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THE IMPLICATIONS OF KELO IN LAND USE LAW

Daniel J. Curtin, Jr.*

The Supreme Court’s recent decision in *Kelo v. City of New London* provoked considerable backlash from media editorials and politicians alike decrying a radical expansion of government power to take private property. This article argues that, despite the alarmist tenor of the reaction, the Court’s decision in *Kelo* was not a departure from precedent, or otherwise surprising. Instead, *Kelo* upheld the long-accepted principle that the taking of property for the purpose of economic development, even when it involves transferring the property to a private party, satisfies the Fifth Amendment’s “public use” requirement. *Kelo* is notable in its reliance on, and deferral to, the City of New London’s finding that eminent domain would serve a public purpose based on the City’s comprehensive planning effort and economic development plan for revitalization. This article cautions that over-reaction and misinterpretation of *Kelo* may have the negative consequence of removing what has been a useful tool to facilitate redevelopment.

I. THE GENESIS AND EVOLUTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS AS THEY APPLY TO A GOVERNMENT’S EMINENT DOMAIN POWER

The power to take property for public use has existed since the early days of Roman Law.1 However, it was not until the middle ages that the taking of property was first discussed as a “distinct branch of government power.”2 As

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1. 1 JULIUS SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.12, at 1-14 (3d ed. 2005).
2. Id.
civilization progressed, philosophers began to ponder the nature of individual rights as opposed to broad governmental power. In 1625, Hugo Grotius, who wrote of such power in his work *De Jure Belli et Paci*, birthed the term "dominium eminens" (eminent domain). Grotius noted that there was an inherent governmental power of eminent domain not only in times of government necessity, but also simply for "public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." However, Grotius also observed a restriction on government power that has come to form the basis of modern takings claims: "the state is bound to make good the loss to those who lose their property."

Grotius's noted restriction on government power was not wholly revolutionary. Section 39 of the Magna Carta mandated that "[n]o freemen shall be taken or imprisoned or diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Grotius's qualification also complimented similar sentiments by other philosophers and legal scholars of roughly the same time period who recognized similar limitations on the King's power. Sir Edward Coke, Lord Chief Justice of England, often asserted in his works that "the common law was a long-recognized tradition of rights" to which even the King must pay homage and obedience. Similarly, Sir William Blackstone "stressed the continuity of the common law, as well as its position as a bulwark against the royal powers." John Locke also advocated for limitations to the King's rule by advancing the notion of "natural rights," namely property rights that were not subject to royal authority.

This concern for protecting individual rights, in light of

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3. Id.
4. Id. at 1-15.
5. Id.
6. Id.
8. Id.
9. Id.
10. Id. at 2.
the auspices of a strong central government, also preoccupied the original drafters of the United States Constitution. Among the Anti-Federalists, Thomas Jefferson advocated for the incorporation of the Bill of Rights into the Constitution.\textsuperscript{11} Specifically, the Fifth Amendment states: “Nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”\textsuperscript{12} However, the restrictions on government power within the Bill of Rights originally only applied to the federal government, not the state governments.\textsuperscript{13} It was not until after the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments that courts began to hold states accountable to the mandates and restrictions of the Bill of Rights.\textsuperscript{14}

The controversy surrounding what constitutes a valid public use for eminent domain did not become prevalent until the demands for government support of commerce increased.\textsuperscript{15} In colonial and early America, eminent domain was employed quite extensively for purposes including but not limited to mills, private roads, and the drainage of private lands.\textsuperscript{16} There was little disagreement that these uses were public and that eminent domain could be used in their assistance.\textsuperscript{17}

Following ratification of the Pennsylvania and Vermont state constitutions in 1776–77, other states sought in their early constitutions to place public use limits upon the use of eminent domain.\textsuperscript{18} The judiciaries in these states similarly sought to define the limits of “public use” by offering various interpretations about the meaning of the term.\textsuperscript{19} Throughout the nineteenth and early twentieth centuries, various definitions described the “public use” limitation.\textsuperscript{20} Today the phrase allows almost any type of property to be acquired so

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\textsuperscript{11} Id.

\textsuperscript{12} U.S. CONST. amend. V.

\textsuperscript{13} Sullivan, \textit{supra} note 7, at 2 (citing Barron v. City of Baltimore, 32 U.S. 243 (1833)).

\textsuperscript{14} Sullivan, \textit{supra} note 7, at 2.

\textsuperscript{15} 2A SACKMAN, \textit{supra} note 1, § 7.01, at 7-18.

