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# Revisiting Kelo and Eminent Domain's Summer of Scrutiny

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# REVISITING *KELO* AND EMINENT DOMAIN'S "SUMMER OF SCRUTINY"

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## I. INTRODUCTION

Since the Supreme Court held that economic development satisfied the Public Use Clause of the Fifth Amendment in *Kelo v. City of New London* in June 2005,[1] it has been open season on the Court and its Justices.[2] One

* Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. I would like to thank my research assistant, James Owen, for his valuable help. Any errors are solely attributable to the author.

1. 545 U.S. 469, 484.

2. Of course, not all of the observations about *Kelo* have been negative. For commentary that viewed the decision in a positive light, see, for example, Timothy Egan, *Ruling Sets off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1, reporting that the California League of Cities supported the decision, arguing that "[r]edevelopment is sometimes the only tool a community

commentator decried the Court's ruling as "probably the most universally despised Supreme Court decision in decades"[3] while another suggested that "[t]wenty years from now, people will look back at *Kelo* the way people look back at *Roe v. Wade*."[4] With a tad bit of hyperbole, *Kelo* "threaten[ed] more homes, small businesses, and churches with destruction . . . than all the nuclear-tipped missiles the Soviet Union could have launched in a pre-emptive first strike at the height of the Cold War."[5] Deciding that the best defense against the threat posed by *Kelo* is a good offense, one Californian devised a plan to seize Justice Souter's New Hampshire farm by eminent domain and erect the "Lost Liberty Hotel" on the property.[6] Naturally, the justification for the condemnation of the property in New Hampshire was economic development.[7] Whatever the merits of the proposal to condemn Justice Souter's farm, *Kelo* is, to say the least, a controversial decision.[8]

If the difference in the number of amicus briefs submitted on behalf of the parties serves as a proxy, the negative reaction to Justice Stevens's 5-4 majority opinion[9] was predictable. Of the forty-one amicus briefs submitted to the Court, twenty-eight of them supported the petitioner, Susette

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has to jumpstart revitalization of downtrodden, blighted communities" and also noting Oakland's mayor comments that he "understand[s] the horror of urban renewal . . . . But you don't want to take away a tool that a city has to reform itself. If you did, Oakland would suffer greatly." (internal quotation marks omitted). *See also* Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at B1, *available at* 2006 WLNR 19713936 (containing comments from Florida developers regarding the reaction to the Court's decision in *Kelo*).

3. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1 (quoting Scott Bullock, who represented Susette Kelo before the Supreme Court).

4. Gary J. Andres, *The* Kelo *Backlash; Americans Want Limits on Eminent Domain*, WASH. TIMES, Aug. 29, 2005, at A21.

5. Bob Marshall, *It Can Happen Here: Law in* Kelo *Has Counterpart in Virginia Cod*, RICHMOND TIMES-DISPATCH, July 3, 2005, at E3; *see also* Matt Labash, *Evicting David Souter*, WKLY. STANDARD, Feb. 13, 2006, at 20, *available at* 2006 WLNR 2688916 (including descriptions of the holding as an "acceptable tactic to an urban planner in Leningrad, circa 1925" and the majority's conclusion "that yuppification is a valid public purpose").

6. *See* Labash, *supra* note 5. The Californian, Logan Darrow Clements, chose Justice Souter "[b]ecause his address was the easiest to find on the Internet." *Id.* (internal quotation marks omitted). Clements utilized his website to sell items "from throw pillows to camisoles." *Id.* Furthermore, Clements received a number of pun-filled suggestions for the hotel's menu, including "Chicken Seizure Salad and Revenge Soup" or "the Bader-Ginz Burger with Half-Baked Potato or the Eminent Lo Mein. Dessert might include Rocky Road to Serfdom Ice Cream . . . ." *Id.* The plan was not without critics. *See, e.g.*, Posting of Randy Barnett to The Volokh Conspiracy, http://volokh.com/archives/archive_2005_06_26-2005_07_02.shtml#1119986258 (June 28, 2005, 15:17); Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2005_06_26-2005_07_02.shtml#1120089545 (June 29, 2005, 19:59). As of this writing, the proposal to seize Justice Souter's farm appears to be headed nowhere fast. A March 14, 2006 ballot initiative regarding the project was defeated by more than a two to one margin. *See Souter Won't Get Taste of His Own Medicine*, MSNBC, Mar. 15, 2006, http://www.msnbc.msn.com/id/11827131/.

7. *See* Labash, *supra* note 5.

8. *See* Egan, *supra* note 2, at A1.

9. Kelo v. City of New London, 545 U.S. 469, 472-90 (2005).

Kelo.[10] Attempting to mollify critics, the slim *Kelo* majority pointed out that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" and reminded readers that "many States already impose 'public use' requirements that are stricter than the federal baseline."[11] Slightly later in the opinion, the majority reiterated that "[t]his Court's authority . . . extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution."[12] Justice Stevens's majority opinion sent an unambiguous message: states remained free to enact more substantial barriers to the government's ability

10. The twenty-eight briefs in support of petitioners: Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2787137; Brief of Amici Curiae the National Ass'n of Home Builders and the National Ass'n of Realtors(R) in Support of the Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787139; Brief for Reason Foundation as Amici Curiae in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787140; Brief of Amicus Curiae the Becket Fund for Religious Liberty in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787141; Brief of Amici Curiae Better Government Ass'n et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787142; Amicus Curiae Brief on the Merits of Mountain States Legal Foundation and Defenders of Property Rights in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802968; Brief of Cascade Policy Institute et al. as Amici Curiae in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802969; Brief Amici Curiae of Laura B. Kohr and Leon P. Haller, Esquire, Trustee, Owners of Lauxmont Farms, in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802970; Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802971; Brief of Amicus Curiae New London R.R. Co., Inc. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802973; Amicus Curiae Brief of the Tidewater Libertarian Party on the Merits in Support of the Appellants, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803190; Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803191; Brief Amicus Curiae of Professors David L. Callies et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803192; Brief of the Goldwater Institute et al. as Amici Curiae in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803193; Brief of Amicus Curiae King Ranch Inc. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2803448; Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811055; Brief Amici Curiae of Mary Bugryn Dudko et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811056; Brief of Amici Curiae NAACP et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811057; Brief Amici Curiae of Develop Don't Destroy (Brooklyn), Inc. & The West Harlem Business Group in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811058; Brief of Amici Curiae New London Landmarks, Inc. et al. in Support of Petitioners on the Merits, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2812099; Brief of Amicus Curiae King Ranch Inc. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2825827; Brief Amici Curiae of Robert Nigel Richards et al. Supporting Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802967; Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2802972; Brief Amici Curiae of the American Farm Bureau Federation et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2787138; Brief of Amici Curiae America's Future Inc. & Somerset Transmission & Repair Center in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2750340; Amicus Curiae Brief of The Rutherford Institute in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2605096; Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 1900737; Brief Amicus Curiae of James M. Buchanan et al. in Support of Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 1882158.

11. *Kelo*, 545 U.S. at 489.

12. *Id.* at 489–90.

to acquire land by eminent domain than offered by the Court's decision in *Kelo*.[13]

Following the decision, states responded to Justice Stevens's invitation by subjecting eminent domain to a "summer of scrutiny."[14] State legislators banded together "[i]n a rare display of unanimity" to support eminent domain reform in a manner "that cut[] across partisan and geographic lines."[15] More specifically, forty-four state legislatures have debated bills that, if enacted, would fire a return salvo at the Court's holding in *Kelo*.[16] Twenty-eight of those legislatures had passed eminent domain legislation that circumscribed the government's ability to exercise its sovereign power of eminent domain.[17] As the mass of legislation shows, eminent domain has moved from the pages of legal reporters to the middle of the public debate.

Though legislatures quickly responded to anti-*Kelo* sentiment with an "avalanche of bills," [18] post-*Kelo* reforms have been subjected to almost as much criticism as the decision from which they spawned. Critics are quick to point out that many of the post-*Kelo* legislative measures are riddled with exceptions that fail to curb the risk posed by economic development takings.[19] For example, Texas legislatively banned the exercise of eminent domain for purposes of economic development "unless the economic development is a secondary purpose resulting from municipal community development."[20] The definition of "municipal community development" is vague at best; therefore, a possibility exists that condemnors could use "municipal community development" to mask economic development takings.[21] To be fair, Texas was not the only state to enact a measure containing an exception that threatened, in theory, to swallow whatever protection was offered by the measure in the first place.[22] As a result, post-*Kelo* reforms are susceptible to the charge they are little more than "a feint to pretend to do something about eminent domain without actually doing anything to upset the apple cart."[23]

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13. *See id.* at 489.

14. Egan, *supra* note 2, at A1.

15. John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

16. *See* National Conference of State Legislatures, Eminent Domain 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Jan. 28, 2008).

17. *Id.*

18. Broder, *supra* note 15, at A17.

19. See *infra* notes 254–261 and accompanying text.

20. 10 TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2007). This section also provides an exception for "municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas." *Id.*

21. *See id.* The code section does not provide a definition of "municipal community development." *Id.*

22. *See, e.g.*, VT. STAT. ANN. tit. 12, § 1040 (Supp. 2007).

23. Dan Walters, *Eminent Domain Bills are Stalled — Except One for Casino Tribe*, SACRAMENTO BEE, Sept. 16, 2005, at A3, *available at* 2005 WLNR 14647451.

This Article revisits the Court's controversial decision in *Kelo*, explores the legislative responses to its holding, and defends both *Kelo* and its legislative progeny against the criticisms directed at them. Part II of this paper sketches the jurisprudential evolution of the Public Use Clause, including a description of the majority and two dissenting opinions in *Kelo*. Part III argues that the *Kelo* majority's interpretation of the Public Use Clause and its deference to legislative determinations are justified by precedent and the political philosophies that animate the Takings Clause. The legislation produced during eminent domain's "summer of scrutiny" is detailed in Part IV along with the criticism of those legislative efforts. Furthermore, Part IV suggests that post-*Kelo* legislation is not as heavy-handed as one might expect in light of the public outcry against the decision and employs public choice theory to explain the disjuncture. Part V argues that, despite its perceived limitations, post-*Kelo* legislation represents a pragmatic approach to a specific land use issue that promotes community self-determination. The paper concludes that post-*Kelo* legislation symbolizes the government's effort to remedy the breach of the public's trust caused by *Kelo* regardless of one's substantive view of those legislative measures. Furthermore, the robust post-*Kelo* legislative response is a testament to the strength of one of the core principles of our government—federalism.

## II. *KELO*, PUBLIC USE, AND LEGISLATIVE DEFERENCE

The maxim that "[t]he Constitution creates a Federal Government of enumerated powers" represents one of the "first principles" associated with the structure of our government.[24] For those interested in constitutional law, the powers in Article 1, § 8 are familiar—the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," and so on.[25] However, searching for the power of eminent domain in the text of the Constitution is an exercise in futility—it does not appear in the Constitution.[26] Instead, eminent domain is an *inherent* attribute of sovereignty that permits the sovereign to acquire an individual's property for purposes determined by the sovereign without the individual's consent.[27]

24. United States v. Lopez, 514 U.S. 549, 552 (1995).

25. U.S. CONST. art. I, § 8.

26. *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 616 (1940).

27. *See* United States v. Carmack, 329 U.S. 230, 241 (1946) (referring to the Takings Clause as "a tacit recognition of a preexisting power"); Kohl v. United States, 91 U.S. 367, 373–74 (1875) ("The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the

Indeed, "'[i]n every government there is inherent authority to appropriate the property of the citizen for the necessities of the State . . . .'"[28] Without such inherent authority, the "independent existence and perpetuity" of the sovereign would be threatened.[29]

But simply because eminent domain is an inherent power of the sovereign does not mean that the sovereign can exercise its power without restriction.[30] To the contrary, the concluding phrase of the Constitution's Fifth Amendment establishes two limitations on the sovereign's ability to acquire property by eminent domain—"nor shall private property be taken for public use, without just compensation."[31] Denominated as the Takings Clause, those words serve, at least in theory, as an obstacle to the unfettered exercise of "[t]he despotic power."[32] The first part of the Takings Clause, the Public Use Clause, bars the government from seizing an individual's property unless the property is put to a public post-condemnation use.[33] The second part, the Just Compensation Clause, requires the government to pay for the property it acquires from private owners, which is typically defined as the fair market value of the acquired property.[34] Most eminent domain cases involve the public use requirement because, if the taking is successfully challenged, the property owner retains title to her property. In contrast, a successful just compensation challenge obtains

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power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.").

28. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 240 (1897) (quoting COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357 (photo. reprint, De Capo Press 1972) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS] (defining eminent domain).

29. *See Kohl*, 91 U.S. at 371.

30. *See Chi., Burlington & Quincy R.R.*, 166 U.S. at 240 ( "'[C]onstitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse.'" (quoting COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 28, at 357)).

31. U.S. CONST. amend. V. In its entirety, the Fifth Amendment states that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

32. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795); *see also* Sheldon Richman, *Will Bush Side with the Property Thieves?*, BALT. CHRON., Jan. 21, 2005, http://www.baltimorechronicle.com/012105SheldonRichman.html.

33. For more on the public use requirement, see *infra* Subpart II.A.

34. *See, e.g.*, United States v. 564.54 Acres of Land, More or Less, 441 U.S. 506, 511 (1979) ("The Court therefore has employed the concept of fair market value to determine the [amount of the] condemnee's loss."). For more on the fair market value standard, see LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 20 (James C. Bonbright ed., 2d ed. 1953), which discusses the various definitions of fair market value used by courts around the nation.

more money for the individual, but title to the property is lost. As a result, the two most common issues in most eminent domain cases address the definitional scope of "public use" for constitutional purposes and the role of courts in the determination of what is and what is not a public use.

