

PREVENTING REAL TAKINGS FOR IMAGINARY PURPOSES: A POST-KELO PUBLIC USE PROPOSAL

WILLIAM A. CURRAN*

By allowing the condemnation of private homes to make way for a “more attractive” private development, the U.S. Supreme Court, in Kelo v. City of New London, infuriated the libertarian legal academy and much of the public. Even worse from the perspective of individual rights, the Kelo Court blessed the taking without requiring either the City of New London—the condemnor—or any private developer to actually undertake and complete the project that justified the taking. Many calls for further property protection argue that takings like the one at issue in Kelo are not “public” enough to be permissible under the Fifth Amendment. In this Note, I focus on the word “use,” rather than “public,” in the Takings Clause. Instead of requiring that condemnation of land be proposed for a purpose more “public” than economic development, I would require that the land taken actually be used for the claimed public purpose. My proposal would honor the constitutional rights of property holders and deter inefficient takings while allowing truly beneficial takings to proceed.

INTRODUCTION

By allowing the taking of private homes to make way for a “more attractive” private development, the U.S. Supreme Court, in *Kelo v. City of New London*,¹ infuriated the libertarian legal academy² and much of the American public.³ In *Kelo*, the Court held that a plan for private economic development adequately justified the condemnation of fifteen private parcels. Scholars attacked the decision as an unforgivable failure of the nation’s highest court to uphold the Fifth Amendment, which permits the government to take private property

* Copyright © 2009 by William A. Curran. J.D., 2009, New York University School of Law; B.A., 1998, Dartmouth College. I would like to thank Sarah Lustbader, Tulani Thaw, Drew Johnson-Skinner, Daniel Priest, and the staff of the *New York University Law Review* for graciously and tirelessly working to improve this Note. I also am grateful to Professor Vicki Been for her helpful suggestions. Finally, for everything, thanks to my wife Tracy and daughter Claire.

¹ 545 U.S. 469, 474–75 (2005).

² See, e.g., Richard A. Epstein, *Blind Justices: The Scandal of Kelo v. New London*, WALL ST. J., July 3, 2005, <http://www.opinionjournal.com/extra/?id=110006904> (“[The] regrettable 5-4 decision in *Kelo v. City of New London* marks a new low point in the Supreme Court’s takings jurisprudence.”).

³ See, e.g., William Yardley, *Anger Drives Property Rights Measures*, N.Y. TIMES, Oct. 8, 2006, at A34 (describing resentment of property owners in wake of *Kelo* toward government infringement on property rights and subsequent ballot measures designed to keep government at bay).

only when it will be put to a “public use.”⁴ Pundits and the four dissenting Justices worried that if the possibility of increased tax revenue and employment from a private development were enough of a public purpose⁵ to justify a taking, any grand project would be able to displace a more modest status quo.⁶ As Justice O’Connor noted in her dissent, “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”⁷

Compounding the apparent flimsiness of the constitutional property protection was the fact that the *Kelo* Court allowed the taking without requiring either the City of New London or any private developer actually to produce the project that justified the taking. The majority held that its inquiry was limited to determining whether the government rationally could have believed that its proposed plan had a public purpose.⁸ This essentially allowed the condemnation of private property on the basis of nothing more than the legislature’s reasonable good intentions. Private parties could lose their homes without any public benefit actually being achieved. This standard tells those seeking condemnations that they will not be required to live up to their promises, freeing them to exaggerate promised public benefit in an effort to convince local governments that a taking is worthwhile.⁹

The potential expansiveness of takings under *Kelo*’s “potential public purpose” test has led some scholars to call for the elimination of takings for private economic development, a reversal of *Kelo*.¹⁰ Such an approach is grounded in the constitutional argument that takings for private economic development are not “public” enough to be

⁴ U.S. Const. amend. V (“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.”).

⁵ The majority in *Kelo* interpreted “public use” to mean “public purpose.” 545 U.S. at 479–80. This interpretation follows from applicable precedent. See *infra* Part I.

⁶ *Kelo*, 545 U.S. at 503 (O’Connor, J., dissenting).

⁷ *Id.*

⁸ *Id.* at 488 n.20 (majority opinion).

⁹ Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 192 (2007) (“The lack of a binding obligation creates incentives for public officials to rely on exaggerated claims of economic benefit that neither they nor the new owners have any obligation to live up to.”).

¹⁰ See, e.g., Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 497–98 (2006) (calling for ban on economic development takings by state legislation or state constitutional amendment); Somin, *supra* note 9, at 185 (calling for judicial ban on most, if not all, economic development takings); see also *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting) (arguing that allowing takings for private economic development “effectively . . . delete[s] the words ‘for public use’ from the Takings Clause”).

permissible under the Public Use Clause of the Fifth Amendment.¹¹ However, this proposal is overinclusive—it would prevent truly beneficial takings for economic development—and was properly rejected by the Court in *Kelo*.

In this Note, I argue that a more narrowly tailored approach to protecting property rights in the context of takings for private economic development would focus on the word “use,” rather than the word “public,” in the Fifth Amendment.¹² Instead of requiring that takings be proposed for a purpose more “public” than private economic development, I would require that land taken for private economic development actually be *used* for the claimed public purpose. This requirement would hold developers to their promises, rendering them reluctant to make promises they do not think they can keep and reducing the incentive to exaggerate, a problem that lies at the heart of many troubling takings.¹³ At the same time, this solution, unlike a complete ban on takings for private economic development, would allow truly beneficial takings to proceed.

I argue that the constitutional right to not have property taken for anything other than a public use is not satisfied until the property is actually put to a public use. Those subject to takings should have the right to sue for the return of their property and damages until the justifying public purpose is substantially realized.¹⁴

Functionally, my proposal is similar to several state statutory and constitutional provisions that provide condemnees with a right to repurchase taken land if the public purpose justifying the taking is not achieved.¹⁵ However, my proposal differs from these state protections in at least three important ways. First, the source of my proposal is the Takings Clause itself: specifically, a reading of the clause that identifies the right not to have land taken for any use other than a public use as a constitutional right that provides individual protection

¹¹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹² *Id.*

¹³ My proposal would not apply to takings for economic development by governments. Though one could question the wisdom of such takings, public ownership of such developments should render them permissible under the Public Use Clause.

¹⁴ The justifying public purpose is realized when the development plan that justified the taking is carried out. The timing of the right to sue would be based on timing laid out in the development plan. For a more detailed discussion, see *infra* Part III.A.3.

¹⁵ See, e.g., NEV. REV. STAT. § 37.270 (2007) (providing condemnee with right to repurchase land taken via eminent domain if condemnor does not begin active planning for implementation of justifying public use within fifteen years of obtaining possession of property); WYO. STAT. ANN. § 1-26-801(d) (2009) (providing buyback right if proponent fails to make “substantial use” of taken land within ten years).

similar to that provided by other provisions of the Bill of Rights.¹⁶ Beyond the theoretical importance of this distinction, my proposal's grounding in the Federal Constitution means that accepting it would reset the floor for permissible takings in all states.¹⁷ Second, my proposal is more flexible than the state buyback laws because it bases the timing of buyback rights on the development plan that justified the taking, whereas the state laws set arbitrary deadlines. Third, my proposal seeks to remedy the constitutional violation properly by providing damages as well as buyback rights; current state laws offer only the latter.

This Note proceeds in three Parts. Part I provides an overview of the development and current state of takings law. Part II presents a basic model that illustrates why the Court's approach in *Kelo* encourages takings that violate individual rights. Part II also reviews and critiques other potential solutions to this problem. Part III presents and defends my "actual use" proposal.

I

DEVELOPMENT OF TAKINGS LAW

The five-Justice majority that upheld New London's taking in *Kelo* presented its holding as dictated by "over a century of our case law interpreting" the Takings Clause.¹⁸ In this Part, I review the evolution of the takings doctrine over this period.

A. Basic Doctrine and Early Implementation

The power of eminent domain is not explicitly granted to the federal government by the Constitution;¹⁹ rather, the Constitution assumes a preexisting power in the government to take land as an

¹⁶ For further discussion of how the protection provided by the Takings Clause compares to other individual constitutional rights, see *infra* note 100.

¹⁷ The Supremacy Clause of the U.S. Constitution demands that state laws conform to federal law, including, of course, the U.S. Constitution itself. U.S. CONST. art. VI, cl. 2. In the takings context, this means that a state cannot permit takings that are forbidden by the U.S. Constitution. However, states are free to be more restrictive than required by federal law, and thus could prohibit takings that would be allowed by the U.S. Constitution. Justice Stevens's majority opinion in *Kelo* makes this point explicitly. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.").

¹⁸ *Kelo*, 545 U.S. at 490.

¹⁹ Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 ALA. L. REV. 561, 565 (2008) ("[S]earching for the power of eminent domain in the text of the Constitution is an exercise in futility—it does not appear in the Constitution.").

essential characteristic of sovereignty.²⁰ The Takings Clause²¹ limits this power in two ways. First, the Just Compensation Clause insists that the government pay a fair price for private land that it takes, ensuring that the individuals directly affected do not bear a disproportionate cost for providing a public good.²² Second, the Public Use Clause prohibits the taking of land for anything other than public use.²³ Though private uses are not mentioned in the Fifth Amendment, the Constitution is read to bar the taking of private property for private use, regardless of compensation.²⁴

Interpretations of the phrase “public use”—as it appears in the Federal Constitution and various state constitutions—have varied over time and across jurisdictions. The Supreme Court did not become actively involved in interpreting the Public Use Clause until the late 1800s.²⁵ In *Fallbrook Irrigation District v. Bradley*,²⁶ the Court for the first time substituted “public purpose” for “public use,”²⁷ a linguistic shift that would prove to have lasting substantive effect. The Court soon explicitly embraced the broader definition implied by the substitution of “purpose” for “use” and rejected the stricter test of actual use by the general public.²⁸ It was thus with a

²⁰ See *United States v. Carmack*, 329 U.S. 230, 236 (1946) (“The power of eminent domain is essential to a sovereign government.”); *Kohl v. United States*, 91 U.S. 367, 373–74 (1875) (“The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another.”).

