Public Use and Treatment as an Equal:
An Essay on *Poletown Neighborhood Council v. City of Detroit* and
*Hawaii Housing Authority v. Midkiff*

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[N]or shall private property be taken for public use, without just compensation.¹

An ACT of the Legislature (for I cannot call it a *law*), contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative* authority. The obligation of a law in governments established on *express compact*, and on *republican principles*, must be determined by the *nature* of the *power*, on which it is founded . . . . [For instance,] a law that takes *property* from A and gives it to B: It is against all reason and justice, for a people to intrust a *Legislature* with SUCH powers; and, therefore, it cannot be presumed that they have done it.²

## INTRODUCTION

Since the beginning of the Republic, judges like Justice Chase have been concerned about the limits of governmental power and particularly with limiting the three main implied powers of a sovereign: the *police power*, the *taxing power*, and the *power of eminent domain*.³ These limits are meant to ensure that officials do not use their powers to subject individuals to governmental whim. Yet the history of the takings clause, particularly in this century, shows that courts have allowed local governments to exercise eminent domain for virtually any project that promises some form of public benefit.⁴ The recent cases of *Poletown Neighborhood*
Council v. City of Detroit and Hawaii Housing Authority v. Midkiff, in addition to these developments have placed the law of eminent domain on the horns of a dilemma.

On one hand, shared conceptions of the rule of law and of limited government require that the law place some restrictions, e.g., the public use requirement, on the power of local governments. On the other hand, the United States Supreme Court, since the constitutional crisis of the 1930's, has taught that courts must abstain from second-guessing legislatures' exercise of the police power. To prevent similar fiascos in the future, continues the argument, courts generally should uphold exercises of eminent domain. This injunction has led to the test articulated in Hawaii Housing Authority: a taking will be upheld if it is "rationally related to a conceivable public purpose." In other words, takings will pass constitutional muster if they can survive the test applied to social and economic legislation under the fourteenth amendment's equal pro-


6. 467 U.S. 229 (1984). The Court's decision was unanimous; Justice Marshall did not participate in the case.

7. See generally Bender, supra note 4; Meidinger, The "Public Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1 (1980).

8. Justice Chase's feelings on this matter, see supra note 2 and accompanying text, are indicative of this line of argument.


11. Hawaii Hous. Auth., 467 U.S. at 241. Most courts and commentators use the terms public use and public purpose interchangeably. This Comment follows that example.

A broad reading of the public use requirement is hardly new. Indeed, commentators have been virtually unanimous in characterizing as limitless the current extent of public use. As one recent commentator notes, "Berman, when taken at its word, so short-circuits the inquiry [into exercises of eminent domain] as to erase the public use requirement." Note, Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. REV. 409, 423 (1983) [hereinafter Note, Public Use, Private Use]; see also Note, Hawaii Housing Authority v. Midkiff: The Public Use Requirement in Eminent Domain, 15 ENVTL. L. 565, 589 (1985) [hereinafter Note, Eminent Domain] ("[t]he power of eminent domain seems to be limitless provided there is any semblance of a public use"). Errol Meidinger expresses it thus:

The net result [of eminent domain] is that analytically almost any taking can meet the public use requirement, except perhaps the bald transfer of property from one private holder to another without some supervening governmental purpose. . . . For the most part then, the public use requirement operates as an incremental and somewhat idiosyncratic [sic] restraint—a slight added drag on takings, the exact operation of which is somewhat unpredictable.

tection clause.\textsuperscript{12}

Is there a way out of this dilemma? Is it possible to place legal—as opposed to political or economic—limits on takings through the public use doctrine?\textsuperscript{13} This Comment addresses these questions. Part I unravels the dilemma, discussing \textit{Poletown} and \textit{Hawaii Housing Authority}. Part II sketches a rationale for the public use requirement. Part III proposes a revised public use doctrine that focuses explicitly on the legitimacy of the political process involved in the taking as well as on the nature of the property subject to the taking. This approach limits condemnations without forcing judges to exceed the judiciary's institutional competence.

\section*{I

THE EVISCERATION OF PUBLIC USE}

\subsection*{A. Poletown Neighborhood Council v. City of Detroit}

The events leading up to the \textit{Poletown}\textsuperscript{14} decision were relatively straightforward.\textsuperscript{15} Faced with high labor and plant costs, General Motors decided in early 1980 to close its Clark Avenue and Fisher Body Fleetwood plants in Detroit.\textsuperscript{16} Rather than simply fleeing for the so-called "sunbelt," G.M. offered to remain if the city could offer a suitable site for a new factory. Implicit in the bargain was the expectation that Detroit would retain at least the 6,000 jobs (plus many thousands more on account of the multiplier effect) that the new factory would require.\textsuperscript{17} Because of Detroit's dire economic straits (unemployment at the time was running at 18\% overall and at almost 30\% among Black citizens), the city quickly accepted G.M.'s offer and put together the requisite parcel of land in record time.\textsuperscript{18}

The neighborhood selected for the new plant, however, was a rare

\begin{thebibliography}{18}
\item 12. \textit{See L. Tribe}, supra note 3, \S 16-5, at 1451.
\item 15. For useful descriptions of the factual bases of the case, see Bennett, supra note 4, at 133-42, and Bukowczyk, \textit{The Decline and Fall of a Detroit Neighborhood: Poletown v. G.M. and the City of Detroit}, 41 \textit{Wash. & Lee L. Rev.} 49, 51-65 (1984).
\item 16. \textit{Poletown}, 410 Mich. at 636, 304 N.W.2d at 460.
\item 17. \textit{Id.} at 650-51, 304 N.W.2d at 467. The old plants had employed roughly 10,000 workers. \textit{See Comment, supra note 11, at 924 n.106.}
\item 18. \textit{See Poletown}, 410 Mich. at 647, 650-53, 304 N.W.2d at 465, 467-68 (Ryan, J., dissenting). G.M. was also able to extract a set of conditions from the city that included: (1) title had to vest with the city by May 1, 1981; (2) the city had to "provide for the construction and upgrading of site perimeter roads;" (3) G.M. would not be responsible for the costs of installing underground utility services; (4) the economic development agencies would dispose of all toxic wastes found on the site at their own expense; (5) Detroit would abate all taxes to the
commodity in an urban environment: a stable, integrated area\(^{19}\) that in many ways harkened back to the close-knit ethnic communities that characterized Detroit’s past.\(^{20}\) After being stunned into quiescence between June and October 1980, a group of neighborhood residents began to organize opposition to the project.\(^{21}\) Nevertheless, under Michigan’s quick-take law,\(^{22}\) the city was able to move so quickly on the condemnation that an official could soon say “it comes down to 20 people holding up the city.”\(^{23}\) This was something of an exaggeration, however; there was at least one rally against the condemnation with over 1000 people in attendance.\(^{24}\) The statement did reflect the fact that by March 1981, when the Michigan Supreme Court heard and decided Poletown, roughly 80% of the area’s residents had accepted the city’s offer of compensation.\(^{25}\)

Condemnation did not come cheaply. Including the cost of various improvements,\(^{26}\) Detroit spent over $200 million for a site it subsequently sold to G.M. for $8 million.\(^{27}\) Those figures, moreover, do not include the tax abatements or the intangible costs to the city and its residents of the loss of a unique neighborhood.

In response to the condemnation proceedings, residents of Poletown organized the Poletown Neighborhood Council. The Council sued the City in a Michigan district court\(^ {28}\) on the ground that the condemnation maximum extent possible for a period of twelve years. \(\text{id.}\) at 565, 304 N.W.2d at 469-70 (Ryan, J., dissenting).

\(^{19}\) “Although Poles constituted the majority of inhabitants of Poletown, the area was ethnically and racially diverse. Poletown was considered a rare and desirable urban community by many sociologists, since it seemed to be the embodiment of a stable, integrated community.” Comment, \(\text{supra}\) note 11, at 908-09 (citations omitted).

\(^{20}\) See \(\text{id.}\) at 909 n.12.

\(^{21}\) Bukowczyk, \(\text{supra}\) note 15, at 62-63. Residents of Poletown were not uniformly opposed to or in favor of the project. In fact, there apparently was no accurate survey of residents’ views on the subject taken during the last half of 1980. \(\text{See Serrin, Detroiters Confronting a Choice: New Jobs or Old Neighborhoods, N.Y. Times, Sept. 15, 1980, at A1, col. 1.}\)

\(^{22}\) \(\text{Mich. Comp. Laws Ann. §§ 213.51-.77 (West Supp. 1987).}\) A “quick-take” statute is one that allows the governmental agency acquiring property to “take possession of the private property prior to a final determination of compensation for the property.” Ackerman & Yanich, Eminent Domain: The Constitutionality of Condemnation Quick-Take Statutes, 60 U. \(\text{Det. J. Urb. L.}\) 1, 2 (1982) (footnote omitted, emphasis in original).

\(^{23}\) \(\text{Pushing the Boundaries of Eminent Domain, BUSINESS WEEK, May 4, 1981, at 174 (quoting Emmett S. Moten, director of Detroit's Community and Economic Development Department).}\)

\(^{24}\) Bukowczyk, \(\text{supra}\) note 15, at 65.

\(^{25}\) \(\text{id.}\) at 64.

\(^{26}\) \(\text{See supra}\) note 18.

\(^{27}\) \(\text{Poletown, 410 Mich.}\) at 656, 304 N.W.2d at 469 (Ryan, J., dissenting).

\(^{28}\) The attorney for the council, Ronald Reosti, brought the action in state court in order to take advantage of state precedents (and, conversely, to avoid \(\text{Berman v. Parker, 348 U.S. 26 (1954).}\) Bukowczyk, \(\text{supra}\) note 15, at 69. This strategy did not work. The Michigan Supreme Court ultimately decided Poletown by following \(\text{Berman. See infra}\) notes 31-43 and accompanying text.
was a taking without a public purpose in violation of the Michigan Constitution. Because of G.M.'s condition that it receive title to the complete parcel by May 1, 1981, or it would look for a site elsewhere, the Michigan Supreme Court expedited hearing the case and issued a per curiam opinion ten days after the case was argued.

The court's opinion had three main holdings. First, the court held that the Council's challenge to the taking on the ground of insufficient public purpose failed: "The Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court's role after such a determination is made is limited." Second, the court found that Michigan's delegation of the State's eminent domain power to the city of Detroit was proper, a factor the court believed further limited the scope of its review. Third, in light of this deference, and because the city and its inhabitants would receive a "clear and significant" public benefit, the taking at issue in *Poletown* was valid. Lest any municipalities (or corporations) draw the conclusion that they could use eminent domain proceedings for private gain, the court issued a warning:

Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.

Despite the uneasiness evident in that warning, the court squarely upheld the taking against the Council's allegation of insufficient public purpose.

The two dissenting justices, Ryan and Fitzgerald, responded to the majority with three arguments. First, they argued that governmental action that benefits the public does not, by itself, constitute a public purpose. Almost any conceivable governmental action will provide some benefit to the public; the question is whether that benefit is the chief pur-

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31. Id. at 632, 304 N.W.2d at 458.

32. Id. at 633, 304 N.W.2d at 459.

33. Id. at 634, 304 N.W.2d at 459.

34. Id. at 634-35, 304 N.W.2d at 459-60.

35. Of course, it is questionable whether the court followed its own advice on the question of heightened scrutiny. Given the court's deference to the Michigan Legislature, the warning seems to be dicta. See Note, *Public Use, Private Use*, supra note 11, at 448 n.183.
pose of the governmental action.\textsuperscript{36} Second, they distinguished the slum clearance cases relied on by the majority. In the slum clearance cases,\textsuperscript{37} owners of slum dwellings argued that condemnation of their property was illegal because the properties at issue were eventually transferred to another private party.\textsuperscript{38} The United States Supreme Court rejected this argument in \textit{Berman v. Parker} because the transfer of land that formerly had supported slums to a developer was incidental to the government's health and safety purpose in clearing the slums.\textsuperscript{39} In \textit{Poletown}, both dissenting justices noted that, unlike in \textit{Berman}, the transfer to G.M. was integral to Detroit's scheme.\textsuperscript{40} Third, both justices were wary of the political and economic power wielded by G.M. They therefore advocated a more active judicial role (in contrast to the majority's deference) to ensure that G.M. did not overwhelm the political processes of local government.\textsuperscript{41}

Despite the dissenters' logic in distinguishing \textit{Poletown} from \textit{Berman}, they were unable to divert \textit{Poletown} from the main current of modern public use cases. Since \textit{Berman} and its proclamation that a legislature's determination of public purpose is "well-nigh conclusive,"\textsuperscript{42} courts have allowed broader and broader readings of public purpose.\textsuperscript{43} \textit{Poletown} was merely one more example in this long progression of cases.

