by a condemning authority of the necessity for the taking is not a question for resolution by the judiciary and, absent a clear and palpable abuse of power, or fraudulent, arbitrary or capricious action, it is conclusive upon the courts." (citation omitted)).

147. See *Classic Refinery*, slip op. at 7 ("[A] proper judicial determination of a condemnation proceeding must include an analysis of the purpose of the taking. Normally this analysis is limited to whether the taking was for a public or private use; however, . . . where the facts indicate that the purpose for the taking may no longer exist, [the court] find[s] it necessary to analyze the necessity of the taking as well.")

148. *Id.* at 2–3.

149. *Id.* at 5–6.

150. *Id.* at 8–9.

before any taking is constitutional: “1) that the property will serve a public purpose; . . . and 2) that the condemner . . . has asserted that the property is necessary and essential for the purpose proposed.”¹⁵¹

Although the nature of the judicial inquiry in *Banin* and *Classic Refinery* are different, in both cases the courts engaged in a more intensive level of scrutiny than the judicial trend theretofore. Without this heightened scrutiny, the courts’ refusal to question the judgments of the legislative bodies would have led them to rule in favor of the takings. But because of this more aggressive level of scrutiny, the courts’ analyses were much more probative into the question of whether the takings satisfied a legitimate public purpose. And although the courts ruled in favor of those whose property was taken, the more lasting effect of their decisions is their assertion that legislative claims are not above judicial scrutiny.¹⁵²

These two cases stimulate our proposal for reform: namely, a more intensive level of judicial scrutiny in takings cases in which a legislature proposes the transfer of private property from one individual to another. Accordingly, we argue that the judiciary ought not to defer to legislative determinations of what constitutes a public purpose. In order to check legislative power, the burden ought to rest instead on the government to show, by a preponderance of the evidence, three facts: 1) that the taking is necessary for the achievement of the purported public purpose;¹⁵³ 2) that if the taking were to occur, the materialization of the public benefits they allege is more likely to occur than not;¹⁵⁴ and 3) that the taking is not more

151. *Id.* at 10–11 (citations omitted).

152. *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998); *Classic Refinery*, slip op. at 11–12.

153. We suspect that a showing of the taking’s necessity will be especially difficult in a situation where the land is not slum property but is already being put to productive use although perhaps not the most productive possible use. In such a case where the land is already being used, the legal presumption is against the taking.

Indeed, some states currently do not recognize the taking of private property from one entity to transfer it to another entity for redevelopment if the area is not considered “blighted.” *See, e.g., City of Owensboro v. McCormick*, 581 S.W.2d 3, 7–8 (Ky. 1979) (holding unconstitutional a statute authorizing the acquisition of “any” land for industrial development). In so ruling, the court stated:

Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections

Id. at 5. Moreover, the court held that private property that would not be used by the public cannot be taken “unless the property lies within an area of land which is blighted as defined by statute.” *Id.* at 7; *accord Karesh v. City Council of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978).

154. Our proposed standard is not unprecedented. The requirement of a showing of evidence specific to the individual situation is similar to a standard already discussed by the Supreme Court. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“We think a term such as ‘rough proportionality’

extensive than necessary to serve the alleged public purpose.

Finally, as insurance for the community, we suggest that all takings in which property is transferred to a private party include a provision that if certain clearly defined public benefits do not arise within an allotted time period, then the transferee is liable to compensate the municipality that used its power of eminent domain to acquire the property. For example, if a firm claims that the exercise of eminent domain on its behalf will result in the net creation of 500 new jobs, and if 500 new jobs are not created within a given period of time, the municipality may assess the firm a predetermined fee each year the jobs fail to exist.

CONCLUSION

Writing for the majority in *Berman*, Justice Douglas explained the logic of eminent domain:

Congress . . . finds . . . that [its] ends cannot be attained “by the ordinary operations of private enterprise alone without public participation” . . . [its goal] “cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs”¹⁵⁵

Legislatures’ ability to take private property allows them to achieve legitimate public goals. But legislatures cannot achieve these goals if their use of eminent domain establishes perverse incentives for corporations, private property owners, entrepreneurs, and legislatures. Without the safeguards we advocate, we fear that benefit to the public will continue to mean, as one commentator put it, “of benefit to major corporations.”¹⁵⁶

best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” (footnote omitted). Hence, in a case about a proposed taking, we find it consistent with *Dolan* to require local legislatures to quantify the benefits likely to be gained as a result of the taking and to further demonstrate that the purported benefits are likely to result.

155. *Berman v. Parker*, 348 U.S. 26, 29 (1954) (quoting District of Columbia Redevelopment Act, D.C. CODE § 6-301.01 (2001)).

156. Edmund F. Byrne, *Give Peace a Chance: A Mantra for Business Strategy*, 20 J. BUS. ETHICS 27, 33 (1999).