PRIVACY AND PROPERTY: TWO SIDES OF THE SAME COIN: THE MANDATE FOR STRICTER SCRUTINY FOR GOVERNMENT USES OF EMINENT DOMAIN

> "Government is instituted to protect property of every sort. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."
>
> *-James Madison*[1]

INTRODUCTION

In recent terms the Supreme Court articulated an increasingly more searching standard for regulations involving "privacy rights."[2] This trend took place in both the lower federal courts[3] and the state judiciaries as well.[4] Across the country, the scope of police power is narrow and courts ask legislatures for an increasingly higher level of justification for infringements on the rights of individuals. There is a general trend leading toward recognition of freedom of expression, sexual autonomy, and equal protection in many forms.[5] This growing recognition of a need for fidelity to the constitutional mandate of privacy and freedom is encouraging. This new approach, however, has yet to be applied consistently. In at time where citizens enjoy more protection of the right to do as they please in their own homes; their ownership of those very homes comes under increasing threat from government power.

The practice of eminent domain—the government's power to take private property for public use—was recognized by common law and originally used to

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[1] James Madison, Property National Gazette (Philadelphia) Mar. 29, 1772 at 174.

[2] *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003); Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942).

[3] *See* Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004) (holding that a ban on sex offenders living within 2000 feet of a school or childcare facility violated the privacy rights of plaintiffs). *But see* Lofton v. Secretary of the Department of Children and Family Services, 358 F.3d 804, *reh'g denied [en banc]*, 377 F.3d 1275 (11th Cir. 2004) (denying homosexual couples the right to adopt children as not a fundamental right protected under the Due Process Clause).

[4] *See* State v. Planned Parenthood, 28 P.3d 904 (Alaska 2001) (holding that an Alaska Medicaid program that withheld funds for medically necessary abortions was an unconstitutional infringement on the right to privacy); Jegley v. Picado, 349 Ark. 600 (2002) (holding that a law criminalizing sodomy infringed on the privacy rights of citizens and violated the state constitution).

[5] *See supra* text accompanying notes 62-67.

facilitate the buildings of public roads, schools, and post offices.[6] Codified in the Fifth Amendment,[7] this power has historically been invoked frequently and contributed greatly to building the infrastructure of the nation.[8] In recent years, however, the government invokes their authority more and more often for uses that are by no means public.[9] Across the country, individuals and families are being forced to give up their homes and small businesses in order to make way for large corporations to move in.[10]

Most property owners subject to eminent domain never bring their case to court. Of those eminent domain issues that do make it into courts, the basis for the litigation normally centers on the proper amount of just compensation.[11] Questioning the propriety of the taking rarely occurs.

On the rare occasions that property owners seek to prevent the taking entirely, they invariably invoke the public use limitation.[12] This strategy focuses on whether the proposed reason for the taking qualifies as a public use.[13] Among scholars, the trend is also to focus on the public use limitation to eminent domain as the only way to prevent eminent domain abuse.[14]

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[6] *See* United States v. Chicago, 48 U.S. 185, 194 (1849) ("It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways under the rights of eminent domain."); Dickey v. Maysville, Washington, Paris and Lexington Turnpike Road Co., 37 Ky. 113 (1838).

[7] U.S. CONST. amend. V ("Nor shall private property be taken for public use without just compensation").

[8] Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause* 53 HASTINGS L.J. 1245, 1253-54 (2002).

[9] *See* Dana Berliner, PUBLIC POWER, PRIVATE GAIN, (2003) (listing cases in which eminent domain proceedings have been threatened in order to use the land for large developers such as CostCo, Home Depot, and more)

[10] *Id.*

[11] In the past ten years, the Supreme Court has considered cases dealing with the use of eminent domain regarding land on five occasions. Four of the cases dealt with the specific issue of the amount of compensation required and not on the propriety of the takings. In one, the plaintiff challenged the taking as a violation of 42 U.S.C.S. §1983 and not on the Fifth of Fourteenth Amendment. Not one case challenged whether the taking was constitutional. *See* Brown v. Legal Found. Of Wash., 538 U.S. 216 (2003); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994)..

[12] *See e.g.* Kelo v. City of New London, 268 Conn. 1, 5 (2004).

[13] *Id.* at 5 ("The principal issue in this appeal is whether the *public use* clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan...") (emphasis added).

[14] *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 TEX. REV. LAW & POL. 49 (1998).; Zygmunt J. B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 674 (1989); Stephen J. Jones, Note, *Trumping*

Yet both the courts and academia largely ignore the central problem with takings jurisprudence. The public use limitation is only that—a condition that must be met after the requirements of Due Process are fulfilled. The Fifth Amendment reads:

> "nor be deprived of life, liberty, or *property*, without due process of law; nor shall private property be taken [even] for public use, without just compensation."[15]

This note proposes a new standard of review for all eminent domain cases that is faithful to the Constitution and would lead to more consistent and equitable results. Part I examines the history of eminent domain use and exposes its ravaging effect on private property rights. Part II compares current personal rights jurisprudence with the property rights cases involving eminent domain. This section lays out the current standard used by courts when reviewing the use of eminent domain and contrasts the results with those of cases involving traditional personal rights. Part III proposes a new test for eminent domain use and explains how it would work in application—allowing the taking when truly necessary and protecting property on the same level as other personal rights.