That the result in \textit{Poletown} was predictable, though, does not make it defensible. Indeed, it suffers from at least three problems.\textsuperscript{44} Most obviously, residents of Poletown did not receive adequate compensation for their loss. They were compensated for their tangible property, but received no compensation for their interest in the community itself—their "personhood" property in the community. Second, the decision to condemn Poletown was made during a period of what one justice called "frenzy."\textsuperscript{45} Detroit's eagerness to keep G.M. in Detroit precluded any

\begin{footnotes}
\item[36]\textit{Poletown}, 410 Mich. at 640-41, 304 N.W.2d at 462 (Fitzgerald, J., dissenting); \textit{id.} at 675, 304 N.W.2d at 478 (Ryan, J., dissenting).
\item[38]\textit{id.} at 31.
\item[39]\textit{id.} at 34-35.
\item[40]\textit{Poletown}, 410 Mich. at 641, 304 N.W.2d at 462 (Fitzgerald, J., dissenting); \textit{id.} at 670-74, 304 N.W.2d at 476-77 (Ryan, J., dissenting).
\item[41]\textit{id.} at 641, 304 N.W.2d at 461-62 (Fitzgerald, J., dissenting); \textit{id.} at 670-74, 304 N.W.2d at 476-77 (Ryan, J., dissenting).
\item[42]\textit{Berman}, 348 U.S. at 32.
\item[43]Compare, for instance, the traditional health and safety rationale of \textit{Berman} with the attempt to stimulate Hawaii's fee simple market in \textit{Hawaii Hous. Auth. v. Midkiff}, 467 U.S. 229 (1984).
\item[44]The three problems discussed in the text are all based on existing law. The result also arguably infringes on the Poletowners' freedom of association, but this claim cannot be supported with current authority. See, e.g., \textit{NAACP v. Alabama}, 357 U.S. 449, 460-61 (1958). See generally L. Tribe, supra note 3, § 12-26.
\item[45]\textit{Poletown}, 410 Mich. at 646, 304 N.W.2d at 465 (Ryan, J., dissenting); see also infra note 250.
\end{footnotes}
rational consideration of alternatives. This frenzy not only undermines the legitimacy of the decision, it also signifies that the decision may well have been the product of majoritarian tyranny. As Justice Ryan wrote, it is important to understand "how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means."46 Third, Poletown provides a textbook example of the triumph of judicial formalism. After Poletown, there are few, if any, real limits to the exercise of the power of eminent domain. A local government can decide that a certain goal is important enough to justify taking property from A and giving it to B. In deference to the legislative body, courts will not subject that decision to any meaningful substantive review, despite the fact that the historical purpose of the clause was to prevent such governmental actions.47 Indeed, in this way Poletown manages to find a formal way around one common interpretation of the takings clause: that the government cannot take property from A and give it to B,48 even if the government is tempted by the possibility that it might collect more taxes because of B's more efficient use of the property.49

B. Hawaii Housing Authority v. Midkiff

Hawaii Housing Authority50 presents a rather different set of circumstances from those prompting the demolition of Poletown.51 Hawaii traditionally had had a system of feudal tenures, in which all land was owned by the King or Queen, then feudated to chiefs and, ultimately, to commoners.52 After Hawaii entered the Union, land remained principally in the hands of a few large landowners. This system resulted in an extremely tight market for fee land on the islands. During the mid-1960's, when a land redistribution plan first came under consideration in the Hawaii Legislature, 49% of the land was owned by the state or federal government and another 47% was in the hands of only seventy-two

46. Id.
47. See infra notes 73-85.
48. See, e.g., supra note 2 and accompanying text.
49. For a different rationale for the clause, see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987) (purpose of the clause is to prevent the government from forcing some people to bear a burden that should be shared by the general public).
private parties. Moreover, ownership of the land that was privately owned was extremely concentrated: twenty-two landowners owned 72.5% of the privately-held fee simple land on Oahu. Faced with this situation, the Hawaii Legislature enacted the Land Reform Act of 1967, which allowed tenants of lots at least five acres in size to ask the Hawaii Housing Authority to condemn the tract containing their lots.

A private estate brought suit against the Authority in 1979, claiming that the condemnation procedures violated the public use requirement of the takings clause. The United States Supreme Court disagreed, concluding that Hawaii's taking of land to reduce the concentration of ownership of fee simple holdings in the state satisfied the Constitution's requirement that all takings be for public use.

The touchstone of the Court's analysis was its decision in Berman v. Parker, which upheld the use of eminent domain for slum clearance that involved the sale of the land to a private developer in the face of a challenge that such use created a private, not a public, benefit. Berman held that, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." The Hawaii Housing Authority Court glossed that holding: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." Consistent with this broad reading of the public use requirement, the Court reiterated its teaching in Berman that the scope of judicial review is extremely narrow. Under-scoring the deference shown to state legislatures, the Court then quoted from its opinion in U.S. v. Gettysburg Electric Railway Co. that "unless the use [in question] be palpably without reasonable foundation," the Court would defer to legislative judgments.

The Hawaii Housing Authority Court, however, skipped some even

54. Id.
56. It should be noted that this was not a land distribution scheme that would transfer fee simple land to large numbers of Hawaiians. Rather, this redistribution would largely, if not exclusively, benefit those middle and upper-middle class tenants who were able to afford to lease parcels larger than five acres. See generally Note, A New Slant, supra note 51.
59. Id. at 231-32, 243.
61. Id. at 32.
63. Id. The Court employed the traditional "minimum rationality" standard of review. See id. at 241; L. TRIBE, supra note 3, § 16-5, at 1451.
64. 160 U.S. 668 (1896). This case concerned the condemnation of the Gettysburg battlefield for use as a national cemetery.
more expansive language in Gettysburg Electric Railway. One page after the language quoted in Hawaii Housing Authority, the Gettysburg Electric Railway Court had announced:

Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid.66

Under this standard, it is hard to imagine any proposed use that would fail to pass constitutional muster. The Hawaii Housing Authority Court's standard has much the same effect. To be permissible, legislative actions must only be "rationally related to a conceivable public purpose."67

Under such a lenient standard, the Hawaii Land Reform Act easily passed the Court's review.

As one might imagine, the commentary on Hawaii Housing Authority has been extensive.68 Yet most of the commentary has belabored the obvious: that Hawaii Housing Authority places virtually no limits on a state's power of eminent domain.69 With the notable exception of the Leading Cases analysis in the Harvard Law Review, commentators have simply proclaimed takings jurisprudence a mess, without suggesting, in any detail, a means for the Court to extricate itself—and the rest of us—from this mess.70

C. The End of the Public Use Requirement

The public use doctrine, which is supposed to regulate the state's use of eminent domain, has therefore reached a dead end. If a governmental body rationally believes that acquiring or transferring the ownership of a particular piece of property might somehow enhance the common weal,

68. In addition to the sources cited in note 51, supra, see Durham, Efficient Just Compensa-
tion as a Limit on Eminent Domain, 69 MINN. L. REV. 1277 (1985); Note, Eminent Do-
69. See, e.g., Note, Eminent Domain, supra note 11, at 589-90; Note, Final Requiem, supra note 68, at 404; Note, Police Power, supra note 68, at 336-40; Comment, supra note 13, at 498-99.
70. See, e.g., Millspaugh, supra note 13, at 115; Note, Eminent Domain, supra note 11, at 591; Note, Judicial Review, supra note 68, at 246-47; Note, A New Slant, supra note 51, at 790; Note, Public Use Limitation, supra note 68, at 88-89.
it has the authority to take that property. The idea that there might be some limit on this type of governmental action—arguably the distinguishing feature of a constitutional democracy—has all but evaporated. The choice we now face is between finding a way to revitalize the public use limitation on the power of eminent domain and trusting governments to regulate and restrain their own use of eminent domain. Because the latter alternative seems especially susceptible to abuse and hence unacceptable, how might the public use doctrine be given new life?

To answer this question, one must first understand the purpose of the public use requirement. There may be institutional devices, economic principles, or other doctrines that might promote the purposes formerly served by the requirement. Also, it is possible that any purposes the requirement served two hundred years ago are unnecessary or inappropriate today. Part II of this Comment considers the purpose of the just compensation clause and its public use doctrine, arguing that despite the discrete origins of the clause, the public use requirement is of critical importance in attaining an essential goal of a constitutional system: the restraint of arbitrary government. Because this goal is still vital and because institutional and economic devices cannot limit the exercise of eminent domain, Part III proposes a new doctrinal structure designed to achieve the same ends as the public use doctrine.

II
THE RATIONALE FOR PUBLIC USE

A. Historical Foundations

The idea behind the just compensation clause seems to have arisen

71. Although various states developed different interpretations of the public use requirement in the nineteenth century, see Comment, supra note 11, at 912-15, twentieth century interpretations have moved toward assimilating public use with public benefit or public expediency. Id. at 915-16.

72. One may wonder why popular control (i.e., elections) would not work to limit the use of eminent domain by local governments. After all, a majority of the people presumably elect a majority of the legislative body. There are two possible cases: first, where there is a relatively stable majority on questions of eminent domain; and second, where questions of eminent domain are decided as just another issue by shifting majority coalitions. In the first case, there is no reason for members of the majority to limit their actions, aside from assuring continuing electoral support (which may require only 26% of the total electorate when only half the eligible voters actually cast ballots). The potential for serving special interests is hence quite large. In the second case, a legislator might think twice before voting for an exercise of eminent domain if doing so might cost her future support on some other issue. For such control to be effective, however, the proposed use of eminent domain must be so important to so many voters that a politician who took the "wrong side" on the issue would reasonably fear electoral retribution. For instance, given the heterogeneity of the Poletown neighborhood, the wishes of the residents of the surrounding area, and the general lack of political and economic power of the Poletown residents, electoral control on the basis of future retribution was unlikely to occur.

73. U.S. CONST. amend. V. The best historical treatment of the origins of the just com-
as part of a general movement away from republicanism and toward liberalism that took place between 1776 and the early 1790’s. Two developments capture the essence of this shift: the general decline in public confidence in the state legislatures and the increased importance attributed to the preservation of individual rights.

The first development, the decline in public confidence in state legislatures, provided the historical setting for the first just compensation clause. The area that is now Vermont was first settled under grants from New Hampshire, but in 1764 was awarded to New York. Naturally, New York did not wish to recognize the New Hampshire grants, and it therefore tried to dispossess the Vermonters of their lands. Vermont reacted by inserting a clause in its state constitution requiring compensation even when the state took unimproved land; no Vermont legislature would be able to emulate its New York counterpart in the future.

The dispute over Vermont land, moreover, was not unusual. During the years following the Revolution, the prevalence of paper money, confiscation of Loyalist lands, and other unsavory devices caused citizens to lose faith in the judgment of state legislatures. In addition, many citizens began to doubt a central tenet of republican ideology: that the legislature could discover a common good and achieve it by enacting law. Without the assumption of a common and readily discernable good, the public quickly lost faith in the ability of legislatures to remain impartial.

The second development in the shift toward liberalism was an increase in the respect accorded individual rights, particularly the right to own property. For instance, in the wake of the dispute between Vermont and New York, citizens of Vermont “realized at the start of the [American] revolution that they could not trust the legislature with the definition and protection of rights. As a result, the Vermont Constitution of 1777 was far more protective of individual rights than were other early constitutions.” Similarly, the tendency to reject notions of the common

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pensation clause is Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694 (1985).

74. See Note, supra note 73, at 694.
75. Id. at 704-05.
76. Id. at 702.
77. Id.
78. Id. at 702-03.
80. Note, supra note 73, at 704.
81. Id. at 705.
82. Legislatures came to be viewed as the arenas for an interest group struggle that anticipated the system discussed in THE FEDERALIST No. 10 (J. Madison). See Note, supra note 73, at 706.
83. Note, supra note 73, at 703 (footnote omitted).
good led the early liberals to try to create a large protective sphere around the individual, a sphere that included the fundamental right to property.84

Finally, according to the liberals, greater protection of individual rights—particularly the right of property—was necessary to prevent tyranny and to promote liberty.

The diversity of interests that possession of property occasioned prevented tyranny, and the acquisition of property was a necessary by-product of the freedom of action he [James Madison] deemed an essential part of liberty. “Government,” he wrote, “is instituted no less for protection of the property, than of the persons of individuals.”85

The result of these developments was not only a liberal conception of politics, but also a just compensation clause that—out of fear of legislative overreaching—enshrined the belief that individual rights to property deserve protection in the Constitution.

B. Conceptual Foundations

1. Two Directives for Governmental Action

The various factors discussed in the preceding section—a declining degree of public confidence in state legislatures, a waning belief in the existence of (and a legislature’s ability to comprehend) the common good of society, and the need to prevent tyranny in government, whether by a single person or by a majority of the population—all contributed to a growing feeling that the government could act in a biased manner.86 Moreover, this departure from impartiality was not seen as a momentary aberration; instead, it was seen as the likely result of usual legislative deliberations.87 Legislatures would inevitably trample individual rights88 and in the process jeopardize the Bill of Rights’ commitment to personal freedom.89

Hence, there was a tension between the new country’s aspirations to personal freedom and the likelihood that those officials primarily responsible for maintaining that freedom would instead act to abridge personal freedom. In Madisonian terms, there was a need to prevent factions from seizing the governmental apparatus and using it for their own private ends rather than fostering some notion of the common weal.90 Put-

84. Id. at 705.
85. Id. at 710 (footnotes omitted).
86. Note the sharp contrast between this attitude and republicanism’s trust in the impartial nature of legislatures. See, e.g., G. Wood, supra note 79, at 162-73.
87. Id. at 405, 409-13.
88. Madison identified this problem as one of the “mischiefs of faction.” The Federalist No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).
89. Note, supra note 73, at 712-13.
90. This conception of the common weal need not to rise to the level of altruism; it only must avoid purely self-interested action.
ting the point more succinctly, there was a need to prevent arbitrary government.91

The Framers, not surprisingly, were aware of this need; the desire to prevent arbitrary government lies at the core of a constitutional regime.92 As Professor Sartori has noted, people cherished “‘the constitution,’ because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited government.’”93 The best statement by the United States Supreme Court on this subject came in Hurtado v. California:

Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case . . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude.94

Hurtado therefore suggests two elements central to preventing arbitrary government: preventing government by whim (or without proper consideration), and preventing government by an oppressive majority.95

Forbidding arbitrary government also requires preventing the sacrifice of one person (or group) for the good of all. As Professor Tribe notes:

Whether traced to a principle that society simply should not exploit individuals in order to achieve its goals, or to an idea that such exploitation causes too much dissatisfaction from a strictly utilitarian point of view unless it is brought under control, the just compensation requirement appears to express a limit on government’s power to isolate particular individuals for sacrifice to the general good.96

Although such considerations apply with some force to all governmental actions (consider, for example, the burdens of selective service, progressive taxation, or any exercise of the police power that disadvantages a relatively small group), they achieve the most force when the burden on the disadvantaged individuals is large and the corresponding benefits are

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91. For a present-day restatement of the same policy, see Fasano v. Board of County Comm’rs, 264 Or. 574, 580, 507 P.2d 23, 26 (1973).
93. Sartori, supra note 92, at 855; see Fasano, 264 Or. at 580, 507 P.2d at 26 (1973).
95. An oppressive majority is a political coalition that uses its majority position in a legislature to alter permanently matters that the jurisdiction’s constitution has set outside the bounds of normal political give-and-take. See generally J. Finn, Can the Constitution Govern? (unpublished dissertation, Princeton University, 1986) (discussing the foundations and limits of constitutional authority during times of emergency, specifically Great Britain’s statutory attempts to control terrorism in Northern Ireland). A state legislature’s attempt to alter a constitutional policy (such as desegregation) by statute is a good example.
96. L. Tribe, supra note 3, § 9-6, at 605 (footnotes omitted).
diffused throughout the citizenry. Taking an individual's property is a forceful example, for the burden is usually quite large while the benefits accrue to the general public.97 Requiring the government to pay for the property and to justify its action in terms of the common weal are therefore essential to prevent such sacrifices.