²¹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

²² *Kelo*, 545 U.S. at 497 (O’Connor, J., dissenting) (“[T]he just compensation requirement spreads the cost of condemnations and thus ‘prevents the public from loading upon one individual more than his just share of the burdens of government.’” (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893))).

²³ *Id.* at 496.

²⁴ See *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 80 (1937) (“[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”); JESSE DUKEMINIER ET AL., PROPERTY 945 (2006) (“The Fifth Amendment’s mention of ‘public use’ is read to mean that property may be taken *only* for such uses; the government may not condemn for ‘private’ purposes, however willing it might be to pay compensation for the forced transfer.”).

²⁵ See ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 92–93 (1987) (reviewing history of Supreme Court’s interpretation of “public use”).

²⁶ 164 U.S. 112 (1896).

²⁷ *Kelo*, 545 U.S. at 515 (Thomas, J., dissenting) (describing shift from “public use” to “public purpose” established in *Bradley*). It is unclear, however, whether the Court in *Bradley* intended this change in terminology to be significant, as it may have been unnecessary for the Court to invoke “public purpose” in order to uphold a taking for an irrigation ditch that could have been used by all affected landowners. *Bradley*, 164 U.S. at 162. In his *Kelo* dissent, Justice Thomas notes this possibility. 545 U.S. at 515.

²⁸ See *Mount Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (“The inadequacy of use by the general public as a universal test is

broad understanding of “public use” firmly entrenched as precedent that the Court entered the modern era of takings cases.

B. Modern Doctrine

In the latter half of the twentieth century, the Supreme Court continued to read the Public Use Clause expansively while applying the doctrine to social and economic circumstances different from those of the earlier era. The two major takings cases of this era, *Berman v. Parker*²⁹ and *Hawaii Housing Authority v. Midkiff*,³⁰ set the stage for *Kelo*.

In *Berman*, the Supreme Court unanimously approved the condemnation of an unblighted department store as part of a plan to revitalize a blighted section of Washington, D.C.³¹ In so doing, the Court upheld a taking on the strength of a development plan that authorized the government to condemn private property and transfer it to private developers.³² The Court also seemed to endorse takings to remove obstacles to economic development projects: “[C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”³³ However, *Berman* did not approve a taking that would give unfettered discretion to private parties developing taken land. The legislation authorizing the taking in *Berman* required compliance with the proposal that justified the taking.³⁴

As in *Berman*, the Supreme Court in *Midkiff* approved the transfer of private land to private parties under a plan that provided a guarantee that a public purpose would be served. The plan in question, advanced by the Hawaii Legislature, was intended to reduce the concentration of land ownership in Hawaii.³⁵ The Hawaii Legislature

established.”). This case held that a taking for a power-producing dam was for a public use.

²⁹ 348 U.S. 26 (1954).

³⁰ 467 U.S. 229 (1984).

³¹ *Berman*, 348 U.S. at 34–35.

³² *Id.* at 34.

³³ *Id.* at 35.

³⁴ *See id.* at 30 (noting that condemned property could be transferred to private parties but that “[t]he leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that ‘no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon’ which does not conform to the plan” (quoting District of Columbia Redevelopment Act of 1945, ch. 736, §§ 7(d), 11, 60 Stat. 790 (1945))).

³⁵ *Midkiff*, 467 U.S. at 233. Because of Hawaii’s feudal roots, the ownership of land was extremely concentrated. *Id.* at 232. According to the legislature, seventy-two people owned forty-seven percent of Hawaii’s land, leading to a skewed residential real estate market. *Id.*

passed an act that authorized the taking of private land, which would then be sold in small parcels to the tenants who already occupied it.³⁶ The rights of the private parties who benefited from the takings in *Midkiff* were limited by statute to ensure that the purpose of the takings was realized. These statutory safeguards included empowering the designated state agency to retain a statutory right of first refusal on transfers of the property for ten years—which would prevent rapid resales of the land for quick profit—and a provision forbidding the agency from selling more than one lot to each purchaser.³⁷

In approving the legislature's plan, the Court announced its support for a broad reading of the Public Use Clause: "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public."³⁸ This reading provides ample room for the Court to uphold takings for a wide variety of quasi-public uses and purposes. The next Section considers whether the condemnations at issue in *Kelo* fall into this broad range, as the majority argued.

C. Kelo

The takings at the center of *Kelo* were part of a plan to revitalize New London, a city in southeastern Connecticut that had fallen on hard times.³⁹ The development proposal, approved in 2000, targeted the Fort Trumbull area of the city, which sits on a peninsula on the Thames River.⁴⁰ Fort Trumbull is immediately adjacent to a site where the pharmaceutical company Pfizer Inc. announced in February 1998 that it would build a \$300 million research facility.⁴¹ City officials hoped the Fort Trumbull development would build on any economic momentum generated by Pfizer's investment.⁴²

The development plan for Fort Trumbull was put forth by the New London Development Corporation (NLDC), a private nonprofit corporation established to help the city with development planning.⁴³

³⁶ *Id.* at 233–34.

³⁷ *Id.* at 234.

³⁸ *Id.* at 243–44. Justice O'Connor wrote the *Midkiff* opinion and came to regret it. In her dissent in *Kelo*, she acknowledged that the "troubling" holding in *Kelo* "follows from errant language in *Midkiff* and *Berman*." *Kelo v. City of New London*, 545 U.S. 469, 501 (2005) (O'Connor, J., dissenting).

³⁹ *Kelo*, 545 U.S. at 473 (majority opinion).

⁴⁰ *Id.* at 472–73.

⁴¹ *Id.* at 473.

⁴² *Id.*

⁴³ *Id.*

NLDC developed a plan that encompassed ninety acres and called for the construction of a waterfront conference hotel, commercial and recreational marinas, shops, restaurants, eighty new residences, and 90,000 square feet of office space.⁴⁴ In 2000, New London approved the plan and authorized NLDC to acquire the property necessary to implement it, either by purchase or by exercising eminent domain in the city's name.⁴⁵

NLDC purchased most of the property in the development site from willing sellers but failed to come to agreement with the owners of fifteen parcels, including Suzette Kelo.⁴⁶ Ten of these parcels were owner-occupied; Kelo had lived in her Fort Trumbull home since 1997. Fellow petitioner Wilhelmina Dery was born in her Fort Trumbull home in 1918 and had lived there her whole life, sharing the home with her husband for the previous sixty years.⁴⁷

The proclaimed public purpose in *Kelo* was economic redevelopment.⁴⁸ The project was intended to spur employment and raise tax revenue.⁴⁹ As in *Berman* and *Midkiff*, the achievement of this public purpose was not left entirely to chance: The plan required that any deed conveying the property contain covenants forbidding speculation and limiting development to what was outlined in the development plan.⁵⁰ The Supreme Court declined to use heightened review to evaluate whether the justifying public benefit would come to fruition, refusing to interfere with the discretion of the legislature.⁵¹

Though its broad definition of "public use" was in the same tradition as *Berman* and *Midkiff*, *Kelo* was distinct in at least one impor-

⁴⁴ *Id.* at 474.

⁴⁵ *Id.* at 475.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 483.

⁴⁹ *Id.*

⁵⁰ *Kelo v. City of New London*, 843 A.2d 500, 545 n.64 (Conn. 2004). The plan required covenants containing the following language:

The Parcel shall be devoted principally to the uses contemplated by the Plan, and shall not be used or devoted for any other purpose, or contrary to any of the limitations or requirements of said Plan. All improvements made pursuant to the Plan and this Agreement shall be used in accordance with the Plan unless prior written consent is given by the [development corporation] and [department] for a different use; The Parcel shall not be sold, leased, or otherwise disposed of for the purposes of speculation.

Id. (alterations in original).

⁵¹ See *Kelo*, 545 U.S. at 488 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984))).

tant way: It was the first Supreme Court case in which a taking was justified on grounds of a public benefit—increased employment and tax revenues—provided purely by private development. To the majority, this economic development was just another public purpose that deserved the Court’s approval,⁵² but to the dissent, economic development takings pushed the doctrine too far. Justice O’Connor, in the principal dissent, argued that *Kelo* broke from precedent because of the indirect nature of any public benefit it achieved.⁵³ Taking the property of Suzette Kelo did nothing to spur economic development; only the completion of the planned development would accomplish that.⁵⁴ By contrast, she argued, in *Berman* and *Midkiff*, the very act of the takings served a public good by remedying the social ills of urban blight and land oligopoly, respectively, and thus satisfied the Public Use Clause.⁵⁵

While I agree that *Kelo* was an objectionable taking, the basis for my criticism is not that the proclaimed purpose was economic development rather than blight-removal or some other accepted purpose. Rather, I object to *Kelo* because it approved a taking based on a public benefit (however defined) that may have been wildly exaggerated or even nonexistent. In Part II, I explore the possible sources of such exaggeration.

