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Kelo v. City of New London: The More Things Stay the Same, the More They Change

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Kelo v. City of New London:
The More Things Stay the Same, the More They Change

Corinne Calfee

In Kelo v. City of New London, the Supreme Court upheld the traditionally broad definition of “public use” and the use of judicial deference to legislative decisions to exercise the power of eminent domain. This holding was appropriate: governments at all levels need the flexibility to exercise the power of eminent domain in the face of changing social needs, without the judiciary second-guessing each decision. Political and fiscal limitations already constrain the exercise of eminent domain. At the same time, the Kelo decision may have opened the door to future changes in the level of judicial scrutiny applied in eminent domain decisions by implying that comprehensive planning could help justify a project. The immediate aftermath suggests that the Kelo decision may catalyze a dramatic change in property rights as state legislatures have acted quickly and decisively to limit the definition of public use. Thus the petitioners in Kelo may have lost the battle, but they seem to be winning the war as laws around the county change in the direction they sought.

Introduction ........................................................................................................546
I. Background to Kelo v. City of New London ..................................................549
   A. Facts ............................................................................................................549
   B. Trial Court ..................................................................................................552
   C. Connecticut Supreme Court ......................................................................553
II. Supreme Court Review ..................................................................................555

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J.D., University of California, Berkeley School of Law (Boalt Hall) 2007; M.P.P., University of California, Berkeley, Goldman School of Public Policy 2007; A.B., Harvard College 2000. I would like to thank my colleagues on the Ecology Law Quarterly for their insight, edits, and friendship. I am also unendingly grateful to my family for their love and encouragement.
INTRODUCTION

In *Kelo v. City of New London*, the Supreme Court upheld the traditionally broad definition of "public use" and the use of judicial deference to legislative decisions exercising the power of eminent domain.¹ In a 5-4 decision, the Court found that economic development qualified as public use under the Fifth Amendment² and declined to scrutinize the government’s plan for development, relying instead on a rational basis test.³ As a result, the City of New London’s condemnation

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2. The Fifth Amendment provides that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Fourteenth Amendment makes the Fifth Amendment’s due process requirements applicable to the states. U.S. CONST. amend. XIV, § 1.


The decision incited a maelstrom of publicity—not a typical outcome for an eminent domain case.\footnote{Richard A. Epstein, \textit{Kelo: An American Original: Of Grubby Particulars and Grand Principles}, 8 GREEN BAG 355, 355, 357 (2005) (calling \textit{Kelo} one of the most “riveting” cases for the American public).} News sources across the country built on Justice O’Connor’s biting dissent to proclaim the end of private property as we know it.\footnote{Only the \textit{Washington Post} offered a more nuanced story, prominently quoting a lawyer who said that “[p]eople are just as safe [from seizure] the day after the court’s decision as they were the day before, the week before, the month before and for the past 50 years.” Kenneth R. Harney, \textit{Court Ruling Leaves Poor at Greatest Risk}, WASH. POST, July 2, 2005, at F1.} Susette Kelo, the sympathetic nurse whose pink cottage comprised part of the condemned land, told newspapers far and wide, “this [applies to] every U.S. citizen, every American. No homes, no properties, no farms. Nothing is safe anymore.”\footnote{Avi Salzman, \textit{Homeowners Shown the Door}, N.Y. TIMES, July 3, 2005, at 14CN1. Kelo is not the only sympathetic petitioner in the suit: Wilhelmina Dery lived in her Fort Trumbull home for eighty-eight years until she passed away in March 2006. Elaine Stoll, \textit{Wilhelmina Dery, Who Fought Eminent Domain, Dies in Her Fort Trumbull Home}, THE DAY (New London), Mar. 14, 2006, at A1. However, the New London Day has pointed out that the situation may be less sympathetic than it has been characterized. Susette Kelo purchased her Fort Trumbull home in 1997 after talk of redevelopment had begun and she has a second home in a nearby town. Peter L. Costas, \textit{Dispelling the Myths About the Fort Trumbull Project}, THE DAY (New London), Nov. 6, 2005. She first registered to vote in New London in 2005. \textit{Id}. Most of the other plaintiffs own rental properties in the neighborhood. \textit{Id}. The message that “it’s not fair to take my dilapidated revenue generator” does not resonate as poignantly as “it’s not fair to take my house,” but the former may be a more appropriate characterization of the situation in New London than the latter.} The \textit{Los Angeles Times} explained that the case “gave cities broad power . . . to bulldoze homes and small stores . . . put[ting] shopkeepers and homeowners at the mercy of revenue-hungry governments.”\footnote{David G. Savage, \textit{Justices Back Forced Sale of Property}, L.A. TIMES, June 24, 2005, at A1.}
The publicity suggests that the dissent told a compelling story about a radical change in property rights. However, no such change occurred. Rather, the Court reaffirmed the broad definition of "public use" and the narrow scope of judicial review that has been used in eminent domain cases since 1954.

The Fifth Amendment limits when the government may condemn private property to serve a "public use." As a corollary, the government may not exercise its power of eminent domain unless the property will conceivably serve a public use. Courts have recognized three kinds of public uses that satisfy the public use requirement: public ownership, use by the public, and private use serving a public purpose. As for judicial review, the courts have declined to scrutinize government determinations that a condemned property will serve a public use. Instead, federal courts apply a deferential standard of review to takings cases: the court upholds condemnations that are "rationally related to a conceivable public purpose," without inquiring whether the condemned property will actually serve a public use.

This Note first explains the situation in New London and describes the lower court litigation. It then outlines the Supreme Court's decision, going on to argue that the Kelo decision followed the last fifty years of eminent domain jurisprudence: the Court defined public use broadly and applied judicial deference just as prior eminent domain cases had done. The Court did not adopt either of two alternative state models from Illinois or Michigan, nor did it strike out on its own with a new approach to takings, except for focusing more on the "motive" behind the exercise of eminent domain. This holding was appropriate; governments at all

9. It is possible that many people responded to the majority opinion of their own accord, and would have regardless of the dissents. However, the descriptive language of Justice O'Connor's dissent—and the number of times news accounts repeated it—suggests that the dissents played a significant role in stimulating public response. It is also possible that Kelo evoked public response to property rights law as it stood (and stands), rather than a perceived change to property rights law. However, O'Connor's dissent charged the Kelo majority with changing property rights law because she said "all private property is now vulnerable to being taken and transferred to another private owner. . . ." Kelo v. City of New London, 125 S. Ct. 2655, 2670-71 (2005) (O'Connor, J., dissenting) (emphasis added).

10. Id. at 2665 (majority opinion).


12. See Midkiff, 467 U.S. at 243-44 (holding that private ownership of condemned residential properties would serve the public purpose of eliminating an oligopoly); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (holding that use by the military of quartermaster warehouses qualified as a public use); Shoemaker v. United States, 147 U.S. 282, 302 (1893) (holding that public parks to be used by the public satisfied the public use clause).

levels need the flexibility to exercise the power of eminent domain in the face of changing social needs, without the judiciary second-guessing each decision. Political and fiscal limitations already constrain the exercise of eminent domain. At the same time, the *Kelo* decision may have opened the door to future changes in the level of judicial scrutiny applied in eminent domain decisions by suggesting that comprehensive planning could help justify a project. When a court looks at whether the government engaged in comprehensive planning, it inquires into the government’s motive and second-guesses its decision.