The elements central to preventing arbitrary government do overlap to some extent. Preventing society from sacrificing individuals to the common good also prevents the sort of majoritarian tyranny thought typical of arbitrary government.98 Similarly, preventing governmental whim by requiring some deliberation in decisionmaking is likely to limit the number of times an individual or small group is sacrificed for the common good. Such decisionmaking requires assent from several actors and thereby encourages second opinion and counterargument.99 Finally, preventing majority tyranny is essential to prevent the creation of pariah groups subject to the beneficence of others.100 Still, these purposes are distinct. The prevention of arbitrary government is a general requirement of a constitutional regime and especially of the just compensation clause.101 The maxim that individuals should not be sacrificed for the common good grows out of respect for individual autonomy, governmental regularity, and equality: together these ideals prohibit such governmental activities.102

The purposes of the just compensation clause therefore produce two directives for governmental actors. First, to prevent arbitrary government, the government must act with regularity, through duly elected or appointed officials working in constitutionally-authorized institutions. Second, individual sacrifices can best be prevented if the government recognizes that each citizen103 deserves equal consideration in all decisions. An individual might lose a particular political battle under such conditions, but still will be thought worthy (and capable) of winning.104 These

97. One might question this formulation on the grounds that it would rule out conscription (large burdens placed on a few with diffuse benefits to the public at large). There are two responses to this objection. First, because conscription takes place by means of a lottery, the potential for unfairly burdening some individuals is greatly reduced. All those eligible have an equal chance of being drafted. Second, to the extent the proposed formulation is correct, it ought to call conscription into question, despite The Selective Draft Law Cases, 245 U.S. 366 (1918).


100. See infra note 158 and accompanying text.


102. See L. Tribe, supra note 3, § 9-7, at 608-09.

103. The term "citizen" here does not merely indicate those people who qualify under the U.S. naturalization statutes. Instead, citizen is intended to include all those with a moral or political (not to mention legal) claim to being a part of the community denominated "the United States."

104. The structure of this argument is quite similar to the structure of the main argument
two directives—governmental regularity and equal worth—embodies the central ideal of constitutional government.

2. The Inadequacy of Just Compensation as a Remedy for Arbitrary Government

One might agree with this analysis but conclude that it does not demand a public use requirement. The obligation to pay just compensation for a piece of property should be sufficient to deter abuse of the condemnation power. But this objection fails on several grounds. First, in purely economic terms, the value of the condemned property is likely to be relatively small in comparison to governmental resources. A legislature in a state with an annual budget of ten billion dollars, for instance, might well view an appropriation for ten million dollars as trivial. Yet ten million dollars may allow the condemnation of a significant amount of property.

Second, even if the condemnation involves significant costs, external groups place few, if any, restraints on proposed condemnations. The general public is not likely to pay much attention to the average condemnation, and even if it does, as in a case like Poletown, the perception that the benefits of the condemnation will flow (in an admittedly diffuse way) to the general public is likely to overcome any misgivings a citizen justifying pluralism. For a discussion of the shortcomings of the latter, see infra text accompanying notes 146-58.

105. See, e.g., Sax, supra note 101, at 64 (arguing that it is the purpose of the just compensation rule to prevent arbitrary government, but stating nothing about the public use requirement).

106. As of 1984, there were ten such states, comprising slightly over 50% of the population of the United States. Council of State Governments, The Book of the States, 1986-87 Edition 229, 271 (1986) [hereinafter Book of the States]. The median state expended approximately $5 billion. Id. at 229.

107. But see W. Muir, Legislature 28 & n. 19 (1982) (arguing that all bills are considered on their merits).

108. See supra note 72.

109. Studies repeatedly have shown that the average American knows relatively little about current political events. One such study concludes:

We have, then, the portrait of an electorate almost wholly without detailed information about decision making in government . . . [The electorate] is almost completely unable to judge the rationality of government actions; knowing little of particular policies and what has led to them, the mass electorate is not able to appraise either its goals or the appropriateness of the means chosen to serve these goals.

A. Campbell, P. Converse, W. Miller & D. Stokes, The American Voter 543 (1960). Even if residents of a locality were to pay sufficient attention to local politics to learn of a proposed condemnation at its inception, they would need to mobilize opposition quickly to be effective. This is especially true if, as is likely, the local government can use a quick-take statute. Poletown serves as a good illustration. Although the redevelopment plan was announced in June 1980, the Poletown Neighborhood Council was not organized until October. By that time, the condemnation process was well underway. See Bukowczyk, supra note 15, at 62-63.

might have about the project.\textsuperscript{111} The courts also are likely to acquiesce in most condemnations by limiting review to the narrow standard of minimum rationality.\textsuperscript{112} Moreover, while the state executive may be able to veto legislation appropriating funds for the condemnation, that power provides only a partial safeguard against legislative excesses.\textsuperscript{113} More to the point, proposed condemnations often are insignificant to state executives. A governor who wishes to make the most of her position might have an institutional incentive to go along with the legislature in order to conserve bargaining power for issues she deems more important.\textsuperscript{114} Finally, the executive branch is the organ of government most likely to \textit{initiate} condemnations.\textsuperscript{115} To expect it to serve as a brake on its own activities would be unrealistic.

Indeed, for the above economic and institutional checks to operate, the state legislature must operate as an economically rational actor. This is unlikely. Although an economic model of legislative behavior may be analytically satisfying, it is rife with unrealistic assumptions.\textsuperscript{116} At least one study of legislative behavior suggests that an economic model inadequately describes the legislative process.\textsuperscript{117} Hence, attempting to fashion economic means to deter the use of eminent domain would be a fruitless task.

Even if one assumes that a legislature is an economically rational actor and that other institutional checks will function properly, there remains a final condition necessary to provide just compensation that a legislature is unable to fulfill: the compensation paid to the owner of the condemned property should actually make that person whole. If the legislature is permitted to pay only some fraction of the value of the property to the person, it will externalize the difference in cost and therefore is likely to condemn more land than is efficient. As a result, any eco-

\begin{itemize}
  \item \textsuperscript{111} For an explanation of the difficulties of organizing citizens for collective action, see generally M. Olson, \textit{The Logic of Collective Action} (1965).
  \item \textsuperscript{112} See, e.g., Berman v. Parker, 348 U.S. 26, 33-34 (1954).
  \item \textsuperscript{113} All states except North Carolina give the governor a veto that may be overridden by some vote of the state legislature. \textit{Book of the States, supra} note 106, at 111-13.
  \item \textsuperscript{114} For an extensive discussion of this process in the federal context, see generally R. Neustadt, \textit{Presidential Power} (1960).
  \item \textsuperscript{115} Consider, for example, Detroit Mayor Coleman Young's role in the condemnation of Poletown. \textit{See Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 649-57, 304 N.W.2d 455, 466-70 (1981) (Ryan, J., dissenting); Peterson, Neighbors Lose and Detroit Wins in Court Ruling on New Auto Plant, N.Y. Times, Dec. 10, 1980, at A14, col. 1 (one resident of Poletown stated, 'The Mayor even came to my house and told me there's no way anybody's going to stop it [the redevelopment project] from the moment it broke').}
  \item \textsuperscript{116} Compare D. Mayhew, \textit{Congress: The Electoral Connection} (1974) (arguing that it is useful in understanding Congress to assume that the sole motivation of Members of Congress is to achieve reelection) \textit{with R. Fenno, Jr., Congressmen in Committees} (1973) (empirical study arguing that Representatives have three objectives: getting reelected, gaining power in the House, and making good public policy).
  \item \textsuperscript{117} See generally W. Muir, \textit{supra} note 107 (arguing that the best way to understand the California Legislature is as a school for politicians).
\end{itemize}
Nomic deterrence is at best partial. Although market price might suffice to set the amount of just compensation for many properties, there are several types of property for which the market price systematically understates the cost of condemnation to the previous owner. In such cases, deterrence fails.

In other words, the institutional devices that normally should limit a legislature's ability to enact unpopular legislation fail to operate in the context of a condemnation. The relatively small cost to the government of a condemnation, the likely unwillingness of political actors to object, the failure of economic deterrence, and—most importantly—the systematic inability of the political process to value property accurately, all compel the conclusion that in the context of a condemnation, a legislature has the unrestrained power characteristic of arbitrary government.

3. **Public Use as Remedy for Arbitrary Government**

The problem, in short, is the lack of any institutional device that assures the opportunity for what Professors Alexander Bickel and Harry Wellington called "better-informed second thought" or "sober reconsideration." For there to be some form of "second thought," the condemnor should be required to issue a statement setting forth the reasons for the action that can serve as the basis of a "second thought" review. Requiring a legislature to articulate the public use for which the property will be condemned would serve this purpose well. If the legislature takes the requirement seriously, it will engage in precisely the sort of deliberation that is the antithesis of arbitrary government. If, on the other hand, the legislature fails to take the public use statement requirement seriously, then a court would have grounds to scrutinize more closely the fit between the asserted legislative purpose and the legis-

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118. See infra notes 194-203, 208.
120. See infra notes 194-203, 208.
121. This is much like the sort of situation that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1982), addresses in its requirement for an environmental impact statement for all major federal actions. See id. § 4332(C) (1982). Both involve a significant decision that tends to be made in a forum where officials are indifferent to non-private interests. See Note, Does NEPA Require an Impact Statement on Inaction?, 81 MICH. L. REV. 1337, 1344 (1983); Note, EIS Supplements for Improperly Completed Projects: A Logical Extension of Judicial Review under NEPA, 81 MICH. L. REV. 221, 223-26 (1982). By requiring an environmental impact statement, society ensures that the agency has engaged in some deliberation, has given publicly acceptable reasons for its choices, and does not simply rubber-stamp its own conclusions.
122. This is the underlying rationale of SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (holding that the Securities and Exchange Commission must provide reasons for its actions to establish a basis for judicial review). See Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105-06 (1983) and cases cited therein; see also PPG Indus. Inc. v. Costle, 630 F.2d 462, 466 (6th Cir. 1980); EDF v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).
lature's actions in undertaking the condemnation. Nonetheless, in order to conduct that review a court must apply standards that do not take it beyond its institutional competence. Formulating the standards for such a review is the task of Part III.

C. The Need for a Functional Equivalent of Public Use

The foregoing conceptual analysis of the public use requirement thus poses a significant problem for a legal system that wishes to prevent arbitrary government. On the one hand, the public use requirement (or some functional equivalent) is necessary to prevent legislatures from unfairly depriving individuals of their property. On the other hand, the existing legal framework offers limited means to effect this purpose. Judicial interpretations of public use have narrowed judicial scrutiny of purported public uses to the point that the government's action will be upheld "unless the use be palpably without reasonable foundation."\(^1\)\(^2\)\(^3\) Legislatures, therefore, are free to set the bounds of their own conduct, which is precisely the situation that originally prompted the just compensation clause and its public use requirement.\(^4\) In other words, American law is back where it started almost two centuries ago. The problem today is to develop a different doctrine that serves the same function as the public use requirement but that will not suffer the same fate.

The remainder of this Comment proposes such a doctrine. Rather than focusing on individuals who are harmed by a particular governmental action, the Comment examines the implicit equal protection and consideration rationale that underlies the public use requirement of the just compensation clause. In the most general terms, the Constitution makes it illegitimate for a legislature to sacrifice the fundamental property interests of some for the good of all. Part III outlines the way in which concern for treatment as an equal\(^5\) can shape the policies underlying the


\(^{124}\) See supra notes 73-91 and accompanying text.

\(^{125}\) This Comment follows Ronald Dworkin's distinction between equal consideration and consideration as an equal. Dworkin writes:

There are two different sorts of rights they [citizens] may be said to have [under the fourteenth amendment's equal protection clause]. The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democracy . . . . The second is the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.


Consideration as an equal is a central, if not the central, conceptual foundation that has developed through the interpretation of the fourteenth amendment's equal protection clause.
public use doctrine. The final section of Part III applies these considera-
tions to formulate an alternative public use doctrine through a revised
analysis of Hawaii Housing Authority and Poletown.

