THE PUBLIC USE CLAUSE, COMMON SENSE AND TAKINGS

I. INTRODUCTION

The "law of bloody common sense" [1] dictates that the government cannot take an individual's home and simply give it to one of the largest corporations in the world.[2] This conclusion seems even more self-evident in light of the Fifth Amendment's requirement that land be taken only for "public use." [3] However, the current formulation of the public use doctrine has no room for common sense. Rather, under the public use doctrine, local governments can condemn property for private profit-making enterprises at the expense of individual homeowners and small businessmen who are unable to stand up to city hall and its big business allies. Under the current state of the doctrine, it can truly be said that "[t]he rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire." [4]

This Note outlines how the government has enabled the powerful to acquire any property they desire and the implications for small landowners. Part II sets the context with a discussion of the theoretical importance of protecting property and the Framers' central concern with securing property. Part III traces how the Framers incorporated their reverence for property into specific constitutional protections intended to secure property against arbitrary government interference. However, one of those clauses, the Public Use Clause, has essentially been read out of the Constitution by a judiciary that is excessively deferential when the

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[1] This constituted one of the legal defenses of the lead character in the movie THE CASTLE (Working Dog Productions 1997) against the "compulsory acquisition" of his home for an airport expansion project. I strongly urge anyone with an interest in this subject to rent the movie. Although the film focuses on the Australian law of "compulsory acquisition," the points made in the movie are directly applicable to this Note and are made with substantially more force and humor than I could ever possibly muster.

[2] *See* Lisa Brennan, *Toledo 'Taken' With Jeep Suit*, NAT'L. L.J., Jan. 25, 1999, at A1. The City of Toledo, Ohio is seeking to condemn 190 acres of private land so DaimlerChrysler can build a Jeep manufacturing plant on the property. *Id. See infra* notes 126-30 and accompanying text.

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

[4] Southwestern Illinois Dev. Auth v. Nat'l City Envtl. LLC, 710 N.E.2d 896, 906 (Ill. App. Ct. 1999) (Kuehn, J., concurring).

legislature declares that a use satisfies the requirements of the clause. Part III A addresses the implications of this policy of extreme judicial deference to legislative declarations of public use in light of the Madisonian dilemma. Viewed in this light, the problem with the current state of public use doctrine is that the Public Use Clause no longer protects the property rights of minorities from majoritarian abuse. Rather, powerful factions influence self-interested legislators who make their condemnation decisions according to majoritarian preferences and transfer benefits from minorities least able to bear the burden to some of the wealthiest corporations in the world. Part III B concludes that meaningful application of the Public Use Clause can prevent such majoritarian abuses by reducing the value of government favors and by increasing the costs of attempting to receive such favors. As a consequence, minorities will be protected from arbitrary interference because the incentive for majority factions to redistribute property at the expense of minorities will be reduced.

II. THE IMPORTANCE OF PROTECTING PRIVATE PROPERTY

The protection of property is fundamental for the preservation of all other rights protected by the Constitution. Ironically, however, property has no rights. Rather, people have rights.[5] All of the rights enjoyed by individuals derive from the right to some form of property because rights and property are inextricably linked. [6] John Locke recognized that each individual has a property right in his own person.[7] From this, Locke reduced all rights to property. [8] To protect an individual's life, then, is to protect the individual's property interest in his life.[9] The very language of individual rights indicates their foundation in property: "[T]o have rights to life, liberty, and the pursuit of happiness is to be 'entitled' to those things, to hold 'title' to them, and to be able to 'claim' that others may not 'take' them from us." [10] It is not surprising, then, that the Framers, heavily influenced by the natural rights conception of property, did not separate property from individual rights, but rather found property necessary for securing individual rights. [11] John Adams stated the

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[5] *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is, in truth, a 'personal' right . . . ." *Id.*

[6] *See, e.g.*, Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 508-512 (1993).

[7] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 at 20 (Hackett Publishing, 1980) ("[E]very man has a property in his own person . . .").

[8] *See* Pilon, *supra* note 6, at 510.

[9] *See id.*

[10] *Id.*

[11] *See, e.g.*, JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (2d ed. 1998); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-1929); J. A. C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*,

argument succinctly in 1790: "Property must be secured, or liberty cannot exist." [12]

The Framers argued that because property is necessary for securing all other rights, the protection of property, is in fact, the chief object of government. [13] John Rutledge of South Carolina argued before the Philadelphia convention that "[p]roperty was certainly the principal object of Society." [14] James Madison similarly observed: "Government is instituted to protect property of every sort . . . [t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." [15]

Implicit in Madison's statement is the idea that property can prevent the government from arbitrarily imposing its will on disfavored minorities.[16] Denying property to the politically disfavored effectively strips them of a political identity. Inasmuch as property is an individual right, it is a political right "affecting the individual's participation in popular sovereignty itself."[17] If this were not the case,

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6 WIS. L. REV. 67, 71-76 (1931); Pilon, *supra* note 6, at 508-12.

[12] ELY, *supra* note 11, at 43 (quoting John Adams). For a more expanded argument, see James Madison, *Property*, NATIONAL GAZETTE, March 29, 1792, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds. 1987). Madison argues:

> This term in its particular application means that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual. In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.* In the former sense, a man's land, or merchandize, or money is called his property.
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> In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dedicated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Id. (emphasis in original).

[13] *See* ELY, *supra* note 11; *see also*, LOCKE, *supra* note 7, at 66. Locke, whose writing heavily influenced the Framers, argued in THE SECOND TREATISE, that: "The great and *chief end,* therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property.* To which in the state of nature there are many things wanting." *Id* (emphasis in original).

[14] John Rutledge *quoted in* Ely *supra* note 11, at 43.

[15] Madison, *supra* note 12, at 598.

[16] *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710 (1985) "The diversity of interests that possession of property occasioned prevented tyranny, and the acquisition of property was a necessary by-product of the freedom of action he [James Madison] deemed an essential part of liberty." *Id.*

[17] Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981). Even the followers of Karl Marx would argue that property enables

people would not resist takings upon payment of just compensation, when compensation is adequate. The fact that some resist takings even upon payment of just compensation indicates that property represents more than money. [18] Property represents things money cannot buy, such as "place, position, relationship, roots, community, solidarity, status . . . and security." [19] James Bovard describes the stakes as the following:

> Government cannot control property without controlling people. Every extension of control over property means a decrease in citizens' ability to rely on themselves and plan their own lives. Every decrease in the sanctity of private property will mean an increase in insecurity for some citizens. To allow the government practically unlimited control and jurisdiction over private property is to give politicians and bureaucrats almost unlimited power to intervene in private lives. We face a choice of private property or political subjugation. [20]

The stakes are particularly high in the context of racial segregation. Writing on racial segregation, Richard Thompson Ford observed:

> Segregation is oppressive and disempowering rather than desirable or inconsequential because it involves more than simply the relationship of individuals to other individuals; it also involves the relationship of groups of individuals to political influence and economic resources. Residence is more than a personal choice; it is also a primary source of political identity and economic security. Likewise, residential segregation is more than a matter of social distance; it is a matter of political fragmentation and economic stratification along racial lines, enforced by public policy and the rule of law. . . Segregated minority communities have been historically impoverished and politically powerless. [21]

Protection of property rights also serves an important economic function. [22] By

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individuals to be free. According to the Marxist argument, unlike a wealthy man, a man without property can hardly be considered free to act as he chooses. The main difference between the Marxist argument and that of the classical liberals, however, lies in the distinction between "positive" and "negative" conceptions of freedom. According to the Marxist "positive" conception of freedom, a man lacking property is unable to act as he chooses. According to the classical liberal "negative" conception of freedom, an individual can be both free and unfree: he may be unable to act as he chooses even though he is at liberty to act as he chooses because he is fully free from the interference of others. *See* Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J. L. & PUB. POL'Y. 165, 171 (1983).

[18] *See* Michelman, *supra* note 17, at 1112.

[19] *Id.*

[20] JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 48 (1994).

[21] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV., 1841, 1844 (1994). *See also* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 115 (Univ. of Chicago Press 1994) (1944) (commenting on the role of property in protecting racial and religious minorities).

[22] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (5th. ed. 1998) 36-39 (discussing

protecting property rights, the law creates a number of incentives to exploit resources efficiently. First, property rights encourage investment in production by ensuring individuals that they will be able to keep the fruits of their labor. [23] Second, transferable property rights encourage value-enhancing exchanges. [24] Third, private property fosters rational economic decision-making by encouraging investigation and thoughtful calculation before making economic decisions bearing potential costs. [25] The Framers recognized the economic importance of property rights. In 1821, James Madison argued: "[i]n civilized communities, property . . . encourage[s] industry by securing the enjoyment of its fruits. . . ." [26]

III. CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY

Despite their dedication to property rights, the Framers were content to rely on procedural and institutional safeguards to protect property. In fact, the original Constitution placed few express limitations on the federal government for the protection of property rights because the Framers felt that a Bill of Rights would be superfluous to constrain a government of limited, enumerated powers. [27] Thus, in 1787, the Constitution was sent to the states for ratification without an express Bill of Rights. [28] During the ratification debates, however, five states recommended the addition of a Bill of Rights. [29] The Federalists, in an attempt to win support for the Constitution, agreed to these demands. [30] The Bill of Rights was drafted and sent to the states for ratification in 1789 and approved by the state legislatures two years

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economic incentives created by protecting property). *See also* FREDERIC BASTIAT, THE LAW 10-11 (Dean Russell trans., Foundation for Economic Education, 1981) (1850) (focusing on the role of law in creating proper incentives).

[23] *See* POSNER, *supra* note 22, at 37-38.

[24] *See id.*

[25] JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT AND WHY YOU SHOULD CARE 47-48 (1997).

[26] James Madison, *Note to his Speech on the Right of Suffrage* (1821), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 12, at 601.

[27] *See* THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In fact, Alexander Hamilton argued that the inclusion of a bill of rights would be dangerous: "I . . . affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous." *Id.*

[28] *See* ELY, *supra* note 11, at 26-58. In fact, Ely notes that Madison incorporated many of the guarantees traditionally protected by the state constitutions into the Bill of Rights of the federal constitution. *See id.* Importantly, state constitutions prior to the ratification debates provided extensive protection for private property. Ely points out that the New Hampshire constitution expressly protected the right to acquire and possess property and the Pennsylvania Constitution of 1776 placed the right to acquire, possess and protect property among the natural rights of all persons. *See id.*

[29] *See id.* at 52.

[30] *See id.* (stating that this concession proved essential to securing ratification in a number of closely divided states, including Virginia and New York.).

later. [31]

The Bill of Rights afforded private property two explicit constitutional protections in the Takings Clause [32] and the Due Process Clause [33] of the Fifth Amendment. The incorporation of explicit property protections into the Constitution had broad implications for the recognition of property's centrality in our system of government. One commentator noted that "[t]he Fifth Amendment explicitly incorporated into the Constitution the Lockean conception that protection of property is a chief aim of government." [34] The decision to place property protections next to the criminal justice protections of the Fifth Amendment highlighted the close association between property and individual rights. [35] Moreover, the property protections of the Fifth Amendment were largely unopposed. [36] Thus, the Fifth Amendment reflects "a broad consensus on the centrality of private property in American life."[37]

Although the Bill of Rights, and particularly the Takings Clause of the Fifth Amendment, served as models for subsequent state constitutions, [38] the Takings Clause did not apply to limit state interferences with private property before the Civil War. [39] In 1868, the Fourteenth Amendment was ratified, which included the Due Process Clause that explicitly protected property.[40] Although the Fourteenth

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[31] *See id.* at 53-54. Because the federal constitution provided few express restrictions on the federal government in regard to the protection of property rights, Madison feared that property owners would constitute a vulnerable minority. To protect this potentially vulnerable minority, Madison proposed sweeping language, reminiscent of that in the state constitutions, suggesting the natural right of man to acquire and possess property: "That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." *Id.* However, the states did not accept Madison's broad declaration, opting instead for the due process and takings clause protections of the 5th Amendment. *See id.*

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

[33] U.S. CONST. amend. V ("nor [shall any person] be deprived of life, liberty, or property, without due process of law . . .").

[34] ELY, *supra* note 11, at 54.

[35] *See id.*

[36] *See id.* at 55.

[37] *Id.*

[38] *See id.* at 56. Ely notes that the Kentucky Constitution of 1792, the Tennessee Constitution of 1796, the Mississippi Constitution of 1817 and the Illinois Constitution of 1818 each required states to pay just compensation when property was taken. The Ohio Constitution of 1802 and the Illinois Constitution of 1818 each went a step further by recognizing that the acquisition and possession of property were among the natural rights of all individuals. *See id.*

[39] *See* Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1881).

[40] U.S. CONST. amend. XIV § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

Amendment did not include a Takings Clause, the public use and just compensation requirements of the Fifth Amendment were made applicable to the states in 1897. [41] Thus, by 1897, the Constitution protected individuals against arbitrary takings of private property by both federal and state governments.

Although the government's power to take property from an individual appears to be at odds with the Framers' conception of property, [42] the government's power of eminent domain was presupposed in the takings clause. [43] The Takings Clause merely places two conditions on the ability of the government to exercise its power of eminent domain. First, property must be taken for a public use. Second, just compensation must be paid. "Just compensation" requires only that the government pay for the land that it takes, [44] but the public use limitation is a substantive

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[41] *See* Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 11.11 at 438 (5th ed. 1995).

