The Fundamental Flaw of Eminent Domain Jurisprudence

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Imagine that you live on a small family farm in rural America, a farm that has belonged to your family for generations, each successive generation carving out a living through hard labor and determination. Now, imagine that the state legislature has just authorized a large factory to take your land and convert it into something the state legislature deems more economically beneficial to the state and to “society.” Without your consent the government condemns your property, pays you the minimum market value per acre, and forces you to uproot your family and change your profession. You seek legal counsel, but your attorney informs you that the case has almost no chance of being successful because according to current constitutional interpretation the legislature need only provide a rational justification for the taking; the burden of proving the unconstitutionality of the act rests entirely on you. Most Americans would probably say that this hypothetical situation is impossible, even un-American. Yet, the courts have recently undermined property rights to the level that makes this situation very plausible, making *Kelo v. City of New London* one of the most controversial U.S. Supreme Court cases in the modern era.\(^2\)

In 2005, the U.S. Supreme Court held that economic growth and benefit are within the Public Use Clause of the Fifth Amend-

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ment and that the government could take private property by eminent domain and give it to another private entity, so long as the result would be more economically beneficial to the public.\textsuperscript{3} \textit{Kelo}, along with other similar Supreme Court cases, has left private property with little protection from government takings and the caprice of the legislative branch. These cases have already been decided, and it is unlikely that the Court will change its views on property entirely; however, it may be possible to reach a compromise as to the status of private property rights before the Court is tempted to include additional categories into the already overbroad Public Use Clause. I argue that the text of the Fifth and Fourteen Amendments designates private property rights as fundamental; therefore, the courts should adjudicate cases involving eminent domain by applying an altered form of strict scrutiny. This article seeks to delineate the difference between economic rights, which receive very little judicial protection, and fundamental rights, which receive the strictest protection. By seeking to understand why the U.S. Supreme Court has designed property rights as economic rights, this article reaches a conclusion as to how private property rights can be protected while continuing to ensure that government interests will not be too severely limited. I argue that in cases involving eminent domain the government ought to prove a compelling state interest as well as a narrowly tailored purpose. However, to ensure that the government may use eminent domain when necessary without needing to prove that the state used the least restrictive means possible, I argue that the state need not fulfill the third prong of strict scrutiny.

The U.S. Supreme Court guarantees differing levels of protection to fundamental rights versus economic rights, making it necessary to understand the difference before fully appreciating the need to designate the ownership of private property as fundamental. An economic right is quite distinct from a fundamental right, and they are founded on differing principles. A fundamental right is one that

\textsuperscript{3} \textit{Kelo v. City of New London} 545 U.S. 469 (2005).
is based on “divine law, natural law, or a similar source.” They are rights that society considers to be self-evident, as expressed so poetically in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Continuing on, Thomas Jefferson declared that “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”—in other words, the primary purpose of governments is to protect fundamental rights from being usurped by unjust men. The U.S. Supreme Court has designated a fundamental right as a privilege akin to the right to life (e.g. civil rights or the right to marriage) which cannot be taken away unless a person willingly forfeits that right. An economic right, however, is considered a “positive right,” one that the legislative or executive branch fabricates to fulfill a specific, persuasive purpose (e.g. the right to social security or a minimum standard of living). Legislatures can give, take, or change positive rights based on whether the perception surrounding the validity of these rights remains the same.

5 Loving v. Virginia, 388 U.S. 1, 12 (1967). Justice Earl Warren wrote, “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” See also Maynard v. Hill, 125 U.S. 190, 205 (1888); Lawrence v. Texas, 539 U.S. 558 (2003).
6 A citizen, who is still guaranteed equal protection under the law, may forfeit the fundamental right to vote or own a firearm in certain states if he or she commits a felony.
7 David Thomas, supra note 4, at 161.
I. History

The U.S. Supreme Court has long considered economic rights to be “non-fundamental,” but this has not always been true. Until 1937, economic rights, and more particularly the “right to contract,” were considered fundamental rights. The most famous case involving the right of contract is *Lochner v. New York*, wherein the Supreme Court struck down as unconstitutional a New York statute attempting to regulate bakeries.\(^8\) In 1895, the state passed a law limiting the number of hours that a baker could work to ten per day and sixty per week. The Court rejected the argument that the law was needed to protect the safety of the bakers and ruled that the law was “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract.” *Lochner* was the first case to protect the economic “right to contract” (designating it as a fundamental right) and it would certainly not be the last.

