

Casenote

What's the Use? The Court Takes a Stance on the Public Use Doctrine in *Kelo v. City of New London*

By a 5-4 vote¹ in *Kelo v. City of New London*,² the United States Supreme Court upheld the constitutionality of public takings for the purpose of private economic development under the Fifth Amendment's³ Public Use Clause.⁴ In holding that the takings were valid, the Court concluded that it must defer to the state legislature's judgment because the takings were beneficial to the public and were within the state's police power.⁵

I. FACTUAL BACKGROUND

The City of New London was in serious trouble. In 1990 a Connecticut state agency labeled the City of New London (the "City") a "distressed

1. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005), Stevens, J. delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Kennedy, J., filed a concurring opinion. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C.J., and Scalia and Thomas, JJ., joined. Thomas, J., filed a dissenting opinion.

2. 125 S. Ct. 2655 (2005).

3. U.S. CONST. amend. V.

4. 125 S. Ct. at 2668-69.

5. *Id.* at 2664-66.

municipality.” In 1996 the federal government closed the Naval Undersea Warfare Center, leaving 1500 residents without employment. In 1998 New London’s unemployment rate was almost double the state average, and the City’s population dropped to pre-Great Depression levels.⁶

The City had to do something to save itself, and that something came in the form of an economic revitalization plan for the City’s Fort Trumbull area. To save the City, state and local officials reactivated the New London Development Corporation (“NLDC”), a private, nonprofit entity⁷ whose main mission was to assist the City in revitalizing New London.⁸

In January 1998 the State of Connecticut authorized two multi-million dollar bonds to support NLDC’s planning activities and to create a Fort Trumbull State Park. Coincidentally, the pharmaceutical giant Pfizer Inc. announced its plans to build a \$300 million global research facility on a site immediately adjacent to the Fort Trumbull area. Hoping to capitalize on Pfizer’s presence, NLDC continued to develop its plan for the area and conducted neighborhood meetings to apprise the community of the rejuvenation process. After obtaining the city council’s approval, NLDC submitted its plans to the relevant state agencies, which approved NLDC’s findings. NLDC, as the City’s development agency,⁹ moved into the next stage of development, securing the land for the project.¹⁰

NLDC’s development plan divided the ninety-acre Fort Trumbull area¹¹ into seven parcels.¹² The two parcels that were the subject of the litigation were Parcel 3 and Parcel 4. Parcel 3 contained 90,000 square feet of research and development office space; Parcel 4 was divided into 4A and 4B. Parcel 4A provided support for the state park,

6. *Id.* at 2658.

7. Justice O’Connor, in her dissent, noted that the citizens of New London do not elect the NLDC’s members; they are appointed. *Kelo*, 125 S. Ct. at 2671 (O’Connor, J., dissenting).

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

9. See CONN. GEN. STAT. § 8-188 (2005).

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

11. The Fort Trumbull area consists of approximately 115 privately-owned properties and 32 acres of land from the defunct naval facility. *Id.*

12. Parcels 1, 2, 5, 6, and 7 were as follows: Parcel 1 largely consisted of a waterfront conference hotel with a “small urban village,” housing, restaurants, and shopping. Also, Parcel 1 had a marina for both commercial and recreational use. For Parcel 2, NLDC planned eighty new residences, organized in an urban village, along with space for a United States Coast Guard Museum. Additionally, Parcels 5, 6, and 7 had land for office and retail space as well as parking and water-dependent commercial uses. All the waterfront areas of the parcels would be connected by a “riverwalk.” *Id.*

either through parking or retail services, and a renovated marina was set for Parcel 4B.¹³

When the City approved the development plan, it also authorized NLDC to exercise the power of eminent domain in the City's name. NLDC was able to acquire most of the property without invoking the power of eminent domain; however, NLDC was unable to successfully negotiate with the petitioners. Consequently, in November 2000, NLDC initiated condemnation proceedings against the petitioners.¹⁴

In all, the nine petitioners¹⁵ owned fifteen properties in the development area.¹⁶ Four petitioners owned property in Parcel 3, and eleven owned property in Parcel 4A.¹⁷ Of the fifteen properties, ten were occupied by the owner or the owners' family members, and the other five were investment properties.¹⁸ One petitioner, Wilhelmina Dery, had lived with her husband in their house since 1946.¹⁹ Mrs. Dery was born there in 1918, and her family lived there for over a hundred years.²⁰ Additionally, the petitioners' properties were not "blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."²¹

In December 2000 the petitioners filed suit in the New London Superior Court, claiming, *inter alia*, that the takings violated the "public use" restriction in the Fifth Amendment. After a seven-day bench trial, the trial court allowed the takings of the Parcel 3 properties (four properties); however, the trial court issued a permanent restraining order, disallowing the takings in Parcel 4A (eleven properties). Both sides appealed to the Connecticut Supreme Court.²²

The Connecticut Supreme Court held that all the takings were valid under Connecticut General Statute section 8-186,²³ which allows land to be taken as part of an economic development plan and states that

13. *Id.*

14. *Id.* at 2659-60.

15. Justice O'Connor, in her dissent, emphasizes that these nine "[p]etitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. There is an objection on principle. . . ." *Id.* at 2672 (O'Connor, J., dissenting).

16. 125 S. Ct. at 2660.

17. *Id.*

18. *Id.*

19. *Id.* at 2671 (O'Connor, J., dissenting).

20. 125 S. Ct. at 2660. Her son lived next door in the house that he received as a wedding gift. *Id.* at 2671 (O'Connor, J., dissenting).

21. 125 S. Ct. at 2660.

22. *Id.*

23. CONN. GEN. STAT. § 8-186 (2005).

those takings constitute a public use in the “public interest.”²⁴ Furthermore, the Connecticut Supreme Court, relying primarily on *Hawaii Housing Authority v. Midkiff*²⁵ and *Berman v. Parker*,²⁶ held that the takings qualified as valid public uses under the United States Constitution and the Connecticut Constitution.²⁷ Additionally, the court reasoned that the takings were “‘reasonably necessary’ to achieving the City’s intended public use . . . and, second, . . . the takings were for ‘reasonably foreseeable needs.’”²⁸ Therefore, the court affirmed the trial court’s finding as to Parcel 3, and the court reversed the trial court’s finding as to Parcel 4A.²⁹ The court concluded that “the intended use of this land was sufficiently definite and had been given ‘reasonable attention’ during the planning process.”³⁰ However, three justices dissented because they believed the takings should have been reviewed using a “heightened scrutiny” standard of judicial review.³¹

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”³² and held that takings for the purpose of economic development satisfy the public use requirement of the Fifth Amendment.³³

II. LEGAL BACKGROUND

Eminent domain is the power to take private property for a public use.³⁴ The Fifth Amendment,³⁵ in stating that “private property [shall not] be taken for public use, without just compensation” limits the

24. *Kelo*, 125 S. Ct. at 2660 (citing *Kelo v. City of New London*, 268 Conn. 1, 18-28, 843 A.2d 500, 515-521 (2004)).

25. 467 U.S. 229 (1984).

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

27. *Kelo*, 125 S. Ct. at 2660 (citing *Kelo*, 268 Conn. at 40, 843 A.2d at 527).

28. *Id.* at 2660-61 (citations omitted).

29. *Id.* at 2661.

30. *Id.* (citing *Kelo*, 268 Conn. at 120-121, 843 A.2d at 574).