\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Id.
long as it serves a broadly defined public use.\textsuperscript{21}

Many local governments initiate urban renewal projects to cure the economic stagnation or depression that many urban areas face. In general, urban renewal projects seek to clear unsafe and unsanitary blight by condemning an entire area, even though some buildings within the designated area may not be blighted.\textsuperscript{22} Many localities have expanded the reach of urban renewal projects to urban areas that may be economically depressed and in need of an economic development plan for rejuvenation.\textsuperscript{23} Statutes authorizing urban renewal projects of this character have been upheld, despite significant criticism and possible abuses of this type of land acquisition.\textsuperscript{24} The United States Supreme Court has repeatedly held that the eminent domain power is coterminous with the police power.\textsuperscript{25} Thus, prior to the decision in \textit{Kelo v. City of New London}, a city's eminent domain power as well as a broad definition of public use were both well established.

II. \textbf{KELO V. CITY OF NEW LONDON: THE QUESTIONS FEW ARE ASKING, AND THE ANSWERS VERY FEW ARE GIVING}

A. What Was Really at Issue in Kelo?

In \textit{Kelo v. City of New London}, the United States Supreme Court, by a narrow 5-4 decision, upheld as constitutional the condemnation of real property containing non-blighted houses as part of a broader economic development plan.\textsuperscript{26} The essential issue before the Court was "whether the [C]ity's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."\textsuperscript{27} The Court held that

\begin{thebibliography}{9}
\bibitem{21} 2A SACKMAN, \textit{supra} note 11, \S 7.01, at 7-18.
\bibitem{22} \textit{Id.} \S 7.06, at 7-173.
\bibitem{23} \textit{Id.}
\bibitem{24} \textit{Id.}
\bibitem{27} \textit{Id.} at 2661.
\end{thebibliography}
the condemnation served a public purpose because of the anticipated economic benefits of the proposed project, even though the public did not have direct access to the property and a private developer was to select tenants for the property.\textsuperscript{28} Reaffirming settled law, the Court also noted that a city cannot exercise its eminent domain powers with the "mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."\textsuperscript{29}

At the same time, the "Court long ago rejected any literal requirement that condemned property be put into use for the general public."\textsuperscript{30} Indeed, while many state courts in the mid-nineteenth century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time.\textsuperscript{31} According to the \textit{Kelo} court:

Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when the Court began applying the Fifth Amendment to the states at the close of the nineteenth century, it embraced the broader and more natural interpretation of public use as "public purpose."\textsuperscript{32}

The \textit{Kelo} Court characterized the City's eminent domain takings as a public use because the City executed its eminent domain power "pursuant to a carefully considered" economic development plan drafted by a publicly appointed, nonprofit developer.\textsuperscript{33} The Court recognized this was not a case in which the City was planning to open the condemned land—at least not in its entirety—to use by the general public. Nor were the private lessees of the land in any sense "required to operate like common carriers, making their services available to all comers."\textsuperscript{34}

\textbf{B. What is All the Kelo Uproar About?}

Unfortunately, several media accounts of the case have

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 2655.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 2662 (citing \textit{Midkiff}, 467 U.S. at 244).
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Kelo}, 125 S. Ct. at 2662.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
omitted some of the facts that are essential to understanding the Supreme Court’s decision. Many news accounts of, and editorials regarding, the *Kelo* decision mischaracterize it as an assault on private property rights. There is little mention of the planning that had been in progress since the City enlisted New London Development Corporation (NLDC) in 1978 to form a comprehensive economic development plan to revitalize the City. There was little, if any, discussion of the fact that the Court essentially reaffirmed relevant precedent from earlier decisions such as *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*—cases that upheld government supported projects based on the broad definition of “public use” and the similarly broad reach of the police power. Some of the news articles failed even to mention that the Supreme Court was reluctant to substitute its judgment for that of the local government.

C. The City’s Economic Development

New London is situated where the Thames River meets Long Island Sound in southeastern Connecticut. Within the City’s six square miles, the population has dwindled to 1920s levels. The local unemployment rate is double that of the state. While highly dependent on the real property tax for local revenue, fifty-four percent of the property in the City is tax-exempt because it is owned by the federal or state government, or a nontaxpaying entity. Decades of economic decline led a state agency in 1990 to designate the City a “distressed municipality.” Many jobs were lost through the departure and downsizing of businesses, the largest of which was the Naval Undersea


39. *Id.*

40. *Id.*

41. *Id.*
Warfare Center, which shut down during a round of base realignments and closures.\textsuperscript{42} The center previously employed over 1,500 people in the Fort Trumbull area of the City.\textsuperscript{43}

