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NOTES

JUSTICE AND THE JUST COMPENSATION CLAUSE:
A NEW APPROACH TO ECONOMIC
DEVELOPMENT TAKINGS

JOHN T. GOODWIN*

No person shall . . . be deprived of life, liberty, or property, without due
process of law; nor shall private property be taken for public use, without just
compensation.

-Fifth Amendment, United States Constitution

INTRODUCTION

It is not surprising that the Framers of the Constitution drafted the
Fifth Amendment to provide property with the same due process protec-
tion granted to life and liberty. Like the other two famous rights, a citi-
zen's ability to be secure in the belief that his or her property cannot be
taken arbitrarily is a basic characteristic of a free society. The pragmatic
rationale for protecting property from capricious seizure is strong. Secure
property rights encourage investment, allow borrowing to occur, and
help to create a stable society.1 Despite these benefits, the Fifth Amend-
ment also clearly contemplates that private property rights can be taken
away, if just compensation is provided. As a result, there is an inherent
tension in the Fifth Amendment between the Due Process Clause and
the Takings Clause that has spawned a great deal of debate with varying
levels of intensity during different time periods.

This tension is currently waxing as a result of the 2005 Supreme
Court case Kelo v. City of New London.2 The holding in Kelo solidified a
broad reading of the Public Use Clause that equates public purpose with

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helping me to develop many of the ideas found in this note.

1. See Carol M. Rose, Propter Honoris Respectum: Property as the Keystone Right?, 71
Notre Dame L. Rev. 329 (1996) (describing the benefits of systems which provide
protection for property rights).

public use and which consequently allows property to be taken from one private party and given to another as part of an economic development plan. This holding was the correct statement of the law as established by Supreme Court precedent; however, it drastically increased the chance that disenfranchised citizens will be subject to condemnation proceedings that benefit those who enjoy political influence. Because of this substantial potential for abuse, legislatures should work to mitigate the harms that will result from Kelo by establishing a new model governing situations where private property is seized for economic development purposes. Many commentators have attempted to develop such a model. The purpose of this Note is to propose a new approach that is preferable to these alternatives.

To accomplish this, Part I explains and critiques the rationale behind Kelo and its precedents; Part II describes various abuses, both potential and realized, that result from the standard articulated in Kelo; Part III contrasts various models that commentators have developed and courts have employed to address economic development takings; and Part IV synthesizes these standards into a model that could improve the urban development process by establishing a balance between the property rights of individuals and the need, in some circumstances, to transfer property from one private owner to another in the interest of furthering the public good.

I. KELO AND ITS PRECEDENTS

The line of cases discussed in this section involves situations where a local, state, or federal government agency takes property from one private individual and gives it to another with the eventual goal of benefiting the public. These types of takings are commonly referred to as “economic development takings” because local governments often use them to stimulate new economic development by taking private property and giving it to a developer. In these situations, the public benefit is often character-
ized in terms of increased tax revenue, more jobs, and the elimination of blight.6

A. Economic Development Takings in the Early Twentieth Century

One of the earliest Supreme Court cases to construe the Public Use Clause to encompass public purpose takings was Fallbrook Irrigation District v. Bradley.7 In Bradley, the Court evaluated the constitutionality of an act that organized the structure of irrigation districts, and provided for the acquisition of water and other property by the government of California.8 The act allowed land to be seized for the construction of irrigation ditches, the rights to which were then allocated to private parties.9 The plaintiff challenged this act on the ground that it would result in “taking by legislation the property of one person or class of persons and giving it to another, which is an arbitrary act of pure spoliation.”10 Rejecting this argument, the Court upheld the act because “[t]o irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands would . . . be a public purpose, and a matter of public interest, not confined to” the private parties who received the land.11 Simply stated, it was permissible for the state to transfer property between private individuals, as long as furthering the public good was the object of the transfer. It was irrelevant that the land in question was never actually available to, or used by, the general public.

The Court continued to build on the foundation for economic development takings it laid in Bradley with its decision in Strickley v. Highland Boy Gold Mining Co. ten years later.12 In Strickley, the plaintiff was a mining company that sought to condemn a right of way for an aerial bucket line between its mine and a nearby railway station.13 The defendants alleged that the taking was “solely for private use” and “contrary to the 14th [sic] Amendment.”14 The Court cited an earlier case to support its holding that a “use by the general public . . . test” is inadequate for determining what constitutes a public use.15 Thus the Court followed Bradley in holding that the term “public use” includes situations

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6.  Kelo, 545 U.S. at 472.
7.  164 U.S. 112 (1896).
8.  Id. at 152.
9.  Id.
10.  Id. at 153.
11.  Id. at 161.
12.  200 U.S. 527 (1906).
13.  Id. at 529.
14.  Id. at 530.
15.  Id. at 531 (citing Clark v. Nash, 198 U.S. 361 (1905)).
where the public is generally benefited by a taking, regardless of whether a private party obtains possession of the property.\textsuperscript{16} The Court incorporated into its jurisprudence the permissive standard of review for economic development takings articulated in these two cases, and followed it with little debate for a number of years.\textsuperscript{17}

The rapid rise in the number of economic development takings that occurred during and after the Great Depression facilitated additional major developments in public purpose takings jurisprudence.\textsuperscript{18} Two federal acts encouraged this trend: the United States Housing Act of 1937 and the Housing Act of 1949. First, the 1937 Act provided "financial assistance to the States . . . for the elimination of unsafe and insanitary housing conditions, for the eradication of slums . . . and for . . . the stimulation of business activity."\textsuperscript{19} The 1937 Act spurred on little economic development because of budgetary difficulties created by World War II,\textsuperscript{20} however, the 1949 Act was a different matter. Congress passed this second Act in part "to provide Federal aid to assist slum-clearance projects."\textsuperscript{21} The 1949 Act led to a "massive influx of funds for use by local agencies for urban redevelopment," resulting in a dramatic reshaping of the urban landscape.\textsuperscript{22}

B. Berman v. Parker

The Supreme Court case of \textit{Berman v. Parker} stemmed from the explosion of urban redevelopment planning caused in part by the funding the 1949 Act provided.\textsuperscript{23} The case at issue arose from a challenge to the District of Columbia Redevelopment Act of 1945.\textsuperscript{24} The D.C. Act authorized "all means necessary and appropriate for the purpose" of removing blight and improving human habitation, and declared that "the acquisition . . . of real property . . . pursuant to a project area redevelop-

\textsuperscript{16} Id.
\textsuperscript{18} See George Lefcoe, \textit{Redevelopment Takings After Kelo: What's Blight Got to Do With It?}, 17 S. CAL. REV. L. & SOC. JUST. 803, 837 (2008) (noting that 21,000 units of public housing were constructed between 1934 and 1957).
\textsuperscript{20} Michael H. Schill, \textit{Distressed Public Housing: Where Do We Go From Here?}, 60 U. CHI. L. REV. 497, 500 (1993).
\textsuperscript{21} Housing Act of 1949, ch. 388, 63 Stat. 413 (1949).
\textsuperscript{23} 348 U.S. 26 (1955).
\textsuperscript{24} District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790 (1946). The 1945 Act authorized the \textit{Berman} taking, and the 1949 Act provided federal funding for the project.
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The Act was used to institute a redevelopment project for a region in southwest Washington, D.C., where only 17.3% of the dwellings were considered “satisfactory.” The residents of the redevelopment area were almost exclusively poor, and 97.5% were African American. The region’s Director of Health judged that it was necessary to redevelop the area “in the interests of public health,” and instituted preliminary condemnation proceedings.

The plaintiff filed suit to prevent his department store from being taken in furtherance of the redevelopment plan. He claimed that the Act was unconstitutional because the property was going to be put “under the management of a private, not a public, agency and redeveloped for private, not public, use.” The Court rejected the plaintiff’s arguments using incredibly broad language. First, the Court stated that “[p]ublic safety, public health, morality, peace and quiet, [and] law and order . . . are some of the . . . traditional application[s] of the police power.” As the legislature is “the main guardian of the public needs to be served by social legislation,” the “role of the judiciary in determining whether [the eminent domain] power is being exercised for the public purpose is a very narrow one.” The housing conditions in the redevelopment area were “[m]iserable and disreputable,” tended to spread “disease and crime and immorality,” and were “an ugly sore” that could “despoil a community as an open sewer may ruin a river.” As a result, the Court believed that it was totally within the discretion of the legislature to use any means it deemed necessary to remedy the conditions in the redevelopment area. The Court concluded its decision by stating that “[i]f those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”

The sweeping interpretation of the Public Use Clause that Berman established is troubling. The decision appears to allow a taking to occur simply if the redevelopment area is unattractive. Such a standard allows private property to be transferred from one individual to another on a threadbare pretext and creates a substantial risk of abuse by special interests at the expense of all those who live in “disreputable” areas.

