

KELO V. CITY OF NEW LONDON*

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The Fifth Amendment to the Constitution reads, “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” Last Term, in *Kelo v. New London*,¹ the Supreme Court held in a 5-4 decision that the Constitution allows the government to take property through eminent domain solely for the purpose of “economic development,” which it found to constitute a “public use” as required by the Fifth Amendment. The decision missed an opportunity to establish a heightened-review test that might have mitigated abuses historically associated with such condemnations. Instead, it used precedent to shield a determination that social benefits from such takings outweigh threats to security of property as well as potentially disproportionate socioeconomic impacts.

I. BACKGROUND

New London is a city of approximately 25,000 inhabitants in southeastern Connecticut.² Founded in the seventeenth century, the city suffered progressive economic decline throughout the late twentieth century and was designated a “distressed municipality” in 1990 by a state agency.³ Several years later, the federal government closed the Naval Undersea Warfare Center, which had employed over 1500 people in the city’s Fort Trumbull area. The city’s population had declined almost thirty percent from a high in the early 1960s, and its unemployment rate was twice the state average by 1998.⁴

In January of that year, the state bond commission authorized \$5.35 million in bonds to aid the New London Development Corporation’s (“NLDC”)⁵ planning activities in the city’s Fort Trumbull area as well as \$10 million in bonds for the eventual creation of a state park.⁶ The following month, Pfizer, Inc. (“Pfizer”), a multinational pharmaceutical cor-

* 125 S. Ct. 2655 (2005).

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¹ 125 S. Ct. at 2655.

² New London City, Connecticut, Statistics and Demographics (2000), <http://ci.new-london.ct.us/nlpages/demographics.html> (on file with the Harvard Environmental Law Review).

³ The Connecticut Supreme Court noted that, despite the designation, New London had received some benefit from casinos that had opened after this designation, though it did not recognize these impacts as major. *See Kelo v. City of New London*, 843 A.2d 500, 510 n.7 (Conn. 2004).

⁴ *See Kelo*, 125 S. Ct. at 2658.

⁵ The NLDC was established in 1978 to assist the city in planning economic development. *Id.*

⁶ *Id.* at 2659.

poration, announced plans to build a \$300 million global research facility in New London on a site adjacent to Fort Trumbull. Shortly thereafter, the New London city council gave initial approval for preparation of a development plan, and the NLDC began holding community meetings.⁷

Over the next several months, six alternative plans for the ninety-acre project area were considered. The plan adopted by the NLDC in early 2000 and subsequently approved by the city council divided the area into seven parcels, potentially including a waterfront hotel and conference center, marinas for tourist and commercial vessels, a public “river walk,” eighty new residences, a new United States Coast Guard Museum, office and retail space, and “park support” for the proposed adjacent state park. The project site, at the time the development plan was proposed, included the now-closed thirty-two-acre Naval Undersea Warfare Center, a regional water pollution control facility, and approximately 115 residential parcels.⁸

The proposed development plan, as the Connecticut Supreme Court later explained, would “complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city’s waterfront, and eventually ‘build momentum’ for the revitalization of the rest of the city.”⁹ It was expected to generate between 1700 and 3150 jobs and between \$680,544 and \$1,249,843 in property tax revenues.¹⁰

With this plan, the NLDC voted to use the power of eminent domain to acquire properties within the area whose owners had not been willing to sell.¹¹ None of the properties was alleged to be blighted or in poor condition. The plaintiffs in *Kelo* were nine homeowners who possessed fifteen properties within the development area, four in parcel 3, which was scheduled for research and office space, and eleven in parcel 4A, which was designated as “park support.”¹² Ten of the properties were occupied by the owner,¹³ and five were held as investments.

⁷ The NLDC would own the land within the development area and enter into ground leases with private developers, who would be required to comply with the development plan. When the case went to trial, NLDC was negotiating a ninety-nine-year lease for certain parcels with the developer Corcoran Jennison, who would pay \$1 per year and then be responsible for all development. *See Kelo*, 843 A.2d at 510.

⁸ *See id.* at 508–09.

⁹ *Id.*

¹⁰ *Id.* at 510. The pre-project tax base for the area had stood around \$350,000. *See id.* at 598 n.25 (Zarella, J., concurring in part and dissenting in part).

¹¹ Such authority was granted under state law. CONN. GEN. STAT. § 8-193 (2004). The issue of whether eminent domain power could be granted to such a non-governmental body was discussed by the Connecticut Supreme Court but was not before the U.S. Supreme Court. *See Kelo*, 843 A.2d at 547–52.

¹² The trial court was unable to ascertain what “park support” meant:

The language of the MDP [Municipal Development Plan] is itself confusing at least to the court. At one point it says: “A portion of parcel 4A will be redeveloped for uses that support the state park such as parking or for uses such as retail that will serve park visitors and members of the community.” At another point it

In December 2000, petitioners brought an action in the Superior Court of Connecticut claiming, *inter alia*, that the development plan did not constitute a “public use” under the Fifth Amendment and therefore could not justify the takings. The Superior Court, following a seven-day bench trial, granted a permanent injunction against appropriation of the properties in parcel 4A but not for those in parcel 3.¹⁴

The court focused on the distinction between private and public use, rather than on the question of whether “economic development” itself constituted a public use under the Fifth Amendment, and determined that takings which would benefit private parties could nonetheless constitute public use so long as the public interest was paramount.¹⁵ The court concluded, “[I]t would seem [from the record] that the primary motivation for the city and the NLDC was to take advantage of Pfizer’s presence”¹⁶ to further the city’s development and not to benefit private parties.

The court then analyzed parcels 3 and 4A individually and reviewed whether the taking of the property was necessary and not attributable to unreasonableness, bad faith, or abuse of power.¹⁷ The question of necessity was treated as interrelated to public use: “[I]f it is not necessary to take particular property under the guise of accomplishing a public purpose, the taking in any real sense cannot be for a public use.”¹⁸ Ultimately, the court found that the takings in 4A were unreasonable, especially given that there was no compelling evidence presented that plans could not have been reworked to

says: “Parcel 4A is intended to accommodate the development of support facilities for a marina, or a marina training facility, to be developed south on parcel 4B and the Fort Trumbull State Park to the east.”