II

PROBLEM OF EXCESSIVE TAKINGS

Takings currently occur within the federal constitutional framework set by *Kelo*, which does little to cabin the actions of governments that have the power of eminent domain or developers who receive the taken property. Congress and state legislatures enjoy broad deference in determining whether a taking is for public use.⁵⁶ More importantly for the purposes of this Note, the Court does not inquire into the likelihood that the proposed public benefit that justifies the taking will actually be achieved,⁵⁷ enabling developers to offer governments inflated promises of benefit without the worry of having to keep them.

⁵² *Id.* at 484.

⁵³ *See id.* at 500 (O’Connor, J., dissenting) (“Because each taking [in the previous cases] *directly* achieved a public benefit, it did not matter that the property was turned over to private use.”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ In *Kelo*, for example, the Court indicated that any plausible public benefit value identified by the legislature would do. *Id.* at 482–84 (majority opinion).

⁵⁷ *See, e.g., id.* at 488 (rejecting empowerment of courts to review proposal’s prospects for success).

This status quo is troubling for two reasons. First, it allows for the taking of private land without any guarantee that a public benefit will ever be realized. This is the concern in a taking such as that in *Kelo*, which is justified by a development plan. The Court approves the taking based on the public benefit promised by the plan, allowing the displacement of private residents who have no remedy even if the developer abandons the project and the public purpose is never realized. Such takings run counter to the Constitution's promise that land shall only be taken for a public purpose.

Second, current law creates incentives that encourage inefficient takings, exacerbating the constitutional problem and wasting societal resources. These inefficient takings occur because of the Court's failure to require actual use of taken land. With no mechanism to require follow-through on proposals that justify takings, governments and developers seeking a taking have a powerful incentive—explored in this Part—to exaggerate its potential public benefit.⁵⁸ All takings, whether they achieve public benefit or not, cost the condemnor something, as it must pay the condemnee for the taken land and must pay various administrative costs.⁵⁹ When takings do not yield a substantial public benefit, as will often be the case when the benefits or the certainty of the project are exaggerated, public resources are wasted.

This Part presents a basic behavioral model to explore the incentive to exaggerate created by current law and explains why exaggeration leads to excessive takings. It also evaluates alternatives to an actual-use requirement for curbing this incentive.

A. Modeling the Problem

To illustrate the motivational forces behind takings, this model treats private beneficiaries of takings (“developers”) as self-interested and rational. Though in reality a taking may be engineered by a

⁵⁸ See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1015 (“In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners.”). Of course, government officials seeking reelection have an incentive not to anger their constituents. For a discussion of how this consideration fits into the takings context, see *infra* notes 64–67 and accompanying text.

⁵⁹ Administrative costs would include the costs of drafting the development plans used to justify a taking and of complying with other statutory requirements, such as providing public notice and hearings. Legal fees would dwarf these standard costs in the case of a challenged taking. Regardless, in a typical taking a large portion of these administrative costs are paid by the government taking the land, and hence the public. Any public benefit forecast should be discounted by likely administrative costs.

developer, a government, or a quasi-governmental agency (as in the case of NLDC),⁶⁰ this model simplifies by assuming that the primary proponent of the taking is the developer. I believe this is a fair assumption because the problem addressed—excessive takings for private economic development—will most often have a developer in the role of proponent. However, as will be made clear, this model remains useful when the government acts as the proponent and private developers are brought in only after land is already taken.⁶¹

This model treats governments, which wield the eminent domain power, as rational actors with mixed motives. Governments are assumed to consider both the best interest of the public and their own private self-interest. A taking can provide two kinds of benefits to governments: “public benefit,” which is the public justification for the taking and what makes the taking permissible under the Public Use Clause, and “political benefit,” which is the benefit to government officials for approving a taking. Receiving campaign contributions and pleasing vocal constituent groups are examples of political benefit. Public benefit plus political benefit equals “government benefit.”

Takings also have real costs for a government, which this model refers to as “condemnation cost.” Condemnation cost is comprised of the amount the government must pay condemnees for their land (“just compensation,”⁶² which is the market value of the land), plus the political and legal cost of forcing a handful of voters from their

⁶⁰ Obviously, if the government is the primary proponent, it serves two roles in the taking: the party seeking the taking and the party with the power to effect the taking. In some circumstances, the government may be the proponent in title alone, with another entity driving the transaction. For example, a quasi-governmental agency could be operating at the behest of a corporation that it is trying to attract to a certain area. *See, e.g.*, Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, *THE DAY* (New London, Conn.), Oct. 16, 2005, at A1 (“[Pfizer] has been intimately involved in the project since its inception, consulting with state and city officials about the plans for the peninsula and helping to shape the vision of how the faded neighborhood might eventually be transformed into a complex of high-end housing and office space, anchored by a luxury hotel.”).

⁶¹ The private use of condemned land for economic development is what potentially offends the Public Use Clause. My proposal would allow for takings for economic development by the government. *See supra* note 13.

⁶² The Supreme Court has devised both idealized and pragmatic formulations to define the “just compensation” required by the Fifth Amendment. The pragmatic definition, which is currently applied, provides to the condemnee “‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.” *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)). The idealized definition would “put the owner of condemned property ‘in as good a position pecuniarily as if his property had not been taken.’” *Id.* at 510 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). The Court acknowledges that the pragmatic market standard fails to give “full and literal force” to the ideal but is willing to compromise its position “[b]ecause of serious practical difficulties in assessing the worth an individual places on particular property at a given time.” *Id.* at 511.

homes (“political cost”), in addition to administrative costs.⁶³ A government would only agree to condemn the land of a constituent if government benefit exceeded condemnation cost.

As a final preliminary matter, the variables in this model do not have the same units of measurement. Political cost, public benefit, and political benefit are measured in political—not monetary—terms, while just compensation is simply the market value paid to a condemnee. A government responds to political costs, not economic costs.⁶⁴ The goals of a government, whether they are those of its constituents or the self-interested goals of its officials, are not simply wealth maximization, as standard economic analysis would assume in the case of an individual or firm.⁶⁵ Instead, constituents have diverse goals for their government, which range from pragmatic to aspirational, and government officials have the self-interested⁶⁶ desire to maintain or increase their political power. It is not clear how to translate monetary costs into political costs,⁶⁷ and without this conversion, it is difficult to predict how a change in just compensation will affect takings.

A government must, and should, balance benefits and costs to decide whether to proceed with a taking, but a taking will be unconstitutional when a government accepts an exaggerated input for expected public benefit or includes political benefit in its calculation (because political benefit is not “public” by definition). The following stylized analysis identifies the source of the exaggeration of public benefit and explains why this exaggeration could lead to excessive tak-

⁶³ The size of the political cost is correlated with the amount by which just compensation understates the price homeowners would demand for their homes in a consensual sale. The greater the difference between just compensation and the consensual price, the more fiercely will the homeowners resist the taking, exacting political and legal costs from the government. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 375–76 (2000) (noting that because government responds to political costs, and paying just compensation reduces political costs by appeasing condemnees, paying just compensation may actually lead to more takings than otherwise).

⁶⁴ See *id.* at 355–57 (arguing that government does not behave like private firm because it does not seek to maximize financial returns).

⁶⁵ *Id.* at 355.

⁶⁶ See *id.* at 355–56 (noting that monitoring government officials is more difficult for citizens than monitoring corporate managers is for shareholders, which means that government officials have greater opportunity than corporate managers to pursue self-interested goals that conflict with those of their respective constituencies).

⁶⁷ See *id.* at 357 (“What is conspicuously missing from judicial and academic understandings of the effects of constitutional costs on government behavior is a model of government decisionmaking that explains how the social costs and benefits of government activity are systematically translated into private, political costs and benefits for government decisionmakers, and what role, if any, mandating financial outflows plays in this process.”).

ings. But exaggeration by developers would not by itself be sufficient to bring about excessive takings: The government holds the power to take land, and it must either accept these promised benefits as legitimate or approve a taking for another reason before the taking can proceed. I thus also discuss why a government might be prone to allow takings with exaggerated benefits.

1. *Source of Exaggeration*

The takings process starts with a proponent, in this case a private developer. After failing to convince a landowner to sell a parcel voluntarily, the developer proposes to the government that the land in question be taken via eminent domain. The government responds by asking what public benefit will justify the use of this power. The developer may be unsure of the public benefit of the project, but she knows she needs the land to proceed and that, under current law, she will not be forced to provide whatever public benefit she promises. The developer realizes she can buy something real—the use of property—for something imaginary: an unenforceable promise of public benefit.

Additionally, the developer does not know how much benefit the government wants for the taking, and she wants to avoid underbidding. The developer thus has every incentive to base her projection of public benefit not on what she believes to be reasonably achievable, but on what she believes necessary to secure the land. No price is too great when paying in imaginary currency.

2. *Acceptance of Inflated Benefits*

Governments are likely aware that the lack of an actual-use requirement leaves them with the discretion to accept inflated claims of public benefit. If the government accepts inflated claims, it is possibly taking more land than is optimal because its cost-benefit analysis is flawed. But why would the government use the discretion allowed it by the courts to accept such exaggerated claims?