In the end, the *Kelo* decision did not bring about the dramatic change in property rights that the media, American public, and dissenting justices fear. However, the strong response to *Kelo* will likely effect a major change in property rights as legislators respond to public fear and citizen groups put initiatives on state ballots. The outcome may not be an end to private property rights, but rather stronger private property rights than ever, with owners experiencing unprecedented protection from eminent domain. The flip side of unprecedented protection from eminent domain is that local, state and federal governments will be hamstrung in their efforts to undertake public works projects and be unable to serve the needs of their constituents.

I. BACKGROUND TO *KELO V. CITY OF NEW LONDON*

A. Facts

The *Wall Street Journal* compared the *Kelo* fact pattern to Joni Mitchell’s song *Big Yellow Taxi* in which “[t]hey paved paradise and put up a parking lot/[w]ith a pink hotel, a boutique and a swingin’ hot spot.”

It is, by any measure, a stretch to compare New London’s Fort Trumbull neighborhood with paradise since all accounts suggest a declining residential neighborhood in an economically depressed city. It is also a

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> Of the non-residential buildings, 66 percent were considered to be in poor or fair condition, and 88 percent of the residential buildings were considered to be in either poor or fair condition . . . . The adjacent waste treatment plant was unsightly and produced noxious odors . . . . Much [sic] of the parcels which had been industrial properties were contaminated by decades of industrial use and required substantial remediation.
stretch to compare the state park utility space and office space, for which petitioners' land was intended,\textsuperscript{17} to a "swingin' hot spot." Rather, \textit{Kelo} arose under a specter of long-term economic decline in New London, to which the city responded with a comprehensive—and mundane—redevelopment plan to revitalize the region.

In 1990, the state of Connecticut designated New London a "distressed municipality" to facilitate funding for redevelopment in the region.\textsuperscript{18} Notwithstanding such attention to the city's distress, the decline continued. New London's Naval Undersea Warfare Center closed in 1996 and the city lost the 1500 jobs the Navy had supplied.\textsuperscript{19} By 1998, the City faced a dire economic situation: its population had shrunk to its lowest level since before the Great Depression, and unemployment was almost twice as high as it was in the rest of the state.\textsuperscript{20}

This striking decline inspired the reactivation of the New London Development Corporation (NLDC) in 1998 to combat the city's distress through planning and redevelopment.\textsuperscript{21} By January 1998, the NLDC had garnered $15.35 million in state-bond support for revitalization efforts and by February 1998, the Pfizer pharmaceutical company had publicized a decision\textsuperscript{22} to build a large research facility near the Fort Trumbull

\begin{footnotes}


\item[18] \textit{Kelo v. City of New London}, 2002 WL 500238 at *30, *40. Connecticut provides grants to "distressed municipalities" to cover 100 percent of redevelopment planning costs. \textsc{Conn. Gen. Stat.} § 8-190 (2006). Distressed municipalities are cities that "meet[] the necessary number of quantitative physical and economic distress thresholds which are then applicable for eligibility for the urban development action grant program under the Housing and Community Development Act of 1977" or "any municipality adversely impacted by a major plant closing, relocation or layoff . . . ." \textsc{Conn. Gen. Stat.} § 32-9p(b) (2006).

\item[19] \textit{Kelo}, 125 S. Ct. at 2658.

\item[20] \textit{id.}

\item[21] The NLDC is a private, non-profit organization incorporated in 1978 to "assist the City in planning economic development. \textit{Id.} at 2658–59; \textsc{Conn. Sec'y of State, Commercial Recording Div.}, http://www.concord-sots.ct.gov (last visited Oct. 7, 2006). The NLDC's purpose is as follows:

\begin{quote}
The New London Development Corporation (NLDC) is committed to creating public-private partnerships that act as an engine for economic development in New London. The goals of this private, not-for-profit organization are to increase the city's tax base, to promote an increase in the number of jobs available in the city and to enhance the quality of life for New London's residents.
\end{quote}


\item[22] Accounts differ on the extent to which Pfizer, New London, and the NLDC collaborated in creating the city's redevelopment plan. The size of Pfizer's role in the planning process strikes at the emotional core of the public response to \textit{Kelo}. If Pfizer played a significant role in instigating the plan for New London to exercise eminent domain against the residents of Fort Trumbull, then the facts suggest an abuse of the power of eminent domain in that NLDC would be taking from a private party to give to another at the recipient private party's request. That a corporation would benefit at the expense of homeowners strikes a discordant note with many Americans.
\end{footnotes}
neighborhood. The NLDC leveraged Pfizer's announcement and its

The Supreme Court's opinion does not specify Pfizer's role in the planning process. See Kelo v. City of New London, 125 S. Ct. 2655, 2659 (2005). The company's role does not matter under the Court's deferential review of eminent domain actions: as long as the condemnation was "rationally related to a conceivable public purpose," the Court would not look at the city's actions or motivations. Id. at 2669 (Kennedy, J., concurring) (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).

Pfizer's role in the planning process did matter to the trial court. Plaintiffs claimed that Pfizer's involvement violated the public use clause because the city's public benefit from the project would be merely incidental to the private benefit Pfizer reaped. Kelo v. City of New London, No. 557299, 2002 WL 500238, *34-35 (Conn. Super. Ct. Mar. 13, 2002). Plaintiffs claimed that Connecticut constitutional law prevented takings when the public use paled in comparison to the private use. They attempted to show that Pfizer's involvement in the planning process demonstrated the magnitude of the private benefit in comparison to the public benefit. Id. The trial court rejected these arguments, finding instead that New London acted in good faith toward improving its economic situation. Id. at *44.

Pfizer, perhaps responding to the emotional—and negative—public response to the Supreme Court decision in the Kelo case, reported that it was not involved in the Kelo litigation. Its website says, "Pfizer was not a party to that litigation, had no stake in the outcome of the case and has no requirements nor interest in the development of the land that is the subject of the case. Pfizer will not acquire any property there." News Release, Pfizer, Pfizer Statement on Eminent Domain (June 27, 2005), available at http://www.pfizer.com/pfizer/are/news-releases/2005pr/mn_2005_0627.jsp. Pfizer's statement does not describe the company's role in the planning—as opposed to litigation—process.

Pfizer may have had a large role in the planning process. The New London newspaper, The Day, has characterized Pfizer's response to Kelo as "misleading" because state documents chronicle Pfizer's involvement in planning for New London's economic development as early as the fall of 1997. Ted Mann, Pfizer's Fingerprints on Fort Trumbull Plan, THE DAY (New London), Oct. 16, 2005. The newspaper's requests for state documents under the state Freedom of Information Act yielded information about Pfizer communicating with state economic development planners. The paper emphasized an early architectural "vision statement" sketch illustrating the Fort Trumbull neighborhood in question "replaced" with a "high end residential district." Id. The paper thus implied that Pfizer's drawings planted the idea for condemnation via eminent domain because later sketches retained this "total replacement" idea for Fort Trumbull. Id. Furthermore, unnamed state officials "made clear that the difference between a demand by Pfizer and a statement of preference about what it would like to see next door was a small one, especially when the city and state had already committed to invest ... a total of $118 million in other incentives" to bring Pfizer to New London. Id.; see also Posting of Todd Zywicki to The Volokh Conspiracy, Pfizer's Role in Kelo Takings, http://volokh.com/posts/1130160017.shtml (Oct. 24, 2005); "Pfizer's Fingerprints" on the Kelo Case, HEALTH CARE RENEWAL, http://hcrenewal.blogspot.com/2005/10/pfizers-fingerprints-on-kelo-case.html (Oct. 17, 2005).