31. *Id.* (citing *Kelo*, 268 Conn. at 144, 146, 843 A.2d at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part)). The dissenting justices conceded that the plan was intended to serve a valid public use, but they contended that the City failed to establish, by clear and convincing evidence, that the economic benefits would actually accrue. *Id.*

32. *Id.*

33. *Id.* at 2667-68.

34. Eminent domain authority for the federal government rests in the Fifth Amendment. Each state has its own state constitutional authorization. See *infra* note 37.

35. U.S. CONST. amend. V.

exercise of the power of eminent domain.³⁶ Consequently, for the government³⁷ to exercise this power of eminent domain, two requirements must be met: (1) the person whose land is taken must be justly compensated (the “Just Compensation Clause”) and (2) the land that is taken must be used for a public use (the “Public Use Clause”).³⁸

Eminent domain is not a new concept. With its origins in English common law, the use of eminent domain under state constitutions was accepted by early Americans.³⁹ Early Americans rarely questioned whether the use of eminent domain for the construction of mills, roads,

36. *Id.* The Fifth Amendment, *in toto*, provides that:

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

Id.

37. Each state has a constitutional provision authorizing eminent domain: Alabama: ALA. CONST. art. I, § 23; Alaska: ALASKA CONST. art. I, § 18, Arizona: ARIZ. CONST. art. II, § 17; Arkansas: ARK. CONST. art. II, § 22; California: CAL. CONST. art. II, § 19; Colorado: COLO. CONST. art. 2, §§ 14 & 15; Connecticut: CONN. CONST. art. I, § 11; Delaware: DEL. CONST. art. I, § 8; Florida: FLA. CONST. art. X, § 6; Georgia: GA. CONST. art. I, § 3, para. 1; Hawaii: HAW. CONST. art. I, § 18; Idaho: IDAHO CONST. art. I, § 14; Illinois: ILL. CONST. art. I, § 15; Indiana: IND. CONST. art. I, § 21; Iowa: IOWA CONST. art. I, § 18; Kansas: KAN. CONST. art. XII, § 4; Kentucky: KY. CONST. § 13; Louisiana: LA. CONST. art. I, §§ 2 & 4; Maine: ME. CONST. art. I, § 21; Maryland: MD. CONST. art. III, §§ 40 & 40A; Massachusetts: MASS. CONST. pt. 1, art. X, § 11; Michigan: MICH. CONST. art. X, § 2; Minnesota: MINN. CONST. art. I, § 13; Mississippi: MISS. CONST. art. III, § 17; Missouri: MO. CONST. art. I, §§ 26, 27, 28; Montana: MONT. CONST. art. II, § 29; Nebraska: NEB. CONST. art. I, § 21; Nevada: NEV. CONST. art. I, § 8; New Hampshire: N.H. CONST. pt. 1, art. XII; New Jersey: N.J. CONST. art. I, § 20; New Mexico: N.M. CONST. art. II, § 20; New York: N.Y. CONST. art. I, § 7; North Carolina: N.C. CONST. art. I, § 19; North Dakota: N.D. CONST. art. I, § 14; Ohio: OHIO CONST. art. I, § 19; Oklahoma: OKLA. CONST. art. II, §§ 23 & 24; Oregon: OR. CONST. art. I, § 18; Pennsylvania: PA. CONST. art. I, § 10; Rhode Island: R.I. CONST. art. I, § 16; South Carolina: S.C. CONST. art. I, § 13; South Dakota: S.D. CONST. art. VI, § 13; Tennessee: TENN. CONST. art. I, § 21; Texas: TEX. CONST. art. I, § 17; Utah: UTAH CONST. art. I, § 22; Vermont: VT. CONST. ch. 1, art. II; Virginia: VA. CONST. art. I, §§ 6 & 11; Washington: WASH. CONST. art. I, § 16; West Virginia: W. VA. CONST. art. III, § 9; Wisconsin: WIS. CONST. art. I, § 13; Wyoming: WYO. CONST. art. I, §§ 32 & 33. 2A DAVID SCHULTZ, NICHOLS ON EMINENT DOMAIN § 7.01[1] n.3 (3d ed. 1999).

38. U.S. CONST. amend. V. In *Midkiff*, Justice O'Connor noted that “the Fourteenth Amendment does not itself contain an independent ‘public use’ requirement. Rather, that requirement is made binding on the States only by incorporation of the Fifth Amendment’s Eminent Domain Clause through the Fourteenth Amendment’s Due Process Clause.” 467 U.S. at 244 n.7.

39. SCHULTZ, *supra* note 37, § 7.01[3].

and other works was beneficial to the public; however, as state governments began to increase their support for commerce, the use of eminent domain became more controversial.⁴⁰ Thus, eminent domain entered the earliest jurisprudence of the United States. Cases such as *Calder v. Bull*⁴¹ discussed the power of eminent domain and its limitations. In fact, the majority in *Kelo*,⁴² Justice O'Connor in her dissent,⁴³ and Justice Thomas in his dissent,⁴⁴ all cite *Calder* for its insight on the takings power.

Since the decision in *Calder v. Bull*, the legal landscape of the Public Use Clause has centered around two interpretations of the clause, one broad and one narrow. The current jurisprudence embraces the broader interpretation of "public use," which employs a "public purpose" test to decipher if a proposed condemnation is valid.⁴⁵ In contrast, a reemergence of the narrow interpretation of public use has recently occurred in state courts. Its proponents advocate a more textualist, or literal, approach that interprets the clause to mean actual "use by the public," not use for a public purpose.⁴⁶

A. *The Public Purpose Test*

In *Fallbrook Irrigation District v. Bradley*,⁴⁷ the United States Supreme Court promulgated the public purpose test.⁴⁸ In that case, the Court upheld condemnations for the purpose of constructing an irrigation ditch to provide water to millions of acres of arid, potentially worthless land.⁴⁹ The Court held that "[a]ll landowners in the district have the *right* to a proportionate share of the water."⁵⁰ However, the Court opined that "[t]o irrigate, and thus bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a *public purpose*. . . ."⁵¹ Shortly after the decision in *Bradley*, the Court again applied the public purpose test in *Clark v. Nash*.⁵² In that case,

40. *Id.*

41. 3 U.S. 386 (1798).

42. *Kelo*, 125 S. Ct. at 2662 n.5; *Kelo*, 125 S. Ct. at 2667 n.19.

43. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

44. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

45. *Id.* at 2682-83 (Thomas, J., dissenting).

46. *Id.* at 2679-82 (Thomas, J., dissenting).

47. 164 U.S. 112, 158-64 (1896).

48. *Id.* at 158-64; *see also Kelo*, 125 S. Ct. at 2663; *Kelo*, 125 S. Ct. at 2683 (Thomas, J., dissenting).

49. *Bradley*, 164 U.S. at 161.

50. *Id.* at 162 (emphasis added).

51. *Id.* at 161 (emphasis added).

