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Constitutional Corporatism: The Public Use Clause as a Means of Corporate Welfare

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NOTES

CONSTITUTIONAL CORPORATISM: THE PUBLIC USE CLAUSE AS A MEANS OF CORPORATE WELFARE

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I. Introduction

The use of the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks is a use of government power which has never been of much legal controversy.[1] However, increasingly, the Supreme Court has laid down precedent which challenges the conventional notions of "public use" and stretched the bounds of legitimate government commingling with private enterprise. Those with the most money and economic clout have the attention of state actors in redevelopment projects rather than those whom the state actors are elected or appointed to represent.[2]

State and local governments, which are meant to serve and protect the rights and interests of their respective constituents, are instead serving and protecting the financial interests of the well-connected. This contradiction is often explained away by citing the fringe benefits that will accrue to the community at large by divesting some of its members of their real property. Rather than accord affluent commercial citizens the same deference and power as all other citizens, localities are increasingly commingling their interests with those of their most economically-promising community members (and sometimes those who are not even members of the community).[3]

This commingling has a distinctly corporatist character. Corporatism is a means of political organization which seeks, in the name of efficiency, to implement public policy through cooperation of government, corporations, and labor. In an attempt to provide maximal beneficial results, however, democratic processes are sidestepped. This is often what takes place in modern redevelopment proceedings;

1. *See* Kelo v. City of New London, Conn., 545 U.S. 469, 512 (2005) (Thomas, J., dissenting).
2. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 591 (2007).
3. *Id.*

state actors and non-state actors take part in decision making without the approval of the constituency. Contrary to its claimed benefits of efficiency and proportionate positive outcomes for all, this paper will show that the costs of corporatism outweigh those benefits, particularly for the functioning of a free and democratic society.[4]

This Comment will argue that the inequities involved in these governmental takings pose equal protection problems and as such, cases in which the state seeks to enforce its eminent domain power to the benefit of a private party should be analyzed with strict scrutiny or a variant of intermediate scrutiny at the least. If it can be proven that governmental takings are often corporatist in nature and thus disproportionately harm those with limited access to policy decisions, it necessarily follows that strict scrutiny should apply as the government actions here tend to "prejudice . . . discrete and insular minorities."[5]

Section II of this paper begins by providing a background of corporatism, as it offers the closest analogue to the government actions and ideology underpinning modern Fifth Amendment takings. Subsection A defines corporatism by analyzing the way in which it is meant to work in theory and the way it tends to work in reality. Its cooperative tendency and desire for defined public goals are some of its more enduring features. Subsection B of Section II critiques the theory. It shows that despite its grand language and calls to cooperation, both in practice and in theory, it falls short of a desirable social structure.

Subsection C discusses the judicial analysis of takings and how it has changed over time leading up to 2005. The seminal cases discussed will highlight the slow doctrinal evolution that lead to judicial abrogation of the definition of "public use," and its modification to include "public purpose," "public benefit," and "redevelopment," to name a few. Subsection D finalizes the analysis with a discussion of the *Kelo* majority opinion and its reasoning. Given the import of the decision on this area of law, the analysis will be rather detailed.

Subsection E discusses several cases that have been decided in the years following *Kelo* and attempts to show their overarching themes. Rather than refine the *Kelo* holding, these cases have given legislative bodies and local governments free rein to grant private transfers to real-estate developers. Section III then provides analysis of the thesis. Subsection A & B analyze public-private redevelopment projects and highlights the corporatist nature of the process and the negative effects such projects have on minority groups, particularly the poor and black community.

4. Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for A New Administrative Law*, 49 UCLA L. REV. 1687, 1705 (2002).
5. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

Finally, Subsection C takes a second look at the two dissents from *Kelo v. City of New London.*[6] From these two dissents, this paper attempts to solidify a heightened standard of review for takings given the detrimental effects they can have on certain groups. This subsection concludes that the inequities involved in these private transfers masked as governmental takings pose equal protection problems and as such, cases in which the state seeks to enforce its eminent domain power to the benefit of a private party should be analyzed with strict scrutiny or at least a variant of intermediate scrutiny.

II. Background

A. *Corporatism Defined*

> Corporatism is a school of political thought that conceives politics as a live organism. Indeed, the term corporatism derives from corpus, the Latin word for body. Similar to the human body, in the corporatist State there should be a brain commanding the organs and muscles to better serve the needs and interests of the body as a whole. In this context, political leaders (the brain) make sure that society's welfare prevails over particular interests.[7]

Corporatism is most often associated with fascism, as corporatism is the preferred economic structure of classical fascism.[8] Classical fascism's attack on the liberty of the market and economic individualism was always to be remedied by corporatism and regulated markets.[9] This link to authoritarian government is not coincidental, as corporatism is often meant to serve the interests of a select few, as will be discussed subsequently.

The corporatist approach posits the existence of a public interest, which the state determines and tries to further through the use of government power.[10] Corporatism argues that corporations and governments should cooperate closely to attain these desired social

6. 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting). This case provided the court with an easy target, as the litigants were neither poor nor black, which characterize most victims of such takings.

7. Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMP. LAB. L. & POL'Y J. 843, 855 (2011).

8. *See* ROBERT O. PAXTON, THE ANATOMY OF FASCISM 186 (2004). Unlike many criticisms of corporatism, however, this paper will attempt to show its inherent flaws, rather than criticize based merely on its association with fascism.