[42] However, various rationales for the taking power have been offered over the years. One rationale advanced by early civil law scholars like Grotius and Pufendorf, argues that sovereign states have original and absolute ownership of property. According to this rationale, the state simply grants property to individuals subject to an implied reservation that the state may resume ownership. Another rationale views the taking power as a remnant of feudal tenures. Finally, some scholars have argued that eminent domain is an inherent attribute of the state that is necessary for the existence of government. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1102-03 (4th ed. 1998). Furthermore, scholars have provided economic justifications for eminent domain. For example, Richard Posner argued:

> A good economic argument for eminent domain, although one with greater application to railroads and other right-of-way companies than to government is that it is necessary to prevent monopoly. Once the railroad or pipeline has begun to build its line, the cost of abandoning it for an alternative route becomes very high. Knowing this, people owning land in the path of the advancing line will be tempted to hold out for a very high price – a price in excess of the opportunity cost of the land. . . . Transaction costs will be high, land-acquisition costs high, and for both reasons the right-of-way company will have to raise the price of its services. The higher price will induce some consumers to shift to substitute services. Right-of-way companies will therefore have a smaller output; as a result, they will need, and buy, less of the land. Higher land prices will also give the companies an incentive to substitute other inputs for some of the land they would have bought. As a result of all this, land that would have been more valuable to a right-of-way company than to its present owners will remain in its existing, less valuable uses, and this is inefficient.

POSNER, *supra* note 22, at 62.

[43] *See* United States v. Carmack, 329 U.S. 230, 241-42 (1946) (describing the 5th Amendment takings clause as "a tacit recognition of a pre-existing power . . .").

[44] Mere payment of just compensation does not provide a normative justification for the taking in the first place. Pilon notes that forcing land transfers through eminent domain does not give rise to morally legitimate holdings:

> To be legitimately held or owned, property must have been acquired without violating

constraint on the exercise of eminent domain. However, interpretations of "public use" have changed over time.

A. *Early Development of Public Use Doctrine*

The Supreme Court closely guarded private property in the eighteenth century, embracing the natural law concept of property rights.[45] During the eighteenth century, courts read the public use requirement fairly literally, allowing government to take property for itself, but not to transfer land between private individuals. [46] In *Calder v. Bull*, Justice Chase laid the foundation for eighteenth century eminent domain jurisprudence when he stated that a "law that takes property from A and gives it to B" would be beyond the scope of legislative authority, noting that "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it." [47]

However, most early public use doctrine was developed in state courts. [48] In fact, the Supreme Court only began reviewing eminent domain decisions in 1875. [49] The Supreme Court did not overturn a state eminent domain decision until 1896 when

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the rights of others . . . . [T]hings are held illegitimately when they are taken by force or fraud from those who hold them legitimately – that is, when they are taken without the voluntary consent of those who rightly hold them.

Pilon, supra note 17, at 174.

[45] *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795) ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man . . . . The preservation of property . . . is a primary object of the social compact . . .").

[46] *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 413 (1983).

[47] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis in original). As recently as 1934, Justice McReynolds stated: "The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public." Nebbia v. New York, 291 U.S. 502, 558 (1934) (McReynolds, J., dissenting).

[48] *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 212-13 (1978). In fact, during the early development of the public use doctrine, there was little occasion to challenge eminent domain proceedings in federal court. When the federal government exercised its power of eminent domain, a state proceeding was held in state court under the authority of a state statute and the property was eventually transferred to the federal government. *See id.* The federal government stopped using this procedure after an 1871 Michigan Supreme Court decision held that a state could not condemn property for the United States government. *See* Trombley v. Humphrey, 23 Mich. 471 (1871). After that decision, the federal government began condemning property for itself, and federal courts were granted occasion to review federal takings.

[49] *See* Kohl v. United States, 91 U.S. 367 (1875). *See also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 65 (1998); Berger, *supra* note 48, at 212-13.

the Court invalidated a state exercise of the eminent domain power because the taking was for a private rather than a public use.[50]

The development of public use doctrine in state courts can be generalized by the development of two opposing doctrinal views. [51] The broad view argued that the public use requirement is satisfied when the taking results in a public benefit or advantage to the public. [52] The narrow view, however, posited that public use requirement is satisfied only when the public actually uses or retains the right to use the taken property. . [53]

Although the narrow view was influential in the early part of the nineteenth century, it was never the dominant view. [54] Eager to promote private exploitation of resources in a burgeoning economy, legislatures expanded the use of eminent domain for instrumentalities of commerce like railroad and utility rights of way. [55] Unwilling to hinder such economic progress, courts rationalized these takings using the broad view of public use, holding that such takings produced a public benefit. [56] By the beginning of the twentieth century, this doctrinal expansion created uncertainty about whether "public use" should be interpreted broadly or narrowly. [57] The Supreme Court settled the debate in the 1916 by formally repudiating the "use by the public" test and accepting the broader public benefit test. [58]

By formally accepting the broad view of public use, the Supreme Court began watering down the public use requirement. In fact, Richard Epstein calls the broad public benefit test "wholly empty." [59] Under the public benefits test, takings only occur when the new private use has a value greater than or equal to the current use. [60] Therefore, review is almost non-existent because "[s]ome portion of the public will always benefit (just as others will lose) because of the resulting changes in relative prices." [61]

Even with this more expansive view of public use, early courts did not allow the

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[50] *See* Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (invalidating a statute that required a railroad to allow a private individual to build a grain elevator on railroad property).

[51] *See* Berger, *supra* note 48, at 205.

[52] *See id.*

[53] *See id.*

[54] *See id.*

[55] Mansnerus, *supra* note 46, at 413.

[56] *See id.*

[57] *See* Berger, *supra* note 48, at 209.

[58] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (allowing condemnation of land and water rights so a power company could manufacture and sell hydroelectric power to the public). *See also* NOWAK & ROTUNDA, *supra* note 41, at 465.

[59] RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 170 (Press ed. 1985).

[60] *See id.*

[61] *Id.*

use of eminent domain to aid strictly private concerns. [62] Rather, early courts usually allowed takings only for traditional government activities such as road building, irrigation, utilities, and railroads. [63] However, the deferential modern view of public use changed the traditional use of the eminent domain power.

B. *The Decline of Public Use Doctrine*

The deferential modern view began to take shape in 1923 with the Supreme Court's decision in *Rindge Co. v. County of Los Angeles*. [64] In *Rindge*, the Supreme Court held that courts would defer to legislative declarations of public use. [65] The *Rindge* decision also allowed the government to condemn property in anticipation of a future public use, without a showing of immediate public necessity. [66] Rather, under this standard, the government only had to anticipate that at some future time, it would need the property. Such a rule is problematic because an anticipated future use may never become practicable as times and needs change. Thus, it is possible that taken land will never be put to its anticipated public use. [67]

The leading modern case, *Berman v. Parker*, [68] dealt the public use limitation a

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[62] However, the mill acts allowed individual riparian owners to build dams to facilitate the building of mills along a river. The building of these dams would often flood, upstream property. The mill acts generally required that dam builders compensate individuals whose upstream property was flooded. For a discussion of the mill acts, see Epstein, *supra* note 59, at 170-75; Berger, *supra* note 48, at 208-09.