25. Id. at § 2.
27. Id.
28. Id.
29. Id. at 31.
30. Id. at 32.
31. Id.
32. Id. at 32–33.
33. Id.
34. Id. at 33.
35. Id. at 32.
C. Hawaii Housing Authority v. Midkiff

The next case to further solidify the public purpose interpretation of the Public Use Clause was *Hawaii Housing Authority v. Midkiff*. There, the issue was the constitutionality of a Hawaiian law that allowed the state to seize property, with just compensation, from lessors and then transfer it to lessees for the purpose of reducing the concentration of land assets. At the time this case was decided, land ownership in Hawaii was extremely concentrated, with over 40% of the land owned by eighteen private landowners. This concentration was particularly pronounced on Oahu, Hawaii's most urbanized island, where twenty-two landowners held title to 72.5% of the land. The state legislature concluded that "concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and resolved to remedy the situation. The legislature passed the Land Reform Act of 1967, which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees.

The plaintiffs in *Midkiff* challenged this Act as unconstitutional in 1979 after refusing to submit to a compulsory arbitration order that would have resulted in the seizure of their property. In a decision written by Justice O'Connor, the Court, drawing heavily from the language in *Berman*, first held that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." The Court went on to establish the amount of discretion afforded legislative determinations on what constitutes a public use, and, again quoting *Berman*, the Court held that the scope of review is "an extremely narrow one." In establishing the standard of review, the Court gave a high degree of deference to legislatures. It favorably cited a past decision holding that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" The Court also cited *United States v. Gettysburg Electric Railway Co.*, which held that a court should not disregard a legislative determination on what constitutes public use, "unless the use be palpably without reasonable foundation." Drawing
from these past holdings, the Court articulated its standard of review: "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 . . . are not to be carried out in the federal courts."48 As a result, the plaintiffs' challenge was defeated because "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's . . . powers" and the Court could not "condemn as irrational the Act's approach to correcting the land oligopoly problem."49

After the Midkiff decision, it appeared that a legislative determination on what constituted public use was virtually unassailable. The seizure of private property was a constitutionally valid means for exercising any state police power, and property owners could do little to resist it. By the time Kelo reached the Supreme Court, proponents for a narrower interpretation of the Public Use Clause must have been hoping that the Court would use the opportunity to retreat from the broad interpretation that Berman and Midkiff established.50 These proponents were sorely disappointed.

D. Kelo v. City of New London

1. Factual Background

In 2000, the Connecticut city of New London approved a development plan projected to create 1,000 jobs, increase tax revenues, and "revitalize an economically distressed city."51 In order to realize its goals, the city set about acquiring property by purchasing it from willing sellers, and by using its eminent domain power to coercively take the property of unwilling sellers.52 While the development plan was being finalized, Pfizer, a giant in the pharmaceutical business, announced that it would construct a $300 million research facility adjacent to the development area.53 The city incorporated the Pfizer facility into its plans and "intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract."54 The New London City Council approved the plan in 2000, and the condemnation proceedings that gave rise to this case were instituted.55

48. Midkiff, 467 U.S. at 242–43.
49. Id. at 242.
51. Kelo, 545 U.S. at 472.
52. Id.
53. Id. at 473.
54. Id. at 474.
55. Id. at 472.
The *Kelo* petitioners all owned property in the development area. The city did not claim that any of the properties were blighted or in a state of disrepair. Instead, "they were condemned only because they happen[ed] to be located in the development area." The petitioners first brought this dispute before the New London Superior Court, and alleged that, "the taking of their properties would violate the 'public use' restriction in the Fifth Amendment." After the petitioners' claim was defeated at trial and on appeal, the U.S. Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."

2. The Majority Opinion

Justice Stevens wrote the majority opinion for the Court, which affirmed the lower court's ruling by holding that because the "plan unquestionably serve[d] a public purpose, the takings . . . satisfied the public use requirement of the Fifth Amendment." The Court began its analysis by stating that, "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." The takings in this case, however, were "executed pursuant to a 'carefully considered' development plan," which, the Court believed, cast doubt on the petitioners' contention that the plan was instituted for an illegitimate private purpose. Next, the Court evaluated the "use by the public" definition the petitioners supported. This definition would require any land taken in an eminent domain procedure to be *used* by the public, not simply used for the *benefit* of the public. The Court discarded the "use by the public" definition because precedent had "steadily eroded [it] over time." The Court found the "use by the public" standard unsatisfactory because it was "difficult to administer" and "impractical given the diverse and always evolving needs of society." The Court concluded by citing *Strickley*, *Berman*, and *Midkiff* to establish that Supreme Court precedent uniformly supported a broad interpretation of the Public Use Clause. Therefore, the Court held that instead of employing "rigid formulas and intrusive scrutiny" to evaluate...

56. *Id.* at 475.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 477.
61. *Id.* at 484.
62. *Id.* at 477.
63. *Id.* at 478.
64. *Id.* at 477.
65. *Id.* at 479.
66. *Id.*
67. *Id.* at 480–81.
public use determinations made by legislatures, courts should give legislatures “broad latitude in determining what public needs justify the use of the takings power.”

Next, the Court applied this standard to the facts in *Kelo* and found that the city was entitled to use its eminent domain powers to support its “carefully formulated . . . economic development plan.” It rejected the petitioners' argument advocating for a bright-line rule forbidding economic development takings because “[p]romoting economic development is a traditional and long-accepted function of government.” The Court spent little time evaluating the merits of a bright-line rule independent of its incompatibility with past precedents, but it rightly concluded that it would be anomalous, in light of those precedents, for it to forbid economic development takings in New London, given the broad definition of public use established by *Berman* and *Midkiff*. The petitioners argued that the lack of a bright-line rule would leave nothing to “stop a city from transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.” However, this argument did not sway the Court because, in the case at issue, such a one-to-one transfer was absent. This suggests that if such a transfer were present, the Court would apply a higher standard of review to the legislature's determination, and perhaps the taking would be invalidated. Such a safeguard was unavailable to the *Kelo* petitioners, however, and the city’s authority to take the property was affirmed.

3. Kennedy’s Concurrence

Justice Kennedy used his concurring opinion to flesh out the safeguard the majority identified as purporting to protect citizens from one-to-one private transfers. Kennedy agreed with the majority that the deferential rational basis standard of review was appropriate for evaluating actions by legislatures, but he added that “transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.” In explanation, Kennedy analogized the application of this standard to

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68. *Id.* at 483.
69. *Id.*
70. *Id.* at 484.
71. *Id.* at 486–87.
72. *Id.* at 487 (“While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise.”).
73. *Id.* at 489.
74. *Id.* at 491 (Kennedy, J., concurring) (“[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.”).
75. *Id.* at 490.
the enforcement of the Equal Protection Clause. A court applying rational basis review “should strike down a taking that, by a clear showing, is intended to favor a particular private party . . . just as a court . . . must strike down a government classification that is clearly intended to injure a particular class of private parties.” 76 In order to apply this standard, a “court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.” 77

Applying the rational basis standard to the facts in Kelo, Kennedy agreed with the trial court “that benefiting Pfizer was not the primary motivation or effect of this development plan; instead, the primary motivation for [respondents] was to take advantage of Pfizer’s presence.” 78 There was no indication in the record that the development plan was intended to benefit a private party. 79 Therefore, Kennedy voted with the majority to deny the petitioners relief.