Pfizer's assistant general counsel responded to The Day's story in a letter to the editor. He explained that Pfizer simply worked with the city and state to assess how Pfizer's relocation to Fort Trumbull would affect the neighborhood. See William Longa, Letter to the Editor, Pfizer Didn't Call for Razing Fort Trumbull, THE DAY (New London), Oct. 18, 2005, at 9A. The letter asserted that Pfizer's "decision to invest [in New London]" was not "conditional on the replacement of the surrounding neighborhood." Id. In other words, Pfizer did not require New London to condemn the Fort Trumbull residences in exchange for locating its headquarters in the city.

state money into a redevelopment plan focused on ninety acres in New London, hoping that Pfizer’s new location would generate other growth that would rejuvenate the city.\textsuperscript{24} The area that NLDC targeted included 115 private properties.\textsuperscript{25} In 2000, the City authorized NLDC to act on its behalf in the redevelopment efforts, allowing NLDC to exercise the City’s right to eminent domain, which NLDC did soon thereafter when it began to negotiate with Fort Trumbull homeowners for the purchase of their properties.\textsuperscript{26} Most of the property owners in the ninety targeted acres willingly sold their properties.\textsuperscript{27} However, the nine petitioners in \textit{Kelo} refused to sell their combined fifteen properties and NLDC initiated condemnation proceedings to force the owners to sell.\textsuperscript{28}

\textbf{B. Trial Court}

The petitioners brought suit in 2000, claiming that NLDC could not condemn their property because it would not be used for a “public use” as required by the Fifth Amendment and the Connecticut Constitution.\textsuperscript{29} The case presented questions about whether the NLDC’s proposed use of the land for economic development qualified as a public use and what standard of review should apply to the legislature’s determinations as to what constitutes public use.\textsuperscript{30}

Petitioners also made six other claims: the NLDC could not exercise the power of eminent domain on behalf of New London, the taking of their property violated the Equal Protection Clause, the taking violated petitioners' substantive and procedural due process rights, the Connecticut General Statutes do not authorize the kind of development project proposed by NLDC, and the taking did not follow the procedures required by the New London City Charter.\textsuperscript{31} The petitioners lost all six of these claims.\textsuperscript{32}

\textsuperscript{25} \textit{Kelo}, 125 S. Ct. at 2659.
\textsuperscript{27} \textit{Kelo}, 125 S. Ct. at 2660.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Kelo}, 2002 WL 500238 at *1.
\textsuperscript{31} \textit{Kelo}, 2002 WL 500238 at *1.
\textsuperscript{32} The trial court found against the plaintiffs on all of the other issues. The NLDC could exercise eminent domain power. \textit{Id.} at *2. The takings did not violate the Equal Protection Clause. \textit{Id.} at *99. The takings did not violate plaintiffs’ procedural or substantive due process rights. \textit{Id.} at *105–06. Connecticut development law allowed New London to undertake such a
In response to petitioners' claim that economic development did not qualify as a public use, the trial court issued mixed holdings after a seven-day bench trial. It applied federal and Connecticut constitutional law to find that NLDC's condemnation of the parcel intended for research and development office buildings (Parcel 3 in the development plan) satisfied the public use requirements of the federal and Connecticut constitutions. In contrast, the court found that NLDC's condemnation of the parcel intended for an uncertain use—"park support" for the nearby state park, parking and retail services, or support facilities for the nearby marina (Parcel 4a in the development plan, which included petitioners' parcels)—did not satisfy the public use requirement. The court distinguished between these parcels based on Connecticut constitutional law requiring that condemned land be "necessary" to effectuate the intended public use of the condemnation. It found that the development of office buildings was necessary to bring about the intended public use of the condemned land—economic development. Without these 90,000 square feet of additional office space, the redevelopment project could not achieve its goal of revitalizing New London's economy. In contrast, the future use of Parcel 4a was too speculative to be necessary to effectuate the goal of economic development. The fact that NLDC could not identify the precise future use of Parcel 4a signified that its eventual use was not determinative of the project's ability to serve the public use and therefore the parcel was not necessary for economic development. The court issued a permanent injunction against the condemnation of Parcel 4a and a temporary injunction against the condemnation of Parcel 3, pending appeal of the case.

C. Connecticut Supreme Court

The trial court holding that Parcel 3 could be condemned but Parcel 4a could not be condemned apparently dissatisfied both parties: they both

35. Kelo, 125 S. Ct. at 2659.
37. Id. at *51.
38. See id. at *57.
41. Id. at *64, *89.
42. Id. at *89.
43. Id. at *112.
appealed to the Connecticut Supreme Court. The petitioners appealed five issues, and the Connecticut Supreme Court focused on whether economic development qualified as a public use under the federal and Connecticut constitutions. The defendants cross-appealed the trial court's holding that NLDC could not condemn Parcel 4a. The Connecticut Supreme Court rejected the petitioners' appeals and granted the defendants' cross appeal. This decision enabled the NLDC to condemn all of the property it originally sought.

The Connecticut Supreme Court held that economic development qualified as a public use because the components of economic development, such as creating jobs, increasing tax revenue, and promoting urban revitalization, benefited the public. These public benefits fall within the broad definition of public use long afforded by the Connecticut and federal high courts. Furthermore, the Connecticut and federal courts, along with other states' courts, "give substantial deference to the legislative determination of [public] purpose."

In contrast, the dissent argued for less deference to legislative determinations of what it called "public purpose" when the articulated public purpose occurs as a result of private economic development. Decreased deference would mean that courts should inquire into the likelihood of the public benefit occurring and only accept eminent domain condemnations for which the defendant can show with "clear and convincing evidence" that the public benefit will occur. The dissent believed that this stricter standard of review for certain condemnations

45. Plaintiffs appealed whether "economic development constitutes a valid public use under the takings clauses of the state and federal constitutions"; whether the Connecticut General Statutes authorized taking plaintiffs' land; whether taking plaintiffs' land "will sufficiently benefit the public and bear reasonable assurances of future public use"; the constitutionality of delegating eminent domain power to NLDC; the necessity of taking plaintiffs' land on Parcel 3 for office buildings; and the constitutionality of selective takings (carving out a portion of Parcel 3 to protect an Italian Club from condemnation) under federal and Connecticut Equal Protection Clauses. Id. at 508.
46. The Connecticut Supreme Court explained:

The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

Id. at 507.
47. Id. at 508.
48. Id.
49. Id. at 520.
50. Id. at 522, 525.
51. Id. at 527–28.
52. Id. at 587 (Zarella, J., dissenting).
53. Id. at 583.
54. Id. at 588.
would protect private property owners against abuses of the power of eminent domain by local governments captured by private interests.