The government may actually believe the claims made by a private proponent, accepting them due to wishful thinking. It is plausible that, particularly in depressed municipalities like New London, the possibility of thousands of new jobs and a bolstered tax base would come as music to the government's ears. Officials, presumably feeling they have little to lose, may be willing to embrace exaggerated claims as an opportunity for optimism and change.⁶⁸

⁶⁸ If the government, instead of a private developer, had acted as the proponent, it would have been playing two roles in the taking. The government in its condemnor role

Of course government officials also may not be pursuing the public interest single-mindedly. Instead, they may take their self-interest as well as the public interest into account when considering a proposed condemnation. This assumption is a softened version of interest group theory, which is based on the idea that all participants in the political process act only in their self-interest.⁶⁹ Rather than strictly relying on a strong version of interest group analysis, this model assumes that government officials will consider their own interest as well as that of their constituents. A government, then,

would know everything about the public benefit that the proponent knows. While the government cannot deceive itself, an overly optimistic government acting in the public interest could overestimate public benefit. In such a case, condemnation cost would be compared to inflated public benefit, just as here. For a discussion of government acting as merely titular proponent, see *supra* note 60. In the scenario of the optimistic government proponent, private parties would become involved after the taking: The government would transfer the condemned land to private developers for achievement of its public purpose.

⁶⁹ See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 35 (1992) (“The defining theme of the interest group theory of lawmaking is its rejection of the presumption that the government endeavors to further the public interest.”). My softened version of interest group theory stems from Daryl Levinson’s analysis, which points out that the explanatory power of interest group theory is limited. See Levinson, *supra* note 63, at 374 (“Interest group theory should supplement, not supplant, the simple majority rule model, ideally by specifying the circumstances under which majorities will mobilize to defeat interest groups or visa-versa.”). Strong versions of interest group theory present government regulation as a good that will be allocated to those willing to pay the most for it. See Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT.* 335, 344 (defining interest group theory as idea that market forces provide incentives for politicians to enact laws that serve private rather than public interest). According to interest group theory, the government is paid in “political support, promises of future favors, outright bribes, and whatever else politicians value.” Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 228 (1986). Some commentators believe that this strong version of interest group theory applies to takings. See, e.g., Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 *TEX. REV. L. & POL.* 49, 82 (1998) (espousing this view). However, applying this type of interest group analysis to takings stretches its theoretical underpinnings. Interest group theory is based on the idea that legislators skim lightly off the top of legislative privileges enjoyed by a very broad population and transfer their proceeds to a narrow interest group. The legislature takes very little from each member of the broad population, so the costs are hardly noticed. However, when aggregated, the skimmed privileges are very large, making a narrow interest group willing to pay for them. See *id.* at 80 (describing operation of interest group rent-seeking).

Takings operate differently. In a taking, the general public bears only part of the cost—the just compensation—while the rest of the cost is paid by the extremely concentrated group of condemnees who are forced from their homes. As the facts of *Kelo* make plain, condemnees can be a formidable force that can exact tremendous political and legal costs from a government. Of course, *Kelo* could be the exception. Many condemnees may be less willing or able to fight a government; this possibility leaves some commentators convinced that strong interest group theory explains governmental behavior in takings. See, e.g., *id.* at 82–83 (espousing this view).

would not approve a development that obviously runs against the public interest just because of large political benefit. Rather, it would favor a development plan that offered significant political advantages, accepting the inflated claims of public benefit by developers at face value.⁷⁰

Government officials reviewing a request for a taking might be willing to embrace an implausible public benefit estimate for a number of self-interested reasons. For example, officials concerned about their prospects for reelection could seek to encourage development regardless of its likelihood of success so that voters see them as taking action to address widely publicized problems, such as urban blight. The campaign value of a development that unrealistically promises 6000 jobs could be greater than that of a development that realistically promises 600 when voters will not know the plausibility of the projects in the short term.

The behavior of governments in an analogous context—the use of state tax incentives to lure businesses to the state—is illustrative. Despite the lack of any empirical evidence that such costly incentives actually attract business, states use them anyway.⁷¹ State officials benefit from the symbolic value of taking action that appears to create jobs regardless of its success,⁷² and acts that appear to lure jobs to the state allow officials to claim credit when jobs do come to the state for whatever reason.⁷³ Governments considering takings may be similarly disposed toward action. Officials might find themselves favoring the possibility of grand success even if it is, in reality, extremely unlikely.⁷⁴

⁷⁰ A government might similarly accept exaggerated claims of benefit if it were also the development proponent. In such a case, the government would be playing the dual roles of eminent domain-wielding government and project proponent. This means the government would be accepting an exaggeration made by itself. As odd as it may appear, this is plausible when political considerations are taken into account. If, for instance, officials were seeking to bulk up their résumés for reelection, they might inflate the public benefit of a project that involves a taking in their role as proponent—and accept these exaggerated claims in their role as condemnor—in order to be seen by voters as taking bold and effective action.

⁷¹ Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 393–94 (1996).

⁷² *Id.* at 394.

⁷³ *Id.*

⁷⁴ At the time the project at issue in *Kelo* was approved by local officials, the prospect of developing a waterfront conference hotel, eighty new residences, and 90,000 square feet of office space in depressed New London certainly seemed remote. The taken land currently lies unused. Katie Nelson, *Conn. Land Vacant Four Years After Court OK'd Seizure*, N.Y. TIMES, Sept. 25, 2009, <http://www.nytimes.com/aponline/2009/09/25/us/AP-US-Eminent-Domain.html> (describing failure to develop land at issue in *Kelo* despite Supreme Court victory). Indeed, proposals that justify takings often fail to bear fruit. See Kenneth R. Gosselin, *In the Busway's Path: Businesses, Homes Lost to Plan with Shaky Future*,

Regardless of their motivation, if government officials accept inflated public benefit estimates for self-interested reasons, takings would proceed that were not justified solely by the true public benefit. The next subsection provides an example of such a taking—a spin on the facts of *Kelo*—to illustrate how it would be analyzed under the model presented here.

3. *A Problematic Taking*

Katie Kapel, a homeowner on the New London waterfront, gets word that Paradise Resorts is assembling parcels in her community to build a Caribbean-style resort and spa in New London. Recovering from her surprise at the site chosen by Paradise, Kapel resolves to only accept an offer that reflects her deep love for her home—far more than the market price. However, after Kapel rejects Paradise's initial offer for her land, the resort company turns to the city to request a taking and offers a development plan that promises to create at least 6000 jobs and turn downtrodden New London into the next “go-to” vacation spot for the affluent. Paradise is aware that New London is a questionable location for a resort but has heard rumors that a competitor is planning a New England resort and wants to prepare a competing site just in case.

Applying the model above, just compensation is the market value of Kapel's home, and the public benefit is the increase in tax revenue and employment that would be generated by the resort. According to my model, the city likely will not question the public benefit estimate offered by Paradise. The possibility of urban renewal blinds it⁷⁵ to the fact that a resort in chilly New London might not succeed, and the promised jobs might not materialize. The political and legal costs are fairly low. Kapel is not likely to have the resources for a protracted legal fight, and most voters in New London are generally supportive of economic development to create jobs. Because inflated public benefit vastly exceeds condemnation cost, the city agrees to take the land. Kapel challenges the taking, but the court, deferring to the city's expertise in determining public purpose, upholds it.

Requiring actual use per the terms of a development plan, as discussed in Part III.B, would prevent this taking. The next Section considers other possible solutions to the general problem of excessive takings.

HARTFORD COURANT, July 26, 2009, at A1 (“Connecticut is littered with state and local projects that were never built after eminent domain was used to seize properties.”).

⁷⁵ Or, if they are self-interested, the political benefit of taking bold action helps officials ignore the dubiousness of the promised public benefit.

B. Evaluating Proposed Solutions

1. Ban Economic Development Takings

The most straightforward way to prevent abusive takings is to ban *all* economic development takings. This is the approach advocated by the four dissenting Justices in *Kelo* and by some scholars.⁷⁶ It is grounded in the idea that, even accepting the Court's precedents interpreting the Public Use Clause broadly, economic development takings simply stretch the clause too far and render such takings unconstitutional.⁷⁷ While advocates of a ban acknowledge that prohibiting all economic development takings would be an overinclusive remedy, they see no better alternative.⁷⁸

Some economic development takings, however, are socially valuable, and should properly be considered constitutional.⁷⁹ The value in these takings stems from the basic economic justification for eminent domain law: enabling socially valuable developments that would otherwise be hampered by high transaction costs.⁸⁰ These transaction costs are created by the bargaining positions of the parties, both of whom have the power to prevent a value-creating transaction and know it, prompting both to seek nearly all the profit from the transaction. Because both parties want more than their fair share of the available rents and feel their requests are justified by their bargaining positions, they cannot reach an agreement.

An example of the potential for economic development takings to break this deadlock in the context of private economic development would be a hotel that is brimming with business and looking to buy some adjacent land on which to expand. However, all of the land surrounding the hotel is owned by a single landowner who is aware of the hotel's predicament and thus wants to extract the highest possible price. The hotel, meanwhile, refuses to pay much above the market price, arguing the landowner has no profitable use for the land and no other interested buyers. When bargaining breaks down, the hotel

⁷⁶ See *supra* note 10 and accompanying text (enumerating examples of this approach).

⁷⁷ See *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (arguing that economic development takings effectively "delete the words 'for public use' from the . . . Fifth Amendment").

⁷⁸ See, e.g., Somin, *supra* note 9, at 209 ("In theory, of course, we should still allow the use of eminent domain for those rare efficient development projects that cannot . . . prevent holdouts. Unfortunately, however, there is no way of confining the use of the economic development rationale to those rare circumstances.").

⁷⁹ This Note considers an economic development taking constitutional whenever the justifying public use is achieved.

⁸⁰ See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74 (1986) (arguing that where market failures exist, government should be permitted to use its eminent domain power to effect exchange of property).

could prevail upon a local government to condemn a parcel of the surrounding land, arguing that the expansion would increase the local tax base and provide construction and service industry jobs.