52. 198 U.S. 361, 368-69 (1905).

the Court cited *Bradley* in upholding another condemnation for the public purpose of laying an irrigation ditch even though the public also had a legal right to the land.⁵³ In *Strickley v. Highland Boy Gold Mining Co.*,⁵⁴ the Court relied on *Bradley* to uphold a mining company's aerial right-of-way for a bucket line.⁵⁵ These decisions became the bedrock of the public purpose test and its progeny.⁵⁶

B. *The Narrow Interpretation of Public Use*

Under the narrow interpretation of public use, the public must have the opportunity to use the property taken.⁵⁷ Early case law adopted this standard until *Bradley* shifted the United States Supreme Court's narrow interpretation to the broader interpretation.⁵⁸ Interestingly, many state courts have struggled in deciding which interpretation is correct.⁵⁹ For example, the Michigan Supreme Court recently overturned its broad interpretation of public use as applied in *Poletown Neighborhood Council v. City of Detroit*⁶⁰ for a more restrictive, narrower interpretation of public use in *County of Wayne v. Hathcock*.⁶¹

In *County of Wayne*, the Michigan Supreme Court, under circumstances similar to those in *Kelo*, examined whether the condemnation of land to build a business or technological park for private parties was constitutional.⁶² The court analyzed the Michigan statute⁶³ that authorized the taking for a public purpose and concluded that the term

53. *Id.* at 368-70.

54. 200 U.S. 527 (1906).

55. *Id.* at 531-32.

56. *See, e.g.*, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923); *Block v. Hirsh*, 256 U.S. 135, 155 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916); *O'Neill v. Leamer*, 239 U.S. 244, 253 (1915).

57. *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848). The narrow interpretation of public use is the "actual use" test.

58. *See, e.g.*, *Ryerson v. Brown*, 1877 WL 7142 *3-5 (Mich. 1877); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 581-84, 68 N.E. 522, 524 (1903); *Tyler v. Beacher*, 1871 WL 5994 (Vt. 1871).

59. Courts, such as the Washington State Supreme Court and the Michigan Supreme Court, have recently interpreted "public use" narrowly. In *Manufactured Housing Communities v. State*, the court determined that a state statute could not require mobile home owners to give tenants the right of first refusal when the owner sold the mobile home park. 142 Wash. 2d 347, 350-51, 13 P.3d 183, 184-85 (2000). The court concluded that the statute provided a source of low income housing; however, it simultaneously deprived the owner of a valuable property right. *Manufactured Housing Communities*, 142 Wash. 2d at 374-75, 13 P.3d at 196-97. Thus, the statute was unconstitutional. *Id.*

60. 410 Mich. 616, 304 N.W.2d 455 (1981).

61. 471 Mich. 445, 684 N.W.2d 765 (2004).

62. *Id.* at 450-51, 684 N.W.2d at 769-70.

63. Mich. Comp. Laws § 213.23 (2004).

“public purpose,” at the time of the ratification of the Michigan State Constitution in 1963, was understood to be more restrictive than the broad interpretation from *Poletown*.⁶⁴ Therefore, the court held that public use takings could still occur but only under much more limited circumstances.⁶⁵

C. *Economic Redevelopment Cases*

Some courts have held that urban redevelopment,⁶⁶ slum clearance,⁶⁷ and industrial redevelopment,⁶⁸ are valid public uses for the taking of private property.

In the seminal case in this area, *Berman v. Parker*,⁶⁹ the Court upheld the condemnation of a non-blighted department store, even though the space would be redeveloped for private use.⁷⁰ Within the area set for redevelopment, 64.3% of the dwellings were beyond repair,⁷¹ and the Court reasoned that the success of the economic redevelopment program depended on completely redesigning the whole area, not redeveloping the area on a structure-by-structure basis.⁷² The

64. *County of Wayne*, 471 Mich. at 450-51, 472-76, 684 N.W.2d at 769-70, 781-83. In *Poletown* the Michigan Supreme Court upheld a condemnation that allowed the General Motors Corporation to construct an assembly plant. 410 Mich. at 628, 629, 304 N.W.2d at 457. The court stated that “[t]he term ‘public use’ has not received a narrow or inelastic definition by this Court in prior cases.” *Poletown*, 410 Mich. at 630, 304 N.W.2d at 457 (footnote omitted). The court further explained that “[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.” *Id.* (footnote omitted).

65. 471 Mich. at 473-77, 684 N.W.2d at 781-83. The court developed a “test” for determining whether a condemnation complied with the pre-1963 understanding of “public use:” (1) if the land was transferred to a private party, then it must be for “public necessity of the extreme sort otherwise impracticable,” *Id.* at 476, 684 N.W.2d at 783, (2) the private party must remain accountable to the public, *Id.* at 474, 684 N.W.2d at 784, and (3) “the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.” *Id.* at 475, 684 N.W.2d at 785.

66. *See, e.g.*, *Burt. v. City of Pittsburgh*, 340 U.S. 802 (1950); *Oberndorf v. City & County of Denver*, 900 F.2d 1434 (10th Cir. 1990), *cert. denied*; *Block 173 Assocs. v. City & County of Denver*, 498 U.S. 845 (1990).

67. *See, e.g.*, *Southwestern Ill. Dev. Auth. v. Al-Muhajirum*, 318 Ill. App. 3d 1005, 744 N.E.2d 308 (2001); *Sun Co. Ins. v. City of Syracuse Indus. Dev. Agency.*, 209 A.D.2d 34, 625 N.Y.S.2d 471 (4th Dept. 1995).

68. *See, e.g.*, *Sunrise Properties, Inc. v. Jamestown Urban Renewal Agency*, 206 A.D.2d 913, 614 N.Y.S.2d 841 (4th Dept. 1994).

69. 348 U.S. 26 (1954).

70. *Id.* at 31, 36.

71. *Id.* at 30.

72. *Id.* at 34-35.

Court concluded that the taking was within the state's police power⁷³ and deferred to the legislature's judgment because the legislature "is the main guardian of the public needs. . . ."⁷⁴ The Court noted that "the power of eminent domain is merely the means to the end . . . [and] . . . [o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."⁷⁵

Another seminal case in the economic redevelopment area is *Hawaii Housing Authority v. Midkiff*.⁷⁶ In that case, the Court upheld a Hawaii act authorizing the taking of fee title from lessors and transferring it to lessees.⁷⁷ As a result of Hawaiian settlers developing a feudal land tenure system, Hawaii had a land oligopoly that owned 72.5% of the fee simple titles in Hawaii.⁷⁸ In order to stabilize the inflated residential real estate market, the Hawaii legislature passed the Land Reform Act of 1967⁷⁹ (the "Act"), authorizing the transfer of fee simple titles.⁸⁰ The Court analyzed the Act and concluded, based on *Berman*, that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."⁸¹ Additionally, the Court concluded that the plan need not be assured of success to be valid public use⁸² and that the taking does not have to be put to use literally for the general public.⁸³

That same term, the Court upheld a purely economic taking in *Ruckelshaus v. Monsanto Co.*⁸⁴ In that case, the Environmental Protection Agency ("EPA") used the applications from previous pesticide applicants to evaluate the applications of subsequent applicants.⁸⁵ The Court concluded that even though this process directly benefited the subsequent applicants, the process also alleviated a significant barrier to entry into the pesticide market for subsequent applicants.⁸⁶ The

73. The Court stated that the "[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle." *Id.* at 32.

74. *Id.*

75. *Id.* at 33 (citations omitted).

76. 467 U.S. 229 (1984).

77. *Id.* at 231-34.

78. *Id.*

79. HAW. REV. STAT. § 516 (2005).

80. *Midkiff*, 467 U.S. at 233.

81. *Id.* at 241.

82. *Id.* at 242-43.

83. *Id.* at 244 (citing *Rindge Co.*, 262 U.S. at 707).

84. 467 U.S. 986 (1984).

