

# INTERMEDIATE SCRUTINY FOR ECONOMIC DEVELOPMENT TAKINGS: PROPOSING A NEW TEST BASED ON JUSTICE KENNEDY'S *KELO* CONCURRENCE

*"We have no established criterion for 'intermediate scrutiny' . . . but essentially apply it when it seems like a good idea to load the dice."<sup>1</sup>*

## INTRODUCTION

Your land may be all that stands in the way of a plan to stimulate the local economy. Most people do not think of their own land in terms of how much the public benefits from it. Similarly, most people have never considered how much power the government possesses to exercise control over their land. If the government so chooses, it can take your property and replace it with something for the public benefit, so long as it pays you the fair market value of your property (as calculated by the government). Think about a museum, a big box retailer, or even a coffee shop replacing your home.

Surely, a Starbucks in place of your own home would create new jobs, provide tax revenue, and make it easier for your neighbors to get their morning cup of Joe. Regardless of the benefits, however, it may be inconceivable to think of a coffee shop replacing your home. One may argue that, in America, we have rights; our Constitution surely protects against such things. However, the Supreme Court recently held that the Constitution's Fifth Amendment Takings Clause does not prohibit the taking of private property for economic development.<sup>2</sup> As a result, so long as fair market value is paid to the owner, our government can transfer property from A to B when it is rationally conceivable that B's use will have some greater benefit to the public than A's use.<sup>3</sup>

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1. *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

2. *See Kelo v. City of New London*, 545 U.S. 469, 483–86 (2005).

3. *See id.* at 486–87. The majority affirmed the rational basis standard of

Citizens outside the legal community were shocked to learn that the government can buy property from one person—regardless of whether that person is willing to sell—and sell it to another for the purpose of increased economic productivity.<sup>4</sup> This decision, rendered by the Supreme Court in *Kelo v. City of New London*,<sup>5</sup> sparked outrage around the nation.<sup>6</sup> Within the two years following the decision, forty-two states passed statutes or amended their constitutions to prohibit or severely restrict economic development as a public use.<sup>7</sup> Some of this legislation merely restates the long held rule that “eminent domain may not be used to benefit a particular private party.”<sup>8</sup> Other states have taken a more drastic approach and have completely eliminated economic development as a public use altogether.<sup>9</sup>

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review for economic development takings. *See id.* at 486–89. The Court held that takings for the purpose of conferring benefit to a private party and takings that result in pretextual public benefits are void. *See id.* at 477–78.

4. *See generally* Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A1 (describing the *Kelo* ruling as “shameful . . . scandalous and cruel”); *Property Rights and Eminent Domain: Hands Off Our Homes*, ECONOMIST, Aug. 20–26, 2005, at 21–22 (reporting on the *Kelo* decision and the public outcry that followed).

5. *Kelo*, 545 U.S. at 469.

6. *See generally* Egan, *supra* note 4, at A1; Epstein, *supra* note 4, at A1 (describing the *Kelo* ruling as “shameful . . . scandalous and cruel”); ECONOMIST, *supra* note 4, at 21–22 (reporting on the *Kelo* decision and the public outcry that followed).

7. CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO, (2007), [http://www.castlecoalition.org/pdf/publications/report\\_card/50\\_State\\_Report.pdf](http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf) [hereinafter 50 STATE REPORT CARD]. Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Rhode Island have taken no legislative action with regard to economic development eminent domain. *See id.* at 8, 15, 25, 28, 34, 36, 40, 43.

8. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”); *see also Kelo*, 545 U.S. at 477 (“[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”); *see, e.g.*, OKLA. CONST. art. 2, § 23 (“No private property shall be taken or damaged for private use, with or without compensation . . .”).

9. *See, e.g.*, COLO. REV. STAT. § 38-1-101(1)(b)(I) (2007) (“[P]ublic use” shall not include the taking of private property for transfer to a private entity for the purpose of economic development . . .”); LA. CONST. art. 1, § 4(B)(3) (“Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the

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Generally, states have evaded the effects of the *Kelo* decision by creating new legislation, strictly interpreting state constitutional demands, or using other subtle approaches.<sup>10</sup> Such evasions typically occur in one of two ways: directly banning economic development as constituting a public use<sup>11</sup> or permitting economic development as a method for blight removal only.<sup>12</sup> Consequently, at least in these states, a case that would clarify the *Kelo* decision will never reach the Supreme Court.<sup>13</sup>

Traditionally, courts defer to the legislature when defining public use because the legislature is in a better position than the judiciary to assess public need.<sup>14</sup> However, the legislature and other elected public officials often feel intense political pressure to bring about rapid change, particularly with regard to the

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taking or damaging of the property is for a public purpose . . . .”); MO. ANN. STAT. § 523.271(1) (West 2009) (“No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”); N.C. GEN. STAT. § 159-83(a)(1)(2007) (“The authority to exercise the power of eminent domain granted in this subdivision shall not apply to economic development projects . . . .”); *see also* Joshua U. Galperin, *A Warning to States—Accepting this Invitation may be Hazardous to Your Health (Safety, And Public Welfare): An Analysis of Post-Kelo Legislative Activity*, 31 VT. L. REV. 663, 697–706 (2007) (analyzing the state response to the *Kelo* decision).

10. *See* Daniel J. Curtin, Jr., *The Implications of Kelo in Land Use Law*, 46 SANTA CLARA L. REV. 787, 806–810 (2006).

11. *See* Muskogee County v. Lowery, 136 P.3d 639, 651–52 (Okla. 2006) (determining that the Oklahoma state constitutional “eminent domain provisions place more stringent limitations on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution”); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1140–41 (Ohio 2006) (holding that economic development is not a public use). In addition, states such as Colorado completely ban economic development as a legitimate public use. *See, e.g.*, COLO. REV. STAT. § 38-1-101(1)(b)(I) (2007).

12. For instance, in California a municipality may take land for economic development, but only in blighted areas. *See* CAL. HEALTH & SAFETY CODE ANN. §§ 33367, 33490 (West 1999). Similarly, Texas allows economic development takings through eminent domain only “to eliminate an existing affirmative harm on society from slum or blighted areas.” TEX. PROP. CODE ANN. § 2206.001(b)(3) (Vernon 2005).

13. A case with facts similar to *Kelo* would never arise in states that do not recognize economic development as a public use or limit its use to blighted areas.

14. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (“[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”).

economy.<sup>15</sup> Decision making in this frenzied atmosphere can have unintended results. For instance, incentives used to attract new business to an area may cost more than the resulting benefit to the public.<sup>16</sup> In his concurring opinion in *Kelo*, Justice Kennedy suggests that the government should bear the burden of proving a legitimate public benefit exists in some cases, rather than relying on the opinion of the legislature.<sup>17</sup>

This Note attempts to clarify Justice Kennedy's concurring opinion, which calls for a meaningful rational basis standard of review and recognizes the possibility of a stricter standard of review in some instances.<sup>18</sup> This Note will analyze these standards of review and provide a framework for an intermediate scrutiny test to be applied in certain economic development cases.

Part I of this Note serves four distinct purposes. First, it discusses the history and evolution of eminent domain,

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15. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1178 (1995) (“[H]istory demonstrates that state and local officials generally are too vulnerable to local economic and political pressures favoring development to be given exclusive responsibility for environmental protection.”); see also Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 803 (1993) (“[T]he most widespread type of political pressure on public fund investment policies today involves demands to stimulate local economic activity directly by financing development projects that over-extended states cannot fund rather than by bailing out government entities.”).