### *A. The Interpretive Evolution of "Public Use"*

Interpreting the Fifth Amendment's Public Use Clause has proven nettlesome for courts and commentators throughout the history of eminent domain jurisprudence. During the early nineteenth century, many courts embraced a broad—a very broad—view of the scope of public uses that satisfied state constitutional requirements.[35] Public use equated to public benefit and the "public" nature of the benefit was often imperceptible without performing intellectual contortions.[36] The Supreme Court of Georgia, for example, deemed an 1834 statute that permitted the condemnation of private rights of way to be unconstitutional in *Brewer v. Bowman*,[37] but only because the Act did not "*provide[] any just compensation.*"[38] Even though the public would not have access to the passageway, the ability of the private individual to get goods to and from the marketplace endowed the condemnations with a public benefit.[39] In *Scudder v. Trenton Delaware Falls Co.*,[40] a private landowner complained that the condemnation of his land for the purpose of conducting water to a privately owned mill did not constitute a public use.[41] Comparing the potential effect of the mill at issue to the effect of an existing mill in a different county, the court found that the other private mill had "increased the value of property in all that district of country; opened a market for the produce of the soil, and given a stimulus to industry of every kind."[42] Because a mill in a neighboring county bestowed benefits upon that local community, the mill at issue constituted a valid public use.[43] So long as the condemnation had some faintly colorable public benefit, courts with a broad interpretation of public use would uphold condemnations against public use attacks.[44]

The seemingly boundless interpretation of "public use" during the early nineteenth century met opposition from legal commentators and judges

35. *See* Nichols, *supra* note 26, at 617.
36. *See id.* at 617–18.
37. 9 Ga. 37, 39 (Ga. 1850).
38. *See id.* at 39–42.
39. *Id.* at 40 (also noting that "the *public interest* would also be promoted, by enabling every citizen to perform all the duties which are required of him by law, for the benefit of the whole community").
40. 1 N.J. Eq. 694 (N.J. Ch. 1832).
41. *See id.* at 696, 698, 728.
42. *Id.* at 729. The court also observed that the mills to be served by the water "will be sufficient for the erection of seventy mills, and factories, and other works dependent on such power." *Id.* at 728.
43. *See id.* at 727–30.
44. *See* Nichols, *supra* note 26, at 617.

later in that century.[45] In his influential treatise on constitutional law, Thomas M. Cooley argued that "*public use* implies a possession, occupation, and enjoyment of the land by the public, or public agencies."[46] Echoing Cooley's argument in *Bloodgood v. Mohawk & Hudson R.R. Co.*,[47] Senator Tracy disparaged the substitution of "public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement" for "public use," which had a natural connotation of "public possession and occupation."[48] In his dissent to the majority decision in *West River Bridge Co. v. Dix*,[49] Justice Woodbury similarly complained that "[i]t may be, and truly is, that individuals and the public are often extensively benefited by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights."[50] According to Justice Woodbury's interpretation of public use, uses "must in their essence, and character, and liabilities, be public within the meaning of the term 'public use.'"[51]

From the critics' point of view, the expansive nature of what counted as a "public use" posed a substantial threat to the right of private property. In his *Bloodgood* opinion, Senator Tracy questioned what limit could be placed upon the legislature to protect private property if the broad interpretation was the correct constitutional interpretation.[52] The implication was that no such limit could be imagined. And although it recognized that "[p]ublic use may . . . mean public usefulness, utility or advantage, or

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45. *See id.* (identifying the time of the transition as the 1840s or 1850s).

46. COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 28, at 531 (1868), *quoted in* James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions In Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 847.

47. 18 Wend. 9 (N.Y. 1837)

48. *Id.* at 60. The case was an action for trespass against a railroad that had damaged plaintiff's property by destroying fences and digging into the soil. *See id.* at 10. The railroad argued that it was not liable for the damage because an act of incorporation gave it the right to enter plaintiff's lands. *See id.* The issue revolved around whether or not the legislature's delegation of its eminent domain power in the act of incorporation was constitutional. *Id.* at 29. The court held that the act was constitutional but that the railroad had to pay damages to the plaintiff prior to the appropriation. *Id.* at 78. As a result, Senator Tracy's discussion of the meaning of public use is dicta.

49. 47 U.S. 507 (1848).

50. *Id.* at 547 (Woodbury, J., dissenting).

51. *Id.* at 546. For a list of cases addressing the narrower interpretation of public use, see JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 164, at 222 n.6 (1888), and Nichols, *supra* note 26, at 617 n.14, which lists cases where the court defined public use to be "use by the public."

52. *Bloodgood*, 18 Wend. at 60 (asking "is there any limitation which can be set to the exertion of legislative will in the appropriation of private property?"). Later, Senator Tracy remarked that

> [i]t seems to me that such a construction of legislative powers is inconsistent with the secure possession and enjoyment of private property, and repugnant to the language and object of the constitutional provision. Indeed, it concedes to legislative discretion a wider range than I think could be maintained for it on the principles of natural law, if we had no written Constitution.

*Id.* at 62.

what is productive of general benefit," the Supreme Court of West Virginia lamented the consequences of such a definition in *Salt Co. v. Brown*.[53] The court feared that "the great constitutional safeguard" protecting the right of private property "will be utterly subverted" without a narrowing of the interpretation of public use.[54] In other words, the broad interpretation of public use not only risked merely encroaching upon, but swallowing the right to private property in its entirety.

In reality, neither the narrow nor the broad interpretation covered the field of public use interpretation.[55] Instead, the two competing views managed to coexist, but the result in any given case was, to say the least, unpredictable. During the nineteenth century, for example, a railroad satisfied the public use requirement under Alabama law[56] while failing to do so under the law of West Virginia.[57] Recognizing the incoherence, nineteenth century treatise writer John Lewis observed that "[w]hen, however, we come to seek for the principles upon which the question of public use is to be determined, or to define the words, 'public use,' in the light of judicial decisions, we find ourselves utterly at sea."[58] Similarly, the 1876 Nevada Supreme Court wrote that "[n]o question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public

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53. *See* Salt Co. v. Brown, 7 W. Va. 191, 196 (1874).

54. *Id.*

55. Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 209 (1978) (stating that "[w]hile the narrow view of public use held considerable sway, especially in the latter half of the nineteenth century, it never completely took over the field").

56. Aldridge v. Tuscumbia, Courtland, & Decatur R.R., 2 Stew. & P. 199, 199 (Ala. 1832) (upholding the exercise of eminent domain for railroad purposes). The court stated that

> [i]t is true, that the term "use," is employed in the latter clause of the thirteenth section of our declaration of rights. "Nor shall any person's property be taken, or applied to public use, unless just compensation be made therefor." But, it would be curtailing the sovereign power of the government, very much, indeed, to say, that, under this clause, in the declaration of rights, private property could not be appropriated to the public, without a continued occupancy of the thing appropriated. Whatever is beneficially employed for the community, is of public use, and a distinction cannot be tolerated.

*Id.* at 203.

57. Pittsburg, W. & K. R. Co. v. Benwood Iron-Works, 31 W. Va. 710, 735 (1888) (reversing a lower court decision to allow a railroad company to condemn land pursuant to a state statute). The court ruled that

> [t]he mere declaration in a petition, that the property is to be appropriated to public use does not make it so; and evidence, that the public will have a right to use it, amounts to nothing in the face of the fact, that the only incentive to ask for the condemnation was a private gain, and it was apparent, that the general public had no interest in it.
>
> We would do nothing to hinder the development of the State nor to cripple railroad companies in assisting such development, but at the same time we must protect the property-rights of the citizens. Whatever corporations may be entitled under a proper construction of the law they will receive; but they must not be permitted to take private property for private use.

*Id.* at 735.

58. LEWIS, *supra* note 51, § 159, at 217.

use.'"[59] With a hint of sarcasm, the court opined that "[t]he authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases."[60]

The confusion that enveloped the constitutional interpretation of public use during the nineteenth century predictably made its way into twentieth century public use jurisprudence. In *Berman v. Parker*,[61] the Court evaluated the constitutionality of the District of Columbia Redevelopment Act of 1945 (DCRA),[62] an effort to eradicate the problems of blight and substandard housing in a District of Columbia neighborhood.[63] To promote redevelopment, the condemned lands were to be transferred to parties who agreed to initiate projects that conformed to the overall plan.[64] Although public agencies could receive land under the DCRA, section 7(g) of the statute stated that private parties were the preferred recipients of the properties acquired pursuant to eminent domain.[65] Because his land was to be transferred to a private party following condemnation under the DCRA, a commercial property owner challenged it as a violation of the public use limitation of the Fifth Amendment.[66]

Midway into its unanimous decision, the Court identified a justification that satisfied the public use requirement that connoted a broad inter-

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59. Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 400–01 (1876).

60. *Id.* at 401. The full text of the court's comment, which reflects the judicial dissatisfaction with the state of the law, is as follows:

> [w]hat is the meaning of the words "public use" as contained in the provision of our state constitution?" It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property is to be seized. In other words, that in favor of private rights the construction should be strict; that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community is a taking for a public use. No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use" as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right.

*Id.* at 400–01; *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896) (observing that "[t]he question, what constitutes a pubic use, has been before the courts of many of the States and their decisions have not been harmonious).

61. 348 U.S. 26 (1954).

62. District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790 (1946).

63. *Breman*, 348 U.S. at 28–31. Section five of the DCRA delegated the power of eminent domain to a governmental agency for "'the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight.'" *Id.* at 29.

64. *Id.* at 30.

65. *Id.*

66. *Id.* at 30–31. A department store resided on the property. *Id.*

pretation of public use—a generalized, nondescript "public welfare."[67] The Court declared that "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."[68] In this case, the DCRA promoted the "public welfare" by resuscitating a neighborhood through the elimination of blight and inadequate housing on an area-wide basis.[69] According to the Court, the plan promoted the public welfare because

> [m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[70]

Given that description of the living conditions in the area slated for acquisition, the Court held that the DCRA did not violate the public use clause of the Fifth Amendment.[71]

After a period of thirty years, the Supreme Court returned to public use doctrine in *Hawaii Housing Authority v. Midkiff*.[72] In *Midkiff*, Hawaii determined that its "feudal land tenure system" had distorted the market for residential property thereby "injuring the public tranquility and welfare."[73] To energize its sagging residential real property market, the legis-

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67. *Id.* at 33.
68. *Id.* (citation omitted).
69. *Id.* at 34–35. The Court reported that
> [t]he experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

*Id.*
70. *Id.* at 32–33.
71. *See id.* at 35–36.
72. 467 U.S. 229 (1984).
73. *Id.* at 232. The Court described the feudal system in Hawaii as one
> in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants

lature enacted the Land Reform Act of 1967 (LRA), which allowed the government to acquire fee simple titles by eminent domain and subsequently transfer them to qualified private parties.[74] Ten years after the enactment of the LRA, a private landowner, whose property was subject to an action for eminent domain, filed suit, claiming that the LRA violated the public use requirement of the Fifth Amendment.[75]

The Court's *Midkiff* decision reaffirmed the broad understanding of "public use" delineated in *Berman*,[76] which may have been predictable given the similarity of the issues in the two cases.[77] The Court stated that post-condemnation conveyances to private parties did not necessarily lead to the conclusion that the sovereign's exercise of its eminent domain power was unconstitutional.[78] To the contrary, "[t]he Court long ago rejected any literal requirement that condemned property be put into use for the general public."[79] In fact, the beneficiaries of an eminent domain action need not constitute "any considerable portion" of the community.[80] Instead, the transaction as a whole may rise to a "public affair" because of "its class or character."[81] In this case, the problems associated with Hawaii's "unique" land oligopoly and the scheme adopted to combat those

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working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land.

*Id.* This resulted in a real estate market where

State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles.

*Id.* (citation omitted).

74. *Id.* at 233–34. According to the terms of the Act,

tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act.

*Id.* at 233 (citation omitted) (footnote omitted).

75. *See id.* at 233–35.

76. *Id.* at 239–41.

77. *Compare id.* at 231–32 (addressing issue of Hawaii taking fee simple titles using eminent domain and moving them to qualified private parties), *with* Berman v. Parker, 348 U.S. 26, 28–31 (1954) (addressing issue of District of Columbia using eminent domain to condemn and take property designated as a blighted area of the city).

78. *See Midkiff*, 467 U.S. at 244.

79. *Id.*

80. *Id.* (quoting Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923)).

81. *Id.* (quoting Block v. Hirsch, 256 U.S. 135, 155 (1921)). The quoted language goes back even further than the Court's citation. In *Fallbrook Irrigation District v. Bradley*, the Court examined whether or not the condemnation of land for an irrigation system constituted a public use for Fifth Amendment purposes. 164 U.S. 112, 158–59 (1896). The Court stated that "[i]t is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use." *Id.* at 161–62.

problems endowed the LRA with a public use that met the demands of the Fifth Amendment.[82]

The most recent addition to the jungle of public use jurisprudence arrived with June 2005's *Kelo v. City of New London*.[83] During the mid-1990s, the city of New London was in the midst of an economic downturn and its economic forecast looked bleak.[84] The city's unemployment rate had reached crisis levels and the population base had eroded to its lowest point since the 1920s.[85] In light of the economic problems facing the city, a Connecticut state agency identified New London as a "distressed municipality" and decided to use its power of eminent domain to acquire property for redevelopment purposes.[86] Following acquisition, the condemning authority was to transfer the property to Pfizer, Inc. so that it would be "a catalyst to the area's rejuvenation."[87] The property targeted for acquisition consisted of 115 privately owned, non-blighted parcels of land in the New London neighborhood of Fort Trumbull.[88] Susette Kelo, along with several other Fort Trumbull homeowners, challenged the exercise of eminent domain as a violation of the Fifth Amendment's public use requirement because their properties "happen[ed] to be located in the development area."[89] Eventually, the case made its way to the Supreme Court, and the Court had to decide "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[90]

At the outset of its opinion, the Court observed that nineteenth century courts utilized a narrow interpretation of public use, one that required that the public use the property in a literal sense—the public had to leave its footprint on the acquired property.[91] However, the Court concluded that the narrow interpretation had fallen out of favor over the course of time because of the difficulty of its application and the changing needs of socie-

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82. *See Midkiff*, 467 U.S. at 245.

83. 545 U.S. 469 (2005).

84. *See id.* at 473.

85. *See id.* The population at the time of the eminent domain action was less than 24,000 residents. *Id.*

86. *Id.* at 473–75. The city reactivated the New London Development Corporation to oversee the development and delegated its power of eminent domain to that body. *See id.*

87. *Id.* at 473. The cost of the research facility was $300 million. *Id.* The development was also slated to include a hotel with restaurants and shopping, marinas, "[a] pedestrian 'riverwalk,'" "approximately 80 new residences," a new U.S. Coast Guard Museum, and other office and retail venues. *Id.* at 474.