I: THE EVOLUTION OF EMINENT DOMAIN DOCTRINE

A. History of the Takings Clause

To understand the true purpose of the eminent domain power, it is necessary to look both to its historical use and the understanding of property rights at the time of the nation's founding. A review of the historical uses of eminent domain provides insight into how the eminent domain power evolved and how far we adrift we are from its original purpose. One need not accept original intent as binding to concede that the writings of the founders can provide powerful indications of how the Constitution should be interpreted.[16] The words and actions of the founding generations are reliable sources to determine the proper use of eminent domain.

Long before adoption of the taking clause in the constitution, common law established the state's power to commandeer private property. The legal scholar and writer Grotius originated the term "eminent domain" in the 17th century.[17] The

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Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment, 50 SYRACUSE L. REV. 285 (2000); Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335 (2001).

[15] U.S. CONST. amend. V (emphasis added).

[16] For more about originalism, its detractors, and the evolving method of new originalism, *see* Randy E. Barnett, *Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

[17] *See Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain,* 76 DICK. L. REV. 266, 268 n.11 (1972) ("Grotius also first indicated that public use and compensation are requisite to eminent domain.") (citing H. GROTIUS, Hugo Grotius, 3 THE LAW OF WAR AND PEACE ch. 20, 7, at 807 at Lib. II, Cap. xv, § vii).

State utilized eminent domain quite frequently in the early days of the nation.[18] The Court recognizing the Fifth Amendment takings clause "is a tacit recognition of a pre-existing power to take private property for public use rather than a grant of new power" evidences the long history of the eminent domain power. The long history of the eminent domain power is evidenced by the Court's recognition that the Fifth Amendment takings clause "is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[19] The power was used frequently during colonial times to build necessities such as roads and bridges.[20]

Even prior to colonization, eminent domain was a fixture in England. This preexisting power is reflected in both English legislative history and common law.[21] The power of the King to take private property was exceedingly broad. As all land was deemed to be the property of the King—merely leased by the people—the King did not have to compensate for a taking.[22] The tenant of a property did not actually have an absolute interest in the land and was thus not entitled to compensation when the King demanded its return.[23]

In contrast to the British tradition, the founders were demonstrably committed to protecting private property.[24] Early Americans were particularly attuned to the value of property rights, as property acquisition was a main incentive for immigration.[25] This is evidenced by the striking differences between the system of property acquisition that arose in the colonies and the British model.[26] Instead of absolute ownership vested in the king, colonists were often vested with sole title in small plots of land upon arrival in the colonies.[27]

James Madison in particular was deeply influenced by the writings of John Locke, including his writings on the importance of property rights. Locke wrote, "The Supreme Power cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that

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[18] The first litigated case concerning eminent domain to take property was in 1796. Ware v. Hylton, 3 U.S. 199 (1796).

[19] U.S. v. Carmack, 329 U.S. 230, 241-242 (1946).

[20] William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH.. L. REV. 553, 579 (1972).

[21] MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 35 (1993).

[22] Francesco Parisi, *Entropy in Property* 50 AM. J. COMP. L. 595 (2002).

[23] Jesse Dukeminier & James E. Krier, PROPERTY 89, 187, 1102-03 (4th ed. 1998).

[24] *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985) ("It is very clear that the Founders shared Locke's and Blackstone's affection for private property, which is why the inserted the eminent domain provision of the Bill of Rights.")

[25] JOHN N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996).

[26] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 10 (1998).

[27] *Id.*

the People should have Property."[28] Moreover, the founders had to deal with constant intrusions into their homes by British troops exercising the power to demand boarding from the citizens.[29] The war increased intrusion on private property rights in other ways as well.[30] Learning from these experiences, the founders included no fewer than four clauses in the original document and the Bill of Rights to protect private property.[31]

The takings clause language of the Fifth Amendment is not repeated exactly in the Fourteenth Amendment.[32] However, it is settled that the same restrictions that apply to the federal government through the former, apply to the states through the latter.[33] Additionally, while a strict reading of the text does not necessarily lead to this conclusion, it is settled that the Amendments also proscribe the taking of property for private uses.[34]

B. Early Uses of Eminent Domain

Subsequent to the ratification of the Bill of Rights, the eminent domain power was invoked by the states as well as the federal government for a variety of public uses. In 1805, the Supreme Court of North Carolina upheld the state's taking of tracts of property in order to build the University of North Carolina.[35] In 1829, the Supreme Court approved the taking of land to build a bridge over the Charles River as a proper use of eminent domain.[36] Similarly, a Rhode Island court found that land could be taken to build a road.[37]

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[28] John Locke, TWO TREATISES OF GOVERNMENT 45 (1965).

[29] David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 4 (1971)

[30] *Id.*

[31] U.S. CONST. amend. III, ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law."); U.S. CONST. amend IV, cl. 1, ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated."); U.S. CONST amend. V, cl. 4, ("Nor be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. V, cl. 5, ("Nor shall private property be taken for public use without just compensation.").

[32] U.S. CONST. amend XIV § 1 cl. 3, "Nor shall any state deprive any person of life, liberty, or property, without due process of law.").