[63] *See* Mansnerus, Note, *supra* note 46, at 414. Epstein has argued that these traditional takings are clearly within the scope of the Fifth Amendment's public use requirement:

> The great challenge in the area is to mark out that class of cases in which the public use language bites. Here it is clear that the limits will not be reached, or even tested, where the property in question is taken for the traditional functions of government: the operation of a military base, a public park, a post office. In each of these cases the property in question is used to generate a public good – one in which the entire public shares – either because the good itself is nondivisible in its nature (as with military protection) or because it is rendered nondivisible in its administration (as with public parks open by law to the public generally).

Richard Epstein, *Not Deference, but Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 365 (1982).

[64] Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).

[65] *See id.* at 709 ("The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may be exercised by the legislature or delegated by it to public officers").

[66] *Id.* at 707 ("In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered").

[67] *See* Kochan, *supra* note 49, at 69. Kochan also notes that challenging such takings may be difficult because title has already transferred to the condemning authority once the initial condemnation is approved. *See id.*

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

"mortal blow."[69] In *Berman*, the Court validated a District of Columbia urban renewal statute that allowed condemnation of private dwellings deemed "substandard" and transferred the property to private redevelopers. [70] The *Berman* decision impacted the development of public use doctrine in a number of important ways. First, the Court allowed the use of eminent domain in a manner that directly opposed Justice Chase's traditional view that the government could not take land from A and give it to B. Second, the *Berman* Court reaffirmed the restricted role of judicial review in eminent domain proceedings by stating that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." [71] Finally, the Court determined that "the concept of the public welfare is broad and inclusive" enough to allow the use of eminent domain to achieve any legislatively permissible end. [72]

In *Hawaii Housing Authority v. Midkiff*, [73] the Supreme Court drove the point of *Berman* home by rendering the public use requirement "a meaningless standard of review." [74] In that case, the Hawaiian legislature created a system for transferring titles from lessors to lessees in order to reduce the concentration of land ownership in the state on the theory that the forced transfers would decrease land prices and serve the public tranquility and welfare. [75] The *Midkiff* decision limited public use doctrine in a number of important ways. First, the *Midkiff* Court was more explicit than the *Berman* Court in allowing the government to use eminent domain to

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[69] Epstein, *supra* note 59, at 161.

[70] *Berman*, 348 U.S. at 26.

[71] *Id.* at 32 (citing United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946),Old Dominion Co. v. United States, 269 U.S. 55, 56 (1925)).

[72] *Id.* at 33; *See also*, EPSTEIN *supra* note 59, at 161. The Court noted that Congress possessed a "police power" to regulate health, safety, and welfare within the District of Columbia. *Berman*, 348 U.S. at 35. The use of the term "police power" did not grant the government plenary power to take any property without compensation. Instead, the term was read to indicate that "the federal government is not of limited, enumerated powers when it legislates concerning the District of Columbia." NOWAK & ROTUNDA, *supra* note 41, § 11.13, at 465. However, in Hawaii Housing Authority v. Midkiff, the Court relied on the use of the term "police power" in Berman for its conclusion that the "scope of public use is thus coterminous with a sovereign's police powers." 467 U.S. 229, 240 (1984).

[73] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

[74] Kochan, *supra* note 49, at 74.

[75] Midkiff, 467 U.S. at 232-235. Ironically, the Hawaiian scheme to break up the land monopolies was counterproductive. The primary beneficiaries of the scheme were Japanese investors who bought and replaced ordinary suburban homes at a premium as the yen rose against the U.S. dollar. They then tore down the existing structures and built lavish homes that were marketed as vacation homes, thus exacerbating the Hawaiian housing problem by increasing prices and reducing the availability of affordable homes. *See* Gideon Kanner, *Do-Gooders' Designs Twist Takings Clause*, NAT'L. L.J., Jan. 8, 1996, at A19, A20. One commentator noted that, "[t]he monopolistic aspects of the Hawaiian real estate market remained, but now they are controlled more from Tokyo than Honolulu." Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, 155 N.J. L.J., Mar. 15, 1999, at 1145.

transfer property between private individuals. [76] Second, the Court explicitly stated that the eminent domain power is "coterminous with the scope of a sovereign's police powers." [77] Third, the Court essentially eliminated judicial review of legislative declarations of public use when it stated : "[w]here the exercise of the eminent domain power is *rationally related to a conceivable public purpose*, the court has *never* held a compensated taking to be proscribed by the Public Use Clause." [78]

IV. IMPLICATIONS OF JUDICIAL DEFERENCE: MADISON'S VISION OF FACTION

The problem with the current state of public use doctrine is that the public use clause no longer protects the property rights of minorities from majoritarian abuse. Rather, the decline of public use doctrine has allowed majorities who have captured power to take the land of politically disfavored minorities. [79] By deferring to legislative declarations of public use, the judiciary has opened the door to the type of arbitrary government that the Framers sought to prevent. [80] Majorities with the power to condemn property have happily stepped in, using their power to take the land of the politically impotent to benefit the politically influential. Part A of this section demonstrates that the capture of eminent domain power by majorities is unremarkable due to the human nature of government officials and the nature of the condemnation decision itself. [81] Part B demonstrates that the public use clause should be read in light of the contravening structural provisions that Madison designed to prevent the capture of government by faction. Such a reading is essential, albeit ignored, to prevent the capture of eminent domain power along purely factional lines.

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[76] It should be noted that the 9th Circuit decision overruled in *Midkiff* invalidated the use of eminent domain on the ground that it was "a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[77] Hawaii Housing Authority v. Midkiff, 467 U.S. at 232-33.

[78] *Id.* at 241(emphasis added).

[79] *See* Mansnerus, *supra* note 46, 435-38.

[80] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 165 (1980) (noting "That [the Takings] Clause stands as a shield against the arbitrary use of governmental power."); David R.E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L.Q. 671, 682-85 (1988).

[81] While the human nature of government officials is a potential source of abuse in any legislative decision, the condemnation decision is particularly susceptible to abuse. First, there is a strong incentive for interest groups to attempt to influence government officials and a correspondingly strong incentive for government officials to comply with their demands. Second, taking property provides an effective means of subjugating a disfavored group.