Kelo v. City of New London, No. 557299, 2002 WL 500238, *74 (Conn. Super. Mar. 13, 2002).

¹³ Petitioner Susette Kelo purchased her home in 1997 and “loved the view her house afforded her and the fact that it was close to the water.” *Kelo*, 2002 WL 500238, at *3. Petitioner Wilhelmina Dery was born in her home in 1918 and had lived there her entire life with her husband Charles, who was also a petitioner. *See Kelo*, 125 S. Ct. at 2660.

¹⁴ The court granted a temporary injunction on all properties, however, for the duration of the appellate process. *See Kelo*, 2002 WL 500238, at *106–12.

¹⁵ *Id.* at *36 (“As said in 26 Am. Jur. 2d § 56, p. 501, ‘Eminent Domain,’ ‘The controlling question is whether the paramount reason for the taking of the land, to which objection is made is the public interest, to which private benefits are merely incidental, or whether the private interests are paramount and the public benefits are merely incidental.’”).

¹⁶ *Id.* at *42.

¹⁷ These standards of review are established in *Gohld Realty Co. v. Hartford*, 104 A.2d 365 (Conn. 1954) (upholding the constitutionality of a Redevelopment Act for a blighted area). *See Kelo* 2002 WL 500238, at *14 (citing *Gohld*).

¹⁸ *Kelo* 2002 WL 500238, at *51. The question of necessity was further divided—whether, within the bounds of unreasonableness, bad faith, or abuse of power, the taking was necessary to effectuate the public purpose and/or the taking was necessary insofar as it involved excessive speculation. The takings in parcel 3, which was designated for office space, met the necessity concerns because they were found to be both integral to the development plan and not unduly speculative. Regarding speculation, the court explained that, in economic development takings, speculation was somewhat unavoidable in the short term because it would be difficult to market a site until the economically distressed situation was relieved. *See id.* at *68.

preserve the plaintiffs' homes.¹⁹ Both plaintiffs and defendants petitioned the Connecticut Supreme Court for review.

Like the Superior Court, the Connecticut Supreme Court held, *inter alia*, that the development plan constituted a "public use."²⁰ It reversed the Superior Court's permanent injunction, however, finding that the lower court had used too broad a standard of review.²¹ The court, in both its majority and dissenting opinions, recognized that the Superior Court's conclusion that the development plan was primarily intended to benefit the public rather than private interest was "ampl[y] support[ed] from the record."²² Three judges in dissent argued for a heightened standard of review for takings justified by economic development.²³ Plaintiffs appealed, and the United States Supreme Court granted certiorari.

The United States Supreme Court's majority opinion dealt almost exclusively with the question of whether economic development could constitute a public use. Writing for the majority, Justice Stevens referenced the lower courts' repeated findings that there was no evidence of "illegitimate purpose" in the case, and quickly acknowledged that the New London plan was not designed "to benefit a particular class of identifiable individuals" rather than the general public.²⁴ The Court primarily rested its holding on two earlier decisions, *Berman v. Parker*²⁵ and *Hawaii Housing Au-*

¹⁹ The court ordered a permanent injunction against the exercise of eminent domain over the property in parcel 4A. Parcel 4A was allotted for "park support," a term which no witnesses at trial could positively describe. "Even if the court were prepared to give the legislative agency all the deference in the world under these circumstances, it cannot perform what is a constitutionally mandated function. . . . [T]his is a case where the court just cannot make the requisite constitutionally required necessity determination based on the information before it." *Id.* at *76.

²⁰ Looking to both federal and state precedent, the Court held that "economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution." *Kelo v. City of New London*, 843 A.2d 500, 531 (Conn. 2004).

²¹ The Supreme Court of Connecticut found that the lower court's necessity review for parcel 4A applied an improper legal standard to the extent that it did not require the plaintiff to *prove* unreasonableness, bad faith, or abuse of power. Where the trial court found the NLDC's takings in parcel 4A to be unreasonable, the Court found that "reasonable attention and thought" had been given. *Id.* at 574. While the Court found this to be a misapplication of law, there is some argument that it went beyond its permitted standard of review for clearly erroneous findings of fact in overturning the lower court's decision. The Superior Court appeared to apply the same test from *Gohld*, *supra* note 17, as the Supreme Court, just with a different result. The Supreme Court accordingly should have deemed the lower court's decision a clearly erroneous finding of fact, not a misapplication of law, given that the misapplication of law the Supreme Court cites, *see Kelo*, 843 A.2d at 572, was not the standard that the trial court ultimately used in finding unreasonableness. *See Kelo*, 2002 WL 500238 at *76, *89.

²² *Kelo* 843 A.2d at 542.

²³ *Id.* at 574 (Zarella, J., concurring in part and dissenting in part).

²⁴ *Kelo v. New London*, 125 S. Ct. 2655, 2661-62 (2005) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)).

²⁵ 348 U.S. 26 (1954).

thority v. Midkiff,²⁶ which had emphasized the expansive nature of public use, a determination that has historically received rational basis scrutiny.

