

RESTRAINING EMINENT DOMAIN
THROUGH JUST COMPENSATION:
Kelo v. City of New London, 125 S. Ct. 2655 (2005)

The Fifth Amendment provides the legal standard for eminent domain: “nor shall private property be taken for public use, without just compensation.”¹ Thus, there are two constitutional requirements for the exercise of eminent domain: that the use be public, and that the owner receive just compensation. These restrictions were intended to deter the legislature from applying this “despotic power”² with undue frequency. Beginning with *Berman v. Parker*³ and continuing in *Hawaii Housing Authority v. Midkiff*,⁴ the Court granted great deference to legislative determinations of valid public uses.⁵ In fact, such deference extends even to forced private-to-private transfers of property. After the Court handed down these decisions, a debate ensued over whether the Public Use Clause of the Fifth Amendment retained any deterrent effect. Many commentators called on the Court to take a second look at the deferential standard, which it did, to those commentators’ great chagrin.⁶ Last Term, in *Kelo v. City of New London*,⁷ the Supreme Court reiterated and expanded *Berman* and *Midkiff*, holding that economic development constituted a valid public purpose and that the government may legitimately take and transfer private property to another private entity to accomplish that end.⁸ This

1. U.S. CONST. amend. V.

2. *Vanhorne’s Lessee v. Dorrance*, 28 F. Cas. 1012, 1015 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857).

3. 348 U.S. 26 (1954).

4. 467 U.S. 229 (1984).

5. See *Midkiff*, 467 U.S. at 242–43 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.”); *Berman*, 348 U.S. at 32 (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive.”).

6. See, e.g., Michael Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001, 1024 (2005).

7. 125 S. Ct. 2655 (2005).

8. *Id.* at 2665.

ruling decisively rejected calls to limit eminent domain to transfers from private owners to a public authority.⁹ Although the *Kelo* Court extensively examined the public use requirement, it barely discussed the just compensation requirement.¹⁰ If the Court is determined to persist in granting great deference to the public use determinations of legislatures, the Court should reexamine just compensation, lest the Fifth Amendment Takings Clause cease to deter improper uses of eminent domain.

Since 1990, the State of Connecticut has considered the city of New London a distressed municipality.¹¹ By 1998, the federal government had closed a military installation employing 1,500 people and the city's population of 24,000 was its lowest since 1920.¹² In light of these circumstances, the state gave the New London Development Corporation (NLDC), a private, non-profit entity, authority and support to implement development strategies meant to encourage economic development in the area.¹³ The final integrated development plan approved by the state included eighty new residences, a \$300 million Pfizer, Inc. research facility, a pedestrian riverwalk, a state park, a U.S. Coast Guard Museum, a "small urban village" including a waterfront hotel, and enough parking and infrastructure to support the new project.¹⁴ The NLDC intended that the development plan generate tax revenue, create jobs, and improve both the aesthetic quality of the city and the leisure opportunities available for its citizens.¹⁵ The NLDC divided the development into several parcels, most of which were acquired without incident.¹⁶ However, the owners of fifteen properties in the development, four in Parcel 3 and eleven in Parcel 4A, refused to sell; the NLDC then initiated eminent domain proceedings against these holdouts.¹⁷ In December 2000, Susette Kelo, along with other local property owners, brought an action in the New

9. *See id.* at 2665–66.

10. In fact, the Court discussed the measure of just compensation only once. In a footnote, it concluded that "while important, these questions are not before us in this litigation." *Id.* at 2668 n.21.

11. *Id.* at 2658.

12. *Id.*

13. *Id.* at 2658–60.

14. *Id.* at 2659.

15. *Id.*

16. *Id.* at 2660.