A. *The Madisonian Dilemma of Public Use*

The public use clause prohibits, among other things, "the distribution of resources or opportunities, to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." [82] This prohibition is "closely related to the central constitutional concern of ensuring against capture of government power by faction." [83] Madison, in particular, feared the allocation of governmental power and resources along purely factional lines. [84] Madison understood that both majority and minority factions would exist in our democracy, and that both would present equal and opposite evils. [85] However, instead of banning factions outright, Madison recognized that factions must be tolerated. [86] For one thing, the division of labor that is essential to prosperity was also a source of faction. [87] Thus, Madison faced a dilemma which stands as the touchstone of American constitutional democracy which can be stated: "Whereas majoritarian interference with protected rights constitutes a tyranny by the majority, denial of the majority's power to rule in spheres not specifically protected constitutes a tyranny by the minority." [88]

The public use clause provides a stark example of the Madisonian dilemma in action. Forcing transfers by the power of eminent domain prevents minority

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[82] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

[83] *Id.* at 1690 (citations omitted).

[84] *See* THE FEDERALIST Nos. 10, 51 (James Madison). Consider, for example, the following statement by Madison in Federalist No. 10: "[t]he public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." THE FEDERALIST No. 10 at 77 (James Madison) (Clinton Rossiter ed., 1961).

[85] Madison describes the dilemma as follows:

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. . . .When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.

THE FEDERALIST No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

[86] *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1330-31 (1994).

[87] *See id.* Madison stated: "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views." THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

[88] David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 644 (1994).

tyranny in the event that a minority landowner is tempted to stop a public project by holding out for a very high price. [89] Assuming that the purpose is truly public, the holdout power essentially gives an individual landowner a veto over the majority's proposed public project. [90] Without the power of eminent domain, public projects could become subject to the whim of a dissenting minority whose voting power is increased simply by owning property in the path of the government's wrecking ball. [91] Eminent domain prevents the exercise of minority vetoes by allowing legislative majorities to employ the coercive machinery of the state to force the transfer of land from the dissenting minority to the public. [92]

However, the power to take land from dissenting minorities is far from absolute. The public use requirement is supposed to provide a substantial check on the widespread abuse of the eminent domain power by government officials. The Framers recognized the "danger that a self-interested group would obtain governmental power in order to put property rights at risk." [93] Thus, the public use clause is supposed to protect minorities from majoritarian abuse by preventing purely private wealth transfers. [94]

1. Human, All Too Human: Human Nature and the Decision to Take

It is not surprising that the Framers, paranoid about concentrated power, were concerned with the misuse of the taking power. According to Madison, the

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[89] *Cf.* POSNER, *supra* note 22, at 36-39. The argument that eminent domain prevents minority holdouts stems mainly from Posner's economic justification for eminent domain. It should be noted, however, that employing the coercive machinery of the state may not be the only solution to the holdout problem. It may be possible to craft private solutions to the holdout problem. For example, tender offers provide a private solution to the holdout problem in corporate control transactions where the acquirer seeks to purchase shares from widely dispersed shareholders. It may be possible, then, for the acquirer of a large tract of land to enter into a compact with all affected landowners, thus decreasing the transaction cost of bargaining with each individual landowner. However, private parties will probably not explore the possibilities of such innovative bargaining strategies because government intervention in the form of eminent domain is a cheaper alternative. *See* Kochan, *supra* note 49.

[90] *See* Kochan, *supra* note 49.

[91] *See id.*

[92] *See id.*

[93] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45 (1985).

[94] *See* Sunstein, *supra* note 82, at 1724. However, what the public use clause was intended to protect and what it currently protects are two very different things. In 1983, the 9th Circuit expressed concern over majoritarian interference with minority rights in Midkiff v. Tom, commenting: "It is our view that it was the intention of the framers of the Constitution and the Fifth Amendment that this form of majoritarian tyranny should not occur." 702 F.2d at 790. Unfortunately, however, the Supreme Court disregarded the Framers' concern with majoritarian abuse by overturning the Ninth Circuit in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

tendency of government officials to abuse power was simply a part of human nature. [95] In fact, distrust of government officials stands at the core of the Framers' vision, and limiting the power of less than admirable government officials was a central concern of the Framers' government. Consider, for example, Madison's statement in Federalist No. 51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. [96]

Moreover, human nature is of particular concern when property is involved:

> Man can live and satisfy his wants only by ceaseless labor; by the ceaseless application of his faculties to natural resources. This process is the origin of property.
>
> But it is also true that a man may live and satisfy his wants by seizing and consuming the products of the labor of others. This process is the origin of plunder.
>
> Now since man is naturally inclined to avoid pain – and since labor is pain in itself – it follows that men will resort to plunder whenever plunder is easier than work. History shows this quite clearly. And under these conditions, neither religion nor morality can stop it.
>
> When, then, does plunder stop? It stops when it becomes more painful and dangerous than labor.
>
> It is evident, then, that the proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. All the measures of the law should protect property and punish plunder. [97]

Rather than protecting property, however, over the last fifty years courts have quietly enabled legislatures to reward the plunderers by turning questions of public use into little more than legislative fiat. Seen in this light, the decline of public use provides an example of exactly the type of encroachment on individual liberty that Madison feared could ultimately lead to despotism. [98]

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[95] *See* THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[96] *Id.*

[97] BASTIAT, *supra* note 22, at 10.

[98] Madison stated:

> Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations: But on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which,

The broad, virtually unchecked discretion in the use of eminent domain has confirmed Madison's fears regarding both the human nature of government officials and the tendency toward despotism when power is silently accumulated by majority factions. Consider, for example, the role that race has played in the history of takings. During the development of the federal highway system in the 1950s, government planners intentionally diverted highways around white homes so they could cut through the hearts of minority neighborhoods. [99] For instance, in Nashville, engineers originally proposed a route that would have removed several white-owned businesses. [100] After listening to the pleas of state and local officials, the engineers diverted the proposed project through the center of a black community, a black college, and through sixteen blocks of commercial property filled with black businesses. [101] Planners in Los Angeles targeted the neighborhoods of poor, politically powerless minorities by driving five freeways through the city's largest Mexican-American community, Boyle Heights. [102] However, the words of Miles Lord, the attorney general who oversaw Minnesota's highway takings in the 1950s provides the best evidence of the racial animus driving the highway takings:

> We went through the black sections between Minneapolis and St. Paul, . . .about four blocks wide and we took out the home of practically every black man in that city. . . . In both those cities practically. It ain't there anymore, is it? Nice little neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose onto society. [103]

Racial minorities are also disproportionately removed in urban renewal programs. [104] Between 1949 and 1963, sixty-three percent of all the families displaced by urban renewal were non-white.[105] Urban redevelopers generally seek to attract affluent whites downtown by offering upscale housing, shopping, or office space. [106] Political pressures "create a mandate to gentrify selected areas,

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in republics, have more frequently than any other cause, produced despotism.

James Madison, Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism (Virginia Convention, June 6, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION 611, 612 (Bernard Bailyn ed., The Library of America 1993).