88. *Id.* at 474–75. Thirty-two acres of the land to be acquired had been the site of the Naval Undersea Warfare Center. *See id.* at 473–74.

89. *Id.* at 475.

90. *Id.* at 477. The complainants won an injunction at trial, except with respect to one parcel designated for office use. *Id.* at 475–76. On appeal, the Supreme Court of Connecticut removed the injunctions granted at trial. *Id.* at 476. Thereafter, the Supreme Court granted certiorari. *Id.* at 477.

91. *See id.* at 479.

ty.[92] Based upon its review of the historical record, the Court discovered that it had begun to apply a "more natural interpretation of public use as 'public purpose'" in lieu of the narrow interpretation by the end of the nineteenth century.[93] Moreover, the Court stated that it had "repeatedly and consistently rejected that narrow test ever since."[94] Turning to the facts of the case, the Court found that the City had a "carefully formulated" plan designed to stimulate economic development in New London.[95] The development plan not only sought to create jobs and increase the tax base of the community, but also provided for residential and recreational uses of the condemned lands.[96] Applying its "more natural" interpretation of public use, the Court held that New London's "plan unquestionably serves a public purpose"; therefore, the city's plan satisfied the Fifth Amendment's Public Use Clause.[97]

In a vigorous dissent, Justice O'Connor charged that the majority decision "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."[98] Instead of being faithful to Court precedent, Justice O'Connor alleged that the majority had veered from the reasoning in *Berman* and *Midkiff* by upholding an exercise of eminent domain with only remote public benefits.[99] The Court's decision "significantly expand[ed] the meaning of public use" by permitting the government to take private property from one private party and transfer it to another private party so long as the latter's use was an "upgrade" with some "secondary" public benefit.[100] Such reasoning subjected all private property owners to the risk of losing property for the benefit of other parties who planned to make a

92. *See id.* (commenting that the narrow interpretation required answers to questions such as "what proportion of the public need have access to the property? at what price?").

93. *Id.* at 480 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)).

94. *Id.*

95. *See id.* at 483. The Court also noted that "[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area." *Id.* Furthermore, the Court stated that "[t]o effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development." *Id.* at 483–84.

96. *See id.* at 474–75.

97. *Id.* at 484. Justice Kennedy joined Justice Stevens's majority opinion and wrote a concurring opinion as well. *Id.* at 490–93 (Kennedy, J., concurring). In his concurring opinion, Justice Kennedy pointed out that subjecting public use questions to rational basis scrutiny did not mean that takings for purely private persons would be upheld as a result of *Kelo*. *See id.* at 490. For Justice Kennedy, the petitioners' per se test of invalidity was unnecessary because of the adequacy of the present degree of scrutiny and would sacrifice a number of permissible projects with unquestionable public benefits. *See id.* at 492. In fact, Justice Kennedy opined that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* at 493. The facts in *Kelo*, however, did not warrant such invalidity because the transfers were not suspicious and the procedures were not abused. *See id.*

98. *Id.* at 494 (O'Connor, J., dissenting).

99. *See id.* at 498–501.

100. *Id.* at 501, 503.

more economically attractive use of the land.[101] Penning the most memorable line from the decision, Justice O'Connor quipped that "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[102]

Although Justice Thomas joined Justice O'Connor's dissent,[103] he also wrote separately to assert that the majority's interpretation of public use failed to give "the slightest nod to" the historical framework within which the Public Use Clause was created.[104] According to Justice Thomas, the "natural reading" of the Public Use Clause was to understand it as permitting "the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[105] For evidence of this "natural reading," Justice Thomas referred to founding era dictionaries that narrowly defined "use" to mean "[t]he act of employing any thing to any purpose."[106] As a result, post-condemnation transfers to private parties violated the public use restraint on eminent domain as understood at the time of its enactment because the public would not actually use the property.[107] Furthermore, Justice Thomas maintained that broadly interpreting "public use" as "public purpose" makes the inquiry under the Necessary and Proper Clause redundant,[108] "a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose."[109] Therefore, interpreting the "public use" restraint in the same manner reduced it to mere "surplusage."[110] Rather than consign the Public Use Clause to irrelevance, Justice Thomas urged a narrower conception of public use: actual use by the public or post-condemnation governmental ownership.[111]

### *B. Judicial Deference to Legislative Determinations of Public Use*

In contrast to the legal quandary that has engulfed the proper interpretation of the Public Use Clause, courts have long held that it is their responsibility, and not that of legislatures, to determine what does and does

101. *See id.* at 503.
102. *Id.*
103. *Id.* at 494.
104. *Id.* at 506 (Thomas, J., dissenting).
105. *Id.* at 508.
106. *Id.* (alteration in original) (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)).
107. *Id.*
108. *Id.* at 511.
109. *Id.*
110. *Id.* Justice Thomas argued that "[t]he Clause is . . . most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public." *Id.*
111. *Id.* at 521.

not constitute a valid public use for constitutional purposes. In the 1908 case of *Hairston v. Danville & Western Railway Co.*,[112] the Supreme Court observed that "[t]he one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."[113] Despite the apparent clarity of the judicial function in cases like *Hairston*, language from later cases seemed to diminish the Court's role as the final arbiter of what constitutes a public use. In *Old Dominion Land Co. v. United States*,[114] the Court stated that a legislative conclusion regarding public use "is entitled to deference until it is shown to involve an impossibility."[115] Needless to say, requiring a property owner who challenges an eminent domain proposal on public use grounds to show that the proposal involves an "impossibility" is likely to be an insurmountable hurdle.

If the language of cases like *Old Dominion* signaled a diminution of the Court's role as the final authority on the public use question, then the language employed in the major twentieth century public use cases did little to prevent further erosion of that role. In *Berman v. Parker*,[116] the Court asserted that the legislature served as the "main guardian of the public needs to be served by social legislation" like the exercise of eminent domain.[117] Given its primacy in the public use determination, "when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive" for purposes of eminent domain.[118] Moreover, the Court refused to sit as a super-legislature and re-evaluate the details of proposals that involve eminent domain.[119] In short, the Court's role in the determination of what does and does not constitute "a public purpose is an extremely narrow one."[120]

Thirty years later, the Court reaffirmed its myopic role in reviewing public use determinations in *Hawaii Housing Authority v. Midkiff*.[121] Upholding Hawaii's plan to redistribute fee simple titles to correct distortions in its "feudal land tenure system,"[122] the Court asserted that its past decisions "made clear that it will not substitute its judgment for a legislature's judgment . . . 'unless the use be palpably without reasonable foun-

112. 208 U.S. 598 (1908).
113. *Id.* at 606; *see also* LEWIS, *supra* note 51, § 158, at 216.
114. 269 U.S. 55 (1925).
115. *Id.* at 66.
116. 348 U.S. 26 (1954).
117. *See id.* at 32.
118. *Id.* The Court also noted that "[t]his principle admits of no exception merely because the power of eminent domain is involved." *Id.*
119. *See id.* at 32, 35–36. The Court stated that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Id.* at 35–36.
120. *Id.* at 32.
121. 467 U.S. 229, 231–32 (1984).
122. *Id.*

dation.'"[123] Putting a finer point on the scrutiny to be applied to eminent domain justifications, the Court concluded that that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[124] Given the language of *Berman* and *Midkiff*, one might guess that the proposals failing such a deferential standard are likely to be products of shockingly gross oversight or concocted by Justice Scalia's proverbial "stupid staff."[125]

With the deferential standard established in *Berman* and *Midkiff* as precedent for *Kelo*, Justice Stevens's majority opinion noted that those decisions embraced a broad definition of the phrase "public use" arising from the "longstanding policy of deference to legislative judgments in this field."[126] Because the needs of the public involved questions beyond the capacity of courts to answer, the Court afforded "legislatures broad latitude in determining what public needs justify the use of the takings power."[127] Although the petitioners argued in favor of a test that would exclude economic development from permissible public uses, the Court found that economic development was an "accepted function of government" and refused to interfere with that determination.[128] The Court was not about "to second-guess [the wisdom of] the City's considered judgments about the efficacy of its development plan."[129] In this case, second-guessing proved to be unnecessary because the Court found that the city "carefully formulated an economic development plan that it believes will provide appreciable benefits to the community."[130]

Despite her disagreement with the majority's interpretation of public use, Justice O'Connor broadly agreed that local determinations regarding public use should be afforded deference by the Court.[131] Indeed, Justice O'Connor acknowledged that the Court's language in *Berman* and *Midkiff*

123. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).
124. *Id.*
125. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 n.12 (1992).
126. Kelo v. City of New London, 545 U.S. 469, 480 (2005).
127. *See id.* at 482–83.
128. *See id.* at 484–85. The petitioners asked the Court to adopt a bright line test that would exclude economic development per se. *Id.* at 484. In the alternative, the petitioners requested that the Court utilize a test that required the proposed plan to yield the public benefits with a "reasonable certainty." *Id.* at 487. The Court dismissed that assertion based upon its narrow oversight role, which did not include an investigation into the "wisdom" of the legislative determination. *See id.* at 487–88.
129. *Id.* at 488. The Court added that "we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project." *Id.* at 488–89.
130. *Id.* at 483 (such as "new jobs and increased tax revenue"). Justice Kennedy wrote a separate concurrence to point out that subjecting public use questions to rational basis scrutiny did not mean that takings for purely private persons would be upheld as a result of *Kelo*. *See id.* at 490 (Kennedy, J., concurring). For Justice Kennedy, the petitioners' per se test of invalidity was unnecessary because of the adequacy of the present degree of scrutiny and would sacrifice a number of permissible projects with unquestionable public benefits. *See id.* at 492.
131. *See id.* at 497, 499 (O'Connor, J., dissenting).

emphasized that it would defer to legislative determinations of public use because it was "ill equipped to evaluate the efficacy of proposed legislative initiatives."[132] But whatever common ground she shared with the majority on the question of deference, the Court retained a "narrow role" in the public use determination; it had not abandoned its oversight function in its entirety.[133] The Court's failure to perform its admittedly "narrow" function threatened to transform the Public Use Clause into "little more than hortatory fluff."[134] In this case, deferring to New London's exercise of eminent domain amounted to an "abdication of [the Court's] responsibility."[135] According to Justice O'Connor, the states play vital roles in our government "but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them."[136]

With similar vehemence, Justice Thomas pointedly asserted that "[t]here is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a 'public use.'"[137] The probability that the Framers would have singled out the Public Use Clause for deference when legislative determinations associated with other protections secured by the Bill of Rights do not receive such deference is low.[138] For Justice Thomas, the deference offered to public use determinations was incompatible with the protection afforded to the home throughout the history of the Court's Fourth Amendment jurisprudence.[139] Justice Thomas noted that the Court inspects the reasons that justify state action in Fourth Amendment search and seizures cases much more closely than the public use justifications for eminent domain.[140] Ironically, then, homeowners are safe from invasive searches of their homes, but the government may take those homes by eminent domain if it needs them to satisfy what it considers to be a "public use."[141]

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132. *Id.* at 498–99.
133. *See id.* at 500.
134. *Id.* at 497.
135. *See id.* at 504.
136. *Id.*
137. *Id.* at 517 (Thomas, J., dissenting).
138. *See id.* at 517–18.
139. *See id.* at 518.
140. *See id.* Justice Thomas asserted that

> [w]e would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause.

*Id.* (citations omitted).
141. *See id.*

## III. A SECOND LOOK AT *KELO*

A comment appearing in the 1949 Yale Law Journal presciently offered "an advance requiem" for the public use limitation on eminent domain: "so far as the federal courts are concerned neither state legislatures nor Congress need be concerned about the public use test in any of its ramifications."[142] Fifty-six years later, many legal commentators found the requiem more than applicable to the post-*Kelo* universe of eminent domain jurisprudence. Because of its perceived advantage to political insiders, *Kelo* "puts the lie to [the] canard" that "judicial solicitude for economic rights [is] favoritism to the wealthy and business interests."[143] Moreover, the majority's approach equated to "dead constitutionalism" because of the absence of meaningful public use analysis and the matador-like deferential standard applied to the case.[144] In short, many legal onlookers reached the conclusion that the public use and judicial deference portions of the majority opinion were wrongly decided.[145]

### *A. The Definition of Public Use*

Despite assertions to the contrary from beyond the Court, all of the Justices apparently agreed that facts of *Kelo* were within the orbit of *Berman* and *Midkiff*. Highlighting the weight of precedent that favored New London on the public use issue, Justice Stevens remarked that ruling in favor of Susette Kelo on the public use issue would have overturned a century of precedent that instructed the court to apply a broad interpretation of "public use."[146] Limiting her review to the last half of the twentieth century,[147] Justice O'Connor commented that "[t]here is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*."[148] The Justice's description of the language in *Midkiff* as "errant" is particularly noteworthy because she authored *Midkiff*, which garnered unanimous support from the Court.[149] Similarly, Justice Thomas suggested

142. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 613–14 (1949).

143. James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–05 CATO SUP. CT. REV. 39, 64.

144. Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 CHAP. L. REV. 1, 43 (2006).

145. For more commentary on the point, see, for example, Orlando E. Delogu, Kelo v. City of New London—*Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17, 19–30 (2006), and Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 208–18 (2006).

146. *See Kelo*, 545 U.S. at 483 (instructing that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power").

147. *See id.* at 496–501 (O'Connor, J., dissenting).

148. *Id.* at 501.

149. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984).

that the main problem with *Berman* and *Midkiff* was that "[o]nce one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use."[150] Thus, all of the Justices seemed to agree that applying the broad interpretation of public use from the Court's precedent to the facts of *Kelo* would make the result, more or less, a foregone conclusion.