II. SUPREME COURT REVIEW

Petitioners sought a writ of certiorari in the U.S. Supreme Court in response to the Connecticut Supreme Court's unambiguous support for the Fort Trumbull condemnation. The Supreme Court granted certiorari on two questions: first, does economic development qualify as a public use under the Fifth Amendment (in other words, how broad is the definition of public use); and second, what level of deference should the judiciary apply to determinations that a project will serve a public use? This section first describes the petitioners' request for Supreme Court review and then discusses the opinions starting with Stevens' majority and continuing through Justice Kennedy's concurrence, Justice O'Connor's dissent, and Justice Thomas' dissent.

A. Petition for a Writ of Certiorari

The petitioners sought and were granted Supreme Court review to determine whether economic development qualifies as a "public use" under the Fifth Amendment and, as a corollary, how much judicial deference should be afforded governmental determinations that a condemnation will serve the public use. The Court likely granted certiorari because it had never explicitly considered whether economic development qualified as a public use. Furthermore, states have different policies regarding the definition of public use, and the Court may have considered articulating a different ceiling to the broad definition of public use under which states may set their own narrower public use definitions.

Petitioners argued that economic development did not qualify as a public use, and they based their argument on a canon of construction that the Constitution be interpreted to avoid surplussage. They argued that "public use" in the Fifth Amendment must have some constraining effect so as not to be superfluous. They said that including economic development as a public use would render the phrase meaningless because everything would qualify. Any business contributes to economic

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56. Id. at 2661.
58. See id. at *21.
59. See, e.g., Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 702 (1995) (interpreting each item in a series of similar items to have its own definition so as not to be superfluous).
60. Petition for cert., supra note 57, at *25.
development by contributing to the tax base and increasing employment. According to petitioners, this limitless definition of public use would effectively "nullif[y]" the public use clause. In the alternative, they argued that if economic development qualifies as a public use then the courts should apply a heightened judicial scrutiny to such claims. Petitioners asked the Court to require legislatures to show "actual, objective assurance that the particular project will result in the claimed public benefits" in order for economic development to qualify as a public use.

They argued that such heightened scrutiny would have two effects: first, it would reduce the number of condemnations, and second, it would ensure that condemnations were appropriate by rejecting projects motivated by a desire to benefit a particular private party. Increasing the government's burden of proof would reduce the likelihood that a property would be taken from one party and simply given to another for exclusively private use.

NLDC responded that public use has been defined as broadly as the extraordinarily expansive police power and that a bright-line rule excluding economic development from the definition of public use would inappropriately change the definition of public use. It would also contravene traditional judicial deference to legislative determinations of public use. In sum, NLDC argued that economic development is "rationally related to a conceivable public purpose." As such, economic development satisfies the public use requirement.

B. Majority Opinion

In a 5-4 decision, the Court agreed with respondents that economic development qualifies as a public use because the definition of public use is broad and because the judiciary affords legislatures broad discretion to determine whether a condemnation satisfies the public use requirement. Justice Stevens' majority opinion means that the NLDC may lawfully condemn petitioners' properties in Fort Trumbull for redevelopment.

61. Id.
62. Id.
63. Id. at *29.
64. See id. at *28–*29.
67. Id. at *22 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).
68. Kelo, 125 S. Ct. 2655. Justices Kennedy, Souter, Ginsburg, and Breyer joined Stevens' majority opinion. Justice Kennedy wrote a concurring opinion in which no one else joined. Justice O'Connor wrote a dissent and was joined by Justices Rehnquist, Scalia, and Thomas. Justice Thomas also wrote his own dissent. Id. at 2657.
According to the Court, economic development qualifies as a public use for four reasons. First, public use—synonymous with public purpose—is broadly defined. It has been called “coterminous” with the police power, which broadly enables federal, state, and local governments to improve public welfare. Stevens discussed three prior eminent domain cases that support the idea that furthering economic development satisfies the broad public use definition. The Court refused petitioners’ request that it narrow the existing public use standard articulated by these cases. Second, governments have historically promoted economic development through the use of eminent domain. In particular, the Court compared the redevelopment of the Fort Trumbull neighborhood to the Court-sanctioned project that condemned a neighborhood in southeast Washington, D.C. to promote economic development. Third, the Court could find “no principled way of distinguishing economic development from the other public purposes that we have recognized.” It could not identify a logical boundary between acceptable and unacceptable economic development, so opted to preserve the wide range of acceptable economic development. Fourth, the Court determined that the creation of private benefits as a consequence of public use did not in itself violate the prohibition against “taking from A and giving to B.” The Court thus declined to articulate the boundary between acceptable and unacceptable private benefit. Hence the Court upheld its “traditionally broad understanding of public purpose” and rejected petitioners’ proposed change in the law to exclude economic development from the definition of public use.


71. Id. at 2663-65 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Midkiff, 467 U.S. 229; Berman v. Parker, 348 U.S. 26 (1954)).

72. Id. at 2665-66.

73. Id. at 2665 (discussing Berman, 348 U.S. 26 (1954)).

74. Id.

75. Id. This old prohibition against takings for purely private uses conflicts with the deference afforded to public use determinations. See infra text accompanying note 80. The Court would never establish the actual private use—giving to A—as long as there was a conceivable and appropriate public use. It is unlikely that a city would ever provide a public use—even a pretextual one—that would fail to satisfy the broad definition of public use. As long as the condemnation was rationally related to the pretextual public use, it would satisfy the “rationally related” test. Kennedy’s concurrence suggests this conflict. Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring).

76. Id. at 2666 (majority opinion).

77. Id. at 2665-66.
One additional consideration played a role—and possibly a significant one—in the decision. Stevens repeatedly commented that NLDC had a comprehensive redevelopment plan.78 This suggests that the Court cared about NLDC's motive behind the condemnation: the comprehensive plan made the Court more comfortable that the condemnation was intended to further a legitimate public use. The plan demonstrated that the condemnation served more than a pretextual purpose, which would be forbidden by the old prohibition against taking from A and giving to B.79

Having determined that economic development could satisfy the broad definition of public use and having no evidence of improper motives, the Court exercised traditional judicial deference to New London's determination that the condemnation was rationally related to the city's stated public use of economic development.80 It "decline[d] to second-guess" New London's decision about which lands to condemn or whether condemnation and redevelopment would actually promote economic development.81 Having found that economic development was an acceptable public purpose, the proposed development need only be rationally related to this purpose. The NLDC project, of course, satisfied this very low threshold: new office buildings, parking, and a state park could conceivably create economic development. The Court thus rejected petitioners' alternative argument for heightened scrutiny—that a city be "reasonably certain" that economic development would occur—in the case of economic development projects.82

The Court has typically declined to inquire into the actual public use or probability of actual public use in condemnation cases.83 Usually, judicial deference in the takings context means that as long as a project is "rationally related to a conceivable public purpose,"84 a court will not inquire into whether the project will actually effect a public use or what public purpose actually motivated legislative action. In this case, Justice