85. *Id.* at 990.

86. *Id.* at 1015.

Court reasoned that if competitors could enter the market more easily, then the enhanced competition that resulted would lower prices for consumers. Therefore, the Court held that the practice was a valid public use.⁸⁷

III. RATIONALE OF THE COURT

For 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.⁸⁸

A. Interpretation of "Public Use" as "Public Purpose"

The majority opened its opinion by stating what this case was not.⁸⁹ The Court stated that because the land would not be entirely open to the public, this case presented an unsettled "middle ground" between two well-settled eminent domain areas.⁹⁰

The Court first recognized that both a narrow and a broad interpretation of public use exist.⁹¹ In the Court's view, the state courts abandoned the narrow, literal interpretation in the early nineteenth century because it was unworkable,⁹² impractical,⁹³ and overly restrictive.⁹⁴ Indeed, the literal requirement that the land be used for the general public was rejected in *Midkiff* in favor of the broader interpretation.⁹⁵ This broader interpretation translates public use into public purpose.⁹⁶ Therefore, the Court stated that the dispositive question was "whether the City's development plan serves a 'public purpose.'"⁹⁷

87. *Id.* at 1020.

88. *Kelo*, 125 S. Ct. at 2664.

89. *Id.* at 2661-63. First, this case was not the transfer of property from private party A for the sole purpose of transferring it to private party B. The trial court and the entire Connecticut Supreme Court echoed this sentiment when they did not find any evidence of an illegitimate, pretextual reason for the takings. The Court also explained that this case is not the transfer of property from private party A to private party B for future use by the public. *Id.*

90. *Id.* at 2662-63.

91. *Id.*

92. *Id.* at 2662 n.7.

93. *Id.* at 2662 n.8.

94. *Id.*

95. *Id.* at 2662.

96. *Id.*

97. *Id.* at 2663.

B. The Holistic Approach and Deference to the Legislature

In analyzing whether the City's plan served a public purpose, the Court stated that, in takings cases, it is bound "only [by] the taking's purpose, not its mechanics."⁹⁸ The Court overlooked the means of the taking, and instead focused solely on the end of public welfare.⁹⁹ In justifying this approach, Justice Stevens referenced *Berman v. Parker*.¹⁰⁰ In *Berman* the Court relied on a holistic, not piecemeal, approach to take a non-blighted department store and emphasized that the condemnation cannot be viewed in isolation.¹⁰¹ Like *Berman*, the takings in *Kelo* involved non-blighted areas, and the Court relied on *Berman* to conclude that the condemnations were necessary to NLDC's holistic plan.¹⁰²

Additionally, in *Kelo*, the Court reasoned that it should continue to defer to the judgment of the legislature, as the Court had in *Berman*,¹⁰³ *Midkiff*, and *Monsanto*.¹⁰⁴ The Court focused on the "comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of [the Court's] review[.]"¹⁰⁵ and concluded that the overall benefits to the City, coupled with the plan's "unquestionabl[e]" public purpose, satisfy the public use requirement.¹⁰⁶

C. Petitioners' Arguments

The Court then addressed the petitioners' arguments. First, the petitioners asserted that economic development does not qualify as a public use.¹⁰⁷ The Court relied on its binding precedent¹⁰⁸ and con-

98. *Id.* at 2664 (quoting *Midkiff*, 467 U.S. at 244).

99. *Id.* at 2663-64.

100. *Id.* at 2663 (citing *Berman*, 348 U.S. 26 (1954)).

101. *Id.* (citing *Berman*, 348 U.S. at 34).

102. *Id.* (citing *Berman*, 348 U.S. at 34).

103. There, Justice Douglas stated that "the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them . . . there is nothing in the Fifth Amendment that stands in the way." *Berman*, 348 U.S. at 33.

104. *Kelo*, 125 S. Ct. at 2664-65. The Court in both *Berman* and *Midkiff* noted that it does not matter whether the decision came from a state legislature or Congress because "[s]tate legislatures are as capable as Congress of making such determinations within their respective spheres of authority." *Midkiff*, 467 U.S. at 244 (citing *Berman*, 348 U.S. at 32).

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

106. *Id.* Furthermore, the Court concluded that it would also defer to the City's determinations as to "the amount and character of land to be taken for the project. . . ." *Id.* at 2668.

107. *Id.* at 2665.

cluded that NLDC's economic development plan conformed to the "traditional and long accepted function of government" in promoting economic development.¹⁰⁹ The Court also disagreed with the petitioners' argument that "economic development impermissibly blurs the boundary between public and private takings."¹¹⁰ The Court reasoned that takings often benefit private parties,¹¹¹ and the Court again relied on prior case law to illustrate this point.¹¹²

Additionally, the petitioners argued that if the Court held that economic redevelopment was allowed, a parade of horrors would ensue.¹¹³ Specifically, the petitioners argued that transfers between private parties would occur solely because the transferee could put the property to a more productive use, which would generate more tax revenue.¹¹⁴ However, the Court forestalled this assertion by distinguishing the petitioners' hypothetical while essentially limiting the Court's holding,¹¹⁵ the Court stated that "[s]uch a one-to-one transfer of property,¹¹⁶ executed outside the confines of an integrated development plan, is not presented in this case."¹¹⁷

108. *Id.* The Court pointed to *Berman* and its redevelopment of a blighted community; *Midkiff* and its breaking up of a land oligopoly to stabilize the state's residential land market; and *Monsanto* and the Court's acceptance of Congress's purpose of eliminating barriers to entry to increase competition. *Id.* at 2666.

109. *Id.* at 2665.

110. *Id.* at 2666.

111. *Id.*

112. *Id.* In *Berman* the Court stated that the private enterprise could possibly serve the public better than the government. *Id.* (quoting *Berman*, 348 U.S. at 34). In *Midkiff* the lessees were able to purchase homes that were previously unavailable to them. *Id.* (citing *Midkiff*, 467 U.S. at 233). In *Monsanto* the subsequent pesticide applicants benefited from the access to information that ultimately benefited the consumer through economic competition. *Id.* (citing *Monsanto*, 467 U.S. at 1014).

113. *Id.* at 2666-67 n.19.

114. *Id.* at 2666-67.

115. *Id.* at 2667.

116. A one-to-one transfer of property is the taking of property from one private party and transferring it to another private party.

117. *Kelo*, 125 S. Ct. at 2667. The Court noted that the "hypothetical cases posited by [the] petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use." *Id.* The Court further addressed this contention in a footnote, when it quoted Justice Iredell, "[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power—such is the tendency of every human institution . . . [w]e must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence." *Id.* at 2667 n.19 (quoting *Calder v. Bull*, 3 U.S. at 400 (opinion concurring in result)).

Lastly, the petitioners argued that the Court should require that the takings be “reasonably certain” to accrue to the public.¹¹⁸ In rejecting this contention, the Court briefly referenced the rational basis test, stating that courts are not in the position to substitute their judgments for the legislature’s judgment.¹¹⁹ Additionally, forcing courts to evaluate each taking “would unquestionably impose a significant impediment to the successful consummation of many such plans.”¹²⁰

D. Power of the States

Finally, the Court recognized that hardships could and would occur from the condemnations, but the Court stated that the legislature has the ability to further restrict the exercise of the takings power beyond the “federal baseline.”¹²¹ The Court explained that many states already limit the exercise of eminent domain through state constitutions and statutes; in fact, the Court encouraged public debate over the issue.¹²²

E. Justice Kennedy’s Concurrence or Compromise

In his concurrence, Justice Kennedy advocated adopting rational basis scrutiny for takings under the Fifth Amendment;¹²³ however, Justice Kennedy would strike down the takings as the Court presently does in Due Process or Equal Protection Clause cases¹²⁴ if pretextual or incidental public benefits are put forth only to justify the takings.¹²⁵ Moreover, Justice Kennedy stressed the need for serious inquiry into such cases and outlined the trial court’s inquiry to NLDC’s actions, concluding that the evidentiary findings conclusively showed that the takings were not for Pfizer or other private parties.¹²⁶

118. *Id.* at 2667.