17. *Id.*

London Superior Court alleging that the takings violated the Public Use Clause of the Fifth Amendment.¹⁸ In a lengthy decision, the court granted permanent injunctive relief against the demolition of homes in Parcel 4A,¹⁹ ruling that the intended use of the property could be accomplished without demolishing the plaintiffs' homes.²⁰ The court refused to grant a permanent injunction in regard to Parcel 3, but temporarily enjoined the NLDC pending final resolution of the matter.²¹ In both cases, the court rejected the plaintiffs' allegations that the transfer of property to a private entity violated the Public Use Clause of the Fifth Amendment.²² On appeal, Justice Norcott, writing for the Connecticut Supreme Court and relying heavily on *Berman* and *Midkiff*, concluded that economic development did indeed constitute a public use.²³ The court, noting the deferential standard of review granted to planning decisions in eminent domain cases, upheld the lower court's ruling on Parcel 3 and overturned the permanent injunction granted to the Parcel 4A plaintiffs.²⁴

The United States Supreme Court, in a 5-4 decision, affirmed.²⁵ Writing for the majority and citing the Court's "traditionally broad understanding of public purpose,"²⁶ Justice Stevens declared that there existed "no principled way of distinguishing economic development" from the public purposes recognized in *Berman* and *Midkiff*.²⁷ The majority also brushed aside the plaintiffs' objections that permitting economic development to fulfill the public purpose requirement would result in the transfer of property from one private party to another.²⁸ Relying once again on *Berman* and *Midkiff*, the Court concluded that advancing the public interest often benefits private par-

18. *Id.*

19. *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002).

20. *Id.* at *87-88.

21. *Id.* at *111-12.

22. *Id.* at *43-44.

23. *Kelo v. City of New London*, 843 A.2d 500, 527-28 (Conn. 2004).

24. *Id.* at 572-73.

25. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005).

26. *Id.* at 2666.

27. *Id.* at 2665. In defense of this argument, Justice Stevens noted that economic development is "a traditional and long accepted function of government." *Id.*

28. *Id.* at 2666.

ties.²⁹ Although leaving open the possibility that one-to-one transfers of property might “raise a suspicion that a private purpose was afoot,”³⁰ the Court concluded that integrated development plans, so long as they served a public purpose, would not merit such scrutiny.³¹ Given the Court’s great deference to legislative determinations of public use, this ruling effectively declared all development plans legitimate, irrespective of how those plans are enacted.

Justice Kennedy concurred in the judgment,³² noting the similarity between the deferential standard of review applied to eminent domain cases and the rational basis test used in evaluating a challenge to economic regulation.³³ Applying this standard of review, Justice Kennedy reserved the right to strike down takings that benefit a particular party with only “incidental or pretextual public benefits.”³⁴ Justice Kennedy argued that any review of the exercise of eminent domain should be done with “the presumption that the government’s actions were reasonable and intended to serve a public purpose.”³⁵ Because the primary motivation for the New London development plan was to benefit the public, and not Pfizer or any other private entity, Justice Kennedy concluded that the use of eminent domain in this case was legitimate.³⁶ Justice Kennedy augmented the majority opinion by recognizing the potential need for a more stringent standard of review in cases where the “risk of undetected impermissible favoritism of private parties” is particularly severe.³⁷ The benefits to the public embodied in the New London development plan, however, led Justice Kennedy to conclude that the Connecticut Supreme Court had acted properly in this case.³⁸

Justice O’Connor delivered a stinging dissent, writing that according to the majority’s rule, no property is safe from trans-

29. *Id.* As Justice Stevens noted, *Midkiff* resulted in lessees becoming landowners while *Berman* resulted in the transfer of property to private developers.

30. *Id.* at 2667.

31. *Id.* at 2665.

32. *Id.* at 2669 (Kennedy, J., concurring).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2669–70.

37. *Id.* at 2670.

