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## Property Law - Not So Fast: The Supreme Court's Overly Broad Public Use Ruling Condemns Private Property Rights with Surprising Results - Kelo v. City of New London

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**PROPERTY LAW—Not So Fast: The Supreme Court’s Overly Broad Public Use Ruling Condemns Private Property Rights with Surprising Results. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).**

INTRODUCTION

The City of New London is located in the southeastern part of Connecticut where the Thames River empties into Long Island Sound.<sup>1</sup> In 1978, the city created the New London Development Corporation (NLDC), a non-profit organization, to help assist in planning economic growth.<sup>2</sup> The decades following creation of the NLDC, however, proved to be a period of economic decline for New London, particularly in the Fort Trumbull area of the city.<sup>3</sup> The decline was so dramatic that New London was labeled a “distressed municipality” by a state agency in 1990.<sup>4</sup> Adding to this deterioration, in 1996 the Federal Government closed the United States Naval Undersea Warfare Center, located in the Fort Trumbull area, which had employed over 1500 people.<sup>5</sup> By 1998, this closure had contributed to an unemployment rate in New London twice as large as that in the rest of Connecticut.<sup>6</sup> The same year, the NLDC was revitalized in order to focus on the need for economic rejuvenation and development in the New London community of Fort Trumbull.<sup>7</sup> In a coincidental stroke of good luck, Pfizer, Inc. simultaneously announced its plan to develop a research site adjacent to the Fort Trumbull area.<sup>8</sup> New London officially conveyed land to Pfizer in June of 1998.<sup>9</sup> The next month, the City appointed consultants in order to begin the development plan and the state Environmental Protection Act process.<sup>10</sup>

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1. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005), *aff’g* 843 A.2d 500 (Conn. 2004).

2. *Id.* at 2659; *Kelo v. City of New London*, 843 A.2d 500, 508 (Conn. 2004).

3. *Kelo*, 125 S. Ct. at 2658.

4. *Id.* The state office of policy and management labeled New London a “distressed municipality.” *Kelo*, 843 A.2d at 510.

5. *Kelo*, 125 S. Ct. at 2658. *See also Kelo*, 843 A.2d at 510.

6. *Kelo*, 125 S. Ct. at 2658.

7. *Id.* at 2658-59.

8. *Id.* at 2659. *See Kelo*, 843 A.2d at 508. In January of 1998, the state issued \$5.35 million in bonds to help fund development activities and a \$10 million bond to fund a Fort Trumbull State Park. *Kelo*, 125 S. Ct. at 2659. Pfizer, a large pharmaceutical company, announced its plan for a research facility in February of 1998. *Id.*

9. *Kelo*, 843 A.2d at 508. Pfizer purchased the New London Mills site. *Id.*

10. *Id.* at 508-09. Environmental impact evaluations, including any negative findings:

[S]hall be submitted for comment and review to the Council on Environmental Quality, the Department of Environmental Protection, the Connecticut Commission on Culture and Tourism, the Office of Policy and Management, the Department of Economic and Community Development in the case of a proposed action that affects existing housing, and other appropriate agencies, and to the town clerk of each municipality affected

The NLDC included many purposes in their economic development plan.<sup>11</sup> In particular, the plan stated the new Fort Trumbull development should create jobs, increase tax revenue for New London, and help drive the revitalization of the city's downtown growth by taking advantage of the new Pfizer facility.<sup>12</sup> An additional purpose included the creation of a more attractive city and increased public access to recreation.<sup>13</sup> The NLDC produced six plans and finally settled on a plan that was approved by the city council in January 2000.<sup>14</sup> The approved plan encompassed ninety acres of Fort Trumbull and was divided into seven parcels.<sup>15</sup> The development was projected to create an abundance of new jobs and greatly increase the tax base.<sup>16</sup> After authorizing the NLDC's plan, the city council conferred its eminent domain power on the NLDC to purchase or condemn the proposed property.<sup>17</sup> By November of 2000, the NLDC had successfully purchased the majority of land needed for development.<sup>18</sup> However, the owners of fif-

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thereby, and shall be made available to the public for inspection and comment at the same time.

CONN. GEN. STAT. § 22a-1d (2004).

11. *Kelo*, 843 A.2d at 509. See *Kelo*, 125 S. Ct. at 2659.

12. *Kelo*, 125 S. Ct. at 2659.

13. *Id.*

14. *Kelo*, 843 A.2d at 510. The plans developed but not accepted included the following: (1) no action, assuming that the United States Navy would initiate some sort of development plan; (2) recreational and cultural facilities to accompany the nearby state park; (3) new residential construction with few retail stores and office spaces; (4) a business campus with hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses. *Id.* at 510 n.6. The city council approved a sixth alternative after review by state agencies and meetings with the public to explain the process of development. *Kelo*, 125 S. Ct. at 2659.

15. *Kelo*, 125 S. Ct. at 2659. The parcels were given the following designations: (Parcel 1) waterfront conference hotel with restaurants, shopping, marinas for recreational and commercial use, and the origination of a riverwalk connecting all waterfront areas of the development; (Parcel 2) eighty new residences and a United States Coast Guard Museum; (Parcel 3) 90,000 square feet of research and development office space (this parcel is located adjacent to Pfizer's plant); (Parcel 4A) parking or retail which is attached to the new state park; (Parcel 4B) renovated marina and end of river walk; and (Parcels 5, 6, and 7) office and retail space, parking, and water-dependant commercial uses. *Id.* at 2559.

16. *Kelo*, 843 A.2d at 510. The approved plan was expected to create between 518 and 867 construction jobs; between 718 and 1362 direct jobs; and between 500 and 940 indirect jobs. *Id.* These new jobs would more than compensate for the jobs lost by the closing of the Naval Underwater Warfare Center. *Id.* The development plan would generate between \$680,544 and \$1,249,843 in new property taxes for the City of New London. *Id.*

17. *Kelo*, 125 S. Ct. at 2660. This power of eminent domain was conferred on the NLDC by Connecticut General Statute § 8-193 which states "[t]he development agency may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area and real property and interest therein for rights-of-way and other easements to and from the project area." CONN. GEN. STAT. ANN. § 8-193 (2004).

18. *Kelo*, 125 S. Ct. at 2660.

teen remaining properties were unwilling to sell and the NLDC began the condemnation process to acquire the remaining land.<sup>19</sup>

In an effort to avoid losing their properties, the nine remaining property owners filed an action in New London Superior Court in December 2000.<sup>20</sup> They claimed that the taking of their properties was not in accordance with the “public use” restriction of the Fifth Amendment.<sup>21</sup> The Court granted a permanent restraining order with respect to the properties likely to be used as a parking lot in parcel 4A, but offered no relief with respect to the properties destined for office space in parcel 3.<sup>22</sup> Both the City of New London and plaintiffs appealed claiming the trial court erred in its judgment.<sup>23</sup> The Supreme Court of Connecticut upheld the office space takings in parcel 3 and reversed the superior court’s ruling for a restraining order in the parking lot area of parcel 4A.<sup>24</sup>

The United States Supreme Court granted certiorari “to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the *Fifth Amendment*.”<sup>25</sup> In a 5-4 decision delivered by Justice Stevens, the Court affirmed the ruling of the Supreme Court of Connecticut holding that the proposed takings in Fort Trumbull serve a public purpose and therefore qualify as a public use under the Fifth Amendment.<sup>26</sup>

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19. *Id.* Four of the properties were in parcel 3 of the development (reserved as office space to complement the Pfizer facility) and the remaining eleven properties were in parcel 4A (likely to be used as a parking lot). *Id.* at 2659-60. The nine property owners unwilling to sell were not holding out for more money nor were they against development in Fort Trumbull. *Id.* at 2672 (O’Connor, J., dissenting). However, they believed New London’s purpose for condemning their properties was not a valid “public use.” *Id.* (O’Connor, J. dissenting).

20. *Kelo*, 125 S. Ct. at 2660. See also *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at \*1 (Conn. Super. Ct. Mar. 13, 2002).

21. *Kelo*, 125 S. Ct. at 2660. These properties were not blighted, but were condemned as a result of their location within the development area. *Id.*

22. *Id.* Parcel 4A contained eleven properties and parcel 3 contained four properties. *Id.*

23. *Kelo*, 843 A.2d at 508. Plaintiffs claimed the trial court erred by concluding (1) the taking was valid under chapter 132 of the Connecticut General Statutes; (2) economic development is a valid public use and these takings will benefit the public and assure of future public use; (3) giving the eminent domain power to the development corporation was not unconstitutional; (4) that the takings in parcel 3 were reasonably necessary to the development plan; and (5) that allowing a private social club on the property in parcel 3 but not allowing it on plaintiff’s property was not a violation of equal protection of the laws. *Id.* Defendants claim the trial court erred by concluding (1) the takings of the properties in 4A were not reasonably necessary to accomplish the development plan; and (2) the city’s general power to widen and alter roadways did not justify the takings in parcel 4A. *Id.*

24. *Id.* at 574. The Connecticut Supreme Court remanded the case to the trial court “with direction to render judgment for the defendants.” *Id.*

25. *Kelo*, 125 S. Ct. at 2661.

26. *Id.* at 2657, 2665, 2669.

This case note will examine the evolving definition of “public use” under the Fifth Amendment. First, it will trace the broadening definition of public use and legislative deference leading up to *Kelo*, which this case note will argue was decided incorrectly. Next, it will analyze the Court’s precedents and argue that the judgment of the Supreme Court of Connecticut could have been reversed without their disruption. Additionally, it will argue that, ultimately, the decision puts the economically and politically disadvantaged at risk of losing their land to developers who wish to profit by building strip malls and nice hotels in place of homes and small businesses. Last, although the *Kelo* decision has some disturbing consequences, this case note will argue that backlash from this decision has raised public awareness and started a movement for legislation that will ultimately limit the government’s eminent domain power.