16. Because the benefits of economic development are inherently speculative, the actual benefits are often substantially less than expected. When municipalities make concessions to attract economic engines to their community, reliance on overinflated economic benefits can cause them to give far too much and receive far less than expected. A classic example of this phenomenon is the case of *Poletown v. City of Detroit*, in which GM promised that it would create 6,000 new jobs with a new production facility. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 469–70 (Mich. 1981) (Fitzgerald, J., dissenting). Elated at this prospect, the City spent \$200,000,000 to acquire and ready a large parcel of land, displaced 3,400 residents, and gave GM a twelve-year 50% tax abatement. *Id.* In the end, only 3,000 jobs were created (at the peak of production) and the City ended up spending even more money on reverse condemnation suits filed by displaced residents. See Ilya Somin, *Robin Hood in Reverse: The Case Against Economic Development Takings*, Cato Institute Policy Analysis, Feb. 22, 2005, at 6, <http://www.cato.org/pubs/pas/pa535.pdf> [hereinafter Somin, *Robin Hood in Reverse*].

17. See *Kelo v. City of New London*, 545 U.S. 469, 493 (2005).

18. *Id.* at 492–93.

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government takings, and the expansion of the “public use” doctrine. Second, it explains Justice Kennedy’s call for meaningful rational basis review and the lower courts’ response. Third, it briefly summarizes the different levels of judicial scrutiny, as well as their evolution and application. Finally, it emphasizes similarities between public use challenges and substantive due process challenges. Part II thoroughly examines Justice Kennedy’s *Kelo* concurrence to clarify its meaning. This section also proposes a three-part test that comports with Justice Kennedy’s reasoning to conduct a more searching review in certain economic development cases. Finally, Part III demonstrates how the proposed three-part test will assist courts in determining whether a governmental taking warrants a more searching review.

### I. EMINENT DOMAIN’S HERITAGE: PUBLIC USE

Each sovereign state possesses the inherent authority to take private property within its jurisdiction for public use with just compensation.<sup>19</sup> Throughout recorded history, governments have made use of eminent domain in some form.<sup>20</sup> Originally, governments used eminent domain for the construction of roads and other projects with a clear public use.<sup>21</sup> Over the past century, however, courts have expanded the definition of what constitutes public use far beyond actual public use.<sup>22</sup> Instead, the

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19. U.S. CONST. amend. V, cl. 4 (“[P]rivate property [shall not] be taken for public use without just compensation”); PHILIP NICHOLS, *THE LAW OF EMINENT DOMAIN* 1 (1917) (defining eminent domain as “the power, inherent in a sovereign state, of taking or of authorizing the taking of any property within its jurisdiction for the public good”).

20. NICHOLS, *supra* note 19, at 5–6. Although the Institutes of Justinian do not mention anything like eminent domain, there is evidence that the Roman Senate overruled an objection by Marcus Crassus to construct an aqueduct across his farm. CAMBRIDGE UNIVERSITY PRESS WAREHOUSE, *THE INSTITUTES OF JUSTINIAN* 5 (J. T. Abdy & Bryan Walker, trans., 1876); *see also* NICHOLS, *supra* note 19, at 5. A more modern type of eminent domain power is the English inquest of office, which consisted of an inquiry by a jury into any takings by the king. *See* NICHOLS, *supra* note 19, at 6.

21. NICHOLAS, *supra* note 19, at 5–6.

22. *Compare* *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 56–62 (N.Y. 1837) (Tracy, J., concurring) (defining actual public use as use by the public), *with* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 230, 241 (1984) (“But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has held a compensated taking to be proscribed by the Public Use Clause.”).

term has taken on the more liberal meaning of any rationally conceived public benefit.<sup>23</sup>

*A. A History of the Court's Interpretation of Public Use*

In 1789, James Madison proposed to the House of Representatives what was to become the Takings Clause.<sup>24</sup> Madison's proposal was redrafted, adopted by Congress, and ratified by the states as part of the Bill of Rights, specifically the Fifth Amendment. The Fifth Amendment states, in relevant part, that "private property [shall not] be taken for public use without just compensation."<sup>25</sup> The Takings Clause makes two distinct demands: (1) that the taking is for public use and (2) that just compensation is paid to the owner.<sup>26</sup> The Fifth Amendment is applicable to the states through the Fourteenth Amendment's Due Process Clause.<sup>27</sup> The states may create stricter standards for what constitutes "public use" under their own constitutions,<sup>28</sup> while the federal interpretation remains the minimum threshold.<sup>29</sup>

In the early cases concerning eminent domain, takings with a mere incidental public benefit were declared unconstitutional.<sup>30</sup> Originally, "public use" meant that the public was

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23. *Midkiff*, 467 U.S. at 241.

24. BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS* 1012, 1027 (1980). Madison's proposal stated, "[N]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Id.*

25. U.S. CONST. amend. V, cl. 4.

26. *Id.*

27. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897). In *Chicago*, the Court held that the Fifth Amendment applies to the states through the Fourteenth Amendment, and that property taken without compensation is "wanting in the due process of law . . ." *Id.*

28. *See, e.g., County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (construing state constitutional public use demands narrowly to overrule a prior decision in *Poletown v. City of Detroit*).

29. *See Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.").

30. *See Mo. Pac. Ry. 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 . . ."); *see also Clark v. Nash*, 198 U.S. 361, 369 (1905) (noting the Court's disapproval "of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural

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actually able to use the taken property, such as a sidewalk or a park.<sup>31</sup> However, by the end of the nineteenth century, a much more expansive definition of public use had emerged.<sup>32</sup> Our current federal standard for public use gives great deference to legislative determinations, even when non-blighted property is taken for economic development.<sup>33</sup>

### 1. Legislative Deference

Since the 1950s, the Supreme Court has deferred to the legislature as to what constitutes public use in takings cases, applying the lowest level of judicial scrutiny.<sup>34</sup> This standard of review is called “rational basis,” because it permits state action that is rationally related to furthering the health, safety, or general welfare of the public.<sup>35</sup>

In the 1954 case *Berman v. Parker*, the Supreme Court upheld a taking by eminent domain for the purposes of rejuvenating a blighted area of Washington, D.C.<sup>36</sup> Samuel Berman owned a department store which was taken because of its location in an area designated as “blighted.”<sup>37</sup> He challenged the taking as an impermissible public use because the redeveloped area would be for private commercial use and a private agency was managing the project.<sup>38</sup>

The Court made three important holdings in *Berman*. First, the Court did not consider whether the taking was for private

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resources of the State.”).

31. See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978).

32. *Kelo*, 545 U.S. at 480 (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896)) (discussing the progression of the public use doctrine).

33. See *Berman v. Parker*, 348 U.S. 26, 36 (1954) (holding that courts will defer to legislative determinations of the amount of land necessary for blight removal); see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (holding that legislatures are better able to assess the public purpose advanced by a taking); *Kelo*, 545 U.S. at 488–89 (declining “to second-guess the City’s considered judgments about the efficiency of its development plan” as well as “the City’s determinations as to what lands it needs to acquire in order to effectuate the project”).

34. See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

35. *Id.* at 147.

36. *Berman*, 348 U.S. at 26, 28.

37. *Id.* at 26.

