

# Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law

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The government should not be regarded “as a cow to be milked.”<sup>1</sup>

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.<sup>2</sup>

[T]he sovereign may not take the property of A for the sole purpose of transferring it to another private party B . . . [in order to confer] a private benefit on [party B].<sup>3</sup>

## INTRODUCTION

Should Congress earmark \$5 million in the federal defense budget for a contract to be awarded on a noncompetitive basis to Storyrock, Inc., a private for-profit video company, to make DVD scrapbooks of National Guard units?<sup>4</sup> This Article suggests that the anti-favoritism norm

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1. ROBERT K. MASSIE, *PETER THE GREAT* 781 (1980).
2. *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874).
3. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).
4. Matt Canham, *Critics Bash Bennett Earmark*, SALT LAKE TRIB., Oct. 7, 2009, at A1, available at [http://www.sltrib.com/ci\\_13500108?IADID=Search-www.sltrib.com-www.sltrib.com](http://www.sltrib.com/ci_13500108?IADID=Search-www.sltrib.com-www.sltrib.com). Storyrock, Inc. is a Utah for-profit corporation based in Salt Lake City that has been registered since 2000. Utah Department of Commerce Business Entity Search, <https://secure.utah.gov/bes> (search “Storybrook”) (last visited Apr. 24, 2010); see also Remember My Service

in American property law prohibits such government transfers of public funds or assets to private parties on a favored basis. The Article proposes an anti-favoritism legal doctrine that allows the government or a private individual to assert a claim for government recapture of such transfers.

The Storyrock earmark touches a sensitive nerve in our system of justice: no individual should be improperly “singled out” by the government.<sup>5</sup> We usually think of improper “singling out” when the government imposes unfair *burdens*.<sup>6</sup> Thus, individual property owners are protected from government imposition of unfair burdens by Federal and state Just Compensation Clauses, which prohibit “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>7</sup>

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Frequently Asked Questions, <http://remembermyservice.com/faq.html#cost> (select “view pricing sheet”) (last visited Apr. 24, 2010) (noting that Storyrock produces and sells DVDs to military units at prices ranging from \$28 to \$42, depending how many DVDs are ordered).

5. See, for example, *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146, 2153 (2008), where the Court stated that:

We expect . . . legislative or regulatory classifications to apply ‘without respect to persons,’ to borrow a phrase from the judicial oath. See 28 U.S.C. § 453. As we explained long ago, the Fourteenth Amendment ‘requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.’

*Id.* (citing *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)).

6. See generally Richard J. Arneson, *What is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775 (2006).

7. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Federal Just Compensation Clause provides that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V. Similar just compensation provisions in state constitutions prohibit the “taking” of “property” without payment of “just compensation.” See, e.g., CAL. CONST. art. I, § 14 (“Private property shall not be taken or damaged for public use without just compensation . . . .”); UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation.”).

The author’s work in the Just Compensation Clause field includes: JOHN MARTINEZ, GOVERNMENT TAKINGS (2006) [hereinafter MARTINEZ, GOVERNMENT TAKINGS]; John Martinez, *A Proposal for Establishing Specialized Federal and State “Takings Courts,”* 61 ME. L. REV. 467 (2009); John Martinez, *Wrongful*

Improper “singling out” also occurs, however, when the property rights of individuals are unfairly *enhanced* at the expense of the public.<sup>8</sup> The “anti-favoritism norm” in

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*Convictions as Rightful Takings: Protecting “Liberty-Property,”* 59 HASTINGS L.J. 515 (2008); John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROB. & TR. J. 445 (2001); John Martinez & Nick J. Colessides, *Taming the Takings Tiger*, 12 UTAH B.J. 7 (1999); John Martinez, *Framework for Addressing Takings Problems*, 9 UTAH B.J. 13 (1996); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); John Martinez, *Trees in the Forest: A Reply to Professor Laitos’ “The Public Use Paradox and the Takings Clause; A Critique of the Lucas Takings Doctrine,”* 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 51 (1993); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297 (1988); John Martinez, *Reconstructing Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988); John Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases*, 1 HOFSTRA PROP. L.J. 39 (1988); see also 3 C. DALLAS SANDS, MICHAEL E. LIBONATI & JOHN MARTINEZ, LOCAL GOVERNMENT LAW ch. 16 (Land Development Regulation) (2009) [hereinafter SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW]; JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE & LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH (2000) [hereinafter MARTINEZ & LIBONATI, STATE & LOCAL GOVERNMENT LAW].

8. *Wood v. Budge*, 374 P.2d 516, 519 (Utah 1962) (“It is an elementary principle of justice that there should be equal rights to all and special privileges to none.”). For general discussions of the anti-favoritism principle in American law, see Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001); and Daniel S. Hafetz, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095 (2009).

Bell and Parchomovsky were the first to discuss the anti-favoritism norm in general terms, but they did not formulate a workable legal doctrine for implementing the norm. See Bell & Parchomovsky, *supra*, at 551 n.16 (“While we argue that a law of givings is necessary, we do not opine on whether it should be viewed as a branch of constitutional law, nor on what branch of government should be responsible for instituting the law of givings.”). This Article seeks to fill that gap. Moreover, Bell and Parchomovsky conceived of “givings” as the mirror image of the field of “takings.” See Bell & Parchomovsky, *supra*, at 591 (“We propose that this line dividing chargeable givings from nonchargeable distributions should mirror the line between compensable takings and noncompensable deprivations of property.”). However, as this Article demonstrates, the field of anti-favoritism has a different pedigree and purpose and is subject to different analysis, more than simply as a mirror image of the takings field. Conceiving of anti-favoritism as a free-standing norm helps with understanding and formulation of a cogent anti-favoritism legal doctrine.

Criminal prosecution of public corruption also enforces the anti-favoritism norm. See generally Aaron R. Petty, Note, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 852 (2006)

American property law seeks to prevent such unfair enhancements.<sup>9</sup>

The Storyrock earmark, involving the award of government contracts on a favored basis, is only one of several settings that raise anti-favoritism concerns. A second setting involves government award of outright grants on a favored basis. The recession of 2008-2009 generated widespread public resentment with the federal government's award of bailouts to private companies and industries. Between September 2008 and July 2009, American International Group, Incorporated (AIG), the

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("[F]ederal criminal statutes commonly used to prosecute state and local officials for public corruption should be amended to include a *qui tam* cause of action similar to that found in the False Claims Act."); FBI, Public Corruption, <http://www.fbi.gov/hq/cid/pubcorrupt/pubcorrupt.htm> (last visited Apr. 24, 2010) ("Public corruption is of the FBI's top investigative priorities—behind only terrorism, espionage, and cyber crimes."). This Article differs from the field of criminal prosecution of public corruption in at least three significant ways: first, this Article includes governmental conduct which might not rise to the level of criminal conduct; second, the Article suggests recognition of a civil, not criminal, action to enforce the anti-favoritism norm; and third, the Article recommends a claim that would be brought by private parties, not by the government.

9. The question whether affirmative action programs may improperly enhance the private property rights of some individuals and thus constitute improper "singling out" in that context is beyond the scope of this Article. See generally Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992) (stating that equal treatment presupposes people are equally situated; if they are not, then unequal treatment in the form of affirmative action may constitute appropriate corrective justice). For the author's writings on that question, see SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 10:23 (affirmative action in employment), § 20:89 (affirmative action in education); John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49 (1995); John Martinez, *The Use of Transfer Policies for Achieving Diversity in Law Schools*, 14 CHICANO-LATINO L. REV. 139 (1994); Juan Martinez, Book Review, 9 HARV. BLACKLETTER L.J. 163 (1992) (reviewing P. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991)).

Moreover, affirmative action law has moved from a justification based on both the benefit to the institution as well as on the individual or group benefitted, to a justification based only on the benefit to the institution. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that an affirmative action program can only be justified by law school's compelling state interest in seeking to achieve diversity). The law on affirmative action thus now exemplifies the anti-favoritism principle at work: government affirmative action programs cannot favor an individual or group simply for the sake of favoring that individual or group.

biggest insurance company in the United States, received \$182 billion in federal bailout money, the largest in American history.<sup>10</sup> AIG then paid out \$165 million in bonuses, generating public outrage demanding that the Obama Administration and Congress get the bonus money back and exercise greater supervision over how AIG spent the bailout money.<sup>11</sup> AIG's troubles continued when one of its traders demanded to be paid a \$100 million bonus.<sup>12</sup> Similarly, banks that received \$175 billion in federal bailout money and paid out \$32.6 billion in bonuses caused a public outcry demanding return of the bonuses.<sup>13</sup>

A third government favoritism setting involves government regulatory conduct on a favored basis. For example, government zoning of a single lot for apartments, when all other lots in the area are restricted to single-family residence construction, enhances the value of the up-zoned lot on a favored basis.<sup>14</sup> A fourth government favoritism setting occurs when government infrastructure improvements, such as the construction of a sports stadium, which enhances the value of the surrounding properties, is

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10. New York Times, Company Profile - American International Group, Inc., <http://www.nytimes.com/pages/business/index.html> (search "American International Group") (last visited Apr. 24, 2010).

11. Matt Jaffe, *Dispute with Bailout Watchdog Stems From AIG Bonus Audit; Now Congressman Calls for Investigation*, ABC NEWS, June 19, 2009, <http://blogs.abcnews.com/politicalpunch/2009/06/treasury-dispute-with-bailout-watchdog-stems-from-aig-bonus-audit-now-congressman-calls-for-investigation.html>.

12. David Segal, *Traders' \$100 Million Payday Poses Quandary for Regulators*, N.Y. TIMES, Aug. 2, 2009, at A1.

13. Jake Tapper, *The Bonus Battle: Executive Compensation Under the Spotlight, Again*, ABC NEWS, Aug. 3, 2009, <http://www.abcnews.go.com/Politics/Business/story?id=8237258&page=1>. As the Obama administration and Congress quickly discovered, however, in the absence of statutes or state constitutional provisions, there is no established legal doctrine for getting back the public's money. President Barack Obama publicly criticized the bonuses paid by AIG and the banks and appointed a "pay czar" to oversee compensation packages at companies that received bailout funds. *Id.* On March 19, 2009, the House of Representatives voted 328 to 93 to tax the AIG bonuses at 90%, but by then most of the bonuses had been returned. New York Times, *supra* note 10.

14. For discussion of such "spot zoning," see SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 16:8 n.7 (collecting cases).

sited so as to favor the limited number of people in the area.<sup>15</sup>

Unlike the express prohibitions in Federal and state Just Compensation Clauses against governmental imposition of unfair *burdens*, there is no analogous provision in the Federal Constitution that expressly prohibits governmental favoritism. State constitutions, in contrast, contain provisions such as the prohibition against the gift of public funds for private purposes which expressly prohibit government favoritism.<sup>16</sup> But judicial interpretations of such prohibitions have rendered them ineffectual at preventing government favoritism.<sup>17</sup>

Implementation of the anti-favoritism norm, therefore, has been left by default to legislation, such as the Federal

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15. See, e.g., *CLEAN v. State*, 928 P.2d 1054 (Wash. 1996) (holding a statute granting funding for the construction of a baseball stadium constitutional).

16. See, e.g., CAL. CONST. art. XVI, § 6 (“The Legislature shall have no . . . power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . .”); N.Y. CONST. art. 7, § 8 (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . . .”); WASH. CONST. art. VIII, § 5 (“The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.”), § 7 (“No county, city, town or other municipal corporation shall hereafter give any money, or property . . . to or in aid of any individual, association, company or corporation . . .”).

17. See, e.g., *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (adopting a standard requiring something more than a mere “public purpose” to justify a school district’s release of a teachers’ union president from teaching duties while continuing to pay part of her salary, the court holds that the something more standard is satisfied where services provided to the district by the teacher were “not so inequitable and unreasonable” as to “amount[ ] to an abuse of discretion”).

For an excellent discussion of the origins and subsequent decline of “gift of public funds” prohibitions in state constitutions, see Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003), who writes, “Judicial interpretations have effectively nullified the public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors.” See Dale F. Rubin, *Public Purpose in the Northwest: A Sinkhole of Judicial Interpretation - The Case for Alternatives in the Delivery of Public Services and the Granting of Subsidies*, 32 IDAHO L. REV. 417, 419 (1996) (“[Court review is a] judicial rubber stamp of approval for virtually any expenditure which a public body label[s as being] for a ‘public purpose.’”).

False Claims Act,<sup>18</sup> state false claims acts,<sup>19</sup> and state whistleblower statutes.<sup>20</sup> This effectively leaves the foxes in charge of the henhouse.<sup>21</sup>

This Article suggests that the anti-favoritism norm is an integral part of the fabric of our system of jurisprudence, that it was unfortunately and improperly ensnared in the anti-*Lochner* reaction against searching judicial review of economic legislation in the middle of the twentieth century, and that it is once more reemerging as a critical part of our system of justice.

The Article proposes an anti-favoritism legal doctrine to implement the rejuvenated anti-favoritism norm. The proposed doctrine allows the government to assert a claim for recapture of public funds or assets transferred to private parties for private purposes in violation of the anti-favoritism norm. The doctrine further provides that if the government does not recapture such funds or assets on its own, then private parties can assert a claim to force the government to do so.

The proposed legal doctrine provides for consideration of the following factors:

1. Do the circumstances warrant judicial intervention as a threshold matter?
  - a. Is the subsidy *substantial* or trivial in amount?
  - b. Does the government receive significant monetary *consideration* in return?

18. 31 U.S.C. §§ 3729-3733 (Supp. 2009). See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 29:9 (False Claims Act).