38. *See id.* at 2670–71.

fer to another private owner “under the banner of economic development.”³⁹ Criticizing the great deference granted to the legislature by the majority, Justice O’Connor argued that, “were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.”⁴⁰ Justice O’Connor distinguished the situation in New London from that in *Berman* and *Midkiff*, noting that, in the latter two cases, the takings were effected to remedy extraordinary situations that had inflicted affirmative harm on the public.⁴¹ By authorizing the condemnation of well maintained property for the sole purpose of generating economic development, the Court had so greatly expanded the definition of public use as to include virtually all exercises of eminent domain.⁴² Justice O’Connor also indicated her regret that this result followed from the Court’s errant language in *Berman* and *Midkiff* regarding the relationship between the police and takings powers.⁴³ She recognized, in the light of New London’s use of eminent domain, that the two powers were not coterminous.⁴⁴ Such expansive language in earlier decisions had led to a situation where “[t]he specter of condemnation hangs over all property.”⁴⁵

Justice Thomas filed a separate dissenting opinion,⁴⁶ agreeing with Justice O’Connor’s assessment that approving economic development as a public use effectively removes any constitu-

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

40. *Id.* at 2673.

41. *See id.* at 2674–75. In *Berman*, the neighborhood in question had deteriorated from mere urban blight to the point that 65.3% of the dwellings were beyond repair. *Berman v. Parker*, 348 U.S. 26, 30 (1954). In *Midkiff*, the legislature of Hawaii had determined that, while 49% of the state’s land belonged to the government, 47% rested in the hands of only 72 landowners. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

42. *Kelo*, 125 S. Ct. at 2674–75 (O’Connor, J., dissenting). Justice O’Connor noted that virtually all takings would benefit the public in some way and, more importantly, most private property could be used in a more lucrative way by large private interests. *Id.*

43. *Id.* at 2675.

44. *Id.* Justice O’Connor indicated that, by comparing the takings power to the police power, the Court confused the deference due the legislature when exercising the police power with the oversight required by the Constitution in regard to takings. *Id.*

45. *Id.* at 2675–76.

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

tional impediment to the use of eminent domain.⁴⁷ Justice Thomas disagreed, however, with Justice O'Connor's defense of *Berman* and *Midkiff*, arguing that those cases legitimized "the boundlessly broad and deferential conception of 'public use.'"⁴⁸ Justice Thomas therefore pressed for a return to an originalist and significantly more restrictive interpretation of the Public Use Clause.⁴⁹ In Justice Thomas's view, only such a restrictive interpretation of the Public Use Clause would render the Court's eminent domain jurisprudence compatible with Fourth Amendment precedent and the traditional respect granted to the sanctity of property.⁵⁰

Given the great deference that the Court grants legislatures—and, by extension, planning agencies—in determining when a taking is for public use, the *Kelo* Court should have taken the opportunity to reexamine the appropriate measure of compensation granted to the targets of economic development takings. Although the majority and dissenting opinions spent a great deal of time discussing the Public Use Clause, they virtually ignored the just compensation prong of takings analysis. This omission is not altogether unusual, as the fair market value standard of compensation is considered well settled law.⁵¹ Nevertheless, the Court has maintained that market value is not a totem; in certain specific circumstances, an alternate measure of just compensation might be in order.⁵² Given the political reality of eminent domain—namely, that the vast majority benefits at the expense of the few⁵³—the Court should

47. *Id.* at 2678.

48. *Id.* at 2682–83.

49. *See id.* at 2679 ("The term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property.").

50. *See id.* at 2685. Justice Thomas ridiculed the Court's scrutiny in Fourth Amendment cases of police attempts to search a home, while playing hands-off when the government takes "the infinitely more intrusive step of tearing down petitioners' homes." *Id.*

51. *See* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) ("For all the disagreement and uncertainty in the rest of takings jurisprudence, compensation is considered straightforward."); *see also* Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 581 (1995) ("As a practical matter, market value is the polestar in determining just compensation.").

52. *See* *United States v. Cors*, 337 U.S. 325, 332 (1949).

53. *See* Debow, *supra* note 51, at 588–89 ("To the extent that a just-compensation rule lessens the number of projects the government can undertake, those in the government have a vested interest in adopting rules of thumb in just compensa-

reinvest the Just Compensation Clause with the deterrent effect originally intended, lest legislatures employ eminent domain with increased frequency and economic inefficiency.