38. *Id.* at 31.

use, as Berman claimed.<sup>39</sup> Instead, the court deferred to the legislative determination of what constitutes public use.<sup>40</sup> Second, the Court deferred to the legislature as to the amount of land taken.<sup>41</sup> Finally, the Court considered the area as a whole and determined that, because the entire area was blighted, the state could take Berman's non-blighted store.<sup>42</sup> The *Berman* case set the stage for the expansion of the meaning of public use and firmly reinforced the Court's expansive deference to the legislature.

The Court reaffirmed this deferential standard in 1984, expanding it beyond the blight context and into the realm of failed property markets. In *Hawaii Housing Authority v. Midkiff*, Hawaii used the power of eminent domain to break up a land oligopoly that artificially raised the price of land.<sup>43</sup> The Land Reform Act created the Hawaiian Housing Authority, which had the authority to condemn a lessor's land and transfer it to the lessee.<sup>44</sup> The Ninth Circuit held that the takings were unconstitutional because they attempted to take land from one private party and directly transfer it to another private party for fair market value.<sup>45</sup>

The Supreme Court reversed this decision, relying on *Berman's* highly deferential treatment of legislative determinations of public use.<sup>46</sup> The Court stated it had a very narrow role in reviewing legislatures' determinations of public use; the Court noted that it never held a taking unconstitutional when it rationally related to a conceivable public purpose.<sup>47</sup>

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39. *See id.* at 31–35.

40. *Id.* at 32 (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”).

41. *Id.* at 35–36 (“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”).

42. *Id.* at 35 (“[W]e have said enough to indicate that that it is the need of the area as a whole which Congress and its agencies are evaluating.”).

43. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984) (noting that forty-seven percent of the privately owned land in Hawaii at the time was owned by seventy-two people, resulting in a land oligopoly).

44. *Id.* at 233.

45. *Id.* at 235.

46. *See id.* at 239–44.

47. *Id.* at 241.

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Thus, the *Midkiff* Court pushed the boundaries even further concerning what constitutes public use. Now “public use” includes not only takings that directly benefit the public, but also those takings that could *conceivably* benefit the public.<sup>48</sup>

## 2. *Economic Development as Public Use*

Economic development can result in a benefit to the public through job creation and increased tax revenue. Local governments are vulnerable to private parties’ requests for land when certain circumstances such as a poor economy and political pressure exist.

Until it was ultimately overruled by *County of Wayne v. Hathcock* in 2004,<sup>49</sup> the 1981 Michigan Supreme Court case *Poletown Neighborhood Council v. City of Detroit*<sup>50</sup> was the leading case on economic development.<sup>51</sup> In this case, the City of Detroit authorized the taking of private property to alleviate the city’s high unemployment.<sup>52</sup> Even though it was a state supreme court decision, *Poletown* is important because the decision marked the first time eminent domain was recognized as a tool for economic development.

Detroit fell on hard times during the late 1970s and early 1980s.<sup>53</sup> Unemployment was above eighteen percent and the city was desperate for anything that would revitalize the economy.<sup>54</sup> General Motors (GM) wanted to build a new Cadillac factory in Detroit that would create 6,000 new jobs.<sup>55</sup> However, this new factory would come at a steep price. GM demanded 500

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48. *Id.*

49. 684 N.W.2d 765 (Mich. 2004).

50. 304 N.W.2d 455 (1981).

51. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 179–80 (1985); *see also* *Kelo v. City of New London*, 843 A.2d 500, 528 (Conn. 2004); Shelley A. Bolland, *Real Property*, 41 WAYNE L. REV. 1117, 1120 (1995).

52. *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting) (“Unemployment in the state of Michigan is at 14.2%. In the City of Detroit it is at 18%, and among black citizens it is almost 30%.”).

53. *Id.* at 460 (Fitzgerald, J., dissenting) (noting that in the spring of 1980, General Motors notified its employees that it would be closing two plants in the coming years).

54. *Id.* at 465 (Ryan, J, dissenting).

55. *Id.* at 468 n.6.

contiguous acres easily accessible by road and rail.<sup>56</sup> In addition, the land had to be level, free of toxins, and made available quickly.<sup>57</sup>

In the end, the Detroit City Council approved the use of eminent domain to take the necessary land and gave GM a twelve year, 50% tax abatement.<sup>58</sup> The taking displaced 3,400 residents of the Poletown area and cost the city over \$200 million to acquire and ready the land.<sup>59</sup> GM, however, paid only \$8 million for the site.<sup>60</sup> Instead of creating the promised 6,000 new jobs, at its peak, the factory produced only 3,000 jobs.<sup>61</sup>

This case is an example of how political pressure causes well-intentioned public officials to use eminent domain in one-sided deals. Such decisions often leave the city with no recourse when projected outcomes do not occur as promised. The public officials in *Poletown* sought to create new jobs and boost the economy, but GM failed to perform to its promised standards. The 3,400 displaced residents and the \$200 million dollar cost to the city was too high a price to pay for the 3,000 jobs created.

While states are permitted to adopt stricter standards for what constitutes a public use in economic development cases, the federal standard of rational basis remains the minimum threshold.<sup>62</sup> In 2004, the Connecticut Supreme Court found takings for economic development to be a legitimate public use under the state constitution and adopted the federal standard of rational basis to make this determination, relying heavily on the United States Supreme Court's decision in *Berman* and the Michigan Supreme Court's decision in *Poletown*.<sup>63</sup> However,

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56. *Id.* at 460 (Fitzgerald, J., dissenting).

57. *Id.* at 469 (Ryan, J., dissenting).

58. *See id.* at 470.

59. *Id.* at 464 n.15 (per curiam).

60. *Id.* at 469 (Ryan, J., dissenting).

61. Somin, *Robin Hood in Reverse*, *supra* note 16, at 6.

62. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.").

63. *See Kelo v. City of New London*, 843 A.2d 500, 531 (Conn. 2004). "[*Poletown*] warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit." *Id.* at 528 n.39.

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just four months later, *County of Wayne* overruled *Poletown* and held that economic development was not a public use under the Michigan Constitution.<sup>64</sup> Thus, a split formed between states that recognized economic development as a legitimate public use and those that did not.<sup>65</sup> Against this backdrop, the Supreme Court granted certiorari in the *Kelo* case to decide whether the Connecticut constitutional standard for public use dipped below the permissible federal standard.

In *Kelo* the United States Supreme Court determined that economic development backed by carefully considered planning met the federal constitutional requirement of “public use.”<sup>66</sup> In this case, the city granted its power of eminent domain to a private development corporation intending to revitalize ninety acres in the Fort Trumbull area.<sup>67</sup> The development plan entailed razing private residences and placing commercial office buildings, hotels, and a Pfizer pharmaceutical research facility in their place.<sup>68</sup> The state asserted that the anticipated increase in jobs and tax revenue arising from the development project constituted an appropriate public use and therefore justified the takings.<sup>69</sup> Nonetheless, nine homeowners refused to sell.<sup>70</sup> Ultimately, the Supreme Court forced the sale of those

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

65. Since the Court’s decision in *Kelo*, eleven states completely banned economic development as a public use. See Ilya Somin & Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 628 n.35 (2006); see also David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 130 n.2 (2007).

66. See *Kelo*, 545 U.S. at 478 (“The takings before us, however, would be executed pursuant to a ‘carefully considered’ development plan.”).