19. See, e.g., CAL. GOV'T CODE §§ 12650-12655 (Supp. 2010); FLA. STAT. § 68.081 (2009); OKLA. STAT. tit. 62, §§ 372-373 (2009); TENN. CODE ANN. § 4-18-101 (2009). See generally Taxpayers Against Fraud Educ. Fund, The False Claims Act Legal Center, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Apr. 24, 2010) [hereinafter *Qui Tam* Actions] (listing state False Claims Acts with *qui tam* provisions).

20. See, e.g., FLA. STAT. §68.087(8) (2009); 740 ILL. COMP. STAT. § 175/1 (2009). See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 10:68 (state whistleblower statutes).

21. Cf. Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 522 (2009) (stating that House and Senate earmark rules are “self-referential,” in that they are “rules adopted by the foxes to govern administration of the henhouse”).

c. Do the circumstances demonstrate that the transaction is *in good faith, not on a preferential favoritism* basis?

2. Is there a controlling public purpose?

a. Is there a *public purpose at all*?

b. Does the recipient's activity have *independent public significance*, analogous to a highway, railroad, canal, or other "instrumentality of commerce," such that the subsidy involved is unquestionably for a "public purpose"?

c. Is the public purpose inherent in the recipient's activity the *controlling public purpose* for the subsidy, such that the benefit to the private party is merely *incidental*?

3. Is the subsidy indispensable for the private party's achievement of the public purpose?

That is, is the subsidy necessary because otherwise, the operation of the free market would *threaten the very existence* of the private enterprise involved or completely block the private party from achieving the public purpose?

4. Are there factors indicating that *public control* over the subsidy in the hands of the private party is retained by the government, such as: (a) defeasible title, such that the private party will lose title to the asset if it is no longer used for the purpose for which eminent domain was exercised; (b) an enforceable agreement by the private party to use the asset for the purpose for which eminent domain was exercised; or (c) continuing public agency oversight and direction of the use of the asset by the private party for the purpose for which eminent domain was exercised?

Part I of this Article sets out the historical and philosophical foundations of the anti-favoritism norm in American property law. Part II focuses on the evolution of the anti-favoritism norm in the United States Supreme Court. That part explains how the anti-Lochnerism movement improperly caused the Court to simultaneously retreat from the anti-favoritism norm, but that in recent cases the Court has once more rejuvenated the anti-favoritism norm.

Part III describes the federal and state constitutional foundations for a legal doctrine that will implement the rejuvenated anti-favoritism norm. Part IV sets out the substantive content of the proposed anti-favoritism legal

doctrine and explains its operation. Part V addresses potential issues regarding the proposed doctrine.

## I. HISTORICAL AND PHILOSOPHICAL FOUNDATIONS OF THE “ANTI-FAVORITISM” NORM

### A. *Kings Can Play Favorites*

Kings traditionally combined public interest and royal self-interest, an idea best captured by the dictum of King Louis XIV of France that “l’etat cest Moi.”<sup>22</sup> Thus, the king was free to favor anyone with the property under his control or with regulatory edicts making some richer than others at his whim.<sup>23</sup> It was not until the Magna Carta, signed by King John on June 15, 1215, at Runnymede, England that the king at least nominally became subject to the law.<sup>24</sup> How, exactly, subject to the law the king’s decisions to favor some and not others remained a problem.

### B. *Qui Tam*

“The phrase *qui tam* is a shortened version of the Latin phrase ‘qui tam pro domino rege, quam pro se ipso in hac parte sequitur,’ meaning ‘who prosecutes this suit as well for the king, as for himself.’”<sup>25</sup> A *qui tam* action allowed a

22. This translates into, “The State, it is I.” See Michael J. Kelly, *Can Sovereigns Be Brought to Justice? The Crime of Genocide’s Evolution and the Meaning of the Milosevic Trial*, 76 ST. JOHN’S L. REV. 257, 323 (2002).

23. For a discussion of the status of English kings as both sovereigns and property owners, see 1 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 511 (2d ed. 1968), who writes, “The king has a body corporate in a body natural and a body natural in a body corporate.” See 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 468 (3d ed. 1923) (“[That] the king might be seized of land in right of crown or otherwise [is a recognition of a] difference between the person and the office of the king.”).

24. Kelly, *supra* note 22, at 323 (referring to the Magna Carta as “first crack in [the] wall” of royal sovereign immunity from suit). See generally A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* (rev. ed. 1998) (1964).

25. 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*160. For a history of *qui tam* in England and the United States, see *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 774-77 (2000). See generally SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 7, § 29:9 (discussing *qui tam* concept).

private individual to bring an action to recover assets that belonged to the king, while at the same time recovering a bounty for doing so.<sup>26</sup>

1. *Common Law Qui Tam*. *Qui tam* proceedings began as avenues for plaintiffs to get access to royal courts by alleging that not only were the plaintiff's private interests involved, but that the interests of the king were at stake as well.<sup>27</sup> By the fourteenth century, as royal courts became generally available to resolve purely private disputes, the need for common law *qui tam* fell away.<sup>28</sup> By the period immediately before and after the framing of the United States Constitution, common law *qui tam* was dying out altogether, both in England and in the Colonies as well.<sup>29</sup>

2. *Federal Qui Tam Statutes*. *Qui tam* became available, if at all, only through statutes. In an ironic twist, while common law *qui tam* had required the assertion that the king's interest was at stake, statutory *qui tam* instead required the assertion that a private interest was at stake in order to satisfy the requirement of standing. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>30</sup> the Court held that although a *qui tam* relator did not have standing based on his quest for a bounty in the form of a portion of the government's recovery, the relator nevertheless had "representational standing," as a partial assignee of the government's claim for recovery.<sup>31</sup>

The Federal False Claims Act (FCA),<sup>32</sup> originally enacted in 1863, is the federal statute most specifically directed toward providing a federal statutory claim for the recovery by the government of federal funds or assets inappropriately conferred on private parties for private

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26. See generally Petty, *supra* note 8; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81.

27. Note, *supra* note 26, at 85.

28. *Id.*

29. *Stevens*, 529 U.S. at 776.

30. *Id.*

31. *Id.* at 773-74 & n.4 ("More precisely, we are asserting that a *qui tam* relator is, in effect, suing as a *partial* assignee of the United States.").

32. 31 U.S.C. §§ 3729-33 (Supp. 2009). For discussion of the Federal False Claims Act, see SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 29:9 (*qui tam* actions).

purposes.<sup>33</sup> The Act provides that any person who causes false claims to be presented to the United States for payment or who forms a conspiracy to have false claims paid by the United States is liable for treble damages and civil penalties.<sup>34</sup> The federal government itself may bring the action against the false claimant,<sup>35</sup> or a private person may do so by bringing a *qui tam* action “for the person and for the United States Government” against the alleged false claimant “in the name of the Government.”<sup>36</sup>

There are significant limitations on the availability of *qui tam* actions under the Federal False Claims Act. Although claims under the Act can be brought against local governments for federal money improperly paid,<sup>37</sup> states are not proper defendants because they are not “persons” under the Act.<sup>38</sup> In addition, there are formidable substantive and procedural obstacles that a claimant must overcome. Substantively, for a false claim to be actionable under the

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33. Three other federal *qui tam* statutes, all also enacted over 100 years ago, are still in effect. 25 U.S.C. § 81 (2006) (providing cause of action and share of recovery against a person contracting with Indians in an unlawful manner); 25 U.S.C. § 201 (2006) (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292(b) (2006) (providing cause of action and share of recovery against a person falsely marking patented articles); *see also* 18 U.S.C. § 962 (2006) (providing for forfeiture to informer of share of vessels privately armed against friendly nations, but not expressly authorizing suit by informer); 46 U.S.C. § 80103 (2006) (providing for forfeiture to informer of share of vessels removing property from “a wreck, the sea, or a key or shoal” off the Florida coast to foreign nations, but not expressly authorizing suit by informer); Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801 (2006 & Supp. 2008) (creating administrative remedies for false claims and granting enforcement powers to the United States only).

34. 31 U.S.C. § 3729 (Supp. 2009).

35. 31 U.S.C. § 3730(a) (2006).

36. 31 U.S.C. § 3730(b)(1) (2006). For an excellent discussion of the history of *qui tam* actions in England and America, *see Stevens*, 529 U.S. at 774-77, where the Court discusses how there is no evidence that common law *qui tam* actions were ever allowed in America.

37. *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119 (2003) (holding local governments are “persons” for purposes of *qui tam* actions under the False Claims Act).

38. *Stevens*, 529 U.S. at 765 (holding that states are not “persons” for purposes of *qui tam* actions under the False Claims Act).

FCA, it must have been made “knowingly.”<sup>39</sup> The Act defines “knowing” and “knowingly” to mean:

that a person, with respect to information—(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and require no proof of specific intent to defraud.<sup>40</sup>

Procedural constraints on claimants under the Act are also myriad. A claimant under the Act must file the initial complaint *in camera*, where it remains under seal for at least sixty days while the government investigates the allegations and decides whether it wants to intervene in the action.<sup>41</sup> If the United States chooses not to intervene, the claimant may continue alone on behalf of the government.<sup>42</sup> The United States nonetheless retains significant control over the action. The government is entitled to monitor the proceedings,<sup>43</sup> to have discovery stayed if discovery would interfere with its investigation or prosecution of a criminal or civil suit arising out of the same facts,<sup>44</sup> and retains the right to intervene at any time for good cause.<sup>45</sup> Further, the *qui tam* action “may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”<sup>46</sup>

3. *State Qui Tam Statutes.* *Qui tam* actions are similarly available under state false claims acts<sup>47</sup> or whistleblower statutes,<sup>48</sup> but claimants are strictly limited in regard to

39. 31 U.S.C. § 3729(a)(1).

40. *Id.* § 3729(b)(1).

41. *Id.* § 3730(b)(2).

42. *Id.* §§ 3730(b)(4)(B), 3730(c)(3).

43. *Id.* § 3730(c)(3) (codifying that the United States may require service of copies of all pleadings and deposition transcripts).

44. *Id.* § 3730(c)(4).

45. *Id.* § 3730(c)(3).

46. *Id.* § 3730(b)(1).

47. *See, e.g.*, CAL. GOV'T CODE §§ 12650-12655 (2009); FLA. STAT. § 68.081 (2009); OKLA. ST. tit. 62, §§ 372, 373 (2009); TENN. CODE ANN. § 4-18-101 (2009). *See generally Qui Tam Actions, supra* note 19.

48. *See, e.g.*, FLA. STAT. § 68.087(8) (2009); 740 ILL. COMP. STAT. 175/1-8 (2009). *See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, supra* note 7, § 10:68 (state whistleblower statutes).

such actions. For example, in *Scachitti v. UBS Financial Services*,<sup>49</sup> the court held that *qui tam* actions under the Illinois Whistleblower Reward and Protection Act were validly pursued only as long as they were used to support the attorney general's constitutional duties rather than usurping them. Thus, the court held, *qui tam* plaintiffs could only bring actions under the statute as long as the attorney general retained authority to control the litigation, with the power to settle or dismiss the lawsuit without the *qui tam* plaintiff's consent—even when the attorney general had declined to intervene in the action.<sup>50</sup>

Similarly, in *State ex rel. Wright v. Oklahoma Corp. Commission*,<sup>51</sup> the court noted that “[t]he *qui tam* interest of taxpayers is . . . limited to that created by the *qui tam* statute.”<sup>52</sup> In that case, the party allegedly improperly favored by the government brought a pre-emptive declaratory judgment action in which the *qui tam* petitioners then sought to intervene. The court noted that petitioners were required to show that the declaratory judgment action was insufficient to determine the *qui tam* claim before they could intervene.<sup>53</sup>

### C. Public Trust Doctrine

Government transfers on a favored basis cannot occur at all if the particular asset involved is subject to the “public trust” doctrine.<sup>54</sup> That doctrine provides that there are certain resources that belong to all and cannot be owned by any individual.<sup>55</sup> The Magna Carta incorporated the concept by prohibiting the king from conveying property rights to

49. *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544 (Ill. 2005).

50. *Id.* at 560-61.

51. *State ex rel. Wright v. Okla. Corp. Comm'n*, 2007 OK 73, 170 P.3d 1024.

52. *Id.* at 2007 OK ¶ 58, 170 P.3d at 1041.

53. *Id.*

54. See generally Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 345-48 (2009) (reviewing the history of the public trust doctrine).

55. THE INSTITUTES OF JUSTINIAN 90 n.1 (Thomas Collett Sandars trans., 7th ed. 1956) (1905) (“By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”).

waterways subject to the public trust.<sup>56</sup> The king had no power to transfer such assets.<sup>57</sup>

As a result of the American Revolution, the states succeeded to the king's interest and obligations with respect to assets subject to the public trust doctrine in this country.<sup>58</sup> The federal government also acts as a steward for certain assets subject to the public trust. Through the Commerce Clause, navigable waters are deemed to be "the public property of the nation" under the control of Congress for the purpose of ensuring navigation.<sup>59</sup>

The public trust doctrine requires states and the federal government to recapture assets subject to the public trust that have been transferred into private hands.<sup>60</sup> Although the doctrine originally applied only to lands covered by ocean tide waters, it has been extended to apply to submerged lands in the Great Lakes as well.<sup>61</sup> The California Supreme Court has further extended the doctrine to water rights in Mono Lake, holding that the rights to use

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56. MAGNA CARTA art. 23 (1215).

57. *Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1842) (holding that such attempted transfers do not pass title to the assets subject to the public trust, which "still remains in the crown[,] for the benefit and advantage of the whole community").

