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HOW DO YOU SOLVE A PROBLEM LIKE IN *KELO*?

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I. INTRODUCTION

In one of the most controversial decisions by the United States Supreme Court in 2005,[1] the majority of the Court in *Kelo v. City of New London*[2] ruled that the city of New London's condemnation of certain private property to facilitate an economic development plan for the city satisfied the "public use" requirement of the Fifth Amendment of the U.S. Constitution. The combination of three factors alarmed the dissenting members

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1. *See, e.g.*, Eduardo M. Pen, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2974 (2006). As Pen reports:

> The public reaction to the U.S. Supreme Court's *Kelo* decision permitting the exercise of eminent domain for economic development was swift and virtually unanimous. Polling data collected in the weeks following the decision measured public opposition to the decision at approximately ninety percent. People are serious about protecting their homes against eminent domain, and the broadly shared view of the private home as a castle plays no small role in that phenomenon.

Id. See also, e.g., Randy J. Bates, II, *What's the Use? The Court Takes a Stance on the Public Use Doctrine in* Kelo v. City of New London, 57 MERCER L. REV. 689, 710-11 (2006) (showing intense disdain for the *Kelo* case by the states and their legislatures and also finding that predictions of significant implications of the *Kelo* case on the poor and less-fortunate are coming true and will disproportionately affect them in the future). Moreover, the case does little to help guide state courts in deciding future decisions until a future takings case is decided because "[o]nce . . . lawsuits arrive in a state court with plaintiffs screaming 'impermissible takings,' the state courts, as Justice O'Connor's dissent warns, will have no guidance from the Court on how to conduct an inquiry into whether the taking is a permissible one or not. Therefore, legal chaos may ensue in state courts until the Supreme Court clarifies or overrules *Kelo*." *Id.* at 712 (footnotes omitted).

2. 125 S. Ct. 2655, 2669 (2005).

of the Court to the point that they considered the case to be a strong repudiation of property rights. First, the condemned land would eventually be deeded to private entities that would make uses of the property not generally open to the public.[3] Second, the purpose of the condemnation was not to prevent a "harmful" use of property.[4] Third, in light of the deferential position the Court had previously taken when ruling on whether a specific taking satisfies the "public use" requirement, Justice O'Connor in her dissent[5] concluded that following the *Kelo* decision, "[t]he specter of condemnation hangs over all property."[6] O'Connor argued that under her reading of the majority's reasoning, any transfer of property which leads to a more productive use of the property will pass the public use test.[7] In addition to this assault on private property rights, Justice O'Connor sounded an alarm over the unjust possibility that, after *Kelo,* those private parties with fewer resources are more likely to lose their property to private parties with more resources.[8] Justice Thomas, in a separate dissenting opinion, raised this point in terms of its impact on African-Americans and the elderly.[9] He pointed to statistics that show that beginning in the 1950s, after the *Berman* case,[10] cities which have used their taking power to promote economic development have done so in a manner that disproportionately impacts the private property rights of African-Americans and the elderly.[11]

This Article first addresses whether the dissent's and the public's understanding of the case, that a city can now condemn private property anytime the city plans to deed the property to another private property owner who will have a more economically productive use of the property, is a correct reading of the majority opinion. The Article focuses on some of the dicta in Justice Steven's majority opinion and in Justice Kennedy's concurring opinion to dispute this understanding of the case.

This Article then argues that the deferential approach relating to the legislative judgment of public use taken by the U.S. Supreme Court in the *Berman*[12] and *Hawaii Housing Authority v. Midkiff*[13] cases, which the Court relied upon in the *Kelo* case, lacks

3. *Id.* at 2681-82.
4. *Id.* at 2676.
5. *Id.* at 2671 (joined by late Chief Justice Rehnquist, and Justices Scalia, and Thomas).
6. *Id.* at 2676.
7. *Id.*
8. *Id.* at 2677.
9. *Id.*at 2687.
10. Berman v. Parker, 348 U.S. 26 (1954).
11. *Kelo*, 125 S. Ct. at 2686-87.
12. 348 U.S. 26.
13. 467 U.S. 229 (1984).

case law support in the context of "non-traditional" takings.[14] The Article scrutinizes each of the cases that the courts in *Berman* and *Midkiff* cited to for support for extreme judicial deference to a legislative judgment of public use and demonstrates that none of the cases cited to in support for this dicta actually provide support for applying such a deferential approach in the context of a "non-traditional taking."[15]

The Article then provides a close examination of the facts in *Midkiff* as an example of the pitfalls with applying a deferential approach to a legislative judgment on the issue of what is a public use, especially in the context of a non-traditional taking. The Article argues that if the Hawaii Housing Authority in *Midkiff* had been required to provide evidence of the public benefit in that case, the court would have discovered that the condemnations were not actually achieving a benefit to the public through an end to "oligopoly" as asserted by the governmental authority, but instead benefiting wealthy tenants at the expense of charitable public trust landlords.[16]

This Article then argues that with non-traditional takings there is a greater likelihood of abuse of process than with traditional takings and that courts should more closely scrutinize such non-traditional takings. The Article points out that there already exist two recent Supreme Court precedents for applying a closer scrutiny of governmental actions that impinge upon property rights (*Nollan v. California Coastal Commission*[17] and *Dolan v. City of Tigard*[18]) when, due to the context of the governmental action, the action is more susceptible to abuse.[19] The Article also argues that this closer scrutiny in the context of any private-to-private transfer is a better way to protect the fundamental right to security in one's private property, while at the same time allowing governmental entities to engage in

14. *See infra* Part III.
15. *Id.*
16. *Id.*
17. 483 U.S. 825 (1987).
18. 512 U.S. 374 (1994).
19. The U.S. Supreme Court in *Nollan* required that there be an "essential nexus" between the alleged public interest asserted by the government and the condition imposed on the property owner to obtain a permit because in this context "there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan*, 483 U.S. at 837; *see also Dolan*, 512 U.S. at 414 (requiring that the city provide evidence of a rough proportionality between the exaction required by the city and the projected impact of the property owner's planned development requiring a permit). In both cases this higher level of scrutiny came about because the court viewed the action to be more susceptible to abuse in part because such actions are more "adjudicatory" in nature than legislative and therefore owed less deference than in the context of a comprehensive zoning ordinance. *Id.* at 391.

important public benefit projects, than the "public harm" limitation approach proposed by Justice O'Connor in her dissent.

The Article concludes that to restore the constitutional system of checks and balances, the level of judicial scrutiny of the public use requirement should depend upon the different contexts of the taking, and articulates three different categories of takings and the appropriate level of judicial scrutiny and legislative burdens for each category. Under a category one taking (a "traditional taking" where the government will own the land taken, the land taken will be open to the public as a matter of right, or certain specialized traditional takings)[20] it will be presumed that the taking satisfies the public use requirement, but the presumption can be rebutted by evidence of bad faith, abuse of process or pretext. Under a category two taking (a non-traditional taking where a private party will own the land taken), the government has the burden to prove with substantial evidence that the public benefit is likely to occur, and that the taking is reasonably necessary to achieve the public benefit (i.e. that there are no other reasonable alternatives to accomplishing this objective). This second test approaches an intermediate level of scrutiny because of the higher level of potential for abuse in a category two taking than with a category one taking. A category three taking (either a category one or category two taking, but where the land taken is the property owner's home) would be treated at an even higher level of scrutiny than a category two taking because when a person loses her home, the nature of the property interest lost is often more fundamental than the pure economic loss typically suffered when other property is taken and because in this context the uncompensated, subjective value lost can be very high. Consequently, under a category three taking, the government must demonstrate that an important public benefit is being served through the taking of a person's home, determined based upon the government providing evidence that there is a "net social benefit" from the taking.[21]

II. CAN A CITY NOW CONDEMN ANY PROPERTY IF THE CITY MERELY SHOWS THAT THE NEW USE OF THE PROPERTY WILL INCREASE THE VALUE OF THE PROPERTY?

Some critics of the *Kelo* decision have argued that in light of

20. A specialized traditional taking is one where the government enjoys a presumption of a public benefit, but a proposed taking will be invalidated if the party challenging it can show that the asserted public benefit from the taking is so speculative that it is illusory, or provide evidence that the real reason for the taking is to confer a private benefit rather than a public benefit. *See infra* Part IV.

21. *See infra* Part VI.

this case it would be possible to condemn Justice Souter's 200 year old farmhouse in Weare, New Hampshire and to replace it with a luxury hotel even when the purpose of the taking is simply to benefit the developer of the hotel or out of malice towards Justice Souter for joining the majority opinion in *Kelo*.[22] This argument builds on Justice O'Connor's interpretation of the majority opinion in *Kelo* that nothing would really stop a city from condemning a private property owner's home in order to transfer it to another private property owner who will use it for a more profitable use since it can be claimed that due to the increase in tax revenues the public is benefited, and thus the public use requirement would be satisfied. But would such a forced transfer of private property be upheld in light of the majority ruling in *Kelo*? The answer is "no."[23]

Justice Stevens emphasized in his majority opinion that to be valid, the transfer of the private property to another private property owner based on the argument of public benefit must be done in the context of an "integrated development plan."[24] Any transfer to a private property owner made without such an integrated development plan would "raise a suspicion that a

22. *See, e.g.*, Peter J. Smith, *Understanding 'Kelo': Why Justice Souter Should be Praised*, THE UNION LEADER, August 3, 2005, at A9 (stating that the criticism to the *Kelo* decision has become personal and has caused some opponents of the decision to join in a campaign to seize Supreme Court Justice David H. Souter's farmhouse to build a luxury hotel in honor of the United States Constitution).

23. An interesting wrinkle that this hypothetical poses is that even under the O'Connor dissenting opinion, this abusive hypothetical taking might nevertheless satisfy the "public use" requirement since she defines public use to mean not only pubic ownership but also simply "use by the public." *Kelo*, 125 S. Ct. at 2675 (2005) (O'Conner, J., dissenting). The development of the property for a hotel would lead to a use by the public and therefore satisfy the public use test. This is the problem with relying solely upon a literal interpretation of public use as a means to prevent abusive takings (a topic further discussed *infra* Part III). Although the abusive taking for a hotel would not fly under Justice Thomas' interpretation of public use in his dissenting opinion, if the same taking occurred where the end use were a public park, then this apparently would be permitted. In his dissenting opinion, Justice Thomas states that the natural reading of the public use requirement is that the property is owned by the government after the taking or if the public has the *right* to use the property after the taking. *Id.* at 2670-71 (Thomas, J., dissenting). Since a hotel owner can generally exclude others from using the hotel unless doing so in a manner that violates federal, state, or local anti-discrimination laws, such use would not be a public use as Justice Thomas interprets that clause. But once it is determined by the court that after the taking the property would be owned by the government or the property would be subject to the public's right of use (the public park scenario), it would appear that even under Justice Thomas' dissenting opinion the taking would be upheld. *Id.*

24. *Id.* at 2666-67.

private purpose was afoot".[25] A condemnation of only one small piece of land to convey it to a private person or entity for the purpose of developing on it a single hotel, unless part of an integrated development plan, would be suspicious indeed, and based upon the dicta in the Stevens opinion a court would not find such a taking to be for a "public use."