Although the issue that caused the Court the most consternation, the taking of property without due process of law,⁵⁴ has ancient origins,⁵⁵ the institution of just compensation is a fairly recent development. No state constitution required just compensation until 1777, when the people of Vermont provided in their new constitution that “whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”⁵⁶ This provision was revolutionary at the time and grew out of a common desire to deter an overreaching legislature that had consistently sought to deprive the people of Vermont of their land.⁵⁷ The notion that compensation should be required in the event of a taking was particularly important to James Madison, who considered the protection of property of paramount importance, writing that “[g]overnment is instituted no less for protection of property, than of the persons of individuals.”⁵⁸ To that end, Madison inserted the Just Compensation Clause in his draft of the Bill of Rights, although no state had requested it. This clause was the only provision in the ratified Bill of Rights that was not so requested.⁵⁹ Madison hoped this “paper barrier” would impress

tion matters that undercompensate property owners in order to expand the reach of government.”).

54. The case ostensibly centered on what constituted a public use, but the majority’s insistence that the legislative pronouncement on that matter is nearly final indicates that any eminent domain action properly enacted will pass constitutional muster, virtually merging the Due Process and Public Use Clauses of the Fifth Amendment.

55. See William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 & n.16 (1985) (noting that the Magna Carta provides, “No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land”) (quoting MAGNA CARTA art. 39); see also MACHIAVELLI, THE PRINCE 59–60 (Quentin Skinner & Russell Price eds., Cambridge Univ. Press 1988) (“[B]ut above all a Prince must abstain from taking the property of others for men forget more easily the death of their father than the loss of patrimony. Then also pretexts for seizing property are never wanting.”).

56. VT. CONST. of 1777, ch. I, art. II, quoted in Treanor, *supra* note 55, at 702.

57. See Treanor, *supra* note 55, at 702–03.

58. THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

59. Treanor, *supra* note 55, at 708.

upon the Congress, as well as all the citizens, the sanctity of property.⁶⁰

Although the Just Compensation Clause was intended as a deterrent to takings, the Court has consistently chosen simplicity of application over original intent. The Court has described the compensation standard in a way that seems to indicate a desire to provide full compensation, declaring that “[a property owner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. . . . It is the property and not the cost of it that is safeguarded by state and Federal Constitutions.”⁶¹ The Court has opted, however, to apply the fair market value standard by asking “what a willing buyer would pay in cash to a willing seller.”⁶² The great advantage of this standard is its ease of application,⁶³ but in *United States v. 564.54 Acres of Land*,⁶⁴ the Court admitted the inability of fair market value to fully compensate a dispossessed owner.⁶⁵ This under-compensation leads to the overuse of eminent domain.

Fair market value ignores myriad different factors that influence the value of property; it fails to account for replacement of land and improvements, relocation and moving costs, costs to terminate and restart utilities and services, lost business revenue, squandered customer goodwill and reputation, and demoralization costs.⁶⁶ Because planners do not have to pay a true

60. See Coughlin, *supra* note 6, at 1005–06. Madison hoped for this effect even though the Takings Clause did not apply to the States until the 1890s. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

61. *Olson v. United States*, 292 U.S. 246, 255 (1934); see also *United States v. Miller*, 317 U.S. 369, 373 (1943) (“Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”).

62. *Miller*, 317 U.S. at 374. The use of this language in *Miller*, a case that also included the phrase “full and perfect equivalent,” indicates another fundamental contradiction in the just compensation doctrine: The fair market value of a forced involuntary sale rarely, if ever, puts the owner in as advantageous a position as he would have been in had the taking never occurred.

63. See Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 BYU L. REV. 789, 789–90 (lamenting that the Court has made the conscious decision to choose simplicity over fairness).

64. 414 U.S. 506 (1979).

65. *Id.* at 511 (“[T]his principle of indemnity has not been given its full and literal force.”).

