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Breaking New Ground: Using Eminent Domain for Economic Development

Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law; B.A., 2001, Yale University. I would like to thank Professor Eduardo Penalver, whose seminar and helpful comments challenged me to think more deeply and broadly about the issues in this Note.

NOTES

BREAKING NEW GROUND: USING EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT

*Elizabeth F. Gallagher**

INTRODUCTION

The city of New London, Connecticut, has struggled for decades to reverse its economic decline.¹ At the turn of the nineteenth century, New London was prosperous as a whaling town and flourished once again during the Cold War because of defense industries in the area.² However, after these industries declined, New London lost thousands of jobs and became one of Connecticut's poorest cities.³ The waterfront area sits nearly vacant.⁴ As part of a revitalization effort, the city persuaded the pharmaceutical company Pfizer to build a \$270 million research and development facility,⁵ which opened in 2001.⁶

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1. See Terry Pristin, *Connecticut Homeowners Say Eminent Domain Isn't a Revenue-Raising Device*, N.Y. Times, Sept. 8, 2004, at C8. New London is located along the coast of Connecticut, where the Thames River meets the Long Island Sound. See Jennie Green, *Weekender: New London, Conn.*, N.Y. Times, May 31, 2002, at F8.

2. See Jane Ellen Dee, *Oh, Claire: You're a Scholar and Visionary . . . If Only You Could Quit Leaving Skin on the Sidewalk*, Hartford Courant, Feb. 25, 2001, Northeast Magazine, at 5.

3. See Carrie Budoff, *A Battle Against Eminent Domain: Gritty Dispute in New London*, Hartford Courant, Jan. 1, 2001, at A1; Pristin, *supra* note 1. The city recently lost approximately 1900 government positions, in addition to 1000 positions lost when the United States Naval Undersea Warfare Center moved to Rhode Island from New London in 1996. See *Kelo v. City of New London*, 843 A.2d 500, 510 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

4. See Santa Mendoza, *Big Dreams Mean Big Land Problems*, Conn. L. Trib., Dec. 30, 2002, at 24.

5. See Pristin, *supra* note 1.

6. See Robert A. Hamilton, *New London Is Bustling After Pfizer Complex Opens*, N.Y. Times, Dec. 30, 2001, § 11, at 9. The new facility has spurred economic growth in the area by creating jobs and demand for housing. See C.J. Hughes, *Making Over New London's Rough Port*, N.Y. Times, Aug. 15, 2004, § 11, at 13; Richard Lezin Jones, *Through the Roof*, N.Y. Times, Mar. 21, 2004, § 14CN, at 1.

New London has plans to rebuild a ninety-acre waterfront parcel near the Pfizer buildings to further the city's rejuvenation.⁷ The project will include housing, offices, and a waterfront hotel with a fitness center and conference space.⁸ Since the plan was conceived in 1998,⁹ it has enjoyed the enthusiastic support of state and local governments,¹⁰ in no small part due to the more than 1000 jobs and \$700,000 to \$1.2 million in property tax revenues anticipated to result from the project.¹¹

Despite these anticipated benefits, this redevelopment project has been on hold for over four years because of seven property owners who refuse to move.¹² On December 21, 2000, these property owners brought suit against the City of New London to challenge the city's use of eminent domain to assemble land for the waterfront development project.¹³ In order for the city to take the plaintiffs' land through eminent domain, the city must pay them at least market value for their property and the taking must be for a public use.¹⁴ The plaintiffs claim that the city has no authority to take their land because the land will not be put to public use, but will benefit private, commercial interests.¹⁵

As cities struggle to provide jobs and services for their residents and as land becomes more scarce,¹⁶ controversies over economic development projects such as the one described above have become

7. See Eleanor Charles, *Eminent Domain Challenged in New London Project*, N.Y. Times, Apr. 1, 2001, § 11, at 9.

8. See *id.*

9. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *6 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part and rev'd in part*, 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

10. See Charles, *supra* note 7.

11. See *Kelo*, 843 A.2d at 510.

12. See *id.* at 510-11; Budoff, *supra* note 3; Pristin, *supra* note 1. The nearly ninety other property owners have since settled with the city and moved. See Pristin, *supra* note 1.

13. See *Kelo*, 2002 Conn. Super. LEXIS 789, at *1; David M. Herszenhorn, *Residents of New London Go to Court, Saying Project Puts Profit Before Homes*, N.Y. Times, Dec. 21, 2000, at B5.

14. See U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Just compensation for the exercise of eminent domain must constitute at least market value of the property taken. See, e.g., *United States v. Miller*, 317 U.S. 369, 374 (1943). If the government uses eminent domain to take property that is subject to a leasehold, the owner of the lease is entitled to compensation for the value of the lost leasehold interest. See *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) (reiterating that the Fifth Amendment requires compensation for unexpired leasehold interests terminated by the exercise of eminent domain); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 381-82 (1945) (holding that a warehouse tenant was entitled to compensation for the value of his leasehold interest that the federal government condemned through eminent domain for wartime use for one year).

15. See Herszenhorn, *supra* note 13.

16. See Richard B. Tranter, *Defer to Legislatures*, Nat'l L.J., Aug. 16, 2004, at 23.

increasingly common.¹⁷ In turn, property owners who stand to be displaced by economic development projects have increasingly looked to the courts to intervene.¹⁸ For both the Connecticut Superior Court and the Connecticut Supreme Court, the public benefit that the city of New London stands to reap from this development project was clear.¹⁹ Both courts ruled that New London's exercise of eminent domain was constitutional.²⁰ The plaintiffs then appealed to the United States Supreme Court, which has agreed to hear the case.²¹ Property owners such as these plaintiffs should not be allowed to hold up economic development for years in court when the legislature has made a reasoned determination that the inconvenience suffered by the property owners who are forced to sell is a justifiable cost in light of the substantial benefit to the public that will result.

This Note examines whether the use of eminent domain to transfer property from one private party to another for economic development can satisfy the public use requirement of eminent domain. Part I outlines the history of the use of eminent domain to transfer property from one private party to another, especially for the purpose of economic development. Part II describes the dominant approaches that have been applied to argue for or against the use of eminent domain for economic development. Finally, Part III explains why economic development is a valid public use and why the political process coupled with rational basis judicial review of legislative determinations of public use are appropriate safeguards against abuses of eminent domain and adequately protect individual landowners' and the government's interests at stake.

I. BACKGROUND AND HISTORY OF THE PUBLIC USE REQUIREMENT OF THE TAKINGS CLAUSE

This part describes the background and history of the public use requirement of the Takings Clause. Part I.A introduces the public use requirement. Part I.B discusses the Supreme Court's public use decisions where eminent domain was used to transfer property from

17. See Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 Real Prop. Prob. & Tr. J. 251, 252 (2004) (surveying federal and state public use decisions from 1987 to 2003).

18. See *id.* at 257-58.

19. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at *128-30 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part and rev'd in part*, 843 A.2d 500, 542-43 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

20. See *Kelo*, 843 A.2d at 562 (allowing the city's use of eminent domain to take plaintiffs' property by affirming in part and reversing in part the Superior Court's decision); *Kelo*, 2002 Conn. Super. LEXIS 789, at *341 (allowing the city's use of eminent domain for one parcel of land, but granting injunction to the plaintiffs with respect to another parcel).

21. See *Kelo*, 125 S. Ct. at 27.

one private party to another, as well as lower court decisions where eminent domain was used for economic development.

A. *The Takings Clause*

The Fifth Amendment to the United States Constitution prohibits “private property [to] be taken for public use, without just compensation.”²² This prohibition is known as the Takings Clause.²³ States are constrained from such action through incorporation of the Takings Clause into the Due Process Clause of the Fourteenth Amendment.²⁴ In addition, most state constitutions contain a similar public use requirement.²⁵

The function of the public use requirement in the Takings Clause is the subject of considerable debate.²⁶ Textually, the words “public use” seem to indicate that there are some types of takings, namely takings for nonpublic use, that would be impermissible even if compensated.²⁷ Alternatively, the drafters of the Fifth Amendment

22. U.S. Const. amend. V.

23. See, e.g., Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 *Hastings L.J.* 1245, 1248 (2002) (describing the drafting of the Fifth Amendment, including the Takings Clause).

24. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231, 244 (1984) (analyzing exercises of eminent domain by the State of Hawaii under the Takings Clause of the Fifth Amendment); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (incorporating the Takings Clause into the Fourteenth Amendment Due Process Clause, and thus making the Takings Clause applicable to state governments).

25. See Robert C. Ellickson & Vicki L. Been, *Land Use Controls* 1011 (2d ed. 2000); Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 67 n.24 (1986) (describing takings clauses in state constitutions). For example, under the Arizona Constitution,

[p]rivate property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made

Ariz. Const. art. II, § 17. In Connecticut, “[t]he private property of no person shall be taken for public use, without just compensation therefor.” *Conn. Const. art. I, § 11.* The Michigan Constitution states that “[p]rivate property shall not be taken for public use without just compensation.” *Mich. Const. art. X, § 2.* New Jersey’s Constitution states that “[p]rivate property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.” *N.J. Const. art. I, ¶ 20.*

26. See, e.g., Harrington, *supra* note 23, at 1246 (describing the debate over the scope of the public use requirement as well as over courts’ authority to review legislative determinations of public use).

27. See, e.g., Camarin Madigan, *Taking for Any Purpose?*, 9 *Hastings W.-Nw. J. Envtl. L. & Pol’y* 179, 192 (2003) (“Why would [James] Madison, [the drafter of the Fifth Amendment], have included the public use provision, if the Takings Clause requires only basic due process guarantees?”); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the “Public Use” Requirement*, 87 *Minn. L. Rev.* 543, 566 (2002) (“[T]he inclusion of the words ‘public use’ in the Takings Clause had to mean something.”).

may have employed the words “public use” to denote when compensation is required, rather than when the exercise of eminent domain is permissible.²⁸ Although there is no legislative history from the drafting of the Fifth Amendment,²⁹ early case law suggests that, at that time, courts would have considered the use of eminent domain to transfer property from one private party to another to be a private use, which would not satisfy the public use requirement.³⁰ Courts since then have long interpreted the public use requirement as a limitation, of varying stringency, on the government’s exercise of eminent domain.³¹

B. Courts’ Treatment of the Public Use Requirement in Cases Where Eminent Domain Is Used to Transfer Property from One Private Party to Another

Although all courts interpret the public use requirement as some sort of limitation on the government’s exercise of eminent domain,³² only one state, South Carolina, requires property taken through eminent domain literally to be used or occupied by the public to satisfy the public use requirement.³³ In other states and under the

28. See Harrington, *supra* note 23, at 1249, 1299 (arguing that the words “public use” were originally intended to be “*descriptive*, rather than prescriptive”); Merrill, *supra* note 25, at 71 (“[Public use] could mean, as traditionally thought, that government may *condemn* only if the use is public. But it could also mean that when government condemns, it must *compensate* only if the taking is for a public use.”); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 591 (1972) (stating that the words “public use” are grammatically descriptive rather than limiting, although acknowledging that the words generally have not been interpreted that way); *infra* text accompanying notes 168-69.

29. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 791 (1995) (exploring the historical understanding of the Takings Clause as a protection against physical takings rather than regulations affecting value).

30. In *Calder v. Bull*, although not a case implicating the Takings Clause, Justice Chase stated that “[i]t is against all reason and justice, for a people to entrust a Legislature with [the power to take property from A and give it to B] . . . and, therefore, it cannot be presumed that they have done it.” *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion); see also Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 412-13 (1983).