78. Professor John Echeverria counted that "plan," "planner," and "planning" together appeared more than forty times in the opinion. Echeverria, supra note 1 at 10,556. He called this implied importance of the comprehensive plan "[i]nstructing by example rather than mandate." Id.
81. Id. at 2668.
82. Id.
83. See, e.g., United States ex rel. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551 (1946) (holding that "it is for Congress to decide what type of taking is for a public use"); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925) (holding that "[i]t is the sole province of the courts to determine whether a use is a public use").
Stevens notably opted not to use the "rationally related" language even though he applied the standard. 85

The Court emphasized that other jurisdictions need not adopt as broad a definition of public use or as deferential a standard of review as allowed by the U.S. Constitution. The Constitution delineates the maximum breadth states may use in their definitions of public use and in their standards of review for condemnations. 86 Stevens wrote, "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." 87 Thus, the Fifth Amendment provides the broadest possible reading of public use under which states can establish more limited definitions if desired. The Court asserted that it would defer to such state determinations that fall at or under the high federal public use ceiling. 88

C. Justice Kennedy's Concurrence

Justice Kennedy concurred with the majority but stated that increased judicial scrutiny—which he called "meaningful rational basis review"—should apply when a government intends that a taking benefit a particular private party. 89 He worried that in some circumstances "any
conceivable public purpose" would permit projects meant to take from A and give to B, as long as the project proponents could articulate a pretextual public use for the taking. Additional judicial scrutiny could provide assurance that the public use be more than pretextual.90 Justice Kennedy derived this higher standard of judicial review from a comparison of the deferential standard of review for public use to the deferential standard of “rational basis” review under the Due Process and Equal Protection Clauses.91 He argued that just as pretextual arguments are insufficient under the Due Process and Equal Protection Clauses, they are insufficient under the Public Use Clause.92

Kennedy asserted that the potential for private benefit in *Kelo* did not reach the critical threshold above which a closer judicial look would be warranted.93 For him, the comprehensive development plan, the projected economic benefits, the unknown identity of beneficiaries, and New London's careful adherence to required eminent domain condemnation procedure sufficiently reduced the potential for inappropriate private benefit to obviate the need for scrutiny beyond the normal rational basis test. However, he imagined that “[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted.”94 If one of these situations had presented itself, he hinted that he would not have joined the Court's opinion.95 As it was, NLDC’s comprehensive plan—which would not matter under a pure rational basis test—attracted Kennedy's crucial swing vote to the majority.

**D. Justice O’Connor’s Dissent**

Justice O’Connor dissented from the Court’s decision that economic development qualified as a public use and in its application of the rational basis test to takings cases.96 She used a harm-prevention theory to distinguish *Kelo* from earlier takings cases. O’Connor wrote that a public use existed when the project abated an existing harm. In *Kelo*, she felt that petitioners’ homes were not harmful so condemnation did not

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91. *Id.*
92. *Id.*
93. *Id.* at 2670.
94. *Id.*
96. *Id.* at 2673 (O’Connor, J., dissenting).
prevent harm.\textsuperscript{97} Under this analysis, petitioners' property could not be
condemned.

O'Connor would have redefined public use to exclude economic
development and would have increased judicial scrutiny of eminent
domain cases beyond the rational basis test. The most important part of
O'Connor's dissent was the fear-evoking language she used: she
proclaimed that "all private property is now vulnerable to being taken
and transferred to another private owner, so long as it might be
upgraded . . . in the process."\textsuperscript{98} She continued that the Court's holding
"wash[es] out any distinction between private and public use of
property—and thereby effectively . . . delete[s] the words 'for public use'"
from the Constitution.\textsuperscript{99} With this language, O'Connor simultaneously
articulated nuanced constitutional arguments about the breadth of the
Public Use Clause and the appropriate level of judicial scrutiny for
takings cases, and appealed to general popular concerns about the
sanctity of the home.\textsuperscript{100}

O'Connor proposed redefining public use to exclude economic
development because the majority's definition provided only insufficient,
pretextual limitations on public use. The majority could not achieve its
goal of rejecting only those condemnations "whose sole purpose is to
bestow a benefit on the private transferee" without scrutinizing the
legislative decisions leading to such condemnations.\textsuperscript{101} O'Connor argued
that only by looking at the legislative decision-making process can the
courts protect against eminent-domain abuses in which the legislature
offers a pretextual public purpose that was not the real motive for the
taking. The comprehensive plan that made the majority trust NLDC was
not enough for the dissent.\textsuperscript{102}

O'Connor applied the following logic to reject NLDC's eminent
domain actions: private benefit and secondary public uses are inextricably
intertwined because increased tax revenue and new jobs only happen as a
result of private land use. By implication, private transfers inherently
involve secondary public uses, so every transfer of condemned land to a
private party would have sufficient public use to satisfy any "conceivable"
rational basis. O'Connor argued that the Court's proffered limit on public
use thus provided no effective limitation.\textsuperscript{103} The canon of construction

\textsuperscript{97} Id. at 2674–75.
\textsuperscript{98} Id. at 2671.
\textsuperscript{99} Id.
\textsuperscript{100} For an illustration of the resonance of O'Connor's language, see the Castle Coalition's
(last visited Sept. 26, 2006).
\textsuperscript{102} Id. at 2676 (calling such efforts "legislative prognostications").
\textsuperscript{103} Id. at 2675.
against surplussage asserts that each phrase of the Constitution must have meaning, so only interpretations imbuing each phrase with its own meaning are acceptable. 104

In order to avoid the surplussage she found in the Court’s interpretation and render the Public Use Clause meaningful, O’Connor differentiated between primary and secondary uses. She explained that secondary public uses ought not to qualify as public uses under the Fifth Amendment because “nearly any lawful use of real private property can be said to generate some incidental benefit to the public.” 105 Including secondary public uses in the Fifth Amendment penumbra does “not realistically exclude any takings, and thus do[es] not exert any constraint on the eminent domain power.” 106 In Kelo, the public use to which petitioners’ land would be put comes not from the primary use of the land, but rather from potential increases in tax revenue and employment opportunities. This secondary public use falls outside of O’Connor’s narrow harm-prevention definition of public use, thereby disqualifying New London’s condemnation.