During a time which scholars would later term the Lochner era, the court protected economic rights in cases as diverse as *Hammer v. Dagenhart*,\(^9\) striking down federal legislation on child labor, and *Carter v. Carter Coal Company*,\(^10\) invalidating federal legislation regulating the coal industry. In 1937, the Court suddenly cut short the trend of invalidating economic regulation. Under pressure from President Roosevelt, the Supreme Court upheld a federal minimum wage law in *West Coast Hotel Co. v. Parrish*,\(^11\) and the Lochner era became part of legal history, but no longer part of valid legal precedent. Since the end of the Lochner era, the Supreme Court has largely refrained from striking down legislation aimed at regulating economic activities and given legislatures wide deference regarding economic regulation and the extent to which they protect economic rights. The Court went from one extreme to another, from striking down all legislation that infringed on the right of contract to consoli-

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dating all economic rights into one category and stripping them of judicial protection.

Following *West Coast Hotel* and the Court’s sudden swing to legislative deference, the issue of whether property rights would be designated as an economic or fundamental right remained open for almost two decades. However, in 1954 the Supreme Court addressed the eminent domain question in *Berman v. Parker* and ruled that property was an economic right. In *Berman*, a department store which was situated in a heavily blighted area of southwest Washington D.C. was to be taken by eminent domain as part of the District of Columbia Redevelopment Act of 1945. Samuel Berman contended that the taking violated the Fifth Amendment and could not be considered an act of “public use.” In a unanimous vote, the Supreme Court held that the purpose of beautifying the city was within the authority of the government, and it therefore possessed the Constitutional right to seize Berman’s property by eminent domain. Justice Douglas declared in his opinion that “once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”

Following this ruling, “public use” began to be widely interpreted as “public purpose,” meaning that the taking does not need to be for public use, but the project need only have a rational purpose that indirectly benefits the public. Justice Thomas explained the shift when he wrote, “This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a ‘public use’” (emphasis added). The legislature no longer had to prove a public purpose but a vague purpose or expectation of public benefit.

Thirty years later, *Hawaii Housing Authority v. Midkiff* deepened the Court’s resolve to consider all private property cases as it does

13 Id.
14 Kelo, 545 U.S. at 469.
cases involving economic regulation. In the mid-1960s, the Hawaii Legislature found that the State and Federal Governments owned nearly 49% of Hawaiian land, and seventy-two private landowners owned another 47%. In an attempt to supply an overall “economic benefit” to the broader population, the Supreme Court unanimously held that Hawaii could carry out its land reform by redistributing the land by use of eminent domain. The decision held that the redistribution’s purpose was to fix concentrated property ownership and was therefore a justifiable “public use.”

The latest broadening of the Public Use Clause occurred with the 2005 decision by the Supreme Court in *Kelo v. City of New London*. In the late 1990s, the city of New London, Connecticut, was experiencing an economic downturn; its unemployment rate was almost double that of the state, and its population was moving, resulting in the city’s population dropping to the lowest levels since the 1920s. In 2000, the city approved a plan that promised to “create in excess of 1,000 jobs, to increase tax and other revenues, and . . . to revitalize an economically distressed city, including its downtown and waterfront areas.” The city’s development agent purchased property from all the willing sellers in the area and attempted to use the power of eminent domain to acquire the requisite land from the remaining property owners that did not wish to sell. The issue that eventually went before the U.S. Supreme Court was not whether the state has the power to condemn property but whether the transfer of private property to another private entity constituted a “public use.” As Justice Stevens wrote in the majority opinion, “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to private party B, even though A is paid just compensation.” Yet, contrary to legal tradition, the Court ultimately decided that the government *can* take property of A and give it to another private party B as long as the receiving party is