66. James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1305 (1985). Although the first four categories not included in

fair value for taken property, they do not fully internalize the costs of eminent domain. Planners, therefore, are prone to “fiscal illusion”: the false belief that a project is economically efficient.⁶⁷ Given that the Public Use Clause provides an artificially low threshold for takings, the Court must reexamine the just-compensation doctrine to deter states and cities from the over-use of eminent domain.⁶⁸

Commentators have suggested various methods to account for currently undercompensated takings costs. One idea is for the Court to order compensation at a premium. In other words, the trial court would determine the fair market value and add a fixed amount, such as twenty percent. This method has the advantage of maintaining the simplicity of a fair market value assessment while ameliorating some of the effects of fiscal illusion.⁶⁹ Compensation at a premium is not a radical notion; the United Kingdom once used this method, and it is still the rule in Canada.⁷⁰ More importantly, early Mill Acts, cited in both Justice Stevens’s majority opinion⁷¹ and Justice Thomas’s dissent in *Kelo*,⁷² required a fifty percent premium over fair market value when grist mill owners flooded upstream lands.⁷³

Other options for compensation reform are also available. The Court could opt to include easily monetizable costs not currently factored into fair market value.⁷⁴ It could include the

fair market value are easily monetizable, demoralization costs are admittedly more problematic. *Id.* at 1305–06.

67. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620–22 (1984). The authors note that most government decision makers will discount costs “unless they explicitly appear as a budgetary expense.” *Id.* at 621.

68. According to the Castle Coalition and the Institute of Justice, between 1998 and 2002 there were more than ten thousand threatened or actual private-to-private takings. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), available at http://www.castlecoalition.org/report/pdf/ED_report.pdf.

69. Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 142 (2004). The problem with compensation at a premium is that tacking a fixed percentage on top of fair market value will not necessarily produce a result closer to actual cost; it is therefore not an effective method of achieving economic efficiency.

70. *Id.* at 139–40.

71. *Kelo v. City of New London*, 125 S. Ct. 2655, 2662 n.8 (2005) (majority opinion).

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

73. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 & n.1 (1885).

74. See *Durham*, *supra* note 66, at 1301–02.

more amorphous demoralization costs, using the same mechanism as is currently utilized to award compensation for emotional harm in tort cases.⁷⁵ The Court might also move to a compensation-in-kind doctrine, providing a substitute location for resettlement,⁷⁶ or it might simply allow juries to make compensation decisions in takings cases.⁷⁷

Fair market value has become so well entrenched as the level at which compensation will be set that it hardly warrants mention in Supreme Court takings cases.⁷⁸ Despite this entrenchment, however, the Court has reserved the power to revisit the just compensation doctrine in the face of "situations where this standard is inappropriate."⁷⁹ In *Kelo*, the Court reaffirmed its willingness to adapt doctrine to fit the evolving needs of society.⁸⁰ Although moving to a new compensation standard would not deter the use of eminent domain for economic development to the extent possible through vigorous enforcement of the public use doctrine, inefficient takings would occur with less frequency. Given the current makeup of the Court⁸¹ and the likelihood that it will not reevaluate the public use standard in the near future, a more rigorous compensation standard might be the best hope for critics of *Kelo*.

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75. See Parchomovsky & Siegelman, *supra* note 69, at 142; see also Durham, *supra* note 66, at 1306–07. But see Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 *HAMLIN J. PUB. L. & POL'Y* 181, 200 (1993) ("While it would be nice to compensate grandmothers throughout the United States for takings that destroy their homes, this is neither practical nor efficient, and is therefore not a real alternative to fair market value.").

76. See Parchomovsky & Siegelman, *supra* note 69, at 138.

77. See Burney, *supra* note 63, at 799–800 (explaining that a jury determination shifts the focus of review from valuation to fairness, thereby providing a more just measure of compensation).

78. It is this entrenchment that justified the petitioners' exclusion of a just compensation argument from their briefs and that allowed Justice Stevens to scarcely mention just compensation in the *Kelo* decision. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 n.21 (2005).

79. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979).

80. See *Kelo*, 125 S. Ct. at 2664.

81. The recent death of Chief Justice Rehnquist and the retirement of Justice O'Connor are unlikely to affect public use jurisprudence. Both supported strict interpretation of the public use standard and dissented in *Kelo*.