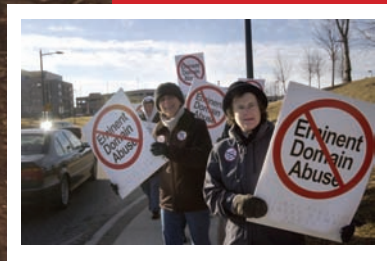
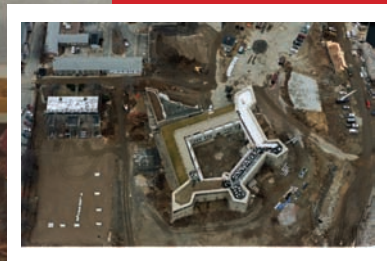
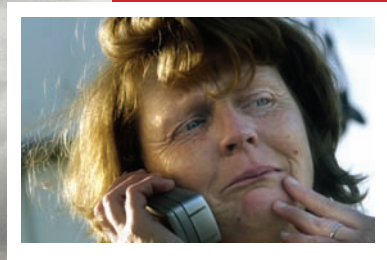


Editors
DWIGHT H. MERRIAM
MARY MASSARON ROSS



EMINENT DOMAIN USE AND ABUSE: *KELO IN CONTEXT*



Kelo v. City of New London: A Tale of Pragmatism Betrayed

Steven J. Eagle*

Introduction

In *Kelo v. City of New London*,¹ the United States Supreme Court held that the Public Use Clause of the Fifth Amendment² does not bar states or localities from taking non-blighted private homes for retransfer to commercial redevelopers for purposes of economic development. By equating it to “public purpose,” *Kelo* appears to drain “public use” as a separate Constitutional safeguard of any remaining significance.

At the same time, however, the Court gave several signals that it might retreat to more moderate ground. Although *Kelo* rejected a bright-line test for demarcating the Public Use clause generally, and affirmed broad deference to governmental land use powers, it did so in the context of facts particularly favorable to the condemnor. Furthermore, five justices indicated that a higher level of scrutiny for takings for retransfer would be appropriate, at least in some situations. Even Justice Stevens, together with the three Justices who joined in his opinion for the Court without qualification, Souter, Ginsburg, and

* Professor of Law, George Mason University School of Law, Arlington, Va. (seagle@gmu.edu), author of *Regulatory Takings* (3rd ed. 2005, Lexis Publishing). An earlier version of this chapter appears as part of the author’s survey of the Supreme Court’s 2004–05 property rights cases in *Engage, the Journal of the Federalist Society’s Practice Groups*, Volume 6:2, October 2005.

¹ 125 S. Ct. 2655 (June 23, 2005).

² U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

Breyer, seem to have sloughed the starry-eyed faith in the ability of eminent domain to improve the human condition that had marked the Court's landmark cases of half a century earlier.³

Perhaps the most remarkable aspect of *Kelo* is the implicit repudiation by Justice O'Connor of her earlier conflation of the Public Use Clause and the police power. Her earlier property rights opinions seemed to elide the distinction between private rights and government powers, instead enveloping all in a jurisprudence of "fairness." Now, as her apparent swansong takings opinion,⁴ O'Connor wrote an indignant dissent, spurred by the good intentions of her earlier pragmatism now betrayed.⁵

The Facts in *Kelo* Resonate with Legal Scholars and the Public

Kelo has generated an immense amount of professional⁶ and public interest.⁷ As a contemporaneous *Washington Post* account declared: "To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate."⁸

Kelo considered whether the condemnation of private homes in a non-blighted neighborhood, with subsequent transfer to private developers for the purpose of economic revitalization, constituted a public use. The affected homeowners included longtime resi-

³ See *infra* text accompanying note 36.

⁴ As of this writing, Justice O'Connor had submitted her resignation, effective with the confirmation of a successor.

⁵ See *infra* text accompanying note 55.

⁶ No fewer than 29 amicus briefs were filed on behalf of the petitioners and 10 on behalf of the respondents.

⁷ According to a July 8–11, 2005, *Wall Street Journal/NBC News* poll "In the wake of court's eminent domain decision, Americans overall cite 'private-property rights' as the current legal issue they care most about, topping parental notification for minors' abortions or state right-to-die laws." John Harwood, *Washington Wire*, WALL ST. J., July 15, 2005, at A4.

⁸ Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.

dents,⁹ and their resistance to the condemnation of their working class neighborhood for upscale redevelopment resonated with the public.