4. The Dissenting Opinions

Justice O’Connor’s dissenting opinion, which Chief Justice Rehnquist and Justices Scalia and Thomas joined, signaled an apparent departure from the majority opinion she authored in Midkiff. She wrote that the effect of the majority’s opinion in Kelo was “effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment,” and agreed with petitioners that it allowed the government to take an individual’s “property for the private use of other owners simply because the new owners may make more productive use of the property.” 80 She would have held that all takings with the sole purpose of furthering economic development are unconstitutional as a result. 81 O’Connor attempted to distinguish Kelo from Midkiff and Berman because in both of those cases, the condemnation itself led to a public benefit, so the public use requirement had already been satisfied by the time the property reached the hands of a private party. 82 In comparison, the properties taken in Kelo were “well-maintained homes [and not] the source of any social harm.” 83 If these properties could be taken, O’Connor concluded that there was nothing “to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a

76. Id. at 491.
77. Id.
78. Id. at 492 (citing App. to Pet. For Cert. 276).
79. Id. at 492.
80. Id. at 494–96 (O’Connor, J., dissenting).
81. Id. at 499–500.
82. Id. at 500.
83. Id.
factory.”84 As a result, she believed the majority gave government the “license to transfer property from those with fewer resources to those with more,” a dangerous precedent to set.85

O’Connor’s position seems especially difficult to square with Midkiff, where she wrote that the Court “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.’”86 The actions of New London appear to fall well within this standard, so perhaps O’Connor was advocating for Midkiff to be overruled without explicitly stating her intention. In addition, the Court in Berman allowed the government to take property belonging to a department store owner for the purpose of creating “a better balanced, more attractive community.”87 There is no indication from the record that the plaintiff’s department store was dilapidated or in a state of disrepair; it was taken as part of a wider development plan, just like the property in Kelo. As a result, it appears that the holding in Kelo was a natural extension of prior Supreme Court holdings and unassailable from a precedential perspective.

Justice Thomas filed the second and final dissenting opinion, which none of the other justices joined. Thomas strongly disagreed with the majority’s view, and he would have departed even further than O’Connor from precedent. He employed a textual argument to advocate for a more “natural” interpretation of the Public Use Cause.88 This interpretation would require the overturning of Berman and Midkiff, and the adoption of a strict “use by the public” test for satisfying the Public Use Clause.89 As a result, Thomas would have held that “the government may take property only if it actually uses or gives the public a legal right to use the property.”90 Thomas’s test would invalidate all economic development takings, which would provide a great deal more protection for the property rights of those with little political influence. However, it would also hamstring local governments by depriving them of one of their most useful tools for achieving economic revitalization.

84. Id. at 503.
85. Id. at 505.
88. Kelo, 545 U.S. at 508 (Thomas, J., dissenting).
89. Id. at 515.
90. Id. at 521.
II. Potential Abuses Resulting from the Kelo Decision

Corruption has been an inescapable aspect of political systems for as long as they have been in existence. As a result, there remains a very real danger that unscrupulous individuals will bend the political process to their own ends. The potential payout is high for private parties who assist cities in economic development schemes, so there is a particular danger that developers will use the Kelo holding to force unsatisfactory plans through local legislatures to the detriment of poor communities. This section describes many of the injustices that may result from this process. These descriptions are followed by the example of Poletown Neighborhood Council v. City of Detroit, a case where a private party manipulated the local legislative process and then used it to the detriment of a community.

A. Unfairness Arising During the Eminent Domain Process

1. Undercompensation

The potential that property owners will be undercompensated is a danger in all eminent domain cases, but it is particularly pronounced in cases of economic development takings because the condemnees usually have few legal or financial resources to resist the taking. According to the Takings Clause, when property is taken from a private individual he or she must receive “just compensation.” Modern eminent domain jurisprudence tends to use fair market value (FMV) as a proxy for just compensation. This method is logical, to some extent, but it almost

91. See generally Fidel V. Ramos, Good Governance Against Corruption, 25 FLETCHER F. WORLD AFF. 9, 9–10 (2001) (noting corruption in the United States, Japan, India, Germany, France, and others); Susan Rose-Ackerman, Political Corruption and Democracy, 14 CONN. J. INT’L L. 363, 363 (1999) (discussing the dangerous effects corruption can have on democracies); Peter J. Henning, Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law, 18 ARIZ. J. INT’L & COMP. L. 793 (2001) (discussing the “limitless” ways officials can abuse their authority for personal gain).


94. U.S. CONST. amend. V.

certainly causes property owners to be undercompensated, particularly from the property owner's perspective. Presumably, before eminent domain proceedings are instituted, the entity seeking to acquire the property has offered market value (or at least an estimation thereof) to the owner. Some owners hold out in order to extort a higher price from the acquiring agency, but many simply believe that their property is worth more than the market value estimation would suggest.96

Several factors could support an owner's belief that the value of his or her property surpasses its market value. One is the sentimental value the owner attaches to it, especially if he has lived on the property for a long time. Alternatively, the owner could be elderly, which would make finding and moving to another home extremely difficult. The owner might also find value in his familiarity with an area, and from residing in a community of friends and neighbors. Conversely, the owner faces significant additional costs not inherent in the property's FMV if he or she is forced to move to a new place to live, because there is a risk that the owner will not be able to find a suitable replacement property. This causes harm to the owner if he or she is unable to find a new place to live that is as desirable as the old property, which ideally should be taken into account in determining just compensation. The purpose of eminent domain is to spread the costs of a taking to all taxpayers, instead of forcing a small group of individuals or families to bear the brunt of the burden.97 Therefore, just compensation should ideally include these additional costs instead of being limited to an estimation of FMV.

2. Private Party Benefit Capture

The problem of private party benefit capture is related to the problem of undercompensation. Specifically, economic development is conducted in such a way that a few select individuals receive a fabulous payout, while affected residents may not even be fully compensated for the loss they incur. There are two principal ways for private parties to capture a disproportionate amount of the benefits from economic development.

First, aggregating several parcels of land into a single parcel causes a significant increase in the total value of the property.98 To illustrate this

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96. See Merrill, supra note 50, at 83 (describing the "subjective premium" that condemnees may place on their property above the fair market value).
97. Id. at 82.
concept, assume that a community contains Property A, Property B, and Property C, which are of roughly equivalent size. Individual residents own these properties, which are located in an economically depressed area. Property B is blighted, but the other two parcels are not. As a result, Property A has a market value of $35,000, Property B has a market value of $20,000, and Property C has a market value of $30,000, for a total market value of $85,000. Now assume that these properties are taken through eminent domain, assembled into a single parcel, Property ABC, and given to a corporation to be used as the location for a new commercial park. As a result, property ABC would significantly appreciate in value. For illustrative purposes, assume that property ABC is now worth $200,000, a large (but not unrealistic) increase over the $85,000 the former owners were given as compensation.)

99. Id. See generally Merrill, supra note 50, at 85 ("[A] resource’s value after condemnation is almost always higher than before.").

100. The appreciation in value from $85,000 to $200,000 may seem large; however, it is not unrealistic. See id. at 1468 ("Based on several standard valuation methods, the assembled value that private developers would have paid for [a] site would have been as much as three times higher" than the $86 in fair market value million they actually paid for it.). It is very difficult to measure with precision the amount of appreciation that occurs after land is assembled because so much of the land’s post-assembly value is speculative. Much of this value is based on future events and possibilities, rather than hard data, because once land is assembled, its value can vary widely depending on the use it is put to and several other factors. For example, if land is assembled to facilitate the building of a public park, its value would likely be much lower than if it is assembled to make way for a popular sports team’s stadium. Additionally, even when the future use of post-assembly land is determined with certainty, difficulties in estimating post-assembly value persist. Considering a plan to build a stadium, for example, the value of the land the stadium is to be built on would depend on a multitude of factors, including the increase in the fan base the construction will create, local and national public support for the team, ticket sales projections, demographic changes, changes in local regulations, and tax considerations. Additionally, every project is different, so even if a particular valuation method fits one project, there is no guarantee that it will be relevant for a different set of circumstances. As a result, the values in this section and in Part IV(A) for illustrative purposes (appreciation from $85,000 to $200,000 after assembly) are not based on one particular model. However, while standard valuation models can have widely disparate results when analyzing land assembly projects, appreciation of over 200% is not uncommon. See id. (discussing appreciation of approximately 300%); see also Leslie Kent Beckhart, No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property, 66 S. CAL. L. REV. 2251, 2279 (discussing many of the difficulties inherent in the real-estate valuation process); Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. L. REV. 621, 674-75 (1998) (discussing the "tragedy of the anticommons" that is created when the cooperation of numerous owners is needed to utilize resources efficiently).
Additionally, the expected benefit from owning the property becomes larger when the corporation makes it clear that it intends to expend resources on an economic development project, if the parties with an interest in the property can expect to receive a share of those resources.