Such conditions prompted state and local officials to target New London for economic revitalization.\textsuperscript{44} To that end, NLDC, a private nonprofit entity established some years earlier to assist the City in planning economic development, was directed to draft a development plan for the Fort Trumbull area.\textsuperscript{45} In January 1998, the state authorized a $5.35 million bond issue to support NLDC's planning activities and a $10 million bond issue toward the creation of Fort Trumbull State Park.\textsuperscript{46}

In February 1998, Pfizer Inc., a large pharmaceutical company, announced that it would build a $300 million research facility on a site adjacent to Fort Trumbull.\textsuperscript{47} Local planners and officials expected Pfizer to be the catalyst for the area's economic rejuvenation.\textsuperscript{48} After receiving initial approval from the City Council, NLDC continued drafting its economic development plan and held a series of neighborhood meetings to educate the public about the process and seek feedback.\textsuperscript{49} The City Council authorized NLDC to formally submit its plans to the relevant state agencies for review.\textsuperscript{50} Upon obtaining state-level approval, NLDC finalized an economic development plan for the ninety-acre Fort Trumbull area.\textsuperscript{51} The City Council approved the plan in January 2000 and designated the NLDC as its development agent in charge of implementation.\textsuperscript{52}

D. The Contents of the Economic Development Plan

It is important to understand that the economic development plan did not consist of purely private

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Kelo, 125 S. Ct. at 2658.
\textsuperscript{45} Id. at 2658-59.
\textsuperscript{46} Id. at 2659.
\textsuperscript{47} Id. at 2659.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Kelo, 125 S. Ct. at 2659.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
development. The plan represented a comprehensive mix of uses that would ensure economic diversity and an overall public benefit. The development planning area was segmented into seven parcels. Parcel 1 was designated for a waterfront conference hotel at the center of a “small urban village” that would include restaurants and shopping. This parcel would also have marinas for both recreational and commercial uses. A pedestrian “riverwalk” would originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 would be the site of approximately eighty new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also included space reserved for a new U.S. Coast Guard Museum. Parcel 3, which was located immediately north of the Pfizer facility, would contain at least 90,000 square feet of research and development office space. Parcel 4A was a 2.4-acre site that would be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B would include a renovated marina as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 would provide land for office and retail space, parking, and water-dependant commercial uses.

NLDC intended for the development plan to capitalize on the arrival of the Pfizer facility and any spillover benefits it was expected to generate. In addition to creating jobs, generating tax revenue, and helping to “build momentum for the revitalization of downtown New London,” the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and

53. Id.
54. See id. at 2665.
55. Id. at 2659.
56. Kelo, 125 S. Ct. at 2665.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Kelo, 125 S. Ct. at 2665.
63. Id.
64. Id.
in the park.\textsuperscript{65} Vested with the City's authorization, NLDC successfully negotiated the purchase of most of the land in the ninety-acre area, but its negotiations with a small group of landowners failed.\textsuperscript{66} As a result, in November 2000, NLDC initiated the condemnation proceedings that gave rise to the \textit{Kelo} case.\textsuperscript{67}

\textbf{E. The Hold-Out Property Owners}

Nine property owners refused to relinquish their property to the City in exchange for just compensation.\textsuperscript{68} Altogether, the property owners owned fifteen properties in Fort Trumbull—four in parcel 3 of the economic development plan and eleven in parcel 4A.\textsuperscript{69} Ten of the parcels were occupied by the owner or a family member, the other five were held as investment properties.\textsuperscript{70} Susette Kelo lived in the Fort Trumbull area since 1997, and made extensive improvements to her home, which she prized for its water view.\textsuperscript{71} Wilhemina Dery was born in her Fort Trumbull house in 1918 and had lived there her entire life.\textsuperscript{72} Her husband Charles had lived in the house since they married some sixty years ago.\textsuperscript{73} They occupied the same house that Ms. Dery's parents first occupied when they moved to the area over 100 years ago.\textsuperscript{74} There is no doubt that the property owners had legitimate reasons for refusing to relinquish their property, despite the fact that the power of eminent domain is essentially an inherent governmental power intended to accomplish land transfers in the face of holdouts.\textsuperscript{75}

\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id. at 2660.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{See Kelo, 125 S. Ct. at 2660.}
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Kelo, 125 S. Ct. at 2671 (O'Connor, J., dissenting).}
\textsuperscript{75} \textit{Id. at 2660.}
III. THE LEGAL IMPLICATIONS OF KELO V. CITY OF NEW LONDON: REAFFIRMING AGE-OLD SUPREME COURT PRECEDENT

A. The "Public Use" Requirement is Coterminous with the Scope of the Police Power

The legal basis for all land use regulation is the police power, which allows a city to protect the public health, safety, and welfare of its residents. A city's land use decisions lie within the police power if they reasonably relate to the public welfare.