31. See Harrington, *supra* note 23, at 1254-55; *infra* notes 105-06 and accompanying text.

32. See Harrington, *supra* note 23, at 1254-55.

33. See *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978) (holding that the public must have definite and fixed use of the property in order to satisfy the public use requirement of the South Carolina Constitution, so the use of eminent domain to build a convention center and hotel complex was unconstitutional); Merrill, *supra* note 25, at 68 n.26 (pointing out that South Carolina is the only state that has refused to interpret “public use” more broadly to include public benefit or advantage); Steven M. Crafton, Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 Emory L.J. 857, 879 n.125 (1983) (noting that out of three jurisdictions that have held the use of eminent domain

Federal Constitution, public use is interpreted more broadly to include situations where the public benefits from the land, but may not literally use or occupy it.³⁴ Furthermore, public use does not necessarily mean public, or government, ownership;³⁵ private ownership resulting from eminent domain can constitute a valid public use.³⁶ The Supreme Court has approved of two circumstances when eminent domain that ultimately results in private ownership of the seized land satisfies the public use requirement—blight clearance and remedying a skewed housing market.³⁷ The Court will soon decide whether a third circumstance, economic development, can satisfy the public use requirement.³⁸ Courts that have already considered the issue differ on whether the public use requirement is satisfied when eminent domain is used to transfer property from one private party to another for economic development.³⁹

Part I.B.1 summarizes the Supreme Court's two public use decisions where eminent domain was used to transfer property from one private party to another. Part I.B.2 discusses lower court decisions on whether economic development is a valid public use to sustain the transfer of property from one private party to another through eminent domain.

1. The Supreme Court's Public Use Decisions

Although the Supreme Court has not yet considered whether economic development justifies the use of eminent domain,⁴⁰ the Court has allowed the use of eminent domain to transfer property from one private party to another in two cases, *Berman v. Parker*⁴¹ and *Hawaii Housing Authority v. Midkiff*.⁴² Both were short,

for urban renewal to be unconstitutional under a literal public use test, only South Carolina still adheres to this test).

34. See 2A Nichols on Eminent Domain § 7.02[3] (Julius L. Sackman ed., 3d ed. 2004) [hereinafter Nichols]; *infra* notes 135-38 and accompanying text.

35. See *Berman v. Parker*, 348 U.S. 26, 34 (1954) (“[P]ublic ownership is [not] the sole method of promoting the public purposes of community redevelopment projects.”).

36. See *id.* at 33-34.

37. See *infra* Part I.B.1.

38. The Supreme Court has granted certiorari to consider this question. See *Kelo v. City of New London*, 125 S. Ct. 27 (2004). The question presented in *Kelo* is the following: “What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?” Brief of Amici Curiae America’s Future Inc. and Somerset Transmission and Repair Center at i, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 04-108).

39. See *infra* Parts I.B.2.a-b.

40. See *supra* note 38.

41. 348 U.S. 26 (1954).

42. 467 U.S. 229 (1984).

unanimous opinions characterized by strong deference to legislative determinations of public use.⁴³

In *Berman*, Congress sought to remedy “substandard housing and blighted areas” in the District of Columbia by allowing the District of Columbia Redevelopment Land Agency (the “Agency”) to acquire land by eminent domain for redevelopment.⁴⁴ Congress has the same legislative power over the District of Columbia as state legislatures have over state affairs.⁴⁵ The Agency sought to acquire the plaintiff’s land as part of its redevelopment of the larger area where the plaintiff’s parcel was located.⁴⁶ Under the Agency’s plan, the plaintiff’s parcel would likely have been sold to a private developer.⁴⁷ The plaintiff challenged the condemnation as a violation of the Fifth Amendment’s public use requirement because the property was not itself substandard housing or a slum, and the property would be redeveloped by a private developer into homes for private use.⁴⁸

The Supreme Court disagreed and allowed the use of eminent domain to transfer property from one private party to another for the purpose of blight clearance.⁴⁹ The Court declined to second-guess the legislature’s determination that the use of eminent domain was necessary for the elimination of slums from the area, finding that “[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one.”⁵⁰ The Court then went on to hold that “[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.”⁵¹ Thus, the Court accepted the legislature’s determination of whether the purpose satisfied the public use requirement and whether the method of obtaining that purpose was valid.⁵²

The Supreme Court’s most recent decision regarding the constitutionality of transferring property from one private owner to

43. *See id.* at 241 (Justice Marshall took no part in the consideration or decision of the case); *Berman*, 348 U.S. at 32-33.

44. *Berman*, 348 U.S. at 28-29. Local governments that have eminent domain powers have been granted these powers by the legislature, usually through nonprofit development corporations. *See, e.g., id.* at 29; *Kelo v. City of New London*, 843 A.2d 500, 513-14 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

45. *See Berman*, 348 U.S. at 31-32 (citing *District of Columbia v. Thompson Co.*, 346 U.S. 100, 108 (1953)).

46. *See id.* at 30-31.

47. *See id.* at 30. Congress’s act allowed the Agency to lease or sell some of the property it acquired to private companies, provided that those companies agreed to use the land in accordance with the Agency’s redevelopment plan. *Id.* In fact, “[p]reference [was] to be given to private enterprise over public agencies in executing the redevelopment plan.” *Id.*

48. *See id.* at 31.

49. *See id.* at 36.

50. *Id.* at 32.

51. *Id.* at 33.

52. *See id.* at 32-33.

another through eminent domain was in *Hawaii Housing Authority v. Midkiff*.⁵³ In *Midkiff*, landowners challenged the Hawaii state legislature's plan to use eminent domain to redistribute land from lessors to lessees claiming that it failed to satisfy the public use requirement of the Takings Clause of the Federal Constitution.⁵⁴ The legislature's purpose in enacting this plan was to alleviate the unusually skewed residential land market caused by the concentration of a majority of the land in the hands of very few owners.⁵⁵ The legislature enacted a complicated condemnation plan that balanced this economic purpose with the landowners' claims that they were prevented from selling their land by the "significant federal tax liabilities they would incur."⁵⁶ The plan provided for purchase only by groups of eligible tenants,⁵⁷ for a public hearing to determine whether "acquisition . . . of the tract will 'effectuate the public purposes' of the Act,"⁵⁸ and for negotiations between lessors and lessees to set an adequate price for the owner's land, not to fall below fair market value.⁵⁹

The Supreme Court held that the Hawaii legislature's plan to use eminent domain to remedy the land oligopoly satisfied the public use requirement of the Takings Clause.⁶⁰ The Court refused to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"⁶¹ The Court reasoned that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers"⁶² and that the public use requirement is "coterminous with the scope of a sovereign's police powers."⁶³ Therefore, the public use requirement was satisfied in this case.⁶⁴ The Court also found that the state's plan was a rational means through which to relieve the land ownership problem.⁶⁵ Thus, the Supreme Court again showed great

53. 467 U.S. 229 (1984).

54. *See id.* at 234-35.

55. *See id.* at 233. The State of Hawaii discovered in the mid-1960s that about ninety-two percent of the land not owned by the state or federal government (approximately fifty-one percent of the land in Hawaii) was owned by only seventy-two private landowners. *See id.* at 232. Therefore, most Hawaii residents leased land from these landowners with no opportunity to buy. *See id.* at 232-33.

56. *Id.* at 233.

57. *See id.* The Hawaii Legislature defined "[a]n eligible tenant [as] one who, among other things, owns a house on the lot, has a bona fide intent to live on the lot or be a resident of the State, shows proof of ability to pay for a fee interest in it, and does not own residential land elsewhere nearby." *Id.* at 233 n.1 (citation omitted).

58. *Id.* at 233.

59. *See id.* at 234 & n.2.

60. *See id.* at 241.

61. *Id.*

62. *Id.* at 242.

63. *Id.* at 240.

64. *See id.* at 243.

65. *See id.* at 242.

deference to a legislature's determination of public use and its choice of how to effectuate its chosen purpose.⁶⁶

2. Lower Courts' Conflicting Interpretations of Public Use

Despite the Supreme Court's consistent deference to legislative determinations of public use, not all lower courts have taken a similarly deferential approach.⁶⁷ In general, federal courts are more deferential to legislative determinations of public use than state courts,⁶⁸ where most public use cases are litigated.⁶⁹ In a study of appellate level public use cases decided between 1954, the year the Supreme Court decided *Berman v. Parker*,⁷⁰ and 1986, all seventeen federal cases surveyed upheld the use of eminent domain, while only about eighty-four percent of the 291 state public use decisions held that the public use requirement was satisfied.⁷¹ A more recent survey of 236 public use decisions from 1986 to 2003 revealed that these results remain largely unchanged.⁷²

Within public use cases, one category of public use decisions that is particularly divisive involves economic development.⁷³ Courts differ on whether the use of eminent domain to transfer property from one private owner to another for economic development of the community satisfies the public use requirement.⁷⁴

a. Decisions that Have Found Economic Development to Satisfy the Public Use Requirement

Perhaps the most famous state case that allowed economic development to satisfy the public use requirement, and consequently

66. See *supra* text accompanying notes 61-64.

67. See *infra* Parts I.B.2.a-b.

68. See Merrill, *supra* note 25, at 65, 94-95 (surveying public use cases from 1954 to 1986).

69. See *id.* at 95; Wilk, *supra* note 17, at 257.

70. 348 U.S. 26 (1954).

71. See Merrill, *supra* note 25, at 96.

72. See Wilk, *supra* note 17, at 257, 258. Of fourteen federal appellate public use cases surveyed, only one invalidated the use of eminent domain because it did not satisfy the public use requirement. See *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (finding that the county's vacation of a restrictive covenant prohibiting anything other than single-family residential homes on the lots in the plaintiff's residential subdivision, and the rezoning of the lots to allow for commercial uses, violated the public use requirement of the Takings Clause of the United States Constitution); Wilk, *supra* note 17, at 260. In contrast, of the remaining 222 state public use cases, eighteen percent found that the public use requirement was not satisfied. See *id.* at 258. In both studies, over sixty percent of the public use cases involved the assembly of large parcels of land for development projects. See Merrill, *supra* note 25, at 98; Wilk, *supra* note 17, at 262.

73. See, e.g., *infra* notes 105-06 and accompanying text.

74. See *infra* Parts I.B.2.a-b.

garnered much criticism,⁷⁵ was the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. City of Detroit*.⁷⁶ In *Poletown*, General Motors Corporation was searching for a site for a new assembly plant.⁷⁷ Knowing that the City of Detroit was eager to keep the company from moving out of the city,⁷⁸ General Motors requested that the city help it acquire the desired parcel of land by condemning it through eminent domain and then transferring the property to the corporation.⁷⁹ When the city complied, the neighborhood association and individual landowners sued the city, claiming that the use of eminent domain violated the public use requirement of the takings clause of the Michigan Constitution.⁸⁰ The city argued that the new General Motors plant would serve a public purpose by "alleviating unemployment and revitalizing the economic base of the community."⁸¹ When General Motors proposed the development project, unemployment in the city was at eighteen percent overall and thirty percent among black citizens.⁸² Even the dissent admitted that it was "difficult to overstate the magnitude of the crisis."⁸³ The plaintiffs, on the other hand, argued that even if this were true, the use of eminent domain primarily benefited General Motors' profits and thus could not constitute a public use.⁸⁴

The Michigan Supreme Court held that the city's use of eminent domain was permissible under the Michigan Constitution.⁸⁵ The court acknowledged that General Motors would benefit in a private capacity from the taking, and such private benefit required heightened judicial scrutiny of the city's claim of public benefit.⁸⁶ But at the same

75. See, e.g., Crafton, *supra* note 33, at 883 (criticizing the use of eminent domain in *Poletown* as for a private use, not a public use, and proposing a new definition of public use based on the economic theory of public goods); 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, 312-13 (2000) (arguing for strict scrutiny of public use cases such as *Poletown*); Mansnerus, *supra* note 30, at 418-21 (describing the court's deference to the legislative public use determination in *Poletown* as unprecedented).