The 1984 *Midkiff* opinion was the Court's most recent enunciation on the question of public use. Hawaii had passed a Land Reform Act allowing the forced conveyance of fee simple titles, along with compensation from landowners to tenants under certain circumstances. The legislature promulgated the statute in response to the overwhelming concentration of land in the state.²⁷ Petitioners were owners challenging the constitutionality of the Act for violating the Constitution's "public use" clause. The Court unanimously upheld the statute, explaining that correcting the "market failures" arising from the "perceived social and economic evils of a land oligopoly traceable to [the state's former] monarchs"²⁸ constituted a public purpose and justified the transferring of lands through eminent domain to private parties. Justice O'Connor proclaimed in dicta, "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."²⁹

Berman, which marks the beginning of the Court's modern eminent domain jurisprudence, is factually more relevant to the holding in *Kelo*. The 1954 case considered the constitutionality of a Washington, D.C., redevelopment act that sought to condemn all the properties in a blighted area³⁰ and to transfer the properties either to public agencies or private developers. Petitioner had owned a department store in the targeted area that was not characterized as blighted but had been condemned nonetheless. Justice Douglas, writing for a unanimous court, explained that the Act, which permitted the government to "protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions,"³¹ was a legitimate exercise of the police power. When the power of eminent domain is employed to facilitate this, "the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."³² Although petitioner was not challenging the overall plan, but merely the condemnation of his non-blighted property, the Court refused to consider any section of the legislature's plan independent of the plan as a whole.³³

The *Kelo* majority opinion continued the tradition of *Berman* and *Midkiff* in reading "public use" to mean "public purpose." While some early

²⁶ 467 U.S. at 229.

²⁷ Seventy-two private landowners controlled all but four percent of the non-government land, and on the island of Oahu, twenty-two landowners owned 72.5% of the fee simple titles. *See id.* at 232.

²⁸ *Id.* at 241–42.

²⁹ *Id.* at 240.

³⁰ "Blighted" as a term was largely undefined in the Act. *See Berman*, 348 U.S. at 26 n.1.

³¹ *Id.* at 28.

³² *Id.* at 32.

³³ *Id.* at 35–36.

cases took a literal reading of “public use” to mean actual use by the public, the Court has since “embraced the broader and more natural interpretation of public use as ‘public purpose.’”³⁴ The majority opinion explained:

For more than a century, our public use jurisprudence has . . . afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power. . . . Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.³⁵

Given this, the Court refrained from any line drawing or the formulating of a new test in this area.

The Court’s analysis of economic development as public use differed from that of the Connecticut Supreme Court’s in two ways. First, citing *Berman*, it refused to analyze any portion of the development plan apart from the whole.³⁶ Second, it dismissed the necessity arguments that had been given such weight at the trial and state appellate levels. On the question of speculation,³⁷ or what Justice Stevens referred to as “reasonable certainty,” the opinion quoted *Lingle v. Chevron USA, Inc.*,³⁸ also decided this term, to explain that such considerations “would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.”³⁹ On the question of efficacy,⁴⁰ the Court noted that once a public purpose was demonstrated, the “amount and character” of the property being taken is at the discretion of the legislative branch.⁴¹ In reaching these conclusions, the majority sidestepped an entire set of petitioners’ arguments for a “reasonable certainty” test.⁴²

³⁴ *Kelo v. City of New London*, 125 S. Ct. 2655, 2662 (2005).

³⁵ *Id.* at 2664–65.

³⁶ The Court noted:

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. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Id. at 2665.

³⁷ *See supra* note 18.

³⁸ 125 S. Ct. 2074 (2005).

³⁹ *Kelo*, 125 S. Ct. at 2667 (quoting *Lingle*, 125 S. Ct. at 2085).

⁴⁰ *See supra* note 18.

⁴¹ *Kelo*, 125 S. Ct. at 2668 (quoting *Berman*, 348 U.S. at 35–36).

⁴² Petitioners argued that, because the character of these takings would not produce immediate and/or foreseeable public benefit, the Court should introduce a more probing test that requires some degree of “reasonable certainty” that the condemned properties will actually be put to public use. This reasonable certainty could be demonstrated through preex-

Despite the majority's forceful language in defense of economic development as a public use, the opinion concluded by noting that the decision only sets the federal baseline and that states are free to introduce heightened restrictions based on their own constitutions and statutes. That is, "the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."⁴³ Justice Kennedy submitted a concurring opinion that attempted to leave the door open for a heightened standard of review, beyond rational basis scrutiny, in future economic development cases that did not appear as unequivocal as that of New London.⁴⁴

Justice O'Connor, who previously authored the *Midkiff* opinion, wrote the dissent in *Kelo* and explicitly rejected her own dicta from *Midkiff* that the "public use" requirement is coterminous with the police power.⁴⁵ She began her opinion with the famous passage from *Calder v. Bull*: "[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."⁴⁶

According to O'Connor, there are only three types of takings that comply with the public use requirement: private property transferred to public ownership; private property transferred to common carriers (railroads, public utilities) that will make it available to the public; and private property transferred to private parties "in certain circumstances and to meet certain exigencies,"⁴⁷ such as removal of urban blight or righting widespread social injustice.⁴⁸ To allow takings merely for economic development, without a preexisting affirmative harm,⁴⁹ would significantly expand the meaning of public use. Furthermore, she derided Justice Kennedy's proposed test as impractical and chastised the majority for leaving regulation to the states.

isting contracts, state guarantees, or specific development projects. Brief of Petitioners at 43–44, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). Petitioners stated in their brief that something cannot constitute a public use if the planned uses are not well identified and protected from private party indifference. *Id.* at 36–40.

⁴³ *Kelo*, 125 S. Ct. at 2668.

⁴⁴ *Id.* at 2669.

⁴⁵ *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting) ("The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated.").

⁴⁶ *Id.* at 2671 (quoting *Calder v. Bull*, 3 Dall. 368, 388 (1798)).

⁴⁷ *Id.* at 2673.

⁴⁸ Although O'Connor does not explicitly cite it, much of the framework for her three categories of "public use" takings parallels that of the Michigan Supreme Court's in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), which had allowed the condemnation of a working-class, immigrant community in Detroit in order to build a General Motors assembly plant).

⁴⁹ O'Connor distinguished *Berman's* non-blighted property within a blighted area from *Kelo's* non-blighted property within a depressed area. See *Kelo*, 125 S. Ct. at 2674–75 (O'Connor, J., dissenting).

Justice Thomas, who joined the O'Connor opinion, added a dissent of his own, arguing for an "originalist" understanding⁵⁰ of public use as actual use by the public. He also made an appeal for considerations of social justice, noting that the costs of economic development takings "will fall disproportionately on poor communities [that] are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."⁵¹

II. ANALYSIS

While the Supreme Court has formerly suggested that public use will effectively extend as far as the police power,⁵² *Kelo* is the first clear pronouncement that economic development itself can constitute a public use. The question of economic development as public use pits the sacrosanct right of private property owners to be secure in their homes against the need for municipalities to develop in order to benefit the common good.