On its face, this hypothetical may not seem overly problematic, and may even make the actions of the corporation appear beneficial; the value of the property can more than double, after all.\textsuperscript{102} Also, if the project is successful, jobs will be created, and there is a chance that the economically depressed region around Property ABC will be revitalized. At the same time, it seems inherently unfair that the property owners were forced to sell their homes for $85,000 while the beneficiary corporation received a $200,000 transfer in the form of the same property, creating a windfall for the corporation of $115,000. A more equitable model for economic development takings could be achieved if the former property owners, rather than the corporation alone, could capture some of the $115,000 windfall.\textsuperscript{103}

The second manner in which developers capture the benefits from eminent domain is by demanding substantial discounts from local governments when they purchase condemned land.\textsuperscript{104} The market for cities attempting to attract developers is highly competitive, and, as a result, local governments are often willing to transfer property to developers at a substantial discount.\textsuperscript{105} For example, using the information from the hypothetical above, assume that the city acquired the three properties for $85,000 through eminent domain proceedings costing $10,000. In addition, the city conditioned the properties for the corporation by demolishing the existing structures for $18,000, by grading the land for $5,000, and by widening the surrounding roads for $30,000. As a result, the total cost to the city was $148,000. Despite this substantial cost, the city is likely to offer a large discount to the corporation as part of its bid to attract the corporation to the city.\textsuperscript{106} It would not be unusual for a parcel of property as described in this hypothetical to be sold to a corporation for as little as $10,000, or even less.\textsuperscript{107}

\textsuperscript{101} When the parcels were separate, any new construction would be confined by the borders of an individual parcel. Once the individual parcels are assembled into one piece of property, a greater variety of larger (and more profitable) structures can be built. \textsuperscript{102} See supra notes 100–01 and accompanying text for an explanation of why this is so. \textsuperscript{103} See infra Part VI for a description of such a model. \textsuperscript{104} See Cohen, supra note 22, at 498 (characterizing economic development takings as inefficient because the acquired property is often sold at a discount). \textsuperscript{105} Id. \textsuperscript{106} Id. \textsuperscript{107} See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 455 (Detroit spent over $200 million to prepare the development site, which was then sold to GM for a meager $8 million); Heller & Hills, supra note 98, at 1476
now has a $200,000 piece of property for which it paid $10,000, creating an instantaneous and virtually risk-free return on investment of 2000%. Once again, it seems unfair that the developer is able to capture this entire benefit while the condemnees are not even fully compensated for their losses.

3. Capture of the Political Process

Large corporations are often so successful at capturing the benefits of economic development takings because they enjoy a degree of political and economic influence that corresponds to their size. Corporations have political influence because they can afford to pay the best lobbyists for advocating development plans to local governments and they can afford to provide generous campaign contributions. Even if this process does not lead to outright corruption, development proposals are generally first presented to local governments by developers themselves. Therefore, the first voice politicians hear when it comes to a proposed economic development project is one which is firmly in favor of the project. In contrast, the targets of economic development takings generally have few resources relative to the proponents of development plans. While it is true that groups such as the Institute for Justice, which represented the plaintiffs in *Kelo*, can foot the bill when eminent domain proceedings are initiated, these groups cannot help everyone and can do little to disrupt the planning process that often makes litigation necessary in the first place.

(discussing a project where the developer paid roughly one-third of the property's FMV); Claire Vitucci, *Corona Agrees to Office Project: The Deal Calls for the City to Acquire Four Parcels Surrounding the Site on South Main Street*, PReSS E NTREPRISE (RIVERSIDE, CA), Apr. 20, 2000, at B1 (developer purchased four parcels of land for $1). See also infra Part II.B.2.i.

108. See Fed. Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 258 (1986) ("The availability of [corporate] resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").


110. See Robert C. Bird, *Revising Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL'y 239, 261 (2010) ("A government's exercise of eminent domain can be an unjust and traumatic process that favors the wealthy and hurts the poor.").

To supplement political influence, corporations also have a great deal of economic influence. A small city that depends upon a single large factory to employ thousands of workers would be highly receptive to demands from the factory owner if the owner threatens to close down its operations. This gives business owners a powerful ability to demand concessions from local governments; the government can either exercise its eminent domain powers, allowing the plant to expand, or it can lose thousands of jobs for its constituents, as well as the tax revenue corresponding to those jobs. To complement the threat of plant closings and job losses, corporations can also offer local governments the incentive of increased employment and tax revenue. However, estimates of the size of these benefits can often become unjustifiably enthusiastic, which leads to the fourth and final major source of unfairness in eminent domain proceedings.

4. Overestimation of Benefits from Economic Development

It is very easy for cities to overestimate the benefits associated with a development project, and many projects are instituted that end up costing much more than they are worth. This causes all taxpayers to suffer a loss, particularly those whose property was transferred to developers. The case described in the next section provides a stark example of how overestimation of benefits from economic development can harm not only condemnees, but also the governments exercising their eminent domain powers.

112. As used in this Note, political influence is the ability to influence the legislative process. This influence is often derived from campaign contributions and lobbying. In comparison, economic influence is derived from a firm’s integral status as part of a local economy. These concepts can be difficult to distinguish, because they often come hand-in-hand. A firm with economic influence will often use it to gain political influence. The concepts are distinct, however, and they can affect the eminent domain process in different ways. For example, a firm could exercise political influence by paying lobbyists to argue that an economic development project is vital to a local community. At the same time, it could bring its economic influence to bear by threatening to close down operations or shed jobs if its demands are not met.

113. The actions taken by General Motors in Poletown, discussed at length below, are the paradigmatic example of this process. Additionally, the development plan in Kelo was designed in part to take advantage of the $300 million research facility Pfizer intended to build. Kelo, 545 U.S. at 473. Other less dramatic examples of firms using economic influence to encourage development include Anheuser-Busch’s construction of a warehouse and distribution facility, and Pepsi-Cola Bottling Company’s construction of a distribution facility, both in New York City. New York City Economic Development Corp., http://www.nycedc.com/BusinesInNYC/SuccessStories (last visited Feb. 23, 2010).

114. See infra notes 144–149 and accompanying text for an example of these phenomena. See generally Ilya Somin, Controlling the Grasping Hand: Economic Development Takings after Kelo, 15 SUP. CT. ECON. REV. 183, 197 (2007)("Both business interests and political leaders dependant on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation.").
B. Poletown Neighborhood Council v. City of Detroit

The Poletown case is often cited disfavorably in discussions about economic development takings. In the case, the Michigan Supreme Court addressed the specific question of whether “a municipality [can] use the power of eminent domain . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state.” The court concluded that because the “power of eminent domain [was] to be used . . . primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community,” it was a permissible exercise of the power to take over a thousand homes and businesses, and then to transfer the property to General Motors (GM) for the construction of an automobile plant.

1. Facts

In 1980, the state of Michigan was facing unemployment of “calamitous proportions,” particularly in the city of Detroit. As Justice Ryan noted in his Poletown dissent, unemployment statewide stood at 14.2%, unemployment in Detroit itself was 18%, and unemployment among black citizens was approaching 30%. During this time, the American automotive industry, upon which Detroit depended for thousands of jobs and millions of dollars in tax revenue, was struggling to compete with the increasingly successful Asian firms that were dominating the automotive industry. As a result, the Ford Motor Company, the American Motors Corporation, and General Motors Corporation were all reporting their largest financial losses in history. Unsurprisingly, Detroit’s governmental leaders were distressed to learn that GM...
was going to close its Cadillac and Fisher Body manufacturing operations, compounding the already depressed economic climate in the city. As a result, the government was extremely receptive to GM's proposal to construct a new plant in the city, which the firm claimed would create over 6000 new jobs and offer a $15 million increase in property tax revenue.

After brief negotiations during which GM dictated terms to Detroit that it accepted with little analysis, the city condemned 465 acres of land so that GM could build a plant of approximately three million square feet in size. The completion of the project required the destruction of Poletown, an ethnic neighborhood on the east side of Detroit. This neighborhood was home to 3438 persons, who would have to be displaced, and 1176 structures, including single-family homes, schools, churches, and businesses, which would have to be destroyed. Many of these residents moved to enjoin the condemnation proceedings, but they were unsuccessful. The Poletown neighborhood was bulldozed to the ground, and the GM plant was built in its place after a few years of delay. The implementation of this plan required "sweeping away a tightly-knit residential enclave of first- and second-generation Americans, for many of whom their home was their single most valuable and cherished asset, and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives."

2. Where the Process Went Awry

i. How Low Can You Go?