119. *Id.* at 2667-68.

120. *Id.* at 2668.

121. *Id.* Justice Stevens noted the inherent states’ power, “there is nothing in the Federal Constitution which denies to [the states] the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect.” *Id.* at 2664 n.11 (quoting *O’Neill*, 239 U.S. at 253).

122. *Id.* at 2668.

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

124. Justice Kennedy cited *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), as two cases that failed rational basis scrutiny because the governmental restriction disadvantaged certain parties. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

125. *Id.* (Kennedy, J., concurring).

126. *Id.* at 2669-70 (Kennedy, J., concurring).

In response to the petitioners' argument for a broad per se rule against economic development takings or at least a strong presumption of invalidity in such cases, Justice Kennedy argued that such a rule would disallow numerous takings that substantially benefit the public.¹²⁷ Nevertheless, Justice Kennedy acknowledged a stricter standard could be "appropriate for a more narrowly drawn category of takings," such as private transfers with an acute "risk of undetected impermissible favoritism of private parties. . . ."¹²⁸ However, Justice Kennedy cautioned against a bright-line rule that would heighten the level of scrutiny simply because the taking's purpose was economic development.¹²⁹ While he also recognized the myriad cases that could demand a stricter standard, Justice Kennedy did not believe that a stricter standard was appropriate in *Kelo*.¹³⁰

F. Justice O'Connor's Dissent

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.¹³¹

Justice O'Connor's dissent contained an air of foreboding.¹³² Justice O'Connor warned that the majority now made all property vulnerable to condemnation by "wash[ing] out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the . . . Fifth Amendment."¹³³ Justice O'Connor called it "upgrad[ing];"¹³⁴ if someone can use an owner's property in a more productive and beneficial way for the public, then "[u]nder the banner of economic development," that person could condemn another's property.¹³⁵

After discussing the inherent safeguards in the Takings Clause,¹³⁶

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

128. *Id.* (Kennedy, J., concurring).

129. *Id.* (Kennedy, J., concurring).

130. *Id.* at 2670-71 (Kennedy, J., concurring).

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

132. Justice O'Connor stated that the majority has significantly expanded the Public Taking Clause's meaning. *Id.* at 2671 (O'Connor, J., dissenting). Justice O'Connor posited that, under the majority's reasoning, any secondary benefit to the public will justify condemnations. *Id.*

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

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

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

136. *Id.* at 2672-73 (O'Connor, J., dissenting). The inherent safeguards in the Takings Clause are the Just Compensation Clause and the Public Use Clause. *Id.* at 2672

Justice O'Connor attacked the majority's complete deference to the legislature, stating that "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."¹³⁷ However, Justice O'Connor admitted that the Court's role in reviewing the legislature's decision is a narrow one.¹³⁸

Notably, Justice O'Connor noted that the issue in *Kelo* was one of first impression.¹³⁹ Justice O'Connor differed in her interpretation of *Berman* and *Midkiff*; she believed that those cases address the "precondemnation use of the targeted property [that] inflicted affirmative harm on society."¹⁴⁰ Specifically, in *Berman* and *Midkiff*, the legislatures decided that eliminating the existing property use would remedy a specific harm¹⁴¹ and that the takings in *Midkiff* and *Berman*, unlike those in *Kelo*, "each . . . directly achieved a public benefit."¹⁴²

Next, Justice O'Connor stated that the scope of the sovereign's police power and the doctrine of public use are not "coterminous" as the Court¹⁴³ stated in *Midkiff*.¹⁴⁴ Justice O'Connor noted that the discussion in *Berman* and *Midkiff* regarding police power and the public use doctrines was dictum and thus, that language was not put to the "constitutional test."¹⁴⁵ Justice O'Connor explained that "the takings in those cases were within the police power but also for 'public use. . . .'"¹⁴⁶ Thus, Justice O'Connor cautioned against a coterminous

(O'Connor, J., dissenting). In addressing this case, Justice O'Connor agrees with the majority that this case is not the traditional "public ownership" or "use-by-the-public" case; however, O'Connor categorizes *Kelo* as a third classification of takings that serve a public purpose while satisfying the Constitution, even though the property is destined for private use. *Id.* at 2673 (O'Connor, J., dissenting).

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

138. *Id.* at 2674 (O'Connor, J., dissenting) (citing *Midkiff*, 467 U.S. at 240).

139. *Id.* at 2673 (O'Connor, J., dissenting). Justice O'Connor frames the issue as whether economic development takings are constitutional. *Id.* (O'Connor, J., dissenting).

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

141. *Id.* (O'Connor, J., dissenting). In *Midkiff* the condemnations eliminated the affirmative harm of an oligopoly caused by extreme wealth. *Id.* (O'Connor, J., dissenting) (citing *Midkiff*, 467 U.S. at 232). In *Berman* the affirmative harm was the "blight resulting from extreme poverty." *Id.* (O'Connor, J., dissenting) (citing *Berman*, 348 U.S. at 32).

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

143. Justice O'Connor wrote the Court's opinion in *Midkiff*.

144. *Id.* at 2675 (O'Connor, J., dissenting).

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

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

analysis¹⁴⁷ because it can be misleading when the police power and the public use doctrines produce differing results.¹⁴⁸

Also, Justice O'Connor criticized the majority for its failure to explain to the lower courts how to correctly conduct an inquiry into suspected takings where the purpose is to benefit private parties.¹⁴⁹ Justice O'Connor stated that "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."¹⁵⁰ Additionally, Justice O'Connor opined that a test that looks only to the purpose of the takings would not even address the state officials' motivations for the takings.¹⁵¹

Finally, Justice O'Connor warned that "the fallout from this decision will not be random."¹⁵² Justice O'Connor explained that those with power and influence in the political process will reap the benefits at the expense of those with few resources to defend themselves.¹⁵³

G. Justice Thomas's Dissent

When we depart from the natural import of the term "public use," and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience . . . we are afloat without any certain principle to guide us.¹⁵⁴

147. Echoing Justice O'Connor arguments, Justice Thomas stressed the distinction between the power of eminent domain and the police power of the state. *Id.* at 2685-86 (Thomas, J., dissenting). Justice Thomas stated that "[t]raditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, in sharp contrast to the takings power, which has always required compensation." *Id.* at 2685 (Thomas, J., dissenting) (citations omitted). Applying that distinction to *Berman*, Justice Thomas concluded that, if the slums were truly blighted then the appropriate remedy rested in the state's nuisance law, not eminent domain. *Id.* at 2685-86 (Thomas, J., dissenting). In *Midkiff*, according to Justice Thomas, the Court relied on precedents that were uses of the regulatory power; therefore, that decision's precedent was irrelevant. *Id.* at 2686 n.3 (Thomas, J., dissenting) (citing *Midkiff*, 467 U.S. at 241-42).