9. *See id.*

10. Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 795 (1998).

goals.[11] It argues that the goals of states, companies, and workers[12] are closely aligned: corporations serve the goals of the state, and consequently, the state should create conditions favorable for the corporation.[13] "[A] more corporatist role for states [seems to] be emerging as states try to do more than simply reflect the sum total of the preferences of their inhabitants, and instead seek to assert their view of the public interest."[14]

B. Corporatism Critiqued

"First, corporatism denies the basic pluralist idea that policy emerges from the free and voluntary interaction of multiple interest groups."[15] "Corporatism . . . seeks to limit the number of groups with access to the state[ ]"[16] because (in effect) it assumes that the government can only bargain with selected, representative interest groups or peak organizations,[17] "with subsequent deal-making among those groups with respect to public policy in key areas."[18] Where pluralism envisions an unlimited number of interest groups acting essentially as so many atomistic actors creating a competitive political marketplace, corporatist theory sees a limited number of groups, each wielding substantial political power.[19] Groups are assembled into hierarchies, with "peak associations" at the top holding the most influence with government policymakers. These peak associations are groups like industry-wide business associations or national labor federations, and the broad membership of these groups is thought to discourage narrow conceptions of political interest. Consequently, in corporatism, it is

11. Eric Engle, *Europe Deciphered: Ideas, Institutions, and Laws*, FLETCHER F. WORLD AFF., Fall 2009, at 63.
12. These are the three groups that are referred to henceforth when discussing the limited number of groups with access to policy decisions. Corporatism sees these three groups as representative of the entire population in one respect or another. Therefore it is more efficient and effective, according to corporatism, to have these three major groups come together to resolve issues of public concern than to require the cumbersome and inefficient procedures of democratic rule.
13. "Likewise, corporatists believe the state should, in cooperation with corporations, create conditions favorable for workers. Thus, guaranties of medical care, retirement, unemployment insurance—the social insurance systems established in the first world since about 1900—are provided because educated, healthy workers are more productive, enabling corporations to better serve the interests of the state." *Id.*
14. *See* Aman, *The Globalizing State*, *supra* note 10, at 795.
15. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4.
16. *See* Wachter, *supra* note 2.
17. "Peak [organizations] are groups like industry-wide business associations or national labor federations, and the broad membership of these groups is thought to discourage narrow conceptions of political interest." *Id.*
18. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4, at 1705.
19. *See* Wachter, *supra* note 2, at 591.

not the local community organizations but national interest groups that are expected to wield power and take part in public policy.[20]

Second, during the bargaining that ensues, corporatist theory holds that the state is operating with a public interest goal in mind.[21] It is not a representative entity meant to effectuate the desires of its citizens, but an independent, seemingly autonomous player with a very important seat at the policymaking table. In so doing, the state does more than simply reflect the sum total of the preferences of its constituents, but rather seeks to assert its view of the public interest in the bargaining that ensues.[22] The state is, in a sense, just another actor (though obviously a very powerful one).[23]

Third, as a result of these state approaches, corporatist theory holds that the state is elitist in nature—democratic in neither purpose nor result.[24] The bargaining that the state engages in, from a corporatist perspective, often represents an attempt by those molding public policy to avoid a confrontational mode of governance and to reach a politics of accommodation. To achieve this degree of consensus, however, normal political processes usually are sidestepped. What often substitutes for traditional democratic processes are technocratic and managerial solutions. It is technocracy and various forms of expertise that often provide the legitimacy for results that occur outside traditional democratic processes.[25] Therefore, a corporatist approach is not as democratic in its approach as other forms of interest group behavior, which place democratic principles and procedures on a rather high pedestal.[26]

Corporatism is "uniquely morally defective" in comparison with other theories of political organization.[27]

> Assignment of groups to different social places [based on their role in society or their level of sophistication in administration or management] appears to be substantively wrong, especially in light of the corporatist anatomy, which locates powerful groups at or near the head, and weaker groups or minorities at the subservient belly or feet.
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20. *See id.*
21. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4, at 1705.
22. *See id.*
23. *See* Aman, *The Globalizing State*, *supra* note 10, at 795.
24. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4, at 1705.
25. *Id.*
26. *See* Aman, *The Globalizing State*, *supra* note 10, at 795.
27. Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1041 (1983).

> . . . Corporatism is wrong because it systematically renders groups unequal to one another.[28]

Despite the flaws of such a mode of governance, this has become the norm in the manner in which property is redistributed from the poor and working classes to corporations and private developers. That norm developed and morphed over several decades of shifting judicial treatment of government takings.

*C. Judicial Abrogation of the Definition of "Public Use" Pre-*Kelo

"Early American common law recognized eminent domain as a taking that served a 'public advantage,' for 'the necessities of the state,' and for the 'public welfare.'"[29] "Following the adoption of the Constitution, takings by eminent domain were not a source of substantial dispute, as public uses were commonly recognized and accepted."[30] "Colonial and early state constitutions at the dawn of American jurisprudence made provisions for the use of eminent domain for the construction of mill dams and private roads."[31] "As the industrialization of America grew" during the middle of the nineteenth century "the use of eminent domain began to expand" as land was taken and given to privately-held railroads for tracks.[32] While some cases prior to 1954 broadened the concept of public use[33] in the Fifth Amendment, there was still reasonable limitation on its applicability.