76. 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

77. See *id.* at 460 (Fitzgerald, J., dissenting).

78. See *infra* text accompanying notes 82-83. The city had long relied on the automobile industry as its primary economic support. *Poletown*, 304 N.W.2d at 467 (Ryan, J., dissenting).

79. See *Poletown*, 304 N.W.2d at 468 (Ryan, J., dissenting).

80. See *id.* at 457; *supra* note 25 (quoting the text of the takings clause of the Michigan Constitution).

81. *Poletown*, 304 N.W.2d at 459. The city estimated that the new assembly plant would result in the retention of 6150 jobs and generate \$15 million in new property tax revenues. *Id.* at 467 (Ryan, J., dissenting).

82. See *id.* at 465.

83. *Id.*

84. See *id.* at 458.

85. See *id.* at 460.

86. See *id.* at 459-60.

time, the court, drawing support from *Berman v. Parker*,⁸⁷ recognized that after “[t]he Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose, [t]he Court’s role . . . is limited.”⁸⁸ Upon the evidence, the court was satisfied that the public benefit of the project was “clear and significant” and that such a project was “a legitimate object of the Legislature.”⁸⁹

Beginning with Justices Fitzgerald’s and Ryan’s dissents in *Poletown*, many commentators criticized the decision as rendering the public use requirement meaningless.⁹⁰ Nonetheless, the *Poletown* decision stood in Michigan for over twenty years.⁹¹

In *Kelo v. City of New London*, New London wanted to use eminent domain to take the plaintiffs’ waterfront properties to build, among other things, an industrial park and a hotel.⁹² The city projected that the project would directly and indirectly create over 1000 jobs and generate property tax revenues of \$700,000 to \$1.2 million.⁹³ The city had recently lost thousands of jobs⁹⁴ and the state had designated the area as a “distressed municipality.”⁹⁵ The plaintiffs challenged the taking under both the United States and Connecticut Constitutions as invalid because the transfer of their property to a private party would not be for blight clearance or to provide a public service or utility.⁹⁶

87. 348 U.S. 26 (1954); *see supra* text accompanying notes 44-52.

88. *Poletown*, 304 N.W.2d at 458.

89. *Id.* at 459.

90. *See id.* at 464 (Fitzgerald, J., dissenting); *id.* at 464-65 (Ryan, J., dissenting); *supra* note 75 and accompanying text. However, even after *Poletown*, not all transfers of property from one private party to another through eminent domain in Michigan were found to satisfy the public use requirement. In *City of Center Line v. Chmelko*, the city claimed that its exercise of eminent domain would alleviate a parking problem that did not really exist. 416 N.W.2d 401, 403-04 (Mich. Ct. App. 1987). The court relied on *Poletown*’s requirement of a “clear and significant” public benefit and held that the city’s purported public benefit that required the exercise of eminent domain was, in contrast, a “complete fiction.” *Id.* at 402, 404. Similarly, in *City of Lansing v. Edward Rose Realty, Inc.*, the Michigan Supreme Court invalidated the city’s use of eminent domain to require the plaintiff, the owner of an apartment complex, to allow access to the cable company with which the city had an exclusive franchise agreement. 502 N.W.2d 638, 640 (Mich. 1993). Although the court “assume[d] the validity of the public interest advanced by the city,” it found that that public interest was greatly outweighed by the private interest and therefore did not satisfy the Michigan Constitution’s public use requirement. *Id.* at 643.

91. *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004) (overruling *Poletown*); *infra* text accompanying notes 124-31.

92. *Kelo v. City of New London*, 843 A.2d 500, 509-11 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004); *supra* text accompanying notes 7-8.

93. *See supra* text accompanying note 11.

94. *See supra* note 3 and accompanying text.

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

96. *See id.* at 519-20.

The Supreme Court of Connecticut upheld the taking as constitutional under both the United States and Connecticut Constitutions.⁹⁷ The court explained that the public use determination “requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.”⁹⁸ Moreover, the court recognized that deference to legislative purposes and motives was consistent with previous Connecticut cases,⁹⁹ as well as *Poletown*,¹⁰⁰ *Berman*,¹⁰¹ and *Midkiff*.¹⁰² The court concluded that the “significant municipal economic development” that the plan would stimulate was a valid public use.¹⁰³ Therefore, the court ruled that New London could use eminent domain for economic development.¹⁰⁴

Many other state courts, including those in Kansas, Louisiana, Maryland, Minnesota, Missouri, New Jersey, New York, North Dakota, and Ohio, have adopted a similarly deferential standard of review for legislative determinations of the public use requirement and allowed eminent domain to be used for economic development.¹⁰⁵

97. *See id.* at 574.

98. *Id.* at 523.

99. *See id.* (“The term ‘public use’ is synonymous with public benefit or advantage.”(quoting *Olmstead v. Camp*, 33 Conn. 532, 550 (1866))).

100. *See id.* at 528 n.39; *supra* text accompanying notes 75-89.

101. *See Kelo*, 843 A.2d at 525-26; *supra* text accompanying notes 44-52.

102. *See Kelo*, 843 A.2d at 526-28; *supra* text accompanying notes 53-66.

103. *Kelo*, 843 A.2d at 528.

104. *See id.* at 536.

105. *See Gen. Bldg. Contractors v. Bd. of Shawnee County Comm’rs*, 66 P.3d 873, 883 (Kan. 2003) (holding that the development of an industrial park that would create jobs and tax revenues fits within the valid public purpose of encouraging economic development, so the county’s exercise of eminent domain was permissible); *City of Shreveport v. Chasse Gas Corp.*, 794 So. 2d 962, 973 (La. Ct. App. 2001), *writ denied*, 805 So. 2d 209 (La. 2002) (holding that the city was permitted under the Louisiana Constitution to acquire defendant property owners’ land to build a state-of-the-art convention center and hotel for the public purpose of economic development); *Prince George’s County v. Collington Crossroads, Inc.*, 339 A.2d 278, 288-89 (Md. 1975) (holding that the county could use eminent domain to assemble land for an industrial park where the legislature had determined a need for such economic development and the county would retain some control over the project); *City of Duluth v. State*, 390 N.W.2d 757, 761-64 (Minn. 1986) (finding that the public benefits of alleviating unemployment and urban revitalization justified the state’s use of eminent domain to take property from the plaintiffs to give to another private party for use as a paper mill); *City of Kansas City v. Hon*, 972 S.W.2d 407, 414-15 (Mo. Ct. App. 1998) (allowing the city to condemn property through eminent domain for future commercial expansion of an airport because such a use was a valid public use under the Missouri Constitution); *N.J. Hous. & Mortgage Fin. Agency v. Moses*, 521 A.2d 1307, 1311-12 (N.J. Super. Ct. App. Div. 1987) (holding that the agency’s use of eminent domain to acquire land for a shopping center to support nearby housing projects was for a valid public purpose under the United States and New Jersey Constitutions); *Vitucci v. New York City Sch. Constr. Auth.*, 735 N.Y.S.2d 560, 562 (App. Div. 2001) (holding that the city’s use of eminent domain to condemn land for urban renewal in the form of expansion of a major area employer’s plant was valid); *City of Jamestown v. Leever’s Supermarkets, Inc.*, 552 N.W.2d 365, 374-75 (N.D. 1996)

b. *Decisions that Have Not Found Economic Development to Satisfy the Public Use Requirement*

Currently, state courts, including those in Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina, and Washington, do not view economic development as a valid public use for the exercise of eminent domain.¹⁰⁶ In addition, property owners challenging the use of eminent domain for economic development have enjoyed some recent successes in courts that are usually deferential to legislative determinations of public use¹⁰⁷ and in at least one court that had not yet decided the issue.¹⁰⁸

(holding that the city had the power to exercise eminent domain for economic development under the United States and North Dakota Constitutions and remanding for determination whether the taking to build a retail food store was primarily for a public, not private, purpose); *City of Toledo v. Kim's Auto & Truck Serv., Inc.*, No. L-02-1318, 2003 Ohio App. LEXIS 4995, at *14 (Ohio Ct. App. Oct. 17, 2003) (finding that, under Ohio's broad view of public use as any use of the land from which the public benefits, the use of eminent domain to condemn a car repair shop as part of an urban renewal plan was valid).

106. See *City of Little Rock v. Raines*, 411 S.W.2d 486, 494-95 (Ark. 1967) (holding that the city did not have the power to use eminent domain to build an industrial park because industrial development does not satisfy the public use requirement of the Arkansas Constitution); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 456-58 (Fla. 1975) (holding that the city could not condemn land through eminent domain to build a parking lot below a privately owned shopping mall because the basis for the need was private interest, not public necessity); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5-8 (Ky. 1979) (holding that the city could not take agricultural property for the purpose of private commercial development because the purpose did not satisfy the public use requirement of the Kentucky Constitution); *Opinion of the Justices*, 131 A.2d 904, 908 (Me. 1957) (answering in the negative the legislature's question whether a statute allowing the City of Bangor to use eminent domain for industrial development would be constitutional under the Maine Constitution); *Merrill v. City of Manchester*, 499 A.2d 216, 218-19 (N.H. 1985) (holding the public use requirement of the New Hampshire Constitution was not satisfied where the city sought to use eminent domain to develop land into an industrial park because such a use would only incidentally benefit the public); *Karesh v. City Council*, 247 S.E.2d 342, 345 (S.C. 1978) (finding that the city could not use eminent domain under the South Carolina Constitution to lease land to a private corporation for parking and convention space because the project primarily benefited the private owner with no assurance that the public would enjoy use of the facilities); *In re Seattle*, 638 P.2d 549, 556-59 (Wash. 1981) (en banc) (holding that the city's proposed plan to use eminent domain to acquire land to rebuild the downtown area into a public space, shopping center, art museum, and parking lot was unconstitutional under the Washington Constitution because when only a portion of the project would be put to truly public use, the public use requirement was not satisfied).

107. See, e.g., *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 465-66 (7th Cir. 2002) (holding that the public use requirement was not met where the state had not determined what the property would be used for or whether the development would certainly benefit the community); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002) (granting preliminary injunction to plaintiffs facing eminent domain in part because the public use advanced by the city seemed pretextual where the city had shopped for a developer before it had a plan for the land and where there was a nearby parcel available for Costco, the developer that the city eventually recruited, to purchase for a

Although New Jersey courts allow economic development to satisfy the public use requirement,¹⁰⁹ in *Casino Reinvestment Development Authority v. Banin*, the plaintiffs succeeded in arguing that the development project for which their property was being condemned did not serve a public purpose.¹¹⁰ Donald Trump had assembled a parcel of land on which he intended to build a casino and hotel.¹¹¹ He asked the Casino Reinvestment Development Authority, which had eminent domain powers,¹¹² to help him acquire three properties that

retail store); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (holding, despite usual deference to legislative determinations of public use, that the public use advanced, the need to satisfy the expansion plans of a major employer who had other expansion options, was invalid under the United States Constitution); Southwestern Ill. Dev. Auth. v. Nat'l City Env'tl. L.L.C., 768 N.E.2d 1, 10-11 (Ill. 2002) (holding that the economic development resulting incidentally from the state's use of eminent domain to condemn land for a privately owned racetrack to build a parking garage violated the state constitution's and the Federal Constitution's public use requirements because the private owner was the primary beneficiary, not the public); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (holding that, despite usual deference to the state authority's determination of public use, the project to build a parking lot for a casino did not satisfy the public use requirement because the purpose of the taking was not clear at the time the state sought to condemn the property and the private benefit overwhelmed the public benefit); *infra* text accompanying notes 109-15.