### BACKGROUND

The Fifth Amendment of the United States Constitution declares that no person shall “be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*”<sup>27</sup> There are three categories of takings which justify the “public use” clause, two of them more straight-forward than the other.<sup>28</sup> The first type of taking, premised on the most obvious type of public use, occurs when the government takes land from private entities in order to use it for a school, road, military facility, or hospital.<sup>29</sup> Essentially, the “public” or the government owns the property.<sup>30</sup> A second type of taking occurs when private property is transferred to private owners of a common carrier or utility.<sup>31</sup> This type of taking, although transferred to a private entity, allows the public equal access to the service it provides.<sup>32</sup> The third, a more controversial and confusing type of taking, involves the transfer of private land to a private entity that will ultimately serve a “public purpose.”<sup>33</sup> It is this third type of taking that was commonly rejected throughout the nineteenth cen-

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27. U.S. CONST. amend. V (emphasis added).

28. *Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting).

29. *Id.* (O’Connor, J., dissenting). See *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925) (allowing the United States to take private land for military facilities); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923) (allowing the state of California to take private property for the creation of a public highway).

30. *Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting).

31. *Id.* (O’Connor, J., dissenting). See *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) (allowing the taking of property for use by a railroad); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (transferring private water rights to a power company to generate power).

32. *Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting).

33. *Id.* (O’Connor, J., dissenting). See *Berman v. Parker*, 348 U.S. 26 (1954) (allowing transfer of private property to a private developer in order to eradicate the conditions causing slums); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (transferring fee simple title from lessor to lessee in order to break up a land oligopoly causing a skewed land market). See *infra* notes 36-76 and accompanying text.

ture, but has become increasingly widespread in recent years.<sup>34</sup> Although there are many cases leading to the decision in *Kelo v. City of New London*, two cases, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, greatly contributed to the Court's justification for its ruling.<sup>35</sup>

### *Redevelopment Due to Blight*

In 1954, the United States Supreme Court decided *Berman v. Parker*, in which it upheld the District of Columbia Redevelopment Act of 1945.<sup>36</sup> The Act involved takings for the purpose of "slum clearing" and found that conditions in parts of Washington, D.C. were so substandard they were "injurious to the public health, safety, morals, and welfare" of the people of the Nation's capital.<sup>37</sup> This Act gave the government the power to eliminate harmful conditions by any "means necessary and appropriate for the purpose," including acquiring and assembling, "by eminent domain and otherwise, real property for 'the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight.'"<sup>38</sup> In 1950, the District of Columbia attempted the first redevelopment project under the Act.<sup>39</sup> According to the Planning Commission, many of the residences in Area B were beyond repair and lacked electricity, indoor toilets, wash basins, or central heating.<sup>40</sup> Due

34. See Eric R. Claeys, *Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 904-05 (Winter 2004). In the nineteenth century, "courts routinely rejected—in extremely strong language—the proposition that legislatures could redistribute land between private parties," but modern law treats "public use" as "public usefulness," a much broader term. *Id.*

35. *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). See also *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710 (1923) (allowing the condemnation of private land for use as a railroad tunnel); *Cincinnati v. Vester*, 281 U.S. 439 (1930) (disallowing greater appropriation of land than needed for the widening of a city street); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling a previous decision allowing takings to confer benefits on private entities); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (allowing condemnation of private land in order to transfer it to a large private corporation); *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (2002) (prohibiting the vacation of a restrictive covenant which would have resulted in the taking of residential property in order to confer a benefit on developers).

36. *Berman*, 348 U.S. at 36.

37. *Id.* at 28. See D.C. CODE §§ 5-701—5-719 (1951) ("[I]t is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.")

38. *Berman*, 348 U.S. at 28, 29 (quoting D.C. CODE §§ 5-701—5-719 (1951)).

39. *Id.* at 30. Due to overwhelming blight, "[t]he first project undertaken under the Act relates to Project Area B in Southwest Washington, D.C." *Id.*

40. *Id.* "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." *Id.*

to these conditions, the District's Director of Health declared it "necessary" to redevelop that area in order to protect the public's health.<sup>41</sup> Thus, the necessary steps were taken to assemble the land in the area for redevelopment.<sup>42</sup> After the land was assembled, some of it would be transferred to public entities for the construction of schools, streets, and utilities.<sup>43</sup> However, the majority of the land would be sold or leased to private developers because preference was given to private entities over public agencies.<sup>44</sup>

Berman, a department store owner whose non-blighted property was located inside Area B, objected to the taking of his land, in part, because it was an unconstitutional taking under the Fifth Amendment.<sup>45</sup> Berman contended that taking his property and transferring it to a private entity was not a valid "public use."<sup>46</sup>

The Supreme Court upheld the Redevelopment Act, allowing the taking of Berman's property.<sup>47</sup> The Court articulated two reasons for its holding.<sup>48</sup> First and foremost, the *Berman* Court deferred to the legislature's judgment as to whether to exercise its police power over the affairs of the District of Columbia.<sup>49</sup> Traditionally, a government may enact its police powers for matters of public safety, public health, morality, peace and quiet, and law and order.<sup>50</sup> The Court stated the legislature's job is to determine how to use these powers, and the judiciary's job is to decide whether the police power is being used for a public use.<sup>51</sup> Second, the Court stated the use of eminent domain is only a means to the end which Congress has proposed.<sup>52</sup> Thus, once Congress has proposed the removal of blight, it is within Congress' authority to determine which means will achieve this

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41. *Berman*, 348 U.S. at 30.

42. *Id.*

43. *Id.* The development plan specified that at least one-third of the new homes were to be low rent. *Id.*

44. *Id.* However, the leases and sales required private developers to conform to the specific, authorized development plan. *Id.*

45. *Id.* at 31. The redevelopment plan called for the transfer of Berman's unblighted department store to private developers, for their benefit, because it was located inside the development area. *Id.*

46. *Berman*, 348 U.S. at 31. Plaintiff argued that "[t]o take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community." *Id.*

47. *Id.* at 36 ("If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so.").

48. *Id.* at 32-33.

49. *Id.* at 31-32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .").

50. *Id.* at 32.

51. *Id.* (concluding that the judiciary's power to determine public use is extremely narrow).

52. *Berman*, 348 U.S. at 33. The Court explained that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.*

goal.<sup>53</sup> The Court rejected the notion that the only method to achieve a public purpose is by public ownership, and found “private enterprise” may better serve the needs of the public and facilitate Congress’ purpose.<sup>54</sup>

Although Berman’s land was not blighted, experts stated that in order for the community to be redeveloped in such a way as to avoid future blight, the whole area had to be redesigned.<sup>55</sup> The Court agreed, concluding that the Constitution does not force redevelopment programs to be on a lot-by-lot basis.<sup>56</sup> The *Berman* Court laid the groundwork for future cases involving the use of eminent domain for transfer of private land to private entities by stating:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.<sup>57</sup>

Thus, the *Berman* Court concluded that courts should give deference to the legislature when determining what constitutes a public purpose and in determining the means to realize it.<sup>58</sup>

### *Takings Conferring Private Benefits*

Thirty years after the decision in *Berman*, the United States Supreme Court, in *Hawaii Housing Authority v. Midkiff*, was given another chance to

53. *Id.*

54. *Id.* at 33-34. Although Berman argued the taking of his property was merely the transfer of a benefit from one businessman to the other, the Court said ultimately, the interest of the public might be served best through a private entity. *Id.* at 33-34.

55. *Berman*, 348 U.S. at 34. The Court concluded that Congress looked at the best interest of the entire community and, even if individual properties in the community were not blighted, they were to be condemned in the interest of the community as a whole. *Id.*

56. *Id.* at 35. The Court stated,

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.* at 34-35.

57. *Id.* at 35-36 (referencing *Shoemaker v. United States*, 147 U.S. 282, 298 (1893); *U.S. ex. rel. T.V.A. v. Welch*, 327 U.S. 546, 554 (1946); *United States v. Carmack*, 329 U.S. 230, 247 (1946)).

58. *Berman*, 348 U.S. at 33.



decide the issue of whether economic development constitutes a "public purpose."<sup>59</sup> The *Midkiff* Court unanimously affirmed *Berman*.<sup>60</sup> By the late 1960s, the State of Hawaii had tried various methods to break up a land oligopoly plaguing Hawaii's residential land market.<sup>61</sup> The legislature had determined the ownership of the majority of land by only a few citizens was "inflating land prices, and injuring the public tranquility and welfare."<sup>62</sup> The Hawaii Legislature attempted to compel the large land owners to sell their property to their lessees.<sup>63</sup> However, the landowners largely rejected this proposal claiming they would have sold, not leased, their property years ago had federal taxes not been so burdensome upon the occurrence of a sale.<sup>64</sup> In an effort to appease the landowners and eliminate the oligopoly, the Hawaii Legislature passed the Land Reform Act of 1967.<sup>65</sup> Among various restrictions, the Act allowed current lessees of property to petition the government to condemn their land in order to relieve the seller of high taxes and promote a friendlier housing market.<sup>66</sup>

In 1977, the lessees of Midkiff's land began the process to procure the property on which they lived.<sup>67</sup> The Hawaii Housing Authority determined that these takings would further the purpose of the Land Reform Act and ordered Midkiff to negotiate a selling price with his lessees.<sup>68</sup> When these negotiations failed, instead of submitting to compulsory arbitration, Midkiff filed a suit in the United States District Court for the District of Hawaii claiming that the Land Reform Act was unconstitutional.<sup>69</sup> Like the *Berman* Court, the district court in *Midkiff* held that the Act's goals were within the bounds of Hawaii's police power.<sup>70</sup> Upon appeal, the Ninth Circuit Court of Appeals reversed the district court's decision.<sup>71</sup> The court of appeals, using strict scrutiny, determined the purpose of the Land Reform

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59. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

60. *Id.* at 230, 244.

61. *Id.* at 232. The oligopoly stemmed from a feudal land system created by Polynesian immigrants in which there was no private ownership of land. *Id.*

62. *Id.*

63. *Id.* at 233.

64. *Id.*

65. *Id.* at 233. See HAW. REV. STAT. §§ 516-22 (1977) (giving the Hawaii Housing Authority the power of eminent domain if, after a public hearing, the proposed takings are determined to be a valid public purpose).

66. *Midkiff*, 467 U.S. at 233-34. The federal tax burden was lessened by making the sales "involuntary." *Id.* at 233.