148. 125 S. Ct. at 2675 (O'Connor, J., dissenting).

149. *Id.* (O'Connor, J., dissenting). Justice O'Connor noted that Justice Kennedy "suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take – without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not." *Id.* (O'Connor, J., dissenting).

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

151. *Id.* at 2676 (O'Connor, J., dissenting).

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

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

154. 125 S. Ct. at 2686 (Thomas, J., dissenting) (quoting *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9, 60-61 (N.Y. 1837) (opinion of Tracy, Sen.)).

Justice Thomas contended that the Court has not only expanded the Public Use Clause to the public purpose clause but the Court has also further bastardized the public use clause, creating the “Diverse and Always Evolving Needs of Society” clause.¹⁵⁵ Justice Thomas concluded that “[t]he Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.”¹⁵⁶

1. An Historical Perspective of Public Use. Justice Thomas analyzed the Public Use Clause in its historical context and concluded that the Public Use Clause is a *limitation* on the government’s power of eminent domain.¹⁵⁷ First, he supported his view with a textualist argument.¹⁵⁸ Justice Thomas looked to the “most natural reading” of the clause by analyzing founding-era dictionaries’ definitions of the word “use,”¹⁵⁹ and he concluded that the most natural reading conformed to the narrower interpretation of public use.¹⁶⁰

Next, like Justice O’Connor, Justice Thomas contrasted public use with “general Welfare” and concluded that “[t]he Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope.”¹⁶¹ Justice Thomas further reasoned that the Constitution’s common law background in nuisance law provided another historical signpost that the majority’s interpretation was flawed.¹⁶² Justice Thomas suggested that public nuisance law, not eminent domain, “eliminate[es] uses of land that adversely impact[] the public welfare,”¹⁶³ and, citing to Blackstone¹⁶⁴ and

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

156. *Id.* at 2681 (Thomas, J., dissenting).

157. *Id.* at 2679 (Thomas, J., dissenting).

158. *Id.* at 2678-80 (Thomas, J., dissenting).

159. *Id.* at 2679 (Thomas, J., dissenting). Justice Thomas agreed with the majority that two interpretations of the word “use” existed at the time of the founding. *Id.* (Thomas, J., dissenting). The narrower definition is “[t]he act of employing any thing to any purpose,” and the broader definition is “convenience . . . help . . . [or] [q]ualities that make a thing proper for any purpose.” *Id.* (Thomas, J., dissenting) (quoting 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)). For comparison, Justice Thomas cited two other times in the Constitution that “use” is employed, and both utilize the narrower definition. *Id.* (Thomas, J., dissenting) (citing Eric R. Clacys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 897 (2004)).

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

161. *Id.* at 2679-80 (Thomas, J., dissenting).

162. *Id.* at 2680 (Thomas, J., dissenting).

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

164. *Id.* (Thomas, J., dissenting) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 134-35 (1765)).

Kent,¹⁶⁵ Justice Thomas reasoned that “[w]hen the public took property . . . it took it as an individual buying property from another typically would: for one’s own use.”¹⁶⁶

In addition, Justice Thomas criticized the majority’s public purpose test as an unnecessary “duplicate” of the Necessary and Proper Clause.¹⁶⁷ Under the Necessary and Proper Clause, Justice Thomas reasoned that “a taking is permissible . . . only if it serves a valid public purpose.”¹⁶⁸ If the majority interprets “public use” as “public purpose,” then the Public Use Clause replicates the Necessary and Proper Clause’s analysis, rendering the Public Use Clause surplusage, and to hold so, would violate the rule against surplusage established in *Marbury v. Madison*¹⁶⁹ and its progeny.¹⁷⁰

Justice Thomas also examined the states’ use of eminent domain prior to the incorporation of the Fifth Amendment.¹⁷¹ States previously used eminent domain in the context of Mills Acts.¹⁷² For a fee, the public would use these grist mills, and the law dictated that these mills remain open to the public.¹⁷³ Justice Thomas noted that “early state legislatures tested the limits of their state-law eminent domain power”¹⁷⁴ and that some state courts allowed takings for public and private purposes.¹⁷⁵ To Justice Thomas, the importance of the Mills Acts was their original purpose, to allow the public to use the grist mills.¹⁷⁶

2. Current Public Use Clause Jurisprudence. Not only did Justice Thomas attack the current jurisprudence’s use of the broader interpretation of public use, Justice Thomas also attacked the fundamen-

165. *Id.* (Thomas, J., dissenting) (citing JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 275 (1827)).

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

167. *Id.* (Thomas, J., dissenting). The Necessary and Proper Clause limits the Federal government to take property “when necessary and proper to the exercise of an expressly enumerated power.” U.S. CONST. art. 1, § 8, cl. 18.

168. *Kelo*, 125 S. Ct. at 2680 (Thomas, J., dissenting).

169. 5 U.S. 137 (1803).

170. *Kelo*, 125 S. Ct. at 2678-80 (Thomas, J., dissenting).

171. *Id.* at 2681 (Thomas, J., dissenting).

172. *Id.* (Thomas, J., dissenting). Mills Acts allowed downstream landowners, for just compensation to the upstream landowners, to flood upstream landowners’ properties in order to power grist mills. *Id.* (Thomas, J., dissenting).

173. *Id.* (Thomas, J., dissenting). Thomas labels these grist mills “common carriers—quasi-public entities.” *Id.* (Thomas, J., dissenting).

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

175. *Id.* at 2682 (Thomas, J., dissenting).

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

tal foundation on which the current jurisprudence stands.¹⁷⁷ Justice Thomas argued that the Court has “blindly” adopted this broad interpretation “with little discussion of the Clause’s history and original meaning. . . .”¹⁷⁸ Justice Thomas identified two distinct lines of cases that abuse the Clause’s history and meaning: (1) the Court’s opinions that adopted the “public purpose” interpretation and (2) the Court’s opinions that deferred to the judgment of the legislatures.¹⁷⁹ According to Thomas, these abuses converged in *Berman v. Parker*¹⁸⁰ and *Hawaii Housing Authority v. Midkiff*,¹⁸¹ the cases primarily relied on by the majority.¹⁸²

Justice Thomas first began his analysis with *Fallbrook Irrigation District v. Bradley*,¹⁸³ the seminal “public purpose” interpretation case.¹⁸⁴ In *Bradley* the Court stated that the irrigation of the land served a public purpose.¹⁸⁵ According to Justice Thomas, that statement was dictum.¹⁸⁶ Justice Thomas remarked that the Court did not cite any authority for its proposition, but instead stated that “[t]he use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect.”¹⁸⁷ As a result, Justice Thomas stated that the “test” from *Bradley* spawned a litany of cases¹⁸⁸ in which the Court adopted *Bradley* with little or no analysis.¹⁸⁹

Furthermore, Justice Thomas argued that in *United States v. Gettysburg Electric R. Co.*,¹⁹⁰ the Court, in dictum, stated that “when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably

177. *Id.* at 2682-86 (Thomas, J., dissenting).

178. *Id.* at 2682 (Thomas, J., dissenting).

179. *Id.* at 2682-83 (Thomas, J., dissenting).

180. 348 U.S. 26 (1954).

181. 467 U.S. 229 (1984).

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

183. 164 U.S. 112 (1896).

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

185. *Bradley*, 164 U.S. at 161-62.