One reason for the intense public interest is surprise. People associate eminent domain with traditional public uses and generally have been unaware of the increasing use of condemnation to acquire private property for transfer to other private entities. The growth of public awareness of condemnations for retransfer largely came about through a series of articles by *Wall Street Journal* reporter Dean Starkman. In 1998, he wrote:

Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business.”¹⁰

Follow-up articles in 2001 noted that state courts were starting to reign in eminent domain abuse.¹¹ Nevertheless, by late 2004 it seemed that localities valued eminent domain for retransfer more than ever:

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren't tracked nationally, but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.¹²

The most comprehensive study of eminent domain for retransfer to private interests was prepared by the Institute for Justice, a libertarian public interest organization that

⁹ *Kelo*, 125 S. Ct. at 2660 (noting that one petitioner, Wilhelmina Dery, was born in her house in 1918 and has lived there ever since, and that another petitioner, Susette Kelo, has lived in the area since 1997, works as a nurse, and is much attached to her house and its water view).

¹⁰ Dean Starkman, *Take and Give: Condemnation Is Used To Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

¹¹ Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, at B1; Dean Starkman, *State Courts Side with Property Owner in Another Eminent Domain Contest*, WALL. ST. J., Feb. 15, 2001, at B14.

¹² Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1.

also represented the *Kelo* petitioners.¹³ This analysis, which reviewed condemnation activity in 41 states during the years 1998–2002, indicated that a total of 10,282 takings were threatened or filed in which the real property involved would be retransferred to a private entity.¹⁴

The city of New London is located in southeastern Connecticut, where the Thames enters Long Island Sound. Largely because of the loss of manufacturing and naval jobs, the economy and population of New London have undergone a significant and prolonged economic decline. The State of Connecticut has designated it a “distressed municipality.”¹⁵

In January 1998, Connecticut approved a \$5.35 million bond issue for redevelopment planning in the Fort Trumbull area, and a separate \$10 million bond issue for a state park there.¹⁶ In February 1998, the pharmaceutical manufacturer Pfizer Inc. announced that it would construct a \$300 million research facility adjoining Fort Trumbull.¹⁷ Local planners hoped that the Pfizer project would draw in new business and serve as a “catalyst to the area’s rejuvenation.”¹⁸ After extensive hearings and in coordination with the State, the city formulated an economic revitalization plan for the Fort Trumbull area, to be effectuated through its non-profit entity, the New London Development Corporation.¹⁹

The plan included a waterfront conference hotel, restaurants, shopping and new residences and support facilities.²⁰ According to the Supreme Court of Connecticut, the plan “was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues,

¹³ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), available at http://www.castlecoalition.org/report/pdf/ED_report.pdf.

¹⁴ *Id.* at 2.

¹⁵ *Kelo*, 125 S. Ct. 2655, 2658 (2005).

¹⁶ *Id.* at 2659.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2658–59.

²⁰ *Id.* at 2659.

and to revitalize an economically distressed city, including its downtown and waterfront areas.”²¹

Four Opinions, Four Perspectives

There were four opinions in *Kelo*. Justice Stevens, writing for a 5-4 majority, asserted that “public purpose” has morphed to subsume “public use,”²² and that the Fort Trumbull project served a public purpose.²³ Justice Kennedy signed on to the Stevens opinion, but, in a separate concurring opinion, made it clear that, under certain unspecified circumstances, heightened judicial scrutiny of condemnations for retransfer is required.²⁴ Justice O’Connor wrote the principal dissent. In line with her penchant for pragmatism, she stressed the possibilities of abuse in the Court’s prior public use language.²⁵ Finally, Justice Thomas, who also joined the O’Connor dissent, asserted that the Court’s error had been fundamental—it had stripped the “Public Use Clause” out of the Constitution.²⁶

Justice Stevens and the “Living Constitution”

The “living constitution,” a jurisprudential approach often associated with Justice Brennan and the Warren Court, asserts that the Constitution is a living document subject to “contemporary ratification,” and must be interpreted in light of society’s “current problems and current needs.”²⁷ Justice Stevens, writing for the Court in *Kelo* in that idiom,²⁸

²¹ *Id.* at 2658 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

²² *Id.* at 2662 (asserting that “while many state courts in the mid-19th century endorsed ‘use by the public’ as the proper definition of public use, that narrow view steadily eroded over time.”).

²³ *See infra* text accompanying notes 27–41.