III
SUBSTITUTING CONSIDERATION AS AN EQUAL
FOR PUBLIC USE

Anyone familiar with the complexities of equal protection analysis
will immediately realize that imposing the doctrinal structure of that
analysis—as a proxy for the ideal of treatment as an equal—onto the
subject matter of public use is at best a facile solution. For example,
classifying property ownership as a fundamental right, and hence sub-
jecting all takings to strict scrutiny, might be a coherent philosophical
position, but it would return the judiciary to the age of Lochner. Moreover, the basis of that classification is not one that lends itself to the
tripartite system of review that has characterized equal protection analy-
sis in the past generation.

On the other hand, property is, to some extent, a fundamental value
of the American constitutional system. The best evidence of this attitude
is Justice Stewart’s declaration in Lynch v. Household Finance Corp.: [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a
fundamental interdependence exists between the personal right to liberty
and the personal right in property. Neither could have meaning without
the other. That rights in property are basic civil rights has long been
recognized . . . .

Additionally, classifications based on property holdings may implicate
values other than simple economic subsistence, such as an individual’s
desire to feel rooted in a community.

The taking of property, therefore, lends itself to an analysis from the
standpoint of treatment as an equal, but that analysis requires more than
merely applying existing equal protection doctrine. Rather, one must re-
turn to the underlying purposes of equal protection, as understood in the

See L. Tribe, supra note 3, § 16-1, at 1437-38 (equal protection excludes decisions made on
the basis of prejudice (a lack of regularity) or on the basis of a lack of treatment as an equal).
Much of the remainder of this Comment may therefore appear to be dealing with the subject
matter of the equal protection clause under another guise.

127. Lochner v. New York, 198 U.S. 45 (1905). Contrary to some recent commentators,
see, e.g., Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873, 874-75 (1987), the return to
Lochner is generally seen as a return to a constitutional system in which the laissez faire right
to property is given more weight than other rights guaranteed under the Constitution. See L.
Tribe, supra note 3, § 8-3, at 568-70.
129. 405 U.S. 538, 552 (1972); see L. Tribe, supra note 3, § 15-13, at 1373-74.
130. See infra notes 219-34 and accompanying text.
ideal of treatment as an equal, and generate new doctrine that embodies concerns central to equal protection in the context of public use. Section A, below, invokes the norm of governmental regularity and explains how concern for that norm—stemming from the ideal of consideration as an equal—can be said to motivate the narrowness of judicial review in the area of public use. Section B applies the norm of consideration as an equal to property and explains how certain types of property are best seen as inextricably linked with individual autonomy. Such property should only be condemned for the sake of a compelling state interest. Because this type of property is relatively unusual and because the lesson of the post-Lochner era is that economic and contractual interests deserve less protection than other constitutional liberties, courts have not recognized the importance of this type of property in the context of public use analysis. Nonetheless, there are good reasons to rectify this oversight. Section C reanalyzes Hawaii Housing Authority and Poletown using the equal consideration approach. This produces a more satisfactory basis for the result in Hawaii Housing Authority and demonstrates that the result in Poletown was wrong.

A. Procedural Equality: The Political Process and the Norm of Governmental Regularity

1. "Layperson"

To understand the demands of the ideal of treatment as an equal in the context of the just compensation clause's public use requirement, this Comment uses a device invented by Professor Ackerman as a way to understand the law of eminent domain in general. The device is to discover what a layperson, well-schooled in the general customs of the United States, would think central to the governmental actions involved in a condemnation. What conceptions of governmental action would

131. See supra note 125 and accompanying text.
132. It is, of course, dangerous to speak of a constitutional provision as enshrining any particular value or of some policy as being the "deep" meaning of any constitutional provision. See L. Tribe, supra note 3, § 9-6, at 605, § 12-1, at 785.
133. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (the Court has abandoned "the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise" [footnote omitted]).
134. B. Ackerman, Private Property and the Constitution (1977).
135. Ackerman creates a hypothetical person to embody the public's understanding of legal matters. He describes the device as follows:

[T]he observer can be provided with a relatively clear question which can serve to direct his inquiry: What must a foreigner be taught about property before he can hope to avoid calling attention to himself as a strange and alien being? Or, to put the point closer to home, most of us are obliged as parents to solve a similar problem as we undertake to teach our children to survive successfully in the larger society that awaits them. Just as the observer could ask himself how he might ease the path of the entirely ignorant foreigner, so he might consider the things a child must (and does) learn about property on pain of being labeled a deviant by the dominant institutions of American society.
Layperson understand to follow from the directive of governmental regularity, and what types of actions might appear outside or at the periphery of Layperson's understanding?

2. Malfunctions of the Political Process

For Layperson, the paradigmatic governmental action is likely to take any one of a number of forms. If asked, she might suggest: (1) the legislature enacting a statute that makes some conduct criminal, (2) a judge handing down a decision in a case, or (3) a member of an executive or independent regulatory agency promulgating a directive. But if one were to ask Layperson whether there were any similarities among these apparently different actions, she would probably respond according to a rather different model of governmental action. At the most obvious level, each action is taken by a governmental official, acting in that role, and not by a member of the public. At a more substantive level, Layperson would insist that these officials act in a reasonable fashion, or at least not in ways that appear arbitrary or whimsical. Finally, Layperson would expect that a public official, by definition, would act primarily, though not exclusively, to benefit the public at large. These three elements of the paradigmatic governmental action combine to produce a nearly conclusive presumption of validity or legitimacy.\footnote{Id. at 97.}

One might try to test Layperson's understanding of governmental action by posing three hypothetical questions. Suppose that officials are coerced or bribed to take some proposed action. The action has been taken by a person who occupies an office, but the person was not acting as Layperson would expect an official to act. Hence, she would not believe the action to be worthy of the deference she would ordinarily give to governmental action.\footnote{The existence of graft makes it clear that officials do not always act in their official roles, but until it becomes customary for public offices to be occupied by private individuals seeking their own ends, Layperson would still expect the separation of public and private roles. Cf. Berman v. Parker, 348 U.S. 26, 32 (1954) ("[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive").}

Suppose instead that an official makes a decision either (a) arbitrarily or (b) under the influence of some public hysteria. In both cases, Layperson would conclude that the decision strays too far from paradigmatic governmental action to deserve Layperson's deference or support. In the worst case, the official presumably has failed to meet minimum standards of rationality. Although an official may not need to give a proposal a great deal of thought, perhaps because the matter has
already been thought through, prudence requires the official to give some attention to the matter. This model explains the provision for judicial review of "arbitrary" and "capricious" actions in the Administrative Procedure Act.\textsuperscript{139}

The second case also points to a problem that has troubled commentators since the \textit{Federalist Papers}: the possibility that provincialism or majoritarian tyranny (to use de Tocqueville's phrase)\textsuperscript{140} would lead local (and sometimes state) governments into oppressive legislation.\textsuperscript{141} Nor is this a problem that has escaped judicial notice. As the Oregon Supreme Court declared in \textit{Fasano v. Board of County Commissioners}:

[W]e feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. . . . Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.\textsuperscript{142}

Layperson is likely to believe that making a decision in such an environment, moreover, is likely to increase the risk of encountering the improprieties of the first hypothetical. Hence, she would be unwilling to give such decisions the kind of deference she would give to paradigmatic governmental action.

Finally, suppose that the official's understanding of what constitutes a "public benefit" systematically excludes the wishes of some people. A pluralist political system makes it inevitable that some people will lose in any given decision.\textsuperscript{143} But what would Layperson make of the fact that certain groups of people repeatedly seem to lose political battles while others seem to win just as often? Are these the "discrete and insular" minorities mentioned in \textit{Carolene Products} as deserving special judicial protection?\textsuperscript{144} Or should judges merely protect the process of pluralist

\textsuperscript{140} A. \textsc{De Tocqueville}, \textit{Democracy in America} 262-76 (J. Mayer ed. 1969).
\textsuperscript{141} The \textit{Federalist} No. 10, at 81 (J. Madison) (C. Rossiter ed. 1961). See generally G. Wood, supra note 79, at 404-09 (on the perceived excesses of the state legislatures during the Confederation).
\textsuperscript{142} Fasano v. Board of County Comm'rs, 264 Or. 574, 580, 507 P.2d 23, 26 (1973) (quoting in part Ward v. Village of Skokie, 26 Ill.2d 415, 424, 186 N.W.2d 529, 533 (1962) (Klingbiel, J., specially concurring)).
\textsuperscript{143} As Justice Powell noted, "in a democratic society there inevitably are both winners and losers. The fact that one group is disadvantaged by a particular piece of legislation, or action of government, therefore does not prove that the process has failed to function properly." Powell, \textit{Carolene Products Revisited}, 82 \textit{Colum. L. Rev.} 1087, 1091 (1982) (emphasis added).
\textsuperscript{144} United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
politics?\textsuperscript{145}

If Layperson accepts the view that American politics should be understood from the vantage point of pluralism,\textsuperscript{146} she can begin to answer these questions. Pluralism's legitimacy and justification stems from its appearance as an outcome-neutral process and its ability to provide a substantive vision of the normal political process.\textsuperscript{147} Professor Dahl's theoretical argument for pluralism\textsuperscript{148} best illustrates these two essential attributes.

Pluralism, in Dahl's view, presumes that government (and the legislature in particular) proceeds about its business by means of what he calls "minorities rule."\textsuperscript{149} Shifting coalitions of groups enact their own version of good public policy on issues of importance to a few key groups in the coalition and of relative unimportance to the other groups in the coalition. The factor distinguishing such a political process from a dictatorship is that in pluralist politics the governing power is distributed widely among a number of groups while in a dictatorship it is held by a single minority group.\textsuperscript{150} Further, the openness of pluralist politics to minority groups constitutes the normative strength of pluralism: "With all its defects, [pluralism] does nonetheless provide a high probability that any active and legitimate group will make itself heard effectively at some stage in the process of decision."\textsuperscript{151} In short, Dahl argues that because pluralist politics prevents the dictatorship of a single minority group on all issues, it is acceptable and even desirable as a system of democracy.

One might wonder about the substance of pluralism. Is it sufficient that an "active and legitimate group will make itself heard effectively"?\textsuperscript{152} Dahl recognizes that groups do not merely want a hearing;

\begin{itemize}
\item \textsuperscript{145} But see Powell, \textit{supra} note 143, at 1091 (arguing that screening for procedural violations requires a substantive notion of proper process).
\item \textsuperscript{147} The word "normal" is borrowed from \textit{R. Dahl, Preface, supra} note 146, at 137-51.
\item \textsuperscript{148} \textit{R. Dahl, Preface, supra} note 146.
\item \textsuperscript{149} \textit{Id.} at 133.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 150.
\item \textsuperscript{152} \textit{Id.} (emphasis added). Dahl glosses over the implications of the requirement that groups be active and legitimate. \textit{Id.} at 138. Noting that Blacks and communists have been "defenseless," he suggests that such groups may "often gain entry" to the system "(1) by engaging or threatening to engage in 'abnormal' political activity—violence, for example; (2) by threatening to deprive groups already within the arena of their legitimacy; or (3) by acquiring legitimacy, and hence motivating the in-groups to incorporate the outgroup." \textit{Id.} But how is an excluded group to gain legitimacy in the first place? Blacks needed the Court's decision in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), and numerous other decisions
\end{itemize}
they want action on their demands. The system must "placate" them with a combination of rhetoric and action. In noting that groups are not entitled to equal control over the outcome of a decision, and that having a voice requires that a group participate in the system of minorities rule, Dahl suggests the true nature of pluralist politics: a number of groups of various sizes, representing constituencies of differing sizes, intensities, and viewpoints, with access to different levels of political skill and resources, compete in a political marketplace. Just as in the economic marketplace, success depends on the possession of these qualities in judicious amounts.

For pluralist politics to be defensible, and thereby impervious to judicial intervention, the political system must: (1) be composed of groups that include all citizens; (2) allow all of these groups to participate actively in the struggle denominated "minorities rule;" and (3) provide each group with "spoils" that are roughly proportional to what other groups similar in size, political skill, and resources will receive. Clearly if some citizens are wholly alienated from the system, or if some groups are seen as pariahs, or if some groups are regularly "double-crossed" (made part of the winning coalition but not allowed to advance their favored programs), the system has malfunctioned. In such circumstances, Layperson would be unwilling to grant the products of the political process the deference she would give the paradigmatic governmental action.

Based on Layperson's reaction to these three hypotheticals, a court reviewing a proposed taking would want to be attentive to the sorts of departures from the paradigmatic governmental action that would prevent Layperson from deferring to the proposed taking. A judge would want to sift through the situation to identify any "warning flags," i.e., conditions indicating that the decisionmaking process departed too far from the paradigm. More specifically, a judge would look for evidence in the last three decades even to begin to achieve legitimacy. Is that really a viable model for other excluded groups?

154. Id. at 145.
155. See id. at 145-46.
156. For a recent elaboration of this theme, see, e.g., Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371 (1983).
157. There are some obvious practical problems here. How can an observer know what a group with similar political resources would have done in a given situation? In any single episode, such a determination is likely to be impossible. A consistent pattern over time, however, is more easily recognized and therefore more easily remedied.
159. This follows from the nature of ordinary jurisprudence. See B. ACKERMAN, supra note 134, at 88-112.
of coercion or bribery of public officials, especially through deals that exploit the weaknesses of local governments. For instance, did an official expend unusual effort in attempting to satisfy an outside party? Not all such efforts need raise questions about the legitimacy of the action, but they do need careful judicial scrutiny to prevent exploitation by the local government.

