



Why is there a distinction in the judicial treatment of "public use" and "just compensation"? Both are constitutional standards designed to limit the exercise of eminent domain. Why is almost insurmountable deference to legislators appropriate for the decision to take property but not to ascertaining the necessary compensation?

The same level of judicial review is merited for justifying the taking of property as for determining the amount of compensation to be paid. Otherwise, all property is held at the pleasure of the legislature, a result fundamentally inconsistent with the purpose of the framers of the Constitution and Bill of Rights to secure property rights. Admittedly, there is no precise test to decide whether a particular exercise of eminent domain is for a "public use," but the language of the clause at the very least dictates that any taking of property must be for a predominantly public, not private, advantage. There is no excuse for courts, as the majority did in *Kelo*, to wash their hands of the matter by invoking judicial deference. One should bear in mind that there is no ready formula to ascertain the appropriate amount of "just compensation," but this does not prevent judges from tackling the issue.

The unhappy outcome in *Kelo*, the forced displacement of residents from their homes to facilitate essentially private economic development, also demonstrates that a principled respect for individual property rights often serves to safeguard the weak and vulnerable. Reflecting the lingering influence of the Progressive movement and the New Deal, many scholars are prone to disparage judicial solicitude for economic rights as favoritism to the wealthy and business interests. The *Kelo* decision puts the lie to this canard. By eviscerating the "public use" limitation, the Court majority has paved the way for powerful corporations and developers, in league with local government, to condemn private property for any vague developmental purpose. *Kelo* sustained a redistributive scheme that operated, as Justices Sandra Day O'Connor and Clarence Thomas perceived in their dissenting opinions, in favor of developers at the expense of politically weak individual homeowners.

This is a classic example of why the framers saw constitutional protection of property as a barrier against arbitrary and excessive government.

Where do we go from here? It is somewhat heartening that four Justices were prepared to rein in the free-wheeling use of eminent domain. Still, short of a change of mind by the Court majority, homeowners must look to Congress or the states for relief. The *Kelo* decision aroused a firestorm of criticism across political party lines, in large part because ordinary people realized for the first time that their homes and businesses were susceptible to aggressive exercise of eminent domain for economic development projects. The majority opinion invited public debate, and *Kelo* appears to have triggered a national dialogue on eminent domain. In an extraordinary move, the House of Representatives, by a vote of 365 to 33, adopted a resolution expressing its disapproval of the majority opinion in *Kelo* and asserting

that the decision "effectively negate[s] the public use requirement of the takings clause. . . ." H.R. Res. 340, 109th Cong. (2005). Both the House and Senate have passed an amendment to an appropriations measure barring the use of federal funds to support any project that uses the power of eminent domain for private economic development purposes. H.R. 3058, 109th Cong. (2005). It is rare for a Supreme Court decision dealing with property rights to receive such widespread attention and condemnation. Some states in fact already bar the exercise of eminent domain to transfer property to private parties for economic development schemes. See *County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004). Proposals are also pending in many state legislatures to curb economic development condemnations. But these efforts, however welcome, are not a substitute for a Supreme Court that will enforce the "public use" clause of the Fifth Amendment. ■



## *Kelo v. City of New London*

### A Tale of Pragmatism Gone Awry

By Steven J. Eagle

In an attempt to fashion a coherent takings doctrine, the U.S. Supreme Court has made liberal use of both broad rhetoric and pragmatism. The Court's recent 5-4 opinion in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), continues this approach and demonstrates its inadequacies.

Before *Kelo*, Supreme Court dicta accorded broad deference to state and local condemnation of land for private economic redevelopment. *Kelo* is the first case to present squarely the issue of whether this comports with the Fifth Amendment's Public Use Clause, "nor shall private property be taken for public use, without just compensation." The Court upheld the city's action 5-4, but Justice Kennedy's concurring opinion indicated serious reservations that might limit such condemnations in the future.

#### The Debate over the Meaning of "Public Use"

Justice Stevens's majority opinion asserted that for over a century the Court has "embraced the broader and more natural interpretation of public use as 'public purpose.' . . . We have repeatedly and consistently rejected that narrow test [requiring use by the general public] ever since." *Kelo*, 125 S. Ct. at 2662-63.

The doctrine of enumerated powers and the Fifth and Fourteenth Amendment Due Process Clauses forbid government actions that are arbitrary or capricious or serve only private and not permissible public ends. Whether the "more natural" interpretation of the Public Use Clause demands only that the public receives some benefit depends on whether the clause merely duplicates other safeguards or has independent significance.

The disparagement of "public use" as an independent constitutional safeguard was evident in the Court's earlier leading cases. *Berman v. Parker*, 348 U.S. 26 (1954), involved eradication of urban blight. There, Justice Douglas proclaimed:

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.

Id. at 33 (citations omitted).

Similarly, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), involved the use of eminent domain to break up a pattern of highly concentrated land ownership. There, Justice O'Connor declared that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." Id. at 240.