To be sure, this taking is for economic development. It will transfer property from one private owner to another, and the only benefit to the public will be indirect and incidental. However, if maximizing societal wealth were our only goal, we would want to allow this kind of economic development taking because it would result in an increase in value to society as a whole. This value would be lost under a complete ban of economic development takings.

2. Increase Judicial Scrutiny

Alternatively, courts could insist that developers prove to some level of certainty that the justifying proposal will be completed. Judge Zarella of the Connecticut Supreme Court, dissenting in part from his court's opinion in *Kelo*, included this idea as one prong of a four-part test he proposed for economic development takings.⁸¹ This proposal likely would discourage some developers from offering truly implausible claims of public benefit, such as those put forth by Paradise in our hypothetical in Part II.A.3. However, it also would require the kind of judicial intrusion into legislative territory that the Supreme Court has explicitly rejected.⁸²

Moreover, principles of institutional competency cut against proposals like Judge Zarella's. Raising the level of scrutiny applied to the likelihood that the public purpose will actually be realized would place the judiciary in a role for which the legislature is better suited. While local government officials and planners are far from immune to mistakes in their economic development efforts, they are certainly better qualified to make decisions about developments they have studied at length in communities they know intimately than are judges

⁸¹ *Kelo v. City of New London*, 843 A.2d 500, 588 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) ("The level of proof necessary to meet the burden of establishing that the anticipated economic development will result in a public benefit should be clear and convincing evidence."); *see also* *City of Helena v. DeWolf*, 508 P.2d 122, 129-30 (Mont. 1973) (requiring that condemnor show reasonable likelihood of completion of public project to justify taking); Michael A. Lang, Note, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 472 (2006) (proposing heightened scrutiny test that requires condemnor to show that "the asserted public use will accrue to the public in a reasonable period of time").

⁸² *Kelo*, 545 U.S. at 487-88 ("Alternatively, petitioners maintain that for takings of this kind we should require a 'reasonable certainty' that the expected public benefit will actually accrue. Such a rule, however, would represent an even greater departure from our precedent [that the wisdom of legitimate and rational legislative takings is not to be debated in the courts].").

considering the matter from the bench.⁸³ The protection of stricter scrutiny is of limited usefulness: It is likely to be both over- and underinclusive.

3. *Make Compensation More Just*

Other proposals focus on making the compensation paid to condemnees more just. For example, rather than setting just compensation at market value, courts could allow condemnees to share directly in the public benefit touted by the developer. Under such a system, the courts would take a harder look at the public benefit and base the amount that must be paid to the condemnee on the value of the public benefit instead of on the market value at the time of the taking.⁸⁴ For example, the just compensation might be based on the projected value of the land after it is improved via the development plan as opposed to its market value at the time of the taking.

This proposal would be quite effective at deflating exaggerated claims about public benefit and would prevent abusive takings.⁸⁵ It also would be flexible enough to allow for some economic development takings. However, this remedy is nonetheless flawed, as it can over- or undercompensate condemnees and may deter the wrong takings because the remedy is not linked to the harm suffered by the condemnee but rather to the supposed benefit of the development. In other words, a condemnee would receive more compensation when the justifying development promises more benefits. But the possibility of greater public benefits has nothing to do with the severity of the damages suffered by the condemnee. A condemnee who suffers relatively minor damages for being displaced by a very beneficial project would reap a large reward while a condemnee who suffers greatly due to a marginally beneficial project would, perversely, receive much less. The overall effect of this remedy on society would be just as unfortunate: The most beneficial projects would require the most compensation, thus deterring exactly the developments we want to encourage.

One way to increase compensation to condemnees while avoiding these incentive problems would be to set just compensation at the

⁸³ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005) (rejecting idea that judgment of courts be substituted for that of elected officials or government experts in regulatory takings context).

⁸⁴ James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 869.

⁸⁵ See *id.* (“Because governments themselves would (through higher condemnation awards) bear the costs of undue optimism about the benefits of their programs, there would be incentives to make realistic assessments.”).

market price plus a bonus.⁸⁶ An increase in compensation would help provide some balance to the current system, which always undercompensates the condemnee.⁸⁷

It is hard to predict whether increasing compensation would lead to fewer takings. It certainly would increase the economic cost of takings to the government. While the government's cash outlays would increase as a result of these bonus payments, the political cost of takings—which stems in large part from the resistance put forth by those being forced to give up their property—would dissipate as compensation increased.⁸⁸ The higher the compensation, the lesser the resistance, as the compensation meets or at least approaches the subjective valuation of more condemnees. Plugging all of this into the model, more takings will occur if net compensation costs decrease, i.e., if political costs decrease by more than the amount just compensation costs (translated into political currency) increase.

4. State Buyback Provisions

The failure of the federal courts or Congress to adopt any of these proposals does not, of course, preclude the states from doing so. Indeed, several states have enacted by constitutional provision, statute, or judicial opinion rules that increase just compensation,⁸⁹ ban some economic development takings,⁹⁰ and/or tighten judicial scrutiny.⁹¹ These state laws are subject to the same criticisms enumerated above.

⁸⁶ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 184 (1985) (“This bonus can be justified, first, as a balm for the infringement upon autonomy brought about by any forced exchange and, second, as an effort to correct the systematic underestimation of value in the market value test.”). A ten percent bonus was paid in British compulsory purchases cases for many years, though it is no longer paid today. *Id.*

⁸⁷ Krier & Serkin, *supra* note 84, at 866 (noting that by definition compensation based at market rate undercompensates unwilling sellers precisely because they are unwilling).

⁸⁸ See Levinson, *supra* note 63, at 375–76 (noting risk that, by lowering political costs, paying higher compensation may actually lead to an increase in takings).

⁸⁹ See, e.g., R.I. GEN. LAWS § 42-64.12-8 (2008) (providing for just compensation of 150% of market value of land taken for economic development).

⁹⁰ See, e.g., N.H. CONST. art. 12-a (“No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”).

⁹¹ See, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004) (disallowing condemnation of land for development of industrial park for purpose of economic development and adopting state constitutional rule allowing transfer of condemned land to private parties only when demanded by extreme public necessity, when condemned property remains subject to public oversight after transfer, or when condemnation itself serves public interest).

Some states have also adopted provisions that allow condemnees to repurchase condemned land if it is not used for the proclaimed public purpose within a given time frame. Wyoming, for example, adopted a statute providing that if “substantial use” of taken land is not made within ten years, a rebuttable presumption arises that the land is no longer needed for a public purpose and the condemnee may petition a court to let her repurchase the land for the same price she originally received for it from the government.⁹²

At first glance, such statutes may seem to curb exaggeration of proclaimed public benefit by forcing developers to consider carefully the public benefit they promise or risk losing their land. However, these statutes⁹³ fall short of a fully effective actual-use requirement in the private development context for several reasons. First, when considered as part of their entire statutory scheme, they are overinclusive. Every reasonably rigorous buyback provision is part of a larger statutory scheme that also bans economic development takings, rendering these buyback provisions entirely moot. For example, in addition to a provision creating a buyback right,⁹⁴ Nevada law contains a provision that bans transfers of taken land to private parties for economic development.⁹⁵ Second, these statutes are inflexible, creating arbitrary deadlines for the achievement of public purposes. In the case of the Wyoming buyback provision, for example, a developer has ten years to make “substantial use” of the taken land regardless of economic realities and the complexity of the project.⁹⁶ By contrast, an actual-use requirement bases its remedial deadline on the timing promises

⁹² WYO. STAT. ANN. § 1-26-801(d) (2009).

⁹³ In addition to the statutes considered in the text, a recent law passed in Utah merits mention. Much like my proposal, the Utah statute provides a buyback right if the proclaimed public purpose is not met. UTAH CODE ANN. § 78B-6-520.3(3) (2009), available at <http://www.le.state.ut.us/UtahCode/getCodeSection?code=78B-6-520.3>. However, the Utah law only operates when land is “sold under threat of eminent domain,” which is when a party with the power to condemn property buys land after notifying the owner of its intent to pursue an eminent domain action. *Id.* § 78B-6-520.3(1)(e). Importantly, the statute thus does not apply to an actual taking. This leaves a condemning party free to avoid the operation of the statute by proceeding with a taking instead of negotiating for a sale.

⁹⁴ NEV. REV. STAT. § 37.270 (2007) (providing condemnee with right to repurchase land taken via eminent domain if, inter alia, condemnor does not begin active planning for implementation of justifying public use within fifteen years of obtaining possession of property).

⁹⁵ *Id.* § 37.010(2) (disallowing, with certain exceptions, direct or indirect transfer of land from public agency that condemned it to private party for purpose of economic development). Wyoming has a similar provision. See WYO. STAT. ANN. § 1-26-801(c) (2009) (same).

⁹⁶ WYO. STAT. ANN. § 1-26-801(d) (2009). A developer who did not use the land within the time frame could try to overcome the statutory presumption and thus secure an extension; however, this flexibility is quite limited as it requires court approval. It also does

made by the developer in the development plan.⁹⁷ A developer is thereby held only to her own word, not to an arbitrary statutory time frame.

Finally, the remedy offered by these statutes neither properly honors the constitutional right not to have land taken for a private purpose nor serves as an adequate deterrent to improper takings. An actual-use requirement would provide condemnees with individualized damages in addition to buyback rights and therefore would address both of these problems.⁹⁸ The next Part presents the details of this proposal.