A judge should also look for a lack of reasoned deliberation in the decisionmaking process. In the terminology of administrative law, the judge should determine whether there was “substantial evidence” to support the official’s action.161 Again, actions lacking a basis in substantial evidence are not necessarily the proper subject of judicial intervention, but heightened scrutiny in such cases seems prudent.

Finally, a judge should examine whether the political process has systematically excluded any interests that Layperson might expect to mobilize around the proposal. This expectation will, of course, change over time; fifty years ago there were few individuals or groups who would protest turning a city park over to a developer. Today, a judge ought to expect that such a proposal would provoke significant—even if ultimately unsuccessful—protests. Indeed, if such protests do not materialize, their absence ought to alert the judge to the possibility that the political process may have gone seriously awry.

3. Governmental Regularity and Consideration as an Equal

In general, requiring governmental regularity makes individual oppression less likely. As Professor Tribe writes,

To isolate the virtues of regularity, it is helpful to note at the outset the pervasive and recurring equation between the irregular and the oppressive. It is probably true that “the most significant feature of small town politics is the frequency with which legal and procedural requirements are overlooked and ignored. . . .” [P]ersonalization in government, at least when not sought by the individual, most often seems the antithesis of respect for personal integrity and autonomy. Hence the emphasis upon “a government of laws, and not of men” as the “very essence of civil liberty,” and the persistent war, throughout the history of liberal thought, against capricious subjugation to the whim of the sovereign.162

Regularity thus neatly meshes with the core value of the equal protection clause: that each citizen be treated as an equal.163 Less abstractly, each of the warning flags identified above can be understood as a failure by the government to accord some individual (or group) the basic requisites of treatment as an equal. Recall that the three warning flags indicate when a governmental act deviates sufficiently from the paradigmatic govern-

162. L. Tribe, supra note 3, § 10-1, at 630 (footnotes omitted).
163. Id. § 16-1, at 1437-38.
mental act to warrant heightened scrutiny: (1) bribery (the easy case) or coercion (the hard case) of officials; (2) lack of reasoned deliberation by governmental decisionmakers; and (3) some indication that the political process departed from the theoretically-sanctioned pluralist paradigm. These failings translate into four failings from the standpoint of treatment as an equal: the failure to recognize individuals as political actors, the failure of deliberation, the failure of official judgment, and the failure of reciprocity.

The first failure of pluralism—the failure to recognize individuals as political actors—follows directly from the nature of pluralist politics. In pluralist politics, a group's likelihood of winning an objective is roughly proportional to the size of the group and the intensity of its feelings, among other factors. The political system, therefore, is merely a means of enforcing the will of the stronger or more numerous group(s). The normal functioning of pluralist politics, in other words, prevents individuals from being treated with the consideration due equals. Instead, they are treated merely as component parts of a group and receive consideration proportional to the strength of that group.

An example will make the nature of this failing clear. Suppose a state contains only two politically active groups, Democrats and Republicans, that Democrats outnumber Republicans 70-30, and that the population always votes a straight party ticket. The Democratic candidate for any elective office will always win. Further suppose that all Democrats are quite liberal and that all Republicans are quite conservative, so that no Republican ever favors a Democratic proposal or vice versa. The effect will be that no Republican proposal will ever be adopted. In such circumstances Republicans would be isolated; it would be unrealistic to expect that they and their proposals would receive the consideration due equals. By the principles of pluralist politics, however, the only flaw in this hypothetical is its alleged unreality.

The second failure of pluralism involves the official's dispensing personal justice or acting without due deliberation. This failure encompasses decisions that are made on the basis of prejudice, a potentially
dangerous failing of pluralism identified in footnote four of *Carolene Products.* It also implicates the second warning flag, the lack of reasoned deliberation. Grouping these two types of problems together makes good sense, for consideration as an equal requires governmental regularity in both forms: the government not exploiting its privileged role and the government not acting without due deliberation.

The third failure of pluralism—the failure of official judgment—can best be seen as what Professor Sax has called the risk of excessive zeal. Unlike an individual, the government (under certain circumstances) may act as a judge in its own cause. In this role, it runs up against the ancient problem of favoring its own interests over the public interest. As Juvenal put it, "who shall guard the guards themselves?" The matter becomes more difficult when one considers that officials are people too, and hence are likely to get caught up in any public frenzy that may seize the general population. Even if officials are not susceptible to such sentiments, private interests may be able to exert informal pressure on officials and may even "capture" an official or agency.

Although drawing a clear distinction between permissible and impermissible influence is a task beyond the scope of this Comment, it should be clear that at some point an official acting at the behest of a private party might begin to pay special attention to that party's interests and may even advance those interests at the expense of the interests of

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167. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). The footnote reads in part:

It is unnecessary to consider now whether legislation which restricts the political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the fourteenth amendment than are most other types of legislation [e.g., restrictions upon the right to vote, restraints upon the dissemination of information, interference with political organization, and prohibition of peaceable assembly].

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

168. For a discussion of the government's ability to reward friends and punish enemies, see Sax, *supra* note 101, at 64.

169. This is a version of the problem Sax calls the scope of exposure to risk. *Id.* at 65. See *infra* notes 176-77 and accompanying text.


the government or the general public. At that point, the relationship no longer looks like Layperson's paradigm of good government, but instead takes on the characteristics of a principal-agent relation. In such cases, the norm of governmental regularity is violated and therefore the ideal of treatment as an equal is violated as well. The privileged private party, serving as a "dictator" on the issue in question, receives treatment that is more favorable than treatment as an equal. At the same time, less privileged citizens receive little, if any, thought.

Each of the warning flags thus gains added meaning when understood in light of the ideal of treatment as an equal. The final failure, the failure of reciprocity, brings out this point most sharply. As Professor Sax noted in another context, there is a significant difference between the mutuality that exists when two parties can impose costs on each other and the imbalance that occurs when one party can unilaterally impose costs on another. Sax explained the problem of reciprocity in the context of governmental enterprise procurement, but the analysis also applies to those more purely governmental functions in which the normal political channels, designed to take into account citizen dissatisfaction, have failed. In other words, in a well-functioning political process, citizens can impose costs on the government—e.g., by voting a politician out of office—and thereby restrain tendencies toward unequal treatment. But when the process breaks down, as when the types of failure noted above occur, concern for the goal of treatment as an equal must arise.

In short, the three warning flags should suggest not only that the political process has gone awry, but also that the ideal of treatment as an equal is in jeopardy. Because treatment as an equal is an important component of constitutional government, any such failing strikes at the heart of the political system and, therefore, justifies judicial intervention.

4. Generating Doctrine

Explaining the malfunctioning of the political process in terms of the values of nonarbitrary government and treatment as an equal points to a fundamental problem in the current understanding of the just compensation clause's public use requirement. As noted in the preceding sections, nonarbitrary government and equal consideration are central to the ideal of a constitutional regime. The implicit concern of courts in applying current public use doctrine is for the integrity of the political

174. See Restatement (Second) of Agency § 1 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to this control, and consent by the other so to act.").
175. For this use of the term "dictator," see K. Arrow, Social Choice and Individual Values 30 (1951).
176. See Sax, supra note 101, at 66.
177. In some cases, citizens also may vote to reduce the tax revenues available to local officials.
process underlying the proposed condemnation. Yet, the hallmark of modern public use cases is the degree to which the judiciary’s deference to legislatures has narrowed the scope of judicial review of such actions. As the Court noted in Berman, legislative determinations of what constitutes public use are “well-nigh conclusive.” 178 In short, the courts assume that the political process has functioned normally and therefore do not question the legitimacy of legislative judgments. 179

Common sense and the foregoing analysis suggest, however, that in a small number of cases this assumption is wrong. How can a court recognize these cases and what should it do when it finds one? Section 2, above, implicitly answered the first question. Courts ought to examine every just compensation case to see whether any of the three warning flags is present: coercion or bribery of officials, especially through deals that exploit the weaknesses of local governments; lack of reasoned deliberation in the decision process; or systematic exclusion of interests that might normally be expected to mobilize around a proposal, or private interests deriving unusually great benefits from the exercise of governmental power. 180 The presence of any one of these warning flags should be a sufficient indication to a court of the possible illegitimacy of the proposed taking to warrant a heightened standard of review. 181 Indeed, given the minimum rationality standard that courts currently apply, it is more accurate to say that, as a practical matter, a public use case should be subject to judicial review only when the presumption of legitimacy is reversed.

The presence of a warning flag should not by itself, however, justify judicial intervention, except in egregious cases. For judges to inject themselves into the political system, as this Comment suggests, requires

179. See United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946) (departure from judicial restraint “would result in courts deciding on what is and is not a governmental function,” i.e., passing on the legitimacy of particular governmental actions).
180. The warning in Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), quoted supra text accompanying note 34, is an example of judicial cognizance of such a warning flag.
181. Cf. Note, Oakland Raiders, supra note 11, at 105-07 (proposing to shift the burden in eminent domain cases to the government to show that its proposed use is valid). This Comment’s proposal differs from that Note’s proposal in two critical respects. First, under this Comment’s proposal, the burden of proof would not shift to the government in every case, as the Note advocates, but would shift only when a plaintiff makes a showing that it is more likely than not that the political processes have gone awry. Thus, this proposal is narrower in scope. Second, the shift in burden concerns the legitimacy of the governmental action, not the validity of the proposed use. The latter would thrust the courts back into the quagmire of second-guessing the legislature, a role the Court abdicated some 50 years ago. Scrutinizing the legitimacy of the decision making process, moreover, is less likely to give a judge the opportunity to substitute her views of social policy for those of locally elected officials. Finally, judges are eminently qualified to evaluate process questions; they are relatively unable to evaluate the substantive merits of a plan. This Comment’s proposal, therefore, is consistent with recognized limits to judicial competence. The proposal outlined in the Note is not.
that the questionable condemnation decision be more than an isolated example of local governmental malfunction. Instead, just as Justice Clark in *Baker v. Carr* justified judicial intervention in reapportionment cases on the grounds that the political system lacked any means of self-correction,\textsuperscript{182} intervention in eminent domain cases must be premised on the breakdown of the self-corrective processes of pluralist politics. The best indicator of such a failure is an historic pattern of group exclusion either from winning coalitions or from the fruits of such victories. Judges ought to intervene, therefore, when one or more of the warning flags is present, indicating a skewed political process, and when the malfunction is part of an established pattern in which the disfavored group has not obtained the sorts of benefits that Layperson might expect it to obtain.\textsuperscript{183} A pattern of political irregularities, therefore, presents a prima facie case for a court to apply a higher level of judicial scrutiny than the usual perfunctory standard of review.

It is possible for a private interest to derive an unusually great benefit from governmental action that is not the proper subject of judicial review. For instance, suppose data communications service is a natural monopoly and thus can best be provided by a single company. Further suppose that the federal government, experimenting with alternative forms of serving the public, offers this monopoly to a private company and does so without procedural or substantive errors. How should a court evaluate this set of actions? *Fasano*\textsuperscript{184} again provides guidance.

In *Fasano*, the court noted that the greater the change in the status quo produced by rezoning, the greater the burden should be on the government (or government and private party) to justify that change.\textsuperscript{185} Generalizing this observation to other sorts of change, once a court finds a prima facie case for heightened scrutiny, it should apply that heightened scrutiny unless the government can show: (1) that there is a compelling need for the change (with a greater need being required for more disruptive projects); (2) that the identified need is best met by the proposed change (or at least that there is no roughly equivalent alternative available); and (3) that the proposed change is in harmony with other policies governing the subject of the change. In the data communications

\textsuperscript{182} 369 U.S. 186, 258-59 (1962) (Clark, J., concurring).

\textsuperscript{183} This section assumes that a judge can determine what the "normal" requisites of a group in the political system might be. Any such assessment, of course, will not be entirely accurate, but that is not the point. Rather, the point is that the judge should use Layperson's understanding of American politics to set wide bounds on what may be considered "normal" politics. Certain practices (e.g., giving up office after losing an election) will undoubtedly be thought normal. Others, like auctioning off votes in public, will be thought abnormal. A single questionable act need not suggest abnormal politics. Instead, a pattern of such actions, like a pattern of discrimination, can and should imply an intent to exclude a group from meaningful participation in the political process.

\textsuperscript{184} Fasano v. Bd. of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

\textsuperscript{185} Id. at 586, 507 P.2d at 29-30.
service case, the natural monopoly takes care of elements (1) and (2), and the flawless character of the federal grant (perhaps as a public utility) satisfies element (3). In essence, therefore, the government may recover the presumption of deference by showing that the decision satisfies not only a minimum rationality standard, but also a higher standard of rationality—one that requires the legislative means substantially to further the legislation's announced ends.186

This formulation makes sense in terms of promoting the underlying rationale of public use: consideration as an equal. By denying the assumption of legislative legitimacy, a court says that the action fails to satisfy the norm of governmental regularity because the process seems to have failed to treat as equals all individuals who might be affected. The government can overcome such a showing only by demonstrating that, even though it apparently has not treated all affected persons as equals, the ideal of consideration as an equal nevertheless justifies its action.187

B. Substantive Equality: Individual Autonomy and the Norm of Equal Consideration

1. Introduction

The norm of treatment as an equal also is of particular importance in the analysis of the just compensation clause and its public use requirement. As suggested above, treatment as an equal is grounded on respect for individual autonomy188 and political equality—those values most jeopardized by arbitrary government.189 This understanding of treatment as an equal has important consequences in the realm of property. Each individual deserves the right to treatment as an equal with regard to those aspects (or types) of property that contribute to individual autonomy.190 The just compensation clause and its public use requirement should be understood as a mandate to protect these forms of property. The following sections first distinguish between different types of property and then identify those types of property that ought to receive

187. For an explanation of "treatment as an equal," see supra note 125.
188. Rawls offers a useful explanation of autonomy. He suggests that acting autonomously is acting from principles that we would consent to as free and equal rational beings, and that we are to understand in this way. Also, these principles are objective. They are the principles that we would want everyone (including ourselves) to follow were we to take up together the appropriate general point of view.
189. See supra text accompanying notes 90-104.
190. Property can contribute to individual autonomy in at least two ways: it can free the individual from worries about survival (e.g., food, shelter, clothing) and it can help the individual define his or her life (e.g., a musician's instrument).
heightened protection because of their close relation to individual autonomy and, hence, to treatment as an equal.