Though they may have agreed on the apparent applicability of precedent, the dissenting Justices attempted to free *Kelo* from the strictures of precedent. To distinguish *Kelo* from *Berman* and her own decision in *Midkiff*, Justice O'Connor compared the relationship of the taking to the harm to be averted in each of the three cases. In *Berman* and *Midkiff*, "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society."[151] The blighted properties harmed society in *Berman* while the concentration of fee simple titles had a detrimental impact on Hawaii's market for fee simple titles in *Midkiff*.[152] In those cases, "each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."[153] But in *Kelo*, neither Susette Kelo's home nor those of her fellow condemnees inflicted "any social harm" on society because the homes had not been classified as blighted.[154] As a result, the public benefit in *Kelo* was one step removed from the public benefits obtained in *Berman* and *Midkiff*—the government had to transfer the property to a private party for the public to benefit from the economic development that justified the taking.[155] Compared to the "direct" public benefits associated with the takings in *Berman* and *Midkiff*, Justice O'Connor classified the public benefits in *Kelo* as "incidental";[156] therefore, New London's plan violated the public use requirement of the Fifth Amendment.[157]

While Justice O'Connor's distinction has appeal, the facts of *Kelo* are not all that different from its twentieth century predecessors. The key distinction Justice O'Connor makes is that in *Berman* and *Midkiff*, "each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use" whereas the public benefit in *Kelo* arose only after the post-condemnation transfer of the property to Pfizer.[158] Describing the condemnations using that language suggests a two-step process: 1) a harm-eliminating taking that vests title in a condemning au-

150. *Kelo*, 545 U.S. at 520 (Thomas, J., dissenting).
151. *Id.* at 500 (O'Connor, J., dissenting).
152. *See id.*
153. *Id.*
154. *Id.* at 475, 500.
155. *See id.* at 501.
156. *Id.*
157. *See id.* at 505.
158. *Id.* at 500.

thority and 2) a subsequent transfer to a third party. But if an eminent domain transaction involves two-steps, the takings in *Berman* and *Midkiff* did nothing to ameliorate blight or break up the concentration of fee simples in Hawaii. The takings simply made the condemning authority the record owner of condemned property.[159] To that end, post-condemnation transfer to private parties had to be part of the calculus in both cases unless the government intended to retain title to the property. And in *Berman*, the express terms of the DCRA reflect a contrary intention—the DCRA permitted private parties to be the primary agents of redevelopment with the associated benefits.[160] Justice Kennedy even commented that "everybody knows that private developers were the beneficiaries in Berman" during *Kelo*'s oral arguments.[161] Similarly, the fee simples acquired by eminent domain in *Midkiff* had to be redistributed to citizens who were not already members of the land oligopoly.[162] Without redistribution, the land oligopoly remained intact, albeit with a new member of the fee simple oligopoly—the State of Hawaii.[163]

If condemnations involve the two-step process posited by Justice O'Connor, the distinctions between *Berman*, *Midkiff*, and *Kelo* become very difficult to discern. Much like the proposals in *Berman* and *Midkiff*, obtaining the public benefits of the plan in *Kelo* also necessitated the post-condemnation transfer of the acquired properties. To reap the benefits associated with economic development, New London's plan required the New London Development Corporation to transfer title to the properties to Pfizer after the takings so that Pfizer could construct its facility.[164] Without such a transfer, the New London Development Corporation would retain title to the acquired properties.[165] Given the similarity of the transactions in the three cases, either all of the takings produced "incidental" public benefits or they all satisfied the broad interpretation of public use under modern public use jurisprudence. No bright line exists by which to disaggregate "direct" public benefits from those deemed "incidental." Whatever line exists, or might exist, is very, very blurry.

Rather than attempt to distinguish *Kelo* from *Berman* and *Midkiff*, Justice Thomas would simply overrule the entire line of precedent that broadly interpreted "public use."[166] According to Justice Thomas's public use genealogy, the Court began its misguided trek toward its modern broad

159. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233-34 (1984); Berman v. Parker, 348 U.S. 26, 28-30 (1954).
160. *Berman*, 348 U.S. at 30.
161. Transcript of Oral Argument at 12, *Kelo*, 545 U.S. 469 (2005) (No. 04-108), *available at* http://www.ij.org/pdf_folder/private_property/kelo/kelo_ussc_transcript.pdf.
162. *See Midkiff*, 467 U.S. at 233-34.
163. *See id.*
164. *See Kelo*, 545 U.S. at 474-75.
165. *See id.* at 473-75.
166. *Id.* at 521 (Thomas, J., dissenting).

interpretation of the public use limitation in *Fallbrook Irrigation District v. Bradley*.[167] Justice Thomas notes that, in *Bradley*, the Court examined whether the condemnation of land for an irrigation project constituted a valid public use.[168] Justice Thomas's interpretation of the language in *Bradley* not only suggested that the Court's conflation of public use with public purpose was unnecessary, but also that the Court could have, in fact, decided that case using the narrower "actual use by the public test."[169] The statute at issue in *Bradley* provided that "'[a]ll landowners in the district have the right to a proportionate share of the water.'"[170] For Justice Thomas, this meant that the "'public' [had] the right to use the irrigation ditch because all similarly situated members of the public—those who owned lands irrigated by the ditch—had a right to use it."[171]

However, Justice Thomas's description of *Bradley*'s facts reveals that they are much closer to those of *Kelo* than they may appear upon first blush. According to Justice Thomas, the beneficiaries of the irrigation project in *Bradley* were "landowners."[172] But landowners are a subset of the general public, which means that the general public did not, in fact, have a right to use the water flowing through the irrigation ditch. As evidence that the use in *Bradley* was less "public" than Justice Thomas's description suggests, Justice Peckham opined that "[t]he water is not used for general, domestic or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands."[173] In other words, the general public would not actually "use" the water, but only a much smaller category of individuals— "landowners" with a right to use the water—would actually use the water from the irrigation ditch. Interestingly, Justice Peckham commented that "landowners" with an excess of water have the authority to "sell or assign the surplus or the whole of the water as he may choose."[174] So, private "landowners" who received the sole benefit of the irrigation project could sell all of the water for financial gain, which looks eerily reminiscent of the facts in *Kelo*.

The financial gain accruing to private parties is not the only similarity between *Bradley* and *Kelo*—the facts of both cases meet the strictures of Justice Thomas's narrow test for the Public Use Clause. Much post-*Kelo* commentary focused on Pfizer and the financial gain it stood to accrue

167. *Id.* at 515 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).
168. *Id.*
169. *See id.* at 515–16.
170. *Id.* at 515 (alteration in original) (quoting *Bradley*, 164 U.S. at 162).
171. *Id.*
172. *See id.*
173. *Bradley*, 164 U.S. at 162.
174. *Id.*

under the redevelopment proposal.[175] However, Pfizer was not the sole beneficiary of New London's redevelopment plan. The plan included the construction of a hotel, a marina for "tourist boaters," a "public walkway along the waterfront," "eighty new residences" connected to the rest of the development by a "public walkway," and a relocated Coast Guard Museum open to the public.[176] Furthermore, the plan contemplated the construction of a "major health club complex" that would be open to the public.[177] These aspects of the plan satisfy Justice Thomas's narrow test because the public would be able "to use"—in the narrow sense—some of the properties marked for acquisition under the redevelopment proposal. In fact, a plausible argument can be made that *Kelo* conforms more closely to the requirements of the narrow interpretation of public use than *Bradley*.

Applying the "actual use by the public" test[178] to the facts on *Kelo* highlights the complexities associated with using it as the barometer to determine whether or not any given justification for eminent domain is a constitutional "public use." New London's plan involved a number of narrowly defined "public" uses, but do those uses in the aggregate rise to a sufficient level to satisfy the "actual use by the public" test? What proportion of the public must be able to use the acquired properties post-condemnation? Presumably, the entire public could use the "public walkway along the waterfront" [179] while only Pfizer's employees or guests could gain access to the research and development facility.[180] But, Pfizer's employees are members of the public so how does their use of the property factor into the "actual use by the public" test? These are precisely the kinds of questions that the majority opinion avoided for a very simple reason—they cannot be answered in a manner that provides stability and predictability in the law.

The conundrum facing the dissenting Justices, or any other court for that matter, is that it is difficult to create a workable public use test that can be applied to the variety of situations that create eminent domain controversies. Justice O'Connor's distinction between "direct" and "incidental" public benefits is unworkable because of the imperceptible line between benefits that are "direct" and those that are indirect or "incidental." Indeed, the linguistic distinction between direct/indirect public benefits harks back to the now discredited direct/indirect assessment used to identify appropriate exercises of Commerce Clause power in cases like *United States v. E.C. Knight Co.*[181] Moreover, the public-private nature of most

175. *See, e.g.*, Richman, *supra* note 32.
176. Kelo v. City of New London, 843 A.2d 500, 509 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).
177. *Id.* at 509 n.5.
178. *See Kelo*, 545 U.S. at 479 (describing the "use by the public test").
179. *Kelo*, 843 A.2d at 509.
180. *See id.*
181. *Compare* United States v. E. C. Knight Co., 156 U.S. 1, 17 (1895), *abrogated by* Wickard v.

eminent domain actions would ensnare the "actual use by the public" test in a series of fact-sensitive inquiries that would lead to unpredictable results.[182] Recognizing its historical inability to articulate a meaningful public use standard, the majority in *Kelo* deferred to the decision-making capabilities of local legislatures just like in *Berman* and *Midkiff*.[183]

### *B. Judicial Deference to Local Determinations of Public Use*

Similar to the agreement regarding the application of precedent to the public use issue, all of the Justices agreed, at least in principle, that the Court should not "second guess" the wisdom of local legislatures as a general matter.[184] The underlying justification for the deference afforded local decision-making processes stems from the comparative institutional competencies to make such decisions. Federal courts are removed from the exigencies that spur local authorities to exercise the power of eminent domain. Therefore, an informational asymmetry exists between federal judges and local decision-makers. As a result, federal courts are loath to overturn local decisions. The Court provided one of its most elegant explanations of the reason to defer to local decisions in *Clark v. Nash*.[185] In *Clark*, Justice Peckham wrote that

> Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts

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Filburn, 317 U.S. 111 (1942) (holding that "the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree"), *with* Perez v. United States, 402 U.S. 146, 151–52 (1971) (stating that "activity . . . may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this [is] irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'" (quoting *Wickard*, 317 U.S. at 125)).

182. Justice Stevens noted that the narrow interpretation of "public use" withered over time because it proved to be "difficult to administer . . . [and] impractical given the diverse and always evolving needs of society." *Kelo*, 545 U.S. at 479.

183. *See id.* at 481–83.

184. *See id.* at 488; *id.* at 499 (O'Connor, J., dissenting); *id.* at 520 (Thomas, J., dissenting).

185. 198 U.S. 361 (1905).

> may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from a denial of its validity.[186]

Simply put, "judges do not have the equipment they would need if they were to try to determine the likely consequences of their decisions for the total pattern of social activity" when confronted by some issues within the courtroom.[187]

Decisions associated with the exercise of eminent domain are prime candidates for deference because they mingle both specific findings and non-quantifiable public-minded benefits. For example, the specific findings that justified the condemnation in *Berman* included that "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory."[188] If the standard for evaluating proposed public uses involved precise quantities, the Court could use such evidence as a metric for its decision. However, the Court identified a less precise justification that satisfied the public use requirement—"public welfare."[189] In a statement that is noteworthy because of its breadth, the Court stated that "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."[190] A court is well beyond its decision-making comfort zone if part of the justification for an exercise of eminent domain mixes quantifiable variables with "spiritual" or "aesthetic" considerations.

From the perspective of political philosophy, the deference granted to legislative judgments regarding eminent domain is the product of the philosophies that informed its enactment. Although disagreement exists about the degree of influence,[191] historians generally acknowledge that one phi-

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186. *Id.* at 367–68.

187. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1752 (1976). Kennedy also commented that "rational result orientation requires factual inquiries that are at once particularized and wide-ranging." *Id.*

188. *See* Berman v. Parker, 348 U.S. 26, 30 (1954) (the full recitation of the underlying facts was that "[t]he first project undertaken under the Act relates to Project Area B in Southwest Washington, D.C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating").

189. *Id.* at 33.

190. *Id.*

191. Stephen A. Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903, 917 (1989) (book review). The topic of republicanism and its influence on the founding generation is quite com-

losophy played a central role in shaping the early history of this nation and its laws, including property law—republicanism.[192] History instructed the Founders that past republics had died from "luxury," a sense of satisfaction, and an earnest desire for greater personal gain, which ignited envy in citizens and subsequent conflict.[193] To escape the seduction of individualism that ruined prior republics, the Founders embraced a brand of republicanism that instructed that "the common good would be the only objective of government."[194] The welfare of the public, according to Thomas Paine, was "wholly characteristical of the purport, matter, or object for which government ought to be instituted, and on which it is to be employed, *respublica*, the public affairs, or the public good; or, literally translated, the *public thing*."[195] The essence of republicanism was the "sacrifice of individual interests to the greater good of the whole."[196] Early American law is replete with examples of this all for one and one for all mentality. Price and wage controls, constitutional provisions prohibiting monopolies, along with other economic regulations all highlight the emphasis on the body politic as a whole rather than the individual.[197] According to one historian, "[i]deally, republicanism obliterated the individual."[198]

Defining republicanism as the virtual obliteration of the individual leaves little room for individual accomplishment. However, the elevation of the public good above individualism illuminates a second aspect of republicanism—faith that a sovereign will wield power for the good of the people.[199] Republican principles encouraged individual citizens to participate in the decision-making processes of the community.[200] If individual interests were subservient to the public good, legislatures would advance the public welfare because they were aggregates of individuals seeking to promote the public good.[201] Republican deference to legislative prerogative

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plex and beyond the scope of this paper. The book review cited in this footnote provides further detail regarding the meaning of republicanism to the Founding Fathers and the dispute among historians regarding the appropriate definition of republicanism.

192. *See id.* at 913–17.

193. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 52 (1993).

194. *Id.* at 52–54 (stating that "[t]he history of antiquity thus became a kind of laboratory in which autopsies of the dead republics would lead to a science of social sickness and health matching the science of the natural world").

195. THOMAS PAINE, RIGHTS OF MAN: PART SECOND, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 345, 369 (Philip S. Foner ed., 1969), *available at* http://www.thomaspaine.org/Archives/ROMpart2.html.

196. *See* WOOD, *supra* note 193, at 53.

197. *Id.* at 63–64; *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 33 (1998).

198. WOOD, *supra* note 193, at 61.

199. Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 350 (1999).

200. *See* Siegel, *supra* note 191, at 916 (commenting that "men . . . most realized their humanity when they participated in public, communal life").