58. *St. Clair County v. Lovington*, 90 U.S. 46, 68 (1874) ("By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them.").

59. *Gilman v. City of Phila.*, 70 U.S. 713, 724-25 (1865) ("Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose . . . For this purpose they are the public property of the nation . . ."); see also *United States v. Rands*, 389 U.S. 121, 122-23 (1967) ("The Commerce Clause confers a unique position upon the Government in connection with navigable waters. . . . This power to regulate navigation confers upon the United States a 'dominant servitude' . . . [which] extends to the entire stream bed below ordinary high-water mark.").

60. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (N.D. Ill. 1892) ("A grant [of assets subject to the public trust doctrine] . . . has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").

61. *Id.* ("It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.").

water from the lake previously appropriated to the City of Los Angeles can, in effect, be redefined to make sure they are consistent with the state's public trust interest.<sup>62</sup>

The principal difficulty with the public trust doctrine is that only assets subject to the public trust are covered. Although it has been judicially extended to cover freshwater lakes and streams, it is still restricted to navigable waters and adjacent shores. Moreover, judicial extensions of the doctrine are subject to subsequent legislative curtailment. For example, the Idaho Supreme Court in 1995 followed the California approach in extending the state's public trust doctrine to cover previously appropriated water rights,<sup>63</sup> but the next year, the Idaho Legislature passed a statute restricting the state's public trust doctrine to its traditional scope as a limitation on the state's power to transfer lands underlying navigable waters.<sup>64</sup>

#### D. *Special Assessments*

A special assessment is a charge imposed on property owners within a limited area to help pay the cost of a local infrastructure improvement which specially benefits property within that area.<sup>65</sup> A municipal project to widen the street on a residential cul-de-sac is an example of a local infrastructure improvement that might be undertaken through a special assessment. Special assessment projects are authorized and conducted pursuant to statutory authority.<sup>66</sup>

A determination that an improvement is needed begins the special assessment process.<sup>67</sup> A proposed allocation of

62. *Nat'l Audobon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 728 (Cal. 1983) ("The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.").

63. *See Selkirk-Priest Basin Ass'n v. State*, 899 P.2d 949 (Idaho 1995); *Idaho Conservation League v. State*, 911 P.2d 748 (Idaho 1995).

64. IDAHO CODE ANN. §§ 58-1201 to 58-1203 (2008).

65. *See, e.g., Covell v. City of Seattle*, 905 P.2d 324 (Wash. 1995). *See generally* SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 7, ch. 24 (special assessments).

66. SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 7, § 24:1.

67. *Id.* § 24:20.

estimated costs must then be prepared. That requires two steps: first, determination of the zone of private benefit; second, apportionment of costs among individual properties in the zone of private benefit.<sup>68</sup> The first step, “[d]etermining the zone of private benefit consists of: (1) identifying the total private benefits produced by an improvement; and (2) locating the properties upon which such benefits are conferred.”<sup>69</sup> “[I]dentification of the total private benefits requires: (a) characterization of the effects of an improvement as ‘benefits’, and (b) further categorization of such benefits as either ‘public’ (general) or ‘private’ (local).”<sup>70</sup> “[L]ocation of the properties upon which private benefits are conferred, is usually not difficult once those benefits are identified . . . [since such] benefits may be geographically defined . . . as physically adjacent to the improvement or functionally defined, usually accruing to users of the improvement.”<sup>71</sup>

The second step, apportioning the costs among properties

in the zone of private benefit, requires: (1) determination of the total public and private benefits produced by a special assessment improvement, (2) identification of the components of the improvement which produced the public benefits and those that produced the private benefits, (3) determination of the costs of the public-benefit-producing components (public costs) of the improvement and of the costs of the private-benefit-producing components (private costs) and (4) apportionment of the private costs of the improvement among the properties in the zone of private benefit.<sup>72</sup>

A special assessment becomes an obligation and lien on the land upon which it is imposed.<sup>73</sup>

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68. *Id.* § 24:22.

69. *Id.* § 24:23.

70. *Id.*

71. *Id.*

72. *Id.* § 24:24.

73. *City of Kenner v. Jo, Inc.*, 541 So. 2d 311, 315 (La. App. 1989) (holding that a special assessment is against land); *Coral Gables v. Bd. of Pub. Instruction*, 313 So. 2d 92, 95 (Fla. App. 1975). See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 24:36.

If the costs imposed on a property owner exceed the benefits conferred by a special assessment project, then the owner will be compensated.<sup>74</sup> Conversely, if the benefits exceed the costs, the owner will be charged a special assessment.<sup>75</sup>

Special assessments implement the anti-favoritism norm by preventing transfers of public funds to private parties on the favored basis that such parties happen to own land in the special assessment project area. Such recapture, however, is restricted to limited-area public infrastructure improvement projects that characterize special assessment projects.

#### E. "Betterment" Recapture Legislation

Legislation in England seeking to recapture land value increases from public projects or favorable zoning has been around since about 1662.<sup>76</sup> In 1879, Henry George recommended enactment of legislation imposing a comprehensive land tax to recapture all increment in land

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74. SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 24:23 (discussing imposition of harms by special assessment project which may require compensation to owners).

75. *Id.* § 24:23 (stating that costs must be properly apportioned); *id.* § 24:30 (stating that apportionment of costs may be challenged by owners).

76. EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, MINISTRY OF WORKS & PLANNING, FINAL REPORT 107, Cmd. 6386 (1942) [hereinafter UTHWATT REPORT] (referring to Act 13 & 14 Chas. II, ch. 2). *But see* MADELYN GLICKFELD ET AL., WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 491 (Donald G. Hagman & Dean J. Misczynski eds., 1978) [hereinafter GLICKFELD ET AL.] (noting that Charles Haar, in his book *Land Planning in a Free Society* is skeptical that the statute referred to by the Uthwatt Report was indeed a betterment statute). *See* CHARLES HAAR, LAND PLANNING IN A FREE SOCIETY 95-96 (1952).

The concept of betterment recapture is known by various other names, including "recoupment," *see* Andrew Berchard, *A Comparison of U.S.-Canadian Excess Condemnation, Expropriation and Property Taking*, 9 IN PUB. INT. 3, 9 (1989) (advocating a "niceness" approach to recoupment of excess private gains), and "social increment" recapture, Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 364-65 (1990) (arguing that minimal judicial review under the Due Process Clause should be used to ensure social increment is recaptured).

value resulting from the general growth of industrial society.<sup>77</sup>

The Tower Bridge Southern Approach Act of 1895 provided for such “betterment” recapture, but only applied to enhancements caused by a public infrastructure project.<sup>78</sup> England’s “Housing, Town Planning, etc. Act 1909” provided for the recapture of land value increases due to zoning.<sup>79</sup> The 1909 Act was replaced by a 1947 statute.<sup>80</sup> Problems in administering both statutes proved insurmountable, however, and they were never fully implemented.<sup>81</sup>

Broader legislation has been suggested which would cover enhancements which would cover all government conduct that enhances private property—not just zoning or public infrastructure construction—as well as enhancements to all types of private property interests—not just to land value.<sup>82</sup> Although land value taxation schemes

77. H. GEORGE, *PROGRESS AND POVERTY* (1879); see also Richard A. Jaffe & Stephen Sherrill, Comment, *Grand Central Terminal and the New York Court of Appeals: “Pure” Due Process, Reasonable Return, and Betterment Recovery*, 78 COLUM. L. REV. 134, 157 (1978) (discussing Henry George proposal, the authors note that, “[t]he basic concept of betterment recovery is by no means new”).

The ideas of Henry George have met with mixed reviews. Compare John J. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 416-17 (1977) (criticizing betterment recapture theory of Henry George as akin to the “search for Holy Grail”), with Samuel B. Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 HARV. L. REV. 265 (1888) (supporting Henry George’s ideas and defends them against early criticisms).

78. GLICKFELD ET AL., *supra* note 76, at 491 (discussing the London County Council (Tower Bridge Southern Approach) Act, 1895).

79. *Id.* at 492-93.

80. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51 (Eng.).

81. GLICKFELD ET AL., *supra* note 76, at xxxi-xliv; see also Margaret H. Clune, *Government Hardly Could Go On: Oregon’s Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275, 303-04 (2006) (reviewing the history of English betterment legislation).

82. See, e.g., Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 357 n.269 (2003) (recommending that instead of using regulatory mechanisms like open-space zoning, setback requirements, or prohibitions on development, the federal government should protect coastal floodplains by more readily engaging in direct condemnation—and factoring in the deduction of publicly-added value from the compensation amounts, which would make the use of direct condemnation more economically viable for the government); Eric

have been enacted in various countries and states in the United States, they have also “had a history of nonenforcement and repeal.”<sup>83</sup>

## II. THE EVOLUTION OF THE “ANTI-FAVORITISM” NORM IN THE UNITED STATES SUPREME COURT

The United States Supreme Court enforced the anti-favoritism norm throughout the nineteenth and early twentieth centuries and it continues to do so in the twenty-first century. The path of such enforcement, however, has been neither smooth nor straight.

The Court’s anti-favoritism jurisprudence during the nineteenth and early twentieth centuries prohibited the unfair enhancement of individual property rights at the expense of the public by Congress and state legislatures because it was not a “public purpose.”<sup>84</sup> The Court based such jurisprudence on the Federal Due Process Clauses<sup>85</sup> and the Taxing and Spending Clause.<sup>86</sup> That period in anti-favoritism jurisprudence, however, eventually overlapped with the *Lochner* era,<sup>87</sup> from 1905 through 1937,<sup>88</sup> when the

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Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999) (defining windfalls as “economic gains independent of work, planning, or other productive activities that society wishes to reward”).

83. Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 123-25 (1981) (citing examples in England, Canada, New Zealand, Australia, California, Hawaii, and Vermont).

84. The classic case illustrating the approach is *Citizens’ Savings & Loan Ass’n v. City of Topeka*. 87 U.S. (20 Wall.) 655, 664 (1874) (“To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.”).

85. U.S. CONST. amend. V; *id.* amend. XIV, § 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”).

86. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

87. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating restriction on bakers’ working hours).

Court engaged in activist judicial review of economic legislation under the Due Process and Contract Clauses.<sup>89</sup>

In both anti-favoritism and Lochnerism jurisprudence, the Court second-guessed governmental determinations, but in dramatically different ways. Anti-favoritism decisions closely examined whether the objective sought to be attained was actually “public”—in advance of the general welfare—or instead “private”—serving only to enhance the purely private interest of a single person or a small group of beneficiaries of government largesse. Lochnerism decisions closely examined whether the objective sought to be attained—even if public—would detrimentally affect private property rights.<sup>90</sup> The net result of Lochnerism was to protect private property rights at the cost of invalidating state and federal legislation aimed at pulling the country out of the Great Depression.<sup>91</sup> The private property rights-protection dimension of Lochnerism simultaneously raised the separate and distinct “counter-majoritarian difficulty,” whereby unelected judges overrode the determinations of elected political bodies and officials, action viewed as illegitimate in a democratic society.<sup>92</sup>

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88. The *Lochner* era is generally understood to have ended with the Court’s decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law). The *Lochner* approach was firmly rejected in *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding state statute making it a misdemeanor for any person to engage in the business of debt adjusting except as an incident to the lawful practice of law).

89. Ellen Frankel Paul, *Freedom of Contract and the “Political Economy” of Lochner v. New York*, 1 N.Y.U. J. LAW & LIB. 515, 520 (2005) (considering, after examining the criticisms against Lochnerism, whether a strategy “more explicitly tied to the Constitution’s political heritage . . . could have produced a more viable, consistent, and defensible ground upon which to stake liberty of contract under the Due Process Clauses of the Fifth and Fourteenth Amendments”).

90. See generally *id.*

91. See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 949-52 (1999) (describing the standard critique of Lochnerism as overriding New Deal legislation under the banner of private property rights protection).

92. The phrase “counter-majoritarian difficulty,” is a shorthand expression of the problem of reconciling judicial review of political branches by unelected judges in a democratic society. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our

When faced with a political threat from President Franklin Delano Roosevelt to pack the court with additional Justices who would support his New Deal legislation,<sup>93</sup> the Court abandoned activist judicial review seeking to protect economic interests under the Due Process and Contract Clauses. At the same time it abandoned Lochnerism, however, the Court also retreated from its enforcement of the anti-favoritism norm.<sup>94</sup>

In retreating from enforcing the anti-favoritism norm at the same time that it retreated from enforcing the protection of private property rights, however, the Court threw out the baby with the bathwater. Both settings involved second-guessing of government determinations, but they were categorically different. Lochnerism protected *individual property owners* by invalidating supposedly unfair *burdens* on private property, whereas the anti-favoritism norm protected *the general public* by invalidating unfair conferral of *benefits* that did not advance the general welfare. Lochnerism thus was aimed at protecting individual property owners; anti-favoritism is aimed at protecting the public.

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system.”). For classic explorations of the counter-majoritarian difficulty, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); and Charles E. Cohen, *The Abstruse Science: Kelo, Lochner, and Representation Reinforcement in the Public Use Debate*, 46 DUQ. L. REV. 375 (2008). Lochnerism, therefore, is just a specific instance of the counter-majoritarian difficulty.

93. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938) (describing the famous “switch in time that saves nine”); see also John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 974-75 (1986) (recounting court packing plan, whereby FDR, frustrated by the United States Supreme Court’s tendency to invalidate New Deal legislation, and bolstered by his landslide victory in the 1936 presidential election, proposed to add an additional justice for each sitting justice over seventy years of age who did not retire). *But see* THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 312 (David J. Danelski & Joseph S. Tulchin eds., 1973) (“The President’s proposal had not the slightest effect on our decision [in the *West Coast Hotel Company v. Parrish* case].”).