2. Types of Property

The core of the concept of property is use. If Layperson owns a bicycle, she can use it in ways that another person, call her B, cannot (at least not without Layperson’s permission). Unfortunately, matters are not always so simple. Consider a number of possible types of property that lie in the penumbra of this core conception of property: (1) the air over Layperson’s land, (2) a strip of B’s land that provides the only access to a public beach, (3) Layperson’s wedding ring, and (4) Layperson’s class ring.

The air over Layperson’s land is significant because it illustrates a distinction between social and legal property—that is, between property that B would recognize as another’s without resort to the legal system, and property that the other person could establish as hers only by consulting a lawyer or otherwise engaging the legal system. Layperson can readily identify the bicycle as hers, but even her well-socialized intuitions would not help her determine whether she owned the air over her land.

The access strip highlights another distinction among types of property: some property falls in the realm of what Sax has called private rights, while other property is more properly thought of as entailing public rights or public-stake interests. Layperson’s claim to her bicycle is an example of a private right. By contrast, public-stake interests may be based on any one of several claims. The first basis for public-stake interests stems from what might be called the problem of diffuse holdings. Suppose Layperson owns a house on a hill and the land above her property is owned by a coal company. Now suppose the coal company begins surface mining on its land. As a result, tailings and other debris begin to cover Layperson’s land. Layperson would immediately recog-

192. B. Ackerman, supra note 134, at 98.
193. Id. at 116-18.

Although Sax advocates recognition of a legally cognizable right under the rubric of “public rights,” the case law does not support him. See, e.g., Allen v. Wright, 468 U.S. 732 (1984); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). When there is an interest in which the public qua public has a stake, something akin to a “public right” may exist, but that right is not enforceable unless some person can allege injury in fact. L. Tribe, supra note 3, §§ 3-16 to 3-17. For purposes of clarity, therefore, this Comment uses the term public-stake interest to refer to interests that may be enforceable only by an individual but in which the public qua public has a stake.

195. This example is based on the discussion in Sax, Takings, supra note 194, at 153-61.
nize that the company has infringed upon her property rights and can be compelled to stop the discharge and pay compensation to Layperson for the damage. If, on the other hand, the land adjacent to the mine is owned not by Layperson but by the public generally (for example, as a public park), protection traditionally has been less forthcoming because no one person has a large enough stake to pursue a claim. As Sax notes, the difference between these two situations is fortuitous. Just as the first encroachment gives Layperson a legal right, the second should give the public an enforceable legal interest.

A second type of claim to public-stake interests may be made on the basis of non-exclusive benefits. Recall that an essential part of what allows Layperson to call the bicycle hers is that others have to ask Layperson's permission to use it. In other words, the right to exclusive use is an inherent attribute of a private property right. The public cannot exclude someone from the public park, though, based on the claim that the park is not theirs to use. By definition, each member of the public has an equivalent interest in the public-stake interest constituting the public park. Yet incompatible uses must somehow be prohibited or the park will soon be ruined. A simple way to achieve this goal is to conceptualize the park as a public-stake interest, perhaps held in trust by the government for the benefit of the public.

A final way to derive a public-stake interest is to begin with the observation that some property is inherently public in character. This does not mean that the public owns the property, but that a substantial portion of the property's value derives from the relation that members of the public have with the property. For instance, in medieval England the site of the village Maypole probably was invested with far more significance than its potential economic uses would indicate. The reason for this supposed overvaluation is that the public had invested resources (generally psychic) in having that spot as the scene of the May celebration. The public's relationship to the property created part, if not most, of its value.

Layperson's wedding ring represents the distinction between fungible property, that type of property for which a substitute can readily be found in the marketplace, and personhood property, that type of property so closely connected to the owner that no substitute will suffice. A simple example of fungible property is Layperson's bicycle. If it were lost, stolen, or damaged, Layperson would probably be content with a new bicycle. Admittedly, Layperson might have many wonderful memo-

196. Id. at 155-57.
197. Id.
198. See Sax, Decline of Private Property, supra note 194, at 485.
ries of riding the old bicycle, but it is unlikely that any of those experiences would be so important to her that no other bicycle would do. By contrast, Layperson's wedding ring is what has been called personhood property.\(^{200}\) If the ring were lost or damaged, it is unlikely (assuming Layperson views the ring as a symbol of her marriage and considers her marriage an important part of her life) that any other ring would serve as an adequate substitute. That particular ring symbolized her marriage; another might be nice, but it would not have the ties and associations with her life that the first ring had.

Layperson's car might be another example of personhood property. Suppose she likes driving fast and has invested a great deal in finding a suitable car, taking care of it, and tuning it so that it will perform to its utmost capacity. If the car were suddenly destroyed, Layperson would suffer a significant loss even if she could find a car just like it. The replacement would merely be a replacement; it could never signify the investment of Layperson's self in quite the same way as the first car.

Layperson's class ring suggests another classification of property. The ring is a form of social property,\(^{201}\) that is, property that another well-socialized person would immediately recognize as belonging to Layperson. The law recognizes some of these property interests (for example, Layperson's bicycle), but does not recognize others. Examples of non-legally sanctioned social property include status (however achieved), the intangible benefits of living in a desegregated community,\(^{202}\) an individual's interest in another person's plot of ground that provides amenities to members of the general public,\(^{203}\) or the benefits that stem from wearing a class ring. The common characteristic of non-legally-sanctioned property is the manner in which it is related to something that is legally-sanctioned property. The latter is responsible for the social meaning attributed to the former. For example, a class ring signals to others the wearer's connection to a particular high school or college, allowing alumni to recognize each other. Non-legally sanctioned property, therefore, is a set of interests that individuals find valuable and, therefore, deserving of legal protection, but which traditionally have not been given legal protection.

\(^{200}\) Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61 (1982). It should be noted at the outset that whether property is characterized as personhood or fungible property depends on the identity of the owner. For example, to a law student a hammer is probably fungible property while a copy of Holmes' *The Common Law* might be personhood property. For a carpenter, though, the roles would probably be reversed. Thus, a court attempting to classify the property as personhood or fungible must do so with the character of the property owner in mind.

\(^{201}\) See supra text accompanying note 193.


The foregoing discussion of the different types of property is best summarized in a chart:

<table>
<thead>
<tr>
<th>Legal Status</th>
<th>Relation to Self</th>
</tr>
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<tbody>
<tr>
<td>personhood</td>
<td>fungible</td>
</tr>
<tr>
<td>legally sanctioned</td>
<td>legally sanctioned</td>
</tr>
<tr>
<td>personhood: e.g., wedding ring</td>
<td>fungible: e.g., bicycle</td>
</tr>
<tr>
<td>non-legally sanctioned</td>
<td>non-legally sanctioned</td>
</tr>
<tr>
<td>personhood: e.g., neighborhood, school</td>
<td>fungible: e.g., parks, wetlands</td>
</tr>
</tbody>
</table>

Layperson would normally associate a taking with fungible property that is legally-sanctioned (otherwise the government would not have to pay compensation). An archetypical example is the condemnation of a parcel of land to build a highway. Although land is considered unique for contractual purposes,204 it is legally-sanctioned fungible property for the purposes of a taking and hence compensation is paid. In general, the government should be disinclined to take personhood property because by definition the standard means of compensation is inadequate.205 It follows that a judge should scrutinize a taking of personhood property closely.

Similarly, Layperson would not normally associate a taking with non-legally sanctioned property, like neighborhoods or schooling, because these public-stake interests usually are not deemed significant enough under current law to warrant compensation. For instance, a member of the general public traditionally does not have a compensable

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204. Restatement (Second) of Contracts § 360 comment e (1982).
205. The standard compensation for a taking is the market value of the property. J. Sackman, 3 Nichols' Law of Eminent Domain § 8.61, at 8-131 (1988). As the examples of personhood property indicate, market value only accounts for some portion of the total value of the property to the prior owner. Hence, it will be difficult, if not impossible, to pay the owner just compensation. Arguably, a sufficiently large payment will come close to compensating Layperson for her lost wedding ring. For example, suppose Layperson were not only to get the market value of the ring but were also to be paid $1,000,000 in an attempt to compensate her for any loss of personhood. Layperson, of course, would be in a better financial position after the payment than she was originally. Indeed, Layperson might prefer having the $1,000,000 to having the ring. Still, does that payment actually compensate her for her loss?

R. George Wright provides an answer:

[T]he crucial un-Kantianism, or unfairness, or exploitation, [of such a taking] which cannot be erased by showering the condemnee with compensation, inheres not so much in the disproportionality of the burden imposed upon one or a few condemnees, but in the implicit denial of the condemnee's basic identity, the contempt for her basic life-choices and in the assumption of the essential meaninglessness of the condemnee's life, or the condemnee's lack of capacity to invest her life with the meaning derived from the property in question.

interest when a private wetland is developed. Yet Professors Sax and Rose have offered good reasons why such non-legally sanctioned property interests should on occasion be compensable. When the interest involves diffuse holdings, provides non-exclusive benefits, or is of an inherently public character, judges should be alert to the possibility that these forms of non-legally-sanctioned property rightfully fall within the scope of the takings clause.

Courts ought to note, therefore, that only legally sanctioned fungible property has the characteristics that make it suitable for a government taking. When courts encounter other forms of property, some form of heightened scrutiny may be necessary, particularly if there is any doubt about the legitimacy of the proposed taking.

3. Generating Doctrine—2

The distinctions made in the foregoing section between types of property, their relationship to autonomy, and consideration as an equal are central to the development of a new doctrine of public use. The following sections will develop the doctrine by examining the different types of property in turn.

a. Legally-sanctioned fungible property

As suggested in the previous section, if the property in question is fungible and legally sanctioned, it is preeminently the type of property that the eminent domain power is designed to encompass. Taking legally sanctioned property does not prevent Layperson from acquiring other, similar, property. The "just compensation" for such property is likely to capture the real costs of replacement while not endangering Layperson’s other less tangible and less compensable interests. Taking legally sanctioned fungible property therefore passes constitutional muster because it poses no threat to the ideal of treatment as an equal.

b. Non-legally-sanctioned fungible property

To understand the doctrine that ought to apply to non-legally sanctioned property, recall an example of such property: the public’s stake in

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207. See supra notes 194-99 and accompanying text.
208. The existence of significant interests that are without legal protection undermines the argument that the legislative process will accurately value the losses associated with condemnation and that the owners of these interests will receive any—let alone just—compensation. That argument, the reader will recall, is central to pluralist theories of politics. By diminishing these apparently legitimate expectations, the government fails to achieve one of the basic purposes of the takings clause: providing people with the security that they may invest in property. See, e.g., Note, supra note 73, at 72 (describing the dispute between Vermont and New York over title to land that now belongs to Vermont).
209. J. SACKMAN, supra note 205, § 8.61, at 8-137.
a privately-held wetland. This interest is held in general by the public, but, as is typically the case for a public-stake interest, members of the public at large would not have standing to protest the destruction of the wetland.210 Moreover, the stake each member of the public holds in the wetland is fungible. One stake in the wetland is identical to any other stake in that wetland. Consequently, the public-stake interest in a private wetland qualifies as fungible non-legally sanctioned property.211 Still, how can the law understand the public-stake interest in non-legally sanctioned property? The public trust doctrine provides a useful analogy.

The public trust doctrine traditionally has been held to apply only to submerged lands, either on the coast or underneath navigable rivers.212 If one adopts this historical doctrine as the exclusive (or preeminent) legal understanding of public trust, it then follows that in almost every case the doctrine’s applicability would be limited to preserving certain public lands.213 The logic behind this limitation, though, is outdated and contradicts a basic premise of the common law: that a doctrine ought to evolve to meet the changing needs of society. As Sax points out, there is no reason to limit the public trust doctrine to these lands.214 Instead, the public trust doctrine should be limited only by its underlying purpose: protecting interests held in common.

If the public trust doctrine is allied with the purpose of protecting interests held in common, the doctrine can become, using Sax’s term, “liberated.”215 Such protection could take two forms: either protecting expectations held in common but without legal sanction,216 or protecting properties that the public has invested with significance for society.217 In either case, the rationale extends to non-legally sanctioned fungible property since such property is held in common, without explicit legal sanc-

211. The reader may have noticed that the way this Comment defines public-stake interest in the wetland makes short shrift of whether the wetland is held publicly or privately. The reason for ignoring the distinction is simple: the public’s interest in the wetland is identical whether it is owned publicly or privately. What differentiates a public from a private wetland is neither the public-stake interest nor the governmental interest (by analogy to the public trust doctrine), but the owner’s private interest in that property.
213. Wilkinson, supra note 212, at 305-06.
214. See Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C. DAVIS L. REV. 185, 185-87 (1980).
215. See generally id.
216. See id. at 188-89.
217. For instance, the site of an important local event might have this significance. See Rose, supra note 199, at 759.
tion, for the benefit of the public. Thus the considerations that underlie liberating the public trust doctrine and applying it to areas historically outside its scope also suggest that the public-stake interest in wetlands, for example, be given similar protection.