108. See, e.g., *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (holding that the city may not use eminent domain to give the plaintiff's property to a private development corporation for redevelopment of the downtown area because the ultimate use would not have been a valid public use under the Arizona Constitution); *infra* text accompanying notes 116-23; see also *Wilk*, *supra* note 17, at 258 (finding an increase during 2000-2003 in the number of cases where the purported public use for the exercise of eminent domain was invalidated); Eduardo M. Peñalver, *Perspective: Public Use and Private Profit*, N.Y. L.J., Oct. 29, 2004, at 2 ("Recently . . . some courts have shown an increased willingness to second-guess the government's assertions that it is condemning property for a public use."). These recent successful challenges to the use of eminent domain for economic development likely motivated the plaintiffs in *Kelo* to appeal their case to the Supreme Court, even though Connecticut is generally deferential to legislative determinations of public use. See *Kelo*, 843 A.2d at 524-25. In fact, the homeowners in *Kelo* are represented by attorneys from the Institute for Justice, which successfully represented other homeowners in recent eminent domain cases, including *Banin*, 727 A.2d at 103, and *Bailey*, 76 P.3d at 899. See Scott Bullock, *Narrow "Public Use,"* Nat'l L.J., Aug. 16, 2004, at 23. The Institute for Justice also filed an amicus brief on behalf of the plaintiffs who prevailed in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), which overruled *Poletown*. See *Bullock*, *supra*. The Institute for Justice is a public interest law firm devoted to advancing and defending freedom by representing clients in cases involving economic liberty, private property rights, and the First Amendment, among other issues. See Inst. for Justice, About IJ, at <http://www.ij.org/profile/index.html> (last visited Jan. 26, 2005).

109. See, e.g., *N.J. Hous. & Mortgage Fin. Agency v. Moses*, 521 A.2d 1307, 1311 (N.J. Super. Ct. App. Div. 1987) (holding that the agency's use of eminent domain to acquire land for a shopping center to support nearby housing projects was for a valid public purpose under the United States and New Jersey Constitutions).

110. *Banin*, 727 A.2d at 111.

111. See *id.* at 106.

112. See *id.* at 103.

he had been unable to purchase in order to build an adjacent parking lot and park.¹¹³ In response to the property owners' challenge, the court found that the exercise of eminent domain was impermissible because there was no definite plan as to the proposed use of the land¹¹⁴ and the private benefit to Trump would overwhelm the public benefit.¹¹⁵

*Bailey v. Myers*¹¹⁶ was the first public use decision to reach an appellate court in Arizona in seventeen years¹¹⁷ and the first time the court addressed whether economic development satisfied the public use requirement of the Arizona Constitution.¹¹⁸ The City of Mesa, Arizona, wanted to use eminent domain to take the plaintiffs' business, Bailey's Brake Service, to redevelop a larger, five-acre plot of land into a retail center.¹¹⁹ Under the redevelopment project, the site of Bailey's Brake Service was to hold an Ace Hardware store.¹²⁰ The plaintiffs claimed that their property was being taken for private use rather than public use required by the Arizona Constitution.¹²¹ The court agreed, stating that when private ownership results from the exercise of eminent domain, the public benefit must be substantially greater than the private benefit.¹²² Since the city's use of eminent domain did not meet this requirement, the condemnation could not go forward.¹²³

Yet another recent victory for individual property owners against an exercise of eminent domain for economic development occurred in Michigan. On July 31, 2004, the Michigan Supreme Court again had occasion to address the use of eminent domain for economic development, in *County of Wayne v. Hathcock*.¹²⁴ In *Hathcock*, the county sought to develop an area of land near an airport into a "state-of-the-art business and technology park" through use of its eminent domain powers.¹²⁵ The plaintiffs, whose land was to be condemned for the new development, challenged the taking, claiming it failed to satisfy the public use requirement of the Michigan Constitution.¹²⁶

113. *See id.* at 106.

114. Trump would have been permitted to use the land for anything that was part of the "hotel development project and appurtenant facilities." *Id.* at 110.

115. *See id.* at 111.

116. 76 P.3d 898 (Ariz. Ct. App. 2003).

117. *See Wilk, supra* note 17, at 258.

118. *See Bailey*, 76 P.3d at 900; *supra* note 25 (quoting the takings clause of the Arizona Constitution).

119. *See Bailey*, 76 P.3d at 899-900.

120. *See id.* at 899.

121. *See id.*

122. *See id.* at 904.

123. *See id.*

124. 684 N.W.2d 765 (Mich. 2004).

125. *Id.* at 770.

126. *See id.*; *supra* note 25 (quoting the takings clause of the Michigan Constitution).

This time, the court undertook a much more searching review of the purported public use that would result from the private economic development and rejected the court's deference to the legislature in *Poletown* as unsupported and "disingenuous."¹²⁷ Instead, to determine whether the project satisfied the public use requirement, the court in *Hathcock* emphasized the "common understanding of [public use] among those sophisticated in the law at ratification" of the state constitution.¹²⁸ The court identified only three situations where the common understanding at the time of the constitution's ratification would allow the transfer of condemned property to a private entity to constitute a public use: (1) when the transfer is of extreme public necessity, as when a railroad must be built; (2) when the public retains some sort of control over the use of the property, as where a privately owned utility pipe is controlled by the state; and (3) when land to be condemned is selected because of public concern, as in blight clearance.¹²⁹ Since the proposed technology park did not fall within any of these categories, the court held that the transfer of land to a private entity did not satisfy the public use requirement of eminent domain.¹³⁰ In doing so, the court overruled *Poletown*.¹³¹

Thus, courts are currently conflicted over whether economic development can constitute a public use sufficient to justify the use of eminent domain.¹³² Even courts that have held economic development to be a valid public use do not always approve every exercise of eminent domain for economic development.¹³³ In addition, courts that agree on whether economic development satisfies the public use requirement can differ in their justifications for their decisions.¹³⁴ This Note next discusses various approaches to whether economic development satisfies or does not satisfy the public use requirement.

127. *Hathcock*, 684 N.W.2d at 785 n.81.

128. *Id.* at 787. The Michigan Constitution was ratified in 1963. *Id.* at 781.

129. *See id.* at 781-83.

130. *See id.* at 784.

131. *See id.* at 787; *supra* notes 75-89 and accompanying text (discussing *Poletown*).

132. *See supra* notes 67-131 and accompanying text.

133. *See supra* note 90; *supra* note 107 and accompanying text; text accompanying notes 109-15.

134. *Compare, e.g., supra* text accompanying notes 116-23 (considering whether the public use requirement is met by balancing the public benefits against the private benefits), *with supra* text accompanying notes 124-31 (considering whether the public use requirement is met by looking at what public use meant when the state constitution was adopted).

II. COMPETING VIEWS OF ECONOMIC DEVELOPMENT AS A VALID OR INVALID PUBLIC USE FOR THE EXERCISE OF EMINENT DOMAIN

Judicial interpretations of the public use requirement can be categorized by their outcomes as either narrow or broad.¹³⁵ The narrow interpretation, with very few exceptions, limits public use to situations where the public owns the property or has significant access to the property.¹³⁶ Under the narrow interpretation, economic development does not satisfy the public use requirement. The broad interpretation equates public use with public benefit or advantage¹³⁷ and thus may consider the use of eminent domain to transfer property to a private party for economic development to satisfy the public use requirement.¹³⁸ Even within these two categories, however, courts and commentators have used a variety of approaches to argue for the same outcome. This part discusses the various approaches that courts and scholars use to justify a broad or narrow interpretation of the public use requirement as it pertains to economic development.¹³⁹

A. *The Broad Interpretation: Economic Development Satisfies the Public Use Requirement*

Part II.A summarizes the major arguments put forth by courts and scholars to allow the use of eminent domain for economic development.

135. See 2A Nichols, *supra* note 34, § 7.02[2]-[7].

136. See 2A *id.* § 7.02[2]; Mansnerus, *supra* note 30, at 421-22. For example, the court in *Hathcock* supported a narrow interpretation of the public use requirement. See *supra* text accompanying notes 129-30; see also cases cited *supra* note 106.

137. See 2A Nichols, *supra* note 34, § 7.02[3]; Mansnerus, *supra* note 30, at 413, 421-22. The *Berman*, *Midkiff*, *Poletown*, and *Kelo* decisions are examples of a broad approach. See *supra* text accompanying notes 44-65, 75-89, 92-104; see also cases cited *supra* note 105.

138. Almost all states now define “public use” more broadly than literal use by the public. See *supra* text accompanying notes 33-34. As a consequence, the description “narrow approach” is now often used to denote an approach to the public use requirement that is generally restrictive and less deferential to legislative public use determinations, but that is not strictly limited to use by the public. See *Kelo v. City of New London*, 843 A.2d 500, 532 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004); see, e.g., *supra* note 106 and accompanying text (citing cases in which courts have taken a narrow approach to the public use requirement, in the more current use of “narrow,” and not allowed economic development as a valid public use). Thus, courts that take a broad approach to the public use requirement as it is traditionally defined, see *supra* text accompanying note 137, may or may not find economic development to satisfy the public use requirement. In references to broad or narrow approaches to the use of eminent domain for economic development in the remainder of this Note, the broad approach would typically allow economic development to satisfy the public use requirement and a narrow approach typically would not.

139. See *infra* Parts II.A-B.

1. The Use of Eminent Domain for Economic Development Is Necessary for Land Development

The main argument that the public use requirement should be interpreted broadly is that such a power is necessary to support beneficial land development.¹⁴⁰ When a developer seeks to acquire land for a new project, owners, knowing their land is necessary to the project, have an incentive to hold out for a higher selling price than fair market value.¹⁴¹ Holdout landowners can greatly increase the price of acquiring land for development projects, or may impede the project altogether, if the owner refuses to sell under any circumstances.¹⁴² Since the most common public use controversy involves the assembly of large parcels of land for development projects,¹⁴³ holdout landowners can be a significant impediment to land development. Thus, the use of eminent domain for economic development to acquire the holdout properties may be the only way to allow development projects to continue.¹⁴⁴

2. Economic Development Projects Bring Benefits to the Surrounding Communities

Courts that have held economic development to satisfy the public use requirement have noted the benefits to the community that these projects bring.¹⁴⁵ In particular, the increase in jobs and tax revenues that result from these projects are often greatly needed for the revitalization of the community.¹⁴⁶ Economic development projects

140. See, e.g., Tranter, *supra* note 16 (arguing that narrowing the permissible uses of eminent domain will ultimately hinder redevelopment efforts and “contribute to urban decline”).

141. See Merrill, *supra* note 25, at 75.

142. See *id.*

143. See *supra* note 72.

144. Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. Rev. 1061, 1083-84 (1995) (supporting the use of eminent domain for urban redevelopment as a valid public use but advocating a stricter public use test when private corporations exercise eminent domain power). *But cf.* Merrill, *supra* note 25, at 82 (noting that one common objection to the use of eminent domain to assemble large tracts of land is that developers may use buying agents, option agreements, and straw transactions to complete a transaction, making the use of eminent domain unnecessary). In a straw transaction or purchase, property is bought by a temporary, third-party owner and subsequently transferred to the real purchaser. See Black’s Law Dictionary 1461 (8th ed. 2004). In addition, a developer wishing to remain anonymous can authorize a buying agent to purchase property on his behalf without disclosing his identity to the seller. See *id.* at 67 (defining agency and undisclosed agency).