94. For an excellent discussion of the simultaneous end of the Lochner era and of the enforcement of the anti-favoritism norm in United States Supreme Court jurisprudence, see *State ex rel. Ohio County Commission v. Samol*, 275 S.E.2d 2, 8 (W. Va. 1980) (Neely, C.J., concurring).

The Court's simultaneous retreat from both Lochnerism and enforcement of the anti-favoritism norm is not surprising, since both entail second-guessing of government determinations. However, since Lochnerism is individual-property-protecting, whereas the anti-favoritism norm is general-public-protecting, the latter still warrants heightened judicial protection, even if the former may not. It is therefore not surprising that the anti-favoritism norm has reemerged. Paradoxically, it has come back in the form of the Court's interpretation of the Federal Just Compensation Clause.

The private property-protection dimension of Lochnerism and the general public-protection dimension of the anti-favoritism norm coincide in Just Compensation Clause jurisprudence. In *Pennsylvania Coal v. Mahon*,<sup>95</sup> the Court held that a state statute prohibiting the mining of coal underneath residences without leaving sufficient support for the surface of the land was a prohibited taking without just compensation of the coal owner's right to mine the coal. Justice Holmes, writing for the majority, emphasized that the lawsuit involved "a single private house,"<sup>96</sup> thereby noting that the statute took property from the coal company only to turn around and give it to the individual surface residential landowner. In *Pennsylvania Coal*, therefore, both the private-property-protection and the anti-favoritism norms were violated.<sup>97</sup>

The Court confirmed the continued vitality of the anti-favoritism norm in its 2005 decision *Kelo v. City of New London*.<sup>98</sup> *Kelo* arose in the context of private-benefit expropriations, where private property is taken from party A to be given to party B.<sup>99</sup> In that setting, the private

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95. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

96. *Id.* at 413.

97. Ironically, Justice Holmes, who wrote the majority opinion in *Pennsylvania Coal*, also wrote the famous dissent in *Lochner*, in which he warned that the Supreme Court's invalidation of a New York statute that limited the working hours of children constituted an improper intrusion by the Court into the legislative arena. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

98. *Kelo v. City of New London*, 545 U.S. 469 (2005).

99. *Id.* at 477 ("[T]he sovereign may not take the property of A for the sole purpose of transferring it to another private party B . . . [in order to confer] a private benefit on [party B].").

property protection norm is closely tied—indeed is followed immediately by—enforcement of the anti-favoritism norm. The Court held that when private property is expropriated from an individual owner to be given to another private party, such expropriation-plus-transfer-to-another-private party must be in furtherance of a “public purpose.”<sup>100</sup> As in *Pennsylvania Coal*, the Court again enforced both the private-property-protection norm and the anti-favoritism norm.

*Kelo*, however, did not discuss how the rejuvenated anti-favoritism norm would operate *outside* the direct condemnation setting.<sup>101</sup> In the direct condemnation setting involved in *Kelo*, the government expropriates assets from a particular owner, thereby triggering the private-property-protection norm of whether the expropriated party is being subjected to unfair burdens. When the government then seeks to transfer that particular asset to a specific or identifiable private party, the anti-favoritism norm question is thereby posed, and asks whether such subsequent transfer would violate the anti-favoritism norm. However, when the asset involved in a government transfer on a favored basis is *not* concurrently acquired by the government from a private party through direct condemnation, but is instead already owned by the government—and is proposed to be transferred to a specific or identifiable private party—the anti-favoritism norm is triggered independently of whether the expropriation from a private party was appropriate. The anti-favoritism question is the same, it just arises outside the setting of a governmental direct condemnation.

The anti-favoritism norm is similarly independently triggered in the other four settings identified in the Introduction of this Article: (1) the award of a government

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100. *Id.* at 480 (“The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.”).

101. “Direct condemnation” involves government acquisition of property through a forced purchase from the property owner, where the government purposefully intends such expropriation and fully expects to pay just compensation for it. MARTINEZ, GOVERNMENT TAKINGS, *supra* note 7, § 1:2. By comparison, “non-direct condemnation” involves governmental conduct other the government’s conscious and purposeful exercise of the power of eminent domain, but whereby property is detrimentally affected to such an extent that the owner is entitled to a remedy for the harm. *Id.* § 1:3.

contract on a favored basis; (2) government award of a grant on a favored basis; (3) governmental regulatory conduct, such as zoning, on a favored basis; and (4) government favoritism in the siting of public infrastructure projects. Indeed, the *Kelo* direct condemnation setting could be viewed as merely a subset of one or more of these.<sup>102</sup>

The question in each of the four settings in which the anti-favoritism norm is triggered then is starkly posed: are the interests of *the general public* being violated by unfair conferral of *benefits* that do not advance the general welfare? Since that question was not involved in *Kelo*, the Court did not elaborate on the outlines of a broader anti-favoritism jurisprudence.<sup>103</sup> The foundations and elements of anti-favoritism doctrine, however, can be identified from federal and state constitutional law.

### III. CONSTITUTIONAL FOUNDATIONS OF “ANTI-FAVORITISM” LAW

#### A. *Federal Constitution*

The Federal Constitution’s Taxing and Spending, Just Compensation, and Due Process Clauses impose an anti-favoritism obligation on federal, state, and local governments to recapture public funds or assets transferred

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102. Thus, the anti-favoritism norm would be triggered in each of the following direct-condemnation-followed-by-transfer-to-private party-scenarios: (1) the subsequent transfer of the expropriated asset is awarded on a favored contract basis, perhaps as a sole-source (as in the Storyrock example); (2) the subsequent transfer of the expropriated asset is awarded on a favored basis on a favored basis by grant; (3) the subsequent transfer of the expropriated asset is awarded on a favored basis, accompanied by favorable zoning to allow the transferee to exploit the use of the asset on a disproportionately favorable basis compared with surrounding property; (4) the subsequent transfer of the expropriated asset is accompanied by favored siting of a public infrastructure projects, such as the construction of a stadium which will provide the transferee with customers to enhance the commercial use of the transferred asset.

103. For an excellent discussion of the failure of the Court to develop a workable standard of judicial review of such legislative action, see Daniel S. Hafetz, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 *FORDHAM L. REV.* 3095 (2009). Popular resentment might have been motivated by a more general change in attitudes toward the accumulation of great wealth as a desirable moral principle. Cf. Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 *IND. L.J.* 119 (1994).

to private parties for private purposes.<sup>104</sup> Moreover, those Clauses empower private parties to bring claims against the government to enforce that obligation when the government fails to do so.

1. *Taxing and Spending Clause.* The Taxing and Spending Clause of the United States Constitution provides that the federal government has the “Power To lay and collect Taxes, Duties, Imposts and Excises. . . and provide for the common Defence and general Welfare of the United States.”<sup>105</sup>

In *Citizens' Savings & Loan Ass'n v. City of Topeka*,<sup>106</sup> the city had issued \$100,000 worth of bonds expressly for the purpose of using the proceeds to make a donation to a private party, the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, to encourage the company to establish a factory to build iron bridges in the city. The principal and interest on the bonds was to be raised by levying taxes on the city residents for that purpose. A state statute purportedly authorized the issuance of the bonds and the imposition of the taxes to repay them. Citizens' Savings & Loan Association of Cleveland, a bondholder, brought an action against the city to require payment of the interest on the bonds. The Court held that the statute was invalid because it purported to authorize the taking of “the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.”<sup>107</sup> Accordingly, the Court held, that the bonds were invalid contracts because they were promised to

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104. These Clauses apply to federal, state, and local governments. *E.g.* *Green v. Frazier*, 253 U.S. 233, 238-39 (1920) (holding that the Fourteenth Amendment's Due Process Clause imposes substantive content of Taxing and Spending Clause prohibitions on state and local governments); *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that the Just Compensation Clause applies to the states through the Fourteenth Amendment's Due Process Clause); *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U.S. (20 Wall.) 655 (1874) (finding that the Taxing and Spending Clause applies to cities).

105. U.S. CONST. art. I, § 8, cl.1.

106. 87 U.S. (20 Wall.) 655.

107. *Id.* at 659.

be repaid through taxation, and there was no authority to tax for such private purposes.<sup>108</sup>

The Court's opinion in *Citizens' Savings* implemented the "natural law" conception that "each branch of government is confined to a sphere of authority defined by the nature and function of that level and by the inherent rights of citizens."<sup>109</sup> That conception, seeking to protect the free market from governmental interference, subsequently was overturned as Lochnerism. The Court's decision in *Citizens' Savings*, however, also implemented the anti-favoritism norm as a concern independent from the goal of protection of the free market. The anti-favoritism norm seeks protection of the public's interest in preventing the allocation of public funds or assets to private parties for purely private purposes. That conception was not affected by counter-Lochnerism.

2. *Just Compensation Clause.* The Federal Just Compensation Clause also provides a foundation for imposing an obligation on the federal government to seek the return of property conferred on private parties for private purposes.

There are two direct condemnation settings in which the anti-favoritism norm comes into play. The first major setting, in which the government keeps expropriated land for its own use, has two subsets. In the first subset, in which the government expropriates an entire parcel of land owned by a property owner, it has long been established that the government need only pay compensation that is "just," in that the property owner is left no worse off—but also no

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108. *Id.* at 660. See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 26:3 n.20 (collecting cases differentiating between permissible public expenditures for public purposes and impermissible public expenditures for private purposes).

109. The initial mention in the United States Supreme Court of the "natural law" conception that government does not have the power to take property from A to give it to B arose in dictum in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). See *State ex rel. Ohio County Comm'n v. Samol*, 275 S.E.2d 2, 8 (W. Va. 1980) (Neely, C.J., concurring) (discussing the natural law conception as underlying the *Citizens' Loan* decision); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 560-61 (2d ed. 1988) (discussing *Calder v. Bull* as the most notable early example of the concept that governmental authority is subject to unwritten limits that preserve private autonomy).

better off—than if the condemnation had not occurred.<sup>110</sup> Thus, the prohibition of over-compensation implements the anti-favoritism norm: the owner should not be singled out for preferential treatment at the taxpayers' expense based on the fortuity that his or her land was taken.

In the second subset, in which the government expropriates on a portion of a parcel of land owned by a property owner, (known as “partial takings”), is equally well established that the property owner should not be over-compensated. Thus, “special benefits” accruing to the remainder of the parcel of land as a result of the government's acquisition of the part taken are deducted from the amount of compensation awarded for the value of the part taken.<sup>111</sup> Acknowledging that the deduction for special benefits is protective of the public, and hence implements the anti-favoritism norm, the United States Supreme Court noted in *Bauman v. Ross*: “To award him less would be unjust to him; to award him more would be unjust to the public.”<sup>112</sup>

The second major direct condemnation setting also has two subsets. In this major setting, the government purports to exercise direct condemnation against a private property owner, (whether to take all or part of the landowner's parcel of land), only to turn around and convey the land so taken to another private party. If such re-transfer is for the latter's private purposes, then such action is a condemnation for a “private use” and will be enjoined.<sup>113</sup> The net effect is the same as if the government were forced to re-acquire the asset involved: the conferral of the benefit to the private party must be retrieved—although the asset must then be returned to the private party from whom it was initially expropriated. Again, the anti-favoritism norm is implemented.

110. *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“He is entitled to receive the value of what he has been deprived of, and no more.”).

111. *See id.* at 573 (“The power of congress, exercising the right of eminent domain...to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, does not appear ever to have been judicially questioned . . .”).

112. *Id.* at 574.

113. *See, e.g., Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

There is a close relationship between the prohibition against the use of taxing and spending powers for private purposes and the Just Compensation Clause prohibition against takings for private purposes. The Court in *Citizens' Sav. & Loan Ass'n v. City of Topeka*,<sup>114</sup> noted that taxation had been previously used to repay bonds issued to assist railroads, but that in those settings, the public interest in transportation and the highly regulated character of railroads might have warranted the conclusion that such taxation was for a public purpose.<sup>115</sup> The Court went on to invalidate the issuance of \$100,000 worth of bonds used to make a donation to a private bridge company seeking to encourage the company to build a factory in the city. The Court held that levying taxes on the city residents to repay the bonds was for a private, not a public purpose, and hence violated the implied limitation on the power to tax that it be used for a public purpose.

The reasoning of the Court in *Citizens' Savings* is remarkably similar to the Court's reasoning in *Kelo v. City of New London*<sup>116</sup> on the question of "public use" in the eminent domain setting. In *Kelo*, the issue was whether private property was being appropriated by the government for transfer to a private party for private purposes. All the justices agreed that turning formerly private property over to railroads was a quintessential "public use."<sup>117</sup> But the justices disagreed on whether turning formerly private property over to private developers for the building of a mall was for a "public use." The majority held that to be on the "public use" side of the scale, the government's condemnation action must have originated from a development plan which: (1) is comprehensive in character; (2) was adopted after thorough deliberation; and (3) was not adopted to benefit a particular class of identifiable individuals.<sup>118</sup>

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114. 87 U.S. (20 Wall.) 655, 660-61 (1874).

115. *Id.* at 661-62.

116. 545 U.S. 469 (2005).

117. *Id.* at 477 ("[T]he condemnation of land for a railroad with common-carrier duties is a familiar example [of use by the public.]); *id.* at 496 ("[T]he government may take their homes to build a road or a railroad.") (O'Connor, J., dissenting).