With regard to public use, as Justice William O. Douglas, speaking for the Supreme Court, stated:

The concept of the public welfare is broad and inclusive... The values it represents are spiritual as well as physical, aesthetic as well as monetary. 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.

In the 1970s, the Supreme Court upheld a village's zoning ordinance relating to land use restrictions on single-family dwelling units in Village of Belle Terre v. Boras. This opinion, written by Justice Douglas, identified the interests that supported the village's exercise of its police power at the time:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker... The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for

76. When the word "city" is used, it also means "county."
78. See Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 604 (1976).
79. Berman, 348 U.S. at 33 (internal citations omitted).
Today, regulations are sustained under complex conditions that at one time may have been condemned as arbitrary and unreasonable. Cities face different needs and interests than those identified in Village of Belle Terre, and courts afford greater deference to legislative determinations wherein a city, under its police power authority, exercises eminent domain. Cities are confronted with "smart growth," "sustainable growth," "new urbanism," and other techniques to stop sprawl. In addition, they are at times confronted with stagnant local economies. Through legislative processes, cities may condemn land for redevelopment pursuant to thoughtful and deliberate economic development plans. Local regulations addressing such concepts are as proper an exercise of a city's police power as were those in Village of Belle Terre, due to the elasticity of that power.

In Kelo, the United States Supreme Court acknowledged and cited settled case law upholding the broad reach of the police power and, likewise, an expansive reading of the public use requirement. In addition to its Berman decision, which broadly construed the police power and the scope of "public use," the Court relied on its more recent decision in Hawaii Housing Authority v. Midkiff. In Midkiff, the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees, for just compensation, in order to break up a land oligopoly. Justice O'Connor, writing for a unanimous Court, concluded that "the State's purpose of eliminating 'the social and economic evils of land oligopoly' qualified as a valid public use." The Court reasoned that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." In the same term, the Supreme Court continued to afford great deference to legislative determinations for public use.

81. Id. at 9.
85. Id.
86. Kelo, 125 S. Ct. at 2664 (quoting Midkiff, 467 U.S. at 229).
87. Midkiff, 467 U.S. at 240.
and public health, safety, and welfare.\textsuperscript{88}

\textbf{B. The Kelo Majority: Following Precedent and Deferring to Legislative Decisions}

The five Justices in the \textit{Kelo} majority underscored longstanding Supreme Court precedent under which the Court avoids interfering with local legislative decisions.\textsuperscript{89} Writing for the majority, Justice Stevens stated, "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."\textsuperscript{90} The Court rejected the landowners' argument for a bright-line rule prohibiting the use of the power of eminent domain for economic development, noting that facilitating economic development is an important traditional governmental function.\textsuperscript{91} The Court held that there was no logical distinction between public use for economic development and other uses declared to be legitimate public uses.\textsuperscript{92}

As the submissions of the parties and their \textit{amici} make clear, the 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. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners relief that they seek.\textsuperscript{93}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{88} In \textit{Ruckelshaus v. Monsanto}, the Court upheld certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that authorized the Environmental Protection Agency (EPA) to "consider the date (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant provided just compensation for the data." \textit{Midkiff}, 467 U.S. at 240 (citing \textit{Ruckelshaus v. Monsanto}, Co., 467 U.S. 986 (1984)). The Court ultimately held that Congress had sufficient belief "that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition." \textit{Id.} (citing \textit{Ruckelshaus}, 467 U.S. at 1015).
\item \textsuperscript{89} \textit{See Kelo}, 125 S. Ct. at 2663, 2665.
\item \textsuperscript{90} \textit{Id.} at 2664.
\item \textsuperscript{91} \textit{Id.} at 2665-67.
\item \textsuperscript{92} \textit{Id.} at 2662.
\item \textsuperscript{93} \textit{Id.} at 2668.
\end{enumerate}
\end{footnotesize}
After the Court ruled that determinations of use for economic development were typically legislative, as opposed to judicial, decisions, it applied the broad deference it has traditionally afforded legislatures when faced with matters of socioeconomic concern. 94