17 Kelo. 545 U.S. at 473.
part of a “carefully considered development plan” that could benefit the public.\textsuperscript{18}

With \textit{Kelo v. City of New London}, private property rights were significantly compromised because the Court ruled, essentially, that not only were property rights considered economic, or non-fundamental rights, but also that these lesser, economic rights could be superseded by a general “economic benefit” to the general public.\textsuperscript{19}

\textbf{II. Economic Rights and Rational Basis Standard}

Judges treat the ownership of private property rights as an economic right because they see the primary value that people receive from owning property as being economic or monetary. In regulatory takings cases, which deprive people of the use of their property because of government regulation, the U.S. Supreme Court has usually formed its decisions around an economic argument—yet the Court has used a similar reasoning in eminent domain cases. In \textit{Lucas v. South Carolina Coastal Council}, the Court ruled that Lucas’ right to his property was driven by his economic interests and the state had deprived him of those interests.\textsuperscript{20} Lucas wanted to build a house on his South Carolina beach-front property but could not because of laws attempting to combat erosion and to preserve resources. The Supreme Court ruled that the state had deprived Lucas’ property of all economic value and, therefore, Lucas was due “just compensation” by the state. Since the arguments surrounding regulatory takings revolve around the loss of economic benefit to the owner, the Supreme Court justifies its rulings in eminent domain cases based upon purely economic factors.

The most common concern that scholars and judges raise regarding private property rights being considered fundamental is that it would severely limit the government’s ability to take property for legitimate projects that have historically been included in the Fifth Amendment’s limit of “public use.” This view was best explained

\textsuperscript{18} Id.

\textsuperscript{19} Id.

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by Justice Anthony Kennedy in his concurring opinion in *Kelo*: “A broad per se rule or a strong presumption of invalidity [using a higher standard of scrutiny], furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.”

Kennedy objected to the raising of the standard because by designating private property as a fundamental right, the government would be placed under such a stringent judicial standard that projects such as the building of roads and hospitals would become almost impossible since few takings would pass the strict scrutiny test and be considered constitutional. This concern is legitimate, especially if the Court were to use the three pronged strict scrutiny test that normally applies to cases involving fundamental rights. Yet, the Fifth and Fourteenth Amendments prove that private property ought to be considered fundamental even if it requires the Court to invalidate some projects that the public would deem beneficial. Property rights are vital and deeply imbedded in the American tradition. But there are ways in which the Court may alter the judicial standard that would resolve many of the critiques of property rights being fundamental.

III. EMINENT DOMAIN

Before making the case for property rights being considered fundamental, it is important to analyze the actual text of the Fifth Amendment. The Amendment states: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

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21 *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).
compensation.” It is important to note that the Constitution, via the Fifth Amendment, specifically gives the government the power of eminent domain, or the authority to take property without the owner’s consent. Eminent domain is an authorized, legitimate exercise of the government’s power—when used appropriately as designated by the Bill of Rights. Not only is eminent domain included in the Constitution, but the principle extends back to English common law. Ballentine’s Law Dictionary defines the term as being:

The power of a nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner’s consent, conditioned upon the payment of a just compensation. . . . The theory of such power, otherwise known as compulsory purchase or expropriation, is that all lands are held mediately or immediately from the state, upon the implied condition that the eminent domain, the superior dominion, remains in the state, authorizing it to take the same for public uses, when necessity requires it, by paying therefore an equivalent in money. It resembles the ancient prerogative of purveyance whereby the crown enjoyed the right of buying up provisions and other necessities for the use of the royal household at an appraised valuation and in preference to all others, even without the consent of the owner.