III CONSTITUTIONAL REMEDY FOR CONSTITUTIONAL VIOLATION

The key to preventing takings based on exaggerated public benefit lies in recognizing that the Takings Clause,⁹⁹ like other provisions in the Bill of Rights, conveys an enduring constitutional right to individuals.¹⁰⁰ According to such a reading, the clause allows the govern-

nothing to cure the arbitrariness of the time frame. Nevada has a similarly arbitrary time frame. *See supra* note 94.

⁹⁷ *See infra* Part III.A.3.

⁹⁸ *See infra* Part III.A.5.

⁹⁹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹⁰⁰ In addition to the admittedly modest support found in the case law, the nature of individual constitutional rights argues for the adoption of an actual use requirement. Comparing the way current law treats the rights provided by the Fourth Amendment and the Takings Clause illustrates the oddness of the expiring Takings Clause right. The Fourth Amendment states, in relevant part: “The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .” U.S. CONST. amend. IV. Leaving aside exceptions not relevant for present purposes, searches must not exceed the bounds of validly executed warrants. *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that, with few specific exceptions, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment”). The inclusion of a person or place in a warrant in a search case is like the promise of a public benefit if a parcel is condemned in a takings case: It renders permissible otherwise unconstitutional behavior. However, in the Fourth Amendment context, the Court requires that police actually adhere to the promise they make when describing their probable cause to a magistrate in order to get a warrant. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (holding that warrant to search bar did not validate search of bar patron). If police exceed the scope of the warrant, any evidence they gather generally will be excluded.

If the Supreme Court replaced the actual guarantee of the Fourth Amendment with the “promise” standard of the Takings Clause, a suspect’s rights would be satisfied when federal officers *promised* a magistrate that they would confine their search to the area described in a warrant regardless of whether they did so. If the officers broke their promise, the suspect would have to live with being searched and would have no right to suppress the evidence illegally collected. His right would be lost, just as a condemnee’s right to protection from a taking for a private purpose would be lost if a justifying public

ment to extinguish this individual property right only by (1) paying just compensation for the taken land, and (2) actually using the land for the public purpose that justified a taking. This Part explores how such an actual-use requirement would change the decisional dynamics surrounding condemnations. Section A outlines the details of the “actual-use requirement” remedy. Section B applies this remedy to show how it would prevent excessive takings. Section C defends an actual-use requirement against several challenges.

A. *Elements of the Actual-Use Requirement*

An actual-use requirement has the dual purpose of honoring a constitutional right and deterring the violation of that right. The right would be honored through the return of land and payment of damages. Preventing the violation of the right requires more explanation, and is addressed in the next Section. First, I present the essential elements of the actual-use proposal.

1. *Scope*

Requiring actual use is intended to remedy the institutional failure that often accompanies takings for private economic development. Because this institutional failure is not apparent outside of the private economic development context, the requirement of actual use applies only to these takings.

2. *Individual Remedy*

Typical guarantees that taken land will be put to a public purpose are contractual or statutory.¹⁰¹ Contracts run between the government authorizing the taking and the developer utilizing the taken property, and statutes are to be enforced by the former against the latter.¹⁰² This leaves the fox guarding the henhouse.¹⁰³ A government that has displaced a constituent to partner with a developer is

purpose were not realized. Because neither the dishonesty of a federal officer nor the failure of a developer can make a constitutional right disappear, the Takings Clause demands that the purpose that justifies a taking actually come into being.

¹⁰¹ See, e.g., *Berman v. Parker*, 348 U.S. 26, 30 (1954) (describing statutory requirement of term requiring use in contractual terms of lease or sale).

¹⁰² See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 978–79 (2003) (discussing state efforts to impose greater accountability for use of condemned land via contractual and statutory tools).

¹⁰³ Some state courts have rejected takings as unconstitutional when the statutory or contractual guarantees provide too little assurance that the developer will use the taken land for the claimed public purpose. See, e.g., *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 110 (N.J. Super. Ct. Law Div. 1998) (holding that taking was not for public use because development plan did not impose strict enough time or use requirement on taken land). The Connecticut Supreme Court explicitly found that the development plan

extremely unlikely to do anything to bring the developer's failures to light. Any failure of the developer becomes a failure of the government partner, and, unlike the developer, the government must pay the political costs of the failure. These limitations on the government would be apparent to a rational developer, who would thus feel safe exaggerating the public benefit of her proposal.

By contrast, the recommended actual-use requirement properly recognizes the rights of condemnees, who have completely different incentives. Unlike the government, condemnees have an adversarial relationship with the developer. Condemnees who have been coerced from their homes would be likely to monitor the progress of the development that justified the state's use of its power; they have a financial and often an emotional stake in its outcome.¹⁰⁴ Additionally, the monitoring could be outsourced—perhaps plaintiffs lawyers would take an interest. Regardless, for the remedy to work as a deterrent, not every condemnee would need to monitor every private development taking as long as enough of them did.

3. *Development Plan as Baseline*

Currently, when a court approves an economic development taking, it does not rule that a certain *public benefit* justifies taking private land but rather that a *development plan* promising some benefit does. To ensure that the benefit promised by the plan is realized, an actual-use requirement recognizes a condemnee's continuing interest in her property under the Takings Clause until the public benefit laid out in the approved development plan is substantially achieved. This flows logically from the court's enshrining of the plan as sufficient to justify a taking. If the plan justifies the taking, then it should be the substantial achievement of the benefit promised by the plan within the plan's time frame that extinguishes a condemnee's right in the property. Essentially, an actual-use requirement treats a taking for economic development by a private party as contingent upon substantial completion of the justifying development.¹⁰⁵

in *Kelo* did provide specific enough requirements to ensure a public use would be achieved. *Kelo v. City of New London*, 843 A.2d 500, 546–47 (Conn. 2004).

¹⁰⁴ The common law recognizes that individuals are often in a better position than the government to seek enforcement of their rights. *See, e.g.,* *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435–36 (App. Div. 2001) (noting that donors have greater interest in enforcing terms of their charitable gifts than attorney general and recognizing that standing doctrine allows individual enforcement of gift terms).

¹⁰⁵ *See* Garnett, *supra* note 102, at 981 (proposing condemnees retain future interest in condemned land so that land reverts to condemnee upon abandonment of public purpose, even after completion of development project).

Requiring developers to follow through substantially on the justifying development plan is important for several reasons. First, it provides an affirmative guarantee that a public benefit will be achieved from the taking. Current statutory and contractual guarantees that allow for private economic development provide only that the land be used in line with the development plan or for nothing at all.¹⁰⁶ An obvious problem with this kind of guarantee is that it only prevents developers from straying from the plan justifying the taking; it does not require them to actually *fulfill* the plan.

Second, the plan sets the physical and temporal standards that must be met if the taking is to be constitutional. Once the plan is fulfilled in good faith—the land is actually put to a public use—the Fifth Amendment’s demands are met. The plan’s success would be measured by the completion of its physical goals, such as building a 350-room hotel within a certain time frame.¹⁰⁷ While a developer certainly could build a 350-room hotel without creating any new jobs by keeping the hotel vacant, the completion of the hotel should serve as an adequate proxy for the public benefit the hotel was meant to create. A rational developer would be unlikely to expend the resources to build a facility with capacity she did not believe it could utilize. In essence, this requirement aligns the private financial interest of the developer with the public interest. Developers also would be free to sell the property they received from a taking. The sale would be subject to the same development plan that justified the taking; the constitutional right of condemnees not to have their land taken for anything other than a public use would run with the land, allowing condemnees to press their claim against the new developer. In other words, a developer of land condemned pursuant to a development plan could sell the land. The buyer of the land would be obligated to fulfill the justifying public purpose, just as the seller was, and condemnees would be able to sue the buyer.

Finally, the plan would control the timing of the constitutional right. Development plans set out time frames for the achievement of the public benefit they promise. The substantial achievement of this public purpose within the promised time frame would extinguish condemnees’ constitutional interest in the land, in effect ending the con-

¹⁰⁶ The development plan in *Kelo*, for example, required that any deed conveying the property contain covenants limiting development to that proposed in the development plan and forbidding speculation. *Kelo*, 843 A.2d at 545 & n.64. There was no affirmative obligation to complete the development.

¹⁰⁷ If, for instance, a developer promised to build a 350-room hotel, and she kept her promise but then went bankrupt and the hotel was converted into an office building, condemnees would have no claim.

tingency of the transfer. If, for example, a development plan promised a hotel within ten years, then the developer has ten years to build the hotel before a condemnee can sue. However, it bears emphasizing that requiring actual use calls for substantial and not complete compliance with the development plan. This is essential in order to provide courts and developers with the wiggle room to prevent the wastefulness that would accompany a decision, for example, against a developer who made good faith efforts to complete a project and had reached ninety percent completion by the deadline. Whether a project could be considered substantially complete would be a case-by-case inquiry.

One possible objection to my temporal requirement is that it would merely lead developers to greatly extend the time frames attached to development plans. However, this kind of manipulation would serve little purpose as it would reduce the value of the promised public benefit. Creating 1000 jobs in thirty years is worth considerably less than creating 1000 jobs in five years. Developers want to maximize the claimed public benefit—within realistic limits—so that they have the best chance of winning government approval, and thus will be unlikely to artificially extend the time frame.

4. Parties

An actual-use requirement would provide condemnees with a remedy against the private developer of their land, with the government serving as a backstop if developers become insolvent. I target developers because they are easier to deter than governments: Governments respond only to political costs, so it is difficult to predict how they will react to an increase in the financial risk and cost of takings.¹⁰⁸ A government might be quite willing to bear financial costs to achieve its goals so long as the financial costs translate into dispersed, or insignificant, political costs. However, for a rational private developer, maximizing profit is the only goal, so an actual-use requirement would serve as a powerful deterrent against exaggerated projects. The next Section considers the effect of this deterrent in greater detail.