If the public-stake interest in fungible non-legally-sanctioned property is understood, therefore, by analogy to the public trust doctrine, such property may be suitable for taking. In some sense, the public has always had a significant stake in the property. Dispossessing a private party does not disrupt a reasonably settled expectation; it merely returns some "rent" to the public that otherwise was a windfall for a private party.218 Treatment as an equal cuts in favor of a court upholding the taking: it is precisely such special windfalls that the ideal of treatment as an equal seeks to outlaw.

c. **Legally sanctioned personhood property**

If, however, the property in question is some form of personhood property, then the consequences are different. By definition, personhood property implicates interests that are noncompensable. Legally sanctioned personhood property would thus categorically fall outside the scope of the takings clause. Furthermore, there are good policy reasons for a court to abide by this exclusion. Personhood property enables individuals to develop identities that are rooted in communities; indeed, the intimate associations called communities create and are dependent on personhood property to provide the context for those associations. The Supreme Court has long recognized that such associations with inanimate objects, insofar as they foster patriotism and good citizenship, deserve preservation.219 The importance of personhood property for full development of a self should cause the Court to move to full protection of such property as an attribute of individual autonomy.220 To accomplish this, the Court should subject takings of legally sanctioned personhood property to strict scrutiny.221

Put more concretely, judges ought to strike down as unconstitutional all takings of personhood property unless the government can show a compelling state interest in taking the property. Although this is

218. One might question the plausibility of this move. For example, suppose Layperson is tremendously attached to, and defines herself by, a salt marsh that the local city council proposes to fill and sell to developers. She certainly should be permitted to raise that claim in a court challenge. Her claim, however, is to ownership of the marsh as a form of personhood property, a claim that raises more complicated issues that are explored in the following sections.


220. See supra text accompanying note 200.

221. Cf. L. Tribe, supra note 3, § 16-6, at 1451-54 (discussing strict scrutiny in the equal protection context); id. § 16-7, at 1454-55 (discussing strict scrutiny where classifications created by governmental action create inequalities bearing on fundamental rights).
a stringent test, it need not fall prey to the criticism that has plagued strict scrutiny in the equal protection context, namely, that the scrutiny is "'strict' in theory and fatal in fact." Rather, a compelling state interest would be something akin to a purpose that furthers the policies underlying the concept of personhood property. For instance, if the destruction of A's home were necessary to preserve a neighborhood from an epidemic, the purposes behind the takings clause (preserving property from arbitrary governmental interference) would be ill-served by an interpretation of the clause that frustrated governmental actions seeking solely to preserve such property.

One might object to this suggestion on the grounds that requiring judges to subject takings of personhood property to strict scrutiny will be unworkable in practice. One judge's personhood property, the objection would run, will be another judge's fungible property. By contrast, the suspect classification schemes applied in the equal protection context can be applied in a relatively mechanical fashion. The objection is really an objection to the idea of personhood property as a legal category. As noted above, determining whether a particular object fits the theoretical characteristics of personhood property requires an ad hoc examination of the facts of a particular situation. In this respect, alleged takings of personhood property are no different from takings in general. However uneasy one may feel with personhood property, it is a category for which there are clear cases—such as Layperson's wedding ring. With an ad hoc, fact-based inquiry there will always be some disputed (and disputable) decisions; but because each case is limited to its facts, the precedential value of an ill-conceived decision will be minimal.

One may wonder, then, whether this analysis applies to non-legally sanctioned personhood property. That is a difficult question and is reserved until after a more pressing question is resolved. Suppose the personhood property in question is not Layperson's wedding ring but Richperson's palatial 1000-acre estate? Richperson makes the same claim about her estate that Layperson makes about her wedding ring. Because of the nature of the property, the government may not rightfully exercise the power of eminent domain over it. Does Richperson win? If so, are there any limits on personhood property, or does this analysis suggest the clearly erroneous thesis that the power of eminent domain cannot extend to valued property?

There are at least three answers to this problem. The first solution is

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222. See Gunther, supra note 186, at 8-10.
223. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (analysis under the takings clause requires an ad hoc assessment of the circumstances of each case).
224. Consider, for instance, Richperson's business, discussed infra note 225, and Layperson's wedding ring as examples of personhood property. By contrast, consider any normal article of commerce as an example of fungible property.
to take Richperson's claim seriously.\textsuperscript{225} It is possible that Richperson's self may be constituted by her estate. If that is the case, there is no principled way to escape the conclusion that courts ought to strike down the proposed taking. Because of the probability of fraud, courts ought to scrutinize Richperson's claim rather closely, but if Richperson can make the claim of personhood property stick, her interests ought to be protected to the same degree as Layperson's interest in her wedding ring.

The second solution is to treat Richperson as a classic instance of the hold-out problem and to evaluate whether the costs of buying her out are worth the benefits of transferring title to her estate.\textsuperscript{226} Yet this solution suffers not only from the standard problems involved in cost-benefit analysis (e.g., evaluating costs and benefits, interpersonal comparisons, discounting the future, and so forth), but also from a failure to understand the nature of the problem. The issue is not whether it is economical for a government to take Richperson's estate; instead, it is whether the government should be permitted to take the estate even though it is personhood property. Cost-benefit analysis, which works well with legally sanctioned fungible property, simply cannot make sense of this question.

The third solution presumes that governmental bodies ought to recognize and protect personhood property. Not all personhood property, however, necessarily deserves the same degree of deference. Consider a proposed taking of four properties: Richperson's estate, Layperson's modest home, Poletowner's similarly modest home, and the horse of Talley Hogh, a devoted member of the Paradise Polo Club. Further assume that Poletowner lives in an old, closely knit neighborhood, and that Talley Hogh lives adjacent to the Polo Club, rides there every day, and is as involved in the lives of the other members of the Club as Poletowner is connected to the other members of the neighborhood. By contrast, Layperson lives in a relatively anonymous suburb and Richperson spends most of her time alone on her estate.

In evaluating these takings, a judge would want to weigh two different types of factors. Because the purpose and importance of personhood property derives from its relation to self, a judge would want to make sure that a proposed taking would not critically damage the property owner's self. For instance, if Richperson's life revolved around her Fer-

\textsuperscript{225} Richperson's claim would be most believable if the property in question were a business that she had built from scratch, working 16-hour days seven days a week, for 20 years. Such cases are likely to be rare, though, because the primary means of acquiring wealth in the United States is by inheritance. See Kotlikoff & Summers, \textit{The Role of Intergenerational Transfers in Aggregate Capital Accumulation}, 89 J. POL. ECON. 706, 707, 722 (1981) (estimating that roughly 80% of wealth in the United States is the result of accumulated intergenerational transfers).

\textsuperscript{226} For a good general discussion of the ramifications of the hold-out problem in the context of eminent domain, see Meidinger, \textit{supra} note 7, at 49-59.
rant, taking that Ferrari would raise the more general problem of taking personhood property in its most acute form. On the other hand, if Richperson had the resources to buy a second Ferrari, a judge might also conclude that her resources would negate any possible injury to her self.\textsuperscript{227} By contrast, if Layperson's only valued possession is her wedding ring, a judge should think more carefully about its relation to her self before concluding it could be taken.\textsuperscript{228} Hence the first principle for evaluating a taking of legally-sanctioned personhood property is the person's ability to take the loss and still maintain a self. Where the resources necessary to maintain individual autonomy are readily available, the need for judicial sympathy and intervention is lowest.

Moreover, because personhood property is relatively rare, and because society has an interest in fostering the fullest development of its inhabitants, a judge would particularly want to protect those forms of personhood property that are shared. The idea of shared personhood property should not seem anomalous; after all, presumably a wedding ring is personhood property for both spouses. Furthermore, because "property represents a relationship between wealth and its 'owner,'"\textsuperscript{229} nonmaterial forms of wealth merit the legal protection that has traditionally been given to tangible goods.\textsuperscript{230} Thus, a judge can best preserve personhood property when the judge preserves the relations individuals find valuable, whether or not these are forms of traditional property.

The archetypal case of such shared personhood property is the network of relations generally termed community. Person $A$'s relations with $B$, $C$, and $D$ define $A$ as a particular type of person with a particular social niche. Individuals clearly find these networks valuable for themselves and for how these networks both define individuals and give individuals an arena in which to create a rewarding world.\textsuperscript{231} This reciprocal creation of a social world is the clearest example of the way individuals

\textsuperscript{227} This determination would largely depend on the way in which Richperson related to her car. See supra note 200 and accompanying text.

\textsuperscript{228} This analysis also applies to Richperson's wedding ring. The difference between Richperson's wedding ring and her Ferrari lies in social attitudes towards items of personhood property. Marriage, as symbolized by the wedding ring, is thought unique and hence worthy of special consideration. Although Richperson might have a special attachment to her first Ferrari, her commitment to that car does not have the social sanction, and hence legal status, of her marriage.

\textsuperscript{229} Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733, 739 (1964).

\textsuperscript{230} \textit{Id.} at 785 ("Status is [now] so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.").

\textsuperscript{231} See, e.g., \textsc{R. Bella\'h, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Hab-its of the Heart} 155-62 (1985) (describing the experiences of three Americans who understood their identity, in part, in terms of their relationships to their church, ethnic group, or political cause).
can achieve autonomy in an interdependent world.\textsuperscript{232} For these reasons (and so long as the relations are not invidious or otherwise constitutionally suspect), judges should examine takings with an eye to fostering such communal relations.\textsuperscript{233}

Thus, two principles emerge: the degree of judicial intervention in favor of personhood property should be inversely proportional to a person's resources, and communal forms of property should be promoted. When these principles are combined, Talley Hogh's claim should be preferred to Richperson's, Poletowner's claim to Talley Hogh's, and Layperson's claim to Richperson's. A judge would thus arrive at the following order of claims:

\begin{center}
Poletowner \text{> Talley Hogh or Layperson \text{> Richperson}}
\end{center}

(where $A > B$ means $A$'s claim is preferred to $B$'s claim)

Depending on the circumstances, all these claims may be subject to a taking, but Richperson's property will be most vulnerable to a taking. The third solution, therefore, recognizes the merits of Richperson's claim, but also suggests that, of all types of personhood property, it is least susceptible to destruction. Hence, if social resources are limited, Richperson's claim will be protected, but only after other forms of personhood property.

To summarize, legally sanctioned personhood property generally should not be taken. If such takings are contemplated, however, judges should subject the taking to strict scrutiny so as to minimize damage to the social stock of personhood property. A court should weigh the proposed taking against the property owner's ability to sustain a loss, and should especially protect property that is shared.

\section*{d. Non-legally sanctioned personhood property}

Having disposed of claims for legally-sanctioned personhood property, what is a judge to do when confronted with a claim involving a non-legally-sanctioned personhood interest? Recall the sorts of interests that fall into this category: status, one's neighborhood, or the recognition associated with a class ring. Layperson's interest in these types of property lies in the fact that these things cause certain qualities to be attributed to

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\item[232.] See A. \textsc{De Tocqueville}, supra note 140, at 513-17, 520-24 (discussing the virtues of political and civil associations).
\item[233.] Such communal relations need not involve preserving the nuclear family. Indeed, part of what makes community such a strong type of personhood property is that each community can decide for itself what relations are important. Unfortunately, the Court has not yet sorted out the fact that because non-invidious self-determination is an important part of individual autonomy, less than welcoming communities still deserve constitutional protection. See, e.g., \textsc{Bowers v. Hardwick}, 478 U.S. 186 (1986) (protecting the right of the "community" of Georgia to enact anti-sodomy laws); Belle Terre v. Borass, 416 U.S. 1 (1974) (protecting the Village of Belle Terre against the threat of living groups composed of non-nuclear families). \textit{But see} \textsc{Moore v. City of East Cleveland}, 431 U.S. 494 (1977) (protecting the right of an extended family to live under one roof).
\end{footnotes}
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Layperson. In other words, Layperson's association with these types of property is important to establishing her identity. In the language of political theory, these things constitute her self; in the language of constitutional theory, they are the sources of her autonomy. As such, the judge should protect them from taking in the absence of a compelling state interest,\textsuperscript{234} for only in this way can a judge give equal consideration to each person while also respecting the social interest in individual autonomy.\textsuperscript{235}

C. A Revised Analysis of Hawaii Housing Authority and Poletown

I. Stating the Doctrine

The doctrine this Comment has developed for takings analysis can be formulated as a two-pronged test.

1. Has the challenged action raised sufficient warning flags so that a reasonable person would conclude under the factors identified by the \textit{Fasano} court that the official action in question has lost its presumption of legitimacy?\textsuperscript{236} If the answer is no, then the inquiry ends; the action is upheld because it is not properly reviewable by the judiciary. If the answer is yes, then a court should proceed to consider the type of property at stake.

2. Is the property of the type that is appropriately the subject of a taking?\textsuperscript{237}

   a. Legally sanctioned fungible property is replaceable and not essential to the constitution of a self. Consequently, it is appropriately subject to taking.

   b. Non-legally sanctioned fungible property is also well suited for

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\textsuperscript{234} By insisting on the compelling state interest standard, the burden is placed on the government to show, in terms of the concept of treatment as an equal, how what appears to be a deviation from treatment as an equal will, in fact, promote treatment as an equal. \textit{See supra} text accompanying notes 186-87.