67. *Id.* at 473. The power to condemn comes from the state’s police powers and that power is often given to development corporations. See, e.g., MICH. COMP. LAWS ANN. § 213.23 (2006). It is the state’s power to condemn, but the development corporation actually wields this power and acquires the land for the project. *Id.* (“Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public”); see also *Level 3 Commc’ns of Virginia, Inc. v. State Corp. Comm’n*, 604 S.E.2d 71, 72 (Va. 2004) (allowing a private company to create a “public service corporation” with the power of eminent domain to lay fiber optic cable).

68. See *Kelo*, 545 U.S. at 474.

69. *Id.* at 472.

70. See *id.* at 476.

residences.<sup>71</sup>

a. *Kelo*'s Majority Opinion Expands Takings to Conceivable Future Benefits

The majority opinion in *Kelo*, a 5-4 decision, was written by Justice Stevens.<sup>72</sup> The Court adhered to established precedent by equating public use with public purpose and focused on the benefit to the public.<sup>73</sup> However, the Court also relied on *Berman* and *Midkiff* to grant broad deference to the legislature in defining public use.<sup>74</sup> Relying on these doctrines, the Court found the potential for increased jobs and tax revenue satisfied the public use requirement.<sup>75</sup> *Kelo* departed from *Berman* and *Midkiff*, however, in defining the existence of a valid public use. In both *Berman* and *Midkiff*, the public benefit was immediate, whereas in *Kelo* whether the development project would actually revitalize the city's economy was more speculative.<sup>76</sup> Thus, the federal standard for public use expanded further from immediate public benefit to future benefit.<sup>77</sup>

The homeowners argued in favor of a "reasonable certainty" test for economic development takings.<sup>78</sup> Using this criterion, such takings would be valid only if the purported public benefits were reasonably certain to accrue.<sup>79</sup> The Court rejected this requirement, finding that such second-guessing would significantly impede the consummation of development

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71. *Id.*

72. *Id.* at 472.

73. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 164 (1896); *see also Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined . . . [public use] broadly.").

74. *Kelo*, 545 U.S. at 480 (stating that there is a "longstanding policy of deference to legislative judgments in this field").

75. *Id.* at 483-84.

76. In *Berman*, the removal of blight was definite and would occur immediately when razing the blighted area. *Berman*, 348 U.S. at 30. In *Midkiff*, it was apparent that the so-called land oligopoly would definitely and immediately be broken up when the authorities transferred the land from lessor to lessee. *Midkiff*, 467 U.S. at 233-34.

77. *Kelo*, 545 U.S. at 486 n.16 ("[F]ocusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause.").

78. *Id.* at 487.

79. *Id.*

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plans.<sup>80</sup> Further, the Court held that it is through these comprehensive development plans that the parties' legal interests and rights are clarified, thus negating the need for judicial intervention.<sup>81</sup> Although the majority rejected the general use of heightened scrutiny in economic development cases, Justice Kennedy's concurring opinion left open the possibility of its use under certain circumstances.<sup>82</sup>

b. Justice Kennedy's Attempt to Limit the Expansion of the Public Use Doctrine

Justice Kennedy's concurring opinion was the swing vote in *Kelo*.<sup>83</sup> Kennedy agreed that the Court should use the highly deferential rational basis standard when the government authorizes a taking through eminent domain.<sup>84</sup> However, Justice Kennedy emphasized that takings with only incidental or pretextual public benefits are forbidden under the Public Use Clause.<sup>85</sup> Kennedy compared the rational basis standard used under the Takings Clause with the rational basis standard used under the Equal Protection Clause.<sup>86</sup> He argued that courts should strike down takings intended to benefit private parties with only incidental public benefits, just as a court should strike down government classification intended to injure a particular class with only incidental public justifications.<sup>87</sup> Thus, Kennedy suggested that a taking is unconstitutional when there is only an incidental benefit to the public.<sup>88</sup>

i. Distinguishing Kennedy's Standard of Review

Under traditional rational basis scrutiny, courts give great deference to elected officials.<sup>89</sup> Justice Kennedy's concurring opinion sought to take back some of that deference in cases in which the purported public benefits are pretextual or incidental

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80. *Id.* at 488.

81. *See id.*

82. *See id.* at 488–89, 493.

83. *See id.* at 490–93 (Kennedy, J., concurring).

84. *Id.* at 490–91.

85. *Id.*

86. *Id.* at 491.

87. *Id.*

88. *Id.*

89. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

to the private benefits. Kennedy called this standard of scrutiny “meaningful rational basis” review.<sup>90</sup> It is not immediately clear, however, whether this slightly higher form of scrutiny surpasses rational basis review, such as intermediate scrutiny.

Intermediate scrutiny is a relatively recent invention of our Supreme Court.<sup>91</sup> In the 1976 case *Craig v. Boren*, the Court introduced an intermediate scrutiny test to review challenges to gender-based classifications.<sup>92</sup> Under the Boren Test, gender-based classifications are constitutional only if they are “substantially related” to “important governmental objectives.”<sup>93</sup> Intermediate scrutiny has not only found a home in the Equal Protection and Fourteenth Amendment cases,<sup>94</sup> but in First Amendment cases as well.<sup>95</sup>

A distinction between rational basis and intermediate

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90. *Kelo*, 545 U.S. at 492. In proposing his standard Kennedy cited *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446–47 (1985), in which the traditional rational basis test was used but the burden was put on the government to establish the reason for the classification. *Id.* at 491. Since Kennedy was rather specific in “presuming the legitimacy” of the governmental action under meaningful rational basis, the burden flip in *Cleburne* was cited as an example of heightened scrutiny and not as a model for meaningful rational basis. *See id.* at 492.

91. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (introducing a heightened level of scrutiny for gender based classifications).

92. *Id.*

93. *Id.*

94. *Id.*; *see also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. . . . To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”); *Roe v. Wade*, 410 U.S. 113, 154–55 (1973) (holding that infringements on the fundamental right to abortion could be upheld only if necessary to promote a compelling governmental interest); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 874 (1992) (assessing whether the regulations would place an “undue burden” on a woman’s ability to choose abortion).

95. *See* *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (challenging governmental regulations for broadcasts); *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980) (applying intermediate scrutiny to commercial free speech challenges); *see also* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 207 (2003) (holding that even if the law inhibits some constitutionally protected corporate and union speech, that assumption would not “justify prohibiting all enforcement” of the law unless its application to protected speech is substantial, “not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications”).

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scrutiny fundamentally concerns who bears the burden of proof.<sup>96</sup> The deferential standard set by *Berman* and upheld by *Midkiff* and *Kelo* forces the property owner to demonstrate that the taking fails the public use requirement. Intermediate scrutiny, as used in regulatory land use cases, places the burden on the government to justify its actions. Justice Kennedy never specified which party would bear the burden of proof under his meaningful rational basis review. However, Justice Kennedy did note that the court should review the record with the presumption that the government's actions intend to serve a public purpose.<sup>97</sup> This language suggests that the public bears the burden of proof and that meaningful rational basis falls below the intermediate scrutiny threshold.