[99] *See* BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 29 (1989) (stating that traditionally acceptable uses of eminent domain, such as takings for roads, are susceptible to government abuse).

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *Id.*

[104] *See* Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 740 (1994).

[105] *See* FRIEDEN & SAGALYN, *supra* note 99, at 28.

[106] *See id.* The results of a 1959 survey in Baltimore indicated that people who paid high rents in other parts of town were unwilling to move downtown because of the "class of

resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction."[107] Novelist James Baldwin put the point more bluntly when he observed that "urban renewal" amounted to nothing more than "Negro removal." [108]

Forty years ago in Philadelphia, a city with a large black population, Mayor Richardson Dilworth commented: "We've got to get the white [leadership] back. . . . We have to give the whites confidence that they can live in town without being flooded." [109] Mayor Dilworth's redevelopment plan called for renovating Georgian houses on Society Hill to attract affluent whites. [110] Between 1960 and 1970, Mayor Dilworth got his wish: the black population on Society Hill dropped from twenty percent to four percent black and the median family income rose almost 400 percent. [111]

2. The Condemnation Decision

Condemnation decisions do not present the normal case of legislative decision-making in which opposing factions compete for votes, each winning sometimes and losing sometimes. [112] In fact, the majoritarian process actually defeats the interests of individual condemnees because condemnation decisions are examples of legislative actions in which "rent-seeking" is particularly successful. [113] Rent-seeking describes the process by which special interests expend resources in an effort to obtain government favors. [114] Rent-seeking is successful in the context of eminent domain for a number of reasons.

First, most eminent domain decisions are made at the local level. At least in theory, factions have greater access to, and presumably greater influence over local

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people" who lived there. It is not surprising then, that between 1951 and 1964 of the 10,000 families who were displaced in public programs including urban renewal and highway development, 90 percent were black. *See id.* at 29-39.

[107] Quinones, *supra* note 104, at 740. Quinones argues that the internal pressures of the redevelopment process: tax increment financing, assembly powers, and the requirement that urban renewal is exercised in "blighted" areas combine to form an "unholy trinity." *Id.*

[108] 12 THOMPSON ON REAL PROPERTY 194, § 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin).

[109] FRIEDEN & SAGALYN, *supra* note 99, at 40 (quoting Mayor Richardson Dilworth of Philadelphia).

[110] *See id.*

[111] *See id.*

[112] *See* Mansnerus, *supra* note 46, at 436; Aladjem, *supra* note 80, at 687.

[113] *See* Kochan, *supra* note 49, at 80. Rent-seeking is inefficient in a number of ways. First, the use of eminent domain for private benefit allows a party to capture a benefit that could not be obtained in a competitive, efficient market. Second, rent-seeking produces deadweight losses in the unproductive expenditures used to create legislation and increased costs passed on to consumers as a result of these rents. Finally, money spent to support or defeat legislation is diverted away from more productive uses. *See id.* at 83-84.

[114] *See id.* at 80.

officials making condemnation decisions. In fact, Madison feared that local factions presented a greater danger to liberty than those operating at the national level. [115] However, Madison wrongly predicted the greater danger of local factions. [116] Factions have more power and are more common at the national level due to improved access to national legislators. [117] The improved access is the result of better, cheaper forms of communication and transportation; free-rider obstacles to political participation; and the value placed on obtaining national as opposed to local legislation. [118] But lobbying Congress is not particularly useful when it is the City Council or a local agency making condemnation decisions. Therefore, Madison's fear of factions dominating local decisions remains pertinent in the context of eminent domain. [119] In fact, local communities routinely give in to companies who extort political favors by threatening to leave town. [120] For example, when Pittsburgh officials got wind of the fact that the Heinz Corporation contemplated building a warehouse and distribution center in Ohio, the Urban Redevelopment Authority sought to condemn the adjoining six-acre lot and raze the existing building, displacing a number of small businesses that employed over 200 people in the process. [121]

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[115] *See* THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Madison stated the issue in the following manner:

> The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. . . . [C]ommunication is always checked by distrust in proportion to the number whose concurrence is necessary.

Id.

[116] *See* Easterbrook, *supra* note 86, at 1333-39.

[117] *See id.*

[118] *See id.*

[119] *Cf.* Kochan, *supra* note 49, at 102-04 ("[W]e should expect interest-groups to seek durable contracts at even the local level for condemnations precisely because the value of such deals is increased through the existence of competitor immobility").

[120] *See* City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (involving the City of Oakland's attempt to take the Raiders football team by eminent domain to prevent the team from moving to Los Angeles).

[121] *See* Tom Barnes, *Business Balk at Moving for Heinz, at* http://www.post-gazette.com/regionstate/19990601heinz5.asp (last visited Mar. 3, 2000).

Second, rent-seeking is successful in the context of condemnation decisions because the benefits of such decisions are concentrated and the burdens are widely dispersed to the general public as taxpayers. [122] Because the benefit to the party seeking the condemnation is large, that party has an incentive to actively lobby the condemning authority so long as the cost of lobbying does not outweigh the expected benefit derived from the condemnation. [123] By almost summarily upholding condemnation decisions, courts actually increase the benefits to parties seeking condemnations by adding stability and continuity to the bargains struck by interest groups and politicians. [124] The benefits, however, are already sufficient to encourage lobbying because the government can transfer property at lower costs than those required by arms' length bargaining on the open market. The pot is sweetened with the prospect of other government goodies that often accompany the condemnation itself, like tax increment financing and property tax exemptions. [125]

Examples of the benefits to parties seeking condemnations are staggering. Consider the benefits of the $300,000,000 subsidy package DaimlerChrysler

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[122] *See* Mansnerus, *supra* note 46, at 436. *See also* Sonya Bekoff Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L. J. 627, 661 (1977). The public benefits of urban redevelopment are disputable. A study of eight redevelopment projects indicated that taxpayers suffered a net loss in each project because "gross project costs, paid for by taxes, exceeded land productivity benefits for every project." *Id.*

[123] *See* Mansnerus, *supra* note 46, at 436.