201. *See* WOOD, *supra* note 193, at 58.

embraced the notion that "what was good for the whole community was ultimately good for all the parts" of the community; individual prosperity was directly proportional to community welfare.[202] To make that connection, republicanism presupposed that the "public" possessed a uniform set of interests that could be advanced by legislative action.[203] Regardless of the merits of that assumption, the public interest emerging from legislative debate more closely approximated the public good than other forms of decision-making, particularly that undertaken by aristocrats or royals.[204] Passing legislation required a consensus of legislators and they were supposed to act pursuant to the public good, which made it difficult to pass corrupt bills.[205]

Republicanism's emphasis on individual sacrifice and legislative deference threatened to eviscerate individual rights; therefore, liberalism emerged as a philosophical competitor to challenge republican orthodoxy. Contrary to republicanism's public-minded private citizen, liberalism viewed a citizen as self-interested and disinclined to further the public good as a general matter except for those members of the public whose interests aligned with her own.[206] In fact, "[p]ublic life, in the liberal view, involves just another forum in which individuals pursue their private interests."[207] And unlike republicanism's faith legislative deliberation, liberals argued that individual rights were not subject to political determination; they were "prepolitical" and could not be violated according to the whims of the political process.[208] For liberals, government existed to protect rights accruing to an individual by virtue of citizenship, not to promote the public welfare.[209]

Madison's Takings Clause, both as originally written and as enacted by Congress and the state legislatures, intertwines the philosophies of republicanism and liberalism.[210] The Public Use Clause is imbued with republicanism: an individual property owner is required to sacrifice her

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202. *Id.*

203. *Id.* at 57–58.

204. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701 (1985).

205. *See id.*

206. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995) (observing that "[l]iberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest").

207. *See* Siegel, *supra* note 191, at 916–17.

208. *See* Treanor, *supra* note 206, at 821; *see also* Siegel, *supra* note 383, at 917 (stating that "liberalism denies the possibility of a society having a public interest apart from the sum of its members' individual interests").

209. *Id.*; *see also* Treanor, *supra* note 204, at 705 (stating that "[n]on-republicans . . . sought to create a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference").

210. *See* Treanor, *supra* note 206, at 819 (arguing that the Takings Clause embraces republican ideals because government is barred from decreasing the value of property and liberal ideals in that some rights are so fundamental as to be beyond deprivation due to political inequalities).

property interest for the good of the public at the request of the government if the property taken is to be put to a "public use." A condemnation for the good of the whole, as determined by the representative body of the whole in good faith and for the welfare of the public, outweighs the individual right to private property. However, the property owner does not bear the entire burden of eminent domain because the sovereign must provide the dispossessed owner with a "just compensation" in exchange for the property. Thus, the "just compensation" requirement evokes the concern for individual rights and government protection of those rights associated with liberalism. Making the connection between the republicanism and liberalism embodied by the Takings Clause, the Court in *Armstrong v. United States*[211] explained that

> [t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[212]

Regardless of its historical foundation, the Court's deference to local determinations in eminent domain cases seems like an outlier given its willingness to interfere with state decisions encompassing other substantive areas of the law.[213] In his dissent, Justice Thomas suggests that the Court does not hesitate to inject itself into local affairs in search and seizure cases despite its reluctance to "construe the Constitution so as to intrude upon the administration of justice by the individual States."[214] By the same token, the Court willingly invalidates state decisions in the area of family law even though "[t]he whole subject of the domestic relations of husband and wife, parent and child, belong[ed] to the laws of the states, and not to the laws of the United States."[215] To take but one example, the statute at

211. 364 U.S. 40 (1960).

212. *Id.* at 49.

213. Ely, *supra* note 143, at 62 (stating that "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy deference").

214. Kelo v. City of New London, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting); *accord* Patterson v. New York, 432 U.S. 197, 201 (1977); *see also* Irvine v. California, 347 U.S. 128, 134 (1954) ("Even as to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably. Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts." (citations omitted)).

215. *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890).

issue in *Lawrence v. Texas* had both criminal and family law elements that subjected some citizens for grossly unfair treatment.[216] The Court declined to defer to Texas's sovereign authority to enact and enforce criminal law or its traditional power to regulate family relationships; its statute went too far notwithstanding the historical authority of states over the subject matters of the statute.[217]

Though they regulate very different areas of everyday life, family law and Fourth Amendment jurisprudence have a common animating theme: the protection of privacy. From early twentieth century cases like *Meyer v. Nebraska*[218] and *Pierce v. Society of Sisters*[219] to later cases like *Roe v. Wade*,[220] the story of twentieth century family law is the story of the evolution of privacy as a legal right.[221] For example, the right of privacy transformed abortion from a criminal act to a fundamental right protected by the Constitution.[222] Similarly, the Court has explicitly linked Fourth Amendment protections to privacy. In *United States v. Miller*, for example, the Court commented that "'no interest legitimately protected by the Fourth Amendment' is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into 'the security a man relies upon when he places himself or his property within a constitutionally protected area.'"[223] In other words, "[t]he security of one's privacy against arbitrary intrusion . . . is at the core of the Fourth Amendment."[224]

Whether the context is family law or Fourth Amendment law, the definition of privacy reflects the essential value associated with liberalism: allowing the individual to pursue her interests or make decisions free from governmental intrusion. Reflecting the individual-focused nature of privacy within family law, the Court in *Eisenstadt v. Baird* described the right of privacy as "the right of the *individual,* married or single, to be free

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216. Lawrence v. Texas, 539 U.S. 558, 562–63 (2003).
217. *Id.* at 567–71.
218. 262 U.S. 390 (1923).
219. 268 U.S. 510 (1925).
220. 410 U.S. 113 (1973).
221. For a general overview of the increasing importance of private-ordering and family law, see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444–46. *See also* LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 1–16 (2005).
222. *Roe*, 410 U.S. at 153–54.
223. 425 U.S. 435, 440 (1976) (quoting Hoffa v. United States, 385 U.S. 293, 301–02 (1966)); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) ("the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action").
224. Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); *see, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1359 (describing "the criminal procedural aspect of privacy as: '[the] maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers even against the process of law, except in a few specified cases'" (quoting COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 28, at 299–300)).

from unwarranted governmental intrusion."[225] Even if the public takes a dim view of an individual's relationship, the fundamental right of privacy paves the way for an individual to make that choice in her own best interests. Similarly, the Fourth Amendment protects the individual from state intrusion despite the state's interest in the enforcement of its criminal laws.[226] The Fourth Amendment barrier that protects the individual has the right of privacy at its foundation, which reflects liberalism's conception of the importance of the individual vis-à-vis the public. Though no right is absolute, the individual is at the center of privacy; the public is largely excluded from areas blanketed by the protection of privacy.

Comparing the philosophical underpinnings of the Fourth Amendment or family law with those of the Takings Clause illuminates one justification for the Court's lesser degree of deference in cases involving the former subjects when compared to issues involving the latter.[227] Privacy and its liberal focus on the individual is the nucleus of family law and Fourth Amendment jurisprudence.[228] As a result, more aggressive examinations are necessary to protect the individual from public intrusion into a protected zone of activity. In contrast, the public is inextricably connected to the Takings Clause limitations on eminent domain in an inclusive manner.[229] The inherent eminent domain power of the sovereign establishes its right to acquire property so long as the republican and liberal elements of the Takings Clause are satisfied.[230] The republicanism and liberalism that serve as the foundation of the Takings Clause are inclusive of the public, whereas the liberalism of privacy jurisprudence is exclusive of the public. Because local governments or agencies are charged with divining the public welfare, courts defer to them based upon their intimate knowledge of local conditions in Takings Clause cases in a manner that is inapplicable when the locus of the inquiry inherently excludes the public.

## IV. POST-*KELO* LEGISLATIVE REFORM

Almost one year to the day after *Kelo*, the shockwaves that erupted in the aftermath of the decision reached the Oval Office. On June 23, 2006,

225. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

226. Adrienne Wineholt, Note, Georgia v. Randolph*: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 478–79 (2007).

227. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 803–04 (2004).

228. *See* Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1241–42 (1999).

229. *See* Jane B. Baron, *Winding Toward the Heart of the Takings Muddle:* Kelo, Lingle, *and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 614–16 (2007).

230. *See supra* notes 192–212 and accompanying text.

President Bush signed an anti-*Kelo* executive order entitled: "Protecting the Property Rights of the American People."[231] The order limited

> the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.[232]

Rather than being issued by the executive branch of government, however, most of the anti-*Kelo* crusade occurred in legislatures around the country. On the national level, the United States House of Representatives passed the Private Property Rights Protection Act of 2005,[233] but the act stalled in the United States Senate and has yet to become law. [234] With far more success, state legislatures hurriedly enacted an array of legislative measures aimed at curbing the government's ability to acquire land by eminent domain.[235] While most of the reforms on the state level are statutory, the Louisiana and South Carolina state legislatures passed constitutional amendments that were placed on the November 2006 ballot.[236] Both measures received sufficient voter support to become part of the constitutions of those two states.[237] Regardless of the form, state legislatures reacted quickly, and negatively, to *Kelo*.

### *A. State Legislative Responses to* Kelo

Despite claims that it would "hinder the revitalization of inner cities,"[238] the Florida legislature enacted one of the more, if not the most, stringent set of post-*Kelo* restrictions on the authority of the government to exercise its power of eminent domain. On its face, Florida's constitution seems to embrace a broad view of what satisfies its requirements by using

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231. Exec. Order No. 13,406, 71 Fed. Reg. 36,973, 36,973 (June 23, 2006).

232. *Id.*

233. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005). In the House, the bill passed by a wide margin (376-38). *See* Library of Congress, Thomas, Search Results H.R. 4128, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04128:@@@R (last visited Jan. 28, 2008).

234. For a description of the bill's history, see Ronald D. Utt, *States Vote to Strengthen Property Rights*, BACKGROUNDER, Feb. 1, 2007, *available at* http://www.heritage.org/Research/SmartGrowth/upload/bg_2002.pdf.

235. *Id.* at 2-4.

236. *Id.*

237. *Id.*; National Conference of State Legislatures, Property Rights Issues on the 2006 Ballot, http://www.ncsl.org/statevote/prop_rights_06.htm (last visited Jan. 28, 2008) (Louisiana' measure received 55% of the vote while South Carolina's measure received 86% of the vote).

238. Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at 1B. Utah took steps to modify its eminent domain regulations before the Court decided *Kelo*. *See* UTAH CODE ANN. § 78-34-1 (West 2002 & Supp. 2007).

the word "purpose" instead of the word "use."[239] Article X, § 6(a) declares that "[n]o private property shall be taken except for a public purpose and with full compensation."[240] Whatever its connotation before *Kelo*, the meaning of the word "purpose" in Florida's constitution narrowed considerably during eminent domain's "summer of scrutiny." Florida's legislative amendments barred governmental agencies with the power of eminent domain from conveying property acquired by that power "to a natural person or private entity."[241] Not satisfied with that barrier, Florida went one step further in its statutory amendments by prohibiting the exercise of eminent domain "for the purpose of abating or eliminating a public nuisance" or "for the purpose of preventing or eliminating slum or blight conditions."[242] With the legislative amendments in place, Florida's interpretation of "public purpose" is far narrower than the definition of "public use" in cases like *Berman*, *Midkiff*, and *Kelo*.

Most of the legislative reforms, however, were modest when compared to Florida's sweeping restrictions on the use of eminent domain for just about any purpose. Missouri changed its eminent domain statutes so that "[n]o condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes."[243] To supplement its ban, Missouri decided that "economic development" purposes included increasing the "tax base, tax revenues, employment, and general economic health."[244] Apparently troubled by the expansive connotation of the word "purpose," Kentucky decided to strike the word "purpose" from its eminent domain statutes in its entirety.[245] So, Kentucky redefined "condemn" as taking "private property for a public use [formerly purpose] under the right of eminent domain" and "eminent domain" as "the right of the Commonwealth to take for a public use [formerly purpose]."[246] As for the newly minted "public uses" that satisfied Kentucky law, the legislature declared that:

> [n]o provision in the law of the Commonwealth shall be construed to authorize the condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax

239. *See* FLA. CONST. art. X, § 6(a).
240. *Id.*
241. FLA. STAT. ANN. § 73.013(1) (West 1999 & Supp. 2008).
242. *Id.* § 73.014(1)-(2).
243. MO. ANN. STAT. § 523.271(1) (West 2002 & Supp. 2007).
244. *Id.* § 523.271(2).
245. *See* H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006), *codified at* KY. REV. STAT. ANN. § 416.540 (West 2005 & Supp. 2007).
246. *Id.* (emphasis removed)

> base, tax revenues, employment, or by promoting the general economic health of the community.[247]

Unlike Florida's muscular approach to eminent domain reform, the Missouri and Kentucky bans on eminent domain did not apply if the purpose of the condemnation was to eliminate "blighted, substandard, or unsanitary conditions."[248]

Many legislatures kept the elimination of blight on the list of constitutional uses for eminent domain, but redefined what constituted "blight" for condemnation purposes in an effort to reduce the number of properties eligible for acquisition. Pennsylvania, for example, modified the definition of blight as set forth in its Urban Redevelopment Law, which was enacted in 1945.[249] The mid-twentieth century statute defined blight by reference to seven factors: (1) unsafe, unsanitary, inadequate or over-crowded conditions of the houses in the particular area; (2) inadequate planning in the area; (3) excessive land coverage by the buildings in the area; (4) lack of adequate light and air and open space; (5) the defective design and arrangement of the buildings in the area; (6) faulty street layout; or (7) land uses in the area which are economically or socially undesirable.[250] Following *Kelo*, Pennsylvania's twenty-first century statutory definition of blight expanded the list of characteristics that defined blight to a robust twelve factors.[251] Among the new factors that described blighted areas were facts that constituted a "public nuisance at common law," an "attractive nuisance to children," buildings that were "vermin infested," lots or parcels that become "a haven for rodents," or properties classified as "abandoned."[252] The existence of any of the twelve factors provides the con-

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247. KY. REV. STAT. ANN. § 416.675(3) (West 2005 & supp. 2007).