It is clear that English common law, after which the American legal system is patterned, designed that the state was the ultimate holder of property and that the government could take property for certain

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22 U.S. CONST. amend. V. The full text of the Fifth Amendment states:
“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

23 BALLENTINE’S LAW DICTIONARY 398 (3d ed. 2000).
purposes. This argument is used by scholars and judges to justify the usage and recent expansion of the concept of eminent domain.\textsuperscript{24} They argue that eminent domain is a fundamental government right and must be balanced by the right of private property. Specifically because of this long-held common law tradition, I argue that the Founders saw it necessary to include a limiting clause on the government’s authority regarding takings and to limit it to only takings involving “public use.” The Articles of the U.S. Constitution grant the government its authority to administer, and the Bill of Rights was written and ratified to place specific limits on the government’s power and control in order to protect the people.

\textbf{IV. AMERICAN FOUNDERS}

At the heart of the eminent domain debate is the Fifth Amendment. In addition to eminent domain, the Fifth Amendment places limits on the government’s ability to hold criminals, prosecute criminals twice for the same crime, or compel people to witness against themselves. It could be argued that the Fifth Amendment lumps several disjointed rights into one amendment; but even though the rights enumerated are not tightly connected, all rights are given to the individual and are designed specifically to limit the government’s power in certain spheres. The Fifth Amendment does not only grant the government the power of eminent domain, but limits it to cases in which the taking would be for “public use” and prohibits takings without compensation.

It is also clear that property and property rights were fundamental to the idea of the American system as framed by the Founders. In fact, “life, liberty and property” are mentioned together—putting them on equal footing before the law. To the Founders, property was not any less important before the law than was life or liberty. Professors Lee and Hipp report that “Madison’s minutes of the Constitutional Convention reveal that . . . at least four members, without any opposition, proclaim[ed] that the ‘great object’ of government is to

The fundamental flaw of eminent domain jurisprudence protect property. Historians of the colonial period generally agree that the Revolution was fought to foster and preserve property.\textsuperscript{25} Unfortunately, the long history of the courts does not reflect this view. Case by case, decade after decade, the Supreme Court has whittled away property rights until they bear little resemblance to those envisioned by the Founders. If John Adams could see the degeneration of property rights that has occurred in American jurisprudence he would likely lament, as he did in his lifetime, “After a generous contest for liberty, of twenty years’ continuance, Americans forgot wherein liberty consisted. After a bloody war in defense of property, they forgot that property was sacred.”\textsuperscript{26} Regrettably, the attack on property rights that President Adams witnessed in his lifetime pales in comparison to the almost complete disregard for economic rights that the Supreme Court now holds.

Shortly after the Bill of Rights was ratified, Justice Chase penned this thoughtful observation:

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. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it (emphasis deleted).\textsuperscript{27}

\textit{Kelo v. City of New London} did exactly what Justice Chase thought so inconceivable in 1789—it took property from \textit{A} and gave it to \textit{B}, entrusting to the legislature all power to decide whether such a taking is constitutional and fulfills the Public Use Clause of the Fifth Amendment. In her scathing dissent (joined by Chief Justice Roberts,

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  \item \textsuperscript{25} O. Lee Reed & E. Clayton Hipp, \textit{The “Commonest” Manifesto: Property and the General Welfare}, 46 AM. BUS. L.J. 103, 103 (209).
  \item \textsuperscript{26} 9 John Adams, \textit{The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations} 560 (Boston 1852).
  \item \textsuperscript{27} Calder v. Bull, 3 Dall. 386, 388 (1798).
\end{itemize}
and Justices Scalia and Thomas), Justice O’Connor elucidated the consequences of the court’s decision in *Kelo v. New London*:

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.28

Justice O’Connor lamented that this case would become legal precedent because she understood how it stripped property rights of a long-held protection and removed from property one of its last protections from government exploitation.

The legitimate use of eminent domain is not at issue—even the Founders knew the government must have some recourse in order to accomplish needed improvements and infrastructural projects. What is at issue is the judicial standard by which cases regarding eminent domain are decided. Property rights are fundamental rights and ought to be afforded stronger protections by the judicial branch.