67. *Id.* at 234.

68. *Id.*

69. *Id.* at 234-35.

70. *Id.* at 235 (holding that the means which the legislature chose to eliminate the oligopoly were not "arbitrary, capricious, or selected in bad faith").

71. *Id.* at 235. See *Haw. Housing Auth. v. Midkiff*, 702 F.2d 788 (9th Cir. 1983).

Act was not a public use and the Act was simply a way to transfer land from one person to another.<sup>72</sup>

Upon review, the United States Supreme Court not only affirmed *Berman*, but stated that regulating an oligopoly is included in the State's police powers.<sup>73</sup> The Court concluded that eminent domain could be used to achieve any purpose falling under the government's police power.<sup>74</sup> Again, the Court promoted a rational basis review of eminent domain for economic development, giving almost complete deference to the legislature.<sup>75</sup> Despite the fact that neither the legislature nor the public would have access to the taken land, the *Midkiff* Court concluded "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases."<sup>76</sup>

### *Striking Down Economic Development as a Public Use*

*Poletown Neighborhood Council v. City of Detroit* and *County of Wayne v. Hathcock*, both Supreme Court of Michigan cases, addressed opposing views of takings for private benefits.<sup>77</sup> The early 1980s found Michigan, particularly Detroit, in a state of economic peril resulting from a mass exodus of manufacturers.<sup>78</sup> In 1980, General Motors threatened to leave Detroit unless the city could find a suitable location for a new plant.<sup>79</sup> Due

72. *Midkiff*, 467 U.S. at 235, 243 (holding by the Ninth Circuit Court of Appeals that the takings in *Midkiff* were not similar to those previously held to constitute a "public use").

73. *Id.* at 242 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.")

74. *Id.* at 240-41. The Court stated that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240.

75. *Id.* at 242-43. The Court stated that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Id.*

76. *Id.* at 245.

77. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

78. *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting) (stating that the increased cost of doing business was driving automobile manufacturers out of the state).

79. *Id.* at 466 (Ryan, J., dissenting).

[There was an] offer from General Motors to construct a modern 3 million square foot assembly complex at a cost of \$500,000,000 to replace their aging Cadillac Assembly and Fisher Body plants that General Motors propose[d] to close in 1983. To Detroit, this provided the opportunity to retain 6,150 jobs which would have otherwise been permanently lost to the Detroit area if General Motors were forced by size constraints to move . . . .

*Id.* at 467 (Ryan, J., dissenting).

to the high level of distress Detroit would face if another of its manufacturers left, the State of Michigan enacted the Economic Development Corporations Act.<sup>80</sup> The Act gave Detroit the power to condemn private land in order to transfer it to General Motors for construction of a new facility.<sup>81</sup> Although plaintiffs agreed with the purpose of the Act, they challenged the use of eminent domain to transfer private property to a private entity in the name of economic development.<sup>82</sup> In a very short opinion, the Michigan Supreme Court referred to *Berman* when it deferred to the legislature and upheld the takings.<sup>83</sup> The *Poletown* court used heightened scrutiny for a taking that benefits private entities.<sup>84</sup> This heightened scrutiny was used in order to ensure that the “public interest is the predominant interest being advanced.”<sup>85</sup> Although *Poletown* used heightened scrutiny, it upheld the taking of residents’ private property in order to benefit a private company.<sup>86</sup>

Twenty-three years later, in *County of Wayne v. Hathcock*, the Michigan Supreme Court overruled *Poletown* in order to “protect people’s property rights, and preserve the legitimacy of the judicial branch as expositor—not creator—of fundamental law.”<sup>87</sup> This case involved a county wishing to condemn private property under the guise of eminent domain in order to construct a 1300 acre business and technology park.<sup>88</sup> The purpose of this taking was to rejuvenate a struggling economy, but the Michigan Supreme Court struck it down as inconsistent with the term “public use” found in the Michigan Constitution.<sup>89</sup> When deciding *Kelo*, the United States Supreme

80. *Id.* at 457. See MICH. COMP. LAWS § 125.1601 (1979) (authorizing municipalities to condemn land in order to provide for industrial and commercial sites).

81. *Poletown*, 304 N.W.2d at 457. The Court stated that “the Legislature has authorized municipalities to acquire property by condemnation in order to provide industrial and commercial sites and the means of transfer from the municipality to private users.” *Id.* at 458.

82. *Id.* at 458. The purpose of the Act was to “create an industrial site which will be used to alleviate and prevent conditions of unemployment and fiscal distress.” *Id.*

83. *Id.* at 459 (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)) (“The United States Supreme Court has held that when the legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’”).

84. *Id.* at 459-60.

85. *Id.* at 459-60. In order to ensure the public interest, “[s]uch public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.” *Id.* at 460.

86. *Poletown*, 304 N.W.2d at 460. See Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651, 661 (Spring 2005) (explaining that the court’s decision in *Poletown* did not conform with strict scrutiny).

87. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

88. *Id.* at 769.

89. *Id.* at 770. The court determined that in Michigan there are three categories of condemnation that qualify as public use. *Id.* at 781. The categories include the following: (1) public necessity such as the need for railroads or highways; (2) condemning in order to transfer land to a private entity when that private entity remains accountable to the public for use of that property; and (3) when the land being condemned is of a public concern such as in the case of eliminating blight. *Id.* at 781-83. The court concluded that “Wayne County intends to transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of ‘public use’ at the time our Constitution was ratified.” *Id.* at 770.

Court was armed with the knowledge that at least one state had unanimously and recently rejected the taking of private property for economic development.<sup>90</sup>

#### PRINCIPAL CASE

In *Kelo v. City of New London*, the United States Supreme Court determined whether economic development qualifies as a public use under the Fifth Amendment.<sup>91</sup> The Court's decision began by stating that the government will never be justified in taking land from private property owner A to give to private property owner B for his sole benefit, but the government is allowed to transfer property from A to B if the purpose of the taking is for future use by the public.<sup>92</sup> The Court reasoned that giving A's land to B for the sole benefit of B will never withstand the public use requirement.<sup>93</sup> In order to qualify as a public use, private property may be given to another private owner only if the purpose is to benefit the public.<sup>94</sup> However, the property may not be transferred under the pretext of a public use when the actual purpose of the taking is to confer a private benefit on a particular group.<sup>95</sup> The *Kelo* Court concurred with both lower court opinions in that the economic development plan is a legitimate purpose that will not just confer a benefit on an identifiable group of people.<sup>96</sup>

The Court accepted the purpose of the proposed takings, but it acknowledged the fact that the condemned land will not be required to be open to the public.<sup>97</sup> However, the Court "long ago rejected any literal requirement that condemned property be put into use for the general public."<sup>98</sup> The Court used the modern definition of public use in declaring that *Kelo* does

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90. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

91. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). The Court declared that "[t]he question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the *Takings Clause of the Fifth Amendment to the Constitution*." *Id.* at 2658.

92. *Id.* at 2661.

93. *Id.* See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (explaining that a purely private taking is not a public use because it does not serve a legitimate government purpose); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (explaining that it is beyond reason and justice that people would entrust the legislature to take property from A and give it to B).

94. *Kelo*, 125 S. Ct. at 2662.

95. *Id.* at 2661.

96. *Id.* at 2662. The record clearly states that the purpose of the plan was not to benefit Pfizer but to revitalize the community as a whole. *Id.* at 2662 n.6. See *Midkiff*, 467 U.S. at 245 (stating that the Act in question was not for the benefit of an identifiable individual).

97. *Kelo*, 125 U.S. at 2662.

98. *Id.* (quoting *Midkiff*, 467 U.S. at 244).

not turn on whether the development plan is a public use but whether it serves a public purpose.<sup>99</sup>

The Court then evaluated whether economic development constitutes a public purpose, relying heavily on the outcomes of two United States Supreme Court cases decided within the last half of the twenty-first century, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.<sup>100</sup> As previously mentioned, the Court in both cases upheld the condemnation of property taken from private property owners and transferred to private individuals.<sup>101</sup>

In *Kelo*, the Court affirmed the ruling of the Supreme Court of Connecticut.<sup>102</sup> The Court deferred to the judgment of the Connecticut legislature which determined that the Fort Trumbull area was distressed enough to warrant economic rejuvenation.<sup>103</sup> The Court agreed the economic development plan will create a “whole greater than the sum of its parts” with new jobs and increased tax revenue, among other things.<sup>104</sup> In finalizing its decision, the Court determined that it must look at the development plan in its entirety, not the claim of each individual property owner.<sup>105</sup>

Before concluding its discussion, the Court addressed three of the petitioners’ contentions.<sup>106</sup> First, the Court rejected petitioners’ argument that economic development does not constitute a public use by stating that “economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.”<sup>107</sup>

99. *Id.* at 2662. Compared to the mid-nineteenth century when courts defined public use as “use by the public,” the more modern use evolved into “public purpose,” a much broader term. *Id.*

100. *Id.* at 2663-64 (citing *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984)).

101. *Id.* After describing the facts and holdings of *Berman* and *Midkiff* the Court concluded 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.” *Id.* at 2664.

102. *Kelo*, 125 S. Ct. at 2669.

103. *Id.* at 2665. The Court deferred to the legislature’s judgment despite the fact the City of New London was not faced with blight removal. *Id.*

104. *Id.*

105. *Id.* The Court reaffirmed that “it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.” *Id.*

106. *Id.* at 2665-68.

107. *Id.* at 2665. The Court recognized the importance of agriculture and mining to the public in *Strickley v. Highland Boy Gold Mining Co.* 200 U.S. 527 (1906). *Id.* In *Berman*, the Court recognized the importance of a “well-balanced” community. *Berman v. Parker*, 348 U.S. 26, 33 (1954). In *Midkiff*, the Court recognized that breaking up a land oligopoly was important to the proper functioning of the real estate market. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984).