248. *Id.* § 416.675(2)(C) ("for the purpose of eliminating blighted areas, slum areas, or substandard and insanitary areas . . . ."); MO. ANN. STAT. § 523.271(2) (West 2002 & Supp. 2007).

249. 1945 Pa. Laws 991, *codified as amended at* 35 PA. CONS. STAT. ANN. § 1702 (West 1997 & Supp. 2007).

250. 35 PA. CONS. STAT. ANN. § 1702(a).

251. 26 *id.* § 205(b)(1)-(12).

252. *Id.* For a similar approach, see the statutory changes to Alabama's definition of blight in the aftermath of *Kelo*. Title 24, chapter 2 of the 1975 Alabama Code, for example, permitted cities to acquire blighted properties for redevelopment purposes. The Code defined "blighted areas" as portions of the community with "buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community." ALA. CODE § 24-2-2(c)(1) (2000 & Supp. 2007). Alabama continued to allow eminent domain to be deployed for purposes of urban renewal, but stated that the power could not be used "to acquire property that is not blighted without the consent of the owner." *Id.* § 24-2-2(b). According to the new Alabama statute, no less than nine characteristics could be assessed to determine if property was sufficiently "blighted" for eminent domain purposes. *See id.* § 24-2-2(c) Buildings "unfit for human habitation or occupancy," *id.* § 24-2-2(c)(1), property with population densities that impair the safety of inhabitants, *id.* § 24-2-2(c)(2), or vacant land that had become "overgrown with noxious weeds," *id.* § 24-2-2-(c)(5), or constituted a "haven for mosquitoes" were all outside the bounds of Alabama's new restrictions, *id.*

demning authority with the power to acquire the affected property by eminent domain.[253]

### *B. Criticism of Post-*Kelo *Legislation*

Despite the legislative effort, the final legislative products have been roundly criticized. The primary objection to the reform measures can be succinctly expressed: the amended statutory definitions of "blight" are so vague that they fail to act as a meaningful restraint on the government's power of eminent domain.[254] The problem is that many, if not all, of the qualities that characterize blighted property escape precise definition. Commonly enumerated blighting factors in existing or amended blight statutes include the presence of dilapidated structures, vermin infestation, obsolescent planning, or obstacles to sound growth.[255] However, no definition of malleable factors such as "obsolescent planning" or "sound growth" exists. The absence of accepted definitions for many of these factors permits a condemning authority to sweep just about any parcel of real property into the eminent domain net. For example, a New York court upheld a condemnation of private properties around Times Square because a state agency had labeled the property to be acquired as blighted because they were "substandard or unsanitary" and "impairs sound growth and development."[256] Given the definitional vagaries that permeate much of the post-*Kelo* legislation, critics contend that the reforms merely preserve the status quo; nothing has been done to impede the exercise of eminent domain.[257]

More ominously, advocates of stronger eminent domain measures fear that the meager protections offered by many post-*Kelo* measures permit eminent domain to be used by the politically powerful to exploit the politi-

253. 26 PA. CONS. STAT. ANN. § 205(b)(1)–(12). The Pennsylvania bill applies to a single parcel of property. *Id.* Similar standards apply to proposals that require the acquisition of multiple parcels of land. *Id.* § 205(c).

254. *See* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 725 (stating that "[d]efinitions of 'blight' are generally vague enough to allow condemnation of almost any property"); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 266 (2007) (commenting that "[a] sufficiently expansive definition of blight is essentially equivalent to authorizing economic development takings").

255. For a list of factors included in blight statutes, see Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394–404 (2000).

256. W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 124 (N.Y. App. Div. 2002) (other factors included "a plan for clearance, replanning, reconstruction and rehabilitation of that area; and, . . . the plan affords maximum participation by private enterprise." The property was to be conveyed to the New York Times so that it could construct a new headquarters on the land.).

257. *See, e.g.*, David Barron, *Eminent Domain is Dead! (Long Live Eminent Domain!)*, BOSTON GLOBE, Apr. 16, 2006, at D1, *available at* 2006 WLNR 6439454 (characterizing post-Kelo reforms as having "more bark than bite"); Terry Pristin, *Voters Back Limits on Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6 (reporting that "[e]minent domain specialists on both sides . . . say many of the statutes enacted by state legislatures have few teeth").

cally disempowered for financial gain. To support the point, critics point to eminent domain's unfortunate history of abuse.[258] Indeed, Justice Thomas's dissent alludes to the abuse of eminent domain in the past and its destructive consequences for those who suffered as a result of eminent domain abuse.[259] For example, the mid-twentieth century witnessed deplorable uses of eminent domain to wipe out vibrant racial communities on Chicago's Southside and Philadelphia's Society Hill.[260] Moreover, studies have shown that racial minorities have suffered a disproportionate degree of harm as a result of urban renewal programs premised on the eradication of blight in the past.[261] Given its checkered history, critics fear that the limited protection offered by post-*Kelo* reforms dooms some communities to experience a repeat of the past abuse suffered at the hands of condemning authorities.

### *C. Impediments to Legislative Reform*

The relative absence of aggressive post-*Kelo* modifications to the laws that regulate eminent domain is surprising given the depth of public sentiment against the decision. Public opinion polls unanimously showed that the public disagreed with the Court's holding in *Kelo*. For example, a whopping ninety-seven percent of respondents in an MSNBC poll rejected the idea that economic development justified the loss of private property, even if the public benefited from the project.[262] Furthermore, a Wall Street Journal survey found that protecting "private-property rights" was the number one legal issue that concerned the public after *Kelo*, which is revealing given the degree to which other legal issues, like abortion, have captured the public's attention.[263] With this outward expression of public discontent, one might have expected state legislatures to react to *Kelo* by

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258. *See* 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, 39–41 (2006).

259. *See* Kelo v. City of New London, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting).

260. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 33–35 (2003) (Chicago's Southside); Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 350–51 (2001) (Philadelphia's Society Hill).

261. Werner, *supra* note 260, at 350–57; *see also* Brief of Amici Curiae NAACP et al. in Support of Petitioners at 7–15, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811057.

262. MSNBC, Live Vote: Property Rights and Private Projects, http://www.msnbc.msn.com/id/8331958/ (last visited Jan. 28, 2008) (vote to see results). For a list of other polls and associated results, see Castle Coalition, The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain, http://www.castlecoalition.org/resources/Kelo_polls.html (last visited Jan. 28, 2008).

263. John Harwood, *Public Splits on How Supreme Court Pick Should Interpret Constitution*, WALL ST. J., July 15, 2005, at A4. A November 2005 Wall Street Journal/NBC poll reported that the number one legal issue that concerned the public had nothing to do with the always contentious right to abortion or the right to die. Instead, protecting "private-property rights" was the legal issue that created the most concern for the survey's participants.

enacting aggressive measures to clamp down on eminent domain. However, the legislatures did not enact reforms that gutted the power of eminent domain; they opted for measures that took a more middle-of-the-road approach by barring the specific exercises of eminent domain that incited the anti-*Kelo* public outcry.[264]

History provides a launching point for the search into the reasons for the unexpectedly circumscribed post-*Kelo* legislative approach. In his famous *Federalist 10*, James Madison argued that the "public good is disregarded in the conflicts of rival parties" and that "the superior force of an interested and overbearing majority" often proved to be outcome determinative in legislative halls.[265] Madison referred to these interested parties as "factions," which consisted of a group of citizens "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[266] Furthermore, Madison observed that "the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."[267] Although the causes of faction could not be eliminated, the deleterious effects of faction could be reduced by the structure of a republican government.[268]

The modern-day embodiment of Madison's theory of faction emerged from the marriage of political science and economics: public choice theory.[269] Public choice theory depicts the legislature as an economic marketplace where organized members of the public and individual legislators enter into a mutually beneficial legislative relationship.[270] Legislative outcomes reflect a Byzantine mix of the relative effectiveness of an organization's influence at the time of the vote on a particular issue and the individual legislator's gauge of the political consequences of that vote.[271] Because different organizations have different views of the same issue, the process by which legislation is enacted is the equivalent of a tug-of-war

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264. *See, e.g.*, John E. Kramer & Lisa Knepper, *One Year After* Kelo *Argument National Property Rights Revolt Still Going Strong: 43 Legislatures Work Toward Eminent Domain Reform*, INSTITUTE FOR JUSTICE, Feb. 21, 2006, www.ij.org/private_property/connecticut/2_21_06pr.html.

265. THE FEDERALIST NO. 10, at 42 (James Madison) (Jacob E. Cooke ed., Weslyean University Press 1982).

266. *Id.* at 43.

267. *Id.* at 44.

268. *Id.* at 45–49.

269. Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1333 (1994) (referring to Madison as "the progenitor of modern public choice theory"). The origin of public choice theory is often claimed to be Duncan Black's article *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948).

270. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371–73 (1983).

271. EARL LATHAM, THE GROUP BASIS OF POLITICS 35–36 (1952).

between the conflicting interests of the organizations.[272] The legislation that emerges represents a "political equilibrium" between all of the interested parties.[273]

Today, Madison's factions are labeled special interest groups and modern public choice theory places them at the center of the legislative process. Members of the public coalesce around a common interest to form groups that lobby legislators to produce legislation that is favorable to their interests.[274] Because of the organizational costs associated with large groups, lobbying groups that are small in number tend to be the most effective.[275] But whether large or small, special interest groups vie with one another for favorable legislation within legislative halls. According to William Landes and Richard Posner:

> [t]he price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation.[276]

In economic terms, special interest groups are "rent-seeking," which means that groups pursue self-maximizing ends at the expense of the public welfare.[277]

Within legislatures, public choice theory posits that legislators align with causes that maximize the probability of re-election.[278] Legislators are

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272. *See id.*

273. *See* Becker, *supra* note 270, at 371-73. For negative commentary regarding public choice theory, see Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 714 (1984), stating that "interest-group theory of legislation provides powerful evidence of the persistence and extent of legislative abuse." *See also* Abner J. Mikva, *Forward* to *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988) ("The politicians and other people I have known in public life just do not fit the 'rent-seeking' egoist model that the public choice theorists offer. Perhaps I am still one of those naive citizens who believe that politics is on the square, that majorities in effect make policy in this country, and that out of the clash of partisan debate and frequent elections 'good' public policy decisions emerge. Not even my five terms in the Illinois state legislature—that last vestige of democracy in the 'raw'—nor my five terms in the United States Congress, prepared me for the villains of the public choice literature.").

274. Becker, *supra* note 270, at 371. Becker denominates this behavior as "rent-seeking."

275. *See* Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231-32 (1986). For more on the organization of groups and their role in the legislative process, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

276. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

277. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

278. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 22 (1991) (citing Barba-

viewed as "egoistic, rational, utility maximizer[s]" that respond to incentives that advance their own interests.[279] The stimulus that spurs a legislator to vote one way or another on any given political issue is relatively straightforward: re-election.[280] To that end, a legislator's vote will often align with the pocketbooks of those who elected the legislator to office. If a legislative proposal harms the economic interests of a legislator's constituents, public choice theory predicts that the legislator will vote against that proposal rather than face the wrath of the voters at the ballot box on election day.

The troubling relationship between special interest groups and legislators posited by public choice theory permeates eminent domain jurisprudence. In *Southwestern Illinois Development Authority v. National City Environmental LLC*, the Supreme Court of Illinois ruled that a condemnation of private property and subsequent transfer to a private party for the purpose of building a parking lot adjacent to the third party's racetrack did not constitute a constitutional exercise of the eminent domain power.[281] Although the proposed parking lot benefited the public by alleviating traffic and promoting public safety, the court was troubled by the influence exerted by the private beneficiary during the process of developing the plan.[282] The court concluded that "this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing the National City Environmental's land at an acceptable negotiated price.[283] It appears the Soutwestern Illinois Development Authority's true intentions were to act as a default broker of land for Gateway's proposed parking plan."[284] Similarly, Justice O'Connor's biting dissent in *Kelo* pointed out that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[285] In other words, private parties captured the legislative process and engineered results that generated self-serving benefits.

The post-*Kelo* effort to reform eminent domain in California provides a context within which to examine the influence of special interest groups

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ra Sinclair, *Purposive Behavior in the U.S. Congress: A Review Essay*, 8 LEGIS. STUD. Q. 117, 126 (1983)).

279. *See* Farber & Frickey, *supra* note 277, at 878 (quoting D. MUELLER, PUBLIC CHOICE 1 (1979)).

280. *Id.* at 891 n.115.

281. 768 N.E.2d 1, 11 (Ill. 2002).

282. *Id.* at 9.

283. *Id.* at 10.

284. *Id.*

285. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting); *see also, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 468 (Mich. 1981) (commenting that "[b]ehind the frenzy of official activity was the unmistakable guiding and sustaining, indeed controlling, hand of the General Motors Corporation").

on legislative behavior from a public choice perspective. Like elsewhere in the nation, state politicians in California placed ideology aside and united in the fight for eminent domain reform.[286] In the absence of party politics, at least on the surface, state politicians introduced a number of legislative measures in an effort to prohibit private parties from accruing benefits associated with projects involving eminent domain.[287] However, not everyone in California joined in the reform effort—the California Redevelopment Association and other local governments took steps to block the passage of reform legislation, or at least water down whatever legislation passed.[288] Responding to such pressure, some of the politicians "ginned up a strategy to cool off the anti-eminent domain fervor" and replaced aggressive proposals with one that placed a two-year moratorium on the seizures of private residences and called for a state-wide study of the problem.[289] As a result, politicians could claim that they were dealing with the issue of takings for economic development "without doing any real damage to redevelopment agencies."[290] In the end, the only eminent domain measure to be placed in front of Governor Schwarzenegger was one that permitted the Rumsey Band of Wintun Indians to assist in the management of a 17,300-acre ranch to be acquired by eminent domain, if necessary.[291]

Though it is but one example, the deceleration of the momentum toward strong eminent domain reform in California vividly illustrates the tenets of public choice theory. State politicians reacted to the fear inspired by *Kelo* and made statements that, in all likelihood, fed that fear. For example, one California politician interjected that *Kelo* "opened a new era when the rich and powerful can use government to seize property of ordinary citizens for private gain."[292] The effect of such polemics is multifaceted—they tap into anti-*Kelo* public sentiment, generate positive publicity, and stoke the fire for reform. Positive publicity aids in the pursuit of re-election and the eventual passage of legislation aimed at the subject of the polemical comments makes the speaker appear to be influential, which has the potential to sway voters at election time. On the other hand, public commentary is bound to incite opposition, which is exactly what happened in California. The California Redevelopment Association and other local bodies mobilized and campaigned against reform.[293] Fearing a deleterious effect on their prospects for re-election, some politicians pro-

286. *See* Walters, *supra* note 23, at A3.
287. *Id.* The measures took the form of bills and constitutional amendments. *Id.*
288. *Id.*
289. *Id.* (identifying "Democratic leaders" as those responsible for the alternative measure).
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*

posed less stringent reforms.[294] The effect of the competing proposals was to divide the support between them such that neither had sufficient support to get to the governor's desk.[295] In short, public choice's tug of war for advantageous legislation produced no clear winner as special interest groups competed with one another and split political support to the point that resulted in a virtual legislative stalemate.