O’Connor disagreed with the Court’s deference to legislatures as “the sole arbiters of the public-private distinction” 107 and would have increased judicial scrutiny of eminent domain cases beyond the rational basis test. She argued that legislative control over “public use,” without any judicially enforceable limits, would reduce the clause to “hortatory fluff” and violate our principle of endowing every word in the Constitution with independent meaning. 108 The judiciary must constrain the legislature to protect the integrity of the Constitution—in this case, the definition of “public use,” which she argued would have insufficient meaning if left under legislative control. 109

E. Justice Thomas’ Dissent

Objecting not only to how the public use rules should apply to the facts in Kelo, Justice Thomas generally objected to a public use jurisprudence that is inconsistent with original intent. He asserted that defining public use broadly inappropriately violated the Framers’ intentions. 110 In his view, “public use” only applies to two situations:

104. Id. at 2672 (citing Wright v. United States, 302 U.S. 583, 588 (1938)).
105. Id. at 2675.
107. Id. at 2673.
108. Id.
109. Id. at 2772–73.
110. Id. at 2678 (Thomas, J., dissenting). The Michigan Supreme Court applied just such originalist analysis to its own constitutional public use clause without adopting Thomas’ requirement of government use or use by the public in County of Wayne v. Hathcock. 684 N.W.2d 765 (Mich. 2004). See also Eric R. Claeys, Symposium: The Death of Poletown: The
government ownership and land that the public has a legal right to use.\footnote{111} Thomas would overturn the last fifty years of precedent in favor of this "natural" reading of the Public Use Clause.\footnote{112} On a different note, Justice Thomas expressed concern that poor and minority neighborhoods experience a disproportionate share of condemnations.\footnote{113}

III. KELO EFFECTS NO CHANGE IN JUDICIAL APPROACH TO PUBLIC USE

Despite dissents and public commentary to the contrary, \textit{Kelo} does not change the breadth of the definition of public use or the level of judicial deference afforded to legislative determinations regarding public use. Rather, it follows logically from the holdings in \textit{Berman v. Parker} and \textit{Hawaii Housing Authority v. Midkiff}.\footnote{114} This section starts with an introduction to federal public use jurisprudence and the facts of \textit{Berman} and \textit{Midkiff}, which provide the two primary sources of public use jurisprudence before \textit{Kelo}. Next, this section discusses the evolution of the two public use questions—the breadth of public use and the judicial deference afforded to legislative determinations of public use. The section concludes with a discussion of recent state cases that demonstrate the shift in public use jurisprudence that the majority declined to adopt in \textit{Kelo}.\footnote{115} These state cases currently serve as models for states changing their public use and judicial deference standards in the wake of \textit{Kelo}.

A. Federal Public Use Jurisprudence

The phrase "public use" originated with the framing of the U.S. Constitution, but the definition did not become controversial until much later.\footnote{116} Professor Matthew Harrington has argued that the breadth of the original definition of public use subsumed every proposed use, so


\footnote{112} \textit{Id.} at 2682–83.
\footnote{113} \textit{Id.} at 2686–87.
\footnote{116} This part of the Fifth Amendment stimulated little, if any, debate during the passage of the Bill of Rights. \textit{See} Harrington, \textit{supra} note 89, at 1282–87.
litigation did not arise to challenge the outer limits of the definition. Through the eighteenth and much of the nineteenth century, "public use" did not substantively limit the exercise of eminent domain, but rather described all possible legislative actions. The constraints of representative government were considered sufficient to prevent abusive exercise of eminent domain in that voters would not elect representatives who abused governmental power and condemned property for other than a public use. The judiciary deferred to legislative actions because voters oversaw legislation.

Notwithstanding this judicial deference, courts in the nineteenth century came to view "public use" as a limit—albeit a distant one—on the situations in which a government may exercise its power of eminent domain. State courts considered and upheld the constitutionality of "taking" land by flooding it when dams were built to facilitate the use of mills, because mills—and the economic development they facilitated—qualified as public uses. Toward the end of the nineteenth century, state courts upheld condemnations for private companies to develop railroads, canals, turnpikes, and bridges under a broad definition of public use. These cases emphasized that "public use" did not require the general public to actually use the condemned land, but rather that the public should benefit from the condemnation. As the definition of public use evolved, the tradition of judicial deference strengthened.

1. Introduction to Berman and Midkiff

Two Supreme Court cases in the twentieth century—Berman v. Parker and Hawaii Housing Authority v. Midkiff—articulated a broad definition of public use and the application of judicial deference to determinations that a project will be put to public use. In Berman, the Court considered whether redevelopment of a blighted area in the

117. Id. at 1298-99; see also Lawrence Berger, supra note 89, at 205 (finding little public use litigation until the nineteenth century); William Michael Treanor, The Original Understandings of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995) (discussing the early history of the public use clause).

118. Harrington, supra note 89, at 1247; see also Errol Meidinger, The "Public Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1, 16 (1980-81).

119. See Meidinger, supra note 118, at 17-18.

120. See Echeverria, supra note 1, at 10, 584.

121. Meidinger, supra note 118, at 24; Berger, supra note 89, at 206.

122. Meidinger, supra note 118, at 28; Berger, supra note 89, at 208-09 (describing also that a narrower definition of public use requiring use by the public "held considerable sway" in some state courts, but eventually lost out to the broad definition of public use).

123. See Meidinger, supra note 118, at 30-31.

District of Columbia satisfied the public use requirement. Justice Douglas wrote the unanimous opinion holding that comprehensive redevelopment of a blighted area satisfied the public use requirement and that petitioners' land—even though itself unblighted—could be condemned since the legislature deemed it necessary as part of comprehensive redevelopment.

In *Hawaii Housing Authority v. Midkiff*, the Court considered whether reducing the oligopoly power of seventy-two landowners who owned 92 percent of Hawaii's privately held land qualified as a public use. The state legislature had determined that this concentration of land in the hands of so few "inflated land prices, and injured the public tranquility." To address this public welfare problem, the legislature devised a plan to reallocate property without requiring current landowners to shoulder the heavy tax burdens they would face if they sold the land voluntarily to new owners. The state would, at the instigation of a quorum of homeowners leasing land in a given subdivision, condemn properties and transfer them to non-landowners, giving preferences to the current homeowners. The transferees would pay for the land, and all of the proceeds would go to the landowners as just compensation. Clearly this plan sounded like taking from A and giving to B, an eminent domain scenario long rejected by takings jurisprudence. O'Connor wrote the unanimous opinion in *Midkiff* holding that the Public Use Clause enabled the Hawaii legislature to implement this program to reduce concentrated power.

2. Traditional Breadth of the Public Use Definition

The *Kelo* majority concluded that economic redevelopment qualifies under the historically broad definition of public use that Justice Douglas articulated in *Berman*. Douglas explained that the idea of public use originates in the police power of legislatures to act to promote public

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126. Id. at 34–35.
127. Id. at 35.
129. Id. at 232.
130. Id. at 233.
131. These "homeowners" owned their homes, but not the land underneath the home. Id. 234.
132. Id.
welfare. He articulated a presumption of public purpose in legislative acts: "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Thus, any time the legislature addresses a problem, the court presumes, with limited judicial review of the legislative action, that the resulting legislation follows from the police power to protect "public health, safety or morals." Justice Douglas noted that the same police power presumption applied to eminent domain actions because no constitutional guidance provided otherwise. After Berman, every federal appellate case that considered whether a proposed use satisfied the Public Use Clause found the proposed use acceptable.