Property rights are fundamental by definition. Black’s Law Dictionary defines a civil liberty as “freedom from undue governmental interference or restraint”29 and defines civil rights as “the individual rights of personal liberty guaranteed by the Bill of Rights.”30 Thus, fundamental rights are those guaranteed to the people by the Bill of Rights. Throughout its history, the Supreme Court has been inconsistent in its definition of fundamental rights and has decided

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28 *Kelo*, 545 U.S. at 470 (O’Connor, J., dissenting).
30 *Id.*
that some rights are less fundamental, and therefore less protected, than other rights. Beginning with West Coast Hotel Co., the Supreme Court refrained from striking down legislation which aimed at regulating businesses and protected people’s liberty in their economic endeavors. Instead of adjudicating according to strict scrutiny on cases of business regulation, in Carolene Products the standard became the rational basis test and the Court stated that “legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”

Carolene Products has long been cited when discussing cases involving economic benefit because it set the precedent for giving wide deference to legislatures in deciding the constitutionality of their laws regarding business regulation.

This precedent along with others such as West Coast Hotel v. Parrish are now so deeply embedded in the judicial system that it would be injudicious to consider going back to the Lochner era in which the right to contract was considered a fundamental right. Unfortunately, these precedents have been unwisely extended to all cases involving economic benefit, including property rights, against what I argue was the intent of Carolene Products. Justice Stone specifically limited the ruling to cases involving “ordinary commercial transactions.” The now famous footnote four also gives us needed guidance as to when to use a narrower standard: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”

As set forth by Justice Powell in footnote four, property rights should be protected by a stronger judicial standard. Property rights

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31 West Coast Hotel Co., 300 U.S.
33 Carolene Products Co., 304 U.S. at 307. See also Stromberg v. California, 283 U.S. 359 (1931); Lovell v. Griffin, 303 U.S. 444 (1938).
are mentioned twice in the Fifth Amendment and protected by the
Fourteenth Amendment’s Due Process Clause.\textsuperscript{34} Also, eminent
domain does not fall into the category of ordinary commercial trans-
actions; no one who has had his or her property condemned would
consider the government’s taking of property as any form of ordi-
nary transaction. Therefore, the use of Justice Stone’s opinion as
precedent in property cases does not apply and does not restrict emi-
nent domain cases from being judged using a higher level of judicial
scrutiny.

Adjudicating using rational basis scrutiny removes a key gov-
ernment limitation and lays open the potential for the exploitation of
property owners. As Justice O’Connor aptly illustrated in her dissent
in \textit{Kelo}, the decision essentially opened eminent domain to being
used as a tool for the majority to unjustly oppress the minority. With
economic benefit now being part of “public use,” everyone’s prop-
erty is vulnerable to being taken for any purpose that the legislature
can plausibly rationalize could be put to better use and that could
positively affect the pocketbook of the majority. Homes, farms, and
small business are left with almost no recourse because any new
strip mall, housing complex, or movie theater could be considered
more economically beneficial to the majority.

Also, the Supreme Court has ruled that fundamental rights are
those that are “fundamental to the American scheme of justice” as
defined in \textit{Duncan v. Louisiana}.\textsuperscript{35} Expropriating private property for
the benefit of the majority, while stripping the rights of the few, goes
against our sense of justice. As best expressed in \textit{Powell v. Alabama},
the exploitation of the few violates the “fundamental principles of
liberty and justice which lie at the base of all our civil and political
institutions.”\textsuperscript{36} Few things could be considered further from being
fundamental to America and all it stands for than the use of eminent

\textsuperscript{34} U.S. \textsc{const.} amend. XIV, § 1. Section 1 of the Fourteenth Amendment
states, “[N]or shall any State deprive any person of life, liberty, or
property, without due process of law; nor deny to any person within its
jurisdiction the equal protection of the laws.”


\textsuperscript{36} \textit{Powell v. Alabama}, 287 U.S. 45, 67 (1932).
domain for the enrichment of private companies and the economic benefit of the majority at the expense of property owners.