²⁴ *See infra* text accompanying notes 42–48.

²⁵ *See infra* text accompanying note 55.

²⁶ *See infra* text accompanying notes 59–64.

²⁷ William J. Brennan, Jr., *Presentation to the American Bar Association* (July 9, 1985), in AMERICAN CONSTITUTIONAL LAW 607, 610 (Mason & Stephenson eds., 8th ed. 1987). *See* Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a “Living Constitution,”* 139 U. PA. L. REV. 1319 (1991) “This view of the Constitution as a living and evolving document whose interpretations should not be cabined by too literal a quest for the Framers’ intent is a position that Justice Brennan consistently defended and thoughtfully espoused” *Id.* at 1319. Brennan wrote the Court’s opinion in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

declared that the question was “whether the City’s development plan serves a ‘public purpose.’ Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”²⁹ From a popular perspective, the issue posed by *Kelo* is whether the right to keep one’s own home yields to condemnation for private redevelopment, countenanced for purposes of economic development. The Court ruled 5-4 that it does.

Justice Stevens attempted to demonstrate that even the Court’s older cases equated “public use” with “public purpose” He thus cited *Fallbrook Irrigation District v. Bradley*³⁰ as standing for the proposition that “when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”³¹ *Strickley v. Highland Boy Gold Mining Co.*,³² he added, upheld a mining company’s use of an aerial bucket line to transport ore over property it did not own, and that the Court’s opinion by Justice Holmes “stressed ‘the inadequacy of use by the general public as a universal test.’”³³

Stevens also took full advantage of expansive language in the Court’s cases upholding takings for retransfer for private development that were decided in an era of considerable optimism about large-scale urban renewal. These were *Berman v. Parker*,³⁴ upholding the condemnation of a sound department structure so that the blighted area in which it was located could be comprehensively revitalized, and *Hawaii Housing Authority v. Midkiff*,³⁵ upholding the condemnation of underlying fee interests concentrated in a few eleemosynary trusts and retransferring the titles to the individual residential parcels

²⁸ See *infra* text accompanying note 60.

²⁹ *Kelo*, 125 S. Ct. at 2663.

³⁰ 164 U.S. 112 (1896).

³¹ *Id.* at 2662 (citing *Bradley*, 164 U.S. at 158–164).

³² 200 U.S. 527 (1906).

³³ 125 S. Ct. at 2662 (quoting *Bradley*, 200 U.S. at 531).

³⁴ 348 U.S. 26 (1954).

³⁵ 467 U.S. 229 (1984).

to the homeowners who had long-term ground leases. These were justified as a means of ending feudalism in Hawaii.

In *Berman*, Justice Douglas rhapsodized at length about the power of government to ennoble individuals and communities:

We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . .

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . .

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . .³⁶

Notably, public use, public purpose, transfers to other private parties, and the police power all were fused together.

In *Midkiff*, Justice O'Connor built upon *Berman*, declaring: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."³⁷ As con-

³⁶ *Id.* at 31–34.

³⁷ *Id.* at 240.

sumer advocate Ralph Nader recently observed, the effect of Justice O'Connor's broad language is to make the definition of public use "[w]hatever the government says it is."³⁸

Summing up in *Kelo*, Justice Stevens 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."

He noted cases, like *99 Cents Only Stores v. Lancaster Redevelopment Agency*,³⁹ which troubled Justice O'Connor,⁴⁰ but wrote that abuses "can be confronted if and when they arise."⁴¹

Justice Kennedy Remains Enamored with the Potential of Due Process

Justice Kennedy, whose vote was needed for Stevens' majority, warned in a concurring opinion that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted."⁴² In his *Lingle* concurrence, Kennedy had cited *Eastern Enterprises v. Apfel*.⁴³ There, Kennedy was the only justice to conclude that a severely retroactive, large, and unexpected demand for payment to replenish a retirement and medical benefits fund made upon a former employer was invalid under the Due Process Clause. Kennedy's *Kelo* concurrence established a marker for future cases:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying

³⁸ Ralph Nader and Alan Hirsch, *Making Eminent Domain Humane*, 49 VILLANOVA L. REV. 207, 211 (2004). "Rather than emphasizing the justification of the public use in question, or the relatively small harm, the Court swept aside virtually any objection to any exercise of eminent domain. The Court gave away the game at the outset when it grappled with the definition of 'public use.' The Court's definition? Whatever the government says it is." *Id.* at 210–211 (citations omitted).