118. *Id.* at 478, 483-84 (majority opinion).

Justice Kennedy's separate concurrence, the "swing" vote, would have exercised more skeptical judicial review, noting:

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.<sup>119</sup>

Justice O'Connor, dissenting, would have held that governments may take land to transfer it to private developers only if "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . ." <sup>120</sup> Thus, she would have prohibited the condemnation involved in *Kelo*.

Taxation constitutes a quintessential taking of private property from citizens. General taxation involves fungible money, however, not unique land, and is imposed generally across the tax base, not on particular landowners. Similar concerns about transferring formerly private property to private parties arise, however, in the exercise of tax power to obtain money that will then be given to private parties for a private purpose. Thus, it should call for at least the level of scrutiny that the majority in *Kelo* demanded in the direct condemnation setting, or perhaps skeptical rational basis judicial review, as Justice Kennedy suggested.<sup>121</sup>

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119. *Id.* at 491 (Kennedy, J., concurring).

120. *Id.* at 500 (O'Connor, J., dissenting).

121. For discussion of the relation between the prohibition against takings for private use and the prohibition against the conferral of public funds or assets for private purposes, see Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 68-69 (1986).

3. *Due Process Clause.* In *Green v. Frazier*,<sup>122</sup> the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause imposes the substantive content of the Taxing and Spending Clauses on state and local governments. The Court noted that although the Due Process Clause "contains no specific limitation upon the right of taxation in the States, . . . it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes."<sup>123</sup>

### B. *State Constitutions*

State constitutions contain numerous provisions which embody the anti-favoritism norm. Such provisions have historically been interpreted to confer both an individual right and a governmental obligation to seek recapture of public funds or assets transferred to private parties in violation of the anti-favoritism norm.<sup>124</sup>

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122. *Green v. Frazier*, 253 U.S. 233, 238-39 (1920).

123. *Id.* at 238.

124. Article IV, section 4, of the Federal Constitution, known as the "Guaranty Clause," provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. Federal courts, however, have no power to enforce the clause, since the United States Supreme Court has held that the issue is a nonjusticiable political question. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that women may be denied the vote), *abrogated by* U.S. CONST. amend. XIX.

State courts, on the other hand, do have power to enforce the Guaranty Clause. *Kadderly v. City of Portland*, 74 P. 710, 719-20 (Or. 1903) (lawmaking by voters through initiative is compatible with Guaranty Clause requirement of republican form of government because initiated laws "may be amended or repealed by the Legislature at will" and "are subject to the same constitutional limitations as other statutes"); *see Ex parte Wagner*, 95 P. 435 (Okla. 1908); *In re Pfahler*, 88 P. 270, 273 (Cal. 1906) (initiative power in city charter for strictly local affairs is consistent with Guaranty Clause).

The Guaranty Clause is not a viable basis for the implementation of the anti-favoritism norm, however, for two fundamental reasons. First, there is a problem with determining exactly what the Clause means. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (rethinking the "counter-majoritarian difficulty" entailed in judicial review of popular legislation); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 U.C.L.A. L. REV. 1735, 1746-48 (1998); Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against*

1. *State Taxing and Spending Clauses.* State constitutional taxing and spending clauses have been interpreted by state courts to impose prohibitions against the expenditure of public funds or assets to private parties for private purposes.

For example, the Idaho Supreme Court has held that an appropriation intended to compensate private parties injured through tortious acts of the state's agents, and for which the state otherwise would have been immune, was invalid as an improper gift of public property to private persons for private purposes. The court noted:

It is well recognized that the power to levy and collect taxes and the power to appropriate public funds are coexistent and rest upon the same principle. If a tax cannot be levied for a particular purpose, no appropriation of public money can be made for such purpose. [citation omitted] It is also well settled that taxes cannot be levied and collected, or an appropriation made, for other than a public purpose or in furtherance of the public welfare, and that any attempt so to do is a violation of the implied limitations of the Constitution.<sup>125</sup>

Similarly, the Oklahoma Supreme Court noted that the taxing and spending powers are inherently limited to public, not private, purposes.<sup>126</sup> The Oklahoma Legislature had passed a resolution purporting to order the state highway commission to pay a claim of \$5000 to Mrs. Bland for the death of her husband, a former employee of the highway department, whose death resulted from an injury he suffered while attempting to push a state-owned automobile. The court noted that the resolution, not being a statute, was of no force and effect,<sup>127</sup> and moreover, that even as a statute, it would have been an invalid special law. However, the court based its decision on the central point

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*Homosexuality*, 72 OR. L. REV. 19, 22-24 (1993); David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon, U'Ren and "The Oregon System,"* 67 TEMPLE L. REV. 947, 957 (1994). Second, there are more specific clauses in state constitutions that provide a more solid foundation for implementation of the anti-favoritism norm, as discussed next in this Article.

125. State *ex rel.* Walton v. Parsons, 80 P.2d 20, 22 (Idaho 1938).

126. Hawks v. Bland, 9 P.2d 720 (Okla. 1932).

127. This part of the opinion was subsequently overruled in *Board of Commissioners of Marshall County v. Shaw*, 182 P.2d 507, 513 (Okla. 1947), which held that a resolution sufficed as a state law.

that such a payment would have been a “gift of public money for private purposes.”<sup>128</sup> The court explained:

To justify any exercise of [the power to tax and spend] . . . the expenditure . . . must be for some public service, or some object which concerns the public welfare. This principle . . . is fundamental and underlies all government that is based on reason rather than force.<sup>129</sup>

An early case interpreting the state’s taxing and spending provisions as inherently limited to public, not private, purposes is *McClelland v. State ex rel. Speer*,<sup>130</sup> in which the state sued Wayne Township for a writ of mandate to enforce a state statute requiring the town to lay a tax to reimburse one William H. Speer for money he lost while serving as trustee for the township. In denying the writ, and voiding the statute, the Indiana Supreme Court concluded that “[r]aising the funds for that purpose from the various taxpayers of Wayne township, by tax, would be in effect taking the property of one man to bestow it upon another. . . . [T]he donation . . . cannot be regarded as a public use of money.”<sup>131</sup>

Similarly, in *Beach v. Bradstreet*,<sup>132</sup> the Connecticut Supreme Court similarly invalidated a state statute purporting to authorize a payment to widows and orphans of the Civil War, on the ground that such payments constituted taxation and spending for private purposes. Perhaps exaggerating somewhat, the court concluded that “[a] public purpose is indispensable to a legitimate exercise of the taxing power; though the people support the government, the government should not support the people.”<sup>133</sup>

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128. *Hawks*, 9 P.2d at 722.

129. *Id.* (internal quotation marks and citations omitted).

130. 37 N.E. 1089 (Ind. 1894).

131. *Id.* at 1092-93 (citing cases from numerous other states for the same proposition).

132. 82 A. 1030 (Conn. 1912).

133. *Id.* at 1035 (quoting *Kingman v. Brockton*, 26 N.E. 998 (Mass. 1891)).

2. *State Just Compensation Clauses.* State just compensation clauses also impose obligations on state and local governments to seek the return of property conferred on private parties for private purposes. As under the Federal Just Compensation Clause, there are two major direct condemnation settings in which the anti-favoritism norm is implemented.

In the first major setting, the government expropriates property from an owner and the government keeps the property for its own use. In the first subset of that setting, if an entire parcel of land is taken, the property owner is entitled only to “just” compensation to make the owner whole, and not more.<sup>134</sup> In the second subset of that setting, it has long been established under state just compensation clauses, as under the Federal Just Compensation Clause, that when the government has only taken part of a parcel of land, the special benefits accruing to the remainder as a result of the government’s acquisition of the part taken are deducted from the amount of compensation awarded for the value of the part taken.<sup>135</sup> For example, in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*,<sup>136</sup> the Town required a subdivision developer to improve abutting streets that did not meet specified standards, even though the improvements were not necessary to accommodate the impact of the subdivision. The Texas Supreme Court held that the requirement constituted a taking because the Town had failed to show the required improvements bore any relationship to the impact of the Stafford Estates development on the abutting road or on the Town’s roadway system as a whole. However, the court further held that in determining whether a taking had occurred, the costs of the exaction (in the form of the improvements required) had to be reduced by the “special benefits” accruing to the landowner from the improvements of the road by the Town.<sup>137</sup> A special benefit is one going beyond the general

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134. See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 21:31 (discussing just compensation).

135. See generally *id.* § 21:39 (discussing partial takings).

136. 135 S.W.3d 620 (Tex. 2004).

137. *Id.* at 627-28.

benefit supposed to diffuse itself from the improvement through the municipality.”<sup>138</sup>

In the second major direct condemnation setting, where a state or local government purports to exercise direct condemnation against a private property owner, only to turn around and convey the same asset to another private party for the latter’s private purposes, such action is a condemnation for a “private use” that will be enjoined.<sup>139</sup> The net effect is the same as if the government were forced to re-acquire the asset involved: the conferral of the benefit to the private party must be retrieved—albeit the asset must then be returned to the initial private party from whom it was taken. Nevertheless, the anti-favoritism norm is implemented.

3. *State Due Process Clauses.* Since the United States Supreme Court’s decision in *Green v. Frazier*,<sup>140</sup> in which the Court held the Federal Due Process Clause prohibits state and local governments from transferring public funds or assets to private parties for private purposes, state courts have seen little need to develop their state due process clauses to impose a similar prohibition. Thus, state courts have uniformly held that even if state law (constitutional or statutory) allowed such exercise of power, it would be invalid under the Federal Due Process Clause.<sup>141</sup> Moreover,

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138. *Id.* at 627 n.34 (quoting *Haynes v. City of Abilene*, 659 S.W.2d 638, 641-42 (Tex. 1983)). The Court held, however, that the Town had failed to prove such benefits had indeed accrued.

139. *See, e.g.*, *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769-70 (Mich. 2004); *Bailey v. Myers*, 76 P.3d 898, 899 (Ariz. Ct. App. 2003); *see also* *Everson v. Bd. of Educ. of Ewing Twp.*, 44 A.2d 333, 337 (N.J. 1945) (holding that a statute authorizing school district boards of education to contract for transportation of children to and from schools, including other than public schools, is not unconstitutional as providing expenditure of public moneys for private purposes and construing New Jersey Just Compensation Clause, N.J. CONST. art. I, ¶ 20).

140. *Green v. Frazier*, 253 U.S. 233, 238-39 (1920).

141. *See, e.g.*, *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885 n.2 (Fla. 1980) (“However, a project to be financed by bonds payable from taxation, undertaken by the state or a political subdivision, and serving a purely private purpose, would be impermissible under the due process clause of the Fourteenth Amendment to the United States Constitution.”), *rev’d on other grounds*, *Strand v. Escambia County*, 992 So.2d 150 (Fla. 2008); *People ex rel. City of Urbana v. Paley*, 368 N.E.2d 915, 918, (Ill. 1977) (“It has long been held that the imposition of a tax for other than a public purpose constitutes a

there are numerous uniquely state constitutional prohibitions on government favoritism that make development of state due process clauses for the same purpose unnecessary.

4. *Uniquely State Constitutional Prohibitions.* States are truly the social and political “laboratories” of our democracy where new and different ways of addressing major social problems are developed.<sup>142</sup> Although state constitutional law scholars have long argued that litigants should look to state constitutions as sources of substantive rights independent of federal rights, only the most adventuresome or imaginative seem to take advantage of the opportunity.<sup>143</sup>

In the field of anti-favoritism law, it is particularly important to look to state constitutional law, since states were the first to confront the problem of favoritism by government in a systematic way through specific state constitutional prohibitions.

a. *Gifts of Public Funds or Assets for Private Purposes.* State constitutions contain express prohibitions against gifts of public funds or assets for private purposes.<sup>144</sup> Most

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violation of the due process clause of the fourteenth amendment to the Federal Constitution, and of the Illinois Constitution of 1870.” (citations omitted)).

142. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

143. See, e.g., JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 1.03 (4th ed. 2006) (discussing why the logical and tactical reasons to rely on state law and state constitutions for the development of federal rights).

144. See, e.g., CAL. CONST. art. XVI, § 6 (“The Legislature shall have no power to . . . make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever[.]”); N.Y. CONST. art. 7, § 8 (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking[.]”); WASH. CONST. art. VIII, § 5 (“The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.”); *id.* § 7 (“No county, city, town or other municipal corporation shall hereafter give any money, or property . . . to . . . any individual, association, company or corporation . . .”); *Sturgeon v. County of L.A.*, 84 Cal. Rptr. 3d 242, 248 (Ct. App. 2008) (“By its terms, article XVI, section 6 prevents the Legislature from making or authorizing any gift of public funds for private purposes.”); *Teachers Ass’n, Cent. High Sch. Dist. No. 3 v. Bd. of Educ., Cent. High Sch. Dist. No. 3, Nassau County*, 312 N.Y.S.2d 252 (App. Div. 1970) (holding that a state constitutional prohibition against the gift of public funds or

courts, however, uphold the transfer of public funds or assets to private parties as long some minimal public purpose is served.<sup>145</sup> Some courts go further and require that even if a minimal public purpose is served, there must be adequate consideration provided to the government in exchange.<sup>146</sup> One reported decision focused narrowly on the adequacy (or lack thereof) of the consideration received by the government, in which a 99-year lease of 110 acres of city-owned land was conveyed for \$1 a year to a private entity for construction of a major league baseball spring training complex.<sup>147</sup>

Alaska, uniquely among the states,<sup>148</sup> has a constitutional prohibition against payment of public funds

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assets for private purposes was intended to curb raids on public purse for benefit of favored individuals or enterprises furnishing no corresponding benefit or consideration to state); *CLEAN v. State*, 928 P.2d 1054, 1061 (Wash. 1996) (holding that two provisions, although worded differently, have identical meaning and manifest purpose is to prevent public funds from being used to benefit private interests where the public interest is not primarily served).