## ii. The Tipping Point: Acute Favoritism

Justice Kennedy stated that the facts in *Kelo* did not warrant a departure from the deferential *Berman* standard and that the inquiry conducted by the trial court as to whether the takings were for the primary benefit of Pfizer, Inc. was sufficient to pass meaningful rational basis review.<sup>98</sup> However, Kennedy went on to state that a more stringent standard of review might be used when private transfers, with acute impermissible favoritism, could lead a court to presume the taking was invalid.<sup>99</sup> Under this standard, the burden would be on the government to rebut the presumption of invalidity.<sup>100</sup> This more stringent standard looks more like intermediate scrutiny. Indeed, Kennedy cited *Eastern Enterprises*,<sup>101</sup> which held that the Due Process Clause demands a higher level of scrutiny for retroactive legislation, supporting the use of heightened

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96. See generally *Ramos v. Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003) (explaining the levels of scrutiny and burdens of proof for each).

97. *Kelo v. City of New London*, U.S. 545 469, 490, 493 (2005) (Kennedy, J., concurring).

98. *Id.* at 492.

99. *Id.* at 493.

100. *Id.* (“There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”).

101. *Id.* (Kennedy, J., concurring in judgment and dissenting in part) (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549–50 (1998)).

scrutiny.<sup>102</sup>

Unfortunately, Justice Kennedy did not describe a hypothetical that would demand this higher level of scrutiny.<sup>103</sup> Instead, he pointed to reasons why it would be inappropriate to use such a test in *Kelo*: (1) the city used a comprehensive development plan to combat economic depression; (2) the economic benefits were more than de minimis; (3) most of the private beneficiaries were unknown when the plan was formulated; and (4) the city complied with procedural requirements in facilitating a review of the record.<sup>104</sup> Because of these findings, *Kelo* survived Kennedy's meaningful rational basis review.<sup>105</sup> Kennedy, however, went on to state that courts should presume the transfer was impermissible when there are: (1) suspicious transfers, (2) procedures prone to abuse, or (3) purported benefits that are trivial or implausible.<sup>106</sup>

### 3. *Intermediate Scrutiny in Regulatory Land Use Cases*

The burden shifting that Justice Kennedy described is the hallmark of heightened scrutiny.<sup>107</sup> The first case to abandon rational basis and incorporate intermediate scrutiny in a land use context was *Nollan v. California Coastal Commission*.<sup>108</sup> In this case, the California Coastal Commission granted the Nollans a building permit subject to the condition that the Nollans allow a public easement along the beachfront of their property.<sup>109</sup> This easement would allow people to walk directly from an ocean-side public park to a public beach.<sup>110</sup> The government's purpose for requiring the easement was to protect the public's ability to

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102. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549–50 (1998) (noting that this case was “one of the rare instances where the Legislature [] exceeded the limits imposed by Due Process” and that “the degree of retroactive effect is a significant detriment in the constitutionality of a statute”).

103. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

104. *Id.*

105. *Id.* at 492. Kennedy stating that it was his opinion that the Public Use Clause demanded meaningful rational basis to be applied in *Kelo*. *Id.* By inference then, there must have been plausible claims of “impermissible favoritism” in *Kelo* to warrant such a review. *See id.* at 491–92.

106. *Id.* at 493.

107. *Supra* note 97.

108. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

109. *Id.* at 828.

110. *See id.*

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see the beach.<sup>111</sup> Building a larger house on the land would obstruct the view of the beach from the road, creating a “psychological barrier” between the beach and the public.<sup>112</sup>

The Court held that the condition imposed failed to further the ends that were advanced to justify it.<sup>113</sup> Creating a public easement across a beachfront does not alleviate the psychological barrier that results from a larger building.<sup>114</sup> If there is no essential nexus between the condition and the purpose for the restriction, then it cannot substantially advance a legitimate state interest and the condition becomes a taking rather than a permissible land use regulation.<sup>115</sup>

In 1994, land use regulation scrutiny was further refined in the case of *Dolan v. City of Tigard*.<sup>116</sup> In *Dolan*, a local business owner had applied for a permit to increase the size of her commercial building and parking area.<sup>117</sup> The building permit was granted subject to two conditions: Part of the land had to be dedicated to floodplain improvement, and another part had to be dedicated to the construction of a pedestrian and bicycle path.<sup>118</sup>

The Court found that the conditions imposed furthered the asserted state interests of flood prevention and alleviation of traffic congestion, thus satisfying the essential nexus test.<sup>119</sup> However, the Court added a second step to the analysis by requiring a “rough proportionality” between the conditions imposed and the impact of the development.<sup>120</sup> The floodplain dedication failed this second step because there was no justification for requiring the floodplain to be open to the public.<sup>121</sup> This requirement unnecessarily extinguished the owner’s ability to exclude others from the property.<sup>122</sup> The

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111. *Id.* at 835.

112. *Id.*

113. *See id.* at 837.

114. *Id.* at 838–39.

115. *See id.* at 834.

116. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

117. *Id.* at 379.

118. *Id.* at 379–80.

119. *Id.* at 387.

120. *See id.* at 388.

121. *Id.* at 393.

122. *Id.*

pedestrian and bicycle path condition also failed this step because the government could not show that the increased traffic from the redevelopment reasonably related to the pathway easement.<sup>123</sup>

Intermediate scrutiny tests for regulatory takings provide a good foundation to construct a framework for Justice Kennedy's meaningful rational basis level of scrutiny. Some judges and academics have suggested that the intermediate scrutiny test from *Nollan* would lend itself well to economic development takings cases.<sup>124</sup> Commentators and courts have proposed that, at least in facially improper<sup>125</sup> cases, courts must evaluate whether an "essential nexus" exists between the proclaimed public use and the actual effect of the use.<sup>126</sup> Borrowing the constraints from *Dolan v. City of Tigard*, the court must also find a "rough proportionality" between the property taken and the proclaimed public benefit.<sup>127</sup>

Not everyone thinks applying a *Nollan-Dolan* type test to economic development is a good idea. A *Nollan-Dolan* test focuses on measuring actual benefits after the taking has

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123. *Id.* at 395.

124. *See, e.g.*, *Richardson v. City of Honolulu*, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlian, Diarmuid F., concurring in part and dissenting in part). The *Richardson* court explained:

Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit—perhaps something like *Nollan's* 'essential nexus'—between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.

*Id.*; *see also* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963–70 (2003) (arguing that *Nollan* and *Dolan* may provide insight to a means test for eminent domain).

125. Here, "facially improper" is referring to such cases where there exist suspicious transfers, the procedures used were prone to abuse, or the purported public benefits were trivial or implausible.

126. *Richardson*, 124 F.3d at 1168.

127. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The Court stated that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* The Court likened the measure to one of reasonable relationship. *Id.* *See also*, Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963–65 (2003).

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occurred.<sup>128</sup> In economic development cases, the proclaimed benefits are inherently speculative and may take years to vest, if at all.<sup>129</sup> Therefore, the “actual effect” of the taking is unknown until well after the taking has occurred. Resisting the advance of such a test, distinctions have been drawn between its use in exaction and development cases.<sup>130</sup>

Since *Kelo* was decided, eleven states have narrowed the definition of public use to exclude or severely limit economic development.<sup>131</sup> However, eight states have not taken legislative

128. See *Lambert v. City of San Francisco*, 529 U.S. 1045, 1049 (2000) (petition for writ of certiorari denied) (Scalia, J. dissenting).

129. In these cases, all of the proclaimed public benefits are inherently speculative because the economy will take a long time to realize any potential gains in jobs and tax revenue.

130. The Supreme Court noted this distinction in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*:

The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development’s anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner’s challenge is based not on excessive exactions but on denial of development.