In Poletown, GM was able to use its high degree of economic and political clout to extract a generous deal from the city of Detroit and bring enormous pressure to bear on the people resisting the city's condemnation proceedings. Local Roman Catholic priests resisted the development plan, but the church leadership was firmly in GM's corner. Meanwhile, both the United Auto Workers and the local government

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123. The mayor of Detroit, Coleman Young, said of the taking that led to the Poletown case: "I consider it of great importance, the ability of the city to survive, and to the ability of other industries in the industrial belt, that is the midwest, and the northeast, all these cities face exactly the same problem as Detroit does, escalating unemployment and decreasing population, the exodus of industry."
124. Id. at 467.
125. Poletown, 304 N.W.2d at 470 (Ryan, J., dissenting).
126. See James V. Higgins, GM Poletown Plant Sets the Pace Now; Factory Emerges as Model of Efficiency, DETROIT NEWS, Oct. 9, 2001, at C1.
127. Id. at 464 n.15 (Fitzgerald, J., dissenting).
supported the condemnations. Despite this pressure, residents of Poletown resisted the condemnations. A small group of Catholic priests went against their own diocese to organize the initial lawsuit against Detroit. In addition to litigating, some activists refused to vacate structures until the last moment before they were demolished.

Despite this resistance, GM’s plan advanced at a relentless pace. The process began in the middle of 1980 when GM presented Detroit with a list of demands for the city to satisfy if GM was to maintain a presence in the city. It put further stress on Detroit by requiring that these demands be met by May 1, 1981, putting a great deal of time pressure on both the state legislature and the courts. The process moved so rapidly, in fact, that Justice Ryan was not able to include his dissenting opinion in the Poletown decision until several days after the ruling was announced. The most significant of GM’s demands included four primary criteria for the land it wanted to build its plant on: the land had to be between 450 and 500 acres in size, be rectangular in shape, have access to a long-haul railroad line, and have access to a freeway system. The city conducted in-depth studies of nine sites in total and submitted reports to GM for approval. GM rejected eight of these sites, and settled on the area of land that was the subject of the Poletown dispute.

Nevertheless, before GM was willing to take title to this land, it required Detroit to conduct several expensive improvements, both to the parcel of land and to the surrounding infrastructure. For the roads around the site, GM required the city to relocate and extend East Grand Boulevard (which at the time ran through the site), widen other nearby roads, and construct new roads to circumnavigate the site. The city also had to construct a street lighting system along the perimeter road and improve a major interstate. In addition, the city was expected to dispose of, at its own expense, any “hazardous and toxic waste materials” found on the site. The final estimate for the public cost of the project included $87 million to compensate the former owners and to provide for their relocation (approximately $30,000 per person displaced); $35 million for the demolition of existing structures; $23.5 million for road improvements; $12 million for rail improvements; $3.5 million for pro-

131. Id.
132. Id.
133. Id. at 16.
134. Poletown, 304 N.W.2d at 467 (Ryan, J., dissenting).
135. Id. at 465.
136. Id. at 460 (Fitzgerald, J., dissenting).
137. Id.
138. Id.
139. Poletown, 304 N.W.2d at 469 (Ryan, J., dissenting) (citing letter and attachments from Thomas A. Murphy, Chairman of the Bd., General Motors, to Coleman A. Young, Mayor, City of Detroit (Oct. 8, 1980)).
140. Id.
fessional services; and $38.7 million for "[o]ther [s]ite [p]repairation." On top of these expenses, the city agreed to provide GM with twelve years of tax concessions. In total, the projected cost reached over $200 million (the actual cost has been estimated at over $300 million), and yet the site was sold to GM for a meager $8 million—a discount of 96% from the projected cost.

ii. The Return from Detroit's Investment

In exchange for an expected $200 million in public funds and the displacement of thousands of its citizens, Detroit hoped to receive 6000 well-paying jobs for its workers, and millions of dollars in tax revenue. As Justice Ryan noted in his dissent, however, there would be "no public control whatsoever over the management, or operation, or conduct of the plant to be built," and "[the] level of employment at the new GM plant [would] be determined by private corporate managers primarily with reference . . . to profit," not to the welfare of Detroit. Having granted GM its tax concessions and what amounted to a direct wealth transfer of approximately $192 million, Detroit still had no leverage to encourage GM to live up to its employment estimates. As Justice Ryan feared, the benefits from the new plant were not as significant as Detroit had hoped: the plant laid off 2500 workers in 1986, and by 1988, it was only employing a total of 2500 workers. Even at its peak, the GM plant only managed to employ 3600 workers, and as of 1989, only 2% of these people were residents of the "revitalized" Poletown area.

141. Id. at 469, n.7 (citing and reprinting City of Detroit Community & Economic Development Department, Project Plan: Central Industrial Park, 11 (1980)).

142. Id. at 470 (Ryan, J., dissenting).

143. Main, supra note 130, at 17.

144. Poletown, 304 N.W.2d at 457. According to one estimate, the city of Detroit thought that the deal with GM had the "potential [to create] $15,000,000 in new property tax revenues." Id. at 467 (Ryan J., dissenting) (quoting and reprinting Draft Environmental Impact Statement: Central Industrial Park, II-4-II-5(1980)).

145. Poletown, 304 N.W.2d at 480 (Ryan, J., dissenting).

146. James Risen & Stephanie Droll, GM to Lay Off Another 4,500 Workers at 3 Plants; Sales at No. 1 Auto Firm Continue to Slide; Ford, Chrysler, Some Imports Post Gains, Los Angeles Times, Dec. 4, 1986, at 1.


148. Id.

III. ALTERNATIVES FOR REDUCING THE UNFAIRNESS CAUSED BY ECONOMIC DEVELOPMENT TAKINGS

Commentators and courts have made several suggestions for improving the process of economic development takings, especially in the wake of *Kelo* and *Poletown*. The following table provides a comparison of the suggestions based on four identified benchmarks:

Table 1: Comparison of Proposed Economic Development Takings Models*

<table>
<thead>
<tr>
<th>Model</th>
<th>Ease of Application</th>
<th>Promotion of Fairness</th>
<th>Assurance of Success</th>
<th>Discouragement of Capture</th>
<th>Rating**</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Kelo</em> Standard</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Poor</td>
<td>6</td>
</tr>
<tr>
<td>Showing of Necessity</td>
<td>Poor</td>
<td>Adequate</td>
<td>Poor</td>
<td>Adequate</td>
<td>6</td>
</tr>
<tr>
<td>Heightened Judicial Scrutiny</td>
<td>Poor</td>
<td>Adequate</td>
<td>Good</td>
<td>Adequate</td>
<td>8</td>
</tr>
<tr>
<td>Bright-Line Rule</td>
<td>Good</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>8</td>
</tr>
<tr>
<td>Public Benefit Standard</td>
<td>Adequate</td>
<td>Poor</td>
<td>Poor</td>
<td>Adequate</td>
<td>6</td>
</tr>
<tr>
<td>Reasonably Certain Benefits Standard</td>
<td>Poor</td>
<td>Poor</td>
<td>Good</td>
<td>Adequate</td>
<td>7</td>
</tr>
<tr>
<td>Just Compensation Model***</td>
<td>Good</td>
<td>Good</td>
<td>Adequate</td>
<td>Adequate</td>
<td>10</td>
</tr>
</tbody>
</table>

* Each model is ranked as Good, Adequate, or Poor with respect to the specified objectives. Each model is ranked as Good, Adequate, or Poor with respect to the specified objectives.

** Good = 3, Adequate = 2, Poor = 1. These values are then summed for each model to calculate the rating. The highest possible rating is 12, and the lowest possible rating is 4. The rationale for these ratings is explained below.

*** The Just Compensation Model is proposed in this note, see Part IV, infra.

These suggestions may be categorized in three ways: (1) those that attempt to modify the standard by which courts review legislative determinations of public use; (2) those that seek to construe the phrase “public use” in a conservative manner which would ban economic development takings altogether; and (3) those that would allow economic development to be considered a public benefit, but would require greater care on the part of legislatures to ensure that a significant public benefit is actually created. This section examines and critiques several suggestions that fall into these categories.

A. Modifying the Standard of Review

When courts evaluate a legislature’s determination on whether or not a taking is consistent with the Fifth Amendment’s public use requirement, they use the standard that *Berman*¹⁵⁰ and *Midkiff* first developed.¹⁵¹ This standard is extremely deferential; as long as the taking is “rationally related to a conceivable public purpose,” the legislature’s determination will not be disturbed.¹⁵² In *Kelo*, the Court modified the standard without overruling the prior two cases. Under *Kelo*, if a "legisla-

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¹⁵². *Id.* at 241.
ture’s purpose is legitimate and its means are not irrational” courts should acquiesce to its determination. Many commentators have supported the use of a more robust standard of review. This section will discuss two of these standards.