[33] LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 210 (Brian W. Blaesser et al. eds., 1989) (concluding that "despite the different language of the Fifth and Fourteenth Amendments, and regardless of whether the just compensation clause of the Fifth Amendment has been incorporated into the Fourteenth Amendment, the substantive standard in a governmental takings [sic] of property is now identical under each.

[34] 2A NICHOLS, THE LAW OF EMINENT DOMAIN § 7.01[2], at 7-18 (3d ed. 1985).

[35] Den on demise of the Tr. of the Univ. of N.C. vs. Foy, 5 N.C. 58 (1805).

[36] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. 344 (1829).

[37] Bonaparte v. Camden & A. R. Co., 3 F. Cas. 821 (1830).

The federal government did not explicitly invoke the eminent domain power until 1875. In *Kohl v. United States,* The United States Supreme Court approved the U.S. postal service's use of eminent domain to take land in Cincinnati in order to build a post office.[38] In doing so, the Court reaffirmed that eminent domain is "essential to [a State's] independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed."[39] Helpfully, the Court went on to list reasons for which private property could be taken—including "forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses."[40] For decades, the federal government adhered to this affirmation of eminent domain in defined instances.

Similar instances of eminent domain use occurred across the country.[41] Undeniably, eminent domain was crucial to building a strong and prosperous nation in the early days of the United States.[42] Particularly in the era when vast tracts of land were up for grabs and the states needed a method of unification and order, the eminent domain power was upheld in almost all of these circumstances. While legislatures invoked the power frequently, courts adhered to the view that the taking must be compensated and must be for a truly "public" use.[43] In 1896, the Supreme Court relied not on the public use limitation, but the Due Process clause itself to invalidate the forced transfer of private railroad land to a neighboring farmer.[44] This strict due process analysis of proposed uses of eminent domain did not last long.

C. A Shift Toward Expanded "Public Use"

In 1954, the Supreme Court decided *Berman v. Parker,*[45] a challenge to the taking of large tracks of the District of Columbia for redevelopment purposes. The taking was based on the authority of a blight statute which cited the uninhabitable residential areas and called for them to be razed and replaced with "low-income"

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[38] Kohl v. United States, 91 U.S. 367 (1875).

[39] *Id.* at 371.

[40] *Id.*

[41] Every state constitution has a clause similar in meaning and effect to the takings clauses in the Fifth and Fourteenth Amendment. They are not addressed here as this note is aimed in part at providing a way for more eminent domain cases to be litigated in federal court.

[42] Eminent domain was used to create post offices that united the country, schools to educate the citizens, and roads to facilitate travel. *See* Nichols *infra* note 34.

[43] Missouri P. R. Co. v. Nebraska, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.")

[44] *Id.*

[45] 348 U.S. 26 (1954).

housing.[46] The plaintiff in the case was the owner of a department store.[47] He claimed that his store was already of public use to the community, and further claimed that it was unconstitutional to take his property and give it to another private party—a real estate developer.[48] The plaintiff claimed the taking contradicted both the Due Process Clause and the Public Use clause of the Fifth Amendment.[49]

The Court held in favor of the federal government and announced an unheard of level of deference in eminent domain cases that remains today.[50] The Court's "broad and inclusive"[51] definition of the public use requirement essentially deprived it of any meaning. In a great departure from the list of proper purposes enumerated in *Kohl* nearly 80 years earlier, the Court explicitly held, "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."[52] Thus, in addition to roads, post offices, and bridges, governments could now exercise eminent domain power to create "beauty".

Having dismissed any argument that the taking was not for a public use, the Court next turned to the means the government used to achieve the goal. The Court stated that there was no judicial review of means. "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."[53] Therefore the Court did not find it necessary to investigate other less intrusive means of effectuating the "beauty" goal. The *Berman* decision calls for no judicial scrutiny of means-end fit.

The final issue that the Court looked at was the issue of compensation, simply holding that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[54]

This decision is notable for a number of reasons. First, the Court rejected the plaintiff's claim based on the Due Process clause without any analysis.[55] Second, the Court significantly broadened the category of purposes that qualify as a "public use." Finally, the Court abdicated any judicial responsibility to inquire into the means used to achieve the public purpose, thus essentially removing even a basic rational basis review from eminent domain cases. The stage was set for rampant eminent domain abuse in both federal and state governments.

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 30.

[49] Berman v. Parker, 348 U.S. 26 (1954).

[50] *Id.*

[51] *Id.* at 33.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 36.

[55] The Court only mentioned the phrase "due process" in describing the plaintiff's claims. That particular claim was not addressed in the opinion. *Berman*, 348 U.S. at 31.

D. Current Eminent Domain Abuse

In recent years and in light of *Berman*, state and local governments have become increasingly bold in the way they wield their eminent domain powers. Even the apparently straightforward constitutional requirement of a "public use" in order to use eminent domain has been severely eroded.