³⁹ 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

⁴⁰ *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

⁴¹ 125 S. Ct. at 2667.

⁴² *Id.* at 2670 (Kennedy, J. concurring).

⁴³ *Lingle*, 125 S. Ct. at 2087 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. . . .

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. . . .⁴⁴

It is particularly notable that in the course of this discussion Justice Kennedy cited *Department of Agriculture v. Moreno*⁴⁵ and *City of Cleburne v. Cleburne Living Center, Inc.*,⁴⁶ both cases associated with the surreptitious higher standard of review termed rational basis “with bite,”⁴⁷ or “covert heightened scrutiny,”⁴⁸ in order to establish whether government conduct is arbitrary.

Justice O'Connor's Distress with the Pragmatism She Wrought

Justice O'Connor, the author of the principal dissent, declared that, under the majority's view, the requirement for “public use” does “not exert any constraint on the eminent domain power.”⁴⁹ She set out to distinguish *Kelo* from Justice Douglas's *Berman* opinion,⁵⁰ and her own *Midkiff* opinion.⁵¹

[F]or all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “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.” . . .

⁴⁴ *Kelo*, 125 S. Ct. at 2669 (Kennedy, J. concurring) (internal citations omitted).

⁴⁵ 413 U.S. 528, 533–536 (1973) (striking down statute excluding from federal food stamp program households containing an individual unrelated to any other member of the household as irrational classification).

⁴⁶ 473 U.S. 432, 446–447, 450 (1985) (finding no rational basis in record for believing that group home would pose any special threat to city's legitimate interests).

⁴⁷ Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁴⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988).

⁴⁹ 125 S. Ct. at 2675 (O'Connor, J., dissenting).

⁵⁰ *Berman v. Parker*, 348 U.S. 26 (1954).1

⁵¹ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

The Court’s holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the 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. . . . 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. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government’s power to condemn.⁵²

If *Berman* and *Midkiff* focused on elimination of harm, Justice O’Connor saw the Court’s new jurisprudence as unrestrained.

In moving away from our decisions sanctioning the condemnation of harmful property use, the 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. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.⁵³

The effect 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.⁵⁴ She also warned that Justice Kennedy’s “as-yet-undisclosed test” was apt not to work: “The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”⁵⁵

⁵² *Id.* at 2674–75 (Connor, J., dissenting) (quoting *Midkiff*, 467 U.S. at 245).

⁵³ *Kelo*, 125 S. Ct. at 2675 (O’Connor, J., dissenting).

⁵⁴ *Id.* at 2671 (O’Connor, J., dissenting).

⁵⁵ *Id.* at 2675 (Connor, J., dissenting).

Some of Justice O'Connor's subsequent language resembled nothing more than a *mea culpa*:

There is a sense in which this troubling result follows from *errant language* in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." *This language was unnecessary to the specific holdings of those decisions. Berman and Midkiff simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. 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.*⁵⁶

The mention of language unnecessary to the holdings suggests the usual problem of expansive dicta that turns out to be unreliable when tested. The reference to "errant language" does further. Commentators have seized upon the fact that the "police power" refers to the (uncompensated) alleviation of harm, whereas the Public Use Clause and broader Takings Clause refer to (compensated) provision of government benefit.⁵⁷ Professor Thomas Merrill suggested that the "coterminous" language referred to permissive ends, rather than Constitutionally justifiable means.⁵⁸ Justice O'Connor's use of "errant" suggests that she had not drawn the distinction articulated by Professor Merrill. In any event, she now understands that the Court's majority does not share it.

⁵⁶ *Id.* (internal citations omitted) (emphasis added).

⁵⁷ See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 110 (1985).

⁵⁸ Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). "The illogic of the Court's statements disappears, however, once one recognizes that the police power, like eminent domain, can also refer to the question of proper governmental ends, rather than means. This is clearly what Justice Douglas meant in *Berman* when he said that the police power 'is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.' He was not saying that government could freely employ any means of achieving slum clearance, and with it choose either compensation or non-compensation. Instead, he was saying that slum clearance is a permissible end of government. *Id.* at 70 (citations omitted).

The career of the “coterminous” language, as Justice O’Connor now seems to see it, is that her pragmatic, albeit imprecise, attempt to do good has resulted in the betrayal of broader principles to which she subscribes.

