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THIS LAND IS MY LAND: THE NEED FOR A FEASIBILITY TEST IN EVALUATION OF TAKINGS FOR PUBLIC NECESSITY

THOMAS J. POSEY*

"Government is instituted to protect property of every sort. . . . [T]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."1

INTRODUCTION

A Midwestern state with a one million dollar transportation budget proposes to deal with its traffic problems by building a huge superhighway at a cost of eighty-four million dollars. The state has shown a public necessity for traffic reduction, and has condemned the land of several private citizens in anticipation of the project’s commencement. Can the landowners stop the taking of their land on the grounds that completion of such a project is impossible? According to recent decisions in the state courts of Iowa and Minnesota, the answer is no. But shouldn’t the government be required to show that a proposed public necessity project is feasible before being allowed to exercise its power of eminent domain?

One of the most essential sticks in the bundle of property rights is the right to exclude others.2 It is through this fundamental right that the security of both ownership and use of land are maintained by private citizens.3 The importance of this right, however, does not supersede the government’s powers of eminent domain.4

Federal and state governments, through the use of eminent domain, may condemn the property of a private landowner and use that

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4. Id. at 804.
property to meet a public necessity. If the landowner challenges the condemnation, the courts generally perform an extremely narrow review of the government’s decision to take the land. In order to prevail, the landowner must show either that the taking was in violation of constitutional or statutory provisions, or that some gross impropriety such as fraud or abuse of discretion occurred. However, landowners generally may not base their challenges on the grounds that the proposed project is unfeasible or unlikely to be completed. This rule is clearly illustrated by two recent state court decisions.

In Itasca County v. Carpenter, a private citizen’s land was condemned for the purpose of constructing a road. The landowner challenged the taking on the grounds that completion of the project was impossible. He argued the road could not be completed because one area it was proposed to cross was federally protected Native American land that could not be condemned. Although the trial court agreed, holding that the impossibility of completing the road was sufficient grounds to prevent the condemnation, the Minnesota Court of Appeals reversed. The court indicated that once necessity had been established, the government was authorized to take the land despite any allegations or speculation that the project would never be completed.

Similarly, in Comes v. City of Atlantic, the condemnation of private land for an airport expansion project was allowed, despite evidence that the project might never even be undertaken. The city sought to condemn a private citizen’s land, but lacked the funding to complete the planned expansions. The trial court granted the private landowner a permanent injunction that barred the city from taking his land until it received funding and approval for the project.

7. See, e.g., Luloff v. Lichty, 569 N.W.2d 118, 123 (Iowa 1997) (citations omitted); Douglass v. Iowa City, 218 N.W.2d 908, 913-14 (Iowa 1974) (citing Scott v. City of Waterloo, 274 N.W. 897, 900, 901 (Iowa 1937)).
10. Id. at 888.
11. Id. at 891-92.
12. Id. at 891.
14. Id. at 95.
15. Id.
However, the Supreme Court of Iowa reversed that decision, holding that once the government had shown the property was needed for a public use, it could invoke its powers of eminent domain.\(^{16}\)

The practical effect of these holdings is to weaken the security of private land rights by making it less difficult for the government to exercise eminent domain powers. In both these cases, the government was allowed to condemn private lands for a public necessity, despite evidence that the land might never be used to alleviate that necessity. The reasoning in these cases may set the dangerous precedent of allowing the government to take any land it wishes by simply showing that the land may someday be put to public use.

Part I of this Note outlines the background necessary to analyze the exercise of eminent domain powers by state governments. Part II presents the facts of \textit{Itasca County v. Carpenter} and \textit{Comes v. City of Atlantic} and considers the legal analyses of the courts in both cases. Part II also proposes that these courts erred in their rigid adherence to the notion that the feasibility of public necessity projects should never be judicially examined. Although there will always be some possibility that a project designed to meet a public necessity will not be completed, landowners should be able to raise feasibility challenges in certain limited circumstances. Part III proposes judicial means to limit the use of eminent domain in cases where the government is unlikely to use the condemned land to complete the necessity project. It suggests that judicial review of the feasibility of proposed necessity projects should be performed, but only in those cases where such review is warranted through a burden-shifting test. Further, Part III proposes that at least a rational basis standard of review should be applied to governmental feasibility determinations. This section concludes by addressing common arguments against judicial inquiry into the feasibility of necessity projects and points out flaws in the economic reasoning of those arguments.

I. THE EXERCISE OF EMINENT DOMAIN POWERS BY STATE GOVERNMENTS

Eminent domain is a power exercised by all governments and is generally considered to be an inherent element of sovereignty.\(^{17}\) The
legal basis for the exercise of eminent domain by the United States government is found in the Takings Clause of the Fifth Amendment.\textsuperscript{18} The Takings Clause allows the federal government to seize private land, but only in cases where that land will be put to a "public use." The government generally performs such seizures either following a judicial hearing, or as a "quick take" without notice or hearing by simply filing a declaration of taking or obtaining an ex parte order for possession.\textsuperscript{20} The government is then required to provide "just compensation" for any property that is taken.\textsuperscript{21}

In addition to these takings by condemnation, the federal government may also effect a taking by regulating land use through its police powers.\textsuperscript{22} Such regulations are enacted for the purpose of maintaining or improving some aspect of public safety, health, or welfare.\textsuperscript{23} While these regulations deny private landowners the right to use some or all of their land as they wish to, they do not deprive them of actual ownership.\textsuperscript{24} As such, no monetary compensation is required since the landowner is "compensated" by sharing in the social benefit the regulation provides.\textsuperscript{25}