\textsuperscript{235} In addition, all the considerations that suggest the need for protecting legally sanctioned personhood property, \textit{see supra} notes 219-33 and accompanying text, apply to non-legally-sanctioned property.

\textsuperscript{236} \textit{Fasano v. Board of County Comm'rs}, 264 Or. 574, 580, 507 P.2d 23, 26 (1973); \textit{see also supra} text accompanying notes 184-87.

\textsuperscript{237} \textit{Cf. Note, Public Use, Private Use, supra} note 11. That Note also advocates judicial recognition of personal interests in property, \textit{id.} at 428-32, especially where takings are the result of actions by local governmental bodies. \textit{Id.} at 432-35. The Note concludes that the courts ought to give heightened scrutiny to all eminent domain cases. \textit{Id.} at 438. That approach implicitly raises the question of whether eminent domain ought to be a power of the government in the first place. A better way to proceed would be to place a burden on the plaintiff, but for courts to be on the lookout to ensure that the shortcomings of the political process do not open the door to abuse (which, roughly, is the approach of this Comment).

Further, that Note proposes a two-pronged test that is significantly different from the test proposed in this Comment. The Note's test examines (a) whether the goal and application of the legislation enabling the taking is legitimate, \textit{id.} at 445, and (b) whether a public benefit (as determined by cost-benefit analysis) exists. \textit{Id.} at 449. This Comment's proposed first prong looks at the process of the condemnation, not its goal, and its second prong focuses on the type of property taken rather than attempting to weigh the costs and benefits of the condemnation in traditional terms.
taking, not because it is replaceable but because no person can reasonably expect to have exclusive use of such property.

c. Legally sanctioned personhood property is presumptively unsuitable for a taking unless it is property that merits little judicial protection under the two principles outlined above.\(^2\) Individuals with smaller packages of resources will receive greater judicial solicitude than those controlling greater resources; personhood interests that involve more people, perhaps through a religious or social organization, will be favored over those interests limited to individuals. In any event, legally-sanctioned personhood property receives greater protection than fungible property and will only be taken in extreme circumstances.

d. Non-legally sanctioned personhood property implicates interests that are essential to an individual's autonomy. Like other forms of personhood property, it should be taken only if the government can demonstrate a compelling state interest in the taking.

Although these guidelines do not approach the ideal of a bright line test, they should provide sufficient guidance to judges attempting to decide takings cases. The remainder of this Comment illustrates the application of these guidelines, first to the facts of Hawaii Housing Authority and then to the facts of Poletown.

2. Hawaii Housing Authority: The Right Result for the Wrong Reason

In Hawaii Housing Authority,\(^2\) the Court arrived at the correct result but articulated inadequate reasons for that result. The comparatively regular political process involved in Hawaii Housing Authority deserved judicial deference. In contrast to Poletown, where a local body made the decision to take property, the Hawaii Legislature enacted a condemnation law\(^2\) that embodied a political compromise among competing interests. The law resolved a longstanding controversy through the normal functioning of the political process. That the overall process took approximately twenty years,\(^2\) as opposed to the less than ten months involved in Poletown,\(^2\) lends support to the view that this policy was carefully considered and that the landowning interests that would oppose the policy were not excluded from the decisionmaking process.\(^2\)

The lengthy public hearing and arbitration history of the Hawaii statute thus stand in sharp contrast to the facts of Poletown, where the political process leading up to the taking was condensed into a very short period.

\(^{238}\) See supra notes 219-33 and accompanying text.


\(^{240}\) See id. at 233 (the initial proposal was also reformed in the process).

\(^{241}\) The process began in the mid-1960's, id. at 232, and ended with the Court's decision in 1984.

\(^{242}\) See Poletown, 410 Mich. at 652, 659-60, 304 N.W.2d at 468, 471 (Ryan, J., dissenting).

\(^{243}\) See Hawaii Hous. Auth. at 229.
Hawaii Housing Authority, moreover, presents no evidence of an outside entity bribing, coercing, or otherwise unduly influencing the deliberations of elected officials. Nor is there any evidence of a lack of reasoned deliberation in the process leading to the enactment of the Land Reform Act. For these reasons, the Court properly concluded that the Land Reform Act passed muster.

Although the Court articulated its result in terms of the traditional minimum rationality standard, it implicitly applied something like the first prong of this Comment's proposed doctrine. In the opinion's statement of the facts, Justice O'Connor was careful to acknowledge a number of factors clearly relevant to an assessment of the political process that led to the condemnation: the lengthy planning process that preceded passage of the Land Reform Act, the accommodations that the State of Hawaii had reached with landowners to mitigate the burden of federal taxation, the bipartisan consensus in Hawaii that some form of land redistribution was essential and the stability of that consensus over time, and, finally, the twenty years that had passed from the time the Act was first introduced in the Hawaii Legislature until the time of the Court's review. The Court's mention of these facts was unnecessary to its decision. Their inclusion suggests that the Court actually reached its result in Hawaii Housing Authority by assessing Hawaii's political process, but then justified its conclusion in terms of traditional means-ends analysis.

3. Poletown: Deference Without Analysis

By comparison, the Michigan Supreme Court accorded misplaced deference to the condemnation proceedings at issue in Poletown. Despite the expeditious manner in which the condemnation proceeded, the majority assumed that the condemnation fell within the normal bounds of the political process—yet that was the very question before the court. Recognizing this, Justice Ryan's dissent took the better approach: direct review of the underlying political process.

As Bukowczyk shows, Poletown had been designated a blighted area suitable for destruction by the local governing boards. That

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244. Id. at 241-43.
245. Id. at 232-33.
246. Commentaries on Hawaii Housing Authority illustrate the number of different ways the Court could expeditiously have dealt with the facts of the case. Compare Bixby, supra note 51 (stressing the fact of land concentration) with Durham, supra note 68 (providing the facts of Hawaii Housing Authority in a single paragraph that concentrated on the case's implications for taking clause doctrine) and with Note, A New Slant, supra note 51 (stressing the economic history and effect of Hawaii's land tenure system).
designation raises a concern about whether the Poletowners were a "discrete and insular" minority consistently losing in the struggles of pluralist politics.\textsuperscript{249} Moreover, several factors surrounding the Detroit City Council's decision suggest a failure of the political process. The Council made its decision in an atmosphere characterized by Justice Ryan as a "frenzy;"\textsuperscript{250} the Poletown neighborhood did not have adequate representation during the city's deliberations;\textsuperscript{251} and Detroit paid $200 million to prepare the site for the factory and then sold it to G.M. for $8 million.\textsuperscript{252} Taken together, these facts compel the conclusion that the political process was flawed and therefore that the Poletowners did not receive the minimal requisites of pluralist politics.\textsuperscript{253}

The failure of the political process in \textit{Poletown} therefore necessitates review under the second prong of this Comment's proposed doctrine. The court failed to evaluate the type of property most prevalent in the

\textsuperscript{249} See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
\textsuperscript{250} \textit{Poletown}, 410 Mich. at 646, 304 N.W.2d at 465. Justice Ryan described the atmosphere in the following terms:

\begin{quote}
It is easy to underestimate the overwhelming psychological pressure which was brought to bear upon property owners in the affected area, especially the generally elderly, mostly retired and largely Polish-American residents of the neighborhood which has come to be called Poletown. As the new plant site plans were developed and announced, the property condemnation proceedings under the "quick-take" statute began and the demolitionist's iron ball razed neighboring commercial properties such as the already abandoned Chrysler Dodge Main plant, a crescendo of supportive applause sustained the city and General Motors and their purpose. Labor leaders, bankers, and businessmen, including those for whom a new GM plant would mean new economic life, were joined by radio, television, newspaper and political opinion-makers in extolling the virtues of the bold and innovative fashion in which, almost overnight, a new and modern plant would rise from a little known inner-city neighborhood of minimal tax base significance. The promise of new tax revenues, retention of a mighty GM manufacturing facility in the heart of Detroit, new opportunities for satellite businesses, retention of 6,000 or more jobs, and concomitant reduction of unemployment, all fostered a community-wide chorus of support for the project. It was in such an atmosphere that the plaintiffs sued to enjoin the condemnation of their homes.
\end{quote}

\textit{Id.} at 658-59, 304 N.W.2d at 470-71 (Ryan, J., dissenting). \textit{See generally} Peterson, \textit{supra} note 115, at A14, col.1. One resident said, "This is a political thing that everyone from the President on down wants . . . . The Mayor even came to my house and told me there's no way anybody's going to stop it from the moment it broke." \textit{Id.} Another resident (implicitly anticipating this Comment's emphasis on personhood property) stated: "You can always replace a house . . . but you can't replace a home that easily." \textit{Id.}

\textsuperscript{251} \textit{See} Bukowczyk, \textit{supra} note 15, at 61-63 (discussing the political disarray in Poletown caused by disproportionate pressures marshalled in favor of city acquisition).

\textsuperscript{252} \textit{Poletown}, 410 Mich. at 656, 304 N.W.2d at 469 (Ryan, J., dissenting). Such a difference in cost need not, by itself, suggest a failure of the political process. A city legitimately may believe that it will be repaid in the long term by a corporation's presence, even though it takes a large short-term loss. The imbalance of bargaining power between Detroit and G.M., however, causes the contract between them to look more like an unconscionable contract than one where Detroit was able to balance a short-term loss against a long-term gain. On the imbalance of bargaining power between Detroit and G.M., see generally Bennett, \textit{supra} note 4, at 141-47.

\textsuperscript{253} For a discussion of such minimal requirements, see Ackerman, \textit{supra} note 158, at 744-46. As Bukowczyk said, "the game was rigged." Bukowczyk, \textit{supra} note 15, at 70.
condemnation zone—legally sanctioned personhood property—and instead merely considered its economic value. Homes, churches, and other neighborhood institutions have different (and more important) values from those of a typical commercial building and hence deserve greater protection from condemnation.254

One might still object that Detroit’s urgent need for jobs might justify the result in Poletown. But such an argument from necessity will swallow up the rule unless its application is restricted to circumstances of absolute necessity, or, in terms of current equal protection doctrine, a compelling state interest. The facts of Poletown, though, do not support such a claim. Although creating jobs is an important governmental interest, particularly in an economically depressed area, it is less important than preventing subjugation.255 Furthermore, even if Detroit could demonstrate that the General Motors project was crucial to the city’s vitality and hence constituted a compelling state interest,256 the G.M. project was clearly not the only available alternative. Detroit’s leaders briefly discussed the option of having the city build the new plant and lease it to G.M., but it ultimately rejected that plan because of the tremendous cost.257 Yet the city was willing to spend over $160 million in direct and tax expenditures, in addition to over $100 million in federal assistance.258 In other words, Detroit had raised over half of the estimated $500 million needed for the plant without resorting to bonds; that achievement belies the claim that the city had a compelling interest in the plant. It suggests instead that the city had a compelling interest in keeping General Motors happy. This is not a governmental policy so deserving of judicial deference as to overcome the compelling state interest standard.

These two analyses show that the guidelines proposed in this Comment are not impracticable for judges to apply. Takings questions have always been fact-laden;259 deciding cases of alleged takings under this Comment’s proposed test is no different. The illustrations also explain the need for two different prongs in evaluating whether a proposed taking should be upheld. The first prong, limiting judicial review to cases where the political process has malfunctioned, is necessary to contain the second prong, the potentially revolutionary scope of active judicial protection of personhood property. Hawaii Housing Authority exemplifies the narrow scope for judicial review in a takings case; Poletown demonstrates

254. See e.g., Radin, supra note 200, at 1000.
255. For a general discussion of the anti-subjugation principle as an element of equal protection analysis, see L. Tribe, supra note 3, § 16-21.
256. See Poletown, 410 Mich. at 651 n.4, 304 N.W.2d at 467 n.4. (Ryan, J., dissenting).
258. See id.
259. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (analysis under the takings clause requires an ad hoc assessment of the circumstances of each case).
the need, once the stringent requirements of the first prong are met, for a powerful judicial tool to protect interests central to individual autonomy.

IV
CONCLUSION

This Comment began by observing that the fifth amendment's public use requirement has been eviscerated. Nonetheless, there was a good reason for the Framers to include the public use requirement in the Constitution: to protect individuals from the abuse of power by government officials. Logic and the experience of practical politics suggest that the executive branch, which initiates most takings, cannot check itself. Similar considerations suggest that the majoritarian institution of a legislature will minimize the value of individual property and, thus, not act as a brake upon the condemnation process. For these reasons, the challenge of this Comment was to develop a form of judicial review that kept the doctrine of public use alive without departing from the deferential posture the post-1937 Court has adopted towards social and economic legislation. Put differently, this Comment set out to ascertain whether judges could prevent the abuse of the condemnation power without thereby becoming a superlegislature.

The two-prong test advocated in Part III strikes the necessary balance between intervention by the judiciary to preserve a fundamental interest and the need for complex social and economic decisions to be made by a politically accountable institution. The first prong narrows the judicial review of takings to the few cases in which a governmental action may be said to have lost its presumption of legitimacy and, hence, does not merit the deference judges usually accord to actions of the political branches. The second prong goes to the merits of public use by considering the type of property involved in the alleged taking. Fungible legally sanctioned property is uniquely suited to public use; even in marginal cases, the deference due a legislature as the representative of the people counsels a court to uphold the taking as a permissible exercise of the government's power to secure the public welfare. Courts analyzing takings of non-legally sanctioned fungible property should arrive at the same result, but for reasons having to do with the public's claim on the property, rather than its easy transferability. By contrast, personhood property of any type is presumptively the type of property that should not be subject to a taking. Unless the government can show a compelling interest in acquiring the property in question, takings of personhood property uniformly should be held invalid.