In the majority opinion, Justice Stevens cites to two cases for the proposition that the governmental entity performing the taking must provide a "reasoned explanation" for the taking.[26] In the first of these decisions, *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[27] the court emphasized that notwithstanding judicial deference to the legislative determination of "public use," courts should scrutinize if the alleged public use is a pretext or valid. The court ruled that when there is evidence that the purpose of the taking is to appease a private property owner a court should enjoin such taking for failing to satisfy the public use requirement.[28] The second decision that Justice Stevens cited to, *City of Cincinnati v. Vester*,[29] similarly involved a court examining the real purpose of the condemnation. In *Vester*, the court noted that the lower courts in that case had concluded the real reason for the condemnation of more land than necessary for the public improvement was to resell the excess for a profit in the future to pay for the improvement, rather than the valid purposes the city asserted during litigation (such as providing for a suitably sized remaining property after the taking).[30]

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25. *Id.*

26. *Id.* at 2667.

27. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

28. *Id.* at 1125-27. In *99 Cents*, the redevelopment agency condemned certain land leased by 99 Cents Only Stores at the demand of a larger tenant, Costco, who threatened to relocate to another city if they were not able to expand into the space leased by 99 Cents. The redevelopment agency attempted to condemn the land leased by 99 Cents in order to prevent future blight, which they feared would occur if Costco relocated. *Id.* at 1126-27. The court concluded that appeasing Costco is not a valid public purpose and that there was no statutory authority to condemn to prevent "future" blight. *Id.* at 1131.

29. 281 U.S. 439 (1930).

30. *Vester*, 281 U.S. at 444. The Court in *Vester* implied that the city may have been improperly motivated, as the plaintiffs alleged in their complaint "that the excess condemnation is 'a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement,' and that the properties were taken 'with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated.'" *Id.* at 443. The Court hints at impropriety when it states:

> [The] City's contention is so broad that it defeats itself. It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional

Applying these two cases that Justice Stevens cited with approval in the *Kelo* case to our hypothetical, it strongly appears that Justice Stevens would have invalidated a taking where the governmental entity failed to provide evidence of a valid purpose, and where the evidence to the contrary indicated a purpose that is private in nature or based on ill will towards the property owner. The need for the "reasoned explanation" of the purpose for the taking is particularly pressing in contexts where the end use is not clear on its face to be a "public use." As the court in *Vester* stated: "The importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed pubic improvement than in the case of the latter which might more clearly speak for itself."[31] This dicta suggests that courts should apply a higher level of scrutiny to the purpose behind the taking when the taking does not on its face involve a literal public use.[32] By citing with approval to these two cases on the need for a "reasoned explanation" for the taking, Justice Stevens strongly implies that if the alleged "public use" is in fact a pretext a court should enjoin the taking and that courts should more closely scrutinize the purpose of a taking when the taking does not involve a literal public use.

Justice Kennedy's concurring opinion expressly provides support for a court to rule that the hypothetical taking would not satisfy the "public use" requirement. Justice Kennedy notes that if it can be shown that the legislative intent was to favor a private property owner and that the public benefit was just a pretext, then the court should strike down the taking. "A court applying rational-basis review under the *Public Use Clause* should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . ."[33] In the hypothetical, if Justice Souter were to provide evidence that the real motivation for the taking of his home was out of malice towards him, or to prove a point about the *Kelo* case, or simply to benefit the hotel owner, then the court would strike down the taking. When Justice Kennedy joined in the majority opinion in *Kelo* (and he was the necessary fifth vote) he emphasized that he did so only because certain facts existed

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provision of Ohio, private property could not be taken for some independent and undisclosed public use. Either no definition of purpose is required in the case of excess condemnation, a view of the statute which cannot be entertained, or the purpose of the excess condemnation must be suitably defined. In this view, in the absence of such a definition, the appropriation must fail by reason of non-compliance with statutory authority.

Id. at 448.

31. *Id.* at 447

32. *Id.*

33. *Kelo*, 125 S. Ct. at 2699 (Kennedy, J., concurring).

which negated the appearance of a pretextual public benefit. "Here, the trial court conducted a careful and extensive inquiry into 'whether, in fact, the development plan is of primary benefit to . . . the developer . . . and private businesses which may eventually locate in the plan area . . . , and in that regard, only of incidental benefit to the city.'"[34]

Justice Kennedy pointed to several factors that existed in the *Kelo* case that led to his joining in the majority opinion, but noted that in the absence of these factors a closer scrutiny of the taking would be in order.

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in Berman or Midkiff might be appropriate for a more narrowly drawn category of takings. *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* [emphasis added] under the *Public Use Clause* . . . . This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.[35]

Justice Kennedy identified five aspects of the *Kelo* case to treat it in the same deferential manner as the court treated the takings in *Berman* and *Midkiff*, all or most of which would likely be absent in the hypothetical: (1) a taking occurring in the context of a comprehensive development plan; (2) the plan was intended to address a serious city-wide depression; (3) the projected economic benefits of the project cannot be characterized as *de minimus*; (4) the identity of most of the private beneficiaries were unknown at the time the city formulated its plans; and (5) the city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes.[36] In light of this, the city in our hypothetical would have to create a "comprehensive development plan" and that plan would have to be directed towards satisfying an important public benefit (such as addressing a serious city-wide depression) for a majority of the Court to apply the deferential approach to the challenged taking. Equally important, in Justice Kennedy's concurrence, the city would be required to create elaborate procedural requirements to allow review of the record and inquiry into the city's purposes. If the real purpose behind taking Justice Souter's house in the hypothetical was to benefit a hotel owner and the taking is not part of a genuine comprehensive development plan to address a

34. *Id.* at 2669 (emphasis added).
35. *Id.* at 2670 (internal citation omitted).
36. *Id.*

serious economic problem, the taking will not be upheld.

Finally, if the purpose of the taking is to harm Justice Souter and motivated by ill will towards him, then clearly the taking would be enjoined. Justice Stevens in *Kelo* also cited with approval to *Village of Willowbrook v. Olech*[37] in which the Court ruled that when a property owner is treated differently from other property owners (the city required a thirty-three foot easement in the case as a condition to connect the property owner's property to the city water supply, while requiring only a fifteen foot easement from other property owners) based on ill will rather than a rational basis, such action violates the Equal Protection Clause and will be struck down. The facts in *Olech* are similar to the facts in our hypothetical and as such the taking would be enjoined.

III. DO THE CASES CITED TO BY THE COURTS IN *BERMAN*, *MIDKIFF*, AND *KELO* REALLY SUPPORT JUDICIAL DEFERENCE TO LEGISLATIVE JUDGMENTS OF PUBLIC USE IN A NON-TRADITIONAL TAKING SETTING?

Perhaps the most problematic dicta from the *Kelo* case were those which articulated extreme deference to legislative judgments as to public use in a non-traditional taking context. The Court in *Kelo* stated: "'When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.'"[38] The Court in *Kelo* later stated: "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."[39] In support of this deferential approach, the Court cited to the *Berman* and *Midkiff* cases.[40]

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37. 528 U.S. 562, 564-65 (2000).

38. *Kelo*, 125 S. Ct. at 2667 (quoting *Midkiff*, 467 U.S. at 242 (1984)).

39. *Kelo*, 125 S. Ct. at 2668 (citing Berman v. Parker, 348 U.S. 26, 35-36 (1954)).

40. *Kelo*, 125 S. Ct. at 2660-61. In addition to *Berman* and *Midkiff*, the Court in *Kelo* cited to three other Supreme Court cases for a deferential approach, but these three cases themselves cited to and relied upon *Berman* and *Midkiff* to support their deferential dicta, *see* Hairston v. Danville & W. R. Co., 208 U.S. 598, 607 (1908) (stating, after the deferential language, "[w]e must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain"); National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 422 (1992) (involving a taking to benefit Amtrak, a private, for-profit corporation created by an Act of Congress to serve the public's transportation needs); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013-15 (1984) (finding that the publication of a trade secret

But, it is an interesting question whether the *Berman* and *Midkiff* cases themselves cite to case law that truly supports the application of this deference in the context of a "non-traditional" taking.[41] If the cases cited to by the Court in *Berman* and *Midkiff* do not support such a deferential approach in a non-traditional exercise of eminent domain, then the Court should re-examine the wisdom of this dicta and its application to future "non-traditional" takings.

There are four places in the *Berman* case where the Court articulates a deferential approach for courts to take towards a legislative judgment of what is for the public benefit or whether exercise of the eminent domain power is necessary to achieve the public purpose. In the first instance, the Court states:

> Subject to specific Constitutional limitations, when the Legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs.[42]

The Court cites to four cases in support of this statement.[43] In none of these cases, however, was the issue related to eminent domain. In the first case cited, *Block v. Hirsh*, the law at issue was a law permitting tenants to remain in possession beyond the term of their lease.[44] In the second case cited, *Olsen v. State of Nebraska*, the issue was whether a law prohibiting price fixing violated the due process clause.[45] In the third case, *Lincoln Federal labor Union No. 19129, A.F. of L. V. Northwestern Co.*, the issue was whether laws forbidding employers from entering into contract to exclude non-union members from employment were constitutional.[46] In the fourth case, *California State Auto. Asso. Inter-Insurance Bureau v. Maloney*, the issue was whether legislation requiring insurers to provide insurance to all persons eligible violated the Due Process Clause.[47]

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by the EPA to allow greater competition among producers can be a taking when interfering with distinct investment backed-expectations, but when compensated, would comply with the Fifth Amendment since the pro-competitive purpose is within the police powers of Congress).

41. *See infra* Part III.

42. Berman v. Parker, 348 U.S. 26, 32 (1954). (internal citation omitted).

43. Block v. Hirsh, 256 U.S. 135 (1921); Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); California State Auto. Ass'n. Inter-Insurance Bureau v. Maloney, 341 U.S. 105 (1951).

44. *Block*, 256 U.S. at 153.

45. *Olsen*, 313 U.S. at 243.

46. *Lincoln Federal Labor Union*, 335 U.S. at 529.

47. *California State Auto. Ass'n. Inter-Insurance Bureau*, 341 U.S. at 108.