Neither of these two positions is easily defensible in all instances on policy grounds. For example, in modern urban environments, the over-division of land has introduced situations where privately owned lands frustrate renovation projects for developers, leading to the ineluctable decline of urban centers.⁵³ This is especially true in or near contaminated areas (known as brownfields),⁵⁴ which promote urban sprawl as developers seek out unencumbered lands on city outskirts (known as greenfields).⁵⁵ Long-

⁵⁰ For a discussion of what is meant by "originalist," see Richard Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL'Y 335 (1996).

⁵¹ *Kelo*, 125 S. Ct. at 2686-87 (Thomas, J., dissenting).

⁵² See *supra* note 29 and accompanying text.

⁵³ See Brief for Connecticut Conference for Municipalities et al. as *Amici Curiae* 13, 21, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (arguing that in older, small cities, centuries of development have caused extreme overdevelopment that forms a serious burden to land assembly); see also John R. Nolon & Jessica A. Bacher, "Takings" and the Court: Despite Alarmists, "Kelo" Decision Protects Property Owners and Serves the General Good, N.Y.L.J., June 29, 2005, at 5 ("In an amici curiae brief filed in *Kelo*, the Empire State Development Corporation noted its success in transforming neighborhoods surrounding the New York Stock Exchange, Seven World Trade Center, and in the 42nd Street Redevelopment Area, using authority to condemn private properties and convey them to private development companies under the strict procedures established in statutes adopted by the New York State Legislature. Its brief notes that 'despite private benefits, the predominant economic and social benefits have accrued to the public.'").

⁵⁴ See Bureau of National Affairs, Economic Development Can Be "Public Use" Justifying Exercise of Eminent Domain Power, No. 121, A-1 (June 24, 2005) ("The [*Kelo*] decision is going to be 'of significant benefit to cities' involved in brownfields redevelopment projects. . . . Municipalities have increasingly sought out contaminated, unused urban sites for revitalization and voluntarily taken them over in ways other than purchasing them—such as through eminent domain or condemnation. . . .").

⁵⁵ See Thomas Merrill, *Terms of Art: The Goods, the Bads, and the Ugly*, LEGAL AFF., Jan./Feb. 2005, available at http://www.legalaffairs.org/issues/January-February-2005/toa_merrill_janfeb05.msp ("Large sites in existing urban centers are hard to come by, because ownership of urban land is typically chopped up into dozens of small parcels, making assembly of large sites time-consuming and expensive. It is much easier to acquire large tracts of

standing property rights can become remarkable hurdles to societal development, for good or bad. For example, Hawaiian *kuleana* rights and Native American land rights allow inheritors of tiny fractions of property to restrain the use of the entire parcel.⁵⁶ On the other hand, development projects, even those conceived with the best intentions, have had historically mixed results, often uprooting and destroying communities only to replace them with unrealized plans.⁵⁷

An expansive power of eminent domain is also particularly difficult to insulate from abuse by the politically and economically powerful at the expense of the disenfranchised, whose property rights are often all they have to repel developers seeking quick profits.⁵⁸ It is rarely the drafter of the development plan whose home will be condemned. In *Poletown*, the use of eminent domain for an auto manufacturing plant ruined the security and livelihood of countless individuals primarily to meet a corporate need.⁵⁹ That situation and its subsequent litigation are often posited as the paradigm for the negative consequences of an expansive “public use” interpretation.⁶⁰ In *Kelo*, nine people will be forcibly moved for a plan that was found at trial to be speculative in part.⁶¹

Nonetheless, if eminent domain power were not permitted in the case of economic development except for blighted properties (the position favored by Justice O’Connor as well as some states with pending legislation)⁶² cities could be in the perverse position of promoting urban decay in order finally to step in with the power of eminent domain. And as blight remains an

land by buying up green fields at the outer fringes of urban areas. The result is ever more sprawl. One way to reduce the advantage that developers see in greenfield development is to have a government redevelopment agency, like the one in New London, acquire tracts of land in declining inner city areas, using eminent domain if necessary, and retransfer the land to developers.”)

⁵⁶ See Jocelyn Garovoy, “Ua Koe ke Kuleana o na Kānaka” (*Reserving the Rights of Native Tenants: Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523 (2005)).

⁵⁷ See INSTITUTE FOR JUSTICE, D. BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), available at <http://www.castlecoalition.org> (collecting accounts of economic development takings and finding over 10,000 petitions filed or threatened nationwide for condemnations for private parties); see also J. WYLE, POLETOWN: COMMUNITY BETRAYED (1989) (describing the adverse consequences of Michigan’s famous *Poletown* eminent domain case).

⁵⁸ See *Kelo*, 125 S. Ct. at 2687 (Thomas, J., dissenting) (citing B. FRIEDEN & L. SAGALAYN, DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES 17, 28 (1989) (“Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them.”)).

⁵⁹ See *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981).

⁶⁰ See *generally* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

⁶¹ *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *74 (Conn. Super. Mar. 13, 2002). See also *id.* at *89 (“[T]he court has decided the parcel 4A takings are not justified under the MDP because there is no cognizable or nonspeculative use proposed . . .”).

⁶² See *infra* notes 63 and 107.

undefined term, that situation is as rife with problems as the unchecked ability to use economic development, not to mention that it places the burden of development disproportionately on the impoverished.⁶³ In the constitutional framework after *Kelo*, what we are left with is an acknowledgment that the government cannot take from *A* and give to *B* solely for *B*'s private benefit, while it can take properties for public use, broadly defined, so long as just compensation is provided.