The Court refused to exempt economic development from being a public purpose.<sup>108</sup> Second, the Court rejected the argument that labeling economic development a public use is blurring the lines between public and private takings.<sup>109</sup> While the Court recognized developers and other private individuals will benefit from the development plan in Fort Trumbull, it contended that, in actuality, a public purpose may be best served by private individuals.<sup>110</sup> Again, the Court deferred to the legislature to make this determination.<sup>111</sup> Last, the Court rejected petitioners' recommendations that the Court require a "reasonable certainty" the public will benefit from the takings.<sup>112</sup> The Court contended that a "reasonable certainty" test would depart from precedent in *Midkiff* which established that as long as the legislative purpose is legitimate and the means to that purpose are not irrational, it is not for the Court to debate the wisdom of the taking.<sup>113</sup> In addition, the Court believed that the delay required to confirm this "reasonable certainty" would jeopardize the chance of economic success.<sup>114</sup> Thus, the Court determined the only thing it must decide was whether the legislature's purpose was legitimate and whether there was a rational relation between the purpose of the act and the means used to achieve it.<sup>115</sup> In response to both inquiries, the Court decided in the affirmative.<sup>116</sup>

The *Kelo* Court concluded by noting that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the

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108. *Kelo*, 125 S. Ct. at 2665-66.

109. *Id.* at 2666. The Court stated that "[q]uite simply, the government's pursuit of a public purpose will often benefit individual private parties." *Id.*

110. *Id.* The Court stated that public ownership is not the only way to achieve a public purpose. *Id.*

111. *Id.*

112. *Id.* at 2667. In his oral argument before the Court, counsel for petitioners argued for minimum standards to ensure that a public benefit occurs. Transcript of Oral Argument at 15, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). This argument is in line with that of the dissent for the Connecticut Supreme Court. *Id.* The minimum standards could include things such as "a commencement date for the project, a construction schedule, [and] financial eligibility for the developers . . ." *Id.*

113. *Kelo*, 125 S. Ct. at 2667 (citing *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

114. *Id.* at 2668. The Court explained that "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans." *Id.*

115. *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 (1984) ("The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.")).

116. *Id.* at 2669.

takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline.”<sup>117</sup>

### *Justice Kennedy’s Concurrence*

In his concurring opinion, Justice Kennedy added that a court should use rational basis review when determining whether the legislature’s taking is valid under the Public Use Clause.<sup>118</sup> He went on to say that when applying rational basis review in this type of case, a court should only “strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . .”<sup>119</sup> He disagreed with petitioners’ contention that any taking for economic development must be *per se* invalid but reasoned that there may be some instances in which a private party is shown such acute favoritism that the taking is unacceptable.<sup>120</sup> *Kelo* did not demand a higher level of scrutiny, and Justice Kennedy declined to describe the type of economic development taking that would trigger such scrutiny.<sup>121</sup>

### *Justice O’Connor’s Dissent*

In her dissenting opinion, Justice O’Connor scathingly wrote:

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the *Takings Clause of the Fifth Amendment*. Accordingly I respectfully dissent.<sup>122</sup>

Justice O’Connor believed that the takings in *Kelo* were for the benefit of private developers and, along with Justice Thomas, found it suspicious that the NLDC’s plan coincided so closely with Pfizer’s announcement of a new

117. *Id.* at 2668 (explaining that states have limited eminent domain power in state constitutions and statutes).

118. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

119. *Id.* 2669 (Kennedy, J., concurring). Justice Kennedy reasoned that the public taking in *Kelo* is warranted because of testimony of government officials, respondents’ awareness of New London’s depressed state, the commitment of funds by the state before any private beneficiaries were known, and the fact that many of the private beneficiaries are still unknown. *Id.* at 2669-2670 (Kennedy, J., concurring).

120. *Id.* at 2670 (Kennedy, J., concurring) (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 549-550 (1998)). Heightened scrutiny is not triggered just because the purpose of a taking is economic development. *Id.* (Kennedy, J., concurring).

121. *Id.* (Kennedy, J., concurring). Justice Kennedy stated that “[t]his is not the occasion for conjecture as to what sort of cases might justify a more demanding standard . . . .” *Id.* (Kennedy, J., concurring).

122. *Kelo*, 125 U.S. at 2671 (O’Connor, J., dissenting).

facility.<sup>123</sup> Justice O'Connor began her analysis of the Takings Clause of the Fifth Amendment by noting that it is a limitation on the government's power with two restrictions: public use and just compensation.<sup>124</sup> These two restrictions act as a security to land owners who cannot easily protect themselves from those with greater power in the political process.<sup>125</sup> Justice O'Connor agreed that "considerable deference" should be given to legislative decisions involving the Public Use Clause.<sup>126</sup> However, despite the limited power of the judicial check, it must be instituted if it is to retain any meaning.<sup>127</sup> Justice O'Connor stated the Court's decision "is an abdication of our responsibility" to enforce the Federal Constitution.<sup>128</sup>

Justice O'Connor outlined the three categories of justifiable public use takings.<sup>129</sup> First, the government may transfer private property to public ownership for a road, hospital, school or military facility.<sup>130</sup> Second, the government may transfer property to private parties who will make the property available to the public, such as utility companies and railroads.<sup>131</sup> Third, the Court has allowed takings that satisfy a "public purpose" even when the property taken may be destined for private use.<sup>132</sup> Justice O'Connor stated

123. *Id.* at 2671 (O'Connor, J., dissenting). The City of New London gave the NLDC initial approval for development only two months after Pfizer's announcement of a new facility to be built in the Fort Trumbull area. *Id.* (O'Connor, J., dissenting). This redevelopment plan is "suspiciously agreeable to the Pfizer Corporation." *Id.* at 2677-78 (Thomas, J., dissenting).

124. *Id.* at 2672 (O'Connor, J., dissenting). Justice O'Connor explained that "[t]ogether they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power . . ." *Id.* (O'Connor, J., dissenting).

125. *Id.* (O'Connor, J., dissenting).

126. *Kelo*, 125 U.S. at 2673 (O'Connor, J., dissenting).

127. *Id.* (O'Connor, J., dissenting) (citing *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one.")). Justice O'Connor then stated, "[b]ut were the political branches the sole arbiters of the public-private distinction, the *Public Use Clause* would amount to little more than hortatory fluff." *Id.* (O'Connor, J., dissenting).

128. *Id.* at 2677 (O'Connor, J., dissenting). Justice O'Connor agreed that "States play many important functions in our system of dual sovereignty, 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." *Id.* (O'Connor, J., dissenting).

129. *Id.* at 2673 (O'Connor, J., dissenting).

130. *Id.* (O'Connor, J., dissenting). See *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925) (allowing the United States to take private land for military facilities); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923) (allowing the state of California to take private property for the creation of a public highway).

131. *Kelo*, 125 U.S. at 2673 (O'Connor, J., dissenting). See *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) (allowing the taking of property for use by a railroad); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (transferring private water rights to a power company to generate power).

132. *Kelo*, 125 U.S. at 2673 (O'Connor, J., dissenting). This was true in the two cases relied upon by the majority opinion: "Public ownership" and "use-by-the-public" are sometimes too narrow an interpretation of the Public Use Clause. *Id.* (O'Connor, J., dissenting).



that *Kelo* is the Supreme Court's first case in over twenty years that addresses this ambiguous "public purpose" taking.<sup>133</sup>

Justice O'Connor distinguished the two cases relied upon by the majority.<sup>134</sup> In both *Berman* and *Midkiff*, the takings were for a "public purpose" since private property was condemned and transferred to private parties with an incidental benefit for the public.<sup>135</sup> Although *Berman* and *Midkiff* equated a public use taking with the government's police power to eliminate social harm, giving the *Kelo* Court an added authority to take property, Justice O'Connor stated that these two propositions may not always be equated.<sup>136</sup>

In conclusion, Justice O'Connor contemplated the worrisome future of eminent domain policy.<sup>137</sup> She expressed concern that developers and those with influential political power would take advantage of the new definition of "public use" in order to take property away from those with fewer political resources.<sup>138</sup>

### *Justice Thomas' Dissent*

Justice Thomas agreed with Justice O'Connor's reasoning, but concentrated on the need to revisit the Framers' intended meaning of "public use" and to defer less to the legislature when determining what constitutes a "public use."<sup>139</sup> Justice Thomas stated the text of the Constitution suggests

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See *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

133. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

134. *Id.* at 2673-74 (O'Connor, J., dissenting) (citing *Midkiff*, 467 U.S. 229 (1984); *Berman*, 348 U.S. 26 (1954)).

135. *Kelo*, 125 U.S. at 2673-74 (O'Connor, J., dissenting).

136. *Id.* at 2675 (O'Connor, J., dissenting). Justice O'Connor distinguished the takings in *Midkiff* and *Berman* from those in *Kelo*:

[I]n both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm.

*Id.* at 2674-75 (O'Connor, J., dissenting).

137. *Id.* at 2677 (O'Connor, J., dissenting).

138. *Id.* (O'Connor, J., dissenting). Justice O'Connor stated, "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more." *Id.* (O'Connor, J., dissenting).

139. *Id.* at 2678-87 (Thomas, J., dissenting).

“the *Takings Clause* authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”<sup>140</sup> The Takings Clause is a limitation on legislative power which the Court should not be able to eliminate.<sup>141</sup>

Justice Thomas suggested a return to the “actual use” test to determine whether a taking is for a public use.<sup>142</sup> This test would emphasize the Framers’ intentions that property is a fundamental and natural right and the government should not be able to come in and take it.<sup>143</sup> Justice Thomas criticized the *Kelo* Court for its deference to the legislature for such an obviously legal question.<sup>144</sup> The Court did not defer to the legislature on questions of reasonable search and seizure in the home, but when the issue was whether to tear down a home, the Court accepted the judgment of the legislature.<sup>145</sup> Justice Thomas also criticized equating police power with eminent domain power because, traditionally, police power was used to abate nuisances and did not necessitate compensation.<sup>146</sup> Thus, police power contradicts the takings power which always requires just compensation.<sup>147</sup>

Justice Thomas voiced concern about repercussions stemming from the Court’s decision.<sup>148</sup> He argued the government is incapable of providing

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140. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting) (stating that “[t]he Framers would have used some such broader term if they had meant the *Public Use Clause* to have a . . . sweeping scope”).