Like the federal government, state governments\textsuperscript{26} also possess eminent domain powers.\textsuperscript{27} State governments are similarly limited by the public use and just compensation requirements, as the Fourteenth Amendment\textsuperscript{28} makes the provisions of the Takings Clause applicable to the states.\textsuperscript{29} Most states have explicitly incorporated provisions similar to those of the Takings Clause into their own constitutions,

\begin{enumerate}
\item \textsuperscript{18} "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{20} United States v. Dow, 357 U.S. 17, 21 (1958).
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{22} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).
\item \textsuperscript{23} \textit{Id.} at 1019–22.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{See} Agins v. City of Tiburon, 447 U.S. 255, 262 (1980).
\item \textsuperscript{26} State governments, city and local governments, school districts, counties, and even public utilities possess eminent domain powers. Sidney Z. Searles, \textit{The Law of Eminent Domain in the U.S.A.}, C975 ALI-ABA 333, 336 (1995).
\item \textsuperscript{27} The state may execute a taking through either its eminent domain powers, or by regulating land through its police powers in the interest of public health, safety, welfare, or morals. No compensation is required when a regulatory taking is made, as the landowner is "compensated" by sharing in the benefit the regulation provides to her and the rest of the general public. \textit{See} \textit{id.} at 351; \textit{see also} Laura McKnight, \textit{Regulatory Takings: Sorting Out Supreme Court Standards After Lucas v. South Carolina Coastal Council}, 41 U. KAN. L. REV. 615, 617–18 (1993).
\item \textsuperscript{28} U.S. CONST. amend. XIV.
\item \textsuperscript{29} \textit{Id}.
which further highlights the importance of meeting the public use and compensation requirements.\textsuperscript{30}

Although both the federal and state governments are limited in the exercise of their eminent domain powers by the "public use" requirement, the Takings Clause does not define that term. This has led to varying judicial interpretations of what constitutes a public use. The two principal interpretations of the term can be categorized according to actual-use and public-benefit theories.\textsuperscript{31}

\textbf{A. Actual-Use vs. Public-Benefit Theory}

Eminent domain decisions through the early twentieth century generally adhered to the actual-use theory, which defines public use narrowly.\textsuperscript{32} Under this theory, the specific use for which the property is taken must be one that all members of the public will share equally and to which they will have universal access.\textsuperscript{33} For example, taking land to build a public road, park, or airport is permissible because all members of the public will potentially enjoy actual use of that land. Conversely, a government taking to build a private road would not be allowed, because the public would not be able to use or access it.\textsuperscript{34}

Over the last several decades, however, the public-benefit theory has been adopted, which is more expansive in its scope.

Public-benefit theory broadly defines public use as any use that will benefit or advantage the general public.\textsuperscript{35} The government may use eminent domain to achieve "any legislatively permissible end" that will in some way benefit the public welfare, even if the general public will be denied actual use of the land.\textsuperscript{36} For example, any condemnation by the state for the purpose of enlarging the resources available to the community as a whole is permissible.\textsuperscript{37} The most significant implication of this broad definition is that it allows the

\textsuperscript{30} Forty-nine states have incorporated such provisions into their constitutions. The only state which has not, North Carolina, provides these same protections through statutory law. Searles, \textit{supra} note 26, at 335–36.


\textsuperscript{32} See, e.g., Bunyan v. Comm'rs of the Palisades Interstate Park, 153 N.Y.S. 622 (1915) (taking land to create a public park constitutes taking for public use); \textit{In re} City of New York, 147 N.Y.S. 1057 (1914) (taking to build a subway is taking for public use).

\textsuperscript{33} Pocantico Water Works Co. v. Bird, 29 N.E. 246, 248 (N.Y. 1891).

\textsuperscript{34} See Carpenter v. City of Buffalo, 244 N.Y.S. 224 (1930).

\textsuperscript{35} Sales, \textit{supra} note 31, at 348–50 (1999).

\textsuperscript{36} \textit{Id.} at 345–47.

\textsuperscript{37} \textit{Id.}
government to take land from one private citizen and give it to another private citizen or entity, as long as the taking will provide a public advantage.\(^{38}\)

In *Poletown Neighborhood Council v. City of Detroit*,\(^ {39}\) for example, the local government seized an entire residential neighborhood and then transferred the land to the General Motors Corporation to build an auto assembly plant.\(^ {40}\) The government reasoned that building the plant would help alleviate some of the severe economic blight occurring in Detroit at the time.\(^ {41}\) The potential economic benefit was held sufficient to establish a public use.\(^ {42}\) Similarly, in *Hawaii Housing Authority v. Midkiff*, the state condemned the property of several wealthy landowners who controlled most of the private land in the state, then divided it amongst a large number of citizens.\(^ {43}\) Because the destruction of this oligopoly of land ownership would greatly benefit the general public, the taking was held to be a public use.\(^ {44}\)

### B. Standard of Judicial Review

The broad definition of public use suggested by public-benefit theory and applied in *Midkiff* led to the establishment of a minimum scrutiny test.\(^ {45}\) Heightened levels of scrutiny are considered unnecessary because this inclusive definition made virtually any taking that benefits the public permissible.\(^ {46}\) Under the minimum scrutiny test, any exercise of eminent domain that is rationally related to a conceivable public purpose is allowed.\(^ {47}\) The courts will not question or examine a legislative determination that a public necessity exists, nor will they examine whether a legislatively proposed taking will serve to meet that necessity.\(^ {48}\) Judicial review is generally limited to determin-