"However, the Supreme Court's 1954 decision in *Berman v. Parker*, upholding a Congressional determination to clear blighted slum areas

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28. *Id.*
29. Paul W. Tschetter, Kelo v. New London*: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of "Public Use"*, 51 S.D. L. REV. 193, 209 (2006). A taking is any exercise of government power that appropriates the real property of a private individual and brings it under state control (i.e. public use). However, as will be subsequently discussed, takings can sometimes be used to effectuate the transfer of real property from one private party to another for the development of real estate or commercialization of communities.
30. *Id.* at 210. "Despite the recognition of the existence of eminent domain at common law, the United States Constitution, as it was originally ratified, did not provide protection to private property interests. Initially, the Constitution made no reference of, nor did it create, the concept of eminent domain. Private property protections were not established until James Madison introduced the Bill of Rights in 1789." *Id.* at 209.
31. *Id.* at 210 (citations to other sources omitted).
32. Tschetter, *supra* note 29, at 210-11.
33. *See* Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (upholding the use of eminent domain by a public utility); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923) (rejecting the narrow construction of the public use doctrine); United States. ex. rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946) (holding that an agency-constructed dam which flooded the access road to the property of six land owners was a legitimate public use).

of Washington, D.C.,"[34] " 'gave the [public use] limitation a mortal blow . . . when it held that 'the concept of the public welfare is broad and inclusive' enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress.' "[35] The Court "held, in effect, that it was within the power of the legislative branch . . . to take into account, in enacting redevelopment legislation, aesthetic considerations as well as considerations of health."[36] The Court's decision extended the reach of the "theory of the Public Use Clause by stating that legislative decisions should control public use determinations."[37] The Court held that "[o]nce the object of the legislation is legitimate, it justifies the means chosen to achieve it."[38] The Court essentially said "the end justifies the means—a proposition not usually heard in other areas of constitutional law."[39]

Thirty years after *Berman*, the Court was faced with another important eminent domain case in *Hawaii Housing Authority v. Midkiff*.[40] At issue was a Hawaii land reform statute that allowed a local commission to select specific properties and permit the holders of long-term leases on those properties to purchase the land from the owners in fee simple.[41] To reduce the perceived social and economic evils[42] of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands, the Hawaii Legislature enacted the Land Reform Act of 1967 which created a land condemnation scheme through which title in real property was taken from lessors (i.e. aristocratic landowners) and transferred to lessees in order to reduce the concentration of land ownership.[43] The Act allowed lessees living on single-family residential lots within tracts at least five acres in size to ask the Hawaii Housing Authority (HHA) to condemn the property on which they lived. When appropriate applications by lessees were filed, the Act authorized HHA to hold a public hearing to determine whether the State's taking of the given land would effectuate the purposes of the Act. If

34. Tschetter, *supra* note 29, at 218 (citations to other sources omitted); *see also* Berman v. Parker, 348 U.S. 26 (1954) (sustaining the comprehensive condemnation of blighted areas for public housing projects).
35. Tschetter, *supra* note 29, at 218 n.194 (quoting RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161 (1985)).
36. 348 U.S. at 26.
37. Tschetter, *supra* note 29, at 218.
38. Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 353 (2006).
39. *Id.*
40. 467 U.S. 229 (1984).
41. *See* Tschetter, *supra* note 29, at 221.
42. The Act at issue here was in many respects an attempt to counter what had been, up to that point, corporatist holdings in property, passed on from generation to generation, to the detriment of those with little influence or power. The inclusion of this case is not meant as a criticism of the holding itself or the Act, but is rather a necessary component in the understanding of the broadening and evolution of the Public Use clause.
43. 467 U.S. at 229.

the HHA determined that these public purposes would be served, it was authorized to designate some or all of the lots in the tract for acquisition by the State. It then acquired, at prices set by a condemnation trial or by negotiation between lessors and lessees, the former fee owners' "right, title, and interest" in the land, and would then sell the land titles to the applicant lessees.[44]

The Court reiterated the *Berman* decision by stating that questions of public use should be deferred to legislative decision-making.[45] "Concerning this deference to state lawmakers, when considering what constitutes a public use, the Court [held that] the rational basis test" is to be applied.[46]

D. Kelo v. City of New London*: The Definitive Turn*

While these cases broadened the public use requirement greatly, no case has had as lasting an impact on Fifth Amendment jurisprudence as *Kelo v. City of New London.*[47] "[T]he underlying [development] plan supporting the exercise of eminent domain . . . was openly conceived in tandem with, and designed to meet the specific needs of, a private corporation, Pfizer Pharmaceutical."[48]

The pharmaceutical company Pfizer, Inc. announced that it would build a $300 million research facility in the town, which had up to that point had an ailing economy.[49] Local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation.[50] This case was "not [about] an independently conceived and executed municipal redevelopment effort that incidentally benefited Pfizer" after the fact, but was a jointly planned project that was certain to inure to the substantial benefit of Pfizer.[51] Without the involvement of Pfizer and its eventual success in the area, the project concededly could not have worked as there would have been no customers for the planned five-star hotel, or for the upscale condominiums, or marina. The benefit to Pfizer was not incidental but was rather integral to the plan causing the city to cater to the corporation. Several of the property owners objected to the seizure

44. *Id.*
45. *See id.* at 244.
46. Tschetter, *supra* note 29, at 221.
47. 545 U.S. 469 (2005).
48. Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 IND. L. REV. 97, 104 (2009). In fact, the president of the New London Development Corporation, who is largely credited with persuading Pfizer to put its new research headquarters on a site adjacent to the redevelopment project, was at the time married to Pfizer's director of research. *See* Kanner, *supra* note 38, at 342.
49. 545 U.S. at 473.
50. *Id.*
51. Kanner, *supra* note 38, at 342.

the government was attempting to effectuate, which led to the litigation.[52]

In an opinion authored by Justice Stevens, the Court began its analysis by stating that the "sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."[53] After acknowledging this, however, the Court goes on to explain that economic development has been seen as a legitimate public *purpose*[54] for some time.[55] Even while momentarily putting aside the differing definitions of "use" and "purpose," it would seem the Court was promoting contradictory legal doctrine. The taking of privately-held land simply to be given to another private individual is not legally permissible,[56] unless, of course, the party to receive the property will provide a certain amount of benefit to the surrounding community.[57] Just how much benefit, the Court was unwilling to address,[58] but it was willing to say that economic development is a permissible public use (or is it purpose now?).[59] "That is, seeking to attract or retain private companies is a legitimate government function."[60]