Justice Stevens has publicly stated that his *Kelo* opinion was compelled by law⁶⁴ and not rooted in policy or political theory, but an analysis of the issues brings this assertion into question. The majority opinion masks a balancing of social and administrative costs behind precedent and leaves state courts and/or legislatures with the burden of crafting a test or legislation, respectively, that balances the rights of property owners with the needs of developers. This move may prove problematic given the spate of brusquely drafted state legislation in reaction to the decision—ironic, considering that the decision represents a near complete deferral to legislative power. The Court declined to create a new test that would essentially replace legislative determinations with judicial ones,⁶⁵ but the

⁶³ See Paul Jacob, The Heartland Institute, *Americans, Left and Right, Work to Counter Kelo Decision*, BUDGET & TAX NEWS, Sept. 1, 2005, available at <http://www.heartland.org/Article.cfm?artId=17682> (“Alabama became the first state to enact eminent domain reform after the *Kelo* decision, when Gov. Bob Riley (R) on August 3 signed legislation prohibiting cities and counties from using eminent domain for private development or to boost tax revenue. While property rights advocates praised the new law, they were quick to point out the state’s definition of ‘blight’ remains vague enough to allow considerable mischief. ‘For full protection,’ said Dana Berliner, attorney with the Institute for Justice, ‘legislators must reform the blight laws that all too often provide a sham justification to use eminent domain for private profit. In Alabama you can condemn property under blight law if it might become blighted in the future, or if the property is ‘obsolescent’—usually a code word for ‘we’d like something else here.’”).

⁶⁴ See Linda Greenhouse, *Supreme Court Memo: Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. (“Addressing a bar association meeting in Las Vegas, Justice Stevens dissected several of the recent term’s decisions, including his own majority opinions in two of the term’s most prominent cases. The outcomes were ‘unwise,’ he said, but ‘in each I was convinced that the law compelled a result that I would have opposed if I were a legislator.’ In one, the eminent domain case that became the term’s most controversial decision, he said that his majority opinion that upheld the government’s ‘taking’ of private homes for a commercial development in New London, Conn., brought about a result ‘entirely divorced from my judgment concerning the wisdom of the program’ that was under constitutional attack. His own view, Justice Stevens told the Clark County Bar Association, was that ‘the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials.’ But he said that the planned development fit the definition of ‘public use’ that, in his view, the Constitution permitted for the exercise of eminent domain.”).

⁶⁵ Justice Thomas argues that legislative deference is not necessary, even in light of precedents concerning deference for economic legislative decisions and despite the fact that eminent domain determinations are economic in character:

Even under the “public purpose” interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature’s determination of the various circumstances that estab-

boundaries of precedent allowed for several relevant tests,⁶⁶ which will be discussed below.

The first alternative test that the Court could have employed in deciding *Kelo* was that which Justice O'Connor offered in dissent, creating three permissible categories (public ownership, common carriers, and "certain exigencies").⁶⁷ Because her test's third category is fairly ambiguous in prescribing the conditions of a preexisting harm whose remediation constitutes a public use, it can include both *Berman* and *Midkiff* while excluding *Kelo*. The question of "public use" then pivots on whether preexisting conditions justify a condemnation or not.

There is convenience in this three-pronged test that resembles Chief Justice Rehnquist's nuanced maneuverings in his *United States v. Lopez* opinion.⁶⁸ As in that test, Justice O'Connor's third category incorporates past precedent but prospectively is difficult to apply on anything beyond policy grounds.⁶⁹ In other words, why should the designation of "depressed municipality," such as that used in *Kelo*, be less of a preexisting harm than the blight or social inequity of *Berman* and *Midkiff*, respectively? Or why could not underutilization of property qualify as an ex-

lish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause.

Kelo, 125 S. Ct. at 2684 (Thomas, J., dissenting) (internal citations omitted).

⁶⁶ For purposes of this Comment, analysis is limited to tests within the boundaries of precedent. For example, in his dissent, Justice Thomas sketches out one concept of the "public use" clause that would explicitly require overturning precedent. *See generally id.* at 2678–86.

⁶⁷ *See supra* note 47.

⁶⁸ 514 U.S. 549 (1995) ("First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.").

⁶⁹ For instance, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), which upheld the Controlled Substance Act—prohibiting the possession of certain banned substances—in its application to homegrown marijuana, shows how the third prong of the *Lopez* test essentially leaves courts to make policy judgments in hard cases. The Court attempted to explain how a commodity grown locally and never entering the stream of commerce could still fulfill an economic purpose as required by the *Lopez* test:

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. . . . The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.

Id. at 2211–14 (internal citations omitted).

gency? This test, in effect, grants the judiciary expanded grounds on which to decide “public use” takings, but it leaves hard questions unresolved.

The difficulty for other alternate tests is that for them to be effective, a court must be able to analyze a development plan piecemeal, to “pierce the veil” so to speak, and the Court has refused to do this before in *Berman* and now *Kelo*.⁷⁰ Piecemeal analysis is necessary because a development plan, in its entirety, will often meet threshold requirements for “public use,” even when individual portions of the plan, which may have been hastily included or included for suspect reasons, might contravene “public use.”⁷¹ Petitioners forwarded a test of “reasonable certainty,” which would mandate that governments ensure that properties condemned for “economic development” would be used in the manner envisioned by the legislature. Another test would require a higher procedural threshold for “economic development” takings, such that the government must show through “clear and convincing evidence” a well-thought out planning process.⁷² Both tests build on Justice Kennedy’s remarks regarding a higher standard of review, and either can be squared with precedent, but doing so requires a more thorough analysis of *Berman* and *Kelo*.

In *Kelo*, Justice Stevens determined that it is “appropriate” for the Court to avoid piecemeal analysis:

Given the . . . comprehensive character [of the New London development 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.⁷³

This is, on some level, a policy judgment couched in the rhetoric of prudence and precedent.

To turn to the actual language of *Berman*, which was quoted extensively in *Kelo*, Justice Douglas wrote:

⁷⁰ See *supra* note 36. See also *Hawaii v. Midkiff*, 467 U.S. 229, 244 (1984) (“[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny. . . .”).