Justice Thomas and the Need for First Principles

Finally, Justice Thomas dissented tartly, noting that the Framers had embodied in the Fifth Amendment’s Public Use Clause Blackstone’s view that “‘the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property.’”⁵⁹ “Defying this understanding, the Court replaces the Public Use Clause with a “[P]ublic [P]urpose” Clause (or perhaps the “Diverse and Always Evolving Needs of Society” Clause).⁶⁰

Justice Thomas also criticized Justice Stevens’ explanation that the older case law supported the Court’s equation of public use with public purpose. In his analysis of *Fallbrook Irrigation Dist. v. Bradley*,⁶¹ for instance, the condemnation for purposes of constructing an irrigation ditch did serve a public purpose, since all landowners affected by the ditch had a right to use it.⁶² Likewise *Strickley v. Highland Boy Gold Mining Co.*⁶³ “could have been disposed of on the narrower ground that ‘the plaintiff [was] a carrier for itself and others,’ and therefore that the bucket line was legally open to the public.”⁶⁴

Who Is Benefited by Condemnation for Retransfer and Why Does it Matter?

Implicit in the history of American land use law and redevelopment during the 20th century was the notion that urban redevelopment was a good thing. At the turn of the last century, a Progressive Era idea was that eradication of slums would not only improve public health, but would also uplift the vision of the people, especially the youth,

⁵⁹ *Id.* at 2677 (Thomas, J., dissenting).

⁶⁰ *Id.* (quoting from Justice Stevens’ opinion, *id.* at 2662–63 and adding capitalization).

⁶¹ 164 U.S. 112, 161–162 (1896).

⁶² *Kelo*, 125 S. Ct. at 2683 (Thomas, J., dissenting).

⁶³ 200 U.S. 527 (1906).

⁶⁴ *Kelo*, 125 S. Ct. at 2683–84 (Thomas, J., dissenting) (quoting *Strickley*, 200 U.S. at 531–32).

and thus reduce antisocial conduct and crime as well.⁶⁵ Justice Douglas' *Berman v. Parker* opinion was very much in that tradition.⁶⁶ In recent times, however, enthusiasm for redevelopment has cooled.⁶⁷ Looking back decades later, it is not clear that the neighborhood that was the subject of *Berman* actually benefited from being bulldozed and redeveloped.⁶⁸ In spite of Justice Douglas' idealism, "government sometimes exercises its power of eminent domain in a way that is both inefficient and detrimental to the interests of politically unconnected, vulnerable individuals and groups."⁶⁹ Indeed, among some detractors, the displacement resulting from urban renewal earned it the moniker "Negro removal."⁷⁰ This more recent picture might explain why Justice Stevens in *Kelo* was, relatively speaking, restrained in his praise for renewal efforts.

Indeterminacy of Benefit

Justice Stevens started his *Kelo* analysis by asserting that it was "perfectly clear" that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."⁷¹ Likewise impermissible would be a taking "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."⁷² On that score, Stevens reassured that the "takings before us, however, would be executed pursuant to a 'carefully considered' development plan."⁷³ A "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose

⁶⁵ See JACOB A. RIIS, *HOW THE OTHER HALF LIVES* (1890).

⁶⁶ 348 U.S. 26 (1954). See *supra* text accompanying note 36 for an illustrative quotation.

⁶⁷ **AUTHOR FILL IN FOOTNOTE**

⁶⁸ See Linda Wheeler, *Broken Ground, Broken Hearts In'50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, A-1.

⁶⁹ Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 952 (2003).

⁷⁰ See, e.g., William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377, 381 (2002) (discussing the history, policies, and strategies of community economic development).

⁷¹ *Id.* at 2661 & n.5 (paraphrasing and citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789)).

⁷² *Id.* at 2661.

⁷³ *Id.* (citing *Kelo*, 843 A.2d at 536).

was afoot,” such cases could “be confronted when and if they arise.”⁷⁴ “Courts have viewed such aberrations with a skeptical eye.”⁷⁵

One of the examples that Stevens cited for this proposition was *99 Cents Only Stores v. Lancaster Redevelopment Agency*.⁷⁶ There, a leading “big box” retail chain, Costco, had threatened to leave the city unless its smaller competitor’s adjacent land was condemned and transferred to it. The agency instituted eminent domain proceedings, on the pretextual grounds of blight. The court found that “by Lancaster’s own admissions, it is was willing to go to any lengths . . . simply to keep Costco within the city’s boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents’ leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.”⁷⁷ Looked at more closely, however, the concept of takings for “purely private purposes” implies either that a locality, through its faithful agents, acted against the interest of its citizens and derived no benefit from the process, or that the agents were unfaithful and acted for their own private interests as well as that of the instigators of the taking.