Establishing that condemnees *should* target their suits at developers does not, however, resolve whether developers *can* be sued under the Constitution. The government is the traditional defendant in a takings challenge and the Constitution does not typically run against private parties. But private parties developing condemned

¹⁰⁸ See Levinson, *supra* note 63, at 375–76 (noting importance of political costs to government decisionmaking).

land play a public role: The condemning government delegates to these developers the achievement of the public purpose that justifies the taking.¹⁰⁹ The delegation of the obligation to realize a public purpose—and the financial benefits that accompany it—should not be severable from liability when that purpose is not achieved.

Standing to sue private parties for the violation of constitutional rights when the government delegates its authority to these private parties is well established in other constitutional areas. For example, § 1983 of Title 42 of the United States Code creates a cause of action for the deprivation of constitutional rights under the color of state law.¹¹⁰ The deprivation must be attributable to a state actor, but private corporations are considered state actors when exercising state action.¹¹¹ Several cases in the lower federal courts have come up in the context of prisons run by private corporations on behalf of state governments. Courts have consistently held that inmates can make claims under § 1983 against private prison employees and prison management corporations.¹¹² A private developer charged with achieving a public purpose that justifies a taking would seem at least as much of a state actor as a private company hired to run a state prison or one of its employees.

5. *Award*

The goals of an actual-use requirement are to honor a constitutional right and to deter the violation of that right. This subsection outlines a remedy that meets both of these goals. When the public purpose that justified a taking is not substantially realized, the land must be returned to the condemnee, if practicable, in exchange for the compensation originally paid for the taking, and damages must be paid to compensate the condemnee for the inconvenience of being forced from her property as well as any applicable mental and emotional damages.

¹⁰⁹ See Garnett, *supra* note 102, at 981 (explaining that typical flexibility accorded to government as condemnor may be less appropriate when government intends to delegate achievement of public use to private party). “[W]hen the public use is to be carried out by a private party, a future-assurances requirement simply could be seen as a guarantee that the property is in fact being condemned for the reason given by the government.” *Id.*

¹¹⁰ Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

¹¹¹ *Id.* at 936–37.

¹¹² See, e.g., Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (employees); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (corporations); Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 1001 & nn.162–63 (2007) (summarizing cases in which claims were permitted against prison corporations and employees).

The first part of this remedy—the return of condemned land in exchange for the original compensation—is fairly straightforward.¹¹³ Unfortunately, the return of property will often be impracticable. If the condemnee does not discover a development is falling short of its proclaimed purpose until the site of her former home has become a putting green, she cannot merely seek an injunction ordering the return of her home. It would be disproportionate or wasteful to tear down the development and restore it to its former condition.¹¹⁴ The condemnee also may have moved to another city and no longer desire to return to her home years after being removed from it. To account for this reality, condemnees would also have the option to keep the just compensation and only sue for the additional damages.¹¹⁵

The damages component of this remedy is derived from remedies in torts where the cause of action arises under the Constitution. Constitutional torts generally are awarded like common law torts, with damages designed to compensate for the injury resulting from the violation of a constitutional right.¹¹⁶ As in common law torts, no damages would be available for the inherent value of the constitutional right itself—in this case, the right not to have property taken for any use other than a public one.¹¹⁷ Damages would total the amount necessary to compensate a condemnee for being forced from her property for a period of years, and they would in many cases include a signifi-

¹¹³ Cf. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 640 (2006) (“If the taking is not for public use, the government must give the property back.”). In addition to returning the just compensation, the condemnee should pay a market rate of interest on it. Fairness requires this interest payment as the condemnee has enjoyed the use of the just compensation during the relevant time frame. The condemned property likely would have appreciated during this period, so the payment of interest should not adversely affect the condemnee.

¹¹⁴ This is analogous to the reluctance of courts to order specific performance in contract suits. See, e.g., *Van Wagner Adver. Corp. v. S & M Enter.*, 492 N.E.2d 756, 761 (N.Y. 1986) (“It is well settled that the imposition of an equitable remedy must not itself work an inequity, and that specific performance should not be an undue hardship.”). Courts in contract cases also refuse to order disproportionate remedies. See, e.g., *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890–92 (N.Y. 1921) (refusing to order literal compliance with contract that called for installation of certain brand of pipe when substantially identical pipe of different brand had been installed and compliance would require significant demolition of residence built under contract).

¹¹⁵ Whether property could be returned could be a factor influencing the size of the damage award. Permanent loss of the property would seem to demand greater compensation than would loss for the period of the unconstitutional taking.

¹¹⁶ See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (6th Cir. 1986) (“[T]he basic purpose’ of § 1983 damages is ‘to *compensate persons for injuries* that are caused by the deprivation of constitutional rights.’” (quoting *Carey v. Phipus*, 435 U.S. 247, 254 (1978) (emphasis added))).

¹¹⁷ See *id.* at 307–08 (explaining that awards cannot be given for value of abstract constitutional rights in § 1983 suits); see also Levinson, *supra* note 63, at 372 (noting that constitutional damages awards are not available for “inherent value of constitutional rights”).

cant emotional distress element.¹¹⁸ Awards would vary case by case, as they should. For example, an enormous emotional distress award might be appropriate in the case of someone like Wilhelmina Dery, the ninety-one-year-old New London resident forced from the home of her birth by the *Kelo* taking. However, a lesser award with no emotional damage component would be appropriate if a vacant lot had been taken. This flexibility would partially compensate condemnees for subjective value, something not achieved by any current remedies. It thus would allow courts to properly recognize that different takings require different remedies, providing the largest award to condemnees with the largest loss—their homes.¹¹⁹

But making condemnees whole is only part of the purpose of the remedy; it must also protect potential condemnees through deterrence. The two parts of the actual use award would effectively deter improper takings. The first part—giving condemnees the right to repurchase their land—would go a long way toward deflating the exaggeration of public benefit that drives abusive takings. Developers would know that straying from a development plan would subject them to the loss of their land and would thus be unlikely to seek the taking of land for unrealistic public purposes. Add to this the possibility of a large award to be doled out by a jury from the same community as the condemnee, and developers would have every incentive to be conservative in their public benefit calculations.¹²⁰ The next

¹¹⁸ See *Stachura*, 477 U.S. at 307 (“[C]ompensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as ‘impairment of reputation . . . , personal humiliation, and mental anguish and suffering.’” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))).

¹¹⁹ Justice Thomas based one line of argument in his dissent on the fact that private homes were at issue in *Kelo*. Thomas noted with irony that the Court does not defer to the legislature in its Fourth Amendment jurisprudence defining the scope of permissible searches of homes but that it does defer “when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners’ homes.” *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting). Thomas’s position may suggest that special protections—and awards—should be provided when private homes are subject to takings. However, this would be under- and overinclusive. For example, drawing a line between commercial and residential property would fail to distinguish between the taking of a shop run by generations of the same family and that of a vacant lot. By contrast, recognizing and trying to compensate for subjective value would properly distinguish among the countless possible types of property that could be subject to condemnation.

¹²⁰ Other remedies could also serve to implement the purpose of actual use. For instance, a fixed value that is some multiple of just compensation could be set as the reward. This would allow for greater predictability in deterrence but would fail to compensate condemnees on a case-by-case basis. Another potential remedy is judicial monitoring of a development to ensure it meets the public purpose promised in its development plan. The court permitting a taking could maintain jurisdiction over the development, with monitoring via a receiver, until the benefit was met. Though this solution is somewhat heavy-

Section analyzes how this remedy would operate to deter abusive takings.

B. Deterrence

Perhaps the most important remedial characteristic of an actual-use requirement is that it operates through the private developer, allowing it to avoid the problem of deterring political actors who do not respond directly to financial incentives.¹²¹ The self-interested developer will carefully consider the elements of a proposal that claims to yield public benefit because she will be required to deliver on these promises or lose the property and be liable for emotional damages. Completing an element of the plan that was supposed to provide a benefit—for example, a hotel that would employ 100 people—would prove extremely expensive if the market could not support the element (for example, if demand for hotel rooms proved inadequate).¹²² Thus, the developer would no longer have an incentive to exaggerate.

With an actual-use requirement, the developer would approach the government with an accurate estimate of the public benefit. The public-minded government could then compare condemnation cost with public benefit using accurate information and make a good-faith takings decision.¹²³ The respective roles played by the legislative and judicial branches would not change, but the branches would be better able to play their roles because they would have more complete information. With an actual-use requirement, unlike under proposals for

handed, it arguably is justified by the similarly heavy-handed nature of a private development taking. This remedy admittedly strays from the idealized individual monitoring model I assume through much of this Note. But, by insisting that proponents keep their promises, it too would effect the change in the decisional dynamics of takings that is my central purpose.

¹²¹ See Levinson, *supra* note 63, at 357 (describing uncertainty of officials' weighing of financial considerations).

¹²² An actual-use requirement would require the construction of the hotel, not the provision of the promised jobs. The physical claim is considered an adequate proxy for the promised public benefit. See *supra* Part III.A.3.