1. Showing of Necessity

Professor Errol Meidinger has discussed a standard of review that requires legislatures to establish that a taking is “necessary to carrying out a public purpose.” Such a standard would not permit takings where comparable property is available on the open market, and it would force legislatures to look for less disruptive avenues to achieve economic development before resorting to coercive takings. This standard of review has two primary advantages. First, it would provide some protection for potential targets of economic development takings. Legislatures would be prevented from condemning property simply because it would be cheaper than other methods, or because one group of property owners has more political clout than another. For example, if two suitable areas of property are available, one of which is occupied, and another of which is available but contaminated and requiring expensive cleanup before use, the occupied property could not be taken against the will of the owner under this standard. The second primary benefit of this standard is that it provides legislatures with the power to thwart holdouts. If only one parcel of property is suitable for achieving a public purpose, the condemnor would be able to take that property regardless of the owner’s resistance. This would make necessary takings cheaper, because owners would not be able to successfully resist the proceedings simply because they want to extract a better offer from the government.

Despite its benefits, adopting this standard of review would not be an improvement over the current model. Its primary drawback is the difficulty involved in defining the term “necessary.” Arguably, even if there are two suitable parcels of land it is not necessary to take either because a substitute will always be available. Also, this standard does not address the problem of undercompensation because it does nothing

154. See infra notes 157–172 and accompanying text.
156. Id. at 47.
157. Id. at 47–48.
158. Id. at 47.
159. For illustration, assume that there are two parcels of land that would be suitable for a development project. If the government tries to seize one parcel, its owner could argue that his parcel is not “necessary” to the project, because there is another suitable parcel of land. If the government were then to attempt to seize the second parcel, its owner could assert the same argument. As a result, the government could not take either parcel of land under the “necessary” standard. This may be solely an academic concern
to encourage compensation above FMV. Finally, just because an area of property is “necessary” for an economic development plan, it does not follow that there is a reasonable chance that the expected benefits from the plan will materialize. As evidenced by Poletown, it is very natural for proponents of economic development plans to overestimate the benefits that will result from the implementation of their plan. The necessity standard is not effective at encouraging legislatures to form reasonable estimates of these benefits.

2. Heightened Judicial Scrutiny

An alternative modification to the takings jurisprudence would be to require courts to apply a heightened standard of review in evaluating a legislature’s decision to proceed with an economic development taking. Several of the amicus curiae briefs filed in support of the petitioners in Kelo supported this approach.\(^{160}\) For example, the National Association of Home Builders (NAHB) and the National Association of Realtors (NAR) argued that “a higher level of scrutiny should be triggered [when] a government is . . . condemning property [and] there will be a transfer of property interest such that a private party will maintain primary ownership . . . over the property.”\(^{161}\) Such a standard would have allowed the Court in Kelo to provide more oversight for legislative actions, and could have discouraged the legislature from approving an economic development plan with little chance of success, or one which unreasonably favored a private party.

Professor Thomas Merrill would also support such an approach under certain circumstances.\(^{162}\) The model he supports would require the application of heightened scrutiny when “one or more of three conditions are present: high subjective value, potential for secondary rent seeking, and intentional or negligent thick market bypass.”\(^{163}\) Heightened scrutiny under this model means “a rough comparison of benefits and costs.”\(^{164}\) Merrill applied this model to the Poletown case, which involved a large subjective cost (an “irreplaceable” community was destroyed), and where the condemned property was transferred to a single entity, creating a significant opportunity for secondary rent seeking.\(^{165}\) Therefore, under


\(^{161}\) Id. at ¶16.

\(^{162}\) Merrill, supra note 50, at 90.

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) Id. at 111. Professor Merrill defines secondary rent seeking as condemnor activity that aims to capture a resource’s value after condemnation, “which is almost always higher than before.” Id. at 85.
Merrill's model, it would have been appropriate to apply heightened judicial scrutiny to the takings in *Poletown*, and the trial court would have evaluated the relative costs and benefits of the proposed project.

The primary benefit of a heightened scrutiny standard is that it decreases the likelihood that special interests will push an ill-thought-out economic development plan through a local legislature. As the *Poletown* case illustrated, even judges are not immune to political pressure, but they are much less responsive to such pressure than local governments. As a result, Judges might be expected to overturn condemnation determinations that are not likely to result in significant public benefits. This increases the risk faced by developers that they will invest significant resources into a development plan, only to see the courts prevent it from coming to fruition. Therefore, under a heightened scrutiny standard, developers would be hesitant to advocate any plan without careful consideration of its true costs and benefits to the public. Finally, this standard also provides some additional protection to condemnees because courts are likely to be skeptical of takings that exclusively affect low-income or minority communities, especially if suitable land substitutes are available.

This standard provides greater protection to landowners than that provided by the current *Kelo* standard, but it still leaves the eminent domain process open to abuse. A heightened scrutiny standard simply shifts the burden of proof to the condemnor, and those who support economic development plans can have plenty of proof available in the form of economic studies, financial data, and expert testimony. Evidence falling into these categories is easy to come by (for a price), difficult to rebut without countervailing data, and problematic for the typically underprivileged condemnee to obtain. On the other hand, if condemnees are able to come up with evidence to rebut the models offered by condemnors, courts face the difficulty of dealing with dueling experts, each with his or her own interpretation of the data in direct opposition to the other side's conclusions, resulting in a very difficult and time-

166. *Id.* at 90.

167. See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 674 (1975) ("[J]udges, particularly those with life tenure, are less susceptible to many of the political pressures that can affect the actions of elected officials.").

168. See Bird, *supra* note 110, at 262 ("Under this regime, government agencies would be able to seize land only under the most extraordinary and compelling circumstances.").

169. For a discussion of the difficulties involved in acquiring and deciphering economic models, see Rutheford B. Campbell, Jr., *The Impact of Modern Finance Theory in Acquisition Cases*, 53 SYRACUSE L. REV. 1, 4 (2003) ("Too often in these cases, one finds courts facing overwhelmingly complex, tedious, and extreme evidence of value offered by the parties' experts, evidence that in its worst form becomes essentially unmanageable.").
As a result, a heightened scrutiny standard would be incredibly difficult to apply in the context of economic development takings, and other approaches are preferable.

B. Disallowing Economic Development as a Justification for Takings

Some commentators have argued that economic development takings should be banned altogether.7 Proponents of this view tend to believe that economic development takings either create too much potential for abuse of condemnees' rights, or result in too much inefficiency in the planning process.172 This view has crystallized into two approaches: first, the bright-line rule that the petitions in Kelo advocated;173 and second, the modified rule Justice O'Connor supported in her dissent to that decision.174

1. Bright-Line Rule

The most conservative approach to remedying the abuse economic development takings can cause would be to ban them altogether, as the petitioners in Kelo suggested.175 Under this approach, any taking with the purpose of furthering a development plan would be per se invalid. The primary benefit of this approach is that it would be very easy to apply; economic development takings are not difficult to identify, and courts would have to spend little time and effort applying this rule. In addition, a bright-line rule would be very effective at preventing developers from employing improper influence over the local legislative process to accomplish their goals. In Poletown, GM would not have been able to encourage the coercive acquisition of the neighborhood, forcing it either to look elsewhere for a site to construct its new plant, or to work to convince Poletown residents to voluntarily sell their property by increasing compensation.

Unfortunately, a necessary consequence of banning economic development takings is the halting of a large proportion of economic development, and as the Court noted in Kelo, the promotion of "economic

170. Id.
171. See, e.g., William A. Curran, Preventing Real Takings for Imaginary Purposes: A Post-Kelo Public Use Proposal, 84 N.Y.U. L. Rev. 1656, 1672 (2009) ("The most straightforward way to prevent abusive takings is to ban all economic development takings . . . the approach advocated by the four dissenting justices in Kelo and by some scholars.").
172. See Cohen, supra note 22, at 498 (characterizing economic development takings as inefficient because "the government, able to acquire property at a discount, does not have to consider the full costs of its plan in deciding whether the overall economic gains accruing to society from the project outweigh the overall costs").
173. Kelo, 545 U.S. at 484.
175. Kelo, 545 U.S. at 484.
development is a traditional and long-accepted function of government.\(^{176}\) Hundreds of local governments have depended on the eminent domain power to revitalize their communities, and the adoption of a bright-line rule would severely hamper the efforts of city planners.\(^{177}\) Also, instead of eliminating unfairness in the eminent domain process, this rule would simply create a new kind of unfairness by giving holdouts a disproportionate amount of power. Under a bright-line rule, a small minority of owners in an area could bring needed economic development to a halt for arbitrary or selfish reasons, thereby preventing the resurgence of an entire community. A bright-line rule may be easy to apply, but better alternatives are available in light of these defects.