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38. Such takings still require that just compensation be paid to the initial private owner. *Id.* at 347–49.
40. *Id.* at 457.
41. *Id.*
42. *Id.* at 459–60.
44. *Id.* at 240–42.
46. Richardson v. City and County of Honolulu, 124 F.3d 1150, 1157–58 (9th Cir. 1997).
48. Richardson, 124 F.3d at 1158.
ing whether the taking constitutes a public or private use.\textsuperscript{49} However, this deferential standard of review is not required where the proposed public use involves an “impossibility” or is “palpably without reasonable foundation.”\textsuperscript{50}

Although \textit{Midkiff} established the minimum scrutiny test as the appropriate standard of review, the United States Supreme Court applied heightened rather than minimum scrutiny in a number of subsequent cases.\textsuperscript{51} These cases, however, are distinguishable because they all involve regulatory takings rather than condemnations.\textsuperscript{52} The rationale for applying heightened scrutiny to regulatory takings is that such takings are uncompensated.\textsuperscript{53} The Court will examine such takings more closely to insure the government is not using its regulatory power to place public economic burdens on the shoulders of private individuals.\textsuperscript{54} The Court’s language in \textit{Midkiff} has been interpreted to support this rationale.\textsuperscript{55} Because \textit{Midkiff} requires deference to legislative decisions where a taking is fully compensated, such deference is presumably not required where no compensation is made.\textsuperscript{56} In the regulatory cases, the courts are protecting the economic rights of the landowner.\textsuperscript{57} But in condemnations, those rights are already protected by the compensation requirement.\textsuperscript{58}

\textbf{C. Practical Effects of the Minimum Scrutiny Test}

The states have taken advantage of the virtually absolute deference shown by the courts to legislative necessity decisions and have frequently tested the limits of their eminent domain powers. Such efforts have largely been successful because most courts will only overturn a legislative determination of necessity where fraud, bad

\textsuperscript{49} Searles, \textit{supra} note 26, at 343.
\textsuperscript{52} Id.
\textsuperscript{53} Regulatory takings interfere with a landowner’s right to quiet enjoyment without providing any monetary compensation for the lost use. Such takings are subject to a more strict judicial review to insure they are only used when necessary. \textit{See} Richardson, 124 F.3d at 1157–58.
\textsuperscript{54} Dolan, 512 U.S. at 389–90.
\textsuperscript{55} Richardson v. City and County of Honolulu, 124 F.3d 1150, 1158 (9th Cir. 1997).
\textsuperscript{56} Cf. \textit{id}.
\textsuperscript{58} \textit{id}. at 1015.
faith, or gross abuse of discretion can be proven. However, the courts have been inconsistent in their response to state and local governments’ attempts to expand the concept of necessity.

In *Anaheim Union High School v. Vieira*, for example, the California Court of Appeal held that a school district could condemn land for the purpose of building a school, despite the fact that it would not be constructed for at least four years. Similarly, in *Charlotte v. Rousso*, the North Carolina Court of Appeals held that the city of Charlotte could take property to build a park, even though no specific plans or design for the proposed park had been made. Likewise, a Pennsylvania trial court in *In re Condemnation of School District* held that a taking for a proposed school was permissible where plans for the project had not even been authorized. More recently, the Minnesota Court of Appeals in *City of Duluth v. State* held that even takings that are merely “convenient for the furtherance of a proper purpose” are allowed.

Not all courts, however, have allowed such broad extensions of the concept of necessity. In *Phoenix v. McCullough*, for example, the Arizona Court of Appeals held that the city could not condemn land for airport expansion where it did not plan to begin construction for fifteen to forty-six years. In another airport expansion case, *Mann v. City of Marshalltown*, an Iowa state court determined that where there was not a reasonable probability that the government would complete the proposed project, condemnation should not be allowed. But despite these decisions, it is generally extremely difficult to contest a taking on the basis of lack of necessity.

II. *Itasca County v. Carpenter and Comes v. City of Atlantic*

Two recent state court decisions clearly illustrate the effect of defining public use broadly and of applying minimum scrutiny review in eminent domain cases. Part A of this section examines the facts and legal analysis performed in *Itasca County v. Carpenter.* Part B presents the similar legal reasoning performed in *Comes v. City of Atlantic.* Part C suggests that both courts erred in their rigid adherence to broad definitions of public use and permissive standards of review.

A. *Itasca County v. Carpenter*

*Itasca County,* Minnesota condemned land owned by Douglas Carpenter, a private citizen, for the purpose of constructing a road. After a court authorized the county to take his property, Carpenter learned that the proposed route of the highway would also require the condemnation of federally protected tribal land owned by another private individual. That land, however, could not be condemned without the consent of its owner, who testified he would never give such consent. Because the road was now impossible to complete as planned, Carpenter moved to dismiss the county's petition for condemnation.