As in *Berman* and *Midkiff*, the Court restated its deferential treatment to the legislative determination to take the land, for whatever use was deemed worthy.[61] Just as the Court declined to second-guess the City's judgments about the efficacy of its development plan, it also declined to second-guess the City's determinations as to what lands it needed to acquire in order to effectuate its desired project.[62] "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area," the Court said.[63] The cases are legion in which courts choose to "second-guess" legislative determinations and analyze the constitutionality of prospective government actions,[64] but the Court does not seem to think forced displacement of citizens warrants such judicial scrutiny so long as compensation[65] is paid. This deferential standard adopted for the Public Use Clause is, therefore, deeply perverse.[66] It encourages "those citi-

52. *See* 545 U.S. at 475.
53. *Id.* at 477.
54. Emphasis added.
55. *Id.* at 484.
56. *Id.* at 478.
57. *Id.* at 487.
58. *Id.* at 483.
59. *Id.* at 484.
60. McFarlane, *supra* note 48, at 107.
61. 545 U.S. at 488-89.
62. *Id.*
63. *Id.* at 489 (quoting Berman v. Parker, 348 U.S. 26, 35–36 (1954)).
64. So legion that any potential list of citations to such cases would be nonsensical. Searching any hornbook would suffice the reader in a query for an example of such a judicial ruling.
65. Generally determined by the government actor.
66. *See* McFarlane, *supra* note 48, at 112.

zens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak,[67] a key feature and shortcoming of corporatist theory.[68] The Court surrendered even more of its power to decide whether the proposed redevelopment constitutes a "public use" to the very municipal agency seeking to condemn the properties in question for its own fiscal benefit at the behest of a private, profit-seeking developer.[69]

*E. Post-*Kelo *Private Transfers*

Subsequent to the Court's decision in *Kelo*, courts have given greater deference to private transfers. Several subsequently-decided cases give insight to the effect *Kelo* has had on Fifth Amendment jurisprudence. In *Western Seafood Co. v. United States*, the owner of a shrimp trawler servicing business, seeking an injunction to prevent condemnation of some of its riverfront property for the purpose of constructing a marina to be operated privately, sued the City of Freeport, Texas, and a private development corporation created by the city for urban development purposes.[70] As in *Kelo*, the City sought to develop its waterfront to revitalize a waning local economy.[71] The Fifth Circuit found that the proposed taking of Western Seafood's property was the result of a carefully considered development plan.

Western Seafood argued that *Kelo* was distinguishable because in the New London case the beneficiaries of the transfer of property were not identified prior to the city's exercise of eminent domain. Western Seafood maintained that in its own case, the beneficiaries were identified prior to or at the earliest stages of the City's planning process.[72] Relying on Justice Kennedy's concurrence in *Kelo*, Western Seafood argued that these facts required a higher standard of scrutiny than rational basis.[73]

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67. *Id.* at 112-23.
68. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4, at 1705.
69. Kanner, *supra* note 38 at 336.
70. W. Seafood Co. v. United States, 202 F. App'x 670 (5th Cir. 2006).
71. *Id.* at 675.
72. *Id.* at n.9 (explaining that "[f]irst, at the December 5, 2003 hearing for preliminary injunction, the City's counsel stated, '[the Blaffers] were the ones who came forward and said, Hey, we'd like to do this project for you.' Second, at the April 8, 2004 status conference, Defendants' counsel replied to the district court's inquiry regarding the participation of the developer Royall by saying, 'Mr. Royall is the principal, the, I guess, person in charge.' Third, Western Seafood cites to the master plan document dated October 2002 to demonstrate that the marina project had been proposed by the Blaffers before the development plan was drafted. The document says, 'Building a state-of-the-art marina right on the riverfront as proposed by the Intermedics property owners. . . .' Western Seafood points out that the Blaffer heirs owned the Intermedics property.").
73. *Id.* at 675.

The Fifth Circuit declined to address whether a heightened standard was necessary because it did not believe the facts warranted such an analysis. The court acknowledged that the plaintiff offered evidence to prove the private benefit in the case was intended, but the court said that because the beneficiary's property was along the river where the marina was to be built, the City's desire to collaborate with them was logical. The court believed the evidence provided by Western Seafood did not support the inference that the City exhibited favoritism or had a purpose other than to promote economic development in Freeport.[74]

Another recent case is *Goldstein v. Pataki*, which stemmed from a publicly-subsidized development project that included the construction of a sports arena that would be home to the National Basketball Association franchise then known as the New Jersey Nets,[75] as well as no fewer than sixteen high-rise apartment towers, and several office towers.[76] Fifteen property owners whose homes and businesses in the takings area were slated for condemnation to make way for the project brought suit to enjoin the eminent domain proceedings from taking place. The plaintiffs alleged that the project, from its very inception, was not driven by legitimate concern for the public benefit.[77] Instead, the property owners claimed that a "substantial" motivation of the various state and local government officials who approved or acquiesced in the approval of the redevelopment project had been to benefit Bruce Ratner, the man whose company first proposed it and who was to serve as the primary developer. Ratner was also the principal owner of the New Jersey Nets. In summation, the plaintiffs argued that all of the "public uses" the defendants had advanced for the taking and subsequent construction were pretexts for a private transfer that violated the Fifth Amendment.