2. Public Benefit Standard

Justice O'Connor disagreed with the majority's holding in *Kelo* because it gave governments the "license to transfer property from those with fewer resources to those with more," a "perverse result" which she believed the Founders could not have intended.\(^{178}\) O'Connor distinguished *Kelo* from both *Berman* and *Midkiff* by characterizing the takings in the latter as ones that "directly achieved a public benefit," where "it did not matter that the property was turned over to private use."\(^{179}\) In *Berman*, the public benefit was the elimination of blight,\(^{180}\) and in *Midkiff*, it was the elimination of a harmful land oligopoly.\(^{181}\) As a result, O'Connor would have allowed the condemnation to proceed in *Kelo*, even if its eventual goal was to further an economic development plan, but only if it eliminated blight or some other condition injurious to the public.\(^{182}\) Absent such a condition, this model would prevent any taking justified solely through economic development rationale.

O'Connor's approach has no clear benefits, and two major drawbacks. First, it would not provide significant protection to poor communities because it is altogether too easy to classify these communities using the "vague, amorphous term" blight.\(^{183}\) Many jurisdictions have loose standards for designating a community as blighted, and the communities that are most likely to be considered blighted are the ones most in need

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176. *Kelo*, 545 U.S. at 484.
179. *Id.* at 500.
180. *Id.* at 480.
181. *Id.* at 482.
182. *Id.* at 500.
of protection from overly enthusiastic city planners. As a result, O'Connor's approach probably would not have helped the condemnees in Poletown. This approach would also do nothing to encourage local governments to be realistic in their predictions regarding a development plan's success. As long as an area of land is blighted, it can be taken for economic development purposes, regardless of the amount of negligence or corruption involved in the planning process. The application of this approach would result in little improvement over the current one, and many of the methods outlined in this section would be preferable.

C. Requiring More Detailed Legislative Findings

The next two models in this section are similar to those in Part III(A), in that they focus on providing judicial oversight for the legislative process. However, instead of examining the motives behind economic development takings, or evaluating the necessity of a particular taking, they focus exclusively on the likelihood that an economic development plan will be successful in creating a public benefit. If a plan is not likely to be successful, or if the benefits from implementing a plan are likely to be small, they would prevent coercive takings altogether.

1. Reasonably Certain Benefits Standard

The petitioners in *Kelo* would have preferred a bright-line rule banning economic development takings. However, they alternatively argued for an approach where courts would require "reasonable certainty" that the expected public benefits will actually accrue before allowing an economic development taking to proceed. Accordingly, courts could invalidate takings where the anticipated benefits from an economic development plan are speculative or based on insufficient data. One benefit of this approach is that it would force legislatures and planners to put more thought into economic development plans, and consequently, it might be effective at preventing takings where the potential benefits are uncertain and the costs are high.

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184. In West Virginia, for example, blight includes "any area which is predominantly open and which because of lack of accessibility, obsolete platting, diversity of ownership, deterioration of structures or site improvements, or otherwise, substantially impairs or arrests the sound growth of the community." W. Va. Code Ann. § 7-11B-3 (2010).

185. *Kelo*, 545 U.S. at 487.

186. *Id.*

187. *Kelo*, 545 U.S. at 484.

188. *Kelo*, 545 U.S. at 487.

There are two primary problems with this model. First, it does little to protect the rights of condemnees. It may prevent some economic development takings from occurring, but for those that are allowed to proceed, condemnees will still bear a disproportionately large share of the costs, while still receiving only a small share of the benefits. Second, as the Court noted in Kelo, applying this approach would require courts to second guess "considered judgments about the efficacy of . . . development plan[s]," a task for which they are ill-suited. It is always difficult to anticipate what the future holds, and the application of a vague "reasonable certainty" standard is unlikely to defeat many imperfect economic development plans absent extensive guidelines on how the standard should be applied. Even then, requiring courts to evaluate complicated financial projections is unlikely to lead to a more efficacious result than the model currently utilized. The following section expands on some of the difficulties involved with heavy reliance on such financial projections.

2. Expected Return Model

The Expected Return Model involves many of the same benefits and drawbacks of the previous one, with one significant improvement: instead of employing a vague standard such as "reasonable certainty," this model would require condemnors to produce expected benefit calculations that could be compared to the cost of the project. Expected benefit is calculated by multiplying the present value of future benefits by the probability that they will be realized, and then summing them up:

\[
\text{Expected Benefit} = \sum P_i \times \frac{B_i}{(1+r)^t}
\]

In this equation, the potential benefit in terms of a dollar amount (B) is multiplied by the probability (P) that it will occur. This value is then divided by one plus the desired rate of return, also called the discount rate, (r), raised to the power of (t), which represents the number of

190. The use of this model might lead to more successful economic development plans, but this provides little consolation to condemnees who do not receive just compensation.
191. Id. at 488.
192. In United States v. Carroll Towing Co., 159 F.2d 169, 173 (E.D.N.Y. 1947), Judge Hand used a similar method to calculate expected injury by multiplying the probably that an injury would occur by the magnitude of the injury. Similarly, expected benefit is calculated by multiplying the probability that a benefit will occur by the magnitude of the benefit.
193. The discount rate represents the opportunity cost of choosing a particular investment. The inflation rate and the rate of return on low-risk government bonds are popular values to use for the discount rate in expected value calculations. See Jongho Kim, Bankruptcy Law Dilemma: Appraisal of Corporate Value and its Distribution in Corpo-
years into the future the benefit will occur. This is done for all potential future benefits, and the resulting values are summed up to calculate the expected benefit. The expected benefit can then be compared to the cost of the project to determine whether or not it is worth pursuing.

To illustrate this approach, one can apply it to a hypothetical set of simple facts based on those in the Poletown case. Assume that ten years after the GM plant is constructed, there is a 35% chance that the total payout to the city (in the form of salaries and tax revenue) will be $300 million, a 30% chance that the payout will be $400 million, a 20% chance that the payout will be $350 million, and a 15% chance that the payout will be $200 million. The total cost of the project is $200 million. When the plan is instituted, the rate of return Detroit could expect to receive on an alternative investment is 7%, so this value will be used as the discount rate. The expected benefit can be calculated from this data as follows:

\[
\text{Expected Benefit} = \frac{300 \times 0.35}{(1+0.07)^{10}} + \frac{400 \times 0.30}{(1+0.07)^{10}} + \frac{350 \times 0.20}{(1+0.07)^{10}} + \frac{200 \times 0.15}{(1+0.07)^{10}}
\]

\[
\text{Expected Benefit} = 53,376,675 + 61,001,915 + 35,584,450 + 15,250,479
\]

\[
\text{Expected Benefit} = 165,213,520
\]


194. This formula is a combination between a basic present value calculation, and a basic expected benefit calculation.

195. For simplicity's sake, this model will assume that all benefits are one-time cash flows occurring at a definite time in the future. In reality, this analysis would also include perpetuity and annuity calculations for recurring cash flows such as tax revenue, as well as sensitivity analysis for the different variables.

196. The probabilities and dollar amounts in this section are used solely for illustrative purposes, and do not reflect the actual probabilities of success or failure of the plan at issue in Poletown.

197. This outcome is based on circumstances where, due to increasing automation, the GM plant creates about half of the jobs that were projected.

198. This outcome is based on circumstances where GM employs the projected number of workers, the best case scenario.

199. This outcome is based on circumstances where a few jobs are lost to automation, but the GM plant employs nearly the total amount of workers that it projected.

200. This outcome is based on the worst case scenario, where GM closes the plant after a few years due to international competition.

201. This value is used because it is assumed that the government could have alternatively expected to receive a 7% rate of return if it chose not to pursue GM's plan, see supra note 193 for a brief explanation of discount rates.
The expected benefit is less than the cost of $200 million, so a rational actor in the position of the Detroit government would have chosen to either forgo the project or to extract some sort of guarantee from GM that would have increased the probability that the more positive cash-flows would be realized. The advantage this approach has over the “reasonably certain” test is that the process is well-defined, and the results are easy to interpret.

In a world of perfect information, this method would be the best option for reaching an efficient outcome because a rational legislature would be highly unlikely to approve a project with expected benefits less than its cost. The primary flaw of this model, however, is that information is far from perfect. It is very difficult to settle on the proper numbers to plug in for the many variables, and small changes can have a large effect on the outcome. For example, in the hypothetical above, decreasing the discount rate from 7% to 6.5% would cause an increase in the expected benefit of almost $8 million, while increasing the number of years to 12 would cause expected benefit to fall by almost $21 million. As a result, while this model is very effective in theory, it is not a practical alternative.