⁷¹ In New London’s situation, the fact that one accepts that a revitalization plan, which utilizes a private developer to capitalize on the major influx of capital by a corporation near an area that has recently lost many jobs, constitutes a “public use,” does not *a fortiori* mean that all condemned properties within the general area also constitute a “public use.” There may be no use, public or private, for specific condemned properties, which have simply been targeted because of geographical proximity to the general project.

⁷² The emphasis on piecemeal review is admittedly not necessary for either test to have some meaning, but allowing for piecemeal review significantly expands the impact and applicability of tests questioning the reasonableness of development plans.

⁷³ *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

We think the standards prescribed were adequate for executing the plan to eliminate . . . the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building. . . . Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.⁷⁴

The essential phrasing here is “integrated plan.” In *Berman*, the “integrated plan” that was sanctioned by the Redevelopment Act was the removal of blight, and to the extent that an entire area can be blighted while containing non-offensive properties, such properties might have had to be removed to effectuate the public purpose of restoring the blighted area.⁷⁵

Where the “integrated plan” is solely a plan for economic development without the removal of a preexisting social harm, the “integrated plan” blanket rule that the Court invokes becomes less appropriate. The removal of blight has a theoretical boundary, which the Court refused to review in *Berman*.⁷⁶ Admittedly, some areas may be included in the blighted region that are less invidious than others. However, at least where the *Berman* decision was concerned, the Redevelopment Act laid out loose criteria for the scope of blight.⁷⁷ Economic development projects know

⁷⁴ *Berman v. Parker*, 348 U.S. 26, 35–36 (1954).

⁷⁵ Justice O’Connor noted this circumstance in her *Kelo* dissent. *See Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting) (“Congress had determined that the neighborhood had become ‘injurious to the public health, safety, morals, and welfare’ and that it was necessary to ‘eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose. . . .’”) (internal citations omitted).

⁷⁶ *Id.* (“Having approved of Congress’ decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot.”) (internal citations omitted).

⁷⁷ The Court commented:

The Act does not define either “slums” or “blighted areas.” [It does, however, define “substandard housing” as] the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.

no similar boundaries as they are not removing geographically limited social harm, but improving social welfare (in theory), which is unlimited in scope. The language of *Berman* is ambiguous as to whether “integrated plan” references the remediation of harm or the encouragement of growth. Piecemeal analysis, therefore, was not expressly prohibited in *Berman*—what was prohibited was piecemeal analysis of a plan seeking to correct a preexisting harm.⁷⁸ By deferring to *Berman*, the Court refused to entertain any potential tests that, while generating certain problems of administrability, might have mitigated some of the abuses associated with economic development.⁷⁹

Had Justice Stevens taken the piecemeal approach seriously, petitioners provided him with an appealing, though flawed, test on the grounds of “reasonable certainty.” The basic idea being that if properties that created no social harm were being condemned for “public use,” then there should be a clear use outlined and increased protections to ensure that such a public use would in fact come about. Petitioners suggested that “condemnations may be rejected by looking at whether the use is reasonably foreseeable and binding minimum standards for ensuring public benefit are in place”⁸⁰ Petitioners argued that “standards developed in state case law”⁸¹ favor this result and that logically, “[i]f the use is unknown, it is impossible to evaluate if it is being condemned for public use or not.”⁸² Thus, reasonable certainty is conceptually necessary to complete a rational basis analysis.⁸³

Berman, 348 U.S. at 100 n.1.

⁷⁸ An alternative analysis could argue that although the *Berman* decision spoke in broad generalities, it was not entirely removed from the factual scenario of removing blight. It did factor in expert opinion: “It was not enough, [the experts] believed, to remove existing buildings that were unsanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums” *Id.* at 34. In *Kelo*, the trial court found that while a similar holistic argument was made and accepted by the developers in regards to parcel 3, nothing was presented concerning parcel 4A. *See Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *89 n.23 (Conn. Super. Mar. 13, 2002). Unlike *Berman*, there was almost no evidence presented in the record suggesting that the property at issue in parcel 4A served a discrete purpose in the development plan. The *Berman* Court’s determination not to make a piecemeal investigation in light of expert testimony that such an investigation would compromise the integrity of the project is misapplied here where developers forwarded no such argument. This is even more relevant in light of the fact that the homes being condemned present no social harm.

⁷⁹ Beyond the arguments about precedent, there is the practical argument that when outside developers are used in “economic development” situations, designated areas often must be apportioned for planning purposes, as was the case with New London’s seven parcels. Thus, to argue that there is an “integrated plan” is somewhat of a fiction.

⁸⁰ Brief of Petitioners at 48, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

⁸¹ *Id.* at 36.

⁸² *Id.* at 38; *see also supra* note 18 and accompanying text. The Supreme Court’s response is that the use is known, but only when viewed from the perspective of the project as a whole.

⁸³ Reply Brief of Petitioners at 10, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (“Although reasonable foreseeability follows a distinct line of case law, it is

There is an intuitive appeal to this test, but it has some hidden pitfalls. First, too much certainty may be undesirable in a development plan where changing circumstances necessitate modifications. Locking in a plan through contractual obligations or statutory penalties commits developers to long-term projects that may prove inappropriate as circumstances change. Alternatively, it may scare developers off altogether, as they will be the ones taking the risks on the properties being successful, and unduly rigid plans or excessively steep penalties for contract non-enforcement are deterrents.⁸⁴ The Supreme Court has recently outlined in *Lingle* the need for courts to be circumspect in predictively evaluating takings.⁸⁵ Although petitioners' test may conflict with the precedent established in *Lingle*, some of the practical concerns could be remedied by designing a test that emphasizes "reasonableness" over "certainty."⁸⁶

An alternative test to "reasonable certainty" (and one that would not run up against the Supreme Court's distaste for replacing legislative judgments with judicial predictions) would demand "reasonable process." Instead of requiring prospective guarantees, such a review would insist on "clear and convincing evidence"⁸⁷ of adequate planning procedures, includ-

also possible to treat it as another form of rational basis analysis. Without having a reasonably foreseeable use, it is impossible to say if the use is rationally related to a legitimate government interest.").