526 U.S. 687, 703 (1999).

131. 50 STATE REPORT CARD, *supra* note 7. Alabama, Alaska, Kansas, Louisiana, Minnesota, Missouri, New Hampshire, North Carolina, North Dakota, South Dakota, and Wyoming have all passed legislative reform that effectively bans takings for economic development. See *id.* at 5, 6, 20, 22, 27, 29, 33, 37, 38, 45, 54; see also ALA. CODE § 11-47-170(b) (LexisNexis 2008) (“[A] municipality or county may not condemn property for the purpose of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”); ALASKA STAT. § 29.35.030(b) (2008) (“The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development . . . .”); KAN. STAT. ANN. § 26-501b(f) (2007) (“If the legislature authorizes eminent domain for private economic purposes, the legislature shall consider requiring compensation of at least 200% of fair market value to property owners.”); LA. CONST. art. 1, § 4(B)(3) (“Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose . . . .”); MINN. STAT. ANN. § 117.025(d).11(b) (West 2009) (“The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.”); MO. ANN. STAT. § 523.271(1) (West 2009) (“No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”); N.C. GEN. STAT. § 159-83(a)(1)

action since *Kelo* was decided.<sup>132</sup> When confronted with an economic development takings case, the state courts may look to Justice Kennedy's concurrence for guidance on the level of review to apply in certain suspicious economic development cases. However, courts applying the *Kelo* findings to another case do not know how much weight to give each finding.<sup>133</sup> Since each case is different, one or more of the findings is bound to be absent. For example, private beneficiaries may already be known prior to the taking, or there might not be a comprehensive development plan for the area. In addition, courts must estimate how extensive a review of the record needs to be in a case with plausible claims of impermissible favoritism.

## II. APPLYING HEIGHTENED SCRUTINY TO ECONOMIC DEVELOPMENT TAKINGS

Justice Kennedy's primary concern with economic development takings is that private parties will receive the majority of the benefits and the public will receive a mere pretextual or incidental benefit.<sup>134</sup> Under certain circumstances,

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(2007) ("The authority to exercise the power of eminent domain granted in this subdivision shall not apply to economic development projects . . ."); N.D. CENT. CODE § 32-15-01(3) (2007) ("[A] public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health."); N.H. REV. STAT. ANN. 498-A:2 (VII)(b) (LexisNexis 2008) ("[P]ublic use shall not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities."); S.D. CODIFIED LAWS § 11-7-22.1 (2008) ("No county, municipality, or housing and redevelopment commission, as provided for in this chapter, may acquire private property by use of eminent domain: For transfer to any private person, nongovernmental entity, or other public-private business entity; or primarily for enhancement of tax revenue."); WYO. STAT. ANN. § 1-26-801(c) (2007) ("'Public purpose' shall not include the taking of private property by a public entity for the purpose of transferring the property to another private individual or private entity except in the case of condemnation for the purpose of protecting the public health and safety . . .").

132. 50 STATE REPORT CARD, *supra* note 7. Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Rhode Island have all taken no legislative action with regard to economic development eminent domain. *See id.* at 8, 15, 25, 28, 34, 36, 40, 43.

133. *See, e.g., Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007). *Franco* provides an example of a case that did not have the four findings present in *Kelo*, in which plausible claims of impermissible favoritism were present. *See id.*

134. *Kelo*, 545 U.S. at 490–91 (Kennedy, J., concurring) ("A court applying rational-basis review under the Public Use Clause should strike down a taking

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Kennedy suggests that something more than meaningful rational basis should be used.<sup>135</sup> These circumstances include cases in which the transfers are very suspicious; the procedures employed are prone to abuse; or the purported benefits are trivial or implausible.<sup>136</sup> Thus, some form of intermediate scrutiny should be utilized whenever a court determines that a case falls within one of these categories.

*A. Proposing a Three-Part Test: “Economic Development Intermediate Scrutiny”*

Intermediate scrutiny tests share certain common elements.<sup>137</sup> The two most prominent elements often relate to *substantiality* and *necessity*.<sup>138</sup> An intermediate scrutiny test including the requirements of substantiality and necessity would lend itself well to economic development takings cases. Under these types of tests, the term “substantial” often refers to a substantial governmental interest or objective.<sup>139</sup> The term “necessary” means the restriction is no greater than necessary to further the stated interest.<sup>140</sup>

A three-pronged analysis of government action can determine if a taking advances a legitimate public interest. For certain takings through eminent domain to be valid under the Fifth Amendment, the court must determine whether the asserted public purpose is substantial.<sup>141</sup> Second, the court must

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that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . .”).

135. *Id.* at 493 (“My agreement with the Court . . . does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings.”).

136. *Id.*

137. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (holding that, to survive intermediate scrutiny, a law, regulation, or government action must further an important governmental objective and be substantially related to that interest); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86–87 (2000) (determining that in the intermediate scrutiny context “necessity” means “reasonable necessity” and not the strict, narrowly tailored necessity found in strict scrutiny tests).

138. *See Virginia*, 518 U.S. at 532–33; *Kimel*, 528 U.S. at 86–87.

139. *See Virginia*, 518 U.S. at 532–33; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

140. *See Kimel*, 528 U.S. at 86–87.

141. The applicable cases to receive heightened scrutiny are those which Justice Kennedy expressed concern. *Kelo*, 545 U.S. at 493.

determine whether the taking substantially advances the asserted public interest. Third, the court must determine whether the taking is more extensive than necessary to advance the substantial public interest.<sup>142</sup> To be legitimate, the taking must satisfy all three prongs.

*1. Substantial vs. Pretextual Public Benefit*

The public benefit prong focuses on whether the public benefit is substantial or merely pretextual. In most economic development cases, the proclaimed public benefits include increased employment and tax revenue as well as rejuvenation of the local economy.<sup>143</sup> Justice Kennedy's main concern over economic development is that private corporations will receive a windfall by showing only a minimal, pretextual public benefit.<sup>144</sup>

Taking homes in an effort to revitalize a local economy may seem harsh to the landowner. However, when a city falls on economically troubling times, public officials feel political pressure to jumpstart growth.<sup>145</sup> To attract business that will create new jobs and generate tax revenue, cities offer incentives in the form of land acquisition through condemnations and tax abatements.<sup>146</sup> As demonstrated in *Poletown*, sometimes the demands of new businesses grossly outweigh the benefits.<sup>147</sup>

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142. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). This test was developed by the Supreme Court to determine if commercial speech falls under First Amendment protection. *Id.* The structure of the proposed three-prong test is very similar to this four-prong test.

143. See *Kelo v. City of New London*, 545 U.S. 469, 469–70 (2005) (explaining that economic benefits from the redevelopment include “new jobs and increased tax revenue”); *Norwood v. Horney*, 853 N.E.2d 1115, 1152 (Ohio 2006) (“As municipalities increasingly struggle to provide public services with limited financial resources, governmental authorities are encouraging more intensive economic development to generate additional tax revenue, to create new jobs and to jump start local economies.”); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639, 647–48 (Okla. 2006) (describing economic development as “increased taxes, jobs and public and private investment in the community . . .”).

144. See *Kelo*, 545 U.S. at 491.

145. See materials cited *supra* note 15.

146. See, e.g., *Kelo*, 545 U.S. at 469–70 (“[T]he city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue.”).

147. See Somin, *Robin Hood in Reverse*, *supra* note 16, at 6–7. Although the court records indicate the city paid the displaced landowners \$200 million,

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Often, cities have no recourse when the expected benefits do not materialize, leaving communities with an even larger economic burden.