In one of the more publicized cases, the municipal government of Atlantic City attempted to use the eminent domain power to take the home of Vera Coking, a home that she had lived in for over 30 years.[56] The government wasn't taking it to build a road or to erect a post office. The land was not slated to be operated or owned by the government at all. Instead, the land was given to Donald Trump so that he could build a bigger parking garage for the Trump Plaza Casino.[57]

Memorialized in a documentary by Michael Moore,[58] the story of Poletown is a prime example of eminent domain abuse and its ravaging effects. The city decided that it would raise more tax dollars by razing more than 1100 homes, 20 stores, and two churches and then give the property to General Motors for a manufacturing plant.[59] In the landmark decision for proponents of the use of eminent domain for such purposes, the highest court of Michigan found that such a condemnation was permissible as a "public use."[60]

But the story doesn't end there. The court held that the condemnation is permissible and beneficial to the public and accepted the premise that the plant would be built and the community will reap the benefit of the new tax revenue. In light of the sweeping taking and the almost two decades that the plant has been operational, the benefit to the community has been scant at best.[61]

In recent years, in response to a surge of news coverage and public outcry against eminent domain abuse,[62] more property owners are bringing their case to court and

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[56] David M. Herszenhorn, *Residents of New London Go to Court, Saying Project Puts Profit Before Homes* N.Y. TIMES, Dec. 21, 2001, at 5.

[57] Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. 1998). In addition to being one of the more outrageous uses of eminent domain, this case is also notable because the property-owner won her case in court. *See* Paul Schwartzmann, *She Kicks Sand in Trump's Face, Sneers at the Donald's Bucks*, N.Y. DAILY NEWS, July 26, 1998, at News 7.

[58] ROGER & ME (Warner Studios 1989).

[59] Zygmunt J. B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions,* 16 B.C. ENVTL. AFF. L. REV. 661, 674 (1989).

[60] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

[61] Paul Lawless, *Power and conflict in pro-growth regimes: tensions in economic development in Jersey City and Detroit*, Urban Studies (July 1, 2002) at 1329. ("Most of those interviewed as part of this research programme consider that the apparent economic growth evident in the later years of the 1990s remains marginal to the needs of many living in the city.").

[62] http://www.castlecoalition.org (last accessed Nov. 15, 2004).

on rare instances even winning.[63] This summer, the same court that handed down the *Poletown* decision over twenty years ago held the taking of homes to build an office park to be unconstitutional under the Takings Clause of the Michigan constitution.[64] After noting that, in order to qualify as a public use, the proposed purpose must be for an enterprise dependent on land that can only be achieved through the government, the court went on to explicitly overrule *Poletown.*[65] Some federal courts are also prepared to use a more searching standard to determine whether the taking is constitutional. The United States District Court for the Central District of California held that "courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely a pretext."[66]

On September 28, 2004, the United States Supreme Court accepted certiorari in *Kelo v. New London Development Corporation.*[67] The question the Court will consider is "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?"[68] The Court's decision in this case is certain to have dramatic effects on takings jurisprudence.

E. The Ravaging Effects of Eminent Domain Abuse

The situations mentioned above are only a few of the eminent domain proceedings taking place across the country.[69] Whole neighborhoods, often populated primarily by African Americans, other minority groups, and senior citizens are being cleared for such "public uses" as a new Costco, a pharmaceutical plant, or just more expensive houses.[70] And it isn't simply individual property owners who are being affected. Included in the property taken by the government through eminent domain are places of worship,[71] important local shopping

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[63] 99 Cent Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (2001) (holding for the first time since *Berman* that a condemnation was invalid based on lack of public use).

[64] Wayne v. Hathcock, 471 Mich. 445 (2004).

[65] *Id.* at 483.

[66] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1229 (C.D.Ca 2002).

[67] Kelo v. City of New London, 268 Conn. 1, 5 (2004).

[68] Kelo v. City of New London, Plaintiff's Petition for Certiorari to the United States Supreme Court, at i.

[69] *See* Dana Berliner, PUBLIC POWER, PRIVATE GAIN 2 (2003) NEED SOURCE. These are not isolated occurrences. Berliner reports that from 1998-2002, 10,282 condemnations were filed or threatened nationwide for the benefit of private parties.

[70] *Id.*

[71] *Cottonwood*, 218 F. Supp 2d at 1203.

centers,[72] and historic meeting places.[73] Thus, even when the entire neighborhood is not subject to eminent domain, the whole community suffers from the community devastation.

The concern over the abuse of eminent domain is more than an argument about the importance of property rights. Condemnations for private gain are a public welfare issue. Most eminent domain litigation centers on the proper amount of compensation. This focus is based on the faulty premise that property has only monetary value. Many property owners are personally attached to their property enough that no amount of money can make up for their loss, however.[74] Often, the property that is taken has been owned by a family for generations[75] or the small business being condemned is an integral part of a community and integral to the personhood of the entrepreneur.[76] This lack of accounting for the intangible emotional value of property and the detrimental impact of eminent domain on the community as a whole are compelling reasons—in addition to the deprivation of constitutional mandate—that courts should reverse their current course and apply heightened scrutiny in these cases.

II. PROPERTY RIGHTS AS PERSONAL RIGHTS

While personal rights have enjoyed a high level of protection, the property rights deeply embedded in our Constitution, are repeatedly violated.[77] This discrepancy is unconstitutional for two main reasons. First, as a textual matter, the Fifth and Fourteenth Amendments explicitly protect property as a matter of due process. In contrast, these amendments are silent about individual rights.[78] Second, as will be demonstrated, it is logically impossible to protect personal rights without protecting property rights and vice versa. The distinction between the two is false.