The next time the Supreme Court considered the breadth of the Public Use Clause, in Midkiff, O'Connor quoted the language from Berman. She concluded that the "public use' requirement is... coterminous with the scope of the sovereign's police power," implying breadth without visible end. Legislative actions arise out of the police power and are justified if they potentially improve public health, safety, morals, or welfare—or in O'Connor's terms, "upgrade" the public

135. Berman, 348 U.S. at 32.
136. Id.
137. Penn. Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J. dissenting). This broad power has no precise definition. See Sax, supra note 110 (explaining the breadth of the police power). The concept has been used in wide-ranging contexts to justify government regulation including fire regulation (Munn v. Illinois, 94 U.S. 113, 146 (1876)); garbage disposal control (Gardener v. Michigan, 199 U.S. 325 (1905)); restrictions on prostitution (L'Hote v. City of New Orleans, 177 U.S. 587 (1900)); and restrictions on liquor (Beer Co. v. Mass., 97 U.S. 25 (1878)).
139. Merrill, supra note 89, at 96.
140. Ironically, given her dissent in Kelo, O'Connor has been credited with opening the door to the broad definition of public use. See Lewis, supra note 134, at 576.
142. See Lewis, supra note 134, at 585-86 (arguing that O'Connor ought to have articulated boundaries around public use). If the judiciary made laws prospectively, it would make sense to articulate such boundaries. As it is, the judiciary can only look back and ask whether a given situation qualified or did not. If the court does proactively articulate a boundary, such descriptions are often dicta, albeit useful dicta.
experience. Actions for eminent domain, as legislative actions, satisfy the public use requirement if they meet these standards. In other words, something that improves public health, safety, morals, or welfare necessarily has a public use.

The broad public use definition applied in Kelo is consistent with prior applications. Kelo's improvement of New London's economic outlook was intended to improve public welfare by increasing employment opportunities and to augment the City coffers by increasing the tax base. The NLDC documented its public-welfare goals during the legislative process in the form of the comprehensive redevelopment plan, just as the District of Columbia had developed a comprehensive redevelopment plan in Berman and the Hawaii state legislature conducted hearings to discover the extent and harm of the property oligopoly in Midkiff. In all three situations, the courts found this documentation of the process and findings sufficient for the policy to fall under the police power and thus satisfy the Public Use Clause.

In sum, Kelo was entirely consistent with Berman and Midkiff, so it did not change the law, contrary to O'Connor's implied critique. Rather, it was O'Connor's narrow public use definition that would have changed existing law.

3. Traditional Deference to Legislative Determinations

In Berman, Midkiff, and Kelo, the Court deferred to the legislative determination that the policy in question fell under police power and thus had a public use. Judicial deference has a long history and is grounded in the belief that the electoral process will prevent the enactment of ill-considered or partisan laws and will correct bad legislative decisions. Justice Douglas first articulated the narrow scope of judicial review for legislative definitions of public use for eminent domain purposes in Berman. Douglas wrote that "[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one." This statement leaves little room for interpretation, as does O'Connor's echo in Midkiff that "the Court has made clear that it will not substitute its judgment for a legislature's

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144. Id. at 2661; Berman v. Parker, 348 U.S. 26, 29 (1954); Midkiff, 467 U.S. at 233.
146. Berman, 348 U.S. at 32.
judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"147 As for eminent domain, she emphasized that takings always satisfy the public use clause when they are "rationally related to a conceivable public purpose," unless they follow from an improper purpose.148

The Court in *Kelo* continued its historic practice of deference to local authorities' determinations of whether a condemnation project will serve the public use when it deferred to the NLDC's determination of how to address the public's need for increased employment and tax revenue. The Court refused to examine the likelihood of NLDC's success, or even to require the NLDC to prove "reasonable certainty" of success.149 This follows directly from *Berman* in which the Court refused to consider whether the District of Columbia's plan was desirable and from *Midkiff* in which the Court acknowledged that, although constitutional, Hawaii's plan might not succeed in achieving a reduction in oligopoly or in mitigating its consequences.150 Writing for the *Midkiff* majority, O'Connor quoted older cases saying, "whether in fact the provision will accomplish its objectives is not the question," rather, an exercise of eminent domain is constitutional if the "[l]egislature rationally could have believed that the [policy] would promote its objective."151

O'Connor adopted a radically different viewpoint in her *Kelo* dissent by drawing a tenuous distinction between *Berman* and *Kelo* to justify judicial deference in the former, but not the latter. She wrote that earlier cases, like *Berman*, involved property owners whose conduct or land "inflicted affirmative harm on society,"152 whereas the *Kelo* petitioners' "well-maintained homes are [not claimed to be] the source of any social harm."153 However, the *Berman* petitioner's land did not inflict affirmative harm on society—it was not blighted and did not contribute to slum conditions—but the court permitted its condemnation amidst other blighted buildings because "piecemeal" redevelopment "would be only a palliative" to the blight.154 Furthermore, if *Midkiff* involved affirmative harm, the affirmative harm arose due to the patterns of property ownership that "inflat[ed] land prices, and injur[ed] the public tranquility,"155 distorting real estate markets and therefore undermining

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148. Id.
153. Id. at 2675.
the state's economic stability. The property ownership structure in *Kelo* could be described in the same way: individual ownership of distinct residential parcels imposed affirmative harm by deflating property values, decreasing New London's employment opportunities, and reducing tax revenue from what it would be under a different property-ownership structure. Correcting O'Connor's mischaracterizations of *Berman* and *Midkiff* would leave on shaky ground her attempt to distinguish *Kelo* without overturning her own *Midkiff* decision.

**B. State Models for Changing Public Use Jurisprudence**

The Court's decision to uphold the broad definition of public use and to apply judicial deference did not arise in the absence of alternative models—states have been more willing than the federal government to narrow the definition of public use by broadening the scope of judicial review. Recent high-court decisions from Illinois and Michigan provide alternatives to indefinitely broad definitions of public use. These doctrines are also serving as models for state legislative efforts to redefine public use and standards of judicial review in the wake of the *Kelo* decision. In *Southwestern Illinois Development Authority v. National City Environmental (SWIDA)*, the Illinois Supreme Court differentiated broad public purpose and narrower public use to find a condemnation unconstitutional. Meanwhile, the Michigan Supreme Court revisited the original meaning of public use in its constitution to adopt a three-part public use test for application to condemnations involving transfer to a private entity in *County of Wayne v. Hathcock*.

In 2002, the Illinois Supreme Court held that public purpose extends further than public use, so something may serve the public purpose

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156. Merrill, *supra* note 89, at 65.
157. For example, California voters will decide on Proposition 90 in November 2006, an initiative that "bars state and local governments from condemning or damaging private property to promote other private projects or uses. It limits government's authority to adopt certain land use, housing, consumer, environmental and workplace laws and regulations, except when necessary to preserve public health or safety. It also voids unpublished eminent domain court decisions and defines 'just compensation' as government occupation or leasing of property for public use. Finally, it requires condemned property to be 'offered for resale to prior owner or owner's heir at current fair market value if government abandons condemnation's objective.' Cal. Sec'y of State, PROPOSITION 90: GOVERNMENT ACQUISITION, REGULATION OF PRIVATE PROPERTY INITIATIVE CONSTITUTIONAL AMENDMENT, Official Title and Summary, available at http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf (last visited Oct. 10, 2006). The proposed changes in California's eminent domain law borrow ideas first articulated by the courts in Illinois and Michigan.
158. 768 N.E.2d 1 (Ill. 2002).
without qualifying as a public use. The government cannot exercise eminent domain over a property for a public purpose, only for a public use. The court considered whether SWIDA, a municipal corporation, could condemn part of a recycling center for private racetrack parking. SWIDA argued that the condemnation would serve legitimate public purposes such as promoting public safety through improved traffic controls, the elimination of blight, and economic development. The court agreed that such uses qualified as public purposes, but said that they fell short of the narrower public use definition. In coming to this decision, the Illinois court applied both state and federal constitutional law.