145. See *supra* notes 81-83, 89, 92-95, 103 and accompanying text.

146. See *supra* notes 81, 88-89, 93 and accompanying text; see also Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 737-38 (1988) (suggesting that the government should proactively consider using eminent domain to keep major employers from leaving the area and leaving unemployed workers behind). *But see* Ilya Somin, *Poletown Decision Did Not Create Desired Benefits*, The

can also create housing and public spaces, or alleviate traffic and parking problems.¹⁴⁷ The increase in tax revenues fund public education, housing, and other government services, on which local residents, especially low-income residents, depend.¹⁴⁸

The benefits of being able to exercise eminent domain to encourage economic development can also come in less obvious forms. Some environmentalists support the use of eminent domain for economic development because such a power can give governments an additional method of control over how land is used.¹⁴⁹ For example, cities may choose to help private developers acquire previously developed land for projects because building on that land is environmentally preferable to building on currently undeveloped land.¹⁵⁰ Thus, although privately owned economic development projects result in private benefits to the owners, significant benefits from the development flow to the public as well.

3. Deference to Legislative Determinations of Public Use Is Appropriate Because the Political Process Is Sufficient to Safeguard Private Property Rights

The political process, through which citizens and interest groups lobby for their interests to be represented by their legislators,¹⁵¹ safeguards private property rights, so courts should defer to legislative determinations of public use. Too much judicial intervention is not warranted because property owners in the United States are an influential class, and thus less in need of protection than commonly argued.¹⁵² In this view, landowners do not need special protection through the Takings Clause.¹⁵³ Rather, they are able to use their

Detroit News, Aug. 8, 2004, at 13A (stating that the General Motors assembly plant built following *City of Detroit v. Poletown* actually created only about half of the 6000 jobs that were originally anticipated, although over 4000 people were displaced).

147. See, e.g., *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn.), cert. granted, 125 S. Ct. 27 (2004).

148. See J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405, 418-19 (2003) (arguing that gentrification may not deserve the criticism it has received because it can create economic, political, and social advantages for poor and ethnic minorities and its negative consequences can be minimized).

149. See Pristin, *supra* note 1 (noting that the controversy over economic development as a public use has produced some strange allies, including environmental groups lining up with developers in favor of such uses of eminent domain as encouraging "smart growth" rather than suburban sprawl).

150. See *id.*

151. See Jones, *supra* note 75, at 302.

152. See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 114-15 (1995) (suggesting that, since property owners have political clout, society's evolving ideas of environmentalism would naturally transition towards environmental goals without the need for government interference through the Takings Clause). *But see infra* text accompanying notes 203-08 (arguing that property owners lack the political voice to challenge uses of eminent domain).

153. See Freyfogle, *supra* note 152, at 114-15.

political clout to “fend for themselves” against abuses of eminent domain by lobbying for their interests and electing legislators who represent those interests.¹⁵⁴

For this reason, one scholar has argued for primary reliance on the political process instead of the courts, but in the context of regulatory takings rather than physical takings under the Fifth Amendment Takings Clause.¹⁵⁵ Especially in state legislatures and Congress, property owners are able to effectively organize and lobby for their interests.¹⁵⁶ Legislators are further constrained against abusing their regulatory power by the knowledge that property owners may decline to buy property in certain jurisdictions or at all if their use and enjoyment of it is overregulated.¹⁵⁷ Courts should take these checks and balances into account when deciding whether to disrupt this political process.¹⁵⁸ Judicial intervention is only needed when property owners do not have a political voice or the option to vote with their feet,¹⁵⁹ which is more likely in local legislative land use decisions than higher-level ones.¹⁶⁰ Thus, except in certain circumstances when there is an increased risk that property owners do not have an effective check on legislative decisions, courts should refrain from interfering in the political process.¹⁶¹

Most courts that allow the use of eminent domain for economic development are deferential to legislative determinations that the economic development project in question serves a valid public use.¹⁶²

154. *See id.*

155. *See* William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 5 (1995) (arguing that issues regarding regulatory takings should “be left to the political branches of the state and federal governments” unless the political process is in some way skewed against the landowner). Regulatory takings are government regulations that diminish property value to such an extent that compensation might be required under the Takings Clause. *See id.* at 1.

156. *See id.* at 4.

157. *See id.*

158. *See id.*

159. That is, the option to move to a new locality with land use laws that they prefer. *See generally* William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001) (exploring how homeowners’ concerns about their home values drives local governments to compete to provide services to increase the value of this major asset of their dominant political constituents).

160. *See* Fischel, *supra* note 155, at 5.

161. *See id.*

162. In federal and most state courts, whether an exercise of eminent domain satisfies the public use requirement is initially a legislative question, but one that is subject to review by the courts with varying deference. *Compare* *Bailey v. Myers*, 76 P.3d 898, 900 (Ariz. Ct. App. 2003) (stating that the question of “whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public” (quoting Ariz. Const. art. II, § 17)), and *County of Wayne v. Hathcock*, 684 N.W.2d 765, 785 (Mich. 2004) (criticizing the court’s deference to the legislature in *Poletown* and asserting that questions regarding the public use requirement are “squarely within the Court’s authority”), with *Kelo v. City of New London*, 843 A.2d 500, 523 (Conn.), *cert.*

For example, in *Kelo v. City of New London*, the court, noting that other state and federal courts do the same, gave “substantial deference” to the legislative determination that the purpose of the exercise of eminent domain satisfied the public use requirement.¹⁶³ Such deference is appropriate because “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation” and eminent domain is properly the subject of social legislation.¹⁶⁴ Courts thus retain only a limited role in a public use determination, by conducting rational basis review of the legislative purpose for the exercise of eminent domain.¹⁶⁵ For most of these courts, rational basis review is sufficient to allow the legislature to take the primary role in regulating eminent domain decisions, but to retain some authority for the judiciary to screen for potential abuses of that power.¹⁶⁶

4. The Original Intent of the Words “Public Use” in the Takings Clause Was Not to Limit the Use of Eminent Domain

Reliance on the political process to safeguard private property rights is consistent with the original intent of the drafters of the Fifth Amendment.¹⁶⁷ The words “public use” may never have been intended to be an absolute limit on eminent domain power at all.¹⁶⁸ Rather, the words described when compensation was required—when property taken by eminent domain is put to public use.¹⁶⁹ The Takings

granted, 125 S. Ct. 27 (2004) (pointing out that the court has long been deferential to legislative public use determinations).

163. *Kelo*, 843 A.2d at 527-28.

164. *Berman v. Parker*, 348 U.S. 26, 32 (1954); *see also* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (“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.”).

165. *See, e.g., Midkiff*, 467 U.S. at 241; *Berman*, 348 U.S. at 32; *Kelo*, 843 A.2d at 528; *see also infra* notes 191-94 and accompanying text (pointing out that rational basis review of eminent domain cases is consistent with substantive due process treatment of economic legislation). Under rational basis review, a court will uphold a law as long as it bears a reasonable relationship to a legitimate government interest. *See Black’s Law Dictionary* 1290 (8th ed. 2004).

166. *See supra* text accompanying note 165. *But cf. supra* text accompanying notes 86-88 (purporting to apply a heightened standard of review while still showing great deference to the legislature’s determination of public use); *infra* notes 222-35 and accompanying text (arguing that a heightened standard of review is necessary to guard against abuses of eminent domain).

167. *See* *Harrington, supra* note 23, at 1299 (arguing that the original understanding of “public use” was never to describe constitutionally permissible takings, but rather to describe when compensation for takings was required).

168. *See id.*; *Merrill, supra* note 25, at 71 (noting that the words “public use” in the Takings Clause are ambiguous and could describe either when the government may exercise eminent domain or when the government must compensate an owner for taking his property); *supra* text accompanying notes 28-30.

169. *See supra* note 168; *see also* *Jed Rubinfeld, Usings*, 102 *Yale L.J.* 1077, 1079-80 (1993) (arguing that the phrase “public use” in the Takings Clause specifies when

Clause thus construed, however, does not leave property owners without any protection against abuses of eminent domain.¹⁷⁰ Instead of using “public use” as a protection, Congress’s “unstated assumption [in drafting the Fifth Amendment] was simply that representative government—subject to appropriate procedural requirements—would be enough to protect against the abuses of the power of eminent domain.”¹⁷¹ Thus, the United States Constitution was never intended to allow the courts to interfere significantly in legislative determinations of when the use of eminent domain is appropriate.¹⁷²

5. There Are Protections Against Abuses of Eminent Domain Other Than Eliminating Its Use for Economic Development

There are better ways to protect individuals against abuses of the power of eminent domain than by categorically prohibiting its use for economic development.¹⁷³ Some scholars have suggested increasing protection against abuse by using other parts of the Takings Clause, such as the just compensation requirement¹⁷⁴ or procedural due process,¹⁷⁵ instead of the public use requirement.¹⁷⁶ One common objection to the use of eminent domain is that property owners may place subjective value on their properties that is not taken into account in determining the compensation due for a taking.¹⁷⁷ Another common objection when the property taken will ultimately be owned

compensation is required, not when takings are permissible, so the government should only compensate property owners when it takes land and puts it to public use, but not when land is taken but not so used).

170. See *infra* text accompanying note 171.

171. See Harrington, *supra* note 23, at 1299; see also Fischel, *supra* note 155, at 73 (describing the Takings Clause as containing mechanisms to protect against excessive taking, including just compensation, and to facilitate change, by requiring that property be surrendered, but not to absolutely prohibit certain takings, through the words “public use”).

172. See Harrington, *supra* note 23, at 1299.

173. See, e.g., Peñalver, *supra* note 108.

174. See *supra* text accompanying note 22 (quoting the Takings Clause of the United States Constitution, including the just compensation requirement); *supra* note 25 (quoting various takings clauses of state constitutions).

175. The United States Constitution provides that neither the state nor the federal government may deprive any person of property without due process of law. U.S. Const. amends. V, XIV.

176. See Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 70-73 (1999) (suggesting the use of procedural due process and just compensation requirements to remedy excessive uses of eminent domain, while allowing some uses of eminent domain for economic development to continue); Merrill, *supra* note 25, at 84 (suggesting a change to the amount of compensation due for an exercise of eminent domain to compensate for the full value that an owner attaches to his property); Peñalver, *supra* note 108 (suggesting that the public use requirement should not be narrowed too much and that other tools, including the just compensation clause, can be used to ensure property owners are treated fairly).

177. See, e.g., Merrill, *supra* note 25, at 83; Jones, *supra* note 75, at 297-98 (citing examples of inadequate compensation for condemnation through eminent domain).

by a private entity is that the private owner will personally profit from his use of the property.¹⁷⁸ In other words, that owner gets to keep for himself much of the surplus value of the property, which is the difference in income between the new, often commercial, use of the land and the old use by the original owner.¹⁷⁹ Currently, the minimum compensation required by the United States Constitution for taking property by eminent domain is the market value of the property,¹⁸⁰ although some federal and state statutes require more.¹⁸¹ While no amount of money can totally compensate for the subjective value an owner places on her property, a more generous compensation rule makes up for some of these uncompensated losses and alleviates some of the sense of unfairness of the taking.¹⁸²

Procedural and substantive due process also protect against abuses of eminent domain.¹⁸³ Before the government deprives an individual of an interest in property, such as through eminent domain, the property owner is entitled to certain procedural protections.¹⁸⁴ The property owner must have a meaningful opportunity to be heard,¹⁸⁵ which requires, at a minimum, the “drafting and filing of a formal judicial complaint and service of process on the owner.”¹⁸⁶ This is usually accompanied by an appraisal of the value of the property and a hearing to determine whether the exercise of eminent domain is legal and, if so, what the proper amount of compensation is.¹⁸⁷ When such procedures are in place and effectively provide an owner facing condemnation with a meaningful opportunity to inquire into the government’s purpose for the taking, there is less chance that the

178. See Merrill, *supra* note 25, at 85; see, e.g., *supra* text accompanying note 84.

179. See Merrill, *supra* note 25, at 85.

180. See *supra* note 14 and accompanying text. Market value fails to compensate for a variety of other costs of the takings, including the subjective value an owner attaches to her property and relocation costs. See Ellickson & Been, *supra* note 25, at 1045-46.