141. *Id.* at 2678-79 (Thomas, J., dissenting) (stating that the Court should not be allowed to “eliminate liberties expressly enumerated in the Constitution” and the Public Use Clause is one such limit on the government’s eminent domain power).

142. *Id.* at 2686 (Thomas, J., dissenting). The actual use test is easier to administer because it determines whether the government owns or the public has a right to use the land being condemned. *Id.* (Thomas, J., dissenting). In contrast, the public purpose test only determines whether the taking is purely private or whether it will deliver some sort of public benefit. *Id.* (Thomas, J., dissenting).

143. *Id.* at 2686 (Thomas, J., dissenting).

144. *Id.* at 2684 (Thomas, J., dissenting). Justice Thomas stated, “a court owes no deference to a legislature’s judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property.” *Id.* (Thomas, J., dissenting). Justice Thomas reasoned that the Court does not defer to the legislature on questions of “when a search of a home would be reasonable” or when “a convicted double murderer may be shackled during a sentencing proceeding” or when “state law creates a property interest protected by the *Due Process Clause*.” *Id.* (Thomas, J., dissenting). The Framers would not have intended the Court to defer to the legislature in these situations; therefore, the Court should not defer to the legislature in the situation at hand. *Id.* (Thomas, J., dissenting).

145. *Kelo*, 125 U.S. at 2685 (Thomas, J., dissenting). Justice Thomas explained, “[t]hough citizens are safe from government in their homes, the homes themselves are not.” *Id.* (Thomas, J., dissenting).

146. *Id.* (Thomas, J., dissenting).

147. *Id.* (Thomas, J., dissenting). Justice Thomas concluded that “[t]he question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power.” *Id.* (Thomas, J., dissenting).

148. *Id.* at 2686-87 (Thomas, J., dissenting).

compensation that reflects the subjective value of the individual's property and these economic development-type takings will most likely occur in poorer neighborhoods unable to make the most profitable use of their properties.<sup>149</sup>

Finally, Justice Thomas suggested that

when faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.<sup>150</sup>

Thus, Justice Thomas believed that the conflict of principles and original meaning of the Public Use Clause justified a finding in favor of the *Kelo* petitioners.<sup>151</sup>

#### ANALYSIS

In deciding *Kelo v. City of New London*, the United States Supreme Court erred by determining that pure economic development constitutes a public use as defined by the Fifth Amendment. Since its inception, the Public Use Clause has evolved from being narrowly defined to being so broadly defined the *Kelo* decision essentially negated the entire clause.<sup>152</sup> Although the Court relied on *Berman* and *Midkiff* in upholding the decision of the Supreme Court of Connecticut, its holding relied on language irrelevant to the specific holdings in those two cases.<sup>153</sup> Where *Berman* and *Midkiff* justified takings by invoking the government's police power to eliminate a societal harm, the *Kelo* Court, as did the Michigan Supreme Court twenty years earlier in *Poletown*, transferred property from one private citizen to another

149. *Id.* (Thomas, J., dissenting). The Court's decision is an opportunity for development companies with political power to take advantage of the poor who lack this power. *Id.* at 2687 (Thomas, J., dissenting).

150. *Kelo*, 125 U.S. at 2687 (Thomas, J., dissenting). The original meaning of "public use" is that it must be owned by the government or the public must have a legal right to use it. *Id.* at 2680 (Thomas, J., dissenting).

151. *Id.* at 2687 (Thomas, J., dissenting).

152. *Id.* at 2680 (Thomas, J., dissenting), 2671 (O'Connor, J., dissenting) (explaining the *Kelo* Court effectively deleted the words "for public use" from the takings clause of the Fifth Amendment); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 50 (Winter 2003) (explaining that the Court in *Midkiff* read the term "public use" completely out of the Fifth Amendment).

153. *Id.* at 2675 (O'Connor, J., dissenting). Justice O'Connor stated, "the takings in those cases were within the police power but also for 'public use' . . . . The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated." *Id.* (O'Connor, J., dissenting).

with little or no benefit to the public.<sup>154</sup> Justices Thomas and O'Connor predicted the cost of such a decision, and these consequences have been realized in the short time since the *Kelo* decision.<sup>155</sup> In *Kelo*'s wake, various development plans have failed and many state and federal legislatures have begun the process to limit the power granted by the United States Supreme Court.<sup>156</sup> Thus, several state court cases and the backlash from *Kelo* are actually spurring a movement to limit the government's eminent domain powers by excluding economic development as a public use.<sup>157</sup>

### *The Evolution of Public Use*

Municipal, state, and federal governments possess the unrelenting obligation to protect the personal property of individual citizens.<sup>158</sup> Amid knowledge of the government's responsibility, James Madison proposed the Public Use Clause to prevent legislatures from forfeiting this obligation in favor of powerful factions.<sup>159</sup> Despite the duty the Public Use Clause imposes, the government justifies condemning private property for development which confers a private benefit by employing a broad reading of "public use."<sup>160</sup> Transferring property from one private individual to another pri-

154. *Id.* at 2673-74 (O'Connor, J., dissenting). See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981).

155. *Kelo*, 125 U.S. at 2686-87 (Thomas, J., dissenting). Justice Thomas predicted that cities would rush to condemn the land of the poor in favor of the politically wealthy. *Id.* Justice O'Connor contended that "[a]ny property may now be taken for the benefit of another private party . . ." *Id.* at 2677 (O'Connor, J., dissenting). In their Petition for Rehearing, Petitioners listed sixteen cities that began or continued their abuse of eminent domain for private development as a result of the Court's decision in *Kelo*. Petition for Rehearing at 1-8, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

156. See Eric Heisler, *Ruling has Unexpected Effect here—it Stalls Projects*, ST. LOUIS POST-DISPATCH, Aug. 28, 2005, at B1 (stating that "[i]nstead of running rampant, the use of condemnation has stalled"); Law Tribune Advisory Board, *Limit Eminent Domain Authority*, CONNECTICUT LAW TRIBUNE, Aug. 22, 2005, at 17 (stating that the *Kelo* decision has led to backlash against eminent domain); Matt Welch, *The Left's Eyeing your Home*, LOS ANGELES TIMES, Aug. 14, 2005, at M6 ("Legislators in 28 states have made at least preliminary noises about restricting the practice, with Alabama being first to enact a new law.").

157. Pritchett, *supra* note 152, at 50-51 (listing various efforts that have raised public interest about the opposition of eminent domain). See also Sandefur, *supra* note 86, at 678 (stating that overruling *Poletown* is a step in the right direction for reform).

158. Steven E. Buckingham, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1294 (May 2005). Buckingham argued that the "government's obligation with respect to the protection of private property is not discretionary; it is obligatory." *Id.*

159. Michael J. Coughlin, *Absolute Deference Leads to Unconstitutional Governance: The Need for A New Public Use Rule*, 54 CATH. U.L. REV. 1001, 1005-06 (2005) ("Madison feared that powerful factions interested in the acquisition of more property would influence the legislatures for their own benefit at the expense of the less powerful, and proposed the Public Use Clause in part to control the effects of the factions' influence.").

160. Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. 1505, 1517 (June 2005). Saxer explained that "[c]ondemning private property for urban development, which benefits private interests, requires a broad interpretation of public use." *Id.*

vate individual is not a novel concept.<sup>161</sup> However, early courts did not allow the use of eminent domain to transfer land for private use and correctly defined the scope of "public use" very narrowly.<sup>162</sup>

Transfers of land to private entities using eminent domain began with the industrial revolution and the desire for economic expansion.<sup>163</sup> These condemnations were acceptable under the proper reading of the Takings Clause in which eminent domain is only authorized if the public has a "right to employ" the condemned land.<sup>164</sup> Even though many private contractors carried out the construction of railroads, highways, and dams, these takings were justified as public uses because they conferred a direct benefit on, and were open to, the general public.<sup>165</sup> Takings for "general public utility" were not "terribly controversial" because of their availability for use by the public.<sup>166</sup> Although eminent domain at this time could be used for "matters of public necessity," transferring property from one private citizen to another was "constitutionally inconceivable."<sup>167</sup>

161. Pritchett, *supra* note 152, at 2. Pritchett stated that "[f]or two centuries, local, state, and federal governments have used eminent domain in pursuit of public policy goals, often at the expense of the individual property owner but also to the benefit of purely private interests." *Id.*

162. See *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) (stating that taking property from A to give to B is inconsistent with just principles and is resisted in every jurisdiction where it is attempted to be enforced); *Ryerson v. Brown*, 35 Mich. 333, 339 (1877) (stating that eminent domain could only be used by private corporations for extreme necessity); *Claeys, supra* note 34, at 878, 902-04 (stating that "[a] use was public only if the public used the property" and that courts in the nineteenth century did not allow the transfer of private property from one citizen to another unless it was in the context of a governmental use or common carrier).

163. Pritchett, *supra* note 152, at 9-10.

164. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting). Justice Thomas suggested that "[t]he Constitution's text, in short, suggests that the *Takings Clause* authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking." *Id.* (Thomas, J., dissenting).

165. *Id.* See also *Sandefur, supra* note 86, at 656-57 (stating that courts rationalized railroads as a public use because they were so highly regulated by the government and, in a sense, constituted a government enterprise); *Claeys, supra* note 34, at 902-03 ("The public's right of access [to common carriers] ensured that the public 'uses' the property, even though a private delegate happened to own the property.").

166. *Buckingham, supra* note 158, at 1281.

167. *Buckingham, supra* note 158, at 1297. Buckingham explained,

In the original estimation of the Supreme Court, then, it is clear that the proper exercises of eminent domain were to be confined to urgent matters of public necessity . . . . With respect to takings of private property in which the property seized was to be subsequently transferred to another private citizen, however, the Court found this constitutionally inconceivable.