The *Kelo* Court rejected the landowners' argument that such a taking must show that there is a "reasonable certainty" that the public will actually receive the expected public benefit. 95 In doing so, the Court acknowledged the long line of cases in which a deferential standard of review was applied to legislative decisions. 96 According to the Court, "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation— are not to be carried out in the federal courts." 97 Therefore, the Supreme Court followed its well-established precedent of deferring to legislative decisions by declining to adopt the "reasonable certainty" requirement. 98

With regard to its consideration of public benefits, the *Kelo* majority cited its recent decision in *Lingle v. Chevron U.S.A., Inc.*, in which the Court struck down the "substantially advances" test for regulatory takings because it would inappropriately "empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies." 99 In *Lingle*, the Hawaii Legislature, concerned about the effects of market concentration on the retail price of gasoline, passed Act 257 to limit the rent oil companies could charge lessee-dealers. 100 Under the rent cap of the state statute, oil companies could not charge lessee-dealers more than fifteen percent of the dealer's gross profits from gasoline sales plus fifteen percent of gross sales of products other than gasoline. 101 *Chevron*

94. See *id.* at 2667 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).
95. *Kelo*, 125 S. Ct. at 2667.
96. *Id.* at 2667-68.
97. *Id.* at 2667 (citing *Midkiff*, 467 U.S. at 229).
98. See *id.* at 2667-68.
100. *Lingle*, 544 U.S. at 533.
101. *Id.*
challenged the rent cap on its face, arguing that it did not "substantially advance" a legitimate government interest. The federal district court and the Ninth Circuit Court of Appeals sided with Chevron, ruling that the statute would not "substantially advance" the stated interest because it would not actually reduce lessee-dealers' costs or retail prices.

The United States Supreme Court unanimously reversed, holding that the "substantially advances" inquiry is one of due process, that it has no place in takings jurisprudence, and that the language was "regrettably imprecise." In other words, the means-ends nature of the inquiry addresses due process considerations, but has nothing to do with whether private property has been taken under the Constitution. The Court reasoned that a takings analysis should not demand heightened review of legislative determinations, "a task for which courts are not well suited." Rather, the analysis should focus on "help[ing to] identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."

Similarly, the majority in Kelo recognized that it should apply a deferential standard to the legislature's determination of public use. The Court explicitly noted the connection between the two cases: "[E]arlier this term we explained why similar practical concerns (among others) undermined the use of the "substantially advances' formula in our regulatory takings doctrine."

C. The Importance of a Comprehensive Economic Development Plan

Local governments can minimize the risks of judicial challenges to their public use determinations by creating

102. Id. at 533-34.
103. Id. at 534-36.
104. Id. at 540-42.
105. Id. at 542.
106. Lingle, 544 U.S. at 544.
107. Id. at 542.
109. Id. at 2667 ("[T]his formula would empower—and might often require—courts to substitute their predicative judgments for those of elected legislatures and expert agencies.") (quoting Lingle, 544 U.S. at 544).
comprehensive economic development plans and/or addressing such issues in their general plans, or as needed in specific plans.\(^\text{110}\) As noted above, the Court generally will not closely scrutinize legislative decisions that are supported by well-reasoned decision-making processes.\(^\text{111}\) The Court affords broad deference to legislative decisions because the remedy for poor legislative decisions is at the ballot box, not in the courts. In \textit{Kelo}, the majority underscored the fact that the City's comprehensive economic development plan was thorough and deliberate.\(^\text{112}\)

Consequently, the \textit{Kelo} majority deferred to the City's judgment of using eminent domain to redevelop the Fort Trumbull area because the record indicated that the economic development plan would serve a public purpose.\(^\text{113}\) In other words, the Court was able to discern from the record the City's intent to put this land to public use.\(^\text{114}\) According to the Court, "[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue."\(^\text{115}\)

Furthermore, the majority noted the comprehensive nature of the project and pointed out that such urban planning and development is a legislative, not judicial, matter: "As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts."\(^\text{116}\) It is the "whole greater than the sum of its parts" that the majority viewed as the "public use."\(^\text{117}\) Therefore, the media's contention that \textit{Kelo} affirmed a City's

\(^{110}\) See Edward J. Sullivan & Isa Lester, \textit{The Role of the Comprehensive Plan in Infrastructure Financing}, 37 Urb. L. 53, 55 (2005). In California, the general plan, a legislative act, is the constitution for all future development and all such development, whether public or private, must be consistent with that general plan. \textit{Associated Home Builders, Inc. v. City of Walnut Creek}, 4 Cal. 3d 641 (1971). For specific plans in California, see sections 65450-457 of the California Government Code.