The second place where *Berman* contains deferential language occurs immediately after the first statement quoted above and states: "This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[48] The Court in *Berman* then cites to two Supreme Court decisions for support of this assertion: *Old Dominion Land Co. v. U.S.*[49] and *United States ex rel. Tennessee Valley Authority v. Welch*.[50] *Old Dominion* did involve an exercise of eminent domain, however, the land taken would be owned by the federal government and was to be used for a quartermaster warehouse.[51] Consequently, although there is dicta in *Old Dominion* that courts should defer to legislative judgments,[52] because the case involves an exercise of eminent domain where the government will own the property after the taking rather than a private property, this case does not truly support judicial deference in the context of a taking where a private party will become the owner of the property after the taking. *Tennessee Valley Authority* also involved the exercise of eminent domain, but, as with *Old Dominion*, the government would own the real property after the taking, and the real property was to be used to create a dam.[53] Neither *Old Dominion* nor *Tennessee Valley Authority* provides support for judicial deference to a legislative judgment of public use in the context of a "non-traditional taking"[54] (and one more susceptible to abuse) where a private party ends up the owner of the property.

In the third place in *Berman* where the Court articulated a deferential approach for courts to take when reviewing the government's exercise of eminent domain, the Court stated: "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[55] In support of the statement not to independently scrutinize the "means" issue (i.e., whether the taking was necessary to achieve the public purpose), the Court in *Berman* cited to two Supreme Court cases. The first case, *Luxton v. North River Bridge Co*, involved the construction of a bridge between New York and New Jersey and granting control of the bridge to a private third party for construction and maintenance.[56]

48. *Berman*, 348 U.S. at 32.
49. 269 U.S. 55 (1925).
50. 327 U.S. 546 (1946).
51. *Old Dominion*, 269 U.S. at 63-64.
52. *Id.* at 66.
53. *Tennessee Valley Authority*, 327 U.S. at 548.
54. *See infra* Part III.
55. *Id.*
56. 153 U.S. 525 (1894).

Facilitating travel open to the public use as a matter of right is a traditional example of use of eminent domain, even when a private party is given control over construction and maintenance of the bridge and ultimate ownership.[57] Consequently, the *Luxton* case does not support the notion that courts should not scrutinize whether a taking is necessary when done in the context of a non-traditional taking setting where the potential for abuse of process is far greater. In the second case, *Highland v. Russell Car & Snow Plow Company*, the issue did not involve a direct taking of land, but instead whether an order of the President under the Lever Act fixing a maximum price on coal during World War I to ensure adequate food, fuel, and other resources necessary to prosecute the war violated the right to carry out private contract in respect of property under the due process clause of the Fifth and Fourteen Amendments.[58] Regulations such as these are quite distinguishable from a direct taking of land and do not support the notion that courts should not scrutinize the means chosen when those means relate to a direct taking of property in a non-traditional context.

The final dicta in *Berman* that articulates that courts should defer to a legislative judgment states: "Once the question of the pubic 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."[59] *Berman* cited to three cases as support for this statement. The first of these cases was *Shoemaker v. United States*, which involved a direct taking of land, but for the purpose of creating a public park, an example of a traditional exercise of eminent domain.[60] The second of these cases was the *Tennessee Valley Authority* case previously discussed, which involved creation of a dam by a governmental entity, and is also an example of a traditional exercise of eminent domain.[61] The third case was *United States v. Carmack* which involved a taking of land for use as a post-office, another example of a traditional exercise of eminent domain.[62] In sum, none of the cases cited by the Court in *Berman* provide support for courts to defer to a legislative judgment of the public benefit or necessity of the taking to achieve the public benefit in the context of a non-traditional taking.

The Court in *Kelo* also heavily relied upon the *Midkiff* case as

57. *Id.* at 529-30 (stating that Congress can build bridges to be used in interstate commerce either directly or by giving control to a corporation).
58. 279 U.S. 253, 262 (1929).
59. *Berman*, 348 U.S. at 35-36.
60. 147 U.S. 282, 297 (1893).
61. 327 U.S. at 548.
62. 329 U.S. 230, 247-48 (1946).

precedent for the position that courts should defer to legislative judgments of the public benefit and need for the taking.[63] There are four instances where the Court in *Midkiff* articulates this deferential approach. In the first instance, the Court in *Midkiff* stated, after citing to *Berman* for some of the judicial deference language described above, "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[64] It is unclear what this sentence really means and as some have pointed out, this can not mean literally what is seems to, because if it did then there would be no need to compensate for a forced taking of fee simple title if there were a legitimate police powers type public benefit to the taking.[65]

In the second instance, the court in *Midkiff* states: "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[66] In support of this statement the Court quoted *United States v. Gettysburg Electric R. Co.*, which involved a law to fund condemnations for the purpose of creating a national monument to memorialize the site where a civil war battle took place.[67] Taking land to create a national memorial that presumably would be open to the public to view, although a more unusual use of land then say for a public library, should be considered to fall within a traditional type taking.

In the third instance, the Court in *Midkiff* states: "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause" and cites to four cases as support.[68] The first case *Midkiff* cites to is the *Berman* case previously discussed. The second case the Court in *Midkiff* cited to is *Rindge Co. v. Los Angeles*, which involved a taking of land for a public highway, a traditional exercise of eminent domain.[69] The third case cited to is *Block v.*

63. *See Kelo*, 125 S. Ct. at 2667.

64. *Midkiff*, 467 U.S. at 229, 240.

65. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV., 61, 72 (1986).

66. *Midkiff*, 467 U.S. at 241 (quoting United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).

67. 160 U.S. 668, 679-80 (1896). Also of interest regarding this case is the Court's statement that courts should be deferential to legislative judgments of public use because the government must pay full compensation for a taking, requiring the government to tax in order to pay for the taking, thus requiring the public support for the taking. *Id.* at 685. Today it is recognized that the fair market value limitation to "just compensation" does not fully compensate property owners for their full losses from a taking, *see infra* Part VI, calling the judicial deference standard into question even for a traditional taking.

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

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

Hirsh, which did not even involve a direct taking of land, but instead a statute that allowed tenants to remain in possession of their leased real estate after the expiration of the term of their lease under certain conditions.[70] The final case cited to in *Midkiff* is *Thompson v. Consolidated Gas Corp.*, which also did not involve a direct taking of property, but instead whether an order limiting the amount of gas production equaled a taking of property.[71]

In the fourth and final instance, the Court in *Midkiff* states "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . [the state] Legislature *rationally could have believed* that the [Act] would promote its objective."[72] The Court in *Midkiff* cited to three cases in support, but none involved an exercise of eminent domain. The first case cited, *Western & Southern Life Insu. Co. v. State Bd. Of Equalization*, involved the validity of a tax under the interstate commerce clause.[73] The second case cited, *Minnesota v. Clover Leaf Creamery Co.*, involved the validity of a ban on certain milk containers under the interstate commerce clause.[74] The third and last case cited, *Vance v. Bradley*, involved the validity of an act under an equal protection analysis.[75]

There were two cases cited to in *Berman* and one case in *Midkiff* that involved potentially non-traditional condemnations where a private entity, rather than the government, would own the land condemned, but these cases were not cited as support for a deferential review of public use. Instead, one case, *Puerto Rico v. Eastern Sugar Associates*,[76] was cited to by the Court in *Midkiff* as support for the conclusion that regulating the evils of oligopoly was a valid public purpose.[77] The other two cases, *Hunter v. Norfolk Redevelopment & Housing Authority* and *Gohld Realty Co. v. Hartford*,[78] were cited by the Court in *Berman* as support for the concept that it is proper to use the eminent domain power even over areas not blighted, but nearly blighted, in order to prevent the cycle of decay. Although these three cases permit a private-private forced transfer of land, they contain dicta which involves judicial scrutiny of the terms of the transfer to determine if there really is a public benefit to the taking.

The court in the *Hunter* case ruled that a condemnation by a housing authority to eliminate slum areas was a proper public use

70. Block v. Hirsh, 256 U.S. 135 (1921).
71. Thompson v. Consol. Gas Utilities Corp., 300 U.S. 55 (1937).
72. *Midkiff*, 467 U.S. at 242 (internal quotation marks omitted).
73. 451 U.S. 648, 652 (1981).
74. 449 U.S. 456, 458 (1981).
75. 440 U.S. 93, 94-95 (1979).
76. 156 F.2d 316 (1946).
77. *Midkiff*, 467 U.S. at 242.
78. Gohld Realty Co. v. Hartford, 104 A.2d 365 (Conn. 1954); Hunter v. Norfolk Redevelopment & Housing Authority, 78 S.E.2d 893 (Va. 1953).

even though the land was transferred to a private entity because, the court noted, the grant was subject to restrictions which were necessary to effectuate the purpose of the Act.[79] The court in the *Gohld Realty* case held that a redevelopment plan involving the forced taking of land and transferring the land to a private entity was constitutional, but also stated that it was up to the court to determine if the government's public use determination was unreasonable, in bad faith, or an abuse of power.[80] Finally, the court in the *Puerto Rico* case, using highly deferential dicta, ruled a law constitutional that facilitated forced private-to-private transfers to reduce the negative conditions on the public from the historically heavy reliance on the sugar industry in Puerto Rico.[81] However, the court did not abdicate judicial review and ultimately required that the legislative judgment on public use be reasonable rather than arbitrary in terms of the goal and the means chosen to achieve the goal.

> [I]t is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably believed by the Legislature to exist . . . . And thus, although we cannot substitute our estimate of the extent of the evils aimed at for that of the Insular Legislature, we are required to make some inquiry into the facts with reference to which the Legislature acted . . . .
>
> Our function is only to determine the reasonableness of the Legislature's belief in the existence of the evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence.[82]

In summary then, none of the cases cited to by the U.S. Supreme Court in the *Midkiff* and *Berman* cases (which in turn were relied upon by the Supreme Court in the *Kelo* case) provide support for extreme judicial deference to a legislative judgment in a non-traditional taking. Although there were three cases among the group cited to in *Berman* and *Midkiff* where the Court ruled that a private-private transfer did not violate the public use requirement, the court in each of these cases advocated a judicial role in determining whether the legislative judgment regarding the public benefit was reasonable. Of the remaining cases that did involve a direct exercise of the eminent domain power, the land taken was ultimately owned by a public entity or created a use that was open to the public and non-commercial in nature. Such takings are examples of a traditional exercise of eminent domain that are less

79. *Hunter*, 78 S.E.2d at 901.
80. *Gohld Realty Co.*, 104 A.2d at 371.
81. 156 F.2d 316.
82. *Id.* at 324 (footnote and internal citation and quotation marks omitted).

likely to be abused and therefore deference to a legislative determination makes more sense in that context than when the context of the taking makes it more likely to be abused such as in a non-traditional taking.