The Second Circuit stated that the development project met several well-established categories of public uses, including the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements.[78] Although the court acknowledged that the property owners who brought suit owned property in the takings area that was not blighted, the court stated that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building."[79] Further, the court said it did not matter that New York had

74. *Id.*
75. Since the subsequent move into New York City, the team has been renamed the Brooklyn Nets, in honor of the franchise's new hometown.
76. Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008).
77. *Id.* at 54.
78. *Id.* at 58-59.
79. *Id.* at 60 (quoting Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985) (quoting Berman v. Parker, 348 U.S. 35 (1954))).

procured the services of a private developer to execute such improvements and implement its development plan.[80] Upon finding a valid public use to which the project is rationally related, it "makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end."[81]

The Third Circuit decision in *Whittaker v. County of Lawrence*[82] is also informative. There, the property owners who brought suit all owned parcels of property within an area of approximately 530 acres that had been identified for industrial development by the Lawrence County Economic Development Corporation, a private non-profit corporation formed by Lawrence County.[83] When purchase negotiations proved unsuccessful, the County created the Redevelopment Authority of Lawrence County, which had the authority to condemn property, which it quickly did.

The Third Circuit began its analysis by stating that a taking for purposes of economic development satisfies the Fifth Amendment's public use requirement.[84] The property owners asserted that the Lawrence County Commissioners authorized the use of eminent domain power despite no indication of blight, as required by Pennsylvania's Urban Redevelopment Law, and that such deliberate misuse of state authority suffices to violate the substantive due process guarantee of the Constitution. The court noted that a state official's failure to follow state law does not, by itself, shock the conscience[85] in the absence of additional facts. Because the property owners simply alleged that the defendants did not follow state law in taking their property without providing any other evidence of conduct that shocked the conscience, the court dismissed the claim.

Lastly, arguing that the action in this case amounted to "intentional and arbitrary discrimination" without a rational basis, the property owners brought an equal protection claim.[86] The property owners claimed that because the property was not blighted, there was no legitimate government interest in exercising eminent domain over the property and that the government officials acted irrationally in condemning it. The Third Circuit disagreed however, stating that States have a legitimate government interest in exercising their eminent domain power for the public use, which, for purposes of the Federal

80. *Id.* at 59-60.
81. *Id.* at 60 (quoting *Rosenthal*, 771 F.2d at 46). The unanswered question is, to what end; public use or private redevelopment and ownership?
82. Whittaker v. County of Lawrence, 437 F. App'x 105 (3d Cir. 2011).
83. *Id.* at 107.
84. *Id.* at 108.
85. "[A]n underlying constitutional violation is not required to state a substantive due process claim, and some violations of state law may shock the conscience," enough to violate the substantive due process guarantee. *Id.*
86. *Id.*

Constitution, includes economic development. Any argument to the contrary was, to the court, without merit.[87]

III. Issue

These cases serve to show the corporatist nature of much of modern Takings law; governments and private corporations collaborate to attain a mutual desired social end, which is meant to benefit the community as a whole. However, as is so often the problem with corporatism in practice, government bargains only with selected, representative interest groups or peak organizations and normal political processes are sidestepped for the sake of efficiency.[88] What often substitutes for traditional democratic processes are technocratic and managerial solutions.[89]

What is perhaps most upsetting about this state of affairs is that even to the extent that the land-owners can prove favoritism in the selection of a particular development plan, those land-owners would have redress only through state law, not federal constitutional law.[90] So while municipal officers involved in corporatist back-dealing to attain personal benefits might be subject to state legal sanction, the fact that corporate favoritism occurred has no effect on the constitutional claim. In other words, any self-serving corporatist dealings the redeveloper and city might enter into would not make the "public project" any less or more public.[91] The inequities posed by these government-coerced private transfers require reviewing courts to apply a more demanding standard as a safeguard.

IV. Analysis

A. Public-Private Redevelopment Has a Disparate Impact on Low-Income and Minority Neighborhoods.

i. Decision-makers often exercise inadvertent discrimination in pursuit of economic development.

The corporatist nature of the aforementioned cases stems from the public-private redevelopment that leads to the use of the eminent domain power by government actors at varying levels. While some find these public-private partnerships to be beneficial for economic growth

87. *Id.*
88. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law*, *supra* note 4, at 1705.
89. *Id.*
90. Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 605 F. Supp. 612, 618 (S.D.N.Y. 1985), *aff'd* 771 F.2d 44 (2d Cir. 1985). The court actually evaded the condemnees' argument. They argued not only that there was favoritism in choosing the redeveloper, but also that the project boundaries were corruptly drawn to encompass their property for the favored redevelopers' use. *Id.* at 616-17.
91. *See* Kanner, *supra* note 38, at 363.

and city morale,[92] the problems posed by redevelopment programs would seem to outweigh any claimed economic benefit to the already-affluent by providing them with housing, shopping, and entertainment.