\(^{111}\) See supra Part III.B.

\(^{112}\) \textit{Kelo}, 125 S. Ct. at 2665.

\(^{113}\) \textit{Id.} at 2664-65.

\(^{114}\) \textit{Id.} at 2665

\(^{115}\) \textit{Id.}

\(^{116}\) \textit{Id.}

\(^{117}\) \textit{Id.}
right to condemn private property solely to transfer it to another private party is misleading.

The City's comprehensive economic development plan was essential to the *Kelo* majority's view that the plan would serve a public purpose. The landowners argued that without a bright-line rule prohibiting eminent domain for economic development, nothing would prevent the government from seizing A's property to simply give it to B. However, the Court determined that “[s]uch a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”

The Court made clear that “it has long been accepted that a 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.” Despite the Court's efforts to make clear that such condemnation is prohibited, the media blitz thrust *Kelo* into the public spotlight by claiming that A to B transfers are exactly what the Court authorized. According to the Court,

> [t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . . 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.

Unfortunately, few popular accounts of the case accurately reflected the Court’s deliberate holding. The Court’s actual language failed to make the cutting room floor. Noted land use attorney and author Dwight Merriam expressed the same frustration in a recent article:

> I read hundreds of e-mail messages and electronic reports on *Kelo* in the days following the decision and it reminded me of the children's game of Telephone . . . . The first child is given a short statement such as: “The Court in *Kelo* has followed its precedent and held given the facts that the

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119. *Id.* at 2666.
120. *Id.* at 2667.
121. *Id.* at 2661.
122. *Id.* at 2665.
needs of the community, the plan, and the degree of
government control were sufficient to support a legislative
finding that the land assembly and private economic
development was a public purpose and therefore a public
use under the Fifth Amendment." The next child
whispers to the next and so forth until it has gone all
around the circle from one end of the room to the other.
And the last child says: "The Court held in Kelo that
governments can take private property for any old private
developer at any time without regard for need,
government oversight, or any kind of plan."123

Contrary to some media accounts, the decision stands for
the proposition that the Supreme Court is reluctant to
overturn a state or local legislature's land use decision for a
public purpose, as long as it is supported by a thorough,
deliberate and reasonable plan. Of course, that prospect is
not revolutionary.

D. Justice Kennedy's Concurring Opinion: Rational Basis
Doesn't Mean Free License

Justice Kennedy wrote a concurring opinion that sought
to clarify the extent of the Court's holding.124 He observed
that the Court's deferential standard of review in such cases
was effectively akin to rational basis review for economic
regulations under the due process and equal protection
clauses of the Constitution.125 Such a standard of review,
according to Justice Kennedy, does not foreclose the
possibility that a more stringent standard of review would be
appropriate in cases where the challenged condemnation is
suspicious, the procedures used are prone to abuse, or the
stated benefits are trivial or implausible.126 The concurrence
is a reminder that the Court retains the power to determine if
the economic development plan prompting eminent domain is
for an impermissible, nonpublic purpose.

123. Dwight H. Merriam, A Hat Trick in the U.S. Supreme Court for
Government: Lingle, San Remo, and Kelo, 28 ZONING AND PLAN. L. RPT. NO. 8,
at 1 (Sept. 2005).
124. See Kelo, 125 S. Ct. at 2669-71 (Kennedy, J., concurring).
125. Id. at 2669 (Kennedy, J., concurring).
126. Id. (Kennedy, J., concurring).
E. Justice O'Connor's Dissent: Sounding the Alarm

In her dissent, Justice O'Connor sounded the alarm that would contribute to the post–Kelo frenzy that has followed an otherwise legally unremarkable case.\textsuperscript{127} According to the dissent,

\[\text{under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.}\textsuperscript{128}

The dissent remained unpersuaded by the majority's reliance on the City's comprehensive economic development plan.\textsuperscript{129} However, Justice O'Connor's impassioned dissent is inconsistent with the approach she articulated in \textit{Lingle} just weeks earlier.\textsuperscript{130} The \textit{Kelo} dissent would not defer to legislative decisions to determine whether an economic development plan satisfies the “public use” requirement of the Constitution.\textsuperscript{131}

The dissenting Justices believed that conveying private property to other private parties can never represent a “public purpose” and therefore could not constitute a “public use” under the Fifth Amendment. According to Justice O'Connor,

\[\text{[t]o reason ... that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words ”for public use” from the Takings Clause of the Fifth Amendment.}\textsuperscript{132}

Justice O'Connor argued that the Court should provide a bright-line rule that all economic development, no matter its