This false dichotomy between personal rights and property rights is even more perplexing in light of the founders' understanding of the inseparability of the two rights. John Bingham, the drafter of the Fifth Amendment, wrote "the absolute

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[72] Timothy McNulty & Tom Barnes, *Councilman Threatens Land Seizure* PITTSBURGH POST GAZETTE, Apr. 12, 2003, at D-1 (discussing proposals to condemn a historic downtown shopping center and replace the stores with large department stores).

[73] *Id.*

[74] John E. Kramer, *The Battle for Fort Trumbull: Are Property Rights Safe?* HARTFORD COURANT, July 22, 2001, at C-1.

[75] Laura Mansnerus, *Refusing to Let Go: Property Owners Test Eminent Domain's Limits* N.Y. TIMES, JULY 23, 2001, at B1.

[76] Court Rich, *Mesa is Too Meddlesome* ARIZONA REPUBLIC, Feb. 25, 2004, at 4.

[77] The courts' indifference toward property rights is evidenced in many areas outside of eminent domain takings. State and federal governments are depriving people of their property rights through regulatory takings, criminal forfeiture statutes, and imposing economic regulations—to name a few. For an overview of property rights deprivations, *see* JAMES V. DE LONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT AND WHY YOU SHOULD CARE (1997).

[78] *See supra* note 21.

equality of all, and the equal protection of each, are principles of our Constitution . . . . It protects not only life and liberty, but also property, the product of labor."[79] Madison or Hamilton wrote, "Government is instituted no less for the protection of property, than of the persons of individuals."[80] This sentiment has been repeated by scholars throughout the years. "Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."[81]

Even in recent years, astute judges have noted the interconnectedness of property and privacy. In 1972, Justice Stewart wrote:

> [T]he dichotomy between [the two] is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither would have meaning without the other.[82]

A. The Meaning of Personal Rights

Either of the terms "personal rights" or "privacy rights" describes the substance of the term "liberty" in the Fifth and Fourteenth Amendments. Liberty was described by Justice Peckham in 1897 as:

> The liberty mentioned in [the fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[83]

Notice that this early description of "liberty" is focused on what we now call "economic liberties," the right to contract, the right of free employment, and the right of private property. All of the interests asserted are property interests. One's employment is one's property.[84] One's contracts are one's property.[85] And certainly one's home is one's property.

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[79] CONG. GLOBE, 35th Cong., 3d Sess. 140 (1857).
[80] The Federalist 54 at 370.
[81] 2 Story Const. §1790.
[82] Lynch v. Household Finance, 405 U.S. 538, 552 (1972).
[83] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).
[84] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

Sadly, the connection between liberty and property did not last long in Supreme Court rhetoric. Twenty six years later, the Court expanded the meaning of liberty to include broader family and religious interest while still including property interests:

> Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire a useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness.[86]

Following this trend, in recent years property interests have been entirely absent from definitions of liberty:

> [I]n addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and the upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.[87]

Having established the substance of the liberty right and gradually reading property interests out of the liberty definition, the Court embarked on further sub-categorizing by designating certain rights as "fundamental."[88] This was a departure from the earlier Supreme Court uses of the term "fundamental right."[89] Originally, the phrase did not refer to a set of particularly important liberty interests, but to the equal and encompassing protection of all "life, liberty, and property."[90]

This vague new category of fundamental rights is generally comprised of those rights which are either enumerated in the Bill of Rights or those rights that have been established through history and tradition to be essential to the exercise of life, liberty, or property.[91] Fundamental rights are a sub-set of life, liberty, or property

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[85] Lochner v. New York 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.") .

[86] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[87] Washington v. Glucksberg 521 U.S. 702, 720 (1997) (citations omitted).

[88] *Id.*

[89] United States v. Cruikshank, 92 U.S. 542, 554 (1875) ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.")

[90] *Id.*

[91] *Glucksberg*, 521 U.S. at 721. ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively 'deeply rooted in this Nation's history

rights that the Court has singled out for special protection. The most often cited fundamental right is the right to privacy.[92] This right to privacy then in turn breaks down into such rights as "the decision whether to bear or beget a child,"[93] the right to marry,[94] and the right to establish a home.[95]

In effect, the Court's jurisprudence has created a hierarchy of rights. The most specific are those discrete activities that have been explicitly held as "fundamental", such as marriage.[96] Then next level of specificity is privacy interests, a subset of fundamental rights. One level higher is fundamental interests. And finally at the most specific are those interests deemed "mere liberty interests."[97]

B. Recent Moves Toward a More Inclusive Definition of Liberty

Last term, in *Lawrence v. Texas,*[98] the Court made a substantial, but unheralded effort to clear away some of the muddle in its rights jurisprudence.[99] Justice Kennedy rejected the analysis of two levels of rights. His opinion varied from the normal substantive due process analysis by cutting out the level of "privacy" rights. Instead of labeling the right at issue a part of "privacy," he relied explicitly on "liberty" as expressed in the Fourteenth Amendment.[100] Second, Kennedy applied a searching standard of review without determining whether the interest at stake

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and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'") (citations omitted).

[92] Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("[T]he fourth amendment create[s] 'a right to privacy no less important than any other right carefully and particularly reserved to the people.'") (citations omitted).