The district court agreed with Carpenter and dismissed the county's petition to condemn his land, on the grounds that the proposed public use of his land was now a legal impossibility. However, the Court of Appeals reversed, stating that its own review of the law of eminent domain led to the opposite conclusion. The court quoted the *Midkiff* case, indicating that judicial review of condemnation petitions is required to remain extremely narrow. The court stated that it would rest its decision solely on its finding

67. *Id.*
68. *Id.* at 888–89.
69. *Id.* at 888.
70. *Id.* at 889.
71. *Id.* at 891–92.
73. *Carpenter,* 602 N.W.2d at 889 (citing *Midkiff,* 467 U.S. at 240).
that the trial court had not made an extremely narrow review of the condemnation petition.\textsuperscript{74}

The court indicated that the Minnesota Constitution provides that property may be condemned once a public use has been established.\textsuperscript{75} The government, however, has the burden of establishing that the condemnation is necessary to achieve some public purpose.\textsuperscript{76} The court pointed out that according to \textit{City of Duluth v. State}, as long as the taking is reasonably necessary or convenient in achieving that purpose, the government’s burden is met.\textsuperscript{77} In addition, the court added that once necessity is established, a condemnation can only be prevented by a showing that it is manifestly arbitrary or unreasonable.\textsuperscript{78} Proving that the project has only speculative purposes or is impossible would meet this standard.\textsuperscript{79}

The court stated that speculative purpose was not an issue in this case because there was a specific plan for the construction of a road.\textsuperscript{80} Further, the court noted that the project was not a legal impossibility because the purpose could still be attainable.\textsuperscript{81} The court suggested that the government might “find a way” to complete the project by modifying the current road plan.\textsuperscript{82} However, the court stated that the ability of the county to complete the project was “not at issue,” and that the only relevant consideration was whether condemnation of the defendant’s land was reasonably necessary to accomplish the purpose of building a road.\textsuperscript{83} Since both the public purpose of the project and the means employed to achieve that purpose were legal, the court reasoned that no inquiry into the feasibility of the project was warranted.\textsuperscript{84}

The court held that because there was a plan for the road, and modifications to that plan could allow it to be completed, the defendant’s land was reasonably necessary to achieve a public purpose.\textsuperscript{85}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Carpenter}, 602 N.W.2d at 889 (citing MINN. CONST. art. I, § 13).

\textsuperscript{76} \textit{Id.} at 889 (citing County of Dakota v. City of Lakeville, 559 N.W.2d 716, 720 (Minn. App. Ct. 1997)).

\textsuperscript{77} \textit{Id.} (citing City of Duluth v. State, 390 N.W.2d 757, 764–65 (Minn. 1986)).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{See id.}

\textsuperscript{80} \textit{Id.} at 891.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 890.

\textsuperscript{85} \textit{Id.} at 891.
The court added that to hold otherwise would require countless judicial reviews of the practicability of legislative plans and decisions and would contradict well-settled principles of eminent domain.86

B. Comes v. City of Atlantic

In 1999, the city of Atlantic, Iowa developed a comprehensive master plan for the expansion of its airport.87 The plan was designed to be long-term and would be implemented in stages over a number of years.88 Completion of the project would require the acquisition of private property adjoining the airport, as well as the rerouting of a road that crossed that property.89 The project depended on receipt of funding from the federal government for which the city had applied.90 James Comes owned the private farmlands bordering the city airport.91 Fearing that the city may prematurely condemn his property before being approved for federal funds, he sought an injunction against any condemnation attempts by the city.92

The trial court held that although it was possible that the city would receive the funds and complete the project, it could not condemn Comes' land until the federal funds had been approved.93 There was still a significant possibility that the city would not receive the funding and that no expansion would ever take place.94 The court entered a permanent injunction against the city, which prevented condemnation of Comes' property until the necessary funding was obtained.95

The appellate court reversed the trial court's grant of the injunction and remanded the case.96 The appellate court based the decision on its finding that there was no likely obstacle to the completion of the project.97 The court indicated that the Iowa Constitution limits takings to those made for public use. Further, there is a constitutional

86. Id.
87. Comes v. City of Atlantic, 601 N.W.2d 93, 95 (Iowa 1999).
88. Id.
89. Id.
90. Id.
91. Id.
92. Plaintiff sought a permanent injunction against the city to bar present and future attempts to take his land. Id. at 95.
93. Id.
94. Id.
95. Id.
96. Id. at 98.
97. Id.
requirement that such takings must be reasonable and necessary. ⁹⁸ To obtain an injunction against such takings, the court stated that landowners must show fraud, abuse of discretion, violation of constitutional or statutory provisions, or the presence of some other gross impropriety. ⁹⁹

The court focused its analysis on whether uncertainty surrounding the approval of funding was sufficient to hold the constitutional requirement of a public purpose had not been met.¹⁰⁰ The court noted the similarities between the present case and Mann v. City of Marshalltown,¹⁰¹ which also involved airport expansion. Quoting Mann and Faulkner v. Northern States Power Co.,¹⁰² the court stated that a reasonable probability that the government will complete a proposed project is sufficient to establish a right of condemnation.¹⁰³ The court reasoned that unless the plaintiff proved the city could not reasonably expect to use his property for airport expansion, there was no basis for an injunction.¹⁰⁴

The only major uncertainty presented by the plaintiff was whether the federal funds would be available to complete the project.¹⁰⁵ Although the court conceded that there was a possibility that the funds would not be received, it held this was an insufficient basis to block the condemnation of the plaintiff's land.¹⁰⁶ The court reversed the injunction and remanded the case to the trial court for entry of an order dismissing the plaintiff's petition.¹⁰⁷