V. STRICT SCRUTINY

One of the reasons that the Supreme Court has been loath to recognize private property rights as fundamental is that cases involving eminent domain would then be subject to strict scrutiny. In judicial review, there are several standards by which the courts adjudicate. Cases involving economic rights only have to pass the rational basis standard. In terms of eminent domain, the courts can only find taking private property unconstitutional if there is absolutely no rational connection between the taking and the purpose for which the private property was taken. In cases involving fundamental rights, the government has first to prove that there is a compelling government interest. When speaking of compelling interest, it does not simply mean that the interest or purpose is important; it means that it satisfies a legal standard. Therefore, to have a constitutional taking the government must not only explain why the taking is important to the public, thus satisfying the “public use” clause, but it must also describe why the taking “merits the designation of ‘compelling interest’ as a matter of law.”

For example, in *Berman v. Parker* the government took over a blighted area of Washington D.C. Not only was the development program in D.C. important and compelling, but it fulfilled a legal requirement in that the state had the authority to take the property because of its constitutional “police powers.” D.C. had a right to set regulations and take actions within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. *Kelo v. City of New London* would be much more suspect because, even though the reason could be deemed important or compelling, the taking was done for purely economic reasons and not for reasons of health, safety, or morals (though one could make an argument that it was done for the “general welfare”). Though many takings cases could pass the “compelling interest” test, the

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state would have a larger burden of proving the importance of the project and the legal standard it fulfills.

Second, in cases involving fundamental rights, the government must prove that the action is narrowly tailored. When strict scrutiny is applied, the government must prove the necessity of infringing on a fundamental right. If the government action is too broad and does not narrowly achieve its stated purpose then it would be considered unconstitutional. For example, in Kelo v New London, the stated purpose of condemning the petitioners’ property was to develop part of the city in order to jumpstart its flailing economy. To pass the narrowly tailored part of the test the city would need to show that there were not alternative means beyond condemning property that would have achieved the same ends. In most traditional takings cases involving eminent domain this test will not be a strong inhibitor of state action because in attempting to reduce traffic there are few alternatives to building highways, and few alternatives to caring for the sick than building hospitals.

The third prong of strict scrutiny is that the government must prove it used the least restrictive means possible to accomplish its purpose. I propose that private property rights be considered fundamental but that, due to the unique characteristics of eminent domain cases, the government need not fulfill the “least restrictive means possible” test in cases involving eminent domain. In fact, the Supreme Court often applies varying forms of strict scrutiny to tailor the judgment to the circumstances. It is clear when reading Employment Division v. Smith involving the Free Exercise Clause, Gratz v. Bollinger on affirmative action, and Burson v. Freeman about free speech that the Supreme Court applies the strict scrutiny test differently when confronted with differing and unique issues.

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39 Id.
In excluding the third prong of the test, many of the concerns raised by Justice Kennedy in his concurring opinion in *Kelo* are addressed. Kennedy contended that a higher standard of scrutiny would prohibit the state from taking part in projects that have real benefit to the public and do not violate the Public Use Clause. If the taking fulfills the compelling state interest and narrowly tailored prongs of strict scrutiny, then the legislature would be given wide deference as to the location and size of the project. The government would not be under the obligation of proving that the result would be the least restrictive means possible. In cases of roads and highways it would be appropriate to build larger and wider highways than needed to plan for future expansion and growth without violating the Fifth Amendment.

By applying an altered form of strict scrutiny to cases involving eminent domain, property owners have more protection from unconstitutional takings of their property and the government will continue to be able to accomplish needed projects that do not offend the Public Use Clause of the Fifth Amendment. In requiring the government to prove its compelling interest and its efforts to fulfill those interests by alternative means, strict scrutiny protects from unwarranted takings and requires accountability from the government. Also, by not requiring that the government limit its projects to the least restrictive means possible, legislatures across the country may act to ensure the betterment and progress of society.