Without a clear winner in the marketplace of legislation, public choice theory predicts that eminent domain reform legislation should straddle a fence in the middle of the road, at least if viewed from the perspective of the parties interested in the outcome. Although they may differ in degree, each post-*Kelo* legislative reform curtails the exercise of eminent domain in one way or another, which responds to the pressure for change exerted by proponents of reform. On the other hand, each reform also contains a sufficient amount of wiggle room in the form of blight removal, which offers an olive branch to opponents of eminent domain reform. Neither side emerged with a complete victory from the competition for favorable legislation, but neither side lost much, if anything, either.

In the alternative, of course, a pitched battle between special interest groups that results in legislative gridlock might result in the passage of no legislation. However, public choice theory posits that legislators have re-election as their primary interest; therefore, the media coverage and the resulting public furor over the result in *Kelo* foreclosed the option to do nothing.[296] Conversely, authoring or supporting legislation that clamped down on eminent domain with too much force threatened to alienate powerful political insiders.[297] The result is, again, legislation that straddles a fence in the middle of the road. Indeed, a legislator may have, in fact, increased the probability for re-election by supporting such legislation because it is sufficiently ambiguous for each side to claim victory, or at least disclaim defeat. The public, and most importantly, voters, are mollified by the passage of legislation that offers increased protection for private property. Furthermore, neither proponents nor opponents of eminent domain reform see their oxen gored. Enacting limited reforms serves the best interests of public choice's legislator and represents a compromise between all of the parties involved in the legislative process.

294. *See id.*
295. *See id.*
296. *See id.*
297. *Id.*

## V. A SECOND LOOK AT POST-*KELO* REFORMS

Aiming substantive and legislative process criticisms at the micro-level—characterizing reforms as "toothless" products[298] of "state legislators [who] don't really believe in property rights"[299]—overlooks the profound effect of post-*Kelo* activity on the macro-level.[300] Assuming that the "despotic power" plodded along in relative anonymity before *Kelo*, the media attention showered upon *Kelo* served an educative function by rocketing eminent domain to forefront of public consciousness. In turn, state legislatures across the nation took action in response to the public furor over the decision.[301] As further evidence of the public's post-*Kelo* engagement with the issue of eminent domain, voters in ten states approved ballot measures that restricted eminent domain during the November 2006 election.[302] In all likelihood, none of this eminent domain legislation would have been produced in the absence of *Kelo*. Eminent domain's "summer of scrutiny"[303] amounted to a "Great Property Rights Revival."[304]

On the micro-level, critics complain that most of the post-*Kelo* measures are not sufficiently stout to offer meaningful protection for private property owners—permitting eminent domain to be used to eradicate blight paves the way for abuse. However, asserting that the vagueness of the blight standard permits abuse does not mean that condemning authorities will, in fact, abuse the standard. For example, the first post-*Kelo* decision to rule on a public use challenge under state constitutional law was issued by the Supreme Court of Oklahoma in *Board of County Commissioners of Muskogee County v. Lowery*.[305] In *Lowery*, a county sought to acquire easements to construct three water pipelines by condemning the non-blighted properties of three landowners.[306] One of the pipelines was supposed to serve local residents while the other two pipelines were intended to benefit a privately owned electrical plant.[307] The county initiated emi-

298. Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42, 42–43.
299. Pristin, *supra* note 257, at C6.
300. *See* Somin, *supra* note 298, at 42–43.
301. *See id.*
302. National Conference of State Legislatures, *supra* note 237.
303. Egan, *supra* note 1, at A1.
304. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8 (suggesting that the affirmative vote on ballot measures designed to respond to Kelo "were seen as a resounding indication of voters' anger at a 2005 United States Supreme Court decision that said such takings were legal"); Timothy Sandefur, *The Great Property Rights Revival*, NATIONAL REVIEW ONLINE, Nov. 27, 2006, http://article.nationalreview.com/?q=NWFmZTVmZWIwODJmYjcwY2Y1YzkzYmY3YjE4YTEyNTg= (further stating that "[w]hen [the government] undertakes development by seizing people's property and giving it to others, it commits exactly the kind of injustice our Founding Fathers rebelled against two centuries ago. On Tuesday, Americans rebelled against it again").
305. 136 P.3d 639 (Okla. 2006).
306. *Id.* at 642, 647 n.11.
307. *Id.* at 642–43.

nent domain proceedings and justified the takings on the ground of economic development alone.[308] The landowners then brought suit claiming that the takings violated the public use clause of Oklahoma's constitution.[309] In its decision, the Supreme Court of Oklahoma observed that unlike the broad statutory authority to exercise eminent domain in *Kelo*, Oklahoma law required a finding of blight to justify the deployment of eminent domain for purposes of economic development.[310] The county did not make a finding of blight prior to condemnation, which, presumably, made the decision rather easy. The court held that "economic development alone does not constitute a public purpose" for purposes of Oklahoma's state constitution.[311]

Shortly after the Supreme Court of Oklahoma made its decision in *Lowery*, the Supreme Court of Ohio issued an opinion in a public use case with facts surprisingly similar to *Kelo*: *Norwood v. Horney*.[312] To combat an ever-growing financial deficit, the city of Norwood, Ohio, decided to acquire several parcels of real property by eminent domain and transfer them to a private developer for the construction of office and retail space.[313] Although Norwood's city code permitted condemnation for the eradication of blight, Norwood's surveyors testified at trial that the neighborhood to be acquired "was not a slum, blighted, or a deteriorated area" but, at most, a "deteriorating area."[314] As a result, Norwood classified the property subject to condemnation as a "deteriorating area," a classification that justified the exercise of eminent domain under the city's code, and initiated eminent domain proceedings.[315] Because their properties were to

308. *Id.* at 643–45.

309. *Id.* The authority to condemn was granted by OKLA. STAT. tit. 27, § 5 (1997 & Supp. 2008). Article 2, § 23 of the Oklahoma Constitution declares that "[p]rivate property shall not be taken or damaged for public use without just compensation."

310. *Id.* at 650 (stating that "[c]ontrary to the Connecticut statute applicable in *Kelo*, which expressly authorized eminent domain for the purpose of economic development, we note the absence of such express Oklahoma statutory authority for the exercise of eminent domain in furtherance of economic development in the absence of blight" and reasoning that the usage of eminent domain to eliminate blight not only satisfied the public use requirement of the state constitution, but also justified the post-condemnation of land to a private party).

311. *Id.*

312. 853 N.E.2d 1115, 1122 (Ohio 2006). At the time of the case, the city had a $3.6 million deficit on its books and reduced bus and recreational services as cost-savings measures. *See* Merit Brief of Appellee Rookwood Partners at 6, *Norwood*, 853 N.E.2d 1115 (Nos. 2005-1210, 2005-1211), 2005 WL 3630498. The developer planned to construct over 200 residences and more than 500,000 square feet of office and retail space in Norwood, which was estimated to add $2 million per year to city coffers. *Norwood*, 853 N.E.2d at 1124.

313. *Norwood*, 853 N.E.2d at 1124.

314. *Id.* at 1126.

315. *Id.* at 1125. Norwood Code 163.02(c) defined a "deteriorating area" as "an area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area but which, because of incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of mainten-

be conveyed to a private party post-condemnation, five property owners challenged Norwood's exercise of eminent domain in an attempt to retain their homes.[316] After winding through the state courts, the Supreme Court of Ohio had to decide whether or not Norwood's eminent domain action satisfied the public use requirement of Article I, § 19 of the Ohio Constitution.[317] Although not as straightforward as *Lowery*, the Supreme Court of Ohio held that economic benefits alone did not meet the public use requirement of Ohio's constitution.[318]

However, the court took an additional bite out of the ability of Ohio's cities to acquire property by eminent domain by ruling that the "deteriorating area" standard was void for vagueness.[319] Variables associated with the standard such as increased traffic, the number of dead end streets, diversity of ownership, and small front yards applied to "virtually every urban American neighborhood,"[320] which "invite[d] ad hoc and selective enforcement."[321] To support its assertion, the court claimed that the factors used to justify Norwood's action could be found in "Beacon Hill in Boston, Greenwich Village and Tribeca in lower Manhattan, and Nob Hill in San Francisco."[322] With a literary nod in the direction of Edith Wharton, the court commented that a contrary ruling diminished a "cherished and

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nance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate, or is in danger of deteriorating, into a blighted area." *Id.* at 1125 n.5.

In contrast, Norwood Code 163.02(b) defined a "[s]lum, blighted or deteriorated area" as "an area in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, excessive dwelling unit density, detrimental land uses or conditions, unsafe, congested, poorly designated streets or inadequate public facilities or utilities, all of which substantially impairs the sound growth and planning of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals and general welfare." *Id.*

316. Norwood v. Horney, 830 N.E.2d 381, 383 (Ohio Ct. App. 2005), *rev'd*, 853 N.E.2d 1115.

317. *See Norwood*, 853 N.E.2d at 1123. The private property owners lost in both trial and appellate courts and asserted several grounds of error on appeal. *See id.*

318. *See id.* at 1142. According to the court, decisions upholding the exercise of eminent domain under these circumstances resulted from "an artificial judicial deference" to the legislature's determination of what constituted a valid public use for eminent domain purposes. *Id.* at 1136. Contrary to the deference offered to the city in the lower courts, the Supreme Court of Ohio declared that "we have never found economic benefits alone to be a sufficient public use for a valid taking." *Id.* at 1141. The court observed that economic considerations could factor into condemnation decisions, but eminent domain was not "simply a vehicle for cash-strapped municipalities to finance community improvements." *Id.* A "genuine public use" had to justify the government's power to acquire land by eminent domain. *Id.* Economic development alone did not constitute such a "genuine public use;" therefore, Norwood's plan violated the public use restriction imposed by the Ohio Constitution. *Id.*

319. *Id.* at 1142–53.

320. *Id.* at 1144.

321. *Id.* at 1145.

322. *Id.* at 1144 n.13.

venerable individual right based on nothing more than 'a plank of hypothesis flung across an abyss of uncertainty.'"[323] Because of its twin killing of the power of eminent domain under Ohio law, property rights advocates hailed *Norwood* as a "'home run for homeowners.'"[324]

The facts of cases like *Lowery* and *Norwood* put the concern about the potential for abuse of the blight standard in a different light. In both cases, the blight standard was available, but the condemning authorities pegged their justifications on other grounds. If an excessive risk of abuse of the blight standard existed across the board, one would have expected that the condemning authorities would have based their actions on that standard. After all, justifying the exercise of eminent domain on the broadest, and most accepted, ground available reduces the risk of losing a public use challenge. However, the condemnor in *Lowery* did not even bother to cite blight as a reason for its condemnation, which is unusual given that, presumably, the condemnors knew that Oklahoma law required a finding of blight to support an eminent domain action.[325] And, Norwood's surveyors did not categorize the area to be acquired as "blighted;" therefore, Norwood lacked the evidence to utilize the blight standard in its city code.[326] These two cases, of course, cannot be understood to mean that the blight standard is not subject to abuse at all, but the cases suggest that the blight standard may not be subject to widespread abuse either.

Although the facts of *Lowery* and *Norwood* imply that the risk of widespread abuse is less than feared, those cases do not unambiguously address the threat of facially innocuous invocations of the blight standard

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323. *Id.* at 1146 (quoting Edith Wharton, *The Descent of Man*, 35 SCRIBNER'S MAG. 313, 321 (Mar. 1904), *reprinted in* THE SELECTED SHORT STORIES OF EDITH WHARTON 49, 62 (R.W.B. Lewis ed., 1991)).

324. Gregory Korte, *Norwood Loses Case on Property Seizures*, CINCINNATI ENQUIRER, July 27, 2006, at A1 (quoting the Ohio Farm Bureau Federation). For further positive commentary, see Steve Kemme, *Norwood Site to Stay Vacant For Now*, CINCINNATI ENQUIRER, July 29, 2006, at A1, reporting that one of the attorneys in the case described the decision as "a complete vindication of the rights of every home and business owner in the state." More recently, two other state supreme courts issued decisions that limited municipal authority to exercise the power of eminent domain based upon blight designations. In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007), the borough sought to justify its acquisition of land by eminent domain on the ground that the property "in need of redevelopment" because it was "not fully productive." *Id.* at 449. The owners of the real property challenged the condemnation action on the ground that the borough's justification failed to satisfy the requirements imposed by the state's constitution. *Id.* at 453–54. The Supreme Court of New Jersey observed that the state constitution expressly required a finding of blight in conjunction with an exercise of eminent domain for redevelopment and held that the borough's justification fell outside of the definition of "blight" comprehended by the constitution. *Id.* at 455, 460. Similarly, the Supreme Court of Missouri rejected a city's exercise of eminent domain because of a lack of evidence that the property was a "social liability" in *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431, 435 (Mo. 2007).

325. *See supra* text accompanying note 308.