181. See, e.g., 42 U.S.C. §§ 4601-4655 (2000) (requiring the federal government and states seeking certain federal land development grants to pay condemnees reasonable moving expenses and other bonus payments over the market value of the property). Many states enacted similar statutes. See, e.g., Colo. Rev. Stat. §§ 24-56-101 to -113 (2003); Conn. Gen. Stat. §§ 8-266 to -282 (2001).

182. See Merrill, *supra* note 25, at 83-84; Peñalver, *supra* note 108.

183. See Lazzarotti, *supra* note 176, at 70-72 (discussing procedural due process protections). *But see* Jones, *supra* note 75, at 306-07 (arguing that the current state of substantive due process protection of economic rights, which provides for rational basis review, is inadequate).

184. See U.S. Const. amends. V, XIV; *Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976) (stating that an individual may not be deprived of a property interest without some form of a hearing).

185. See *Matthews*, 424 U.S. at 333.

186. Merrill, *supra* note 25, at 77.

187. See *id.* *But see* Lazzarotti, *supra* note 176, at 71 (noting that there is no uniform, constitutionally required procedure due for the exercise of eminent domain). *Cf.* Mansnerus, *supra* note 30, at 435 (describing “quick-take” statutes in effect in some jurisdictions, which allow eminent domain procedures to be expedited).

exercise of eminent domain is unconstitutional.¹⁸⁸ Furthermore, when the government exercising eminent domain must pay for compensation to the property owner and for these procedural due process requirements, it has an incentive to limit excessive uses of eminent domain.¹⁸⁹ Thus, increasing compensation and procedural due process requirements for eminent domain can provide effective limits on abuses of eminent domain without totally limiting its utility for valid economic development projects.¹⁹⁰

Substantive due process, which concerns the purpose for the legislation and the means through which those purposes are accomplished, also offers protection against abuses of eminent domain by requiring rational basis review¹⁹¹ of economic legislation.¹⁹² Although substantive due process protection of economic rights has been greatly weakened in the post-*Lochner* era,¹⁹³ rational basis review still requires courts to ensure that there is a legitimate purpose for the exercise of eminent domain and that eminent domain is a reasonable method through which to achieve that purpose.¹⁹⁴

B. *The Narrow Interpretation: Economic Development Does Not Satisfy the Public Use Requirement*

Part II.B discusses the reasons some courts and scholars do not view economic development as a valid public use for the exercise of eminent domain.

188. See Lazzarotti, *supra* note 176, at 68, 70-72.

189. See Fischel, *supra* note 155, at 74 (opining that deference to legislative determinations of public use is permissible because the costs of exercising eminent domain deter legislatures from unrestrained uses of eminent domain); cf. Merrill, *supra* note 25, at 77-78, 80-81, 87-88 (supporting the idea that, in general, the costs of exercising eminent domain are a sufficient check on abuses of eminent domain, but asserting that these checks may break down in economic development cases); *infra* text accompanying notes 227-35.

190. See Lazzarotti, *supra* note 176, at 68; *supra* text accompanying notes 174-89.

191. See *supra* note 165.

192. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that economic legislation "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").

193. The Supreme Court first expanded substantive due process protection of economic rights in *Lochner v. New York*, in which the Court reviewed economic legislation regarding the minimum wage with heightened scrutiny. 198 U.S. 45, 64 (1905). By 1937, however, the Court abandoned heightened substantive due process review of economic legislation and showed more deference to legislative regulation of business, economic, and social affairs by applying a rational basis standard of review to such legislation. See *Carolene Prods.*, 304 U.S. at 152 (upholding, under rational basis review, a congressional act prohibiting the shipment of filled milk through interstate commerce); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding a regulation of minimum wage for women because the regulation was reasonable in relation to its subject and was adopted in the interests of the community).

194. See *supra* notes 163-66 and accompanying text.

1. The Use of Eminent Domain for Economic Development Does Not Sufficiently Safeguard Private Property Rights

The primary criticism of allowing economic development as a valid public use is that private property rights are not sufficiently protected.¹⁹⁵ Property owners view their constitutionally protected property rights¹⁹⁶ as “historical and sacred.”¹⁹⁷ In addition, people tend to overvalue what they currently own and undervalue opportunity losses, for example, compensation they would receive in return for giving up property they currently own and future benefits they would receive as a result of economic development.¹⁹⁸ Given this viewpoint of property rights, property owners tend to resist any government interference in their property.¹⁹⁹ Thus, when eminent domain is used to transfer property from one private owner to another, it often seems unfair²⁰⁰ and as though the government is favoring one private owner at the expense of another.²⁰¹ Predictably, when such a use of eminent domain occurs, public outcry often ensues.²⁰²

Individual property owners may not be in a position to effectively challenge government takings of their property through the political process.²⁰³ In the political process, homeowners facing condemnation

195. See Lazzarotti, *supra* note 176, at 74 (exploring whether eminent domain can be used for economic development in a manner that maintains the importance of private property rights); Jones, *supra* note 75, at 287 (“[T]he definition of public use [has been expanded] to the extent that the Fifth Amendment no longer acts as a viable safeguard of private property rights.”); Kruckeberg, *supra* note 27, at 543 (“Whether you know it or not, your house is for sale.”); *id.* at 566 (“[C]orporations may soon strip the significance from the concept of private property.”).

196. The United States Constitution specifically protects against the deprivation of “life, liberty, or property.” U.S. Const. amends. V, XIV.

197. Lazzarotti, *supra* note 176, at 54.

198. See Saul Levmore, *Just Compensation and Just Politics*, 22 Conn. L. Rev. 285, 300 (1990) (offering a psychological explanation for why people are reluctant to give up property even if they will be compensated for it).

199. See *id.*

200. See, e.g., Mansnerus, *supra* note 30, at 440 (“[F]orcing an owner to transfer his property to another owner in the name of better planning may violate a fundamental notion of fairness”); Peñalver, *supra* note 108 (“Non-lawyers are often shocked to learn that the state can exercise its power of eminent domain to facilitate ostensibly private projects.”).

201. See Madigan, *supra* note 27, at 193 (describing the use of eminent domain to transfer property from one private owner to another as favoring one private interest over another and arguing that such use is economically inefficient).

202. See Tresa Baldas, *Taking Aim at Eminent Domain*, Nat’l L.J., July 19, 2004, at 1 (reporting that homeowners are worried that they could be the next victims of “widespread abuse of eminent domain by municipalities”); Bullock, *supra* note 108 (arguing that the public use requirement should be narrowed to stop the abusive use of eminent domain to transfer property from one private owner to another, as for economic development).

203. See Lazzarotti, *supra* note 176, at 73-74; Jones, *supra* note 75, at 302; Mansnerus, *supra* note 30, at 436. *But see supra* text accompanying notes 152-57

may encounter several barriers to an effective challenge.²⁰⁴ Property owners may individually lack the political clout to influence legislative public use decisions.²⁰⁵ They may also be unable to organize into larger groups against condemnations because of “the transient nature of the condemnation and the condemnee’s veritable isolation.”²⁰⁶ A lack of interest or faith in the political process is a further barrier to organization.²⁰⁷ Even if property owners were able to organize a challenge to the taking of their property to make way for a large corporation, individual property owners cannot compete with the legislative influence of large corporations.²⁰⁸

Consequently, some argue that when property changes hands from one private owner to another, the government should not intervene at all if possible.²⁰⁹ The concern is that government intervention “upsets the balance, efficiency, and success of [free] markets.”²¹⁰ The transfer of property ownership through market transactions is thus preferred to transfer through eminent domain.²¹¹

2. The Private Benefits of Economic Development Outweigh Any Public Benefit

Many courts that reject economic development as a valid public use do so by finding that the benefits to the ultimate private owner greatly outweigh any anticipated public benefits.²¹² For instance, in *Bailey v. Myers*, the court rejected the city’s argument that the use of eminent domain to build a retail center served a valid public use because the project would revitalize the downtown area, increase property tax revenues, and create new jobs.²¹³ Instead, the court found that the

(arguing that property owners have sufficient political clout to challenge uses of eminent domain through the political process).

204. See Lazzarotti, *supra* note 176, at 73-74; Jones, *supra* note 75, at 302.

205. See Mansnerus, *supra* note 30, at 436.

206. Jones, *supra* note 75, at 302.

207. See Lazzarotti, *supra* note 176, at 73-74.

208. See *id.*; Levmore, *supra* note 198, at 300-01 (noting that politicians have incentives to generate windfalls for some of their constituents even at the expense of others).

209. See Madigan, *supra* note 27, at 192.

210. See *id.*

211. See *id.*; *cf. infra* text accompanying notes 228-31 (pointing out that the government may prefer the use of market transactions over eminent domain to acquire land).

212. See, e.g., *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 456-59 (Fla. 1975) (holding that the city could not condemn land through eminent domain to build a parking lot below a privately owned shopping mall because the basis for the need was private interest, not public necessity); *Merrill v. City of Manchester*, 499 A.2d 216, 218 (N.H. 1985) (holding the public use requirement of the New Hampshire Constitution was not satisfied where the city sought to use eminent domain to develop land into an industrial park because such a use would only incidentally benefit the public).

213. *Bailey*, 76 P.3d at 901.

private owners of the stores, restaurants, and office space would be the primary beneficiaries of the taking through the profits they would generate.²¹⁴ These private benefits outweighed any public benefits such as tax revenues and new jobs.²¹⁵ Therefore, no use of eminent domain to transfer property to a private party that stands to profit from the development satisfies the public use requirement.²¹⁶

3. The Use of Eminent Domain for Economic Development Is Contrary to Original Intent

Adherence to the original understanding of the power of eminent domain of the drafters of the Takings Clause supports a narrow interpretation of the public use requirement.²¹⁷ The drafters and ratifiers of the Fifth Amendment would not have understood it to support the use of eminent domain to transfer property to a private party for any reason.²¹⁸ The same may be true of state constitutions even though, in many cases, they were written and ratified more recently than the United States Constitution.²¹⁹ For example, the court in *County of Wayne v. Hathcock* relied on the understanding of the public use requirement of the Michigan Constitution at the time of its ratification in 1963 to hold that economic development did not satisfy the public use requirement.²²⁰ Thus, under either the Federal Constitution or certain state constitutions, the use of eminent domain for economic development is contrary to the original understanding of those constitutions.²²¹

4. The Use of Eminent Domain for Economic Development Requires Heightened Judicial Scrutiny

The use of eminent domain for economic development requires heightened scrutiny to ensure that the taking is truly necessary and for

214. *Id.* at 904.