The first problem is the rather unbecoming history of redevelopment and urban renewal projects in the twentieth century. Redevelopment has had a long and inglorious history of open racism and abuse of those on the lower rungs of the socio-economic ladder.[93] The underprivileged, poor, and lower middle-class "who are forcibly displaced by urban renewal without compensation for all their demonstrable economic losses,"[94] are the same people who are supposed to be the beneficiaries of "benign government housing policy, but whose vital interests in a family home are in fact ignored."[95] That, to say the least, is an unfortunate display of moral blindness on the part of advocates of redevelopment.[96] The history of redevelopment is notorious because society's needs are contested and subjective, often colored by narrow perspectives, racism and classism.[97] Redevelopment projects consistently come at the expense of the same marginalized groups, namely Black communities, the poor, the working class, and more recently, middle-class residents.[98] Advocates for social justice in the 1960s recognized the elitist and racist purposes to which many federal urban renewal funds were dedicated, giving urban renewal the nickname, "Negro Removal."[99] The ruling in *Kelo* is conducive to municipal favoritism and corruption, and may raise the renewed danger of illegitimate use of urban renewal in a racially discriminatory fashion to remove minority populations from coveted parts of town, potentially reinvigorating this "Negro Removal" of the 1950s.[100]

Specific examples of such discrimination abound. Of the many families forcefully displaced by urban renewal between 1949 and 1963, " '63 percent of those whose race was known were nonwhite," and further, "of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which . . . was seldom available to them' " to begin with.[101] Public works projects in the 1950's and 1960's destroyed predominantly minority

92. *See* Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, *in* THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41 (Vermont Law School 2006).
93. *See* Kanner, *supra* note 38, at 348.
94. *Id.* at 348-49.
95. *Id.*
96. *Id.* at 349.
97. McFarlane, *supra* note 48, at 117.
98. *Id.* at 99.
99. *See* Mihaly, *supra* note 92, at 41.
100. Kanner, *supra* note 38, at 338.
101. 545 U.S. at 522 (Thomas, J., dissenting) (quoting Berman v. Parker, 348 U.S. 26, 28 (1954)).

communities in St. Paul, Minnesota, and Baltimore, Maryland.[102] In 1981, urban planners in Detroit, Michigan, uprooted the largely lower-income and elderly Poletown neighborhood for the benefit of the General Motors Corporation.[103] More than 97 percent of those "forcibly removed from their homes by the 'slum-clearance' project upheld . . . in *Berman* were black."[104]

The perceived need was to improve dilapidated, economically disconnected neighborhoods which have historically been located in poor or working-class, black communities in the inner city.[105] As demonstrated by the community disruption resulting from poorly conceived and poorly executed redevelopment schemes during the urban renewal era, the oppression of the "blight" designation has been an enduring feature of American urban life. *Kelo* has now geographically detached eminent domain from inner cities and has made it apparent that the power could potentially be exercised anywhere. By clarifying that "economic development" now theoretically permits property and communities to be taken and remade anywhere, the oppressive aspects of the broad term "development" are finally receiving long overdue attention.

Not enough attention has been paid to how these changes impact the urban social fabric by creating consistent winners and losers chosen by a select few who dictate policy.[106] The consumptive needs and excessive tastes of the affluent are prioritized in modern redevelopment, while the rejection of older, less-upscale, land uses has become personal, class-based, and subjective.[107]

ii. Unclear Definitions of what Constitutes a Blighted Neighborhood Enable Community Groups to Maneuver Decision-making to their Favor while Minimizing Input from Affected Groups.

The sometimes-ambiguous notion of blight in eminent domain proceedings permits questionable determinations. Given this trouble in determining what blight is, the ease of accepting blight elimination as a basis for exercising eminent domain is, in effect, a way of saying "take someone else's property, not mine."[108] Is society prepared to say that "living in a blighted neighborhood mean[s] one's property is . . . less important to the owners who consider that blighted place home" than if they lived in modern suburbia?[109] And what of the effects of declaring these slum properties as blight? The situation is not im-

102. *Id.*
103. J. WYLIE, POLETOWN: COMMUNITY BETRAYED 58 (1989).
104. 545 U.S. at 522 (Thomas, J., dissenting) (quoting *Berman*, 348 U.S. at 30).
105. *See* McFarlane, *supra* note 48, at 100.
106. *Id.* at 117.
107. *Id.*
108. "[O]ne person's blight is another person's community." *Id.* at 129.
109. *Id.*

proved when slum property is converted into public housing, which has financial and other eligibility restrictions imposed on those whom the redevelopment sought to aid.[110] Far from there being an effort to ensure an even distribution of the social surplus, the financial eligibility requirements are now meant to prevent universal access at a non-discriminatory price. The projects only retain the title "public" because the government has chosen to help operate them, not because they truly benefit the public. When viewed on their faces, these programs are dependent on the taking of private property for future private use.[111]

In an attempt to gain support in these disenfranchised communities, Community Benefit Agreements (CBAs) were introduced in the 1990s as a popular instrument in helping to negotiate benefits for the communities directly affected by a development.[112] Covering a lot of issues and having a lot of groups sign on is what gives CBAs credibility as having addressed the most important issues to each particular community. However, these public-relation efforts seem to have provided little change. In 2010, a task force led by the New York City comptroller studied CBAs in New York and noted that agreements of this type—signed when building the new Yankee Stadium, a retail complex in the Bronx and Columbia University's Manhattanville expansions—were negotiated in a context where no clear and generally accepted standards existed to allow critics of the projects to question their credibility. The majority of the task force came to the conclusion that in New York City, CBAs have been overtaken and usurped by developers and by pro-development advocates. From the developer's point of view, this provides a good tactic for minimizing opposition and opening the way for minor concessions to the surrounding community in order to garner support.[113]

B. Quantitative Evidence of Failures of Corporatist Takings

In addition to the substantive concerns over the negative effects that these corporatist programs have on marginalized societal groups, the incremental, quantifiable benefits of economic development are over-touted as real.[114] The results of government financial support and eminent domain proceedings are rarely scrutinized and grand promises for jobs are rarely enforced.[115] A suitable example comes from the Atlantic Yards project that was the basis of the suit in *Goldstein v. Pataki*, discussed above. There, jobs haven't appeared in the