C. Flawed Reasoning in Carpenter and Comes

The reasoning of the courts in Carpenter and Comes is problematic in several respects and illustrates the danger of allowing the unchecked expansion of a state's exercise of eminent domain. The courts in both cases failed to give adequate consideration to the issue

⁹⁸. Id. at 95–96 (citing IOWA CONST. art. I, § 18; Vittetoe v. Iowa S. Utils. Co., 123 N.W.2d 878, 880–81 (Iowa 1963)).
⁹⁹. Comes, 601 N.W.2d at 96 (citing Mann v. City of Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978)).
¹⁰⁰. Id. at 96.
¹⁰¹. Mann, 265 N.W.2d at 314.
¹⁰³. Comes, 601 N.W.2d at 96–97 (quoting Mann, 265 N.W.2d at 315).
¹⁰⁴. Id.
¹⁰⁵. Id. at 98.
¹⁰⁶. Id.
¹⁰⁷. Id.
of impossibility. Further, the courts’ ambiguous and overinclusive standards of what constitutes “necessity” and public use threaten to further broaden these seemingly unrestrained terms. Conversely, the foci of both courts’ reviews of the facts was far too narrow in scope. These deficiencies are further emphasized by the courts’ failure to suggest any limitations or guidelines to be used in applying their holdings.

1. Redefining Impossibility

While the dispositive issue in both cases should have been the impossibility of completing the proposed projects, the courts simply redefined the evidence of such impossibility that was before them to reach their holdings. In Carpenter, the court stated that once necessity was established, the only way to prevent the taking was by showing that it was manifestly arbitrary or unreasonable, and indicated that impossibility met this standard. Although the court acknowledged the proposed road was now impossible to complete as planned, it suggested the government might modify the plan and “find a way” to somehow make completion possible. But using such a hypothetical analysis serves to guarantee a different impossibility: landowners will be forced to defend themselves against condemnations for impossible projects.

The reasoning of the Carpenter court seems to suggest that in any case where a proposed project is impossible to complete, the government may simply argue that it will change the proposal, even if the only proposed modification is to “find a way to make it work.” And, although the court stated early in its opinion that impossibility is one of the few ways to prevent a condemnation, it later stated that the ability of the county to complete the project was “not at issue.” These conflicting positions indicate that although the court technically acknowledges impossibility as one of the few defenses available to a landowner, it does not consider that defense to be an issue meriting judicial review.

In Comes, the court engaged in a similar reframing of an impossible project. Although the project may be able to be undertaken at

109. Id. at 891.
110. Id.
111. See id. at 891.
112. See Comes, 601 N.W.2d at 95.
some point in the future, at the time the case was decided it was impossible to complete.\textsuperscript{113} No funding had been secured for the multimillion-dollar airport expansion project, and the court conceded that it was uncertain whether the city would ever receive such funding.\textsuperscript{114} In addition, the court cited the \textit{Mann} case where a condemnation for airport expansion was not allowed because of uncertainties surrounding project funding.\textsuperscript{115} Yet the court held that it could reasonably be expected that the property would be used for airport expansion and allowed the taking.\textsuperscript{116} While the court stated that uncertainty surrounding a project may be sufficient to prevent a condemnation and referenced the \textit{Mann} case as support, it held that a completely unfunded multimillion-dollar project was certain enough to allow a taking.\textsuperscript{117} Such a holding effectively erodes the ability of a landowner to challenge an impossible project.

2. Overly Broad Definitions

In addition to concerns regarding impossibility, the courts' ambiguous definitions of "necessity" and public use are far too broad. In \textit{Carpenter}, the court adopted the reasoning from \textit{Duluth}, that even a taking that is "convenient" in achieving a public purpose can establish the government's proof of a public use.\textsuperscript{118} The \textit{Comes} case appears to hold that "uncertainty" surrounding the completion of a project is sometimes sufficient to prevent condemnations, but offers no standards or guidelines for evaluating such uncertainty.\textsuperscript{119} While the court distinguishes its holding from that of the \textit{Mann} case, it does not provide any discernable reasons for doing so.\textsuperscript{120} Viewed together, the ambiguous definitions in \textit{Comes} and \textit{Carpenter} suggest that any taking that is convenient to government attainment of a public use should be allowed, except in some cases where project completion appears uncertain. Such a permissive and ambiguous standard allows few challenges, if any, to an impossible or unfeasible project.

\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 98.
\textsuperscript{115} \textit{Id.} (citing Mann v. City of Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978)).
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} Itasca County v. Carpenter, 602 N.W.2d 887, 889 (Minn. App. Ct. 1999) (citing City of Duluth v. State, 390 N.W.2d 757, 764–65 (Minn. 1986)).
\textsuperscript{119} See \textit{Comes}, 601 N.W.2d at 96–97.
\textsuperscript{120} See \textit{id.}
3. Scope of Review

The scope of review employed by the courts is also problematic. While judicial reviews of condemnations are generally performed narrowly, the court in Carpenter took this notion to the extreme. The court refused to consider issues of feasibility and necessity, and focused only on whether the trial court’s review should have been more narrow.

While the court in Comes was willing to address the feasibility issue briefly, it failed to examine or explain in any detail the factual differences between its holding and that of the Mann court. The court limited its analysis to the determination of whether any possibility existed for completion of the project. Once it found that such a possibility existed, the court looked no further. Such narrow and limited analyses endorse the notion that there should be few obstacles to exercises of state eminent domain powers.