215. *Id.*

216. *Id.*

217. See *infra* text accompanying notes 218-20.

218. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion) (“It is against all reason and justice, for a people to entrust a Legislature with [the power to take property from A and give it to B] and, therefore, it cannot be presumed that they have done it.”). *But see supra* text accompanying notes 168-71. A counterargument to an originalist approach is that the concept of public use is one that changes over time. See *Gen. Bldg. Contractors v. Bd. of Shawnee County Comm’rs*, 66 P.3d 873, 882 (Kan. 2003) (“[T]here is no precise definition of what constitutes a public use, and what may be considered a valid public use or purpose changes over time.” (quoting *State ex rel. Tomasic v. Unified Gov’t of Wyandotte County/Kan. City*, 962 P.2d 543, 553 (Kan. 1998))); *Mansnerus, supra* note 30, at 410; *supra* text accompanying note 98.

219. For example, the Michigan Constitution relied on in *County of Wayne v. Hathcock* was ratified in 1963. 684 N.W.2d 765, 770 (Mich. 2004).

220. See *supra* notes 128-30 and accompanying text.

221. See *supra* text accompanying notes 218-20.

a public purpose.²²² At the most extreme, courts might review public use decisions with strict scrutiny,²²³ in which the courts would never presume the constitutionality of a taking simply because the legislature has found it to be constitutional.²²⁴ Other scholars skeptical of judicial deference to legislative public use decisions would require some level of heightened scrutiny, although not always strict scrutiny.²²⁵ Regardless of what this level of scrutiny would be called, it would entail a searching, objective review by the court of “the ‘public’ nature of the transaction,” rather than deference to legislative determinations.²²⁶

Some scholars would require heightened scrutiny of economic development public use decisions even when, in other public use cases, legislative deference is appropriate.²²⁷ One economic model of eminent domain posits that, in general, “courts should give virtually complete deference to legislative determinations of public use” because governments seeking to conserve costs will self-regulate

222. See Merrill, *supra* note 25, at 87-88; Ralph Nader & Allen Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207, 224 (2004) (arguing for heightened scrutiny of uses of eminent domain to transfer property from one private party to another); Jones, *supra* note 75, at 305-07 (arguing that property rights are fundamental rights and, as such, deserve strict scrutiny by the courts); Mansnerus, *supra* note 30, at 444; Jonathan Neal Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. Balt. L. Rev. 542, 557 (1988) (concluding that courts need to apply stricter scrutiny to cases involving the transfer of property from one private party to another through eminent domain in order to adequately protect property rights). For the most part, courts use rational basis review in eminent domain cases. See Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. Rev. 783, 802 (1999) (analyzing various standards of review used by courts to decide public use cases). *But cf.* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (stating that the court would review with “heightened scrutiny” exercises of eminent domain in which private entities are benefited, but also showing great deference to the legislature’s public use determination).

223. See Nader & Hirsch, *supra* note 222, at 224 (proposing strict scrutiny of eminent domain takings when the property will be given to a private party, the condemnee has a particularly strong interest in the property for which money cannot completely compensate, and the condemnee has little political power); Jones, *supra* note 75, at 305-06 (arguing that property rights are fundamental rights and should thus receive strict scrutiny). The strict scrutiny standard of review requires the government to show that there is a compelling government interest that justifies and necessitates the legislative decision in question. See Black’s Law Dictionary 1462 (8th ed. 2004); *cf. supra* note 165 (defining rational basis review).

224. See Jones, *supra* note 75, at 301.

225. See Nader & Hirsch, *supra* note 222, at 224 (arguing for heightened scrutiny when eminent domain is used to transfer property from one private party to another and strict scrutiny when additional criteria is met); Mansnerus, *supra* note 30, at 444-55 (arguing for a searching, objective rational review of eminent domain where the property taken will be transferred to private ownership).

226. Mansnerus, *supra* note 30, at 449; see also Nader & Hirsch, *supra* note 222, at 225 (proposing that heightened review should require the exercise of eminent domain to be “substantially connected to an important government purpose”).

227. See Merrill, *supra* note 25, at 80-87.

against abuse.²²⁸ In a normal market situation, the costs of exercising eminent domain, including the costs of service of process on the landowner, appraisal of the property, and the possibility of challenge, make the acquisition of land through purchase cheaper and thus preferable.²²⁹ The government will only seek to use eminent domain when market costs are artificially high due to a breakdown in the market, such as a holdout situation.²³⁰ Thus, the costs of exercising eminent domain compared to the costs of a normal purchase of property ensure that the risks of abuse of the power of eminent domain are low.²³¹

In the economic development situation, however, the exercise of eminent domain is likely to generate a surplus value that profits only the ultimate owner of the property, not the original owner.²³² If the surplus is greater than the costs of eminent domain, the private entity that will capture the surplus has an incentive to convince the government to exercise eminent domain on its behalf, even if normally, the government would not.²³³ The model would thus require courts to scrutinize closely the decision to use eminent domain when "one or a small number of persons will capture a taking's surplus."²³⁴ Therefore, even if legislative deference is normally appropriate for eminent domain decisions, the use of eminent domain for economic development might require closer judicial scrutiny.²³⁵

Part III argues why a broad approach to public use that allows economic development to satisfy the public use requirement is preferable to narrowing public use and why the public use determination should be made primarily by the legislature.

III. ECONOMIC DEVELOPMENT IS A VALID PUBLIC USE AND THE POLITICAL PROCESS CONTAINS ADEQUATE SAFEGUARDS AGAINST ABUSES OF THE POWER OF EMINENT DOMAIN

A. *Economic Development Is a Valid Public Use*

Economic development is a valid public use for the exercise of eminent domain because it creates real benefits for the community,

228. *Id.* at 81.

229. *See id.* at 77-78 (noting the costs of exercising eminent domain, including, at a minimum, "drafting and filing a formal judicial complaint and service of process on the owner"). *But see* Peñalver, *supra* note 108 ("Eminent domain is an important power that allows the state to assemble large parcels of property without engaging in an expensive series of consensual market transactions.").

230. *See* Merrill, *supra* note 25, at 77-78; *supra* text accompanying notes 141-42.

231. *See* Merrill, *supra* note 25, at 80-81.

232. *See id.* at 85, 87-88; *supra* text accompanying notes 178-79.

233. *See* Merrill, *supra* note 25, at 87-88; *supra* text accompanying notes 229-30.

234. Merrill, *supra* note 25, at 87.

235. *See id.* at 81, 87.

such as increased job opportunities and tax revenues.²³⁶ In *Poletown Neighborhood Council v. City of Detroit*²³⁷ and *Kelo v. City of New London*,²³⁸ the cities seeking to use eminent domain for economic development demonstrated the necessity for such development.²³⁹ Detroit was facing the loss of a major employer in the city at a time when unemployment was already at eighteen percent overall.²⁴⁰ Although in *Kelo* the situation is not quite as dire, the city of New London has recently lost thousands of jobs and is one of Connecticut's poorest cities.²⁴¹ Both cities studied the proposed projects and determined that they would bring thousands of temporary and permanent jobs and millions of dollars of tax revenues to the areas.²⁴² Obviously, tax revenues can be used to fund a variety of government services, including education and low-income housing.²⁴³ Thus, the development projects proposed in these cases alleviate legitimate problems facing the cities.

These development projects, along with their benefits to the community, could not be realized without the option for the government to use eminent domain to assemble large parcels of land.²⁴⁴ Large-scale development projects often require the assembly of large parcels of land under separate ownership.²⁴⁵ Because of the costs of negotiating with each landowner, eminent domain can provide a less expensive way to acquire many separately owned properties.²⁴⁶ Eminent domain also alleviates the problem of the holdout landowners,²⁴⁷ which is most acute when developers need to assemble many parcels of land for one project because the parcels are less fungible. In this situation, sellers know that the developer does

236. See *supra* Part II.A.2.

237. 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

238. 843 A.2d 500 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

239. See *supra* text accompanying notes 1-3 (describing the City of New London's need for economic development); *supra* notes 77-79, 81 and accompanying text (describing Detroit's need to retain jobs when faced with the prospect of losing General Motors as an employer).

240. See *supra* text accompanying note 82.

241. See *supra* text accompanying notes 94-95.

242. See *supra* notes 81, 93 and accompanying text. Although the decision in *Poletown* has been criticized because the plant did not actually generate as many jobs as the city had originally hoped, the plant still created thousands of jobs. See *supra* note 146.

243. See *supra* text accompanying note 148.

244. See *supra* Part II.A.1.

245. See *supra* note 72.

246. See *supra* note 229 and accompanying text.

247. See *supra* text accompanying notes 141-44 (describing the problem of holdout landowners who resist selling at reasonable prices, causing development projects to become prohibitively expensive or impeding the projects altogether). Holdouts might account for the fact that the most common public use controversy involves the assembly of large parcels of land. See *supra* note 72.

not have other options.²⁴⁸ The seller is in a position to holdout for a higher selling price than if the developers could easily substitute other parcels of land for the seller's parcel. The use of eminent domain is thus often the only way that such projects can be completed cost-effectively.²⁴⁹

Of course, while the use of eminent domain for economic development projects is sometimes a necessity, that does not mean that eminent domain should be a first recourse. People tend to view the exercise of eminent domain as an abuse of power when the government interferes with normal market transactions between private parties.²⁵⁰ To that end, courts might inquire whether private entities seeking to purchase land have attempted to do so in good faith through normal market methods, including using straw transactions or buying agents, before seeking legislative help through eminent domain.²⁵¹ In addition, the legislature exercising eminent domain might take steps to ensure that the transaction approximates a market transaction as much as possible. For example, although the Hawaii legislature, in *Hawaii Housing Authority v. Midkiff*,²⁵² helped private owners to purchase land from other private owners through eminent domain, it enacted a complicated set of prerequisites to a sale, including requiring negotiations between the "buyer" and the "seller" to set a mutually agreeable price as though they were negotiating a normal sale.²⁵³ These prerequisites help to ensure that property owners are not the victims of needless condemnations by eminent domain. The political process and judicial review further protect property owners from government abuse of the eminent domain power.²⁵⁴

B. *The Legislature Is the Primary Place to Determine Public Use*

In our system of government, the legislature is charged with the power and responsibility to regulate health, safety, and welfare, which includes the power to make land use decisions.²⁵⁵ The legislature is the appropriate branch of government to make public use decisions because landowners have more recourse to express dissatisfaction with their elected representatives than with the judiciary. Arguably, the drafters of the Fifth Amendment originally intended to protect property rights through the political process rather than the public use

248. See *supra* text accompanying note 141.

249. See *supra* text accompanying notes 142-44.

250. See *supra* text accompanying notes 200-02, 210-11.

251. Cf. *supra* note 144.

252. 467 U.S. 229 (1984).

253. See *supra* notes 57-59 and accompanying text.

254. See *infra* text accompanying notes 255-88.

255. See *supra* text accompanying note 164.

requirement.²⁵⁶ When landowners are unhappy with the land use decisions being made by the legislature on their behalf, they are free to elect new representatives²⁵⁷ or to vote with their feet by moving to a new locality with land use laws that they prefer.²⁵⁸ This is consistent with the most basic understanding of our nation's governing branches, and applicable to all types of legislation, not just legislation concerning eminent domain.