[93] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[94] Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.").

[95] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[96] *Loving*, 388 U.S. at 12.

[97] Mark Strasser, *Fit to be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U.L. REV. 841 (1997) ("Whenever discussing individual rights, it is important to establish the nature of the particular right under discussion - whether it is a mere liberty interest or, instead, a fundamental right. A mere liberty interest may be regulated or abridged by the state so long as the state does so in a way that is rationally related to the promotion of a legitimate state goal.").

[98] 539 U.S. 558 (2003).

[99] This decision has been widely praised—and criticized—for recognizing a broader scope of protection for private consensual intimate relation. *See* David J. Garrow, *Sodomy Case Has Far-Reaching Significance,* Chicago Tribune, June 27, 20o3, at C27. Yet Justice Kennedy's rights analysis—a drastic departure from the traditional approach—has gone largely unnoticed by the media and legal scholars. One notable exception is Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas,* in CATO SUPREME COURT REVIEW (2003) NEED SOURCE.

[100] *Lawrence*, 539 U.S. at 562. ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

was deemed "fundamental."[101] These changes open the door for more protection of liberty interests—including property interests—by giving breathing room to the concept of liberty. Under Justice Kennedy's simplified analysis, a distinction between personal rights and privacy rights becomes superfluous. It remains to be seen whether the Court will adopt this as a regular mode of analysis.

While difficult to untangle, the complexity of personal rights jurisprudence is a testament to how seriously the Court takes these rights. The definitions have shifted and changed to accommodate a wide arrange of interests. In contrast, property rights, in the context of real takings, is simply defined and somewhat crudely administered.

C. The Meaning of Property Rights

It is easy to think of property as the clothes in your closet or the money in your bank account, or the roof over your head. But it means much more than that. Private property is the product of one's labor and work, the embodiment of one's dreams and desires. The right to property is achieved only through the exercise of one's personal freedom. A man uses his inherent right to liberty to obtain the equally inherent right to property.[102]

Clearly, the right to own property includes the right to exclude another from intrusion and taking possession.[103] It is important to note that the right to exclude that is incident to property is equally valid against the world as a whole as it is against an individual. As antebellum scholar Lysander Spooner wrote:

> The right [property] is equally valid, and equally strong, against the will of all other men combined, as against the will of every or any other man separately. It is a right against the whole world. The thing is *his*, and is *not* the world's. And the world must leave it alone, or it does him a wrong; commits a trespass, or a robbery, against him. If the whole world, or any one of the world, desire anything that is an individual's, they must obtain his free consent to part with it, by such inducements as they can offer him. If they can offer him no inducements, sufficient to procure his free consent to part with it, they must leave him in the quiet enjoyment of what is his own.[104]

The right to property means nothing at all if a majority can band together to deprive you of it. The right to property is no right at all if it is subject to deprivation when those around you so choose. For this reason, it is no better for an individual to trespass into a house and steal than it is for society to take the whole house.

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[101] Kennedy's only reference to "fundamental rights" occurs when he addresses the way the Court misconceived the issue in *Bowers v. Hardwick*. *Id.* at 566-567.

[102] *See* LYSANDER SPOONER, THE LAW OF INTELLECTUAL PROPERTY (Bela Marsh, 1855).

[103] RESTATEMENT OF PROPERTY : POSSESSORY INTERESTS IN LAND §7 (1936).

[104] SPOONER, supra note 102, at ch. 1 § IV.

Therefore, personal property cannot be completely subject to acts of the legislature.[105]

While the concept of property is most certainly more concrete than the ideas given so much consideration in personal rights cases, and property itself is explicitly mentioned in the Fifth and Fourteenth Amendments as protected,[106] courts and legislatures routinely grant much less protection. Moreover, accepting that there are certain rights that are fundamental and deserving of heightened scrutiny, property rights fit the definition of a fundamental right. This is particularly true in light of Justice Marshall's statement that:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[107]

As the Fifth Amendment explicitly includes property, it is clear that property rights are fundamental—no "nexus" at all is necessary. Yet, as explained below, the standard of review is distinctly more deferential to the state in eminent domain cases than it is in cases involving "mere liberty interests."

D. Searching Review for Personal Rights

All personal rights receive, at minimum, rational basis review under a substantive due process analysis.[108] This analysis entails determining if there is a legitimate state interest being served by the state action.[109] Very few governmental goals have been deemed to be illegitimate.[110] Having determined that there is a valid state interest, the court then looks to see if the state action in question is rationally related to that objective.[111] This is a question of "fit." Historically, this

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[105] United States v. Certain Lands in Louisville, 9 F. Supp. 137, 138 (W.D. Ky. 1935). ("If the property of the citizen can be condemned and taken...simply because the legislative department may determine that the use to which the property is to be put is for the general welfare, the property of every citizen in this country would be subject to the whims and theories of any temporary majority. . . .")

[106] U.S. CONST. amend V, cl. 3,4; U.S. CONST. amend. XIV §1 cl. 2.

[107] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 102-103 (1973).

[108] Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127-128 (1999).

[109] Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.")