145. See SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 3.12 n.16 (collecting cases on state constitutional prohibition against local government gifts of public funds); *id.* § 21:7 n.11 (collecting cases on state constitutional prohibition against local government conveying public property to private party without adequate consideration).

146. See, e.g., *CLEAN*, 928 P.2d at 1061-62 (using a two-prong test where the court first asks if expenditure is for fundamental purpose of government, and if so, then no improper gift of public funds is found; if not, court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body; court finds construction of a baseball stadium was not a “fundamental purpose of the government,” but that since stadium would be owned by the state, no improper gift was involved); see also *Price Dev. Co., v. Orem City*, 2000 UT 26, ¶ 26, 995 P.2d 1237, 1246 (holding that a public entity must receive adequate consideration in exchange for public property transferred to private parties and construing UTAH CONST. art XIV, §3 and UTAH CODE ANN. § 10-8-2). “‘Adequate consideration’ means that the . . . government must show that there is a clear ‘present benefit that reflects . . . fair market value’ for whatever is given by the . . . government.” *Id.* ¶ 26, 995 P.2d at 1247 (citations omitted).

147. *City of Tempe v. Pilot Properties, Inc.*, 527 P.2d 515 (Ariz. Ct. App. 1974) (reversing summary judgment for city on ground that material issue of fact existed regarding whether city’s 99-year lease of 110 acres of city-owned land for major league baseball spring training complex at annual rental of \$1 per year was adequate consideration).

148. Other states prohibit “support” to private schools. See, e.g., MO. CONST. art. IX, § 8.

“for the direct benefit of any . . . private educational institution.”<sup>149</sup> In *Sheldon Jackson College v. State*,<sup>150</sup> the Alaska Supreme Court held that the state’s tuition grant program, which awarded Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student’s private college and the tuition charged by a public college in the same area, not to exceed \$2500 annually, violated the “direct benefit” prohibition.<sup>151</sup>

The Alaska Supreme Court set out four criteria to guide interpretation of the constitutional prohibition. First, the court noted that as long as private schools were not singled out for special treatment, provision of generally available services such as police and fire protection, although benefitting private schools, were not prohibited.<sup>152</sup> Second, the court noted that the nature of the use to which the public funds were put mattered: if the use of the money was for the essentially private functions of the schools, it was prohibited; but if the use of the money benefited the general health and welfare of the students, it was allowed.<sup>153</sup> Significantly, the court noted in passing that a “substantial question” was raised about a prior decision in which the court had invalidated a statute enabling private school children living far from schools to ride public school buses at public expense.<sup>154</sup> Presumably, such assistance would fall on the *general health and welfare*, not the *essentially private function* side of the line and would be permitted.

Third, the court emphasized that a court must consider the relative magnitude of the benefit conferred: “[a] trivial, though direct, benefit may not rise to the level of a constitutional violation, whereas a substantial, though arguably indirect, benefit may.”<sup>155</sup> Fourth, the court noted that merely channeling the funds through an intermediary

149. ALASKA CONST. art. VII, § 1.

150. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

151. Ariz. Stat. § 14.40.776(a); *Sheldon Jackson College*, 599 P.2d at 128.

152. *Sheldon Jackson College*, 599 P.2d at 130.

153. *Id.*

154. *Id.* at 130 n.20.

155. *Id.* at 130.

did not remove the “direct benefit” character of an improper expenditure.<sup>156</sup>

Applying these factors, the Alaska Supreme Court held: (1) private colleges and their students were singled out for benefits under the tuition grant program; (2) although education in general is a general health and welfare concern, the tuition program specifically targeted private school education, which is by definition a private activity; (3) in 1975-76, Sheldon Jackson College alone received approximately six hundred thousand dollars through the program, clearly a substantial amount; and (4) although the funds were nominally paid to the students, each student was merely a conduit for provision of the funds to the private colleges.<sup>157</sup>

The Alaska Supreme Court’s approach—requiring something more than an after-the-fact rationalization that governmental transfer of public funds or assets to private parties serves a public purpose—is by far in the minority.<sup>158</sup> The overwhelming majority rule is that the *gift of public funds* prohibition across the country is a paper tiger.<sup>159</sup>

b. Lending of Public Credit. The lending of public credit occurs when the government agrees to place itself in the position of a surety.<sup>160</sup> When the government places itself in the position of a surety in regard to private debts or obligations, however, there is the potential for violating the anti-favoritism norm. Instead of a transfer of public funds or assets, such lending of public credit pledges the government’s funds to satisfy private debts contingent on the failure of the private party to pay them. Since no public money is immediately spent, governments are tempted to

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156. *Id.* at 130-31.

157. *Id.* at 131-32.

158. *See generally* Briffault, *supra* note 17, at 910-15 (reviewing demise of “public purpose” requirement as a brake on state and local government transfer of public funds or assets to private parties).

159. *See id.* at 914 (“Today, state constitutional ‘public purpose’ requirements are largely rhetorical.”).

160. *See generally id.* at 910-15; Arthur P. Roy, Comment, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise - A Suggested Analysis*, 41 U. COLO. L. REV. 135, 140-43 (1969); *see also* SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 25:7 (restrictions on the lending of public credit).

over-commit the public treasury by acting as surety for more and more contingent obligations. During the nineteenth century state and local governments engaged in widespread lending of public credit to private railroads and other private enterprises, with disastrous consequences: when many such private enterprises failed during the depression of 1837, the government—and thus the taxpayers—were liable for huge debts.<sup>161</sup> As a result, almost all state constitutions were amended to prohibit the lending of public credit for private purposes.<sup>162</sup>

“Lending of credit” prohibitions,<sup>163</sup> like their close cousins, the prohibitions against the subscription to private stock,<sup>164</sup> are practically meaningless as constraints on government conduct favoring private parties for purely private purposes. If the government is not in a position of a surety, no “lending of credit” is involved.<sup>165</sup> Thus, loans or outright grants are not covered.<sup>166</sup> Even if the government has placed itself in the position of a surety for a private party, if the government’s purpose is to invest for its own benefit, rather than for the benefit of the private party, the prohibition does not apply.<sup>167</sup>

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161. See Briffault, *supra* note 17, at 910-15 (2003) (discussing disastrous consequences of ill-advised lending of credit by state and local governments).

162. See, e.g., IDAHO CONST. art. VIII, § 2 (“The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation.”); UTAH CONST. art. VI, § 29, cl. 1 (“Neither the State nor any county, city, town, school district, or other political subdivision of the State may lend its credit . . . in aid of any private individual or corporate enterprise or undertaking.”). See generally Roy, *supra* note 160, at 136-37 n.8 (citing forty-five state constitutional provisions).

163. See *Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 409-11 (Utah 1986).

164. See generally Briffault, *supra* note 17, at 910-15; Roy, *supra* note 160, at 135-36.

165. See *Utah Tech.*, 723 P.2d at 409-11.

166. See, e.g., *id.* (stating that loans or grants are not “lending of credit”).

167. See, e.g., *id.* at 409-10 (citing that in ninety years, the court reviewed thirteen cases, and found none of them violated the “lending of credit” prohibition in Utah); see also SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 7, § 25:7 (collecting cases illustrating that courts overwhelmingly defer to government determination that a public purpose is involved, and thus no lending of public credit for private purposes).

c. Private or Special Laws or Privileges. A typical statement of the prohibition in state constitutions against the enactment of “private or special laws or privileges” is as follows: “No private or special law shall be enacted where a general law can be applicable.”<sup>168</sup> The purpose of the prohibition against private or special laws or privileges in state constitutions is to prevent singling out, of individuals or particular groups, either for detrimental treatment or for favorable treatment.<sup>169</sup> The prohibition against private or special laws or privileges is thus merely the opposite side of the same coin from the “uniform laws” requirement in state constitutions, which require that laws must be “general” in that they apply similarly to all persons who are similarly situated.<sup>170</sup>

The fundamental difficulty with “special laws” prohibitions as a source of constraints on government conduct conferring benefits on private parties for private purposes on a favored basis, however, is that courts uniformly defer to governmental identification of governmental objectives as “public” and the conferral of benefits on a particular private party as a “reasonable” means for attaining those objectives.<sup>171</sup> Thus, “special laws”

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168. UTAH CONST. art. VI, § 26. For comprehensive treatment of “special laws” provisions in state constitutions as they related to local governments and private parties, see SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, §§ 3:21-3:36.

169. *See* Wood v. Budge, 374 P.2d 516, 519 (Utah 1962) (“It is an elementary principle of justice that there should be ‘equal rights to all and special privileges to none.’” (citation omitted)); *see also* Utah Farm Bureau Ins. Co. v. Utah Ins. Guaranty Ass’n, 564 P.2d 751, 754 (Utah 1977) (“One of the purposes of the constitutional provisions prohibiting the creation or formation of corporations by special acts was to remove the danger of favoritism and corruption in the creation of corporations.”).

170. *See, e.g.*, UTAH CONST. art I, § 24 (“All laws of a general nature shall have uniform operation.”); ABCO Enters. v. Utah State Tax Comm’n, 2009 UT 36, ¶ 15, 211 P.3d 382, 387 (Utah 2009) (“[Standard for ‘uniform laws’ compliance entails]: (1) whether the classification is reasonable; (2) whether the objective of the legislative action is legitimate; and (4) whether there is a reasonable relationship between the legislative purpose and the classification.”); *see also* People v. W. Fruit Growers, 140 P.2d 13, 19-20 (Cal. 1943) (holding that a law is “general” where it applies equally to all persons in a class, and is “special” where it confers particular privileges or imposes peculiar burdens upon similarly situated persons).

171. *See, e.g.* Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo., 950 S.W.2d 854, 859 (Mo. 1997) (applying rational basis test when reviewing

prohibitions do not seriously implement the anti-favoritism norm.

#### IV. THE SUBSTANTIVE CONTENT OF “ANTI-FAVORITISM” LEGAL DOCTRINE

Although the anti-favoritism norm is present throughout American property law, there is no effective anti-favoritism legal doctrine to implement it. Implementation requires formulation of an appropriate standard of judicial review which will embody anti-favoritism legal doctrine.

##### A. *Accountability in the Form of a Standard of Judicial Review*

“Accountability” is “the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”<sup>172</sup> Once the anti-favoritism norm is established as a public value, the critical condition to its realization is accountability.<sup>173</sup> The fundamental problem with current anti-favoritism legal doctrine, however, is that it does not hold governments accountable: transfers of public funds or assets to private parties are, for all practical purposes, conclusively presumed to be for public purposes. By default, reliance is placed on the mythical accountability of governmental

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legislation for compliance with special laws prohibition); *State v. Mason*, 78 P.2d 920, 924 (Utah 1938) (“If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional.”); *Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd.*, 659 S.E.2d 561, 568 (Va. Ct. App. 2008) (“The special laws prohibitions recognize ‘the necessity for and the reasonableness of classification are primarily questions for the legislature. If any state of facts can be reasonably conceived, that would sustain it, that state of facts at the time the law was enacted must be assumed.’” (quoting *Jefferson Green Unit Owners Ass’n v. Gwinn*, 551 S.E.2d 339, 345 (2001))).

172. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005).

173. See MARTHA MINOW, PARTNERS, NOT RIVALS, PRIVATIZATION AND THE PUBLIC GOOD 150 (2002).

officials through elections.<sup>174</sup> But why would the populace be up in arms when public funds or assets are given to private persons, (indeed, one of their own), for private purposes?<sup>175</sup> Instead, as Martha Minow has noted, “society needs more accessible and reliable measures to know when enterprises are effective, what safeguards are in place against abuse, waste and fraud—and whether they are working.”<sup>176</sup>

Judicial review of government conduct consists of a court’s appraisal of whether a governmental agency or official has acted properly. Judicial review is thus an oversight process to ensure accountability.<sup>177</sup> In order to avoid the charge of Lochnerism, however, a standard of judicial review to implement the anti-favoritism norm must be carefully crafted to avoid judicial overreaching into the legislative realm.

The criteria used by courts to evaluate government conduct are contained in *standards of judicial review*.<sup>178</sup> Standards for judicial review of government conduct may be viewed as having a *quantitative* dimension—what materials a reviewing court will examine—and a *qualitative* dimension—how skeptically the court will consider such materials. Both of those dimensions must be considered in

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174. Rubin, *supra* note 172, at 2073 (“The first [myth] is . . . that elected officials—legislators and the chief executive—are accountable to the people . . .”). For a critical reappraisal of judicial deference to legislative fact-finding, see Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 1 (2009), who proposes a paradigm of selective independent judicial review of social facts, whereby independently review the factual foundation of legislation that curtails traditional and emerging fundamental rights.

175. For an amusing study of the obliviousness of people in the face of important choices, see RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 3, 5 (2009), who suggest that what people need are “choice architects” who will organize “the context in which people make decisions” in order “to steer people’s choices in directions that will improve their lives.”

176. MINOW, *supra* note 173, at 166.

177. See generally Rubin, *supra* note 172, at 2073 (“Accountability can be roughly defined as the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”).