Similar to other legal problems, these issues require a balancing test.<sup>148</sup> A court must weigh the extent of private benefits garnered through the taking and compare them to the proclaimed public benefit. This is no easy task. The condemning authority will have to calculate a dollar figure based on inchoate criteria, such as the potential for job creation and economic rejuvenation. Benefits such as tax income are easier to value, since they can be estimated based on established rates and historical sales data. Valuing the private benefits of a taking is equally problematic. Certain private benefits—such as land acquisition—have valuations that are relatively straight forward, whereas production or profit increases are more speculative and require industry expert calculation.

The court must consider evidence from both parties and decide on a reasonable figure for the overall monetary value of the benefits to the public and to the private company. Essentially, this prong's purpose is to determine whether the advanced public benefit is pretextual—a disguised private benefit. The estimated value of the public benefit does not have to outweigh the private benefit. Indeed, in many cases, due to the risks involved of opening up shop in an economically depressed area, the private benefits may have the greater value.<sup>149</sup> This result is a product of risk assessment analysis.<sup>150</sup>

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ongoing court battles and related costs have probably pushed the figure to around \$300 million. *Id.* GM bought the land for only \$8 million. *Id.* at 7. In the end, the city paid over \$300 million for 2,500 jobs. Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 219 (2004).

148. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1974); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 319–20 (2002) (noting that *Penn Central's* balancing approach was the proper framework for analyzing whether a taking had occurred, but that petitioners had not challenged the district court's conclusion that they could not make out a claim under *Penn Central's* factors).

149. See materials cited *supra* note 147.

150. See EDMUND A.C. CROUCH & RICHARD WILSON, *RISK / BENEFIT ANALYSIS* 49 (1982) (using risk/benefit analysis to “deal with decisions involving much greater uncertainty, where catastrophes have to be explicitly considered and may contribute substantially to both uncertainty and expected values, and the problems may be very long term”); see also World Bank, *Making Local Economic Development Strategies: A Trainer's Manual*, at 6,

Therefore, the substantial public benefit prong requires only that public benefits are not pretextual and more than *de minimus*.<sup>151</sup>

## 2. *Substantially Advancing the Asserted Public Benefit*

The second prong focuses on the relationship between the asserted public benefit and the government's exercise of eminent domain for economic development. In economic development cases, the claimed public benefits are usually increased jobs and tax revenue, as well as a rejuvenation of the local economy.<sup>152</sup> To satisfy the second prong, there must be a substantial link between the anticipated public benefits and the taking.

When used in First Amendment cases, this "advancing" prong focuses on the State's interest.<sup>153</sup> In economic development cases, the focus is on the public benefit. Unfortunately, in these economic development cases, the State's interest to benefit the public is always obtained at a cost. To attract a private company to the area, local governments often concede to lofty demands made by those companies willing to invest. The more incentives businesses demand and receive, the less public benefit will result.<sup>154</sup> The Public Use Clause demands a focus on the relationship between the public benefit and the

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<http://www.worldbank.org/urban/local/toolkit/docs/m4/module-4-exercises-11-16-04.pdf> (last visited Jan. 16, 2009) (risk assessment analysis template). See generally GLENN KOLLER, *RISK ASSESSMENT AND DECISION MAKING IN BUSINESS AND INDUSTRY: A PRACTICAL GUIDE* 129-36 (1999) (analyzing the chance of failure as part of risk assessment for making business decisions). For an example of risk assessment analysis resulting in a highly valued private benefit, see *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

151. BLACK'S LAW DICTIONARY 464 (8th ed. 2004) (defining *de minimus* as "[t]rifling; minimal" or a fact or thing "so insignificant that a court may overlook it in deciding an issue or case").

152. See cases cited *supra* note 143.

153. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) ("[W]e ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

154. The incentives used to attract new business will either have an immediate detrimental impact on public funds, for example when the government purchases condemned property; or it could have a future detrimental impact when, for example, the business receives a tax abatement. Although these incentives are often necessary, they should be viewed for what they are: sacrificing some public benefit on the hope that future benefits will outweigh those expended.

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taking.<sup>155</sup>

This prong is similar to the “essential nexus” test in *Nollan*, which searches for a link between the proclaimed public benefit and the actual effects of the land use regulation.<sup>156</sup> Similarly, this prong searches for a link between the taking and the proclaimed public benefit. This refinement is necessary because proclaimed benefits in economic development cases are always more speculative in nature than those claimed in regulatory land use cases.<sup>157</sup>

### 3. *No More Burdensome than Necessary to Obtain the Public Benefit*

Under the third prong, a “necessary” taking means that the taking cannot be substantially more burdensome than it needs to be to advance the perceived public benefit. This test is satisfied by proving the nonexistence of “numerous and obvious less-burdensome alternatives.”<sup>158</sup> This prong does not require a showing that every inch of the land taken be used to further the public benefit. Rather, the prong requires a reasonable relation between the amount of land taken and the use that would generate a public benefit.<sup>159</sup>

Compared to regulatory takings, this prong is most similar to the “rough proportionality” requirement. Courts have long had the authority to “interfere with and prevent any excessive taking of land upon a showing of bad faith or palpable unreasonableness.”<sup>160</sup> The *Dolan* Court found an exaction invalid because the government failed to show that it could not accomplish its objectives with less land.<sup>161</sup> When the government takes land through a forced sale, it should be able to

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155. See U.S. CONST. amend. V, cl. 4.

156. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

157. The economic benefits will not be immediately apparent since the businesses need time to flourish to realize benefits.

158. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995).

159. See *Bd. of Tr. of State University of New York v. Fox*, 492 U.S. 469, 480–81 (1989).

160. See *Bd. of Educ. v. Pace College*, 276 N.Y.S.2d 162, 167 (N.Y. App. Div. 1966) (Benjamin, J., concurring in the result) (citations omitted).

161. See *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (stating that the regulations already required Dolan to maintain some of her land as open space and that “[t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control”).

demonstrate the need for the amount of land taken.

*C. Analyzing the Proposed Test under Real-World Scenarios*

The three-prong test applies to difficult situations regarding takings and economic development. This test could be used in any case involving eminent domain. Its use, however, should be limited to the types of cases with which Justice Kennedy expressed concern.<sup>162</sup> Three issues, in the context of taking land for economic development, are highly contentious: (1) quick-take provisions, (2) replacing one retailer with another, and (3) taking more land than is needed. Each of these scenarios could necessitate a heightened standard of review under Kennedy's short list.

*1. Quick-Take Provisions*

One of the most powerful tools available for a condemning authority is the ability to make use of quick-take condemnations.<sup>163</sup> These provisions allow the condemning authority to take immediate possession of the property once service on the owner with notice of the condemnation is given. Most states have some form of "quick-take" authority; however, their use is typically limited to cases in which the government can show immediate necessity for the condemnation.<sup>164</sup> Without the restraint of demonstrating necessity, a condemning authority could take possession of property for any reason, without giving the owner a chance to contest the validity of the taking.<sup>165</sup>

Some of the most notorious cases of quick-take condemnations have occurred in Maryland. In these cases, the condemning authority quickly took possession of private

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162. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005).