[110] Examples of those that have are invidious discrimination, animus, and arguably promotion of morals. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[111] United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

prong of the inquiry has been easy to satisfy. Because remedial legislation can be incremental, laws that only address a fraction of the problem are constitutional.[112]

Those rights that meet all of the necessary criteria to be deemed "fundamental" earn the protection of strict scrutiny. As Justice Harlan wrote in *Poe v. Ullman*,[113] "[s]ince . . . the statute marks an abridgement of important fundamental liberties . . . , it will not do to urge justification simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required."[114] Infringement on fundamental rights must be "narrowly tailored to serve a compelling state interest."[115] The court first looks at the interest that the state purports to serve by the governmental action to determine if it is compelling.[116] The Court has often made distinctions between interests that are compelling and those that are merely legitimate.[117] After determining that the state interest is compelling, the court determines if the means used are necessary. The court will invalidate the law if it determines that there are other less restrictive means to achieve the goal.[118]

E. No Review for Property Rights

In stark comparison to the varying levels of scrutiny and the relevant considerations in personal rights review, property rights cases generally have just three considerations. The element that has garnered the most attention in recent Supreme Court jurisprudence is the matter of whether the government action constitutes a taking at all.[119] The Court has held that there is no taking when only a portion of the total property in question is affected.[120] In order for any review under the Fifth Amendment to apply, the owner must be deprived of the whole

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[112] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

[113] 367 U.S. 497 (1961).

[114] *Id.* at 554.

[115] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[116] *Id.*

[117] *See e.g.* Saenz v. Roe, 526 U.S. 489, 507 (1999) (finding that a minor savings of state expenditures was not compelling enough to limit welfare eligibility).

[118] Griswold v. Connecticut, 381 U.S. 479, 498 (1965) ("It is clear that the state interest . . . can be served by a more discriminately tailored statute which does not sweep unnecessarily broadly, reaching beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.").

[119] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[120] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."

bundle of rights associated with property, not just one strand.[121] The instances in which government interferes with property rights without even the application of the Takings Clause is another indication of how little value the current regime places on property rights. However, in the cases addressed by this note, in which homes and businesses are taken in their entirety by the government, this prong of the analysis is easily satisfied.

The second element of the takings inquiry is whether the use is for a public purpose.[122] As interpreted this requirement puts no substantive restrictions on the power of government.[123] The literal requirement of the Fifth Amendment that the taking be for "public use" has suffered a slow transformation into "public purpose"[124] and finally "public benefit."[125] While it may initially seem that these three terms are synonymous, they lead to vastly different results. A public use would mean a use that is open to the public.[126] Examples are roads, parks, and post offices. A public benefit, on the other hand, can technically result from *any* use of land that increases the tax revenue of the locality.[127] For example, it would be a "public benefit" to use eminent domain to condemn middle class housing and replace it with luxury homes that incur more taxes. Therefore, the second prong of takings analysis provides scant more protection to property owners than the first.

The final prong of takings analysis is the issue of just compensation.[128] However, the court only needs to address this issue after the taking has been deemed constitutional in itself. As a result, property owners, explicitly entitled to protection under the Fifth Amendment, are in effect left with little constitutional protection of their constitutional right. Further, some scholars, such as David Fawcett have proposed stripping property owners of even the minimal protection of

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[121] Andrus v. Allard, 444 U.S. 51, 63 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

[122] *See supra* p. 7 and accompanying notes.

[123] *See* Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" A Proposal to Redefine "Public Use,"* 2000 L. Rev. M.S.U.-D.C.L. 639, 641 (2000) ("Often it appears as if the public use finding, or the public purpose that the government offers in order to condemn property under the Constitution, is an inevitable certainty when public agencies decide to flex their eminent domain muscles, leaving the real battle to the proper measure of just compensation. The result of such an approach leaves private property an increasingly open target for public agencies to take land under a public purpose guise in order to turn over to private entities for the sake of 'economic development.'").

[124] *Poletown*, 410 Mich. at 632.

[125] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1023 (1992) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-134 n. 30 (1978).

[126] Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569, 575 (2003).

[127] *Id.*

[128] U.S. CONST. amend. V.

the takings clause.[129] Rather than even requiring that the deprivation be for a public benefit, Fawcett contends that *only* those takings that are for a public benefit require just compensation.[130] Takings that are not for a public benefit are a mere exercise of police power and are outside the bounds of the Fifth Amendment.[131] This construction contorts the protections of the takings clause to create even less protection. Fortunately, no court has endorsed this argument. Yet Fawcett's proposal illustrates how far legal scholarship has strayed from the original meaning of the Fifth Amendment.[132]

Conspicuously absent from any review of the eminent domain is the substantive due process analysis that is applied to all other rights guaranteed by the Fifth Amendment. The courts and the bar in general focus on the last clause of the Fifth Amendment and largely ignore what comes before it: "Nor be deprived of life, liberty, or *property* without due process of law."[133]

III. TOWARD A MORE SEARCHING REVIEW OF EMINENT DOMAIN CASES

The Fifth Amendment's property right is "a fundamental civil right, as essential to a free and decent society as the right to practice one's religion, to speak out freely, and to defend oneself in court."[134] It is inexplicable therefore, that property rights are significantly more open to governmental deprivation than other fundamental rights. Furthermore, the Constitution itself as a textual matter, by including property with the rights of life and liberty, mandates that the same level of scrutiny should apply to property rights.