4. Failure to Limit Powers

The most consistent and problematic flaw throughout both opinions is the failure to identify any limit to the powers that may be exercised by the states. For example, how much modification to a proposed public use plan should be allowed before that plan can be deemed impossible, and thereby unconstitutional? What degree of uncertainty must be present to declare it unlikely that a proposed project can ever be completed? If the proposed project will not even commence for several years, how many years are enough to consider the taking arbitrary or unreasonable? Leaving such questions unanswered threatens to expand the states’ powers, which are already extensive.

III. PROPOSED STANDARDS FOR JUDICIAL REVIEW OF THE FEASIBILITY OF PROJECTED NECESSITY PROJECTS

While judicial review of the feasibility of proposed necessity projects is not warranted in all cases, it is defensible in those where the government is highly unlikely to use the condemned land to complete the necessity project. The burden-shifting test outlined below provides a means to identify the cases where such review is justified. The

121. See Carpenter, 602 N.W.2d at 889.
122. Id.
government's feasibility determinations in those cases should be reviewed under a rational basis standard to insure appropriate judicial deference to the legislature's lawmaking actions. Although common arguments against allowing judicial inquiry into the feasibility of necessity projects will be addressed, these arguments are not implicated by the limited and narrow level of judicial review being proposed.

A. Burden-Shifting Test

The use of a burden-shifting test is not a new concept in either constitutional law or eminent domain. It has been used as a test for substantive due process in both of these areas.\(^{123}\) For example, since the end of the *Lochner*\(^ {124}\) era in 1938, the Supreme Court has held that economic regulations are presumptively valid.\(^ {125}\) Courts presume that facts exist which support any legislative economic decision that was made, and the challenger bears the burden of showing that no rational basis exists for the regulation.\(^ {126}\) Similarly, until the 1995 *Dolan* decision, challengers to regulatory takings were required to show that the regulation they opposed had no substantial relation to public health, safety, or welfare.\(^ {127}\) The nature of the government's power in both of these examples explains the rationale for using a burden-shifting test. Because government power in these areas is not absolute, challenges are allowed. However, the extensiveness of these powers suggests the burden of proving unconstitutionality should fall on the challenger rather than placing a burden on the government.

Likewise, the government's condemnation powers under the Takings Clause\(^ {128}\) are extensive but not absolute. Private land may be taken, but only where compensation is made and the land will be put to public use.\(^ {129}\) Because the nature of this power is the same as that of the economic and regulatory takings powers discussed above, it is logical to apply the same type of test. Such condemnations may be challenged because the government does not have an absolute power

\(^ {123}\) See Lehmann, *supra* note 5, at 1169–73.
\(^ {125}\) Lehmann, *supra* note 5, at 1170.
\(^ {126}\) Id. at 1169–70.
\(^ {127}\) Id. at 1155–56.
\(^ {128}\) U.S. CONST. amend. V.
\(^ {129}\) Id.
to condemn. However, the broad nature of this power suggests that the landowners should bear the burden to disprove the constitutionality of the taking. Applying a burden-shifting test, a proposed necessity project would be presumed constitutional until the landowner met the burden of proving that completion of the project is either impossible or highly unlikely. Once that burden is met, condemnation should not be allowed unless the government can show that a rational basis in fact exists to believe the project can be completed.

This rationale is consistent with that of the trial courts in the Carpenter and Comes cases, which were decided correctly. Following the landowners' challenges to the condemnation of their land, they had the burden of proving the takings were unconstitutional. The landowners in both cases presented evidence that established the impossibility of completion of the proposed public use projects. Further, the government in each case did not present evidence showing that a basis existed for believing completion was possible. As such, the trial courts did not allow the takings.

The higher courts purportedly based their decisions on the failure of the landowners to prove that the government's necessity projects could not be completed. Nonetheless, in Carpenter, the appellate court did not dispute that the landowner had proven the impossibility of completing the road as planned. Similarly in Comes, the landowner showed that the city had not secured any funding whatsoever for its proposed multimillion-dollar airport expansion. Rather than requiring the landowners to meet their burdens of proof, it appears both courts simply redefined what was meant by "impossible." Further, the government was not required to refute the challengers' evidence or to make any showing that the projects were possible to complete.

If the courts in those cases had applied a burden-shifting test, the government would have been required to show there was some

131. Comes, 601 N.W.2d at 94–95; Carpenter, 602 N.W.2d at 888–89.
132. Comes, 601 N.W.2d at 94–95; Carpenter, 602 N.W.2d at 888–89.
133. See Comes, 601 N.W.2d at 97–98; Carpenter, 602 N.W.2d at 890–92.
134. See Comes, 601 N.W.2d at 97–98; Carpenter, 602 N.W.2d at 890–92.
135. Carpenter, 602 N.W.2d at 890.
136. Comes, 601 N.W.2d at 98.
137. See Comes, 601 N.W.2d at 97–98; Carpenter, 602 N.W.2d at 890–92.
rational basis to believe the projects could be completed. In Carpenter, for example, the government was able to show that the road could be partially built,¹³⁹ but could not have met the burden of showing that the entire project might be completed. The challenger presented undisputed evidence that the road would progress no further than the property line of the Native American land near his own land.¹⁴⁰ Upon this evidence no basis existed to believe the road project could ever reach completion.¹⁴¹ While it is possible that some other means of completing the road may have been available, such as rerouting it through other land, the government was never even required to make such a showing. After Carpenter met his burden by proving the project was impossible, the burden should have shifted to the government to at least show the existence of a rational basis to believe the project could be completed.