[124] *See* Kochan, *supra* note 49, at 105. *See also* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 233-40 (1986). Both of these authors rely heavily on the seminal work of William M. Landes and Richard A. Posner in this area concluding that the independent judiciary is consistent with the interest group theory of politics. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

[125] *See* Gideon Kanner, *That Was the Year that Was: Recent Developments in Eminent Domain Law* SE45 ALI-ABA 571 (2000). *See also* Regus v. City of Baldwin Park, 70 Cal. App. 3d 968, 979 (Ca. App. 1977) (noting that tax increment financing could "become a commonplace subsidy to private enterprise"). The benefits of urban renewal to private developers are particularly large due to the use of tax increment financing ("TIF"). TIFs essentially allow governments to give private developers essentially free money up front, normally through bond issues. John Gibeaut, *The Money Chase*, A.B.A. J., Mar. 1999, at 59. The government gives developers pretty wide latitude to decide how this money can be used. *See id.* Developers can use TIF money to buy land, demolish buildings, develop plans, or pay for the services of lawyers, architects and engineers. The real benefit to developers stems from the fact that they are not forced to repay the money themselves. Rather, the bonds are paid off with the increased property and sales taxes that are supposed to flow from the redevelopment project. Molho & Kanner, *supra* note 122, at 630-36. It should be noted, that rather than using the increased tax revenues to support "normal" expenditures such as schools, libraries, and police service, the increased tax revenues are used to repay the bonds issued to fund the acquisitions in the first place. *See id.*

negotiated with the City of Toledo, Ohio to keep a Jeep plant from leaving town. [126] The plan calls for the acquisition of a 190-acre neighborhood and the relocation of eighty-three homeowners and sixteen small businesses. [127] Under the plan, not only will DaimlerChrysler, the world's fourth largest corporation, acquire free land on which to build its plant, but the city is also offering a ten year property tax exemption, to build roads allowing access to the facility, and to switch environmental liabilities from DaimlerChrysler to the city. [128] Furthermore, DaimlerChrysler benefits from the deal's stability and continuity due to the prospect of judicial deference to the legislative deal. [129] For all these benefits, DaimlerChrysler neither has to commit to stay in Toledo nor vow to create or maintain a certain number of jobs. [130]

In a strikingly ironic example, the management of the New York Stock Exchange decided to accept the City of New York's offer to spend $900 million to condemn privately owned Wall Street office buildings to prevent the exchange from moving its headquarters to New Jersey. [131] The hypocrisy of the "high priests of private enterprise, lining up at the public trough" [132] is a testament to the incentive that access to high-stakes condemnation decisions can have on the actions of private actors capable of capturing the process.

On the other hand, while the burden to the individual condemnee is large, a number of factors reduce the incentive of individual condemnees to fight proposed condemnations. First, the expectation of just compensation reduces the incentive to lobby. [133] Second, lack of access to the political system may deter individual landowners from fighting condemnations, especially when those seeking condemnations are special interest groups and repeat-players with legislative clout. [134]

Seizing upon the second factor, the government targets the homes of politically disfavored minorities because they are unlikely to seriously oppose condemnation

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[126] *See* Brennan, *supra* note 2, at A1; *see also* Editorial, *Taking Liberties*, NAT'L L.J., Jan. 25, 1999, at A25.

[127] *See* Brennan, *supra* note 2, at A1. Adding insult to injury, the City designated the area as a slum to receive federal HUD funds for the acquisition project. Even worse, the neighborhood will not be used for the plant itself, but will serve as a buffer zone around the completed facility. *See id.*

[128] *See id.* at A16.

[129] *See supra* note 124, and accompanying text.

[130] *See id.*

[131] *See* Gideon Kanner, *NYSE Land Grab Try: Greed is Still Good*, NAT'L. L.J., Dec 21. 1998, at A22.

[132] *Id.* Unlike the typical redevelopment scenario, the properties slated for acquisition in the Wall Street area are far from "blighted." In fact, one has recently been renovated at a cost of $100,000,000. *Id.*

[133] *See* Kochan, *supra* note 49, at 81-82. Even though just compensation does not necessarily reflect the subjective value the owner may attach to the property, the presence of any compensation will lower the incentive to lobby. *See id.*

[134] *See id.*

decisions. [135] In the classic Poletown example, the City of Detroit condemned a community of mostly elderly, retired, Polish-American immigrants so that General Motors could build a factory on the land. [136] Even though the project plan indicated that 3,438 persons would be displaced by the project and that the city anticipated destroying 1,176 structures at a public cost of nearly $200 million, Poletown residents were unable to organize an effective opposition. [137] The City used the recently enacted quick-take statute to ensure that the condemnation would occur before the residents could oppose the action. [138] The City's plan worked. Although the Redevelopment Plan was announced in June 1980, by the time Poletown residents organized the Poletown Neighborhood Council in October, the condemnation process was already well underway. [139] Similarly, residents of Toledo, Ohio's Stickney Avenue neighborhood, only discovered that they would be forced to vacate their homes and businesses to make room for a Jeep plant until they read in the newspaper that Mayor Finkbeiner and DaimlerChrysler Co-Chairman Robert Eaton had struck a deal. [140]

The government can potentially target any politically unpopular individual or group of individuals. Several examples illustrate the ways in which the government has attempted to use the power of eminent domain to exclude

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[135] *See* Mansnerus, *supra* note 46, at 435-38 (discussing the difficulties of challenging condemnation actions).

[136] For good general discussions of the facts and drama involved in the *Poletown* condemnation, See John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown v. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 51-65 (1984).

[137] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d at 464 n.15 (Mich. 1981) (Fitzgerald, J., dissenting).

[138] *See id.* at 470 (Ryan, J., dissenting). Justice Ryan commented in dissent:

> From the beginning, construction of the new assembly plant in Detroit was characterized by the city administration as a do or die proposition. Accordingly, the city, aided by the Michigan "quick-take" statute, marshaled and applied its resources and power to insure that CIP was a *fait accompli* before meaningful objection could be registered or informed opposition organized.

Id. (emphasis in original).
Justice Ryan's evidence regarding the speed with which the City pushed the project through was particularly illuminating. In footnote 11, Justice Ryan included a quotation from an amendment to the Development Plan adopted by the Detroit City Council on October 31, 1980, about the time the residents had organized. The amendment reads:

> The intent of the development plan is to encourage relocation from the project area within 90 days of notification by the City to vacate. In order for property owners and tenants, however, to be informed of the latest date allowed for vacating the premises within a particular area of the project, dates shall be posted monthly by the City at the District Council office and shall be included in the District Council newsletters.

Id.

[139] *See* Aladjem, *supra* note 80, at 685 n.109.

[140] *See* Brennan, *supra* note 2, at A1.

unwanted minorities from a community. For example, a New Jersey town brought a condemnation action to exclude a mental health facility from the community. [141] Similarly, a Massachusetts town attempted to use its power of eminent domain to exclude a low-income housing project. [142] Furthermore, local governments tend to target the elderly when seeking to benefit powerful manufacturing interests. The City of Bristol, Connecticut recently ousted an elderly family from their home of 60 years to benefit a manufacturer who does not even want the residential portion of the property. [143] In a particularly egregious example, the Casino Redevelopment Authority ("CRDA") in Atlantic City sought to oust an elderly woman from her home at the behest of Donald Trump so Trump could use the land in a casino development project. [144]

B. *The Public Use Clause and the Framers' Structural Protections Against Capture by Faction*

Madison envisioned instances in which the majoritarian process would be insufficient to deter tyranny, [145] and provided structural mechanisms to prevent majority tyranny. [146] In an ideal world, Madison envisioned a political process characterized by rational public discourse about the common good rather than voting according to private preferences. [147] However, because Madison understood that the ideal could not be realized in a government of men over men, the choice of political institutions became a central concern. [148] Thus, the Framers emphasized an elaborate governmental structure as a means of constraining faction.