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

187. *Id.* (Thomas, J., dissenting) (quoting *Bradley*, 164 U.S. at 160-61).

188. In *Clark v. Nash*, the Court adopted and used the *Bradley* test when its use was not essential to *Clark*’s holding. 198 U.S. 361, 369-70 (1905). From there, the Court, in *Strickley v. Highland Boy Gold Mining Co.*, again used the *Bradley* test as dictum. 200 U.S. 527, 531 (1906). In subsequent cases, the Court continued to cite *Clark* and *Strickley* and their misuse of *Bradley* as binding precedent. *Kelo*, 125 S. Ct. at 2683-84 (Thomas, J., dissenting).

189. 125 S. Ct. at 2684 (Thomas, J., dissenting).

190. 160 U.S. 668 (1896).

without reasonable foundation.”¹⁹¹ Because the Court quickly incorporated this dictum into the public use doctrine, Justice Thomas concluded that the Court now holds an “insurmountable deference to legislative conclusions.”¹⁹² Baffled, Justice Thomas questioned why the Court gives any deference to the legislature for “the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property.”¹⁹³ In comparison, Justice Thomas asked if the Court would defer to the legislature to ascertain when a search of a home would be reasonable.¹⁹⁴ Continuing the analogy, Justice Thomas stated that a “searching standard” for nontraditional property rights¹⁹⁵ exists, but under the majority’s reasoning, no similar standard would exist for taking the far more intrusive step of razing individuals’ homes.¹⁹⁶ Justice Thomas summarized his feelings by stating that “[s]omething has gone seriously awry with this Court’s interpretation of the Constitution.”¹⁹⁷

Additionally, in response to the majority’s criticism of the “actual use” test¹⁹⁸ as “difficult to administer,” Justice Thomas argued that application of the public purpose test is far more difficult.¹⁹⁹ Justice Thomas explained that “[i]t is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a ‘purely private purpose’—unless the Court means to eliminate public use scrutiny of takings entirely.”²⁰⁰ Also, Justice Thomas stated that the majority’s public purpose test, in application, would actually require the Court to second-guess the

191. *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting) (quoting *Gettysburg Electric Co.*, 160 U.S. at 680).

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

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

194. *Id.* (Thomas, J., dissenting). Justice Thomas also cited two cases that the Court decided in *Kelo*’s session, *Deck v. Missouri*, 125 S. Ct. 2007 (2005) and *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005). *Id.* (Thomas, J., dissenting). In *Deck* the Court decided “when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings.” *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting) (citing *Deck*, 125 S. Ct. 2007 (2005)). In *Castle Rock* the Court decided “when state law creates a property interest protected by the Due Process Clause.” *Id.* (Thomas, J., dissenting) (citing *Castle Rock*, 125 S. Ct. 2796 (2005)). Both issues were legal questions, and the Court did not defer to the legislature for guidance. *Id.* (Thomas, J., dissenting).

195. *Id.* at 2684 (Thomas, J., dissenting). Justice Thomas cites welfare benefits as one such nontraditional property right. *Id.* (Thomas, J., dissenting).

196. *Id.* at 2684-85 (Thomas, J., dissenting).

197. *Id.* at 2685 (Thomas, J., dissenting).

198. The “actual use” test is the narrow interpretation of the Public Use Clause; it looks to the “use by the public.”

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

200. *Id.* (Thomas, J., dissenting) (quoting *Kelo*, 125 S. Ct. at 2661-62, 2666-67).

legislature, an act the Court seeks to avoid.²⁰¹ Justice Thomas explained that “[i]t is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest.”²⁰²

IV. LEGAL IMPLICATIONS

The implications for the poor and powerless may be great.²⁰³ Both Justices O’Connor and Thomas forecast that similar takings²⁰⁴ in the name of “urban renewal” will disproportionately affect the poor who are unlikely to utilize the “highest and best social use” for their property.²⁰⁵ In fact, Justice Thomas invoked footnote four from *United States v. Carolene Products Co.*²⁰⁶ in support of an “intrusive judicial review of constitutional provisions that protect ‘discrete and insular minori-

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

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

203. Though these attempts will ultimately fail on equal protection and other grounds, pro-property right groups have reacted vehemently against the majority’s decision by attempting to condemn Justice Breyer’s New Hampshire vacation home and Justice Souter’s Weare, New Hampshire vacation home. The New Hampshire Libertarian Party is attempting to turn Justice Breyer’s 167-acre farm into “Constitution Park.” As to his efforts to turn Justice Souter’s home into the “Lost Liberty Hotel,” Logan Darrow Clements, the CEO of Freestar Media, LLC, stated that “This is not a prank. The Towne of Weare has five people on the Board of Selectmen. If three of them vote to use the power of eminent domain to take this land from Mr. Souter, we can begin our hotel development.” Kenneth Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F01. Additionally, Clements has done his homework about the number of votes needed to condemn the property:

An initiative can be placed on the Weare, NH March 2006 ballot with only 25 signatures. A University of New Hampshire poll found that 93% of New Hampshire residents are opposed to the Kelo decision. The Town of Weare has 5,552 registered voters. If all registered voters show up to vote in March, the initiative can pass with as few as 2,777 votes. In the last election only 2038 people voted. With this turn-out the initiative could pass with as few as 1,020 votes.

Freestar Media, *The Numbers Say We Can Win: 25-93-2777*, <http://www.freenationtv.com>.

204. Though Hurricanes Katrina, Rita, and Wilma have dissipated and left a horrible wake of destruction in many southern states, their destruction could once again make victims of those that lost everything in the hurricanes. Whole neighborhoods were flattened, and many of those neighborhoods were slum areas, such as New Orleans’s Ninth Ward. Entrepreneurs, who may have sought out these areas for “economic redevelopment” before the hurricanes, now have even less of an obstacle to condemning these properties. The hurricanes may have “broken” people like Wilhelmina Dery, who can no longer claim sentimental value over a pile of rubble that once was their home.

205. *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., dissenting).

206. 304 U.S. 144, 152 n.4 (1938).

ties.”²⁰⁷ As a social precedent, Justice Thomas cited the urban renewal period that followed *Berman* known as “Negro removal.”²⁰⁸ Justice Thomas noted the impact that the slum clearance in *Berman* had on African-Americans; of those affected, ninety-seven percent were African-Americans.²⁰⁹

Congress, as well as many state legislatures, reacted to the decision through proposed legislation. Most of the congressional legislation seeks to exclude “economic development” from the definition of public use. For example, in the House of Representatives, Representative Phil Gingrey (R) of Georgia has introduced three separate initiatives.²¹⁰ The House passed Gingrey’s first initiative, House Resolution 340,²¹¹ on June 30, 2005, just one week after the *Kelo* decision came down. Additionally, more substantive House legislation has been introduced, such as the Private Property Rights Act of 2005,²¹² the Eminent Domain Tax Relief Act of 2005,²¹³ and the Protection of Homes, Small Businesses and Private Property Act of 2005.²¹⁴

207. *Kelo*, 125 S. Ct. at 2687 (Thomas, J., dissenting) (citing *Carolene Products*, 304 U.S. at 152 n.4).

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

209. *Id.* (citing *Berman*, 348 U.S. at 30).