IV. HAWAII HOUSING AUTHORITY V. MIDKIFF — THE UNTOLD STORY AND A PRIME EXAMPLE OF THE NEED FOR CLOSER JUDICIAL SCRUTINY

In upholding the constitutionality of the Hawaii Land Reform Act of 1967, the Court in *Midkiff* emphasized the small number of private landholders that owned a very large percentage of the land in Hawaii, which the court characterized as a vestige of the feudal land tenure system.[83] The court then noted that the Hawaii Legislature concluded that this "concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[84] The Court further noted that "[u]nder the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority . . . to condemn the property on which they live"[85] and that the tenants under the Act could receive financing for their purchase of the fee title to the land they were living at (although the court also mentioned, without any explanation or elaboration, that in practice the tenants who had purchased the fee had done so by providing their own funds).[86] The court ruled that the exercise of the taking power in the Land Reform Act met the public use requirement because the Hawaii Legislature was attempting through the Act to reduce the social and economic evils of land oligopoly, which evils the legislature specifically identified as "artificial deterrents to the normal functioning of the State's residential land market . . . [which] forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes."[87] The Court then stated that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[88]

Based upon the version of the facts recited in the *Midkiff*

83. *Midkiff*, 467 U.S. at 232. *But see*, THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER 262-63 (Barbara A. Hastings ed., 1998) (remarking that land reform efforts in 1848 by the King and his advisors, which involved the transfer of fee simple title to land to three-quarters of the native Hawaiians for farming, did not work because of the difficulty with farming and a lack of understanding of what ownership meant and caused many of these new owners to sell their fee simple title).

84. *Midkiff*, 467 U.S. at 232.

85. *Id.* at 233.

86. *Id.* at 234.

87. *Id.* at 241.

88. *Id.*

case, one is under the impression that a small number of private landholders who owned vast amounts of land were taking advantage of the scarcity of available fee simple title to land to pocket huge financial rewards in the form of exorbitant rents, but that poor, working class, and middle class tenants would be benefited by the Land Reform Act by forcing the landlords to sell to these tenants the lands they were leasing to live on. The reality was far different.

First, although the court does not mention or address this, the "private" landholders, in particular the entity that challenged the Land Reform Act in the *Midkiff* case, was actually a charitable trust, the "Bishop Estate", established to benefit native Hawaiian school children.[89] The Bishop Estate will stated as its purpose: "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called, the Kamehameha Schools."[90] The establishment of these schools promoted the public good because "In socio-economic terms Hawaiian children were about the Islands' most underprivileged people, with among the most social problems."[91] Indeed, the Bishop Estate's property represented the bulk of the endowment of the Kamehameha Schools.[92] Since the income from the Bishop Estate benefited poor native Hawaiian school children, many viewed the Bishop Estate landholdings as in essence owned by native Hawaiians. "It would be a shame and disgrace for us here, who are really foreigners in Hawaii, to take from the Hawaiians what is justly theirs," stated one of the senators in opposition to the bill.[93] When the Land Reform Act was in its final senate debate, of the ninety spectators watching, forty were Hawaiians wearing red ribbons symbolizing opposition to the measure.[94] The brief of the Appellant, Bishop Estate, pointed out to the Court this charitable nature of the Bishop Estate,[95] but the Court did not consider this in its opinion and chose instead to defer to the legislative pronounced version of the facts.

The trustees of this charitable estate were reluctant to sell the land primarily because they believed that selling the land would be contrary to the intent of the trust, which was to educate

89. DAN BOYLAN & MICHAEL T. HOLMES, JOHN A. BURNS: THE MAN AND HIS TIMES 200 (2000) (the "Bishop Estate['s] property represented the bulk of the endowment of the Kamehameha Schools.").

90. TWIGG-SMITH, *supra* note 83, at 262-263.

91. GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS 428 (University of Hawaii Press 1990) (1985).

92. BOYLAN & HOLMES, *supra* note 89, at 200.

93. *Id.* at 201.

94. *Id.*

95. Brief for Appellees at 27, *Midkiff*, 467 U.S. 229 (Nos. 83-141, 83-236, 83-283).

native Hawaii children in perpetuity.[96] Indeed, a comparison of the fate of the Lunalilo Estate (set up to benefit elderly Hawaiian natives) with the fate of the Bishop Estate demonstrates the wisdom of the trustees of the Bishop Estate in holding onto the lands that were part of the estate. The Lunalilo Estate had a holding larger than the Bishop Estate,[97] but the trustees of the Lunalilo Estate sold off the lands, built a home for the elderly Hawaiians, and invested the remaining proceeds in other conservative investments.[98] As of 1998, only one Lunalilo Home still existed and the income of the trust barely met its needs; while the assets of the Bishop Estate were valued as high as $10 billion.[99] In addition, there was a sense that the true owners of the Bishop Estate were Hawaiian children, and there was a desire to ensure that native Hawaiians continue to have this interest in Hawaiian land:

> The beneficiaries of the Bishop Estate were ethnic Hawaiians. The Hawaiian community in general strongly opposed Bishop selling much or any of its land . . . . Hawaiians' statements in defense of the system tended to recall their peoples' loss of land in the nineteenth century . . . . We feel that pressure for land reform then was due more to a rising generation of Western investors than from the native Hawaiian himself. We cannot but feel that pressure for land reform now is due not to the poorer man — among who are a great many Hawaiians — but from a new generation of investors from East and West.[100]

Second, by the 1980s the economic status of the tenants who would benefit from the Land Reform Act had changed dramatically.

> When [the bills that would become the Land Reform Act] were being debated through the 1950s and 1960s, the lessees were an ethnically and politically diverse group of middle and working-class people, spread all around the developed parts of Oahu. By the mid-1980s, the geographic, economic, social and political characteristics of lessees were more constricted. As mentioned, about three-quarters of all lessees were now living on Bishop Estate land, mostly in relatively desirable areas in east and windward Oahu. The majority were middle and upper-class *haoles* and local-Asians, and the

96. TWIGG-SMITH, *supra* note 83, at 257. There were also federal income tax consequences that the charitable trusts wished to avoid and this explains why at one point the trusts worked with the legislature on how to structure a forced taking in order to prevent the imposition of capital gains taxes. *Midkiff*, 467 U.S. at 233.

97. TWIGG-SMITH, *supra* note 83, at 262-63.

98. *Id.*

99. *Id.*

100. COOPER & DAWS, *supra* note 91, at 428-29.

district where they lived tended to vote Republican.[101]

Indeed, the wealthy status of the tenants who had purchased the fee title to their leased land is underscored by the fact (one the Court only mentions in passing) that, in practice, none of the tenants needed to use the financing from the government available under the Land Reform Act to purchase fee title to the land they were leasing.[102] The Brief for the Appellees raised the point more than once that the tenants who were now to benefit from the Act were wealthy, yet the Court failed to address this.[103] "The beneficiaries of Chapter 516 are not the elderly or infirm, but the residents of Honolulu's upper-income neighborhoods who desire to acquire Trustee's fee title for their own private use and who have the economic means to do so."[104] Yet, the Court chose to ignore the evidence that the Appellee provided on these matters and to defer instead to the legislative pronouncements.

Third, although the Court relied in its ruling on the Hawaiian Legislature's conclusion that the land oligopoly had led to a scarcity of fee simple land (an evil associated with land oligopoly that was a key rationale for the Act), and although a finding of such land scarcity was a requirement under the original Land Reform Act, this requirement was dropped in a 1976 amendment to the Act.[105] The Court did not scrutinize the impact of this amendment on the Hawaii Legislature's stated public benefit from the Act, even though the Brief for the Appellee called the Court's attention to the fact that this requirement was no longer a part of the Act and that no such finding was required for the taking before them.[106] The brief also noted that 97% of the land statewide was zoned for non-urban, non-residential uses, that the state owned 34.5% of the land, and that the state had the authority to use public lands for residential purposes, but the state had generally chosen not to do so.[107] Indeed, when the Land Reform Act was first enacted, the Governor of Hawaii during this period, John A. Burns, did not enforce it because he believed that "zoning and tax measures were a better road to land reform."[108] If there was no scarcity of available fee simple title at the time of the taking, then what was the public benefit to forcing the sale of certain leased land?

Fourth, although the Act was characterized as assisting

101. *Id.* at 412.
102. *Midkiff*, 467 U.S. at 240.
103. Brief for Appellees, *supra* note 95, at 105 n. 169.
104. *Id.* at 113.
105. 1976 HAW. SESS. LAWS ACT ch. 242, § 2 (current version at HAW. REV. STAT. § 516-21 (2006)).
106. Brief for Appellees, *supra* note 95, at 35-36.
107. *Id.* at 112.
108. BOYLAN & HOLMES, *supra* note 89, at 235.

tenants living on this land to purchase fee simple title to the land, the Act was amended in 1978 to remove the requirement that the tenant-acquirer live in the tract to be condemned.[109] This amendment made it possible for wealthier tenant-speculators to take advantage of the Act.[110] The Brief for Appellee highlighted this fact to the Court, but, again, the Court, apparently based upon its observance of judicial deference, ignored it. If the tenant was not actually living on the land she was leasing, then the tenant is acting as much like an investor in the land as the landlord. The tenant could now as the new owner choose to lease the land they now owned at rents even higher than the charitable trusts were charging. This was because the Land Reform Act placed no restrictions on the use or alienation by a tenant turned fee simple titleholder under the Act, and the rent control laws that the Bishop Estate were subject to under other Hawaiian Legislation did not apply to these lands after they were condemned under the Land Reform Act.[111] If the Land Reform Act as amended now permitted wealthy, investor type tenants to force the charitable trusts to sell land to them, land previously used to benefit the least advantaged citizens of the state, what is the public benefit in this?