⁸⁴ This issue was raised at trial:

[I]f you're gonna attract a private developer to [a New London] type of site setting, you've got to try to minimize as much uncertainty as much as possible. Most developers are good at understanding risks, but not uncertainty. If you said we'll give you something that looks like a spotted leopard.

Q: What's a spotted leopard?

A: It's where a leopard has spots, spots are things that stay the same and you've got to work around them. . . . If you're gonna attract developers, if you're gonna put out what you call requests for proposals and then get them interested in the site, and after they overcome all the inherent problems with redevelopment, say to them also, well, you've got to work around this contingency, you greatly diminish your ability to finding competent capable people to come in.

Kelo v. City of New London, No. 557299, 2002 WL 500238, at *53-*54 (Conn. Super. Mar. 13, 2002).

⁸⁵ See *supra* notes 38 and 39 and accompanying text.

⁸⁶ This version of the test was favored by the dissenters on the Connecticut Supreme Court. Kelo v. City of New London, 843 A.2d 500, 574 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part). The dissenting opinion explained:

I am not suggesting that an absolute guarantee is necessary to ensure that private economic development will occur as planned. Such a guarantee would be unrealistic in light of the fact that many unforeseen events could affect the plan's implementation. . . . When such difficulties are apparent at the very outset of the planning process, however, a course of action should not be endorsed based entirely on speculation.

Id. at 602.

⁸⁷ "Clear and convincing evidence" is one possible standard that was chosen because of its conformity to the test posed by the Connecticut Supreme Court dissenters. See *id.* at 602 (Zarella, J., concurring in part and dissenting in part).

ing public participation, plan models, economic valuations, and negotiations with potentially interested parties. Like the “reasonable certainty” test, it is procedural, but unlike “reasonable certainty,” it is backward-looking. It would also allow for analysis to be conducted on a level below that of the “integrated project.”⁸⁸ Had such a plan been adopted, some of the homes in *Kelo* might have been exempted from condemnation.⁸⁹

This is not meant to be a prohibitively stringent test, but one that ensures some degree of planning on a level below an “integrated plan.” It places a procedural check on governments in order to protect property owners. There are possible administrability concerns here, as with all tests requiring increased judicial review of legislative determinations. And to the extent that this test resembles the unelaborated musings of Justice Kennedy’s *Kelo* concurrence, it may suffer a criticism voiced by Justice O’Connor: “it is difficult to envision anyone but the ‘stupid staff[er]’ failing it.”⁹⁰ In other words, so long as the procedural requirements are known, any competent official will meet them without affecting a condemnation project’s substance.⁹¹

Nonetheless, ensuring heightened procedural review when inoffensive property is being condemned seems, if nothing else, to be promoted by the Fourteenth Amendment’s Due Process Clause⁹² and Lockean principles concerning liberty of property.⁹³ This is not just a question of whether *A*’s property is being given to *B* for *B*’s exclusive benefit; rather it is more whether *A*’s property is being taken for any coherent reason. When the condemned property presents no social harm by itself, at the very least the state should have to show it has given thought to the use of property that goes beyond indefinite or contradictory labels such as “park support.”

⁸⁸ Such a review could likely not be conducted on a home-by-home basis because that would create endless litigation for any development plan, but it could be conducted at the level of unique apportionments within a plan. Practically speaking, the costs of challenging eminent domain actions are such that individual homeowners would be expected to band together naturally into larger groupings.

⁸⁹ Under this test, the condemnations in parcel 3 would likely have been allowed. Because there was effectively nothing presented at trial to show that parcel 4a had received any concrete attention, however, despite the elaborate planning procedures for the parcel as a whole, it may have been exempted from condemnation.

⁹⁰ *Kelo v. City of New London*, 125 S. Ct. 2655, 2675 (2005) (O’Connor, J., dissenting).

⁹¹ *But see* Nolon & Bacher, *supra* note 53 (citing several state court cases where procedural shortcomings were used to overturn eminent domain actions and commenting that “[t]he dissent is apparently unaware of numerous cases called to the Court’s attention in amici briefs submitted in *Kelo*”).

⁹² Protection against “irrational government action” already exists under the Due Process Clause. *Kelo*, 125 S. Ct. at 2676. However, if the takings clause did not exist, the Due Process Clause would arguably prevent any taking of property. The Supreme Court has not, however, explicitly clarified this relationship. To the extent that the takings clause is a “carving out” from due process protections, instituting a procedural check to ensure that a public use is actually being served does not necessarily seem redundant with the Due Process Clause. *See id.*

⁹³ *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 71 (Prentice-Hall 1952).

Given the longstanding history of broad deference to legislatures in “public use” cases,⁹⁴ any judicially crafted test might work out as more of a procedural than a substantive hurdle in the end, but this is beneficial when much of the concern with economic development takings involves their abuse and incoherent execution. When individuals’ property gets condemned as part of a sweeping redevelopment project that only promises speculative benefits at the hands of private parties, some degree of protection must be afforded for the notion of “public use” to have any meaning.⁹⁵

The preceding analysis demonstrates both that precedent was more malleable than the majority opinion would suggest and that any test brings with it both social and administrative concerns. It also shows that the Court had functional options from which to choose that could have alleviated some of the concerns over using eminent domain power for “economic development.” The Court relied on precedent to insulate its determination that the societal gains of “economic development” are serious enough to warrant the potential costs to the security of property as well as potential abuses of eminent domain. Questions posed in oral argument suggest that the Court was looking for sociological data to guide its decision but was not satisfied in this search.⁹⁶

Kelo is remarkable mostly for what it did not do. It did not craft a workable test to balance the need for development against the right to private property. Federal constitutional protection in its aftermath is such that as long as a plan, taken in its entirety, is perceived to generate some economic benefits by the legislature, courts are helpless to inquire whether the property being condemned will be used to promote a public purpose. It did not come close to addressing the question of what amount of compensation is appropriate for condemnations for economic development.⁹⁷ It

⁹⁴ See *supra* notes 25 to 33 and accompanying text.