163. *Mayor of Baltimore City v. Valsamaki*, 916 A.2d 324, 326 n.1 (Md. 2007); see also BLACK'S LAW DICTIONARY 310 (8th ed. 2004) (defining quick-take condemnations as "[t]he immediate taking of possession of private property for public use, whereby the estimated compensation is deposited in court or paid to the condemnee until the actual amount of compensation can be established").

164. *Valsamaki*, 916 A.2d at 327 (noting that quick take "powers should be exercised only when the necessity [is] 'immediate'").

165. *Id.* at 326–27 (stating that the condemning authority takes possession of the property before trial, prior to providing the property owner with any notice of the taking).

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property to allow for the establishment of new businesses.<sup>166</sup> However, the condemning authority did not have an immediate need for the property,<sup>167</sup> nor did it anticipate the purpose of the property taken.<sup>168</sup> The condemning authority organized to quickly accumulate parcels and have various private companies submit proposals for their use.<sup>169</sup> Thus, the authority took the property without any public benefit in mind.<sup>170</sup>

Takings such as these fail to pass the first prong of the three part economic development test, which requires a substantial public benefit. A substantial, planned public benefit must exist contemporaneously with the taking. Satisfying this prong requires extensive planning by the state to ascertain the property's use and public benefits.

## 2. *Replacing Old or Small with New or Large Businesses*

Occasionally, authorities replace older or smaller shopping centers with newer or larger ones, using the taking power.<sup>171</sup> In these types of cases, the state exercises eminent domain to replace small or old businesses with larger or newer ones. In these cases, the government is transferring property from one private party to another, which is unconstitutional.<sup>172</sup> Under the current deferential standard of review, condemning authorities have been able to justify such takings based on increased jobs and tax revenue.<sup>173</sup>

Here, as with quick-take actions, the key to surviving the three-prong test is planning. Extensive planning would require

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166. *Id.*; see also *Sapero v. Mayor of Baltimore*, 920 A.2d 1061, 1066 (Md. 2007) (noting that the property was taken for urban renewal purposes).

167. *Valsamaki*, 916 A.2d at 344 (“The record does not demonstrate sufficient evidence to support a finding that the City is entitled to *immediate* possession of the Property.”).

168. *Id.* at 329 n.7 (observing that the City appeared to be stockpiling or assembling properties).

169. *Id.* at 331.

170. *Id.* (“[W]e had no specific plans . . . [for the property].”).

171. See *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1125 (C.D.Cal. 2001).

172. See *id.* at 1129 (noting that the evidence is “beyond dispute that Lancaster’s condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another”).

173. See, e.g., *Mun. Boundaries of Meridian v. City of Meridian*, 662 So.2d 597, 617 (Miss. 1995) (noting that the construction of the mall would benefit the local economy through the creation of jobs and tax revenues).

establishing the legal rights of all interested parties. Even with extensive planning, the requirement of a clear public benefit remains. For example, it is difficult to explain the public benefit of taking a small dollar store in a shopping center for the sole purpose of using that space to expand a big-box retailer.<sup>174</sup> The conceivable economic public benefit from the big-box retailer is negated by the simultaneous loss of the dollar store.<sup>175</sup>

Using blight removal would be equally problematic in most cases. Different jurisdictions define blight differently.<sup>176</sup> Generally, a shopping center is not considered blighted unless it has vacant units and run down facilities that are adverse to the public health, safety, or welfare.<sup>177</sup> Private commercial land owners are just as vulnerable to suspicious economic development transfers as homeowners. Demanding that a substantial public benefit be shown in these types of cases will eliminate naked private transfers.

### 3. *Taking More Land than Needed*

The most difficult cases are those that pass the first two prongs and require analysis under the third. As long as there is a substantial public benefit, any amount of land necessary to bring about that benefit is available for the taking. Problems arise when there is uncertainty regarding how much land is required to serve the public benefit. For example, a condemning authority may know that a monorail track needs to pass through a property, but the exact location depends on various unknown factors.<sup>178</sup>

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174. See *99 Cents Only Stores*, 237 F. Supp. 2d at 1128–29 (“[B]y Lancaster’s own admissions, it was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city’s boundaries.”).

175. If the proclaimed public benefit relates to the existence of a retail store, then the benefit cancels out when one perfectly viable retail store is replaced with another.

176. See generally George Lefcoe, *Redevelopment Takings After Kelo: What’s Blight Got to do with it?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 819–27 (2008).

177. See *99 Cents Only Stores*, 237 F. Supp. 2d at 1130 n.2; see also *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 171 (D.C. 2007); CAL. HEALTH & SAFETY CODE § 33030 (2009) (“[R]edevelopment [of blighted areas is] in the interest of the health, safety, and general welfare of the people of these communities and of the state.”).

178. See *HTK Mgmt, L.L.C. v. Seattle Popular Monorail Auth.*, 121 P.3d

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Situations like the monorail example require the court to inspect the authority's plan to determine whether the amount taken is reasonably necessary. If indications of bad faith are present, the court will provide the necessary injunctive relief under the circumstances. For example, if the condemning authority purposefully took more land than necessary and planned to use the excess land for profit, a court could reject the proposed taking as unconstitutional and instead issue a construction easement over the land that was actually needed for the proposed project. Thus, the state would receive the proper amount of land for the project, and the excess land would remain with the original property owner.

This third prong also eliminates takings that are not necessary to bring about the public benefit when other, feasible and less intrusive alternatives exist. An example would be public benefits associated with economic development, such as increased tax revenue and job creation. Instead of attracting the new businesses with property location, a municipality could make efforts to use less intrusive methods such as tax incentives. Thus, taking land should be the last resort to bring about a public benefit.

## CONCLUSION

This Note began by examining how takings through eminent domain are traditionally scrutinized using the rational basis test. Over time, the definition of "public use" under the Takings Clause has expanded to include takings for economic development. Since a private party always stands to benefit from such takings, these types of takings are particularly prone to abuse. Therefore, a form of intermediate scrutiny is necessary in certain cases to protect innocent property owners from unconstitutional takings of property. The public outcry following the *Kelo* case highlights how these takings can affect even the most unsuspecting property owners.

Through analyzing Justice Kennedy's concurring opinion in *Kelo* two forms of scrutiny emerge. What Kennedy referred to

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1166, 1170 (Wash. 2005) (allowing the monorail authority to condemn the plaintiff's entire property even though only one third was needed for the public transportation project and the authority had planned to sell the property to a private company at a substantial profit).

as “meaningful rational basis” places the burden of proof on the landowner to show that the taking was arbitrary. The court retains the burden of reviewing the entire record to determine whether the taking was arbitrary. However, as Justice Kennedy’s opinion in *Kelo* mentioned, a heightened form of scrutiny may be appropriate in some cases. Under such a standard, the burden would shift to the government to prove a public benefit. Finally, the proposed three-prong test is necessary to analyze the government’s compliance with the takings clause.

Property owners should be protected from politically motivated takings. Using intermediate judicial scrutiny in certain types of economic development cases—those with suspicious transfers, in which procedures have been used that are prone to abuse, or when the purported benefits are trivial or implausible—should help to achieve this goal. Applying heightened scrutiny in such cases will force a condemning authority to demonstrate a substantial public benefit and that the taking is necessary to bring about that benefit. Such scrutiny encourages comprehensive planning and significantly reduces suspicious property transfers with “incidental” public benefits.

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