210. In addition to H.R. Res. 340, Representative Gingrey initiated Eminent Domain Tax Relief Act of 2005, H.R. Res. 3268, 108th Cong. (2005), that has been referred to the House Ways and Means Committee. Also, Representative Gingrey initiated Protection of Homes, Small Businesses and Private Property Act of 2005, H.R. Res. 3087, 108th Cong. (2005), that is currently in the House Judiciary and is one of two companion bills to S. 1313, 108th Cong. (2005). Additionally, Representative Gingrey is a co-sponsor of Private Property Rights Act of 2005, H.R. Res. 3135 (2005), that has been referred to the House Judiciary where the Subcommittee on the Constitution held a hearing in September 2005.

211. H.R. Res. 340 was a non-binding resolution expressing “grave disapproval” of *Kelo*; it passed 365-33-18.

212. This act defines “economic development” as “any activity” other than 1) making private property available for general public use or as a public facility or 2) removing harmful effects. Also, the bill denies federal funding to states for eminent domain purposes if the state practices economic development eminent domain. Private Property Rights Act of 2005, H.R. Res. 3135 (2005)

213. This act would exclude any capital gain that a taxpayer realizes from the government’s just compensation for their property. Eminent Domain Tax Relief Act of 2005, H.R. Res. 3268, 108th Cong. (2005).

214. The Protection of Homes, Small Businesses and Private Property Act of 2005 is the companion bill to Senate Bill 1313, and both seek to exclude economic development from the definition of public use, while restricting federal use of eminent domain to public uses only. It also would prohibit states’ use of federal funding for economic development takings. Protection of Homes, Small Businesses and Private Property Act of 2005, H.R. Res. 3087, 108th Cong. (2005).

On the state level, as Justice Stevens predicted,²¹⁵ the state legislatures have reacted vehemently against *Kelo*. As of November 2005, thirteen states²¹⁶ have passed post-*Kelo* legislation or are currently considering legislation to counteract *Kelo*. Furthermore, in an effort to eliminate any ambiguity in the construction of public use, states such as Idaho²¹⁷ explicitly define what constitutes a public use. In contrast, Massachusetts,²¹⁸ Connecticut,²¹⁹ and North Dakota²²⁰ have statutes that specifically allow the use of eminent domain for economic revitalization. Lastly, Utah,²²¹ Nevada,²²² and Colorado²²³ enacted legislation prior to *Kelo* that limited the use of eminent domain.²²⁴

The National Conference of State Legislatures has tracked the state legislation, noting five major categories of reactive legislation: (1) authorization for a public use,²²⁵ (2) restriction of use to blighted properties,²²⁶ (3) enhanced public notice, hearing, and negotiation

215. In accordance with the majority's deferential standard, Justice Stevens suggested for property owners to look to their states for redress. *Kelo*, 125 S. Ct. at 2668. Justice O'Connor believes that is "an abdication of our responsibility." *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting).

216. Those thirteen states are: (1) Alabama, (2) California, (3) Delaware, (4) Illinois, (5) Michigan, (6) Minnesota, (7) New Jersey, (8) New York, (9) Ohio, (10) Oregon, (11) Pennsylvania, (12) Texas, and (13) Wisconsin. For a list of the individual bills, see: National Conference of State Legislatures, *Post Kelo v. New London State Eminent Domain Legislation*, Dec. 16, 2005, <http://www.ncsl.org/programs/natres/post-keleleg.htm>. Numerous sources claim that this number is closer to thirty states that have legislation pending; however, this number includes legislation from states that have prefiled for the 2006 legislative sessions. See Institute for Justice, Castle Coalition, *Current Proposed States Legislation on Eminent Domain*, 2005, <http://www.castlecoalition.org/legislation/states/index.asp>.

217. IDAHO CODE ANN. § 7-701 (2005); see also NEV. REV. STAT. § 37.010 (2005); UTAH CODE ANN. § 78-34-1 (2005); W. VA. CODE § 54-1-2 (2005).

218. MASS. GEN LAWS ch. 121C §§ 2, 5 (2005).

219. CONN. GEN STAT. § 8-186, § 8-193 (2005).

220. N.D. CENT. CODE § 40-58-02, § 40-58-05 (2005).

221. 2005 UTAH SENATE BILL 184.

222. 2005 NEV. ASSEMBLY BILL 143, 2005 NEV. SENATE BILL 326.

223. 2005 CO. HOUSE BILL 1266.

224. National Conference of State Legislatures, *Post Kelo v. New London State Eminent Domain Legislation*, Dec. 16, 2005, <http://www.ncsl.org/programs/natres/post-keleleg.htm>.

225. Under this category, eminent domain may be used only for a "stated public purpose" or a "recognized public use." This legislation does not necessarily define what each public purpose or use is. National Conference of State Legislatures, *Eminent Domain Memo August 30, 2005*, Aug. 30, 2005, <http://www.ncsl.org/programs/natres/EmindomainMemo.htm>. Delaware employs this approach. *Id.*

226. Under this category, the use of eminent domain for economic development purposes is limited "to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local

criteria;²²⁷ (4) local government approval;²²⁸ and (5) prohibiting eminent domain for specific purposes.²²⁹ This list is not exhaustive, and state legislatures could continue to pass creative legislation that does not fit into these categories or fits into more than one category.

Even in the face of these measures, individuals will test the parameters of state statutes in state courts. Once the lawsuits arrive in a state court²³⁰ with plaintiffs screaming “impermissible takings,” the state courts, as Justice O’Connor’s dissent warns, will have no guidance from the Court on how to conduct an inquiry into whether the taking is a permissible one or not.²³¹ Therefore, legal chaos may ensue in state courts until the Supreme Court clarifies or overrules *Kelo*.

To this end, the majority tempered its holding in an attempt to pacify all the fears and doomsday cries that the Court knew *Kelo* would produce. The majority explicitly stated that *Kelo*’s holding was limited to cases where a nonpretexual, economic development plan was in place.²³² The court specifically avoided addressing cases of one-to-one transfers of property.²³³ Therefore, when overzealous plaintiffs knowingly or unknowingly attempt to misuse *Kelo*’s holding for one-to-

government must satisfy before condemning private property for economic development purposes.” National Conference of State Legislatures, *supra* note 225.

227. Under this category, local governments are required “to hold public hearings before condemning property for economic development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land.” *Id.*

228. Under this category, the locally elected legislative body must vote “before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a super-majority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.” *Id.*

229. Under this category, “the use of eminent domain for economic development (e.g., residential, retail or commercial) [is prohibited]; for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions, most frequently for blighted properties.” *Id.*

230. The Wall Street Journal published an article entitled “Eminent Domain: Is it Only Hope for Inner Cities?” that followed a East St. Louis developer, Jim Koman, and his efforts to revitalize that blighted area through the exercise of eminent domain. Ryan Chittum, *Eminent Domain: Is It Only Hope For Inner Cities?* WALL ST. J., Oct. 5, 2005, at B1. Koman currently is building eighteen stripmalls, and of those, he may have to use the power of eminent domain on six properties to collect the necessary land. *Id.* at B6. Mr. Koman explained his philosophy in the article “[p]lease come invest in the inner city.” *Id.* However, Mr. Koman realizes that “[t]he question is, Is it faster for me to buy this guy [a holdout] off, or quicker to go to court and condemn it?” *Id.*

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

232. *Kelo*, 125 S. Ct. at 2666-68.

233. *Id.*

2006]

KELO V. CITY OF NEW LONDON

713

one transfers the state courts will have to shoulder much of the litigation.

RANDY J. BATES, II