326. *See supra* text accompanying note 315. Among the surveyors testifying at trial, apparently only one concluded that the property to be acquired met the definition of blighted in the Norwood City Code. *See* Norwood v. Horney, 830 N.E.2d 381, 388–90 (Ohio Ct. App. 2005), *rev'd*, 853 N.E.2d 1115 (Ohio 2006).

to mask invidious discrimination. Notably, one important study that purports to document over 10,000 instances of eminent domain abuse from 1998-2004 does not allege that eminent domain decisions are widely infected with discriminatory motives.[327] To the contrary, the report, which was prepared by one of Susette Kelo's attorneys at the Institute for Justice, asserts that "[e]minent domain these days is more ecumenical" as compared to its past.[328] Overlooking eminent domain's present ecumenism, some identify Michigan's *Poletown Neighborhood Council v. City of Detroit* and its egregious effects on an ethnic community as an example of the risk to some communities posed by eminent domain.[329] But, *Poletown* did not involve an allegation of invidious discrimination of the type that sullies eminent domain's history and, moreover, the Supreme Court of Michigan eventually reversed its now infamous *Poletown* holding in the much-heralded *County of Wayne v. Hathcock*.[330] Even the recent cases put under

327. *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 102 (2003), *available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

328. *Id.* One would think that if invidious discrimination infected the decision-making process in a widespread manner, this study would have featured such information because the Institute for Justice is at the forefront of the push for eminent domain reform.

329. 304 N.W.2d 455, 459 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, the Detroit Economic Development Corporation sought to acquire all of the real property within an area of Detroit known as Poletown and transfer it to General Motors so that it could build an assembly plant on the site. *Id.* at 458. In the midst of an economic downturn, the city argued that such action was necessary "to alleviate and prevent conditions of unemployment and fiscal distress." *Id.* The dispossessed homeowners of Poletown, who were mostly of Polish descent, countered that the condemnation was a taking for a private use in violation of the public use clause in the state constitution. *Id.* According to the *Poletown* complainants, the public benefit derived from the condemnation was "incidental" to the actual motive for the taking. *Id.*

Ruling against the private property owners, the Michigan Supreme Court, ironically, transposed the complainants' assertions and used them to support its conclusion. *Id.* at 459. The court maintained that "[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental." *Id.* On the other hand, the court characterized the public benefit of the city's plan to be "clear and significant." *Id.* As a result, the court ruled that the "public" benefit of the City's plan—"the economic boost"—satisfied the "public use" requirement of the state constitution. *Id.*

330. 684 N.W.2d 765, 787–88 (Mich. 2004). In *Hathcock*, Wayne County sought to exercise its power of eminent domain to acquire nineteen parcels of real property for the purpose of building a "business and technology park." *Id.* at 769. Taking the appropriate cue from the *Poletown* decision, the county claimed that the plan would resuscitate the "struggling economy" in that part of the state. *Id.* at 770. Dispossessed landowners, however, argued that the county's plan violated the public use clause in the state constitution. *Id.* Notably, the complainants did not assert that the government's plan failed to yield any benefit to the public. *Id.* Instead, the property owners urged that the benefits to private parties were far greater than those accruing to the public in the aggregate. *Id.* at 771. In short, the arguments in *Hathcock* were similar to those addressed in *Poletown*.

The Supreme Court of Michigan ruled that building a "technology park" for the primary benefit of a private party did not satisfy the "public use" requirement of Michigan's constitution. *Id.* at 788. The court reviewed its pre-*Poletown* eminent domain jurisprudence and found that the county's plan lacked any of the characteristics of a public use identified in cases decided before *Poletown*. *Id.* at 785–88. The county's plan did not create "instrumentalities of commerce" like roads, which require the recipient of the property to remain accountable to the public post-condemnation, or which eliminate an issue of public concern like blight. *Id.* at 786–88. For the *Hathcock* court, the county's plan amounted

the microscope of the white hot media, like *Kelo* or *Norwood*, lacked facts that might call the condemnor's motive into question.[331] The risk of abuse is undoubtedly real and can never be discounted; therefore, courts must be ever-vigilant to protect against the exercise of eminent domain for discriminatory purposes. Nonetheless, recent cases like *Kelo*, *Lowery*, and *Norwood* indicate that decision-makers are not necessarily doomed to repeat the invidious discrimination associated with eminent domain's past.[332]

An additional reason to suspect that widespread abuse of the blight standard may not occur in the future also applies to the abuse of eminent domain as a general matter—eminent domain is costly for condemning authorities. The process of condemnation is cumbersome and expensive; therefore, eminent domain is employed as a last resort.[333] Instead, condemning authorities prefer to acquire property by private negotiation rather than by condemnation.[334] However, the cost is not limited to monetary expenditure—the political fallout from any exercise of eminent domain could be enormous. Public choice theory predicts that elected decision-makers will be very wary of invoking eminent domain because negative publicity threatens to diminish the probability of re-election.[335] Given the public's heightened awareness about eminent domain post-*Kelo*, any exercise of eminent domain is likely to be accompanied by a hyper-sensitive evaluation of the necessity of condemnation in an effort to minimize political damage.

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to nothing more than a taking of land from one private party to another private party for the primary benefit of the latter. *See id.* at 786. Distancing itself from *Poletown*, the court stated that *Poletown* was "most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." *Id.* at 785. The court emphatically declared that "the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and . . . is overruled." *Id.* at 787.

331. *See* Korte, *supra* note 324, at 1A (referring to Norwood as a "densely packed working-to middle-class neighborhood"); George F. Will, *Legal Theft in Norwood*, NEWSWEEK, Apr. 24, 2006, at 94, 95 (referring to Fort Trumbull as a "modest middle-class neighborhood).

332. Interestingly, the "abuses" catalogued in Berliner's impressive compilation do not unambiguously prove that eminent domain is utilized in an invidiously discriminatory manner. To the contrary, most of the cases in the compilation display eminent domain's "ecumenical" nature. *See* BERLINER, *supra* note 327, at 102. Similarly, a recent report issued by the Institute of Justice does not go as far as to assert that invidious discrimination is rampant in eminent domain decision-making. MINDY THOMPSON FULLILOVE, EMINENT DOMAIN AND AFRICAN-AMERICANS: WHAT IS THE PRICE OF THE COMMONS? (2007), *available at* http://www.castlecoalition.org/pdf/publications/Perspectives-Fullilove.pdf.

333. *See, e.g.*, *Fresh Twist on Eminent Domain*, N.Y. TIMES, Dec. 24, 2006, at NJ11, *available at* http://www.nytimes.com/2006/12/24/opinion/NJdomain.html (quoting the executive director of the New Jersey Conservation Foundation regarding the financial cost of eminent domain); Weimar, *supra* note 2, at 1B.

334. *See* Weimar, *supra* note 2, at 1B (quoting the development administrator of St. Petersburg, Florida, regarding the financial expenditure associated with eminent domain).

335. *Id.*; *see, e.g.*, *Fresh Twist*, *supra* note 328; Christopher Schurz, *Property Owners Nervous Over High Court Ruling*, LAS CRUCES SUN-NEWS, June 26, 2005, at A1 (crediting an official as saying that eminent domain "could easily leave a bad taste in the mouth of the public," which made officials "wary" of using it);.

Returning to the Connecticut city that began the debate over eminent domain, the results of New London's November 2006 election serve as a warning to an elected official who discounts the effect of eminent domain on re-election. In addition to property taxes and concerns about the success of economic development, the "national controversy over seizures of private homes in the Fort Trumbull neighborhood" was among the issues at the forefront of the election.[336] According to a newspaper report, election day:

> [P]rovided the answer to the question many months old: Would misgivings about everything from taxes to the property seizures at Fort Trumbull to the council's occasionally chaotic power struggles with the New London Development Corp. finally lead voters to turn the incumbent Democrats and Republicans out?

The answer, at least as it applied to all three of them, was yes.[337]

Of course, the results of the election in New London, like any other election, cannot be traced to the public's approval or disapproval of a candidate's record on one single issue—New London is "not a one-issue town."[338] Although supporting the condemnations that began the *Kelo* affair may not have been sufficient to lose the election in isolation, the turmoil that followed *Kelo* is not likely to have benefited re-election campaigns either. New London's election results send a powerful message to decision-makers about the risks associated with any exercise of eminent domain, particularly if it gets the label "abuse" attached to it.

Interestingly, statistical information regarding the extent of eminent domain abuse is ambiguous at best. The most-oft cited report on the scope of eminent domain abuse is the aforementioned Institute for Justice study with its finding that more than 10,000 property owners had either been subjected to condemnation proceedings or threatened with such over a five-year period beginning in 1998.[339] If accurate, such a number would be eye-opening. According to one assessment of the study, however, the figure is deceiving because it represents a total of only 222 projects during the time period.[340] Furthermore, a November 2006 report prepared by the

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336. Ted Mann, *In New London, A Vote For Change*, THE DAY, Nov. 9, 2005, at A1 (on file with the Alabama Law Review) (including property taxes and "faltering economic development" among the issues that attracted voter attention).

337. *Id.*

338. *Id.*

339. BERLINER, *supra* note 327, at 9 (stating that there were "10,282+ filed or threatened condemnations for private parties" which broke down into "3,722+ properties with condemnations filed for the benefit of private parties" and "6,560+ properties threatened with condemnations for private parties").

340. Errol Louis, *Eminent Domain Foes Should Stop Skewing Facts*, N.Y. DAILY NEWS, Nov. 21, 2006, at 33 (citing information from Professors Robert Dreher and John Echeverria of Georgetown

United States Governmental Accountability Office failed to gather statistics regarding how often eminent domain is used, for what purposes, and who obtained benefits from condemnations because of a lack of national or state data to illuminate the questions.[341] Given the ambiguity regarding the breadth of abuse, the legislative response to the torrent of criticism directed at *Kelo* is most fairly characterized as pragmatic. State legislatures adopted reforms that addressed the specific concerns raised in *Kelo*, but went no further in the absence of information to bring additional problems into clearer focus.[342]

The benefit of enacting pragmatic measures rather than heavy-handed reforms is clearer when the costs of enacting overly aggressive measures are taken into account. The increase in the stringency of eminent domain controls would come at the expense of the flexibility afforded to communities to deal with problems in a manner commensurate with community standards. In other words, heavy-handed reforms inhibit community self-determination. Kansas City, Kansas, for example, "had been burdened for generations by poverty, crime, and a stagnant economy" until it used eminent domain to build a racetrack.[343] Despite opposition, the project went forward and has been "a glorious success for this once-struggling country."[344] In fact, one former opponent of the project described the impact of the project as "amazing" and "just a beautiful thing."[345] Eminent domain also played an important role in the redevelopment of Baltimore's Inner Harbor, which not only rejuvenated Baltimore's economic fortunes, but also transformed the locale's flagging image from a blighted area to the "city's front porch."[346] Of course, not all projects will bear fruit, but at least communities have the ability to choose their fates, or poisons, in the absence of stringent regulations. For those states that have enacted aggres-

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Law School).

341. U.S. GOV'T ACCOUNTABILITY OFFICE, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 3 (Nov. 2006), *available at* http://www.gao.gov/new.items/d0728.pdf.

342. *See supra* Subpart IV.A. and Subpart IV.B.

343. Timothy J. Dowling, *Give Eminent Domain a Chance: Law Supports City's Redevelopment*, L.A. DAILY J., Feb. 22, 2005, at 6, *available at* http://www.communityrights.org/pdfs/ladj2-22-05.pdf (also identifying successful eminent domain redevelopment projects in Mississippi); *see also* Dennis Cauchon, *States Review Eminent Domain*, USA TODAY, Feb. 20, 2006, *available at* http://www.usatoday.com/news/nation/2006-02-19-eminentdomain_x-htm (observing that New York's Times Square was "revamped" by eminent domain); Jill Gardiner, *Mayor Ups the Ante on Eminent Domain*, THE N.Y. SUN, May 3, 2006, *available at* http://www.nysun.com/article/32017. The article quotes the mayor of New York City as saying "Times Square really was the poster child for a seedy, dangerous, unattractive, porno-laced place. . . . Because of eminent domain and some forward-looking people in this city, they turned it into a place where 24 hours a day you're safe on the street." *Id.*

344. Dowling, *supra* note 343.

345. *Id.*

346. Brief of Amicus Curiae Mayor and City Council of Baltimore in Support of Respondents at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166940; *see also* Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5, *available at* http://www.nytimes.com/2006/01/18/realestate/18domain.html.

sive reform measures, like Florida, citizens may presently applaud the legislature's tough stance on the exercise of eminent domain in the present.[347] On the other hand, a possibility exists that "[o]ne day in the near future, Floridians are going to wake up and realize they have been duped."[348]

## VI. CONCLUSION

Most Supreme Court decisions involving property law, or any other legal subject for that matter, anonymously fade into history. *Kelo* is different. A comment from the Supreme Court of Georgia's 1851 decision of *Parham v. Justices of the Inferior Court* captures the underlying reason for *Kelo's* anomalous grip on the public's attention.[349] In *Parham*, the court wrote that "[a]ll grants of land are in subordination to the eminent domain which remains in the State; and from the necessities of the social compact, they are subject to this condition."[350] The public might understand the loss of private property for the construction of a school, firehouse, or a public road as part of the "social compact," but the holding in *Kelo* extended beyond those public uses. For many, *Kelo* represented an alarming exemplar of the ability of special interests to capture governmental decision-making power and use it to violate the cherished right of private property. *Kelo* breached *Parham's* "social compact"—government invaded the right of private property for the benefit of a private party that happened to be a big business. In that light, the flurry of post-*Kelo* legislative activity is a governmental effort to repair that breach, an attempt to regain the public's trust. Given the magnitude of the breach symbolized by the ongoing eminent domain debate, post-*Kelo* legislation cannot yet be equated to restitution, but rather mitigation.

Whatever one's view of the merits of the remedial effort, the sheer volume of post-*Kelo* legislation is a testament to the health of the federalism that lies at the foundation of our system of government. In response to an unpopular decision from a federal branch of government, state legislatures enacted statutory law that addressed the specific causes of the public squall. Post-*Kelo* legislation banned economic development takings, barred post-condemnation transfers to private parties, or both. Recognizing *Kelo's* federalism-enforcing aspect during his confirmation hearings, then-Judge Roberts opined that "legislative bodies in the states" possess the power to "protect them [citizens of those states] . . . . where the Court has determined, as it did 5-4 in Kelo, that [it is] not going to draw that

347. Weimar, *supra* note 2, at 1B.
348. *See id.*
349. 9 Ga. 341(Ga. 1851).
350. *Id.* at 344.

line."[351] The states' acceptance of Justice Stevens's invitation in *Kelo* illustrates now Chief Justice Roberts's point.

351. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 286 (2005).