With the apparent imprimatur of *Berman* and *Midkiff*, governments big and small quietly began making much greater use of eminent domain as a lure to attract desirable businesses. A *Wall Street Journal* account highlighted the growing trend: "Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage:

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grabbing property from one private business to give to another." Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, Wall St. J., Dec. 2, 1998, at A1. Eminent domain "has become a marketing tool for governments seeking to lure bigger business." Id. "Desperate for tax revenue," a follow-up story noted, "cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers." Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, Wall St. J., Dec. 8, 2004, at B1.

### **A Focus on Constitutional Interpretation—Justices Stevens and Thomas**

At one level, *Kelo* is a clash of dicta and holdings. Justice Stevens averred that the principal cases during the past century all adopted the broad view equating public use with public purpose. 125 S. Ct. at 2662–64. Justice Thomas's separate dissent asserted that underlying the Court's broad dicta in those cases were facts encompassed by traditional notions of public use, such as facilitation of the work of common carriers obligated to serve the public. Id. at 2682–84 (Thomas, J., dissenting).

### **Grappling with Pragmatism—Justices O'Connor and Kennedy**

Perhaps the most interesting aspect of *Kelo* was the realization by five Justices that the majority approach was unbounded. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, declared that "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power." Id. at 2675 (O'Connor, J., dissenting). She noted that *Berman* and *Midkiff* responded to actual harm:

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.

Id. at 2674–75 (O'Connor, J., dissenting). With apparent chagrin that her own pragmatism had gone awry, Justice O'Connor recanted the broad "errant language" of *Berman* and *Midkiff* as "unnecessary to the specific holdings." Id. at 2675 (O'Connor, J., dissenting).

Justice Kennedy's concurrence declared that:

There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. . . . This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

Id. at 2670 (Kennedy, J., concurring). He cited *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), both cases associated with the heightened judicial scrutiny.

### **The Majority's Quest for Cabined Takings for Retransfer Is a Chimera**

Perhaps the most discerning statement in the four *Kelo* opinions was Justice O'Connor's warning 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." 125 S. Ct. at 2675 (O'Connor, J., dissenting).

Justice Stevens was reassured that the New London takings "would be executed pursuant to a 'carefully considered' development plan." Id. at 2661 (quoting *Kelo*, 843 A.2d 500, 536 (Conn.

2004)). On the other hand, 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 was afoot"; such cases could "be confronted if and when they arise." Id. at 2667. "Courts have viewed such aberrations with a skeptical eye." Id. at 2667 n.17 (citing, inter alia, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)).

Private noncharitable redevelopers always have private purposes afoot. The issue is whether public officials are guided by bribery or self-dealing. If so, they violate existing laws. If not, what does it mean to claim that their actions are "pretextual"? In 99 Cents Only Stores, for instance, officials condemned a competitor's store at the behest of Costco, a principal tenant in the agency's most successful project and the only shopping center in Lancaster with a regional draw for customers.

Justice Stevens stated:

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.

*Kelo*, 125 S. Ct. at 2665.

In light of this statement, was Lancaster wrong in condemning the 99 Cents Only Stores parcel? That a city might be interested in "comprehensive" redevelopment of a wide area might imbue the entire scheme with a public purpose, but that fact does not mean that the taking of an individual small parcel necessarily is for a public use.

#### Looking After Pfizer's Progeny

Justice Stevens stated that the New London development plan "was not intended to serve the interests of Pfizer." Id. at 2662 n.6 (citation omitted). But Justice O'Connor noted that "any boon for Pfizer or the plan's developer is difficult to disaggregate

from the promised public gains in taxes and jobs." Id. at 2675-76 (O'Connor, J., dissenting).

The record certainly indicates that the needs of Pfizer were not far from the minds of redevelopment officials. Ultimately, however, the quest for the definitive quid pro quo is not only illusive but irrelevant. New London and Connecticut want the reputation of a redevelopment partner. If major 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.

Companies desirous of favorable relocation deals and localities desirous of jobs and tax revenues will find each other. "Comprehensive" redevelopment plans will be prepared and agency records built. Procedural due process will be copiously supplied.

New London was a distressed city, but it is also a political subdivision of a wealthy state. If the issue is whether cities should seek relief from state legislators on one hand, or from the profits inuring from condemning the home sites of people like Susette Kelo on the other, the answer suggested by the Supreme Court's decision requires neither elaborate forecasts nor comprehensive study. ■



## *Kelo v. City of New London*

# Supreme Court Refuses to Hamstring Local Governments

By James C. Smith

The Court's decision last term in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), has drawn heavy fire, most of it unmerited. By the narrowest of margins, the Court held that the city could take single-family homes to develop an office park and to provide parking or retail services for visitors to an existing state park and marina. Many observers thought the Court would take this opportunity to display its "conservative" activism by reining in the power of eminent domain. After all, the Court has grown increasingly protective of property rights during the past two decades. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (right to build house notwithstanding beach protection legislation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (right to operate group home notwithstanding zoning). The Court, however, passed on the chance to redefine the "public use" requirement to protect property owners from many forms of government takings. Instead, the majority followed its long-standing rule that the government takes for a "public use" under the Fifth Amendment whenever its purpose is to provide a public benefit. And for a public benefit to exist, members of the general public need not have a right to enter the property, and title to the property need not remain in a public entity.

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