110. *See* EPSTEIN, *supra* note 35, at 179.
111. *Id.*
112. Dan Rosenblum, *Selling Low, Building High*, NEXT CITY (Feb. 18, 2013), http://nextcity.org/forefront/view/selling-low-building-high.
113. *Id.*
114. *See* McFarlane, *supra* note 48, at 106.
115. *Id.*

numbers promised by officials who, when selling the project at first, predicted nearly 17,000 construction jobs and 8,000 permanent jobs.[116] In 2009, the Empire State Development Corporation, a state authority charged with managing the project, predicted 4,538 new jobs in the city as a result of the redevelopment project. Despite these predictions, during the work, the average workforce at the site ranged from 841 to 880, which the developer reported in late July. According to the developer's figures, when the average was 880 construction jobs, 256 were Brooklyn residents and less than 10 percent were from the four community boards in the area. There are around 2,000 of the more permanent arena jobs, but only an estimated 105 are full time. Additionally, at least 20 percent of the subsidized housing units in B2 are reserved for families making more than $100,000, despite the claim of affordable housing. Spaces that were meant to be and were claimed to be reserved for working-class families will instead go to wealthier New Yorkers.[117]

Recent studies suggest that there is no association between economic development incentives and any measure of economic performance.[118] No statistically significant associations between economic development incentives per capita and average wages or incomes; between incentives and college graduates or knowledge workers; or between incentives and the state unemployment rate have been found.[119]

These findings are consistent with the broad body of research on incentives.[120] A detailed 2002 study of more than 350 companies that received development incentives found these incentives actually had a negative effect on these companies' ability to create jobs.[121] Using detailed statistical models to control for a wide variety of factors, this study discovered that companies that received incentives expanded more slowly than those that did not and also that the overall effect of incentives was a reduction of 10.5 jobs per establishment.[122]

Further, the use of eminent domain for economic development seems to be very unpopular with the general population. A poll conducted by Quinnipiac University showed that people are overwhelm-

116. *See* Rosenblum, *supra* note 112.
117. *Id.*
118. Richard Florida, *The Uselessness of Economic Development Incentives*, THE ATLANTIC (Dec. 7, 2012), http://www.theatlanticcities.com/jobs-and-economy/2012/12/uselessness-economic-development-incentives/4081/.
119. *Id.* (With the help of the MPI's Charlotta Mellander, the author examined to what degree economic development incentives are related to state economic performance. "Mellander ran correlations between economic development incentives per capita and economic variables like wages, income, poverty levels, education levels, knowledge workers, and so on.")
120. *Id.*
121. Todd Gabe & David Kraybill, *The Effect of State Economic Development Incentives on Employment Growth of Establishments*, 42 J. REG'L SCI.703, 703 (2002).
122. *Id.* at 723.

ingly opposed to the use of eminent domain for economic redevelopment with 89 percent opposing and only 8 percent approving.[123] Those conducting the poll said that they had never seen such a lopsided margin on any issue they had polled. "Similarly, a poll conducted by the University of New Hampshire found that 93 percent of those polled opposed using eminent domain for private development."[124]

As with corporatism of any kind, the vital concern is the lack of democratic process in policy and decision-making.[125] "Powerlessness in the face of change is part of the human condition, but legal doctrinal powerlessness in the face of human-initiated change is profoundly different," particularly when the one initiating the change is also the one precluding harmed parties from redress.[126] This is no longer a regulatory world in which government exercises a reactive, police-power role and the private developer plays the protagonist.[127] Instead, this is a contractual world, where the traditional roles of each are broken apart and rearranged. Those who are democratically elected defer much of the redevelopment determinations to private unaccountable actors.[128] Such deference to groups wielding economic and political clout pervades of corporatism.

C. Heightened Review

Given the aforementioned negative effects takings of this kind have on poor, working class, and minority communities, it would seem appropriate to require a more exacting judicial review than the rational basis test. Several commentators[129] had proposed a heightened standard of scrutiny for takings that transfer property from one private party to another prior to *Kelo.* However, the dissents of Justice O'Connor and Justice Thomas in that case have received the most

123. *See* Kanner, *supra* note 38, at 345.
124. *Id.*
125. *See* Aman, *Globalization, Democracy, and the Need for A New Administrative Law, supra* note 4, at 1705.
126. *See* McFarlane, *supra* note 48, at 98.
127. *See* Mihaly, *supra* note 92, at 41.
128. *See id.*
129. *See, e.g.*, David L. Callies, *Public Use: What Should Replace the Rational Basis Test?*, 19-APR PROB. & PROP. 14, 15-16 (2005); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 68-75 (1999); Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 369-81 (1983); Stephen J. Jones, Comment, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 304-14 (2000); Peter J. Kulick, Note, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" - A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST. U.-DET. C. L. 639, 672-88; Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 424-56 (1983).

attention and will act as blue-prints for a proposed test to the dilemmas posed by corporatist takings. By emphasizing the city's perspective, the majority opinion was able to consider the dire economic conditions in New London separate from the specific interests that residents of the redevelopment area might have had.[130] The two dissents, however, looked at the prospective redevelopment from the eyes of the landowners because they believe that their obligation, as guardians of the Constitutional rights of the property owner, is to ask and answer what this all meant for the condemnees.[131]

Justice O'Connor strongly critiqued the majority's holding that incidental public benefits of economic development qualify as a valid "public use."[132] The majority held that the state has the power to take property "currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure."[133] However, Justice O'Connor correctly pointed out that any lawful use of real private property can be said to generate some incidental benefit to the public. Therefore, if positive side effects are enough to render transfer from one private party to another constitutional, then the "public use" clause places no genuine limitation on government and transfers from one private party to another are perfectly constitutional so long as the acquiring party can show its capacity to increase economic output on the land.[134]