The twentieth century allowed for additional broadening of the term “public use” into the modern day definition of “public purpose.”<sup>168</sup> That century watched as the “government began to employ eminent domain for purposes whose public utility was strained, if not tenuous.”<sup>169</sup> One scholar defined public purpose as “that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement . . . .”<sup>170</sup> With very little analysis, this term has been used by the Court since 1896 to rationalize takings that confer direct benefits on private parties with only incidental benefits to the public.<sup>171</sup> The increasingly blurred line between what constituted a private use verses a public purpose set the stage for *Berman*’s economic development condemnation in 1954.<sup>172</sup>

### *The Move Toward Pure Economic Takings*

*Berman* set the pace for all eminent domain cases seeking to transfer private property to private users in the second half of the twentieth century.<sup>173</sup> It merged an incredibly broad definition of public use with complete legislative deference and upheld the taking of unblighted property.<sup>174</sup> This decision was not surprising because it followed the New Deal principle that legislatures, not courts, were to make policies regarding economic regulations.<sup>175</sup> After *Berman*, private property was no longer safe from condemnation unless no public utility was realized by its taking.<sup>176</sup> *Midkiff* affirmed *Berman* which left very little room for the Court to decide what qualified as

168. Claey's, *supra* note 34, at 905.

169. Buckingham, *supra* note 158, at 1281.

170. Claey's, *supra* note 34, at 905 (asking whether this definition confers any limits on legislatures).

171. *Kelo*, 125 S. Ct. 2655, 2682-83 (Thomas, J., dissenting). Two lines of cases, those adopting “public purpose” and those deferring to the legislature, merged to form the “boundlessly broad and deferential conception of ‘public use’ adopted by this Court . . . .” *Id.* (Thomas, J., dissenting). See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) (upholding an act allowing the distribution of water among landowners because it served a “public purpose”).

172. Sandefur, *supra* note 86, at 659-60 (“[T]he 1950s cases which held that the concept of public use allowed government to redistribute property to private parties for private profit—on the grounds that such profit had beneficial social consequences—were based on the gradual erosion of the division between public and private.”).

173. Claey's, *supra* note 34, at 907-08 (citing *Berman v. Parker*, 348 U.S. 26, 28-29 (1984)). Both *Midkiff* and the Connecticut Supreme Court in *Kelo* agreed with the broad definition of public use and deference to the legislature. *Id.* at 908.

174. *Id.* at 881 (suggesting that nothing regarding public use requires that the “law be so evolving, elastic, or deferential”). See *Kelo*, 125 S. Ct. at 2682 (Thomas, J., dissenting).

175. Pritchett, *supra* note 152, at 46. Pritchett explained that “[b]y the time *Berman* was argued, the Court had a more than twenty-year record of restraint in considering such measures.” *Id.*

176. Buckingham, *supra* note 158, at 1302. Buckingham stated that after *Berman*, “the private estate of an individual was no longer ‘holy,’ ‘sacred,’ or ‘invoidable’ . . . rather, *Berman* established the proposition that the only property safe from condemnation is that which has no public utility.” *Id.*

public use.<sup>177</sup> Due to the legislature's boundless eminent domain power and its potential effects on all American landowners, all eyes were on the *Kelo* Court to return the Public Use Clause to its original meaning.<sup>178</sup> Although the *Kelo* Court affirmed *Berman* and *Midkiff*, it should have found the economic development justification to be without reasonable foundation, because the *Kelo* takings did not invoke the State's police power or immediately eliminate a social harm.<sup>179</sup>

*Midkiff* and *Berman* transferred property to private individuals but did so by invoking the state's police powers.<sup>180</sup> Both of these cases upheld acts that delivered direct and immediate public benefits and never discussed the possibility that private land could be taken in furtherance of pure economic development such as that in *Kelo*.<sup>181</sup> The takings in *Berman* eradicated a blighted neighborhood and those in *Midkiff* abolished an extremely vexing oligopoly.<sup>182</sup> Where these cases involved economic development

177. *Midkiff*, 467 U.S. 229, 240-41 (stating that a Court cannot substitute its judgment for that of the legislature unless the legislature's judgment is without "reasonable foundation").

178. Buckingham, *supra* note 158, at 1282. Buckingham explained that "[b]ecause of the extensive scope of the modern governmental authority to exercise eminent domain, Kelo's importance touches every American landowner. Because of the relationships implicated—those among individuals, their property, and their government—Kelo concerns nothing less than the foundational principles of our Republic." *Id.*

179. Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners at 15-21, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (stating that the Court's precedents do not support the taking of property for "generalized economic development" found in *Kelo* because the precedents invoked classic usage of a state's police power and the takings conferred an immediate and direct public benefit).

180. *Id.* at 18 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals.")).

181. *Id.* In their brief to the Court, the Property Rights Foundation of America, Inc. stated,

Like any building project, the project here would create construction jobs, but surely that alone cannot be a sufficient basis for a public use; if it were, any condemnation could be justified so long as it contemplated new construction. Likewise, new jobs and increased tax revenues, such as those expected to result here, follow any corporate relocation to a new area.

*Id.*

182. *Kelo*, 125 S. Ct. at 2674-75 (O'Connor, J., dissenting). In regards to *Berman* and *Midkiff*, Justice O'Connor stated,

[T]he extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm.

*Id.* at 2674 (O'Connor, J., dissenting).

resulting from the removal of societal harms, *Kelo* endorsed pure economic development without purporting to eliminate a social harm.<sup>183</sup> Although *Midkiff* and *Berman* “endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence,” the private property use in *Kelo* did not cause public suffering.<sup>184</sup> There is little question that legislatures have the power to enact laws to improve economic conditions, but before *Kelo*, the Court had never upheld a taking for generalized public use.<sup>185</sup> Indeed, “any boon for Pfizer or the plan’s developer is difficult to disaggregate from the promised public gains in taxes and jobs.”<sup>186</sup>

In order to retain its power as a judicial check, the Court must have some authority to determine when the legislature has violated the Public Use Clause.<sup>187</sup> There is a specific caveat in *Berman* and *Midkiff* prohibiting the use of eminent domain for purely private uses such as those proposed in *Kelo*.<sup>188</sup> Even with this caveat and an opportunity, if narrow, for the Court to determine proper public use, the Court upheld the broadened definition of public purpose and opened the door for any and all property to be taken in the name of economic development.<sup>189</sup>

183. *Id.* (O’Connor, J., dissenting). Justice O’Connor stated that “[h]ere, in contrast, New London does not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm.” *Id.* at 2674-75 (O’Connor, J., dissenting).

184. *Id.* at 2677 (O’Connor, J., dissenting). See *Kelo*, 125 S. Ct. at 2674-75 (O’Connor, J., dissenting).

185. Brief Amicus Curiae of the Property Rights Foundation of America, Inc. in Support of Petitioners at 18-20, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). The brief stated that “[t]his Court has never held that the mere promise of a business relocation alone justifies a taking.” *Id.* at 18. However, “[t]he public benefits at issue here—which are not only speculative but are also attenuated in time from the taking of property—are in stark contrast to the public benefits resulting from the takings in *Midkiff* and *Berman*.” *Id.* at 19.

186. *Kelo*, 125 S. Ct. at 2675-76 (O’Connor, J., dissenting).

187. *Id.* at 2673 (O’Connor, J., dissenting) (citing *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) (stating that “the question of what is a public use is for the judiciary)).

188. Transcript of Oral Argument, *supra* note 112, at 9-10 (stating that what is at issue here is that eminent domain cannot be used for private purposes and the caveat in *Berman* and *Midkiff* prohibits eminent domain for private use).

189. *Kelo*, 125 S. Ct. at 2675 (O’Connor, J., dissenting). Justice O’Connor concluded,

[T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.

*Id.* (O’Connor, J., dissenting). See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement.”).



### *The Kelo Court Should Have Followed Michigan's Lead*

When deciding *Kelo*, the United States Supreme Court was armed with the knowledge that at least one state had unanimously and recently rejected the taking of private property for economic development.<sup>190</sup> In *Poletown*, the Michigan Supreme Court exponentially broadened the “public use” clause of the Fifth Amendment, taking it to the conceivable limits of what possibly constituted a public purpose.<sup>191</sup> With *County of Wayne*, Michigan brought the “public use” clause back from the edge of destruction and overruled *Poletown* at a time when *Kelo* was making its way to the Supreme Court.<sup>192</sup>

*Kelo* and *Poletown* were factually very similar: Both cases involved state legislative acts giving private entities the use of eminent domain to transfer property for private use; both Acts used economic development and growth as the sole justification of public use; the issue in each case was whether the taking conferred a public or a private benefit; both rulings upheld state statutes that conferred a private benefit with only incidental benefits to a small part of the public; and both decisions relied on *Berman* in refusing to limit the legislature’s ability to react to economic problems by using eminent domain.<sup>193</sup> *Kelo* and *Poletown* reduced the public use require-

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190. See Sandefur, *supra* note 86, at 651-52.

191. *Id.* at 660-61.

192. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (2004); Sandefur, *supra* note 86, at 651-52. It is timely to discuss eminent domain when *Poletown*, a famous taking case, has just been overruled and the United States Supreme Court is currently considering the subject in *Kelo*. Sandefur, *supra* note 86, at 651-52. Overruling *Poletown* “sends a clear message to other courts that the abuse of eminent domain must be stopped, and that the government’s powers to seize property must be limited by effective constitutional restraints.” *Id.* at 651.

193. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981). See also Economic Development Corporations Act, MICH. COMP. LAWS § 125.1601 (1979) (authorizing condemnation by municipalities to provide industrial and commercial sites with ultimate transfer to private entities); CONN. GEN. STAT. § 8-193 (2004) (authorizing the NLDC, a non-profit, private development entity, to use eminent domain in the name of the City). Due to the projected increase in jobs and increased tax base, the *Kelo* Court determined that the development plan would provide “appreciable benefits” to the public. *Kelo*, 125 S. Ct. at 2665. The Court stated that the plan “unquestionably serves a public purpose . . . .” *Id.* The purpose of the Act in *Poletown* was to condemn property to create an industrial site used to alleviate unemployment and economic problems. *Poletown*, 304 N.W.2d at 458. The issue was whether the proposed condemnation conferred a private benefit or was considered a public use. *Id.* By upholding these statutes, the courts in *Kelo* and *Poletown* authorize an incidental benefit on the public. See *Kelo*, 125 S. Ct. at 2675 (O’Connor, J., dissenting) (stating that the Court’s decision made it possible for the use of eminent domain to transfer property to a private use as long as there is some sort of secondary public use); *Poletown*, 304 N.W.2d at 462 (Fitzgerald, J., dissenting) (stating that the economic benefits of GM’s use of the property are incidental to the private benefit). Each court relied heavily on *Berman* to justify economic development as a public use. See *Kelo*, 125 S. Ct. at 2663; *Poletown*, 304 N.W.2d at 459.

ment and gave the government the power of “public choice.”<sup>194</sup> The government’s choice was whether to use eminent domain to benefit developers or to protect small private homeowners.<sup>195</sup> Unfortunately, wealthy corporations are in a better position to lobby the government and influence its “choice” in their favor.<sup>196</sup> These choices are inherently unfair since the Public Use Clause was intended to protect *all* property owners regardless of their political influence.<sup>197</sup>

The overarching difference between *Poletown* and *Kelo* is that the Michigan Supreme Court overruled *Poletown* just one year before the United States Supreme Court reviewed *Kelo*.<sup>198</sup> *County of Wayne v. Hathcock* raised public awareness and alerted courts and legislatures to review their application of the Public Use Clause after years of relying on *Berman*.<sup>199</sup> Where courts previously had shown judicial restraint in upholding legislative acts involving public use, *County of Wayne* declared takings under the guise of economic development unavailable to the government.<sup>200</sup> *County of Wayne* made it “respectable again for federal and state supreme courts to try to recover the original meanings of their constitutions’ public-use limitations.”<sup>201</sup> Unfortunately, the *Kelo* Court was not persuaded by *County of Wayne*’s lead.<sup>202</sup>

The *Kelo* Court had the opportunity to return the public use clause to its original meaning and restore the fundamental right of property to all Americans.<sup>203</sup> Instead, the Court abdicated its “responsibility to protect

194. Sandefur, *supra* note 86, at 661. Sandefur explained that “[g]utting the public use clause leads to what economists call the ‘public choice’ problem.” *Id.*

195. *Id.* Sandefur stated that “[w]hen a company like GM can expect tens of millions of dollars in benefits from the government, it will spend a great deal in its attempt to persuade the government to act on its behalf.” *Id.*

196. *Id.* at 662-63. Wealthy corporations generally have more money and political power than vulnerable groups such as the poor and racial minorities. *Id.* See also Petition for Rehearing at 7, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (stating that for poorer individuals the cost of litigation will exceed the value of their property).

197. Sandefur, *supra* note 86, at 662 (stating that it is unfair for property to be taken from one and transferred to another due to political influence).

198. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (2004) (overruling *Poletown* because it is inconsistent with Michigan’s jurisprudence and was an invalid reading of its Constitution).

199. Claeys, *supra* note 34, at 912. Claeys explained that “Hathcock is a momentous decision because it reopens many of the questions *Berman* covered over.” *Id.*

200. Sandefur, *supra* note 86, at 671.

201. Claeys, *supra* note 34, at 913.

202. *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005) (affirming *Berman* and *Midkiff* in deferring to the legislature and allowing economic development as a justifiable public use).

203. Brief of Amici Curiae Better Government Ass’n, Citizen Advocacy Center, DKT Liberty Project, National Institute for Urban Entrepreneurship, & Office of the Community Lawyer in Support of Petitioners at 8, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

property owners from government abuse,” deferred to the state legislature, and allowed economic development to be validated as a public use.<sup>204</sup>

### *Abusing Eminent Domain*

The decision in *Kelo* justified and continued the government’s already abusive use of eminent domain.<sup>205</sup> Prior to *Kelo*, *Berman* authorized a broader use of the government’s eminent domain powers and eliminated the rights of individual citizens guaranteed under the Fifth Amendment.<sup>206</sup> During the 1950s and 1960s, redevelopment projects displaced over one million people.<sup>207</sup> Today, eminent domain power is used to transfer land to private individuals “in the name of housing, commercial, or industrial development.”<sup>208</sup> From 1993 to 2003, there were over 10,000 cases in the United States of condemnation or threatened condemnation for private profit.<sup>209</sup> Over 3700 properties were actually condemned using eminent domain.<sup>210</sup> Most condemnations for private benefit fall on those who do not have the income to launch a fight against large corporations.<sup>211</sup> Although the takings clause requires “just compensation” for its takings, this is little comfort to

204. Pritchett, *supra* note 152, at 50 (noting that the United States Supreme Court has eliminated the words “public use” from the Fifth Amendment and criticized the Court’s judicial restraint). See *Kelo*, 125 S. Ct. at 2664. The majority allowed states to place further restrictions on the base-line takings power outlined in *Kelo*. *Id.* at 2668. “[M]any States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.” *Id.*

205. *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., dissenting). Justice O’Connor distinguished the consequences of *Berman* and *Midkiff* from those of *Kelo*:

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court’s theory.

*Id.*

206. Pritchett, *supra* note 152, at 47. The judiciary legitimated takings under the guise of urban renewal. *Id.* See Coughlin, *supra* note 159, at 1024 (“This unconstrained power is permissible under *Berman* when, for example, the legislature has decided that its governed land area ‘should be beautiful as well as sanitary.’”).

207. Pritchett, *supra* note 152, at 47. Pritchett argued that urban renewal projects of the 1950s and 1960s were disproportionately focused on the displacement of minorities. *Id.*

208. *Id.* at 48. Many cities now use “job creation” as the justification for a “public use.” *Id.*

209. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003).

210. *Id.* See Sandefur, *supra* note 86, at 664 (stating that most Americans lack the funds to challenge a condemnation).

211. Sandefur, *supra* note 86, at 662-63. See also *Hands off our Homes: Property Rights and Eminent Domain*, THE ECONOMIST, Aug. 20, 2005, at 21 (“Developers who know the sellers have to sell will surely be tempted to ‘lowball’ their offers.”).

those forced to move from their lifelong homes or self-made businesses.<sup>212</sup> There is no way to capture the subjective value of one's home or business when measuring compensation.<sup>213</sup> People whose properties face condemnation are left with few options since appealing to the judiciary now seems of little use.<sup>214</sup>

Abuses of the government's eminent domain power are all the more likely after the decision in *Kelo*.<sup>215</sup> The Mayor of Washington, D.C. praised the decision but declared, "[w]e must be sensitive to those who may be displaced."<sup>216</sup> With the ruling in *Kelo*, however, it is obvious that "public purpose" will not be applied by the states in a principled manner.<sup>217</sup> In Los Angeles, the city "would not use its powers of eminent domain to force property owners to sell, unless the developers were unable to reach a deal with the landowners."<sup>218</sup> In Chicago, former corporation council stated, "[n]ow that the Supreme Court has said you don't need roads and bridges and muse-

212. Brief of Amici Curiae Better Government Ass'n, Citizen Advocacy Center, DKT Liberty Project, National Institute for Urban Entrepreneurship, & Office of the Community Lawyer in Support of Petitioners at 11-12, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (noting the devastating psychological effect on those forced to leave their homes and the scattering of neighborhood schools, churches and extended families).

213. Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 21, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (promoting compensation rules to ensure individuals do not suffer more than necessary by losing their homes). See also *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting) ("[N]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.").

214. Buckingham, *supra* note 158, at 1304. Buckingham explained that "[w]ith great deference extended to legislatures out of respect for the separation of powers, the individual property owner is left to face a mountain of adverse presumptions with no assistance from the judiciary." *Id.*

215. *Kelo*, 125 U.S. at 2671 (O'Connor, J., dissenting) ("Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner . . .").

216. Sherry Conway Appel, *Supreme Court Decision in Eminent Domain Case a Victory for Cities*, U.S. NEWSWIRE, June 23, 2005, available at <http://releases.usnewswire.com/GeRelease.asp?id=49336> (last visited Nov. 19, 2005). The Washington, D.C. Mayor, Anthony A. Williams, praised eminent domain as a city's most valuable tool and purported to allow citizen input and discussion when making eminent domain decisions. *Id.* Washington, D.C. is currently using eminent domain to redevelop the Skyland Shopping Center which will create 300 jobs and \$3.3 million in new tax revenue. *Id.*

217. *Kelo*, 125 U.S. at 2683 (Thomas, J., dissenting). The Court's application of cases such as *Berman* and *Midkiff* "is further proof that the 'public purpose' standard is not susceptible of principled application." *Id.* "Today's decision is simply the latest in a string of our cases construing the *Public Use Clause* to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 2678 (Thomas, J., dissenting). See also Petition for Rehearing at 1, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (stating that since the ruling in *Kelo*, local governments have abused their power with little constraint on their eminent domain abilities).

218. Matt Welch, *The Left's Eyeing Your Home*, LOS ANGELES TIMES, Aug. 14, 2005, at M6. Welch clarified by stating "[i]n other words, the government won't take your property unless you refuse to sell. How comforting." *Id.*

ums [to justify taking property], you can do it to ‘revitalize’ areas, it makes the job of many government lawyers easier in many instances.”<sup>219</sup> Although some scholars argued that the Supreme Court’s grant of certiorari indicated a willingness within the Court to “set forth a new principle limiting the scope of legitimate governmental condemnations,” *Kelo* broadened public use so that “no homeowner’s, merchant’s or manufacturer’s property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interest that will put it to a ‘higher’ use.”<sup>220</sup> In the three weeks after the Court ruled on *Kelo*, small companies and homes were taken for more upscale businesses and shopping malls, and many other development plans using eminent domain were initiated.<sup>221</sup> These occurrences are the result of the Court’s unwillingness to enforce the Public Use Clause and its reliance on States to choose what constitutes a public use.<sup>222</sup>

### *The Surprising Result of Kelo*

Prior to *Kelo*, *County of Wayne* and various anti-eminent domain efforts had raised public awareness of, and created political opposition to, recent urban renewal programs.<sup>223</sup> Although many initially thought of *Kelo* as a fleecing of Americans’ property rights, the overwhelming backlash from the Court’s decision has raised awareness and created a movement to limit the government’s use of eminent domain.<sup>224</sup> Public support for limitations

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219. Abdon Pallasch, *Court Shows Homeowners Door: Development Trumps Property Rights; Connecticut Municipality Wins in 5-4 decision*, CHICAGO SUN-TIMES, June 24, 2005, at 65.