Applying the substantive due process requirement is consistent with textual interpretation and fundamental rights jurisprudence. In addition, it would allow for a more consistent and just system of adjudicating eminent domain takings, as the examples below will show.

There are four elements to consider in a substantive due process claim: 1) the importance of the right at issue; 2) the extent of the deprivation; 3) the importance of the state interest being advanced; and 4) the extent to which the means used fit with the state interest.[135]

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[129] David B. Fawcett III, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of Takings Analysis*, 47 U. PITT. L. REV. 491 (1986).

[130] *Id.* at 493-494.

[131] *Id* at 493.

[132] Fawcett's proposal also provides an example of why it is necessary to look to some form of original meaning when interpreting the Constitution. Without the restriction of adhering to the values inherent in the text, the words can be manipulated to mean the exact opposite of the obvious.

[133] U.S. CONST. amend V (emphasis added).

[134] Kenneth B. Mehlman, *Debate: Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 257-258 (1995).

[135] *See* text accompanying notes 106-122.

The first element, the importance of the right at issue, establishes the level of scrutiny to be applied to the rest of the element. As the importance of the right increases, the importance of the state interest must also increase. The more important the right, the tighter the fit between means and ends must be. It has been established that property rights are of the utmost importance.[136] For this reason, in order for a deprivation of property to pass due process review, there must be a compelling state interest served by narrowly tailored means.[137]

The extent of the deprivation is an important issue in takings. This prong encompasses the analysis of whether a taking has occurred at all.[138] Some considerations are how much of the property has been taken, what kind of property is taken, and the context of the taking—whether through regulation or condemnation. In the context of eminent domain, the deprivation is total. The owner is deprived of either her home or her place of business. Because eminent domain totally deprives an individual of a fundamental right, the state interest need be particularly compelling.[139]

The result of analyzing the first two elements will be the same in every use of eminent domain to take private property.[140] Thus, the final prongs of important of the state interest and the means/ends fit become vitally important. Governmental entities propose a variety of state interests to support the exercise of eminent domain. These range from unquestionably compelling[141] to completely illegitimate.[142] If the state interest is deemed to be illegitimate, the analysis stops here and the taking is deemed unconstitutional.[143] This step of the analysis subsumes all inquiries about public use. The taking would not be deemed legitimate if it was to benefit a purely private entity.[144] Furthermore, as with other substantive due process reviews, the court could strike down the taking if the alleged governmental purpose was merely a pretext for other unlawful government action.[145]

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[136] *See supra* pp. 13-14 and accompanying notes.

[137] *Glucksberg*, 521 U.S. at 721.

[138] *Tahoe Sierra*, 535 U.S. at 322-323.

[139] *See supra* text accompanying notes 100-103.

[140] The importance of the right at issue in the context of eminent domain proceedings against landowners is paramount. The extent of the deprivation is total.

[141] United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 554 (1946) (holding that the taking of property in order to build a damn that would provide critical power in a state of war is a legitimate exercise of the eminent domain power.)

[142] Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. 1998) (holding that the condemnation of private housing in order to give the land to a neighboring casino was an unconstitutional use of eminent domain).

[143] State interests that are based on invidious discrimination are unconstitutional. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). For examples of eminent domain being used as a pretext for discrimination, *see* Creative Env'ts Inc. v. Estabrook, 680 F.2d 822, 829 (1st Cir. 1982).

[144] *See* Bailey v. Meyers, 76 P.3d 898, 904 (Ariz. 2003).

[145] McCulloch v. Maryland, 17 U.S. 316, 423 (1819). ("Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress

If the court finds a legitimate state interest (in other words, a public use) it should then examine whether the means used are narrowly tailored to serve that interest.[146] This prong adds a necessary level of analysis that is almost completely lacking in eminent domain jurisprudence. It is also not present in other recent proposals to expand property rights through a stricter interpretation of "public use."[147] This balancing takes into account other feasible alternatives to accomplish the same goal.[148] For example, in a situation in which fifty private homes are being razed in order to create a highway where there is an alternative route that would not require that any homes be taken, a court might find that the means are not narrowly tailored to meet the desired ends. The amount of discretion that this places in the court to second guess the legislature is a valid concern. However, "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the court to exercise that same capacity which by tradition courts have always exercised: reasoned judgment."[149]

It is only after these four prongs have been met that the court should then look to the final clause of the Fifth Amendment. Only after the taking "for public use" has been deemed constitutional, should the court then look to the amount of just compensation that is required.

CONCLUSION

Applying the substantive due process standard described above will allow the government to use eminent domain when necessary and still protect property rights. Moreover, the standard will lead to more consistent and just results. Requiring the state to provide a true legitimate purpose as well as show that the means chosen are the best of all the feasible alternatives, takings will be limited to situations in which they are truly necessary and will be carried out in the least intrusive manner.

Katherine M. McFarland

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under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would be the painful duty of this tribunal . . . to say that such an act is not the law of the land.")

[146] 99 Cent Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

[147] *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of Public Use*, 32 SW. U. L. REV. 569 (2003).

[148] Moore v. East Cleveland, 431 U.S. 494 (1977) (invalidating a statute because there were other means to achieve the compelling state interest that did not infringe on fundamental rights.)

[149] Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).