Nothing in *99 Cents Only Stores*, however, suggests that redevelopment agency or city officials were bribed, or otherwise acted out of any motive other than the city’s welfare. Nor were they acting without regard to the city’s welfare. They were aware of the importance of retaining Costco, a principal tenant in the agency’s most successful project and the only shopping center in Lancaster with a regional draw for customers. The court noted that these officials “[v]iew[ed] Costco as a so-called “anchor tenant” and [were] fearful of Costco’s relocation to another city.”⁷⁸ As the Lancaster city attorney candidly

⁷⁴ *Id.* at 2667.

⁷⁵ *Id.* at 2667 n.17.

⁷⁶ *Id.* (citing 237 F.Supp.2d 1123 (C.D. Cal. 2001).

⁷⁷ 237 F. Supp. 2d at 1129 (emphasis in original).

⁷⁸ *99 Cents Only Stores*, 237 F.Supp.2d at 1127.

observed, “99 Cents produces less than \$40,000 [a year] in sales taxes, and Costco was producing more than \$400,000. You tell me which was more important.”⁷⁹

It is true, of course, that Costco would gain from displacing 99 Cents Only Stores, and that it was motivated by its own prospects of gain. But that does not distinguish Costco from any other commercial developer or retailer.

Going on the premise that condemnation for economic development has no lesser legal status than condemnation for alleviation of physical blight, it is hard to distinguish *99 Cents Only Stores* from *Berman v. Parker*.⁸⁰ In the former case, Lancaster condemned an unblighted “big box” store—immediately at the behest of the store’s larger competitor—but ultimately to derive the benefits that inure from the continued cooperation and presence of the larger firm. In the latter case, the District of Columbia condemned an unblighted small department store, which redounded to the immediate benefit of the redeveloper but, the Supreme Court accepted, to the ultimate benefits of the District’s citizens. Indeed, Justice Stevens took pains to point out, in *Kelo*, that it would be a “misreading” to term *Berman* a removal of blight case, since it involved comprehensive revitalization. “Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff’s nonblighted department store.”⁸¹

The Relevance of a “Comprehensive Plan”

Justice Stevens’ emphasis on the comprehensiveness of the plan in *Kelo* also is important:

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, 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.⁸²

⁷⁹ Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, B1 (quoting David McEwan).

⁸⁰ 348 U.S. 26 (1954).

⁸¹ 125 S. Ct. at 2265 n.13.

⁸² *Id.* at 2665.

It is difficult to know what to make of this pronouncement. It might relate to the fact that large-scale actions are more inherently “legislative” and scrutinized by the public, so as to make them more worthy of deference.⁸³ The “legislative” versus “adjudicative” distinction drawn by the Supreme Court in *Dolan v. City of Tigard*,⁸⁴ where the Court imposed heightened scrutiny on administrative agency decisions but not legislative ones, comes to mind as well. In any event, allowing a party to litigation to designate the scale of the inquiry has some of the same drawbacks as allowing that party to designate the “relevant parcel” in the conventional regulatory takings case.⁸⁵ In both situations, the fairness of the result depends in large measure at how far the court looks. The fact that a city might be interested in “comprehensive” redevelopment of a wide area might imbue the entire scheme with a public purpose, but does not mean that the taking of an individual small parcel necessarily is for a public use.

Justice Stevens defended the condemnation in *Kelo* on the grounds that all of the state judges involved in the case “agreed that there was no evidence of an illegitimate purpose” and that “the City’s development plan was not adopted ‘to benefit a particular class of identifiable individuals.’”⁸⁶ Likewise, “the development plan was not intended to serve the interests of Pfizer.”⁸⁷

⁸³ See *Fasano v. Board of Commissioners of Washington County*, 507 P.2d 23, (Or. 1973) *overruled on other grounds*, *Neuberger v. City of Portland*, 607 P.2d 722, 725 (Or. 1980) (deeming small-scale rezoning quasi-judicial in nature). Compare, *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (holding zoning ordinances legislative acts regardless of size of parcel affected).

⁸⁴ 512 U.S. 374, 385 (1994).

⁸⁵ See, e.g. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (noting “our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.”” (citation omitted)).