178. See generally SANDS, LIBONATI & MARTINEZ, *LOCAL GOVERNMENT LAW*, *supra* note 7, § 16:29.50 (suggesting framework for considering standards of judicial review of local government and administrative action).

characterizing a standard of judicial review as “deferential” or “activist.” For example, a “deferential” standard of judicial review’s *quantitative* dimension would not require the government to tender any materials to a court to justify the government’s conduct; the existence of such justifications would be presumed to exist—or could be imagined by a court to exist—after the fact. Similarly, the *qualitative* dimension of a “deferential” standard would be expressed generally as requiring only a “rational relationship” between means and ends. On the other hand, an “activist” standard of judicial review’s *quantitative* dimension would require the government to tender materials documenting that the objective the government was seeking to achieve. And the *qualitative* dimension of an “activist” standard would require the government to show it was seeking a “compelling,” not merely “legitimate” governmental interest, and that the means used was “necessary” to its accomplishment.

*Deferential* standards of judicial review impose minimal constraints on government conduct.<sup>179</sup> *Activist* standards of

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179. *Hancock Industries v. Schaeffer*, 811 F.2d 225, 237-38 (3d Cir. 1987) is illustrative. With respect to identification of the ends sought to be achieved by the governmental action:

The court accepts at face value contemporaneous declarations of the legislative purposes, or, in the absence thereof, rationales constructed after the fact, unless ‘an examination of the circumstances forces [the court] to conclude that they could not have been a goal of the legislation.’ Thus, where ‘there are plausible reasons for [the [governmental]] action, [the court’s] inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.’

*Id.* at 237 (citations omitted). Similarly, with respect to the relation between the objective and the means, the court continued:

[W]hen a court inquires whether the legislative action is rationally related to achievement of the statutory purposes, it need not decide whether the facts available to the legislature are more likely than not true . . . . If the legislative determination that its action will tend to serve a legitimate public purpose ‘is at least debatable,’ the challenge to that action must fail as matter of law.

*Id.* at 238 (citations omitted). When a court inquires whether the legislative action is rationally related to achievement of the statutory purposes, it need not decide whether the facts available to the legislature are more likely than not

judicial review, in contrast, are characterized by a judicial tendency to second-guess the governmental entity involved. Since the end of Lochnerism, whether deferential or activist judicial review is triggered in any given situation depends on the nature of the individual interests affected by the governmental conduct in question: economic rights trigger deferential judicial review; fundamental rights or suspect traits trigger activist review.<sup>180</sup> Implementation of the anti-favoritism norm, therefore, depends on formulation of an appropriate standard of judicial review that will embody anti-favoritism legal doctrine.

B. *Anti-favoritism Doctrine—Individual Rights and Government Obligations*

The anti-favoritism norm is a public protection concept that transcends individual rights. However, individuals must be able to prod the government when it refuses to recapture funds or assets transferred in violation of the anti-favoritism norm.

1. *Individual Right to Seek Anti-favoritism Recapture—A Proxy Individual Right.* Individual rights traditionally protect the interests of the individuals who hold them. They

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true. As the Supreme Court explained in *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979):

In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Accordingly, it is not enough for one challenging a statute on equal protection grounds to introduce evidence tending to support a conclusion contrary to that reached by the legislature. If the legislative determination that its action will tend to serve a legitimate public purpose "is at least debatable," the challenge to that action must fail as matter of law. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

180. *Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) (distinguishing between activist judicial review, when fundamental rights or suspect traits are involved, and deferential review, when property rights are affected by governmental conduct).

do not define governmental power, but instead address the subsequent question of establishing limitations on governmental power.<sup>181</sup> In contrast, the individual right to be free from governmental conduct in violation of the anti-favoritism norm is held as a proxy for defining the power of governments.

When the government exercises direct condemnation to appropriate private property, the condemned owner has the individual right to assert a claim that the particular appropriation is not for a “public use.” In *Kelo v. City of New London*,<sup>182</sup> the majority held that to be a “public use,” governmental appropriation of private land that is subsequently conveyed to another private party must have originated from a development plan which: (1) is comprehensive in character; (2) was adopted after thorough deliberation; and (3) was not adopted to benefit a particular class of identifiable individuals.<sup>183</sup> This constituted a fairly *deferential* standard of judicial review. Although the burden was placed on the government, that burden could be satisfied fairly easily through the preparation of a carefully prepared record. In contrast, Justice Kennedy in his separate concurrence would have exercised a more skeptical judicial review, noting that a reviewing court should examine “the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.”<sup>184</sup>

By comparison, some state courts have interpreted state just compensation clauses to impose more activist standards of judicial review in the direct condemnation settings. For example, in *County of Wayne v. Hathcock*,<sup>185</sup> the Michigan Supreme Court held that a “public use” could only be shown to exist:

- (1) where ‘public necessity of the extreme sort’ requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is

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181. SANDS, LIBONATI & MARTINEZ, STATE & LOCAL GOVERNMENT LAW, *supra* note 7, § 6 (describing “power-limitation” construct).

182. *Kelo v. City of New London*, 545 U.S. 469 (2005).

183. *See id.* at 483-84.

184. *Id.* at 491 (Kennedy, J., concurring).

185. 684 N.W.2d 765 (Mich. 2004).

selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred.<sup>186</sup>

When an expropriated property owner successfully challenges a direct condemnation as being for a non-public use, that amounts to an "anti-favoritism" recapture. Thus, such an individual right already has a built-in standard of judicial review: deferential under Federal Just Compensation law; somewhat more activist under some state just compensation provisions.

In the anti-favoritism setting, however, there may be no specific, identifiable private asset that has been expropriated by the government, as in the direct condemnation setting. The "asset" bestowed on a private party in the anti-favoritism setting—whether in the form of public funds or assets—often has been acquired by the government through taxation or other similar revenue-raising governmental activity such as public fines or fees. In the anti-favoritism setting as well, however, there is an individual right to force the government to recapture public funds or assets conferred on private parties for private purposes.

The individual right in the anti-favoritism setting is the right of autonomy—to be free from governmental conduct that benefits only private parties for their own private purposes.<sup>187</sup> The Court's opinion in *Citizens' Savings* implemented the "natural law" conception that "each branch of government is confined to a sphere of authority defined by the nature and function of that level and by the inherent rights of citizens."<sup>188</sup> While that conception sought

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186. *Id.* at 781, 783.

187. See generally Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1410-11 (1974) (discussing the evolution in American law from protection of the free market to protection of privacy and autonomy); Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483, 488 (2007) (referring to the *Citizens' Savings* case as representative of cases identifying unenumerated rights).

188. *State ex rel. Ohio County Comm'n v. Samol*, 275 S.E.2d 2, 8 (W. Va. 1980) (Neely, C.J., concurring). The initial mention of the "natural law" conception in the United States Supreme Court that government acts improperly when it "takes property from A. and gives it to B" arose in dictum in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). See TRIBE, *supra* note 109, at 560-61 (2d ed. 1988) (discussing *Calder v. Bull* as the most notable early example of the concept that

to protect the free market from governmental interference, the Court's decision in *Citizens' Savings* also implements the individual right to prevent government from exceeding its authority through conferring public funds or assets on private parties for private purposes.<sup>189</sup> That individual right is a tool whereby individuals can protect themselves and the government against the tendency of factions to capture governmental machinery—and public funds and assets—for purely private purposes.<sup>190</sup>

The Court in *Citizens' Savings* made clear that governmental use of the powers to tax and spend for *private* purposes constituted “an unauthorized invasion of *private* right . . . [one of the] rights in every free government beyond

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governmental authority is subject to unwritten limits that preserve private autonomy).

189. Laurence Tribe refers to this as a natural rights conception defined “reflexively,” in that such limits are “implied by the creation and character of the legislature itself—that is, by the specific purposes for which legislatures were created in the American states and by the means through which it was supposed that such legislatures might accomplish their objectives.” TRIBE, *supra* note 109, at 561. Another way of phrasing the constraint is to say that government simply does not have the power under the circumstances—never mind whether any particular limitation on that power arises from some other source. See SANDS, LIBONATI & MARTINEZ, *STATE & LOCAL GOVERNMENT LAW*, *supra* note 7, § 6-7 (holding that first question is whether government has “power,” second question is whether there is a “limitation” on that power).

190. See THE FEDERALIST NO. 10 (James Madison); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1350-51 (2002) (“[Madisonian notion about curtailing factions is] to prevent politically efficacious factions from commandeering the legislature to redistribute wealth and entitlements for no greater good than enriching themselves at others’ expense.”); Bell & Parchomovsky, *supra* note 8, at 553 (“In the context of [anti-favoritism], the [Madisonian] concern is that the faction will enrich itself from the public purse at the expense of the unorganized public.”); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (nothing that the Madisonian idea is to prevent interest groups that have successfully captured the political process at the expense of other interest groups or dispersed majorities to enrich themselves through “rent-seeking” behavior of enriching themselves from public funds or assets); see also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (debunking public-private division and instead proposing a conception of governance as a set of negotiated relationships whereby public and private actors negotiate over policy making, implementation, and enforcement, thereby decentralizing the decision-making process). See generally Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006).

the control of the State.”<sup>191</sup> The Court explained that such right grew “out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”<sup>192</sup> The Court explained the fundamental principle as follows:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.<sup>193</sup>

*Citizens’ Savings* thus makes clear that the individual right to enforce recapture of public funds or assets transferred in violation of the anti-favoritism norm is a proxy for the general public’s interest.

2. *Governmental Obligation to Seek Anti-favoritism Recapture.* The anti-favoritism norm obligates governmental recapture of public funds or assets transferred to private parties for private purposes. This is evident from the origins of the norm in *qui tam*, public trust, special assessment, and betterment fields, where invalidation or recapture are the available remedies. Similarly, the United States Supreme Court’s interpretation of the Taxing and Spending, Just Compensation, and Due Process Clauses all call for invalidation of the transfer as the available remedy.

Government obligation to seek anti-favoritism recapture is also evident in the interpretation of state constitutional provisions. It particularly well established in the “gift of public funds” field.<sup>194</sup> For example, in *Johns v. Wadsworth*,<sup>195</sup> the Washington Supreme Court found that a county ordinance appropriating money to a private

191. *Citizens’ Sav. & Loan Ass’n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 662, (1874) (emphasis added).

192. *Id.* at 663.

193. *Id.* at 664.

194. *See, e.g., CLEAN v. State*, 928 P.2d 1054 (Wash. 1996) (showing that declaratory and injunctive relief is the typical remedy used to enforce state constitutional prohibition against gift of public funds).

195. *Johns v. Wadsworth*, 141 P. 892 (1914).

association to put on the Western Washington Fair was an invalid gift.<sup>196</sup> Although the appropriation was for a worthy educational public purpose, the money went directly to private association, the county maintained no direct control over how the money was spent, and although any building erected with the money would belong to the county, no building was required to be constructed at all. The court affirmed a judgment enjoining the issuance and payment of the funds.<sup>197</sup>

3. *A Suggested Anti-favoritism Recapture Standard of Judicial Review.* The United States Supreme Court in *Citizens' Savings* laid out the general policies to be accomplished by a standard of judicial review in determining whether the anti-favoritism norm has been violated:

[I]n deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.<sup>198</sup>

The Court invalidated the tax to pay off \$100,000 worth of city bonds, the proceeds of which were to be used to make a donation to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company to encourage the company to establish a factory to build iron bridges in the city. The Court noted the slippery slope: "No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."<sup>199</sup>

To implement the Court's general admonitions, a standard of judicial review must implement both the

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196. *Id.* at 892-94.

197. *Id.* at 893-94.

198. *Citizens' Savings*, 87 U.S. (20 Wall.) at 665.

199. *Id.*

individual right as well as the governmental obligation to recapture funds or assets transferred in violation of the anti-favoritism norm. Since the objective is not to protect private property rights, the problem of Lochnerism is not raised. However, since it is a court, after all, that will be exercising judicial review over political bodies or officials, the “counter-majoritarian difficulty” remains. The counter-majoritarian difficulty is avoided, however, if the proposed standard of judicial review is rooted in legal principle and not in the personal preferences of judges.<sup>200</sup>

The following proposed standard of judicial review sets out the legal principles to guide judges in determining whether any particular<sup>201</sup> transfer of public funds or assets constitutes a violation of the anti-favoritism norm.<sup>202</sup>

1. Do the circumstances warrant judicial intervention as a threshold matter?

a. Is the subsidy *substantial* or trivial in amount?<sup>203</sup>

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200. See Harold Hongju Koh, *A Community of Reason and Rights*, 77 FORDHAM L. REV. 583, 600 (2008). See generally Sunstein, *supra* note 190 (arguing that open-ended constitutional provisions must be interpreted in a way that avoids imposing the naked preferences of the judges making the decisions).

201. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”); Levinson, *supra* note 190, at 1385 (“Consequently, the best framing strategy for minimizing redistributive rent-seeking might be to slice transactions narrowly, prohibiting each isolated instance of redistribution.”).