\textsuperscript{127} Id. at 2671 (O'Connor, J., dissenting).
\textsuperscript{128} Id. (O'Connor, J., dissenting).
\textsuperscript{129} Id. at 2676 (O'Connor, J., dissenting).
\textsuperscript{131} See \textit{Kelo}, 125 S. Ct. at 2677-78 (O'Connor, J., dissenting).
\textsuperscript{132} Id. at 2671 (O'Connor, J., dissenting).
character or public benefit, should not be held to represent a valid "public use" for eminent domain purposes.\footnote{133} Instead of deferring to legislative judgments of what land use may constitute a public purpose and use, she argued for a rule prohibiting the use of eminent domain for economic development.\footnote{134} In fact, Justice O'Connor unequivocally questioned the constitutionality of economic development takings and indicated that she would hold that such takings are not constitutional.\footnote{135} She then stated that the Court rightfully admitted, however, "that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer."\footnote{136} In any event, she said that this constraint had 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.\footnote{137}

Justice O'Connor went on to say that

[any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.\footnote{138}

The dissenting justices placed little stock in the City's economic development planning processes, which involved extensive public input, substantial public benefits, and approval under a unique state law. According to Justice O'Connor,

[i]f legislative prognostications about the secondary public

\footnotesize{133. Id. at 2680-81 (O'Connor, J., dissenting).
134. Id. at 2686 (O'Connor, J., dissenting).
135. Id. at 2673 (O'Connor, J., dissenting).
136. Id. at 2676 (O'Connor, J., dissenting).
137. Kelo, 125 S. Ct. at 2676 (O'Connor, J., dissenting).
138. Id. (O'Connor, J., dissenting).}
benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from a less elaborate process, whose only projected advantage is the incidence of higher taxes or that hope to transform an already prosperous city into an even more prosperous one.\(^\text{139}\)

In selectively recognizing the actual facts, the dissent overstated the decision's impact on private property rights. While the Court will defer to legislative determinations of an economic development plan's "public purpose," the Court will examine the plan's record to ensure that the city's determination is reasonable. While this standard of deference does not represent a sufficiently definitive test for the dissent, the Supreme Court has consistently deferred to legislative decisions involving land use planning issues. Despite this long-standing precedent, Justice O'Connor's dissent has served as a rallying-cry for eminent domain critics who viewed *Kelo* as radical departure of past takings jurisprudence.

IV. THE "BACKLASH"—
FEDERAL AND STATE RESPONSES TO THE DECISION

A. Reactions to *Kelo*

Just seven days after the Court issued the *Kelo* opinion, the U.S. House of Representatives passed a rare non-binding resolution expressing "grave disapproval" with the Court's decision.\(^\text{140}\) House Resolution 340 (Gingrey, R-Ga.), which had seventy-eight co-sponsors and passed on 365 to 33 vote, asserted the House's agreement with Justice O'Connor's dissenting opinion.\(^\text{141}\) The resolution stated that eminent domain should only be used for purposes that promote the public good within the meaning of the Fifth Amendment and concluded that the power should never be used to advantage

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141. *Id.*
one private party over any other private party.\textsuperscript{142}

The United States Senate has also been busy with its own response to the \textit{Kelo} decision. Senate Bill 1313 (Cornyn, R-Tex.), with thirty co-sponsors, would declare economic development to be an invalid public use under the federal Constitution.\textsuperscript{143} The bill would also prohibit the use of federal funds for any condemnation for economic development.\textsuperscript{144} The bill remains in committee.

Similarly, legislation and proposed constitutional amendments have been introduced in virtually every state to address the perceived implications of the \textit{Kelo} decision.\textsuperscript{145} Twenty-two states have already passed legislation to restrict the use of eminent domain; Alabama, Delaware, and Texas were three of the first to do so.\textsuperscript{146}

The new Alabama law, which applies to current and future eminent domain proceedings, prevents use of eminent domain for economic development purposes except in blighted areas.\textsuperscript{147} In particular, the law prohibits municipalities and counties from condemning property for (1) the purposes of private retail, office, commercial, industrial, or residential development, (2) primarily for enhancement of tax revenue, or (3) for transfer to a person, nongovernment entity, public-private partnership, corporation, or other business entity.\textsuperscript{148} The law also gives the former owner of property condemned for a lawful purpose, or his heirs or assigns, a right of first refusal if the property is not used for the purpose for which it was condemned or for some other public use.\textsuperscript{149}