Similarly, in Comes, the landowner met his burden of proof by showing that no approval, permits, or funding had been secured by the state for its proposed multimillion-dollar project.¹⁴² Although the state may have been able to obtain such approvals and funding later, at the time the case was decided it had not done so.¹⁴³ There was no basis in the evidence provided to believe the government would obtain these prerequisites and even begin the project, let alone complete it.¹⁴⁴ Because Comes met his burden, the government should have been required to establish a rational basis for believing the airport could be completed.

Despite the uncontested evidence provided by the landowners in both cases, the higher courts did not shift any burden to the government or require additional evidence before allowing the takings.¹⁴⁵ This is the greatest potential difficulty in applying the burden-shifting test. Courts may continue to simply expand the definition of impossibility in an effort to avoid reviewing legislative determinations or offending separation of powers requirements. This has the practical effect of negating the burden-shifting test by establishing a burden that cannot be proven with even the most egregious set of facts.

¹³⁹. Carpenter, 602 N.W.2d at 891.
¹⁴⁰. Id. at 890.
¹⁴¹. Id.
¹⁴². Comes, 601 N.W.2d at 94–95.
¹⁴³. Id.
¹⁴⁴. Id.
¹⁴⁵. See Comes, 601 N.W.2d at 97–98; Carpenter, 602 N.W.2d at 890–92.
To prevent this problem, it may be necessary for the legislature to outline standards for determining whether a project is impossible or highly unlikely to be completed. For example, where funds have not been secured for a project, a history of successful attempts to obtain funding for similar projects may suffice to show that it is likely to be obtained in the instant case. In cases where physical impossibility of completion is alleged, evidence of alternative plans that overcome those physical barriers could disprove the allegations. But even without such legislative standards, there should be little doubt in the courts’ minds that physically impossible or completely unfunded multimillion-dollar projects suffice to establish a landowner’s burden of proof.

B. The Standard of Review

A proposed necessity project will be presumed constitutional until the landowner meets the burden of proving that completion of the project is either impossible or highly unlikely. Once that burden has been met, condemnation should not be allowed unless the government can show that a rational basis in fact exists to believe the project can be completed. Applying this level of scrutiny is necessary to insure that the benefits of the burden-shifting test are not undermined. Although this is a higher level of scrutiny than what is currently applied, it more closely resembles the minimum scrutiny used in *Midkiff* to evaluate public use in compensated takings rather than the heightened scrutiny applied to regulatory takings in *Dolan*.

Recall that a regulatory taking requires a higher standard of review because of the potential for public economic burdens to be placed on private individuals. However, *Midkiff* held that takings through condemnation, which are compensated, only require the government to meet a conceivable rational basis standard to establish that the taking has a public rather than private purpose. Because

147. The most deferential standards of review are conceivable rational basis and rational basis in fact. The more stringent standards of intermediate scrutiny and strict scrutiny are collectively referred to as heightened scrutiny.
149. *Id.* at 389–90.
150. However, this deference to the legislature is not required where the proposed public use involves an “impossibility” or is “palpably without reasonable foundation.” *Midkiff*, 467
the economic rights of the landowner are protected through the compensation requirements, this deferential standard is all that is necessary.\textsuperscript{151} The compensation requirement, however, does not protect the landowner's right to quiet enjoyment of the property.

One of the most basic property rights is that of quiet enjoyment.\textsuperscript{152} This includes both the right to use your property as you see fit and the right to prevent others from using it.\textsuperscript{153} Exercise of eminent domain serves to permanently deprive landowners of this right by transferring ownership of their land to the government. But should this right be denied when the government has no factual evidence to show it will ever put the land to public use? If the government is only required to meet the conceivable rational basis standard\textsuperscript{154} of \textit{Midkiff},\textsuperscript{155} then a taking for an impossible project would be allowed as long as completion is even conceivable.

Every conceivable explanation of how the project might be completed would suffice to uphold the taking. Physically impossible road construction projects and unfunded multimillion-dollar airport expansions would be allowed without requiring the government to show any factual evidence that completion of such projects was possible. Further, such a standard has the same adverse effect on the burden-shifting test as expanding the definition of impossibility. Rather than making it impossible for landowners to meet their burden using any fact pattern, it makes it possible for the government to meet its burden with virtually every fact pattern.

If a case involves such an impossible or unreasonable foundation, and the landowner has met the burden of proving this, the government should be required to show that there is at least a rational basis in fact to believe that the project can be completed. This standard of review is necessary to protect both the landowner's rights and the effectiveness of the burden-shifting test. It requires the government to provide factual evidence that a proposed project is not impossible before interfering with the right to quiet enjoyment. In addition, this


151. \textit{See id.}


153. \textit{See id.}

154. To pass conceivable rational basis review, the government must show that there is at least a conceivable basis to believe its actions are related to a governmental purpose. It is not necessary to establish a factual basis for this belief.

155. 467 U.S. at 241-42.
standard insures that once the burden of proof shifts to the government, it will have to provide more than speculative proof that a project can be completed. Although such a standard does require the government to show more than just remote possibilities or purely hypothetical bases for completion, it is by no means an unreasonable or unattainable burden.