Both of these amendments destroyed what was supposed to be the essence of the public benefit aspects of the Act: to address land scarcity and social upheavals allegedly resulting from the lack of available fee simple title to lands. Had the Court more closely scrutinized the Act (by focusing on the amendments to the Act that took place prior to the takings at issue in the case before them) and the current facts (many of which were raised by the Appellee in its brief to the Court) the Court would have discovered that the "Land Reform Act" may have been a populist type reform in name, but operated far different in reality:

> What could in, say, 1960, have reasonably been called 'land reform' through application of a Maryland-type law, redistributing land away from the more fortunate to the less, had by the 1980s come in a way to look like the opposite—a fairly prosperous group securing for itself by leasehold conversion a useful economic benefit, and over the objections of the representatives of a socially deprived and oppressed group.[112]

The legislation which really served as a populist type land reform in Hawaii was the rent control law that was enacted in response to the sudden imposition of extremely high new rents in the mid-1970s as former long term leases (fifty-five year terms to conform

109. Brief for Appellees, *supra* note 95, at 36.
110. *Id.*
111. Midkiff v. Tom, 702 F.2d 788, 803 (9th Cir. 1983).
112. COOPER & DAWS, *supra* note 91, at 412-13.

with Federal Housing Administration requirements for leasehold loans) came due and were being renegotiated.[113] "Since the initial rent had been set in something of a buyers' market and at a time of relatively low land prices in Hawaii, by the early 1970s rents were very low in relation to market value. When renegotiated they increased dramatically."[114] In addition, landlords expected to recover the cost of "off site improvements" that they had made fifty-five years earlier in the form of the new rents they would negotiate.[115] The new rents were calculated as a percentage of the current fair market value of the real estate and when the Bishop Estate decided to use 4.28% of the market value of the land as the basis to calculate the new rents it led to increases of 1,000% from the rents set fifty-five years earlier, with rents on average in 1974 moving from $350-$400 per year to $5,000 per year.[116]

The rent control law imposed a ceiling on renegotiated rents so that the annual rent could not exceed four percent of the market value of the land. Although this figure seems not much better than the 4.28% charged by the Bishop Estate, even slight differences in the percentage would have a large impact on actual rents charged because due to an economic boom in Hawaii and an increase in demand for land, the land values had increased "hundreds of percent" since the leases were first negotiated fifty-five years earlier.[117] Even if the rent control law produced rents that some tenants on fixed incomes had difficulty paying financially (the tenants who had benefited from the below market rents for a long period also had emotional difficulty with paying such an increased rent since their states of mind "were fixed at the level of their old rent"),[118] it still more directly and better ensured that tenants could afford to remain in possession of their homes than did the forced sale law. This is because, as previously noted, by the 1980s it was mainly middle and upper income tenants who were seeking to force the sale of the land to themselves and they could then charge any rent on their newly acquired land if they decided to lease it.[119] In addition, the rent control law, through reducing the return that landowners could make from their land ownership (the rate of return on investments in real property outside of Hawaii according to the Frank Russell Property Index from 1977-1979 was eighteen percent) led many landowners to voluntarily sell their land in order to reinvest in more profitable investments. This wave of voluntary sales substantially increased

113. *Id.* at 419.
114. *Id.*
115. *Id.*
116. *Id.* at 420-21.
117. *Id.* at 421.
118. *Id.* at 425.
119. *Id.* at 428.

the number of fee simple title properties for sale, with most large landholders subject to the rent control laws selling their properties for better returns elsewhere, but the Bishop Estate still holding out since the beneficiaries of the estate were native Hawaiians and the trustees desired that native Hawaiians continue to be the owners of Hawaiian land.[120]

In light of the charitable nature of the Bishop Estate and the economic situation the Bishop Estate was operating under at the time of the renegotiation of these long-term leases, one author who wrote a book on land and power in Hawaii asks: "In proposing large rent increases, were the landlords, Bishop in particular, acting like cynical, gouging land barons as many of their lessees believed? Or were the landlords simply asking for their due, as determined by ordinary business standards, and what, in the case of Bishop, the trustees believed best for the Hawaiian children who were the estate's beneficiaries?"

Through a more close scrutiny of the facts in *Midkiff*, the Court would have discovered that the alleged public benefits from the forced takings of private property under the Land Reform Act as amended and as in operation in 1984 when the case was argued before the Court did not exist in reality. A powerful argument could be made that the public was more harmed by the Land Reform Act as amended than benefited by it. As such, the Court should have found that the Act as amended did not satisfy the public use requirement and was unconstitutional. Ironically, although the dicta from the *Midkiff* case provides case law support for judicial deference to a government's assertion of public benefit in a private-to-private transfer, a closer look at the facts in the *Midkiff* case provides a telling example of the problems with judicial deference in this more potentially abusive setting, and the importance of having courts more closely scrutinize the alleged public benefit when the government exercises its taking power in this setting.

V. *NOLLAN* AND *DOLAN* PROVIDE CONSTITUTIONAL PRECEDENTS FOR APPLYING A HIGHER LEVEL OF JUDICIAL SCRUTINY WHEN A GOVERNMENTAL ACTION OCCURS IN A CONTEXT WITH A HIGHER LIKELIHOOD OF ABUSE OF PROCESS

The real problem with the *Kelo* case is not that the majority failed to exclude from the concept of "public use" all takings directed towards economic development, but instead that the court applied the most deferential standard of review in the context of a taking which by its very nature (a private-to-private transfer) made the taking more "suspect" than in the more traditional taking for a public highway or public library. Justice Kennedy had

120. *Id.* at 421, 428, 435.

it right when he concluded that when the circumstances of the taking make the taking suspicious, courts should apply a less deferential scope of review ("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*").[121] But Justice Kennedy too narrowly applied the closer scrutiny rule he proposed. All takings of private property where the taken land is planned to ultimately be deeded to private persons or entities for a "non-traditional" purpose (whether for economic development, to build a hotel, or even to clear an area considered to be a "slum")[122] should be considered to have a higher potential for "impermissible favoritism" and abuse of power, which, consequently, should trigger a more demanding level of judicial scrutiny of the taking. Justice Kennedy was also correct when he identified several factors that made the takings in the *Kelo* case less suspicious. Among the key facts Justice Kennedy cited to were that the specific takings challenged were part of a comprehensive plan meant to address a substantial public issue (the economic depression in the city) in which most of the private parties who would end up owning the taken properties were not initially identified. Consequently, these are the sort of matters that a court should be more closely scrutinizing in the context of any taking where the taken property is being deeded to private entities for non-traditional purposes.

Indeed, there is Supreme Court precedent in the takings area for a higher level of scrutiny when due to the context of the governmental action there is a higher likelihood of abuse of process. The Supreme Court in *Nollan v. California Coastal Commission* rejected scrutinizing a specific governmental action on the basis of whether the action was merely rational, and instead, required a showing by the government that the requirement of an easement (in return for a permit to build a larger residence on ocean front property) bore an essential nexus to the alleged police power objective of the imposition.[123] The Court cited to *Penn Central*[124] for the rule that a regulation that abridges property rights must "substantially" advance a legitimate state interest and then stated:

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121. *Kelo*, 125 S. Ct. at 2670.

122. *See infra* Part VII. If, however, the transfer is to a private entity, in order for that entity to provide a service to the general public a forced sale is necessary to assemble the necessary land (as is the case with eminent domain for railroad tracks or utility lines), and should be considered a "traditional" taking, even though deeded to a private entity. *Id.*

123. 483 U.S. at 837 (1987).

124. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978).

> We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.[125]

Thus, *Nollan* stands for the proposition that courts should more closely scrutinize governmental actions, and require a higher burden for the government to meet when the governmental action affects property rights in circumstances where the governmental action is likely to be abused. While the heightened risk in the *Nollan* case was the situation of an exaction imposed as a condition to obtaining a building permit, one could argue that another example of a potential heightened risk is in the context of a private-to-private taking for a non-traditional purpose, which should also cause a heightened judicial scrutiny.

The Supreme Court went even further in a later case[126] than requiring an essential nexus in the context of exactions imposed as a condition to obtaining a building permit, but concluded that they had not needed to do so in *Nollan* because the government had failed in that case to even meet the essential nexus test. In *Nollan*, the governmental entity argued that the reason for requiring the public easement across Nollan's beach was that by increasing the size of the home on their property they were creating a psychological barrier to the public, preventing them from knowing there was a public beach just north and south of their property.[127] The court questioned if this was the real motive for the forced dedication and ruled that there was not an essential connection between the exaction and the alleged purpose for the exaction:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.[128]

The court concluded that the real motive for the easement requirement was the California Coastal Commission's desire to create a continuous strip of publicly accessible beach along the coast, which in fact might be in the public interest and a permissible goal, but not when imposed as a condition for obtaining a building permit.[129]

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125. *Nollan*, 483 U.S. at 841.
126. 512 U.S. 374.
127. 483 U.S. 825, 835.
128. *Id.* at 839.
129. *Id.* at 841-42.

Seven years later, in *Dolan v. City of Tigard*, the Court again addressed the higher level of scrutiny that courts should apply to a governmental action that affected property rights in the "heightened risk" context of an exaction required for a building permit.[130] In *Dolan*, the property owner desired to approximately double the size of her hardware store and increase the size of her parking lot.[131] The city was concerned with the impact her proposed changes would have on traffic and flooding (her property was located in a 100 hundred year floodplain and increasing the size of the parking lot would increase the amount of impervious surface area).[132] The city therefore required that she dedicate a portion of her land for a bicycle and pedestrian path and also required that she dedicate a portion of her land as a public greenway.[133] The Court ruled that there was an essential nexus between the increased size of the store, the increased traffic this would cause, and the imposition required of a bicycle and pedestrian path. However, the Court stated that this would not be the end of the analysis. The Court ruled that due to the context of this governmental regulation (that it was more adjudicatory in nature than legislative and that the city conditioned the permit not on a limitation of use but a deeding of a portion of the property) it was appropriate to apply a higher level of judicial scrutiny than it would apply in a more legislative type governmental regulation as exemplified in the *Euclid*,[134] *Pennsylvania Coal Co.*,[135] or *Agins*[136] cases.[137] In responding to Justice Steven's dissent criticizing the higher level of judicial scrutiny the majority of the Court was imposing, Justice Rehnquist, writing for the majority stated:

> He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights . . . . Here by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.[138]

In applying the higher level of scrutiny to the bicycle and pedestrian easement, the Court stated that although the city estimated that the proposed development would generate roughly

130. *Dolan*, 512 U.S. at 374.
131. *Id.* at 379.
132. *Id.*
133. *Id.* at 380.
134. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
135. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
136. Agins v. Tiburon, 447 U.S. 255, 260-261 (1980).
137. *Dolan*, 512 U.S. at 389-90.
138. *Id.* at 391 n.8.

435 additional trips per day,

> on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could" offset some of the traffic demand and lessen the increase in traffic congestion.[139]

In ultimately concluding that these findings were not constitutionally sufficient, the Court stated: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[140] Quoting with approval from the dissenting justice of the Oregon Supreme Court with respect to this case, the Court emphasized that a finding that the easement "could" offset some of the traffic demand "is a far cry from a finding that the bicycle pathway system *will* or is *likely to*, offset some of the traffic demand."[141]

The *Nollan* and *Dolan* cases provide recent Supreme Court precedent for courts to more closely scrutinize governmental actions affecting private property when the governmental action is taken in a context where there is a heightened risk of abuse. In those cases the heightened risk was due to the exaction context; but when the government uses its taking power in a manner intended for the property to end up in the hands of another private property owner, this should also be considered a context with a heightened risk for abuse, equally deserving closer judicial scrutiny to ensure the government is not asserting public benefits that are a mere pretext or too speculative in nature.