Further compounding the legal analysis is the fact that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.[135] That is precisely the problem with economic development takings. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. The majority's logic states "that eminent domain may only be used to upgrade—not downgrade—property."[136] In essence, such a holding "makes the Public Use Clause [of the Fifth Amendment] redundant with the Due Process Clause, which already prohibits irrational government action." The Court then ironically acknowledges itself that it is not the place of judges to do relative cost-benefit analysis for every challenged taking to determine whether there will be an increase in economic output. This claimed constraint is thus of no genuine importance, however, for as Justice O'Connor asks, "who among us can say she already makes the most

130. *See* McFarlane, *supra* note 48, at 105.
131. *See* Mihaly, *supra* note 92, at 41.
132. Kelo v. City of New London, Conn., 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).
133. *Id.* at 501.
134. *Id.*
135. *Id.* at 502.
136. *Id.* at 503.

productive or attractive possible use of her property?" The possibility of condemnation now hangs over all property as no constitutional limit prevents the State from "replacing any Motel 6 with a Ritz–Carlton, any home with a shopping mall, or any farm with a factory." Thus, economic development takings jeopardize the security of all private property ownership.[137]

The enduring contribution for heightened judicial review of such takings from Justice O'Connor's dissent is that "incidental public benefit" cannot act as a valid "public use" for constitutional analysis.[138] Were this to be the case, the notion of public use would be nothing more than excess language devoid of meaning as almost any property (particularly residential property) can be put to more economically efficient use.[139]

Taking this insight from Justice O'Connor's dissent, it is proper to now move to that of Justice Thomas. Making similar observations to those of Justice O'Connor, Justice Thomas noted that if "the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage."[140] He also notes that the Takings clause is a prohibition on government rather than a power granted to it,[141] and that it seems most implausible that the Framers intended to defer to state and local legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights.[142]

However, most significant for the present analysis was his observation and call for heightened scrutiny for takings of this sort:

> Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," . . . surely that principle would apply with great force to the pow-

137. *Id.* at 505 (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 465 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)).
138. *Id.* at 501.
139. *Id.*.
140. *Id.* at 507 (Thomas, J., dissenting).
141. *Id.* at 511.
142. *See id.* at 517-18.

> erless groups and individuals the Public Use Clause protects.[143]

This observation sums up well the need for heightened scrutiny because, most often, takings of this sort disproportionately harm those with the least access to the political process. As with any corporatist government action, those groups excluded from policy decisions are harmed most for the sake of efficiency or elitist public policy.

In addition to the substantive benefit of heightened scrutiny, such a test would lessen the need to litigate cases of this kind. A demanding standard such as this would make it difficult for private transfers to pass muster for legislatures to attempt them. Further, many of those cases which might nonetheless be brought would be easily disposed of in the dismissal or summary judgment stage. A standard of this level is not only in the interest of those with less access to policy decisions, but also in the interest of judicial economy.

It seems most appropriate that takings be necessary to further a compelling government interest. Public use and access to facilities and routes of transportation would most certainly pass this test, but increased economic output would not. If the aforementioned dangers of corporatism in economic development takings are to be guarded against, the Constitution can allow nothing less.

V. Conclusion

Eminent Domain, when used in its proper capacity serves the legitimate interest of promoting communal cohesion and effective routes of transportation for the general populace. Unfortunately, the public use requirement of the Fifth Amendment's taking clause has been replaced by a requirement of economic development. This has led to the abuses enumerated above, including, but not limited to the use of the eminent domain power of the state to transfer property from one private party to another.

These acts are distinctly corporatist in that they are decided upon and executed outside of the proper political process with few parties at the bargaining table.[144] Only those parties wielding the most political, economic, or financial clout have the ability to make determinations of what uses land will go to, even if the desired land is not yet owned by any party involved in the negotiations. Veiled behind the vague term, economic development, cities and municipalities are now

143. *Id.* at 521-22 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

144. Proper political process does not include unelected corporate managers or board members. Their voices are to be heard in the same manner and same way as their fellow-citizens; through the electoral process. Instead, these private actors have the ability to mold policy by allocating funds from one municipality (or municipal officer) to another as means of growing and increasing revenue.

including non-state actors in the policy decisions underlying much of the acts of the locality in question.

This back-room process works to the detriment of certain groups consistently, including the poor, working class, and black community. Areas that appeal to the affluent, but do not yet meet their tastes are repossessed and renovated under the auspices of urban renewal. This urban renewal is not much more than those same exclusive bargaining parties negotiating their way to cheap purchase and redevelopment of urban spaces for the benefit of themselves and their cohorts. This presents the dilemma of corporatism in practice: inequality of opportunity and inequality of outcome.

Such disproportionate harm to specific classes of citizens warrants no less than the most exacting judicial scrutiny. Approaches such as this are often shouted down as too enamored with property rights or too ideological. Property rights are most important for the least-well off amongst us, as they protect from the reaching arm of both government and business. Judicial attention should be most focused on protecting those rights for the poor and working classes rather than redistributing it to the well-connected in the hope of increased tax revenue or economic development and expansion. If property rights and equality are to have any significant meaning in Constitutional law, all should be secure in their holdings, not only those who have the ability to dictate policy. The Constitution is meant as a safeguard against such government actions, but has instead become a tool for outright theft from the poor to the rich. The notion that such state action is good public policy befits the tyrant more than the free.

> I am unable to accede to this statement of law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail. As a substitute it would be declared that private property is held on condition that it may be taken by any person who can make more profitable use of it, provided that such person shall be answerable in damage to the former owner for his injury. . . Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights.[145]

145. McCleary v. Highland Boy Gold Mining Co., 140 Fed. 951, 952 (C.C.D. Utah 1904).