⁹⁵ As Justice O’Connor writes:

We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

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

⁹⁶ See Oral Argument, *Kelo v. City of New London*, 2005 WL 529436, at *14–*15 (“JUSTICE O’CONNOR: does the record tell us anything about how often takings by eminent domain for economic development occur in this country? Is it frequent? What are we dealing with?”)

MR. BULLOCK: It is, it is frequent, Your Honor. There’s no—we do not know of any study that looks specifically at condemnations for economic development, but after the Michigan court’s decision in *Poletown*, they became commonplace.”)

⁹⁷ The Supreme Court did not have to address this question because it was not raised in the petition for certiorari. However, the issue was raised repeatedly by the justices at oral argument and it is inherently intertwined with the use of eminent domain. See, e.g., Oral Argument, *Kelo v. City of New London*, 2005 WL 529436, at *16 (“JUSTICE KENNEDY:

did not clarify how the “public use” clause interacts with the Due Process Clause.⁹⁸ It did not declare how much benefit must be accrued for “economic development” to have meaning,⁹⁹ or whether an enlarged tax base alone is sufficient. And it did not clarify how the Court will rule in close “economic development” cases in the future.¹⁰⁰

Given how closely the Court split, *Kelo* may have presented a somewhat problematic factual scenario to bring insofar as the state appeared to have gone to great procedural lengths in promulgating the plan—community involvement, multiple submitted proposals, and interactions with a preexisting private company that seemed to assure some degree of subsequent economic improvement.¹⁰¹ This point is especially clear in Kennedy’s concurrence, when he writes:

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings.¹⁰²

What exactly he had in mind, however, remains unclear.

Kelo’s direct ramifications also remain unclear. It gives government a powerful tool to redevelop inner cities, especially in brownfield sites where developers are wary of undertaking the unnecessary risk of landowners holding out and complicating the projects.¹⁰³ It also potentially opens the door for mega-stores like Wal-Mart to move into urban areas with the promise of increased tax bases and new jobs, taking whole neighborhoods in the process.¹⁰⁴ An interesting current application concerns *Kelo*’s impact

But what I am asking is if there has been any scholarship to indicate that maybe that compensation measure ought to be adjusted when A is losing property for the economic benefit of B.”); *id.* at *32–*33 (“JUSTICE BREYER: So going back to Justice Kennedy’s point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn’t have to sell his house? Or is he inevitably worse off?”).

⁹⁸ See *supra* note 92.

⁹⁹ The majority opinion is surprisingly silent on what is meant by economic development. All that is stated explicitly is, “Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.” *Kelo*, 125 S. Ct. at 2665–66. But this does not make lucid whether economic development is simply an increased tax base or something more. Justice Kennedy’s concurrence suggests that there is something more, but no higher requirement is specifically mentioned in the majority opinion.

¹⁰⁰ Unlike in *Berman* or *Midkiff*, the Court is sharply divided, and given Kennedy’s concurrence, it seems likely that a different set of facts could yield a different 5-4 split.

¹⁰¹ Alternatively, the fact that the Court shifted from unanimity on this issue to a 5-4 split in little over twenty years might suggest that the case represents a major step in a gradual return to protection of property rights against government intrusion.

¹⁰² *Kelo*, 125 S. Ct. at 2670 (Kennedy, J., concurring).

¹⁰³ See *supra* note 54.

¹⁰⁴ Joshua Kurlantzick, *Condemnation Nation: The Big Business of Eminent Domain*,

on the rebuilding of New Orleans. One cannot help but think of Justice Thomas' cautionary words that "these losses will fall disproportionately on poor communities."¹⁰⁵

Intentionally or not, the Court's decision has sparked an explosion of debate over economic development as a public use, and the rush in legislatures to push through statutes to counteract the decision¹⁰⁶ is likely to produce a wave of legislation rife with problems and likely to further exacerbate socioeconomic disparities. To cite one example, the Massachusetts House of Representatives has been considering a bill that would allow eminent domain power only in "a substandard, decadent, or blighted open area." In a recent *Boston Globe* op-ed piece, Harvard Law School professors David Barron and Gerald Frug commented:

If the Legislature were serious about addressing the concerns Kelo raises, it would not pit rich against poor by excluding some prosperous areas from the reach of eminent domain. It would provide real protection for all Massachusetts homeowners while still enabling the government to trump holdouts. . . . [I]f a project is a giveaway to a well-connected developer, poor communities should not bear the cost while rich ones receive protection.¹⁰⁷

By shying away from the admittedly difficult, though constitutionally permissible, task of crafting a higher standard of review for economic development takings that could balance the competing needs of interested parties, the Supreme Court has left homeowners in a state of uncertainty as legislatures and state courts consider the proper meaning of "public use."

HARPERS, Oct. 2005, at 72–73 ("The developers and retailers—stores such as Wal-Mart and Target, which build numerous warehouse-style outlets on vast swaths of land to keep costs down—already enjoy immense advantages, including huge tax breaks, over smaller competitors; and yet increasingly they are urging cities to condemn property to serve their own interests, and employing lobbyists and donating large sums to local officials to help this effort. . . . To defend eminent domain as it is now practiced, therefore, is not a defense of our social compact with government, of the need for individuals to make sacrifices in the face of progress; it is an endorsement of a municipal-corporate collusion that now operates like a machine.").

¹⁰⁵ *Kelo*, 125 S. Ct. at 2686–87 (Thomas, J., dissenting).

¹⁰⁶ Pending legislation in the House and Senate include S. 1313, introduced by Sen. John Cornyn (R-Tex.); H.R. 3135, introduced by Rep. F. James Sensenbrenner, Jr. (R-Wis.); H.R. 3083, introduced by Rep. Dennis R. Rehberg (R-Mont.); and H.R. 3087, introduced by Rep. Phil Gingrey (R-Ga.).

¹⁰⁷ David Barron & Gerald Frug, Op-Ed, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A17.