220. Buckingham, *supra* note 158, at 1309. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O’Connor, J., dissenting).

221. Petition for Rehearing at 1-8, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). The brief lists various takings and plans for condemnation based on the *Kelo* ruling. *Id.* For example, “[t]wo days after the *Kelo* decision, Boston City Council President Michael Flaherty called on the mayor of Boston to seize South Boston waterfront property from unwilling sellers for a private development project.” *Id.* at 3. In Oakland, California, “[a] week after this Court’s ruling in *Kelo*, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949.” *Id.* at 5.

222. *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., dissenting). Justice O’Connor explained that “the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings.” *Id.* (O’Connor, J., dissenting). However, this does not compensate for the Court’s refusal to uphold the Constitution. *Id.* (O’Connor, J., dissenting).

223. Pritchett, *supra* note 152, at 50-51. The Eminent Domain Law Project was established by the Institute for Justice in order to provide legal services to people facing the condemnation of their homes. *Id.*

224. Law Tribune Advisory Board, *Limit Eminent Domain Authority*, CONNECTICUT LAW TRIBUNE, Aug. 22, 2005, at 17 (“Ironically, the decision, which was initially regarded as a loss for private property owners, has had the opposite effect: it has led to a backlash against eminent domain . . .”).

on the government's eminent domain power is high and exists in all demographics and political parties.<sup>225</sup>

In its wake, the *Kelo* opinion has slowed condemnation efforts and put developers on the defensive.<sup>226</sup> Many legislators have vehemently opposed the *Kelo* decision and called for Congress to initiate legislation to protect private property.<sup>227</sup> The United States Congress has proposed bills to limit the use of eminent domain for economic development authorized by *Kelo*.<sup>228</sup> On November 3, 2005, the United States House of Representatives approved the Private Property Rights Protection Act of 2005, the first federal legislation passed in response to *Kelo*.<sup>229</sup> States such as Alabama, Nevada, Texas, and Utah have worked fast to pass bills excluding condemnations by the government resulting in private benefits.<sup>230</sup> Some states have created task forces to explore the use of possible restrictions on eminent domain.<sup>231</sup>

225. Gary J. Andres, *The Kelo backlash; Americans want limits on Eminent Domain*, THE WASHINGTON TIMES, Aug. 29, 2005, at A21. Sixty-eight percent of registered voters support limiting government's eminent domain power. *Id.* This includes "[s]ixty-two percent of self-identified Democrats, 74 percent of independents and 70 percent of Republicans . . ." *Id.*

226. See, e.g., *Hands off our Homes: Property Rights and Eminent Domain*, THE ECONOMIST, Aug. 20, 2005, at 21 (stating that, according to polls, ninety percent of Americans disapprove of the kind of takings allowed under *Kelo*). See also Michael Gardner, *Lawmakers Rethink Land-Seizure Laws*, COPLEY NEWS SERVICE, Aug. 17, 2005 (stating that California lawmakers are looking into measures to protect farmland and the use of eminent domain for non-public purposes).

227. See, e.g., Press Release, Rep. Sensenbrenner Introduces Bipartisan Legislation Addressing Last Week's Supreme Court Decision Allowing Government Taking of Private Property (June 30, 2005) (on file with US FED. NEWS) ("This decision assaults the constitutional rights of all Americans and unsettles decades of judicial precedent."); Rep. Cubin Condemns Supreme Court Land Grab Decision, U.S. FED. NEWS, June 30, 2005 ("Any of our homes could now be taken by local governments and turned over to corporate developers under the cover of 'economic growth.' Congress has the ability to address this matter with legislation, and that is an avenue we must consider in the wake of this decision.")

228. See Protection of Homes, Small Businesses, and Private Property Act of 2005, H.R. 3083, 109th Cong. (2005) (defining public use as excluding economic development); S. 1313, 109th Cong. (2005) (proposing a bill to protect homes, small businesses, and other private property rights, by limiting the power of eminent domain).

229. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005) (prohibiting state or political entities from using eminent domain for economic development when said entity receives federal economic development funding).

230. See S.B. 68, 2005 S., 1st Spec. Sess. (Ala. 2005) (enacting a bill limiting the government's eminent domain power to those condemnations that will be of use to the general public); Assemb. B. 143, 2005 Assemb., 73rd Reg. Sess. (Nev. 2005) (amending its eminent domain statute to establish requirements a redevelopment agency must meet before commencing eminent domain proceedings); S.B. 7B, 2005 S., 79th 2nd Called Sess. (Tex. 2005) (limiting the use of eminent domain to take private property for private uses or economic development); S.B. 184, 56th Leg., 2005 Gen. Sess. (Utah 2005) (prohibiting redevelopment agency from using eminent domain to acquire property except under specific circumstances).

231. See H. Con. Res. 38A, 2005 H.R., 143rd Gen. Assemb. (Del. 2005) (creating a task force to "examine and draft appropriate State law that would restrict eminent domain to bona fide public usage"); Exec. Order 15, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005) (creating the Missouri Task Force on Eminent Domain to recommend eminent domain legislation to the Missouri General Assembly).

Other states have proposed legislation to amend their constitutions or eminent domain statutes to put limitations on the government's use of condemnation.<sup>232</sup>

This backlash has allied conservatives and liberals and has some people thinking the *Kelo* Court did them a favor by bringing the issue of economic development for public use to the forefront.<sup>233</sup> With heightened awareness it seems "the pendulum of public use in many states is swinging back toward the narrow construction" of the term.<sup>234</sup> Although the issue of eminent domain for private purposes is not new and it is not going away, the *Kelo* decision might have been the boost needed to push for greater property

232. See, e.g., S. Constitutional Amendment 12, 2005-2006 S., Reg. Sess. (Cal. 2005) (proposing a Constitutional amendment defining public use to exclude the taking of owner occupied property for private use); H.B. 31, 2005 H.R., 108th Reg. Sess. (Fla. 2005) (proposing an amendment to the State Constitution providing that economic development does not constitute a public purpose); H.R. 87, 148th Gen. Assemb., Reg. Sess., (Ga. 2005) (proposing an amendment to the State Constitution stating that economic development does not constitute a public use); H.B. 4091, 94th Gen. Assemb., Reg. Sess. (Ill. 2005) (proposing legislation that requires takings under eminent domain to be for a "qualified public use"); H. Docket 4663, 184th Gen. Court, Reg. Sess. (Mass. 2005) (proposing amendment to the State Constitution prohibiting eminent domain takings for the purpose of economic development); H.B. 5060, 93rd Leg., 1st Reg. Sess. (Mich. 2005) (prohibiting the use of eminent domain to take private property for the primary benefit of a private entity); H.B. 123A, 2005 H.R., 1st Spec. Sess. (Minn. 2005) (prohibiting acquisition by eminent domain for private economic development); Assemb. Con. Res. 256, 211th Leg., Reg. Sess. (N.J. 2005) (proposing a constitutional amendment to limit the use of condemnation to traditional public purposes); S.B. 5936, 228th Leg. Sess., Reg. Sess. (N.Y. 2005) (allowing the use of eminent domain for economic development only when the area is blighted); S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005) (establishing a moratorium on use of eminent domain by the government to take without owner's consent, unblighted private property for use in economic development); H.B. 2426, 104th Gen. Assemb., Reg. Sess. (Tenn. 2005) (prohibiting use of eminent domain for sole purpose of enhancement of tax revenues or economic development).

233. Eric Heisler, *Ruling has Unexpected Effect Here—it Stalls Projects*, ST. LOUIS POST-DISPATCH, Aug. 28, 2005, at B1 (stating that the backlash from *Kelo* is worrying developers and has stalled many projects in St. Louis). With *Kelo*, conservatives and liberals have something to agree on. Lisa Sandberg, *Senate OKs Bill to Protect Private Property*, SAN ANTONIO EXPRESS-NEWS, Aug. 10, 2005, at 1B. Conservatives view *Kelo* as an attack on property rights and liberals view *Kelo* as a target against minority groups. *Id.* After the *Kelo* decision, many voiced surprise at the Court's split. Dane Roberts, *Ruling has Curious Split*, DAILY LOBO, Aug. 30, 2005, available at <http://www.dailylobo.com/media/paper344/news/2005/08/30/Opinion/Column.Ruling.Has.Curious.Twist-971774.shtml> (last visited Nov. 19, 2005). Where as one might imagine that the conservative justices voted in favor of economic development and helping corporations, in actuality the conservative justices voted in the minority in favor of property rights. *Id.*

234. Buckingham, *supra* note 158, at 1305.

protection.<sup>235</sup> After years of broadening and intrusive uses of eminent domain, it seems likely that “this ‘Kelo’ may have broken the camel’s back.”<sup>236</sup>

#### CONCLUSION

When the United States Supreme Court affirmed the decision of the Connecticut Supreme Court in *Kelo v. City of New London*, it permitted the legislature to use eminent domain under the guise of public use when there were minimal benefits to the general public. The Public Use Clause has evolved from being narrowly defined to being so broadly defined that it essentially negates the entire clause. The precedents relied upon by *Kelo* did not justify such a broad reading of public use because, unlike the City of New London, *Berman* and *Midkiff* used eminent domain in relation to traditional police powers. *Kelo* violated the property rights the government is meant to protect and gave the government nearly unlimited freedom of condemnation. Despite adverse consequences resulting from *Kelo*, the decision ultimately created enough backlash to spur a movement to protect private property rights and limit the government’s use of eminent domain.

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235. Tresa Baldas, *States Ride Post-Kelo Wave of Legislation*, THE LEGAL INTELLIGENCER, Aug. 3, 2005, at 4 (“Just five weeks after the U.S. Supreme Court upheld the use of eminent domain to seize private property for economic development, more than half of the states have introduced legislation to thwart potential abuses.”).

236. Gary J. Andres, *The Kelo Backlash: Americans want Limits on Eminent Domain*, THE WASHINGTON TIMES, Aug. 29, 2005, at A21.