As previously discussed, Justice O'Connor, in her dissent in *Kelo*, tried to prevent legislative abuse of the taking power by interpreting "public use" to mean either a literal public use or a prevention of harm.[142] However, this judicial interpretation of public use is problematic for three reasons. First, it is based on a reading of the *Berman* case that only slum properties can be condemned for development by a private entity (i.e., the prevention of harm situation), but in *Berman* some of the land so taken was in fact not in poor condition but in the vicinity of such properties. Second, oftentimes, a given project could be characterized either as promoting the general welfare or as preventing a public harm, making the distinction not a solid basis

139. *Id.* at 387, 395.
140. *Id.* at 395-96.
141. *Id.* at 394.
142. *Kelo*, 545 U.S. at 469.

for distinguishing permissible from impermissible takings.[143] Finally, simply applying a literal interpretation of public use is unwise because it is both over-inclusive and under-inclusive. It is over-inclusive because it would prevent some traditional or otherwise important public benefit type takings, such as the use of eminent domain to lay utility lines. It is also under-inclusive because even a literal public use — where the public has the right to use of the property taken — could serve as a pretext for a taking really designed to benefit a private party.[144]

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143. Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 33 (1987). Large states:

> [The] test is hard to apply to a wide range of borderline cases. If the state wants someone's land for an affirmative benefit (a new post office, a highway, or a dam and reservoir), there is a new public benefit and the state must pay for the land taken. This is just the old physical invasion standard; in such a case, the land taken must be paid for even if the landowner retains valuable adjoining land . . . [for example] how is [the] benefit distinguished from detriment in preservation cases? . . . The state could be securing a benefit for the public (access to an unspoiled coast or shoreline) or the state could merely be preventing a detriment (by prohibiting the landowner from destroying fish breeding grounds or causing increased flooding). A concept this slippery may not be very useful . . . . When Ernst Freund first coined the phrase in the late nineteenth century, the benefit/detriment concept may have been workable because local governments were doing easily classifiable things, like building public works and stopping public nuisances. The concept simply does not mesh as well with broad, preservation-oriented laws and is subject to wide-ranging abuse by aggressive local governments.

Id.; *see also* David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 660 (1995). Dana states that,

> [o]utside of a relatively narrow set of cases, however, there is likely to be a lack of consensus as to whether a restricted activity would be "harmful" to the public. The judicial opinions offer no guidance as to how to distinguish between public harm and public benefit in such cases. Conclusory assertions, presumably reflecting the courts' normative assessments of the activity at issue and its likely societal effects, are all that are offered.

Id.; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022 (1992) (declaring that the comparison is subjective, specifically that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder"). Furthermore, the test is ridiculous because any explanation can be rationalized by the courts to give a positive takings result, thus "[s]ince such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. . . . [T]he Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Id.* at 1025.

144. *See supra* Part II.

VI. RESTORING THE SYSTEM OF CHECKS AND BALANCES THROUGH A CATEGORY BASED JUDICIAL SCRUTINY OF THE PUBLIC USE DETERMINATION

In order to restore our constitutional system of checks and balances regarding the eminent domain power,[145] the Supreme Court should acknowledge that the Court's dicta of extreme judicial deference towards legislative judgments of public use in the *Berman* and *Midkiff* cases in the context of "non-traditional" takings (defined below) was in error and no longer applies. The precise level of heightened scrutiny courts need to engage in should be based upon the context of the specific taking and the resulting potential for abuse of process, and potential degree of harm to property rights from such taking associated with each context. This article proposes three categories of takings and a specific level of appropriate judicial review for each category, with an eye towards balancing the legislative branch's traditional power to enact laws that promote the general welfare with the court's traditional role of invalidating legislation that constitutes an abuse of process or that unduly infringes upon "fundamental" rights.

The first category is a "traditional" taking situation. This category is defined as the taking of land in order to create an improvement that is owned by the government (like the White House), or open to the public as a matter of right (like a public park), or to assemble the necessary land in order for a highly regulated private entity to provide a service to the general public (such as a railroad or utility company). The level of judicial review for a traditional category one taking would be the most deferential of the three categories, with the government enjoying an initial presumption that the taking is for a public use because either there is a literal public use (i.e., the government would own the taken land or the land would be open to the public as a matter of right) or there is a necessary taking for a purpose that directly benefits the public generally (i.e., land assemblage necessary to operate a railroad or utilities). When the taking occurs in this traditional context, an abuse of process, where the taking is not really designed to benefit the public, but instead to confer a special benefit to a private party, is unlikely to arise. Although part of the traditional taking category includes possible transfers to private parties where the end use is not open to the public as a matter of right, when the private party is providing a service to the general public and is highly regulated, these two conditions assist in

145. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). Such an admission of error would be similar to its acknowledgment of error in *Lingle* regarding application of the dicta "substantially advance a legitimate state interest" in the context of a regulatory taking. *Id.*

linking the taking to a public benefit.[146] In addition, due to the problematic land assemblage issue (and holdout problem) inherent in a taking of long stretches of land for utilities or a railroad line, the taking becomes more of a necessity, justifying legislative action to compel the sale.[147]

Notwithstanding the inherent safeguards in a category one taking, there is still the possibility of abuse of process even for this type of taking, and, consequently, courts should engage, with respect to this category of taking, in a robust review of any evidence that the taking was a pretext for another purpose, was in bad faith, or that it failed to comply with due process procedural requirements such as notice and a hearing.[148] If such evidence is presented by the party challenging the taking, the government would have to rebut this evidence or the court should invalidate the taking. Unfortunately, even though there is a long line of Supreme Court cases stating that courts should invalidate a taking that is not really for a public benefit because the asserted benefit is a pretext,[149] the dicta in *Kelo* that all the government must show is a "conceivable" public benefit can undermine a property owner's ability to show that the public benefit is so speculative that the alleged public benefit is a pretext and abuse of process.[150]

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146. *See* Olga V. Kotlyarevskaya, *"Public Use" Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development*, 5 CONN. PUB. INT. L.J. 197, 222 (2006) (declaring that takings where title is deeded to a utility company or railroad company, which are heavily regulated industries, provide a safeguard that the public purpose of the taking will continue to be served after the sale to the private entity occurs).

147. *See generally* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). Merrill argues that such land assemblage takings arise in what he calls "thin markets" where voluntary negotiations are likely to be unsuccessful and where governmental action under the Fifth Amendment power is appropriate. *Id.* at 65. Merrill identifies four other situations that create a "thin market": expansion of an existing facility, landlocked property, where unique property is needed, or where specific capital has already been invested in the property, but since these do not necessarily involve uses that generally benefit the public, as utilities and railroad lines do, they are not included in this proposal as a category one traditional taking. *Id.* at 98-100.

148. The requirement of notice and a hearing can provide a measure of transparency to the process, especially if a public hearing takes place when a large number of property owners land is proposed to be taken, which can help to safeguard against improper takings. *See also* John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 801-02 (2006) (proposing that at the hearing the governmental agency proposing the taking would have to report on the displacement effect from the taking, would accept and respond to public comments prior to the taking, and would present findings that no feasible alternatives exist prior to the taking).

149. *See, e.g.*, Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

150. The idea that the government need only show a conceivable public

Some state courts are already engaged in this kind of vigorous review and have invalidated takings on evidence that the alleged public benefit was a pretext, based upon the highly speculative nature of the asserted public benefit or other evidence of bad faith. For example, the Illinois Supreme Court invalidated a proposed taking to allow a racetrack to expand its parking lot by looking at the motive and effects of the taking.[151] The court in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, noted that the development authority authorized by a state statute to engage in condemnations for economic development (SWIDA) had failed to conduct a thorough study regarding the parking situation and its economic impact for the region, but instead had simply responded to the desires of a business owner.[152] "[I]t is incumbent upon us to question SWIDA's findings as to the parking situation at Gateway and determine whether the true beneficiaries of this taking are private beneficiaries and not the public."[153] The court also noted that Gateway sought to expand its parking through a forced sale of the neighbor's property rather than build a parking garage structure on its existing property since the forced expansion would allow Gateway to achieve its goals more swiftly and profitably.[154] Although the court acknowledged that the expansion of parking, which was estimated to lead to an expansion of revenue between thirteen and fourteen million dollars per year, "could potentially trickle down and bring corresponding revenue increases to the region," the court ruled that "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government . . . for purely private purposes."[155] Indeed, according to the court, SWIDA would advertise that it would condemn land for a fee at the request of private property owners, rather than initiate a taking based upon SWIDA's own study of the economic needs of a region.[156]

A second, famous, example of a state court invalidating a proposed taking based upon abuse of process is *Casino Reinvestment Development Authority v. Banin*[157] In this case, the

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benefit probably comes from the line of cases relating to ordinary police power type regulations affecting economic and business interests where the lax rational relation to a legitimate interest test applies. This test, especially the "conceivable" language part, is incompatible with the Court's role in ensuring that the "public use" requirement in the Constitution is safeguarded.

151. Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002).

152. *Id.* at 11.

153. *Id.* at 10.

154. *Id.* at 10-11.

155. *Id.*

156. *Id.* at 11.

157. 727 A.2d 102 (N.J. Super. Ct. 1998).

abuse of process was based on the fact that the alleged public benefit (the need for a parking structure in the area) from the taking was a pretext and not the real purpose of the taking (to benefit Donald Trump). The court was particularly concerned by the fact that none of the development agreements that Trump entered into required him to maintain the parking facility for a specific period of time, making the asserted public benefit "illusory" and the claimed public benefit a "pretext."[158] For the court, based on prior precedent, "The controlling question [wa]s whether the paramount reason for taking land is in the public interest," and "[w]here . . . a condemnation is commenced for an apparently valid pubic purpose, but the real purpose is otherwise, the condemnation may be set aside."[159] In determining the real purpose of a taking, the court ruled that one should assess the consequences and effects of a proposed taking: "If the consequences and effects of condemning . . . are simply to allow for the acquisition and assemblage of land by Trump for future private development purposes then the asserted public benefits are illusory."[160]

In a third case, *City of Springfield v. Dreison Investments, Inc.*, the court struck down a proposed taking for a baseball stadium for two reasons: the lack of standards in place to safeguard the public purposes for the taking and evidence that the city, and its mayor, had acted in bad faith.[161] The court noted that under the terms of the lease of the stadium there was a potential for a windfall to the developer since the lease did not prohibit the private developer from assigning the lease to persons operating the team for profit and failed to provide for any money to be paid to the city that paid for the stadium.[162] The court also noted that there were misrepresentations in the grant applications for public funds to benefit a private non-profit corporation and no statement of purpose in the order for the taking.[163] The court also closely scrutinized the actions of the mayor and concluded that, over time, the mayor's actions ceased to be directed towards a public benefit.[164]

When courts closely scrutinize evidence of pretext and abuse of process, this does not constitute improper "second guessing" of legislative judgments. Instead, this type of review restores the

158. *Id.* at 103, 105.
159. *Id.* at 103 (citations omitted).
160. *Id.* at 105 (citation omitted).
161. City of Springfield v. Dreison Investments, Inc., 1999-1318, 99-1230, 00-0014, 2000 Mass. Super. LEXIS 131 (Mass. Super. Ct. 2000).
162. *Id.* at *125.
163. *Id.* at *145.
164. *Id.* at *141-42.

system of checks and balances between the branches of government essential to the American constitutional system. Conversely, when courts follow the errant language on judicial deference used in the *Berman* and *Midkiff* cases and fail to closely scrutinize whether the alleged public benefit is a pretext (based upon evidence of bad faith, abuse of process, or a highly speculative public benefit) this system of checks and balances is lost.