IV. THE JUST COMPENSATION MODEL

This section proposes a new model for conducting economic development takings that draws on the strengths of the models analyzed above while avoiding many of their weaknesses. The Just Compensation Model simultaneously addresses the problem of undercompensation and the problem of unrealistic projections by adjusting the incentives influencing typical government and developer behavior. The result is a socially equitable method of achieving economic development that discourages the implementation of development plans with little chance of success.

A. Description of the Model

The Just Compensation Model’s central element involves discontinuing the use of FMV as a complete measure of just compensation in favor of a system where condemnees also receive a proportion of the developer’s profit. It derives this proportion from the difference in value between the disaggregated parcels of land that are condemned and the value of those parcels as a combined unit. As discussed in Part II(A)(2), the value of a single large parcel of land is greater than the sum of its parts. As a result, the FMV of a parcel of property could be $85,000 when it is owned by individual condemnees, but worth $200,000 when

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202. For further explanation, consider a project with a cost that is $10 greater than its expected benefit. A rational actor would just as soon invest in this project as burn a $10 bill. It can be hoped that, given a choice, a legislature would not pursue either option.
owned by a single developer. The transfer of this property to a developer at a significant discount decreases the developer's incentive to maximize the benefits of the project for the community which is being developed; even if the developer loses $100,000 of its investment, it will still own an asset worth $200,000. If the amount of this initial transfer is reduced, developers will be correspondingly less likely to implement plans which involve little chance of success, because payouts will come from overseeing a successful project rather than from a large discount which is obtained when condemned land is initially purchased.

The drawback of taking this entire wealth transfer away from developers is that it would drastically reduce the incentive to propose development plans. Engaging in economic development can be a risky proposition, and the transfer of property at a discount can be used as a hedge against the potential for failure. As a result, instead of eliminating this transfer, the more efficient way to balance the many countervailing incentives involved is to allow condemnees to share in the increase in property value that occurs when condemned properties are assembled. This could be achieved by allowing condemnees to receive income from two sources, instead of limiting compensation to FMV. First, the condemning government should pay FMV for the disaggregated property. Second, the developer should pay the difference between the FMV of the disaggregated properties and the FMV of the assembled parcel of land. Using the numbers from the example above, the calculation would look like this:

\[
\text{Just Compensation} = \text{FMV} + (\text{Aggregated Parcel} - \text{FMV})
\]

\[
\text{Just Compensation} = \$85,000 + (\$200,000 - \$85,000)
\]

\[
\text{Just Compensation} = \$85,000 + \$115,000
\]

\[
\text{Just Compensation} = \$200,000
\]

In this example, the government would pay $85,000 to condemnees, and the developer would pay $115,000, for a total of $200,000 in compensation.

Under this model, condemnees are better off because they would receive $200,000 instead of $85,000. The government is better off because the cost of appropriating the land has not increased, while at the same time, it is less likely that an unsuccessful development plan will be implemented. Finally, while the position of the developers is less advantageous than under the current system, they still receive a direct wealth transfer of $85,000. An additional aspect of this model that is likely to benefit all parties involved is that its application is less likely to be politically controversial. Some property owners might still resist condemnation even when offered extremely generous amounts of additional compensa-

203. See supra notes 98–102 and accompanying text for an explanation of these values.
tion, but it is less likely that they would be able to drum up as much sympathy from the general public. This value is difficult to understate. Because of the political opposition to the Poletown condemnations, the GM plant’s construction was delayed for four years after the Michigan Supreme Court decision, and similarly, public opposition has prevented the New London economic development plan from being totally implemented despite the fact that the property was condemned in 2000, and Kelo was decided in 2005.

B. How does the Just Compensation Model Measure Up?

1. The Benefits

When compared to the models discussed above in Part III, the Just Compensation Model has many clear advantages. First, it is relatively easy to apply because it is based on simple calculations. Determining the market value of a parcel of property before and after it is assembled can still be a challenging and somewhat subjective process, but the process is less daunting compared to models which require the motives of local governments and the projections of developers to be extensively analyzed. Courts—or anyone else for that matter—are not well equipped to analyze incredibly complicated and conflicting financial projections, but determining the proper values to assign property is a task with which courts have extensive experience.

Second, the Just Compensation Model is far more equitable than the current standard. It prevents developers from capturing a substantial portion of the benefits derived under economic development plans, and instead, transfers a portion of this benefit to condemnees. Third, by decreasing the windfall developers receive, this model decreases the incentive developers have to propose development plans that are unjustifiably expensive and unlikely to succeed. As a result, it is more likely that when property owners do face condemnation proceedings, it will be for a true public benefit, and not simply to enrich a private developer. Developers are thereby forced to depend more on profits created by the success of the economic revitalization they are responsible for creating, rather than the initial transfer of property which instantly appreciates in value.

204. See Higgins, supra note 128, at C1.
Finally, the Just Compensation Model decreases the threat of political capture and undue economic influence by reducing the payout that can be obtained through the application of such influence. If the primary source of profit developers expect to receive from a project depends upon the performance of their development plan, they have less of a motive to distort the political process by forcing through a plan that is flawed.

2. The Costs

The most significant barrier to the implementation of the Just Compensation Model is that local governments would find it difficult to adopt, at least initially. There is intense competition between local and state governments to attract developers into their communities, and any government that implemented this model would be at a severe disadvantage because it would be deprived of a significant incentive to offer developers. As a result, this model would have to be implemented on a wide scale, at least on a regional level and preferably on a national level, to prevent a single state or city from being at a severe disadvantage relative to its neighbors. This could be achieved through widespread state constitutional amendments which redefine just compensation, or through an amendment to the Just Compensation Clause in the Federal Constitution. Neither strategy would be easy to accomplish.

The second flaw in this model is that it assumes that individual properties will be significantly more valuable once they have been assembled. This may not always be the case, and as a result, the model has less useful application in some circumstances. In such situations, the compensation condemnees obtain under the Just Compensation Model may be little more than what they would receive under the current system, and they still may not receive enough remuneration to compensate them.

208. See Roger C. Hartley, Preemption’s Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies, 5 U. PA. J. LAB. & EMP. L. 229, 245–46 (2003) (“Local governments compete with one another to attract the investment of private capital into the community by offering incentive packages that include direct grants [and] low-interest loans.”); Curtis J. Berger, Pruneyard Revisited: Political Activity on Private Lands, 60 N.Y.U. L. Rev. 633, 676 (1991) (“Local governments often compete with one another to attract high-ratable developments, and this competition leads to either the watering down of requirements, or the inflating of inducements.”); Vicki Been, “Exit” as Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. Rev. 473, 512 (1991) (“Additional data about the nature of the competitive pressures municipalities face in bargaining with developers can be derived from evidence that local governments compete for new businesses.”).

209. As discussed in note 100 above, the intended use of an area of property once it is assembled can significantly affect its value. As a result, if property is assembled to facilitate the construction of a project that is expected to produce a relatively small amount of income, the value of the assembled property will be closer to the aggregate value of the individual parcels before they were assembled. Applying the Just Compensation Model would not be as beneficial in such situations.
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for the full cost of losing their property. These costs are admittedly sig-
nificant, but they are not prohibitive, especially in light of the benefits of
the model discussed above. Reform of the economic development pro-
cess, while challenging to accomplish, would be well worth the cost.

V. CONCLUSION

The objectives of the Just Compensation Model are twofold. First,
the model provides additional compensation to condemnees who, under
the current system, often suffer losses that are not accounted for in FMV
calculations. Second, it brings the interests of developers more in line
with those of the communities they develop by ensuring that a greater
proportion of the profits derived from economic development projects
comes from successfully carrying out a plan, rather than from initial
wealth transfers. To accomplish these objectives, the model allows con-
demnees to receive, in addition to FMV, the surplus value which is cre-
cated when individual parcels of land are assembled.

This approach has several advantages over the current model, as well
as over many of the suggestions outlined above. Those suggestions focus
primarily on either protecting the rights of condemnees (such as those
which would disallow economic development takings altogether) or
ensuring the success of economic development plans (such as those that
would employ a heightened standard of review), but only the Just Com-
pensation Model focuses on both. Once implemented, the Just Compensa-
tion Model would be relatively easy to apply, and it would be extremely
effective at eliminating a large portion of the unfairness that exists in the
current system. At the same time, it would not totally deprive local gov-
ernments of an important and valuable economic tool. Most impor-
tantly, this model would drastically reduce the frequency of situations
where condemnees are saddled with a disproportionately large share of
the costs that accrue from economic development projects. An approach
to economic development takings that puts justice back into just com-
ensation is long past due, and the Just Compensation Model would go a
long way toward accomplishing this goal.