The Framers' structural mechanisms operate to slow the coercive machinery of the state, and in some instances, to bring the machinery to a halt through political stalemate. [149] The Framer's hospitable view toward government inaction "may be associated with a desire to protect private property; inaction would preserve the

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[141] *See* Borough of Essex Fells v. Kessler Inst. for Rehabilitation, 673 A.2d 856 (N.J. Super. 1995).

[142] *See* Pheasant Ridge Assocs. v. Town of Burlington, 399 Mass. 771 (1971).

[143] *See* Dana Berliner, *Bristol Land Grab Violates Constitution*, THE HARTFORD COURANT, Aug. 9, 1999, at A9. Although there are numerous industrial lots in the city of sufficient size to support the development at issue, the homeowners' property was particularly tantalizing due to it's proximity to the highway and other industrial uses. *See* Bugryn v. City of Bristol, No. CV 980488051s, 2000 Conn. Super. LEXIS 311, at *24 (Conn. Sup. Ct., Jan. 31, 2000).

[144] *See* Casino Redev. Auth. v. Coking, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

[145] THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions").

[146] *See* Sunstein, *supra* note 93, at 44 (1985).

[147] *See* Easterbrook, *supra* note 86, at 1329.

[148] *See id.* at 1330.

[149] *See* Sunstein, *supra* note 93, at 44.

existing distribution of wealth." [150] At the very least, the Framers' structures prevent groups from simply exercising raw political power to obtain what they want. [151]

This can be accomplished through constitutional rules that increase the cost of obtaining legislation or that reduce the value of legislation. [152] Meaningful application of the Public Use Clause can reduce the value of the condemnation decision by limiting the power of government officials to transfer wealth and dispense favors. [153] In other words, a meaningful application of the Public Use Clause reduces the value to factions of capturing the condemnation process by limiting the number of permissible uses of the taking power at the disposal of government officials. By subjecting condemnation decisions to meaningful judicial scrutiny, the stability and continuity of the decision is questionable, thus reducing one of the initial benefits perceived by factions in seeking to obtain property through eminent domain. [154] Thus, in some instances, factions will not attempt to influence condemnation decisions because the reduced value of the taking power will reduce demand. [155] Furthermore, government officials fearing judicial invalidation may be less likely to dispense favors through eminent domain in the first place. [156]

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[150] *Id.* at 45.

[151] *See* Sunstein, *supra* note 82, at 1689-92.

[152] *See* Kochan, *supra* note 49, at 105. Kochan argues in favor of procedural rules that enhance the cost of legislative decisions rather than constitutional rules limiting the uses of power, concluding: "Modern public use doctrine provides empirical evidence that reliance on constitutional rules designed to limit the types of production is unsuccessful in the face of a judiciary that tends to enforce legislative bargains. Therefore, to limit condemnations for private use, an alternative, cost-enhancing mechanism is required." *Id.* at 106.

[153] *Cf.* Richard Epstein, *Exchange, Property, and the Politics of Distrust: Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 56-57 (1992).

> Once the government cannot do the bidding of the interest groups who crowd its corridors, these groups will devote their efforts to more socially productive activities. The compression of the set of permissible government tasks will indirectly, but effectively, improve the level of public discourse both by changing the items on the public agenda and by redirecting the resources that are used to obtain them.

Id.

[154] This proposition is merely the alternative to the idea posed in Kochan's study that the judiciary has actually added stability, enforceability, and durability to legislative bargains by deferring to legislative declarations of public use. *See* Kochan, *supra* note 49, at 105.

[155] *See id.* at 110 ("If engaging in deals with interest groups entails a high cost that outweighs the gains of political favor from the deal, the rational legislator will either refrain from the deal or demand such high consideration that it is no longer profitable for the interest group to enter the bargain").

[156] This was expressly recognized by the Framers. In discussing the importance of an independent judiciary, Hamilton stated:

> It [an independent judiciary] not only serves to moderate the immediate mischief of

In applying the Public Use Clause, courts must recognize that the public use requirement can stand alone in its protection of minority rights. [157] "The takings clause contains *within itself* the substantive standards that differentiate between the legitimate and illegitimate ends of government behavior."[158] The substantive underpinnings of the public use requirement derive from the implicit normative limit on the use of state power to preserve the relative entitlements among citizens. [159] Thus, where property is at stake, it is only necessary to identify that a specific individual or class of individuals will benefit from the taking of another's property. [160]

At the very least, the political process by which the taking occurs can provide evidence of the redistributive nature of the taking. [161] "Where the legislative process is skewed, there is greater opportunity for factions to operate, which makes forbidden results more likely." [162] Accordingly, the state should bear a heavy burden when the government takes the property of a racial minority because the dynamics of racial politics makes it very likely that redistributive coalitions will form along racial lines. [163] Moreover, the state should bear a heavy burden when the government takes the property of any minority because of the likelihood that redistributive coalitions will form along majoritarian lines.

V. CONCLUSION

Due to the current state of public use doctrine, the property of minority landowners is insecure. For that matter, any homeowner or small business owner who lacks the political clout to dissuade the government from taking his home or business is at risk. To make matters worse, because courts generally sit idly by and ignore their duty to apply the Public Use Clause in a principled manner, the government normally gets the property it covets by simply stating a reason that sounds "public" enough. In so doing, courts have allowed local governments to transfer property from the poorest, least politically-connected segments of society

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those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

THE FEDERALIST No. 78 at 470 (A. Hamilton) (Clinton Rossiter ed., 1961).

[157] *See* Epstein, *supra* note 59, at 212-14.

[158] *Id.* at 213.

[159] *See id.* at 4.

[160] *See id.* At least rhetorically, courts have adhered to this standard. For example, the *Poletown* court argued that heightened scrutiny should apply when the condemnation benefits a specific and identifiable private individual. In these cases, "Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature." *Poletown*, 304 N.W.2d at 459-60.

[161] *See id.* at 213.

[162] *Id.* at 214.

[163] EPSTEIN, *supra* note 59, at 213.

to some of the wealthiest corporations in the world, armed with cadres of lobbyists and the influence they bring.

However, a meaningful application of the Public Use Clause can prevent corporations from capturing the condemnation decision at the expense of minority property owners. The Public Use Clause, which limits the permissible uses of the taking power, reduces the value that corporations place on condemnation decisions by limiting the ability of legislators to use the taking power to dispense favors. The reduced value of the taking power will reduce the demand for government-coerced property exchanges, thereby reducing the total number of takings and freeing minority property from the constant specter of the government bulldozer.

Derek Werner