The prohibition does not apply to the use of eminent domain by a municipality, housing authority, or other public entity based upon a finding of blight in an area specifically covered by a redevelopment plan or urban renewal plan.\textsuperscript{150} The law also does not limit the exercise of eminent domain by

\begin{thebibliography}{9}
\bibitem{142} Id.
\bibitem{143} S. 1313, 109th Cong. § 3 (2005).
\bibitem{144} Id.
\bibitem{146} Nat'l Conference, supra note 145.
\bibitem{147} ALA. CODE §§ 11-47-170, 11-80-1 (2005).
\bibitem{148} Id.
\bibitem{149} Id.
\bibitem{150} Id.
\end{thebibliography}
or for the benefit of public utilities or other entities engaged in the generation, transmission, or distribution of utility products or services. \(^{151}\) Nor does it prohibit a municipality or county from using eminent domain to construct, maintain, or operate streets and roadways, government buildings, or park and recreation facilities. \(^{152}\)

Delaware's new eminent domain law provides that the power may be used only for a recognized public use described at least six months in advance of the condemnation. \(^{153}\) The description of the recognized public use must be provided in a certified planning document, at a public hearing held specifically to address the proposed condemnation, or in a published report of the acquiring agency. \(^{154}\)

The Texas law, which amends various state statutes, prohibits the use of eminent domain in certain contexts. \(^{155}\) Under the new law, use of eminent domain is prohibited when the condemnation (1) confers a private benefit on a particular private party through the use of the property, (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party, or (3) is for economic development purposes not related to the elimination of the harmful effects of slums or blighted areas. \(^{156}\) The law does not apply to an array of uses, including transportation projects, infrastructure projects, and public buildings. Significantly, the law expressly excludes the use of eminent domain for the Dallas Cowboys' proposed new football stadium. \(^{157}\)

Legislation and constitutional amendments have been proposed in other states to restrict the perceived implications of the *Kelo* decision. \(^{158}\) In addition, many communities nationwide have adopted local ordinances denouncing the decision and barring the use of eminent domain if it tends to favor other private interests. \(^{159}\)

\(^{151}\) Id.
\(^{152}\) Id.
\(^{154}\) Id.
\(^{155}\) See TEX. GOV'T CODE ANN. § 2206.001 (LexisNexis 2006).
\(^{156}\) Id. § 2206.0001(b).
\(^{157}\) Id. § 2206.0001(c)(6).
\(^{158}\) See Nat'l Conference, supra note 145.
B. Kelo Fever in California

In California, one ballot initiative to severely restrict a city's ability to take private property via eminent domain—Proposition 90, the "Protect our Homes Act"—has qualified to appear on the November 2006 ballot.\(^{160}\) Proposition 90 would apply to all public agencies in California, including cities, with eminent domain authority.\(^{161}\) Its proposed sweeping changes include the following:

- "Public use" would be defined more narrowly than public purpose and would be limited to projects such as roads, parks and public facilities;
- "Public use" would require that the government occupy the property or rent it out for public use;
- Use of eminent domain to transfer property from one private party to another private party would be prohibited (unless the private entity performs a public use project);
- The amount of compensation to be paid for seized property would be changed from fair market value to the value of the property as the government intends to use it;
- Property owners whose property is not taken but who suffer "substantial economic loss" to their property as a result of government action, such as "down zoning," would be entitled to compensation.\(^{162}\)

As a whole, these measures\(^{163}\) would undermine state and local governments' abilities to properly develop economic plans through use of such successful techniques as urban

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2006).


161. Id.


redevelopment, growth limits, infill development, and inclusionary and affordable housing.

V. CONCLUSION: "MUCH ADO ABOUT NOTHING"

The Kelo Court’s decision does not license legislative free reign for the exercise of eminent domain on private property across the country. The Court specifically mentions that a determining factor in its decision was the “comprehensive character of the plan” and the “thorough deliberation that preceded [the plan’s] adoption.” The Court determined that the plan and the thorough planning process ensured that the project satisfied the Constitution’s “public use” standard, consistent with more than a century of case law.

Contrary to popular belief, use of the power of eminent domain for the benefit of the community as a whole is not an especially common method for development among cities. It is instead one of many valuable tools planners and elected officials use to create communities that serve the public health, safety, and welfare. Moreover, the officials who authorize eminent domain are generally subject to accountability at the ballot box. For those reasons, eminent domain does not give cities free reign on private property rights. Rather, it serves as a useful tool, subject to both legislative and judicial accountability, for facilitating redevelopment and revitalization in communities where such public benefits would not otherwise occur.