202. The proposed standard is an aggregation of the factors set out in three major sources: the United States Supreme Court’s interpretation of the Federal Just Compensation Clause in the direct condemnation setting in *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); the Michigan Supreme Court’s interpretation of the Michigan Just Compensation Clause in the direct condemnation setting in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); and the Alaska Supreme Court’s interpretation of the Alaska Constitution’s prohibition against payment of public funds “for the direct benefit of any . . . private educational institution” in *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

203. In the Storyrock example described at the outset of this article, the \$5 million subsidy would seem to be a substantial amount, even though Senator Bennett argued that it represents only .003 percent of the \$154 billion defense operating budget. Canham, *supra* note 4.

b. Does the government receive significant monetary *consideration* in return?<sup>204</sup>

c. Do the circumstances demonstrate that the transaction is *in good faith, not on a preferential favoritism basis*?<sup>205</sup>

2. Is there a controlling public purpose?

a. Is there a *public purpose at all*?<sup>206</sup>

b. Does the recipient's activity have *independent public significance*, analogous to a highway, railroad, canal or other "instrumentalit[y] of commerce," such that the subsidy involved is unquestionably for a "public purpose"?<sup>207</sup>

c. Is the public purpose inherent in the recipient's activity the *controlling public purpose* for the subsidy, such that the benefit to the private party is merely *incidental*?<sup>208</sup>

204. In the Storyrock example, the consideration returned is the provision of the DVDs to the National Guard units. *Id.* If the DVDs have a fair market value approximating \$5 million, then significant consideration is received by the government. *See* Price Dev. Co. v. Orem City, 2000 UT 26, ¶ 26, 995 P.2d 1237, 1247 (holding that public entity must receive adequate consideration in exchange for public property transferred to private parties by construing UTAH CONST. art XIV, §3 and UTAH CODE ANN. § 10-8-2). "Adequate consideration' means that the . . . government must show that there is a clear 'present benefit that reflects . . . fair market value' for whatever is given by the . . . government." *Id.* ¶ 26, 995 P.2d at 1247 (citations omitted).

205. The Storyrock earmark is clearly on a preferential favoritism basis, since the whole point of earmarks is to favor a particular constituent individual or group. *See generally* Kysar, *supra* note 21, at 534 (discussing operation of earmarks, defined as "funds bestowed by Congress upon projects or programs by specifying a narrow location or recipient, or without a competitive allocation process."); Andrew Woellner, *Spending on an Empty Wallet: A Critique of Tax Expenditures and the Current Fiscal Policy*, 7 HOUS. BUS. & TAX L.J. 201, 226 (2006) ("[T]he term 'earmark,' . . . is commonly used to mean spending projects requested by individual members of Congress which are not open to competitive bidding.").

206. In the Storyrock example, Senator Bennett argued that the DVDs would "be a moneymaker for the Defense Department, resulting in more reenlistments and therefore less spending on recruiting new guardsmen and training them." Canham, *supra* note 4. This is certainly an articulable public purpose, but little else.

207. *Hathcock*, 684 N.W.2d at 782, 784. Storyrock's production of DVDs would not seem to have significance similar to such instrumentalities of commerce.

208. *See id.* at 783. The benefit to Storyrock is clearly more than incidental. The lack of competitive bidding means the \$5 million will accrue to Storyrock

3. Is the subsidy indispensable for the private party's achievement of the public purpose?

That is, is the subsidy necessary because otherwise, the operation of the free market would *threaten the very existence* of the private enterprise involved or completely block the private party from achieving the public purpose?<sup>209</sup>

4. Are there factors indicating that *public control* over the subsidy in the hands of the private party is retained by the government, such as: (a) defeasible title, such that the private party will lose title to the asset if it is no longer used for the purpose for which eminent domain was exercised; or (b) an enforceable agreement by the private party to use the asset for the purpose for which eminent domain was exercised; or (c) continuing public agency oversight and direction of the use of the asset by the private party for the purpose for which eminent domain was exercised?<sup>210</sup>

In addition to these factors, the *quantitative* dimension of the proposed standard of judicial review would not restrict a reviewing court to the legislative record, since legislative bodies have a tendency to engage in self-validation.<sup>211</sup> State legislatures and local government

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alone, rather than to any other competitor in the market, since the whole point of earmarks is to favor a particular constituent individual or group. *See* Kysar, *supra* note 21, at 534 (“[Earmarks, by definition, are] funds bestowed by Congress upon projects or programs by specifying a narrow location or recipient, or without a competitive allocation process.”).

209. The achievement of the public purpose of encouraging reenlistments and reducing spending on recruiting and training of National Guardsmen through the award of \$5 million on a noncompetitive basis to Storyrock seems questionable. Senator Bennett only provided a small survey of 125 National Guardsmen—conducted by Storyrock in 2007—which Storyrock said showed that 63% of the guardsmen were more likely to reenlist after viewing the DVD's and 72% said their families also would be more supportive of such reenlistment after viewing the DVDs. Canham, *supra* note 4.

210. There was no indication that Congress would retain any control over the Storyrock award, other than presumably otherwise applicable federal contract procurement requirements.

211. *See generally* Borgmann, *supra* note 174, at 1 (proposing a paradigm of selective independent judicial review of social facts, whereby independently review the factual foundation of legislation that curtails traditional and emerging fundamental rights); Kysar, *supra* note 21, at 522 (discussing how the House and Senate earmark rules are “self-referential,” in that they are “rules adopted by the foxes to govern administration of the henhouse”).

legislative bodies, in particular, usually don't even bother to prepare a validating legislative record at all.<sup>212</sup>

The *qualitative* dimension of the proposed standard of judicial review would track Justice Kennedy's separate concurrence in *Kelo*, in which he proposed a more skeptical rational basis judicial review, noting:

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.<sup>213</sup>

Such a combination of factors, quantitative and qualitative dimensions would strike a proper balance between enforcement of the anti-favoritism norm and proper judicial deference to legislative and political bodies and officials.

#### V. POTENTIAL ISSUES REGARDING "ANTI-FAVORITISM" CLAIMS

This part addresses several issues that should be considered as anti-favoritism law is developed.

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In the Storyrock example, a reviewing court could examine whether the \$5 million earmark contract was awarded purely on a favoritism basis, to benefit Storyrock, rather than the public in general.

212. See John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547 (2005) (proposing that legislative bodies should be required to prepare a legislative record showing the path from evidence, to findings, to conclusions).

In the Storyrock example, no background information regarding the public purpose was provided until the story broke in the media. Neither the House nor Senate rules on earmarks require such information. See Kysar, *supra* note 21, at 537-42 (describing House and Senate earmark rules).

213. *Kelo v. City of New London*, 545 U.S. 469, 491, (2005) (Kennedy, J., concurring). In the Storyrock example, a reviewing court could skeptically consider whether, even if the public purposes of encouraging reenlistment and reducing training costs of National Guardsmen are involved, the means of awarding \$5 million to Storyrock on a noncompetitive basis is a reasonable means to accomplish that objective. Such skeptical review might conclude otherwise.

### A. *Standing*

Courts of equity historically recognized taxpayers' standing to challenge government conduct in order to vindicate the taxpayers' pecuniary interest in preventing waste or unlawful use of public funds or property, to protect the taxpayers' interest as a *cestui que* trust against breach of the public trust imposed on public funds or property, and in recognition of the public law equivalent of the stockholder's derivative class action challenging unlawful management of the affairs of a governmental entity.<sup>214</sup>

Similarly, taxpayer status should suffice to confer standing to challenge governmental conduct allegedly in violation of the anti-favoritism norm and legal doctrine put forth in this Article. The United States Supreme Court has directly addressed—and greatly encouraged—taxpayer standing in the anti-favoritism setting.<sup>215</sup> In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>216</sup> the Court held that although a *qui tam* relator asserting a claim under the Federal False Claims Act<sup>217</sup> did not have standing based on his quest for a bounty in the form of a portion of the government's recovery, the relator

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214. See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 29:7 (taxpayer's actions).

215. Outside the anti-favoritism setting—where litigants press merely a “generalized grievance” about government operations—the Court has been much less receptive to taxpayer standing. See *United States v. Richardson*, 418 U.S. 166, 174 (1974) (“[A] taxpayer may not ‘employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.’” (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring))); see also *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007) (limiting the *Flast* test for taxpayer standing); *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923) (“The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”).

216. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).

217. 31 U.S.C. §§ 3729-3733 (Supp. 2009). For discussion of the Federal False Claims Act, see SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 29:9, discussing *qui tam* actions.

nevertheless had “representational standing,” as a partial assignee of the government’s claim for recovery.<sup>218</sup>

States have developed the “remedial-preventative” distinction for taxpayer standing. Under that approach, a taxpayer seeking “remedial” relief, individual to the taxpayer, must show special individualized injury, whereas a taxpayer seeking “preventative” relief, to prevent governmental action detrimental to the general community, has standing to do so without a further showing.<sup>219</sup> For example, in *Lehigh v. Pittston Co.*,<sup>220</sup> the Maine Supreme Court held that taxpayers sought “preventative” relief in seeking to prevent the sale of a city airport to a private company.<sup>221</sup> The court held that the proposed sale was void because it was illegal as contrary to federal statutes and grant contracts under which federal funding for construction of the airport had been provided<sup>222</sup> and that it was also against public policy because the airport was still dedicated to public use.<sup>223</sup> The court distinguished an earlier case, *Eaton v. Thayer*,<sup>224</sup> in which the court had held that a suit for restitution of funds illegally paid from treasury had been termed “remedial,” but even in *Eaton*, the court had held that it had “full jurisdiction . . . but that the proceeding should be instituted by the Attorney General, not by individual [taxpayers].”<sup>225</sup> Taxpayers therefore should have standing to enforce the anti-favoritism norm in either federal or state courts.

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218. *Vt. Agency of Natural Res.*, 529 U.S. at 773 n.4 (“More precisely, we are asserting that a *qui tam* relator is, in effect, suing as a *partial* assignee of the United States.”).

219. *See*, *McCorkle v. Town of Falmouth*, 529 A.2d 337 (Me. 1987) (holding that a plaintiff challenging counting of ballots in bond election seeks preventive, not remedial relief, and therefore has standing). *See generally* SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 25:15 (remedies in the local government borrowing setting).

220. *Lehigh v. Pittston Co.*, 456 A.2d 355 (Me. 1983).

221. *Id.* at 359.

222. *Id.* at 360, 362.

223. *Id.* at 361.

224. *Eaton v. Thayer*, 128 A. 475 (Me. 1925).

225. *Id.* at 476.

### B. *Encouraging Suits and Discouraging Abuse*

Suits enforcing the anti-favoritism norm should be encouraged, but there is always the danger of abuse which must be addressed. This requires a balance between encouraging suits and discouraging abuse.

Incentives to encourage litigation in the Federal False Claims Act,<sup>226</sup> provide a useful model. Thus, a *qui tam* relator under the Act will generally be entitled to receive a share of the government's recovery, which ranges from 15% to 25% if the United States has intervened,<sup>227</sup> or from 25% to 30% if it has not.<sup>228</sup> The *qui tam* relator's award is paid only from "the proceeds" of the suit, which may consist of an adjudicated amount or a settlement amount.<sup>229</sup>

Disincentives are needed to discourage abusive practices, such as litigation purely for political reasons and without foundation. Indeed, early *qui tam* statutes in England, aptly termed "informer" statutes, were ultimately repealed because of abuses such as collusive use of *qui tam* suits to allow a wrongdoer to avoid a penalty, or the bringing of *qui tam* suits to prosecute obsolete violations.<sup>230</sup> A disincentive such as allowing the prevailing governmental entity in an anti-favoritism suit to recover its costs and attorney fees, such recovery perhaps limited to the lesser of actual costs and attorney fees or the sum of ten-thousand dollars, might suffice to prevent such abuses.<sup>231</sup>

### C. *Notice of Anti-favoritism Claim*

"Claimants seeking to sue the government in tort first must file a notice of claim that sets out the surrounding events and the relief sought."<sup>232</sup> The fundamental policy

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226. 31 U.S.C. §§ 3729-3733 (Supp. 2009).

227. *Id.* § 3730(d)(1).

228. *Id.* § 3730(d)(2).

229. *Id.* §§ 3730(d)(1), (2).

230. Note, *supra* note 26, at 89.

231. See Martinez, *supra* note 212, at 620 (proposing a similar provision to curb abuse in suits against legislation enacted without record of evidence, findings and conclusions).

232. See generally SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 7, § 27:27 (Notice of Claim); John Martinez, *Hurry Up and Wait:*

underpinning the notice of claim requirement is that governments should be given the opportunity to correct their errors before courts are called upon to intervene. Accordingly, litigants asserting anti-favoritism claims should be required to submit a "Notice of Anti-favoritism Claim" to the governmental agency or official involved before resorting to such courts for judicial adjudication. Such Notice would begin the process whereby the governmental agency or official involved determines whether the government should recapture the public funds or assets involved. Once the government has been given an appropriate time to act, such as sixty days as provided in the Federal False Claims Act,<sup>233</sup> the anti-favoritism litigant should be free to proceed to court.

#### D. *No Jury Trial*

Since an anti-favoritism action stems from the equitable concern that government refrain from conferring special benefits on private parties for private purposes, there is probably no Seventh Amendment right to jury trial.<sup>234</sup>

Moreover, in purely practical terms, the sophisticated understanding required to determine whether any particular governmental transfer indeed violates the anti-favoritism norm counsels adjudication by a judge rather than a jury. Accordingly, it would seem that adjudication of anti-favoritism claims, including purely factual questions, should be left to judges for determination, not juries.

### CONCLUSION

The anti-favoritism norm has always been a part of our system of jurisprudence. This Article suggests how a

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*Negative Statutes of Limitation in the Government Tort Liability Setting*, 19 ST. JOHN'S J. LEGAL COMMENT. 259, 261 (2005).

233. 31 U.S.C. § 3730(b)(2).

234. *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707-10 (1999) (holding that although there is no statutory right to jury trial under 42 USC § 1983, the Seventh Amendment confers the right to a jury because a § 1983 action for regulatory takings in which the plaintiff seeks damages is analogous to common-law tort actions to recover damages for governmental interference with property interests, and is therefore one "at law").

rejuvenated anti-favoritism norm can once again help patrol the boundary between government conduct for the benefit of the public and government conduct for the benefit of favored private parties.