Furthermore, landowners are influential in the political process.²⁵⁹ They have the power to lobby for their interests²⁶⁰ and to elect representatives who will represent those interests. Although some commentators fear that property owners do not have the full benefits of the political process because they are unable to organize effectively to challenge condemnations,²⁶¹ this is not the case in most public use cases, which involve the assembly of large parcels of land.²⁶² In assembly cases, there are usually at least several property owners who stand to be displaced by the proposed development projects. In addition, these property owners own land near each other, which facilitates the identification and contact of other owners faced with the same government action. These owners are able to organize to challenge government exercises of eminent domain. For example, all the property owners who refused to sell their land to the developer in *Kelo* brought suit together against the city.²⁶³ Likewise, residents facing condemnation in *Poletown* joined with a local, voluntary neighborhood association, the Poletown Neighborhood Council, to challenge the city's proposed project.²⁶⁴ In *Poletown*, thousands of people were displaced by the use of eminent domain.²⁶⁵ Legislators who made the condemnation decision must have been cognizant of the fact that they were displacing so many of their constituents, even if they determined nonetheless that the decision was best for the area as a whole. Thus, in the most common public use cases, involving

256. See *supra* Part II.A.4. *But cf. supra* text accompanying note 218 (arguing that an original understanding of the Fifth Amendment would not allow the use of eminent domain for economic development).

257. Landowners who cannot vote in a jurisdiction in which they own property, for example, because they are domiciliaries of another state, purchased their property on notice that they would not have legislative recourse to express their dissatisfaction with land use decisions made by the legislature in that state.

258. See *supra* text accompanying note 157; *supra* note 159.

259. See *supra* note 152 and accompanying text.

260. See *supra* text accompanying note 156.

261. See *supra* notes 205-06 and accompanying text.

262. See *supra* note 72 and accompanying text.

263. See *Kelo v. City of New London*, 843 A.2d 500, 507, 511 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

264. See *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).

265. See *supra* note 146.

assembly of land, property owners do have recourse in the political process.

Even if the people displaced by development projects are not landowners, they are still residents of the area and able to voice their approval or disapproval by voting for legislators that will represent their opinions. In fact, when considering resident non-property owners, the legislature is their primary recourse if they are dissatisfied with the use of eminent domain powers. These residents are unlikely to appeal to the courts either because they do not have standing to challenge the taking, or because they probably stand to lose very little of market value.²⁶⁶

Finally, when property owners are truly unable to use the political process to oppose legislative land use decisions, they may turn to the courts for relief. To assure that these owners have the resources to file suit in court, perhaps prevailing plaintiffs should be awarded attorney's fees.²⁶⁷ This way, all owners have some channel through which to challenge eminent domain decisions.

C. Just Compensation and Due Process Are Better Ways to Protect Against Abuses than by Totally Eliminating Economic Development As a Valid Public Use

Just compensation²⁶⁸ and due process²⁶⁹ can also be used to ensure that property owners are not victims of an abuse of the power of eminent domain, without categorically prohibiting the government's ability to use eminent domain for worthy economic development projects. The constitutionally required measure of compensation awarded for a taking of property by eminent domain, usually market value of the property,²⁷⁰ is inadequate. Market value does not cover a condemnee's other costs incurred as a result of the taking, such as relocation costs or value placed on homes above market value.²⁷¹ Nor does it cover the costs of attorney's fees to challenge eminent domain in court.²⁷² Money cannot always completely compensate for the value that a property owner attaches to her home, but increasing required compensation above the market value of the property can

266. If the residents own a leasehold, the government must compensate them at least for taking the market value of that property interest, *see supra* note 14, an amount unlikely to make the costs of litigation worthwhile in many cases. If residents do not own a leasehold, they have no marketable property interest. Therefore, if just compensation is only the market value of the property interest held, these residents stand to recover nothing from the exercise of eminent domain.

267. *See infra* Part III.C.

268. *See supra* text accompanying note 22; *supra* note 25.

269. *See supra* note 175.

270. *See supra* text accompanying notes 180-81.

271. *See supra* notes 180-81 and accompanying text.

272. *See supra* text accompanying note 267 (suggesting the award of attorney's fees to prevailing challengers of eminent domain).

greatly alleviate the sense of unfairness that a few citizens must bear more than their proportional share to benefit the whole community.²⁷³

The procedural safeguards already in place can also go a long way towards protecting owners from eminent domain abuses.²⁷⁴ At a minimum, due process requires the service of process before an owner is subjected to eminent domain.²⁷⁵ In addition, the exercise of eminent domain often requires an appraisal of the property and a hearing on the legality of, and compensation for, the taking before the property transfer takes place.²⁷⁶ These procedural due process requirements are onerous and costly for the government.²⁷⁷ Thus, the procedures ensure that eminent domain is only used when necessary and that the owner facing condemnation is afforded time and a forum in which to challenge the taking.²⁷⁸

Finally, property owners receive protection against abuses of eminent domain through substantive due process.²⁷⁹ Substantive due process mandates rational basis review of economic legislation such as economic development eminent domain decisions.²⁸⁰

D. Rational Basis Judicial Review of Legislative Determinations of Public Use Is Sufficient

Even though the legislature is best suited to make eminent domain decisions, courts maintain an essential role in reviewing such determinations. Courts conducting a sincere rational basis review must ensure that the government has a legitimate purpose for the action and that the action is rationally related to that purpose.²⁸¹ Rational basis review is the standard that courts use most when reviewing challenged legislation and not all legislation passes rational review.²⁸² Strict or heightened scrutiny of every eminent domain

273. See *supra* text accompanying note 182. Monetary compensation for a taking through eminent domain should include: market value of the property; additional value not included in market value that an owner attaches to the property, for example, value accrued to the owner by virtue of having put the property to special use, but determined objectively; moving and relocation expenses; compensation for the time spent on, and disruption of, the relocation; attorney's fees for an owner that prevails on a constitutional challenge of the exercise of eminent domain; and possibly an additional bonus payment to cover other uncompensated subjective losses. Nonmonetary compensation should include relocation assistance, including help finding a new home or property that is comparable in size, amenities, and convenience to the condemned property.

274. See *supra* text accompanying notes 183-90.

275. See *supra* notes 186-87 and accompanying text.

276. See *supra* notes 186-87 and accompanying text.

277. See *supra* text accompanying notes 188-89.

278. See *supra* text accompanying notes 188-89.

279. See *supra* notes 191-94 and accompanying text.

280. See *supra* text accompanying notes 191-92; *infra* Part III.D (explaining why rational basis review sufficiently protects against abuses of eminent domain).

281. See *supra* note 165.

282. See, e.g., *infra* text accompanying notes 284-88.

challenge²⁸³ is inappropriate because there is no reason to believe that legislative decisions involving economic development are more likely to be suspect than other legislative decisions that receive rational basis review. Requiring heightened scrutiny would needlessly burden courts when rational basis review is sufficient to protect landowners from government abuse of the power of eminent domain.

Rational basis review does not mean that every proposed use of eminent domain will satisfy the public use requirement. In *Casino Reinvestment Development Authority v. Banin*,²⁸⁴ using rational basis review, the court did not allow the government to use eminent domain to transfer property to a casino owned by Donald Trump because there was no definite plan as to the proposed use of the land.²⁸⁵ Likewise, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*,²⁸⁶ the court found that a proposed use of eminent domain for economic development was invalid because the reason the government advanced for the taking was purely to satisfy the private expansion plans of a major retailer in the city and thus not for a public purpose.²⁸⁷ Therefore, courts do not abdicate their role by applying rational basis review to public use cases, even if economic development can sometimes satisfy the public use requirement.²⁸⁸

A broad reading of the public use requirement in the United States Constitution allows state and local governments the latitude to tailor their own public use requirements to the needs of their residents. For example, if the Supreme Court upholds the broad reading of the public use requirement in the United States Constitution in *Kelo v. City of New London*,²⁸⁹ narrow state interpretations of public use, such as that espoused in *County of Wayne v. Hathcock*,²⁹⁰ will stand. On the other hand, if the Court narrows the federal public use requirement too much, all governments will lose the option of using eminent domain to benefit their constituents²⁹¹ or to adapt to changing ideas of public use.²⁹²

283. See *supra* Part II.B.4.

284. 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

285. See *supra* text accompanying notes 110-15.

286. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

287. See *supra* note 107.

288. But see *supra* text accompanying notes 222-26. Even after the court's broad reading of public use in *Poletown*, which was so widely criticized as rendering the public use requirement a nullity, see *supra* notes 75, 90 and accompanying text, Michigan courts still found that some uses of eminent domain to transfer property to a private party did not satisfy the public use requirement, see *supra* note 90. Michigan courts after *Poletown*, however, purported to use heightened scrutiny where the use of eminent domain would result in private benefits. See *supra* text accompanying notes 86-88; *supra* note 222.

289. See *supra* text accompanying notes 97-104.

290. See *supra* text accompanying notes 127-31.

291. See *supra* text accompanying notes 145-50, 236-43.

292. See *supra* note 218.

E. *The Development Project in Kelo v. City of New London Satisfies the Public Use Requirement*

Under the standards articulated above, the waterfront development project proposed by the City of New London in *Kelo* is a valid public use for the exercise of eminent domain. The city has demonstrated that New London will benefit greatly from the development.²⁹³ The project will greatly increase the number of jobs available in the area as well as tax revenues to the city.²⁹⁴ The development will also rebuild and rejuvenate the New London waterfront, which for the past few years has largely sat vacant.²⁹⁵

Furthermore, the use of eminent domain is necessary for the completion of this project. The owners who have challenged the condemnation have unconditionally refused to sell,²⁹⁶ even after all other property owners in the area have settled with the city and vacated the premises.²⁹⁷ Because their properties are integral to the project, the whole project is on hold unless their parcels can be acquired through eminent domain.

The legislative decision to exercise eminent domain satisfies rational basis review. As the Supreme Court of Connecticut has verified, the city is in need of development because of its recent job losses and because of its status as one of the poorest cities in the state.²⁹⁸ The city has determined that the project is a significant step towards alleviating these problems, because it will directly create jobs and tax revenues,²⁹⁹ as the recent Pfizer development created.³⁰⁰ Thus, the project is rationally related to a legitimate government purpose and should be allowed to proceed, although the Supreme Court should take care to ensure that the plaintiffs are adequately compensated for the taking.

CONCLUSION

Given the increase in suburban sprawl and the scarcity of land in more dense areas, governments seeking to encourage economic development in certain areas need to be able to use eminent domain to assemble land for the projects.³⁰¹ These projects can serve a valid public use depending on the needs of the community, in the form of tax revenues, job creation, or control over how land is developed.³⁰²

293. See *supra* text accompanying notes 7-8, 93-95.

294. See *supra* text accompanying note 93.

295. See *supra* text accompanying notes 4, 7-8.

296. See *supra* text accompanying notes 12-15.

297. See *supra* note 12.

298. See *supra* note 3 and accompanying text; *supra* text accompanying notes 94-95.

299. See *supra* text accompanying notes 8-11.

300. See *supra* note 6.

301. See *supra* text accompanying notes 244-49.

302. See *supra* text accompanying notes 236-43.

Property owners are not at great risk of being victims of abuse of eminent domain because of the voice they have in the legislature to challenge land use decisions with which they disagree.³⁰³ Indeed, the legislature is the proper forum in which to first challenge the use of eminent domain.³⁰⁴ If this process fails for any reason, the courts are available to determine whether the decision of the legislatures has a legitimate purpose and whether the project is a rational way to achieve that purpose.³⁰⁵ In addition, the legislature can adjust the level of compensation or increase due process requirements to ensure that property owners are sufficiently protected against abuse.³⁰⁶ Thus, property owners are adequately protected by the political process and judicial review. Property owners should not be protected by narrowing the public use requirement so much that eminent domain can never be used for economic development projects because then many of these projects could not be completed, nor any of their benefits to the community realized.

303. *See supra* text accompanying notes 259-66.

304. *See supra* text accompanying notes 255-66.

305. *See supra* Parts III.B, III.D.

306. *See supra* text accompanying notes 268-80.

Notes & Observations