This standard requires the government to produce factual rather than conceptual proof that a project is feasible, but establishment of those facts could be achieved in several ways. As discussed earlier, where funds have not been secured for a project, a history of successful attempts to obtain funding for similar projects may suffice to show that such funding is likely to be obtained again. Or in cases where physical impossibility of completion is alleged, alternate plans may have already been created which disprove such allegations. Like the burden-shifting test, the standard of review may require that legislative definitions or guidelines be established for determining impossibility. Such legislative action would serve to further protect landowners' rights by creating a clear and unambiguous standard to be applied by the judiciary.

C. Counterarguments

Although the burden-shifting test and proposed standard of review are common in constitutional jurisprudence in general, they represent a marked departure from the prevailing approach to (or avoidance of) inquiries into the feasibility of public necessity projects. The two most likely counterarguments to the proposed application of these concepts can be categorized as structural and economic.

1. Structural Arguments

According to the U.S. Supreme Court, "the role of the judiciary in reviewing the legislative judgment is a narrow one."\textsuperscript{156} Many state courts argue that the only judicial inquiry related to a legislative determination of feasibility that is ever appropriate is one based on fraud, mistake, unreasonableness, or impossibility.\textsuperscript{157} While structural concerns based on separation of powers dictate that review should be performed narrowly, the case law indicates that the actual approach

\begin{itemize}
  \item \textsuperscript{156} United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).
  \item \textsuperscript{157} See, e.g., \textit{id.}; Comes v. City of Atlantic, 601 N.W.2d 93, 96 (Iowa 1999); Itasca County v. Carpenter, 602 N.W.2d 887, 889–90 (Minn. App. Ct. 1999).
\end{itemize}
taken has been to perform no review at all. Courts have repeatedly expanded the definitions of terms like "unreasonable," "impossible," and "necessity" to avoid making any judicial inquiries into feasibility.

As a result of this avoidance, countless plots of land throughout the country have been condemned to meet public necessities; yet, the proposed projects still lie unfinished or not yet begun. In most cases, courts gave little if any consideration to the feasibility of these now-abandoned projects. Identification of projects with little or no hope of being completed should occur before condemnation occurs, not after. This would not require evaluating the feasibility of all or even most of the proposed condemnations, only those that first meet the narrow criteria of the burden-shifting test and then rational basis review.

Challenging the constitutionality of a taking is not in and of itself sufficient to place a burden on the government. The landowner holds the initial burden of proof and must show through factual evidence that the proposed project is impossible. Further judicial inquiry is only appropriate where the landowner meets that burden. No burden is placed on the government until that time, and the very deferential rational basis in fact standard of review is applied to the government's actions. This insures that the judiciary's role remains narrow. The only cases subject to review are those where the landowner factually establishes impossibility. Of that limited number of cases, only those where the government fails to provide factual evidence that the project is possible will result in a taking being overturned.

2. Economic Arguments

The most obvious economic argument against judicial review is that allowing such review of project feasibility will flood the courts. Specifically, it is argued that the amount of time and money it will take to perform judicial inquiry in every public takings case is poten-

158. See, e.g., Capron v. State, 247 Cal. App. 2d 212 (1966) (holding that land could be taken for state mental hospital project where that hospital was never built); Arechiga v. Hous. Auth., 183 Cal. App. 2d 835 (1960) (holding land could be taken for public housing project where housing was never actually built). Notably, the land at issue in Arechiga was later turned over to the Brooklyn Dodgers as a means to entice the team to move to Los Angeles. See, e.g., Gideon Kanner, What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners, SD40 ALI-ABA 1 n.21 (1999).

159. Id.

tially astronomical. But like the structural arguments above, these economic arguments are based on the faulty notion that judicial inquiry into potentially unreasonable or impossible projects means evaluating every project that is proposed. If properly applied, the test and standard of review suggested by this Note are narrowly focused and require evaluation of only those cases that are legitimately unreasonable or impossible to complete.

Just as challenging the constitutionality of a taking is not sufficient alone to place a burden on the government, it is also not sufficient alone to justify judicial review. The only cases in which judicial review would even be considered are those where the landowner has shown the court that a factual basis to allege impossibility exists. Only after the landowner has met that burden of proof will the court perform any further inquiry. The burden-shifting test and rational basis in fact standard of review serve to insure the number of cases actually reviewed is limited. Such an approach may even yield net economic savings, as the cost of many extravagant or irrational projects may be avoided.

CONCLUSION

The Constitution allows the federal government and the states to seize private land as long as the landowner is compensated and the land is taken for a public use. But some states are now able to seize land that will never be put to such use by simply asserting their intention to include the land in a public necessity project. States seize land even when it is impossible or highly unlikely that such a project will ever be completed. Judicial review of legislative determinations of necessity has historically been extremely narrow and should remain so. But the categorical refusal by some state courts to examine whether legislatively proposed takings will ever be used to meet a necessity is unwarranted.

Property ownership is directly related to our self-fulfillment and personhood as citizens. Eminent domain allows the government to deny individuals not only the right to quiet enjoyment of their land, but ownership of the land itself. It is essential, however, that the government retains and exercises this power so that public necessities can be met. The land used for roads, airports, schools, and countless

161. Id. at 8.
162. U.S. CONST. amend. XIV.
other public needs would have been impossible to acquire without eminent domain powers. Protection of private citizens' property rights from unconstitutional condemnation must be balanced against the need for broad governmental powers of eminent domain. Applying a burden-shifting test and rational basis in fact review to the feasibility of proposed necessity projects will maintain that balance.