In a category two taking, unlike a traditional taking, the government plans that the property taken will be owned by a private person or entity that is not heavily regulated as to its use of the property (and there might not be a land assemblage reason to force a sale), but where it is alleged the taking will create an indirect benefit to the general public (such as a taking for the purpose of achieving urban renewal/economic development). In this setting, the issue of public benefit is less clear than in a traditional category one taking, and the potential for abuse of process far higher. Consequently, the scope of judicial review for a category two taking should be higher than for a category one taking.

First, the government should be required to show that the taking of the property is "necessary" and that there are no other reasonable alternative ways to achieve the indirect pubic benefit asserted than through the exercise of the takings power. Indeed, requiring the government to show how this taking is necessary is in essence turning the category two taking into one that more resembles a category one taking where traditionally such a necessity does exist, and served as the basis for the historical use of the takings clause in those situations. When James Madison drafted the Fifth Amendment, the clause originally required not only a public use and just compensation, but also that the taking be "necessary."[165]

Second, the burden of proof should be on the government to also provide evidence that the asserted public benefit for the taking is "likely to occur" rather than speculative in order to better satisfy the public benefit requirement. If the asserted public benefit is not likely to occur, then it is more likely that the taking is a pretext and abuse of process where a private party is benefited by the taking rather than the public. One key factor in determining whether the asserted public benefit is likely to occur is whether the new contemplated use by the private party is

165. *See, e.g.*, Handley v. Cook, 252 S.E.2d 147, 153 (W. Va. 1979) (stating the ideas of "just compensation" and fair use were contemplated by James Madison, but that these ideas are traceable back to the equitable judicial policies of the Roman Empire in the second century B.C and the Napoleonic Code).

required to continue for a specified period after the taking occurs. Several state courts have adopted this line of inquiry when determining if an indirect public benefit satisfies the "public use" requirement.[166] In addition, picking up on the dicta in the majority and concurring opinions in *Kelo*, and expanding upon it as the court did in *Southwestern Illinois Development Authority*, the governmental agency should be required to conduct a thorough study of the proposed economic impact from the project, and the study should provide concrete evidence that the asserted public benefit is not only "conceivable" (a major flaw with the holding in *Kelo*), but instead is "likely to occur." As previously discussed, the Supreme Court in *Dolan* has already required the government in the context of imposing an exaction to first engage in studies that provide evidence that the alleged benefit from the exaction "will or is likely" to occur rather than "might" occur. The government should be similarly required to provide evidence that the alleged public benefit in the context of a category two taking will or is likely to occur.[167]

When the government attempts to forcibly take a person's dwelling in either a category one or category two taking, such taking will need to be subject to an even higher level of judicial review and converted to a category three taking. This is because more is lost than income when a home is taken. A person's interest in her home, especially a home lived in for many years, is inextricably linked to the person's identity, community, emotional well being, security, and educational opportunities.[168] Due to the more fundamental nature of an ownership interest in a home as contrasted with ownership of other types of real property,[169] and the fact that homeowners sometimes experience profound subjective value in their homes that are not currently compensated for under the "just compensation" clause,[170] the

166. *See, e.g.*, Wayne v. Hathcock, 684 N.W.2d 765, 782 (Mich. 2004) (the second category of permitted taking is one where a private entity remains accountable to the public to ensure that the asserted public benefit from the taking continues after the transfer of ownership through a mechanism in place to keep the uses desired in place); Springfield v. Dreison Investments, Inc., Nos. 19991318, 991230, 000014, 2000 WL 782971 (Mass Super. Ct., Feb. 25, 2000) (land taken for baseball stadium deemed not to be primarily for public benefit in part because there were no safeguards in place to ensure how the taken land would actually be used after the taking).

167. *Dolan*, 512 U.S. at 374.

168. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (stating a home is not fungible and has been treated with special protections in the U.S. Constitution regarding search and seizure laws, and by state legislation regarding homestead laws, and city rent control ordinances).

169. *Id.*

170. Fee, *supra* note 148, at 794 (proposing that compensation for a homeowner's "reasonable" subjective value in her home should be a formula based upon objective fair market value plus two percent for each year of

government should be required to show, even in the context of a taking to create a literal public use, that the taking of *this* property is necessary and that there are no other reasonable alternative properties that are non-dwellings that could be taken in its place. This necessity test is similar to the necessity test proposed for category two takings. Similar to the category two taking, in a category three taking, the burden of proof should be on the government to also provide evidence that the asserted public benefit for the taking is likely to occur rather than speculative.

The third and key additional requirement for a category three taking is that the government must show that an "important" public benefit is being served with this taking of a person's home, which can be measured by whether there is a "net social benefit" from the taking. This requirement, that the governmental action be for an important public benefit, imposes a level of scrutiny somewhat less than the strict scrutiny courts apply when a law infringes upon a fundamental right such as freedom of expression (which would require the government to show a compelling public interest that is being achieved in a manner least restrictive to the fundamental right), but is greater than the minimal "rational relation to a legitimate interest" test that courts generally apply to regulations that merely impact economic and business interests.

Since a category three taking impacts a person's rights relating to their home, which involve not only purely economic interests but many other important fundamental interests, and is likely to result in the homeowner experiencing large, uncompensated losses,[171] it is inappropriate for courts to apply the minimal level of judicial review in this context. Indeed, Congress expressly recognized that certain property rights involve more than economic or business interests when it enacted the Religious Land Use and Institutionalized Persons Act, and courts in response to this legislation have required a strict level of scrutiny when the government attempts to exercise the eminent domain powers as against a house of religious worship.[172] On the other hand, because of the wording of the Fifth Amendment, which provides an express mechanism for the government to in fact force a sale of property, the level of judicial scrutiny (absent legislation requiring more) should generally not be at the same high level as with a governmental law that impacts upon a right guaranteed under the Bill of Rights and under wording that is more absolute in its description of the right being guaranteed as the wording

ownership of the home).

171. *See supra* Part VI.

172. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

under the First Amendment.[173] Thus, the test proposed for a category three taking is similar to the intermediate level of scrutiny test that courts apply in connection with sex based discrimination where the government must show that the law drawing a distinction based on sex serves an "important governmental objective" and is "substantially related to the achievement of those objectives."[174]

In addition, if it can be shown that the takings for a specific project have a disproportionate impact upon a protected minority (such as African-Americans), then based upon the equal protection analysis courts currently apply to such a disproportionate impact in other contexts, the court must apply a strict scrutiny of the taking and determine whether there is a racially neutral explanation for this disproportionate impact, and if not, the proposed taking should be invalidated unless the government can show a compelling public benefit from the taking that can only be achieved through the taking of the minority owned property.[175]

Because a taking of a homeowner's home impacts upon an even more fundamental right than that of an economic interest in property, and because of the likelihood of substantial uncompensated losses due to current interpretations of the "just compensation" requirement, courts should invalidate a category three taking unless it can be shown that an important public benefit is achieved through the taking, measured in terms of whether there is a "net social benefit" from the taking. A net social benefit would be a public benefit large enough to outweigh the total losses of the parties directly affected by the taking, which would include not only the fair market value of the land taken as currently measured, but also would include: (1) the cost of comparable replacement land and improvements on the land

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173. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

174. Frontiero v. Richardson, 411 U.S. 677 (1973).

175. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 254, 265 (1977). In *Arlington Heights* the Court stated that a racially disproportionate impact of a zoning ordinance is not sufficient to show discriminatory intent, but also stated:

> [W]hether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it "bears more heavily on one race than another" . . . may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears nuetral on its face.

Id. at 266 (internal citations omitted).

taken to the extent they exceed the fair market value of the land taken (this addresses the problem of destroying affordable housing without accounting for the costs of replacing such affordable housing); (2) relocation costs (including not only moving costs but also related termination and start-up costs for utilities)[176]; and (3) loss of "reasonable subjective value."[177]

Since subjective value includes the emotional attachment a person develops towards the place where she has lived, how can one measure this emotional attachment and verify its authenticity? How can one recover for "reasonable" subjective value? John Fee, in *Eminent Domain and the Sanctity of Home*, argues that it is important for courts to consider the subjective value a person places on her home when calculating "just compensation," and then, in trying to solve the enigma of how to measure "reasonable" subjective value, proposes a formula that would increase the compensation provided based on the number of years that a person resides in her home. Fee proposes an adjustment of two percent for each year that a person resides in her home (the idea being that it is reasonable to presume that the longer a person has lived in a home the deeper her emotional attachment and the greater her subjective value) with a cap of a forty percent increase in compensation. This type of formula could be a sensible way for courts to include in the net social benefit calculus some element of the minimum subjective value a person places on a home about to be lost in a forced sale over the fair market value of the home.

A fourth real loss that persons suffer when they are forced by the government to abandon their homes, especially when they have lived in this home for many years and the homeowners disagree with the new use of their home, is referred to as "demoralization costs."[178] These losses, however, can be difficult to measure and verify and can create high transaction costs.[179]

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176. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN L. REV. 1277, 1305 (1984-1985) (stating these two additional costs and identifying loss of current business revenue and loss of business goodwill or value as well, but these do not typically apply to a homeowner).

177. Fee, *supra* note 148.

178. Durham, *supra* note 176, at 1303 (1984-1985) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967)); Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 377 & nn.89-90 (1983).

179. Durham, *supra* note 176, at 1308 (1984-1985) (arguing these costs can be measured in a similar fashion to the tort of emotional distress and that when the demoralization costs are large and quantifiable, and do not pose high transactions costs, they should be included as part of "just compensation").

Perhaps a formula could be created to more easily measure these costs as with the "reasonable subjective value" formula. This component could also then be included when calculating a net social benefit from the category three taking.

Finally, because quantifying the "benefit" from the taking is more difficult to do in a traditional taking as contrasted with a category two (typically economic development taking), this proposal would not require the government to attempt to quantify the benefit in a traditional category one taking even when the target of the taking is a person's home. However, the government would still have to pay the full losses to the homeowners (i.e., not just fair market value, but also the other three components previously discussed, including reasonable subjective value) when the otherwise traditional taking involves a forced sale of a person's home. In a taking of a person's home to achieve an "economic development" type goal (what would otherwise be a category two taking), the government should be required to not only pay the higher just compensation, but also prove that the alleged public benefits from the taking (whether in the form of increased taxes, lower crime rates, or other positive impacts from the taking)[180] will exceed the losses to the homeowners whose homes have been forcibly taken.