⁸⁶ *Kelo*, 125 S. Ct. at 2661–2662 (quoting *Midkiff*, 467 U.S. at 245).

⁸⁷ *Id.* at 2662 n.6 (quoting *Kelo*, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part)).

Justice O'Connor on Mutuality of Benefit

Earlier, I suggested that the benefits of a condemnation for retransfer are apt to be indeterminate.⁸⁸ Justice O'Connor, in her dissent, highlighted that those benefits are apt to be mutual.

As Justice O'Connor noted, in economic development takings, "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."⁸⁹ Justice Thomas noted that the project, which stated a "vague promise of new jobs and increased tax revenue," also was "suspiciously agreeable to the Pfizer Corporation."⁹⁰

The record certainly indicates that the needs of Pfizer were not far from the minds of redevelopment officials. The City's development consultant noted that Pfizer was "the '10,000 pound gorilla' and 'a big driving point' behind the development project."⁹¹ A letter from the president of the City's development corporation to the president of Pfizer's research division noted that Pfizer's "requirements" had been met and that the corporation "was 'pleased to make the commitments outlined below to enable you to decide to construct a Pfizer Central Research Facility in New London.'"⁹²

The Irrelevant Quest for the Private Benefit Quid Pro Quo

Perhaps, as the state supreme court found, the underlying purpose was benefit to the city.⁹³ But, ultimately, the quest for the definitive quid pro quo between the City and Pfizer not only is illusive, it is irrelevant. The prime interest of New London, and also of the State of Connecticut, which very actively participated in the Fort Trumbull project, was not contractual liability, but rather reputation as a redevelopment partner. If major

⁸⁸ See *supra* text accompanying notes 71–81.

⁸⁹ 25 S. Ct. at 2675–76.

⁹⁰ *Id.* at 2677–78.

⁹¹ *Kelo v. City of New London*, 843 A.2d 500, 537 (Conn. 2004).

⁹² *Id.* at 538 n.51.

⁹³ *Id.* at 538.

companies like Pfizer are pleased with the upscale hotels, executive housing, attractive shops, and other amenities adjoining the sites they have redeveloped, other corporations that might be significant redevelopment partners in the government entity's future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy, future redevelopment efforts would become more difficult.

If a condemnation for retransfer results in a large increment in amenities, jobs, and tax revenues, should the condemnation nevertheless be invalidated because the redeveloper obtained a larger benefit, or because the local official was acting to benefit the redeveloper instead of his or her employer? Likewise, if the city obtains a poor deal, either in terms of the absolute amount of benefit that it receives, in relation to better deals that were available, or compared with the condemnee's subjective (and therefore non-compensable) losses, should the city officials' fidelity to the goal of primary public benefit obviate even an irrational disregard of the negative factors?

Cities May Forgo Condemnation for Retransfer: A Non-Sequitur?

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. . . . [T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution.⁹⁴

This drawn-out explanation by Justice Stevens that States do not have to do that which the Constitution does not forbid them to do seems irrelevant at best. Perhaps it might reassure some that their states and cities need not deprive them of their businesses or houses, but one doubts that many would seek solace in the text of the opinion for that purpose. But to state the argument is to weaken it. A suggestion by the Court that the effects of its ruling permitting wholesale restrictions on free speech or distinctions based on

⁹⁴ *Kelo*, 125 S. Ct. at 2668.

race would be mitigated by the rights of States to opt out rightly would be regarded as ludicrous.

Perhaps, as Justice O'Connor indicated in her dissent, this "coda" announces "an abdication" of the responsibility of the Court. "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."⁹⁵

The parenthetical phrase "meant to curtail state action, no less" sounds an appropriate note. As the Court itself has noted in another context, there is a need for more judicial oversight when "the State's self-interest is at stake."⁹⁶ In *Kelo*, the State of Connecticut was heavily involved in the Fort Trumbull project.⁹⁷ New London was a distressed city, but, as the *New York Times* editorial lauding the *Kelo* decision added, Connecticut is "a rich state with poor cities."⁹⁸ In this light, it would not be unreasonable to see the Fort Trumbull condemnations as a "contribution" by Mrs. Kelo and her neighbors of value that the State might otherwise have to extend to deal with urban poverty.

Does the Right to "New Property" Exceed the Right to Traditional Property?