¹²³ An actual-use requirement should still be effective—though perhaps less so—when a public-minded government acts as both proponent and condemnor and takes land based on an inflated public benefit that it developed through an excess of optimism. In this case, the private sector gets involved after the taking is completed, when the government transfers the land to a private developer for the achievement of the public benefit. An actual-use requirement may not sufficiently dampen the government's enthusiasm: The government actually, though inaccurately, believes the purpose will be achieved. However, the taking would likely fail to come about because private developers would be unwilling to accept the delegation of the responsibility to achieve the outsized public benefit. Officials consulting with potential developers before condemning the land would discover this reluctance and adjust their public benefit estimate.

stricter judicial scrutiny of legislative decisions,¹²⁴ a political branch remains empowered to make the political decision of how to expend public resources through takings.¹²⁵ This is important not just because the Supreme Court demands it¹²⁶ but because the legislature, with its closer ties to the relevant community and better access to expert planners, is better positioned to evaluate a proposed development than the courts.¹²⁷

Additionally, under an actual-use requirement, when takings do occur, suits by condemnees for failure to provide the promised public benefit should be rare. The takings the government permits will be those with public benefit to which the developer had enough confidence to commit.

By ameliorating the exaggeration problem, an actual-use requirement also makes irrelevant the mixed motives of self-interested officials who, under the status quo, might accept questionable public benefit promises because of the political benefit they gain personally. Under an actual-use requirement, they would not even be presented with this enticing option because the developer's estimate would be more realistic. This assumption holds true even under more skeptical views of the government. For example, an actual-use requirement would curb excessive takings even if officials tried to proceed with a taking to create the appearance of action when they knew the true public benefit was less than the condemnation cost. Requiring actual use would indirectly curb this political benefit because no developer would take the land from the government. The political benefit, which is derived from being able to claim responsibility for the public benefit, fails when the claimed public benefit shrinks: There is simply less public benefit for officials to claim. If a development promises to produce only 600 jobs, rather than 6000, it might not be worth the condemnation cost.

Of course, government officials who are inclined to favor takings in order to please powerful interest groups would not be deterred by the lack of a large promised public benefit. However, they might be deterred by greater accountability. With a realistic public benefit estimate, constituents would know how much the community stands to

¹²⁴ See *supra* notes 81–83 and accompanying text (rejecting stricter judicial scrutiny approach).

¹²⁵ See *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005) (emphasizing deference given to state and local governments to determine local needs in takings jurisprudence).

¹²⁶ *Id.*

¹²⁷ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544–45 (2005) (explaining in regulatory takings context that predictive judgment of courts should not be substituted for that of elected officials or government experts).

gain from a taking. If this public benefit did not seem to justify the condemnation cost, they might become suspicious of the true reason why officials approved the taking.¹²⁸

To illustrate how actual use changes decisionmaking, I return to the Paradise Resorts example introduced in Part II.A.3. In that example, New London, desperate to attract private investment, accepted an inflated estimate of public benefit in a proposed taking and thus approved an abusive taking.

Paradise Resorts previously promised a public benefit that included the creation of 6000 jobs. Under actual use, Paradise would be required to build the resort or pay damages, regardless of market conditions. If the rosiest economic projection led Paradise to forecast demand justifying a resort that employed 6000, Paradise previously had an incentive to promise the creation of 6000 jobs (or more) because, under current law, the developer could always adjust downward. However, faced with the prospect of being forced to build a resort that would sit idle, a developer under an actual-use requirement would forecast the public benefit with the same kind of forethought she would bring to a typical business decision. The developer would discount the best case scenario of 6000 jobs by its likelihood of occurrence and make a more realistic estimate. The government would then have a realistic public benefit number on which to base its takings decision, and it might realize that the taking is not justified.

An actual-use requirement thus works to curb questionable takings while still allowing worthwhile takings, unlike a complete ban on takings for private economic development.¹²⁹ For example, if a developer was willing to commit to a project that really would create 6000 jobs, the government would approve the taking, as the huge public benefit would be likely to outweigh condemnation cost. The actual-use requirement works to allow efficient takings while preventing abusive ones.

¹²⁸ An actual-use requirement would work indirectly through the private sector when self-interested officials acted as proponent and condemner, inflating public benefit for their political gain. With no developers willing to undertake a project that carries with it a promise of exaggerated public benefit, government officials would be unable to make sufficient progress on the project to claim it as a success. The government could pursue a project on its own, which would put it outside the scope of the actual-use requirement. However, engaging directly in economic development would be quite visible to constituents and could subject officials to political costs, as constituents questioned why the government was taking on a traditionally private function.

¹²⁹ For a discussion of proposals to ban economic development takings, see *supra* Part II.B.1.

C. *Defending an Actual-Use Requirement*

Adopting the actual-use requirement would be a significant change from the status quo, and it would not come without costs. However, there is a basis for requiring actual use in the Court's recent takings cases. This Section begins by using this evidence to establish the constitutional basis for an actual-use requirement. It then addresses some possible objections to the value and workability of the proposal.

1. *Constitutional Basis*

As with any proposed change to established doctrine, the Supreme Court would have to break from precedent to implement an actual-use requirement. However, the holdings of the Court's major precedents do not support takings based on proposed plans with no assurance of completion. The cases are unsatisfying only in the type of protection provided in the event a public purpose is not realized. This Section argues that the case law leaves open the possibility of the Court adopting an actual-use requirement.¹³⁰

Berman, *Midkiff*, and *Kelo* each provided some actual-use protection for condemnees. The actual use protection in *Berman* was both contractual and legislative—the law authorizing the taking at issue required actual-use provisions in the relevant contracts.¹³¹ A contractual protection was in place in *Kelo*: The New London plan required that any deed conveying the property contain covenants limiting development to what was proposed in the development plan.¹³²

The guarantee of actual use in *Midkiff* was stronger. In that case, the government could condemn parcels owned by large landowners only at the request of the tenant of the parcel, who then had an option to purchase that parcel from the government.¹³³ The public purpose

¹³⁰ In the context of imposing heightened judicial scrutiny, however, the *Kelo* majority worried about impeding development. 545 U.S. at 488 (“A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.”).

¹³¹ *Berman v. Parker*, 348 U.S. 26, 30 (1954). For the language of the statute, see *supra* note 34.

¹³² *Kelo v. City of New London*, 843 A.2d 500, 545 (Conn. 2004). For the covenant language, see *supra* note 50. The Court noted that the protection in *Kelo* was similar to that provided in *Berman*. *Kelo*, 545 U.S. at 486 n.15 (“Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to carry out the redevelopment plan.”).

¹³³ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 233–34 (1984). Other private parties could purchase lots from condemned parcels only if the tenant declined to purchase. This scenario seems unlikely, though, given that it was the tenant's petition that triggered the taking in the first place and that the Hawaiian agency managing the process was authorized

in *Midkiff*—the breaking of a land oligopoly—was achieved by a taking and resale which were part of the same unified process. The Supreme Court in *Midkiff* thus approved only takings that, by their very definition, ensured actual use.

The Supreme Court, then, in its three major possessory eminent domain cases in the last sixty years, has approved takings only when there was some guarantee the land would be used as proposed. These guarantees are significant because they show an acknowledgment by the Court of the importance of actual use, or at least an absence of evidence that the Court is willing to approve a taking with no assurance of actual use.

2. Possible Objections

The source of several possible objections to an actual-use requirement is its temporal element. A critic could argue that extending the possibility of suit until a public purpose is achieved would lead to uncertainty for governments and developers, waste for society, and headaches for the courts. Moreover, developers and governments seeking only fair profit and the public good could end up having to pay damages if a well-intentioned project fails for reasons beyond their control. Meanwhile, courts might have to deal with the same parties multiple times as condemnees present new challenges.

Regarding uncertainty, there is no question that an actual-use requirement would add to the risk faced by developers and governments. This risk is not unfair, however, because these parties would be aware of it before executing the taking. Among the many factors a developer would want to consider when proposing a taking would be whether the project would be worthwhile even when discounted by the possibility of a catastrophic event preventing completion of the project.¹³⁴ The developer would only seek takings with benefits large enough to justify the risk.

In the event that a developer did seek and win approval for a taking, one could argue that forcing the developer to finish a project in the face of more socially advantageous alternatives would be wasteful. However, an actual-use requirement would permit solutions commonly used by businesses to deal with this situation, such as effi-

to finance up to ninety percent of the purchase price for the former tenant. For further description of the governing statutes in *Midkiff*, see *supra* text accompanying notes 36–37.

¹³⁴ Of course, a more forgiving version of an actual-use requirement would be possible. Giving the developer a defense to the requirement based on unforeseeable events would lead to less deterrence, just as would lowering the damages remedy. A balance could be struck.

cient breach.¹³⁵ A developer who used the government's coercive power to take land might very well opt out of her development plan if other opportunities were lucrative enough. Of course, given the expense of the actual use remedy, breach would be efficient less often than under a standard contract. But the expense of the remedy is required by the harm caused by the development itself—remedying unconstitutional displacement is expensive. Developers engaging in takings under an actual-use regime would be well aware of the damages they risked facing and thus would weigh them when considering whether to take on a project. Moreover, an actual-use requirement is not intended to provide a business environment on par with those that do not use the government's coercive power to take land.

CONCLUSION

This Note argues that the solution to the problem of abusive takings lies in the language of the Takings Clause itself. I posit that the Takings Clause requires that (1) land be taken only for a claimed public use *and* (2) the land taken actually be used for that claimed purpose. Most of the scholarship published in the wake of *Kelo* has attacked the decision for being inconsistent with the first requirement, arguing that the use of land was insufficiently public, while this Note focuses on the second requirement and its potential as an analytical and judicial tool. It argues that an actual-use requirement would separate takings that are truly abusive from those that have social benefit.

¹³⁵ Efficient breach occurs when a party to a contract decides to breach her contract because the damages are less than the benefit from avoiding the obligation under the contract. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 120 (2003) (providing example of efficient breach).