VII. CONCLUSION

The common perception of the *Kelo* case, that the government can now take any property under the Fifth Amendment if they simply allege or show that the new use of the property will achieve a higher economic use, or that no real public benefit need exist, is a misreading of the majority and concurring opinions. Justice Stevens in the majority opinion emphasized the importance that

180. *See* Nancy Kubasek & Garrett Coyle, *A Step Backward is Not Necessarily a Step in the Wrong Direction*, 30 VT. L. REV. 43, 64, 69-70 (2005). Kubasek and Garrett argue:

> Employment effects can be counted in the public benefit only to the extent that they lead to public benefits: lower crime rates, increased tax revenue, etc. [and] [i]n order to check legislative power, the burden ought to rest instead on the government to show, by a preponderance of the evidence, three facts: 1) that the taking is necessary for the achievement of the purported public purpose; 2) that if the taking were to occur, the materialization of the public benefits they allege is more likely to occur than not; and 3) that the taking is not more extensive than necessary to serve the alleged public purpose.

Id. at 64, 69-70. The authors also recommended that to ensure the alleged public benefits take place a provision be added in the taking documentation that if the private entities promised benefits do not materialize (such as a certain number of new jobs) within a specified period, the city may assess the entity a predetermined fee each year the asserted benefits do not take place. *Id.* at 70.

the private-to-private taking be done in the context of an integrated development plan (as contrasted with an isolated improvement of economic position),[181] that the government must provide a reasoned explanation for the taking,[182] and that courts should closely scrutinize whether the alleged public use is a pretext for what is in essence the conferring of a private benefit.[183] Justice Kennedy, in the concurring opinion (which was necessary for Justice Stevens' opinion to become the majority opinion), also emphasized the court's role in scrutinizing the facts to ensure that the alleged public benefit is not a pretext and not *de minimus*, but instead for an important public purpose.[184] One of the factors that Justice Kennedy pointed to as a basis to uphold the validity of the taking was that the integrated plan was intended to address a serious city-wide depression.[185] Justice Kennedy also emphasized that courts should scrutinize the adequacy of the procedures the government uses when exercising its Fifth Amendment powers to ensure that the procedures facilitate review of the record and inquiry into the city's purposes.[186]

Yet, the *Kelo* decision is still very troubling for the dicta in the majority, concurring, and even Justice O'Connor's dissenting opinion that judges should show extreme deference to a legislative judgment of public use and not to "second guess" legislative judgments, even in the context of a non-traditional taking.[187] Both the majority and O'Connor in her dissent in *Kelo* felt bound to apply the extreme judicial deference standard articulated in two Supreme Court cases, *Berman* and *Midkiff*, that courts must accept a legislative judgment that a particular taking will benefit the public (or prevent a harm to the public), and that the government need only show that such public benefit (or prevention of harm) could conceivably occur. But, as Part III of this article demonstrates, none of the cases cited to by the Court in *Berman* and *Midkiff* provide support for this extreme judicial deference in the context of a non-traditional taking. Consequently, the Court is in a very strong position to reexamine the continued applicability of this deferential approach in the context of non-traditional takings similar to the Court's reexamination of the "substantially advances a legitimate state interest" dicta in the *Lingle* decision.

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181. *Kelo*, 125 S. Ct. at 2666-67.
182. *Id.* at 2667.
183. *Id.*; *see also supra* note 28.
184. *Kelo*, 125 S. Ct at 2669-70 (Kennedy, J., concurring).
185. *Id.* at 2670-71.
186. *Id.*
187. *Id.* at 2864-65 (O'Connor, J., dissenting). Of course, Justice O'Connor's opinion took the position that public use does not generally mean public benefit, but instead a literal public use, plus a prevention of a public harm, like slum clearance — but as to these categories, she would apply a deferential approach. *Id.*

In addition, when courts closely scrutinize evidence of pretext, bad faith, abuse of process, or a highly speculative public benefit, this does not constitute "second guessing" of legislative judgments. Instead this type of review restores the system of checks and balances between the branches of government that are essential to the American Constitutional system.

Indeed, a closer examination of the facts in the *Midkiff* case exemplifies the need for closer judicial scrutiny of the alleged public benefit in a private-to-private transfer to prevent abuses of process (i.e., takings where the alleged public benefit is a mere pretext or illusory) and to restore the judiciary's legitimate role under the Constitutional system of checks and balances. A closer review of the facts in *Midkiff* reveals that, as amended, the Land Reform Act actually benefited wealthy non-native Hawaiians (the tenants who in fact used the Act to force a sale of land to them) at the expense of native Hawaiian children who were the beneficiaries of the Bishop Estate's trust and beneficial owner of the land forcibly taken. The asserted public benefits from the forced transfer of land (to prevent an alleged shortage of fee simple title to land — one of the evils of oligopoly — causing inflated land prices) did not exist in reality; instead, it was the rent control laws that provided effective land reform to lower income tenants who were having difficulty paying the new rents on long-term leases that were being renewed at the new market rates.[188] Ironically, a closer look at the facts in *Midkiff* would have caused the court to conclude that the Land Reform Act as amended and utilized did more to harm rather than benefit the public.

Trying to prevent abusive exercises of the eminent domain power (i.e., exercises that benefit private persons or entities rather than the public) by narrowly interpreting public use to mean a literal public use, as Justice Thomas argued for in his dissent, or to combine with this a prevention of harm requirement (as Justice O'Connor supported) are not the best approaches because such approaches are both over-inclusive and under-inclusive. They are over-inclusive because they would prevent some traditional or otherwise important public benefit type takings, such as the use of eminent domain to lay utility lines. They are under-inclusive because even a literal public use situation or allegation of a prevention of a public harm could be a pretext for a taking that is really designed to benefit a private party. In addition, many governmental actions (such as creating restrictions on modifications of landmarks) can be articulated either as a promotion of a good (promoting tourism, preserving aesthetic and historic values) or prevention of a harm (preventing a loss of tourism, preventing the destruction of aesthetic and historic

188. *See supra* Part IV.

values).[189] Consequently, it is not sensible to apply a distinction on the basis of preventing a public harm versus promoting a public benefit as a basis to evaluate whether the governmental action constitutes a public use or not.

So, what level of judicial scrutiny is constitutionally appropriate for evaluating various types of takings? One guiding principle that currently enjoys recent constitutional support is that courts should more closely scrutinize those takings that are more susceptible to abuse of process. The Court in *Nollan* and *Dolan* provides precedent for applying a closer scrutiny of governmental actions when such actions are done in a context that is more susceptible to abuse of process.[190] The Court in *Dolan* required that the city not only allege that the exaction required in that case for a building permit *might* alleviate the alleged harm from the expansion of the store and parking area, but that the city quantify its findings in support of the dedication for the pedestrian/bicycle pathway and show how the easement not only *could* offset the increased traffic demand but show how it *will* or is *likely* to offset the added traffic demand.[191] Just as imposition of an exaction as a condition to the granting of a building permit is more susceptible to abuse of process than a comprehensive zoning ordinance, so a private-to-private forced transfer of title for a non-traditional purpose (such as economic development) is more susceptible to abuse of process than a traditional exercise of eminent domain for a public road.

Rather than interpret public use to exclude all such non-traditional exercises of eminent domain, this Article argues that an approach that better comports with the legitimate functions of the legislative and judicial branches is for courts to more closely scrutinize these takings with different levels of scrutiny depending upon the circumstances of the taking. The Article articulates three categories of takings and appropriate levels of judicial review and legislative burdens for each category.[192]

Under a category one taking (a traditional taking where the government will own the land taken, the land taken will be open to the public as a matter of right, or certain specialized traditional takings),[193] it will be presumed that the taking satisfies the public use requirement, but the presumption can be rebutted by evidence of bad faith, abuse of process or pretext, in the fashion described in the SWIDA or the Trump cases,[194] and the courts should engage in

189. *See supra* Part V.
190. *See supra* Part V.
191. *See supra* Part V.
192. *See supra* Part VI.
193. *See supra* pp. 644-48 (discussing these "specialized" takings).
194. *See supra* pp. 646-47 (discussing the SWIDA and the Trump cases).

a robust review of any evidence of this presented by the party challenging the taking.

Under a category two taking (a non-traditional taking where a private party will own the land taken), since there is more potential for abuse of process, the government has the burden to prove with substantial evidence that the pubic benefit is likely to occur and that the taking is reasonably necessary to achieve the public benefit (i.e., that there are no other reasonable alternatives to accomplishing this objective).

A category three taking (either a category one or category two taking, but where the land taken is the property owner's home) would be treated at an even higher level of scrutiny than a category two taking because when a person loses her home, the nature of the property interest lost is often more fundamental than the pure economic loss typically suffered when other property is taken, and because in this context the uncompensated subjective value lost can be very high. A person's interest in her home, especially if lived in for many years, is inextricably linked to the person's identity, community, emotional well being, security, and educational opportunities, and is thus more fundamental in nature than other property interests.

Consequently, under a category three taking, the government must demonstrate that an important public benefit is being served through the taking of a person's home, determined based upon the government providing evidence that there is a "net social benefit" from the taking. To satisfy the net social benefit requirement, the government would have to present evidence in a non-traditional category two type taking of the public benefit and that such public benefit would exceed the losses of the property owner losing her home, applying a more expansive and inclusive measure of those losses than current case law interpretations of "just compensation" would require. The added damages would include: (1) the cost of comparable replacement land and improvements on the land taken to the extent they exceed the fair market value of the land taken (to address the problem of destroying affordable housing without accounting for the costs of replacing such affordable housing); (2) relocation costs (including not only moving costs, but also related termination and start-up costs for utilities); and (3) the loss of "reasonable subjective value" of the land taken (measured with a formula based upon the number of years of ownership and residence in the home).

In the event, however, that a category one type taking of a person's home is involved, the government will not need to quantify the public benefit since it is more difficult to quantify the public benefit in this context and because it is a taking which is less likely to be abused. However, the government would still be required to pay to the property owner who is losing her home the

expanded measure of her losses to ensure that the government is exercising the eminent domain powers in an efficient and fair fashion.[195]

Although Justice O'Connor and Chief Justice Rehnquist dissented in *Kelo*, they still adopted the problematic judicial deferential dicta from the *Berman* and *Midkiff* cases. With the addition of two new justices since the *Kelo* decision, it is hoped that the Court will re-examine the continued validity of this approach and will consider instead the three category model described in this Article as the better means to restore the proper balance between the functions of the legislative and judicial branches in terms of allowing the government to exercise its eminent domain powers in a broad fashion for the public benefit, while at the same time better protecting property owners, and in particular homeowners, from abuses of process.

195. Kubasek & Coyle, *supra* note 180, at 62-65. When the government is able to pay a property owner less than she really values her property and less than her total losses from the forced sale, it is not only unfair to the property owner because she is not made whole, but inefficient since it leads to "distortions of market forces" since the private entity was not willing to pay and not required to pay the landowner the landowner's full valuation of the property. *Id.*