In his *Kelo* dissent, Justice Thomas referred to the anomaly wherein the Court protects such "nontraditional property interests" as a tenancy in government-assisted housing,⁹⁹ and interposes the "sanctity of the home" in cases defining permissible police searches,¹⁰⁰ but yet, at the same time, "deferring to the legislature's determination as to

⁹⁵ *Id.* at 2677 (O'Connor, J., dissenting).

⁹⁶ *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977) (striking down state repudiation of its own bond covenant).

⁹⁷ *Kelo*, 125 S. Ct. at 2658.

⁹⁸ Editorial, *NY TIMES*, June 24, 2005, at A22.

⁹⁹ *Kelo*, 125 S. Ct. at 2684–85 (Thomas, J., dissenting) (citing *Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970)). The seminal work advocating Constitutional protection for such entitlements was Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

¹⁰⁰ *Id.* at 2685 (Thomas, J., dissenting) (citing *Payton v. New York*, 445 U.S. 573, 601 (1980) (reasonableness of search)).

what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property."¹⁰¹

The answer may lie in the fact that the majority in *Kelo* treats condemnation for retransfer as simply another form of economic and social legislation susceptible to minimal judicial review. However, the four *Kelo* dissenters do not subscribe to this view and Justice Kennedy has signed on only with respect to the facts in *Kelo*.

***County of Wayne v. Hathcock*—An Alternative Approach**

An important recent case that presents a comprehensive alternative to the *Kelo* approach to “public use” is the Michigan Supreme Court’s sweeping repudiation of its very well known *Poletown* doctrine,¹⁰² in *County of Wayne v. Hathcock*.¹⁰³ In *Poletown*, the state high court had upheld the condemnation of an entire ethnic neighborhood of some 1,400 homes, schools, 16 churches, and 144 local business for retransfer to General Motors Corporation, which intended to build a Cadillac assembly plant. Alleviation of Detroit’s severe unemployment was the articulated and accepted justification. In 2004, in *Hathcock*, the Michigan court rejected condemnation for development of a large business and technology park, with a conference center, hotel accommodations, and a recreational facility, to be located near the Detroit airport.

Hathcock held *Poletown* to have been a “radical departure from fundamental constitutional principles.”¹⁰⁴ The state supreme court reviewed the history of the term “public use” under the Michigan constitutions, and concluded that “the transfer of condemned property is a ‘pubic use’ when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan” in his *Poletown* dissent:

First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved “public necessity of the extreme sort otherwise impracticable.”

¹⁰¹ *Id.*

¹⁰² *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

¹⁰³ 684 N.W.2d 765 (Mich. 2004).

¹⁰⁴ *Id.* at 788.

* * *

Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.

* * *

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement.¹⁰⁵

The Transmutation of Private Ownership from Preventing Public Harm to Furthering Public Good

In its reaction to *Kelo* case, perhaps the public found most vivid the following observation in Justice O'Connor's dissent:

The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.¹⁰⁶

These sentences point to a seismic shift in the basis for the Supreme Court's view of land use regulation. In the seminal case upholding the concept of zoning, *Village of Euclid v. Ambler Realty Co.*, the Court found that its police power justification was intimately related to the law of nuisance.¹⁰⁷ This is but an application of the Court's broader observation, in *Mugler v. Kansas*, that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."¹⁰⁸

Yet *Kelo* implicitly suggests that the touchstone has changed from the owner's *right* to use property, subject to the obligation to do no harm, to the owner's affirmative

¹⁰⁵ *Id.* at 781–783 (quoting *Poletown*, 304 N.W.2d at 478–480 (Ryan, J. dissenting)).

¹⁰⁶ *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

¹⁰⁷ 272 U.S. 365, 387–89 (1926).

¹⁰⁸ 123 U.S. 623, 665 (1887).

obligation to use property in ways that benefit the community—least that property be taken away and vested in others.

Coda

Given the practical impossibility of cabining condemnation for retransfer for economic revitalization, the Supreme Court has two choices. The first, which four justices selected, is to transmute the Public Use Clause into an ad hoc analysis of public purpose and fairness. The second, which four other justices selected, is to hold fast to the traditional limitations on public use, as was done by the Michigan Supreme Court in *Hathcock*.¹⁰⁹

It may be, however, that, when all is said and done, the U.S. Supreme Court will attempt to split the difference with a relaxed definition of “public use,” enforced through a higher level of judicial scrutiny, as suggested by the swing justice, Anthony Kennedy.

¹⁰⁹ See text associated with notes 102–105, *supra*.