The Illinois court applied heightened judicial scrutiny to reach its decision. The decision does not explain what triggered such attention, but several unsavory aspects of the defendant's behavior likely influenced the court. SWIDA answered the racetrack owner's request to condemn without completing a comprehensive plan for achieving the purported public purposes associated with the condemnation. The court determined that the racetrack sought condemnation simply because it was cheaper than negotiating with the recycling center. These behaviors demonstrated a high level of private involvement and control over the distinctly public right to condemn. Furthermore, the racetrack only paid a portion of the condemnation price and a minimal quick-take application fee, for a total cost of $12,500 in return for property worth at least $900,000. The court may also have considered the social tradeoff involved: the condemnation would have decreased the region's future recycling capacity to promote attendance at a racetrack. Despite these distasteful practices, the condemnation would probably have survived rational basis review because SWIDA could have demonstrated conceivable public benefits to be delivered through the condemnation.

In County of Wayne v. Hathcock, the Michigan Supreme Court faced a similar decision and overturned the broad public use definition it

160. SWIDA, 768 N.E.2d at 8.
161. Id. at 4.
162. Id. at 6, 8.
163. Id. at 11.
165. Sw. Ill. Dev. Auth. v. Nat'l City Envtl. (SWIDA), 768 N.E.2d 1, 11 (Ill. 2002); see also id. at 22 (Freeman, J., dissenting).
166. Id. at 10 (majority opinion).
167. Id.
168. Id. at 4, 6. The recycling center rejected an offer of $1 million for the property, but the trial court found that $900,000 would provide just compensation.
had articulated in *Poletown Neighborhood Council v. City of Detroit*. *\(^{170}\)* *Poletown* held that a city may “condemn property for transfer to a private corporation... to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state.” *\(^{171}\)* *Hathcock*, on the other hand, interpreted the Michigan Constitution to preclude the very kind of eminent domain condemnation authorized under *Poletown*. *\(^{172}\)* The case involved the condemnation of parcels on which the county intended to develop a business and technology park to mitigate noise pollution from a nearby airport, create 30,000 new jobs, and generate $350 million in tax revenue. *\(^{173}\)*

The court invoked the original meaning of “public use” when it was added to the Michigan Constitution in 1963. *\(^{174}\)* In particular, the court evaluated whether transfer of a condemned property to a private entity still qualified as a public use under this particular definition. The court found that three kinds of transfer to a private entity qualify as public use:

1. where ‘public necessity of the extreme sort’ requires collective action;
2. where the property remains subject to public oversight after transfer to a private entity; and
3. where the property is selected because of ‘facts of independent public significance,’ rather than the interests of the private entity to which the property is eventually transferred. *\(^{175}\)*

None of the three situations applied to the proposed condemnation, so it did not qualify as a public use and violated the Michigan Constitution. *\(^{176}\)*

In all, *SWIDA* and *Hathcock* provided recent models that the Supreme Court could have used to articulate limits to the broad public use definition. However, the *Kelo* facts might still have qualified as a public use under each of the alternative rules. Under the *SWIDA* rule, the NLDC’s condemnation may not have warranted the heightened scrutiny necessary to differentiate between public purpose and public use because the NLDC initiated the proceedings, used a comprehensive plan, and had no particular private beneficiary lined up to lease the eventual development. The *Kelo* development would satisfy the second prong of the *Hathcock* test as well: the development will remain subject to NLDC’s control because NLDC will continue to own the condemned land. Instead of adopting either of these narrow public use doctrines, the

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171. *Id.* at 457, 459.
174. *Id.* at 781.
175. *Id.* at 783.
176. *Id.* at 787.
**ECOLOGY LAW QUARTERLY**

*Kelo* Court upheld the broad federal definition of public use and judicial deference to legislative condemnation decisions.

IV. CRITIQUE OF THE CASE

The *Kelo* case was rightly decided. A broad definition of public use and judicial deference to determinations of public use preserves the flexibility that all levels of government need to best serve the changing needs of the public.\(^\text{177}\) This flexibility is not unchecked because inherent political and fiscal constraints operate to limit governments’ use of eminent domain and, as the Court makes clear in *Kelo*, governments can elect to impose their own, stricter limits on the exercise of eminent domain.\(^\text{178}\) If anything, the *Kelo* decision’s greatest weakness is suggesting that New London’s comprehensive plan played a role in the judicial determination that the condemnation was appropriate. Under the rational basis test, the Court should not have inquired into the actual motives for the project or the project’s probability of fulfilling its asserted public use. Suggesting that the presence of a comprehensive plan was determinative subtly weakens judicial deference to eminent domain condemnations and opens the door to a heightened review standard in the future.

A. A Broad Definition of Public Use is Necessary

A broad definition of public use enables legislative bodies at all levels to make the wide range of governing decisions they have always been able to make under the public use clause. A broad definition of public use protects governments’ abilities to undertake large-scale projects that could not happen without public involvement via eminent domain. In particular, projects that entail purchasing property from many owners face the potential for “holdouts” who refuse to sell.\(^\text{179}\) These holdouts may be seeking monopoly rent prices,\(^\text{180}\) or they may simply prefer to retain their property. The mere threat of eminent domain as a tool in the government’s repertoire reduces the likelihood of holdouts and therefore the severity of the holdout problem. Holdouts know that once the government initiates legal proceedings to condemn, the best they can do is to get fair market value and they will incur legal expenses if

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178. *Id.* at 2668.
they decide to defend against the condemnation. Therefore, it is in the holdout's interest to settle early in the process, when they might get more than fair market value and avoid lengthy and costly litigation. Faster settlements also reduce transaction costs for the government, since condemnation and litigation are costly. Limitations on the definition of public use would make it harder for the government to condemn property, and would increase holdouts' power, increase the public costs of undertaking big projects, and reduce the likelihood of these projects coming to fruition. However, big projects are important because they achieve changes that private piecemeal changes cannot match and because they allow governments to adjust the built environment and infrastructure to adapt to changing societal needs.

Legislators who make condemnation decisions answer to the electorate and are in a position to determine what will benefit the public via improved health, public welfare, safety, and morals. Legislative bodies need this flexibility because societal needs change over time. For example, the wide definition of public use enabled legislative bodies to build mills, canals, and railroads in the past, and now enables them to build highways and redevelopment projects. Public needs also vary by region. For example, New London needs redevelopment to revitalize its economy while other areas need such things as water rights and the ability to condemn flooded homes. These are unanticipated, and difficult to predict, needs that could not necessarily be met with a narrower definition of public use.

The *Kelo* case itself presents an ambiguous view of the appropriate breadth of the definition of public use. O'Connor's dissent argues that "nearly any lawful use of real private property can be said to generate some incidental benefit to the public" and therefore could qualify as a public use under the Court's broad definition. The majority implies that a project would need to have the potential to increase the tax base or employment in order to qualify as a public use. Such an approach to public use would exclude a project condemning a large business in order to create small businesses because the small business would not likely

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181. Owners often get offered more than fair market value before litigation. The government prefers to avoid condemnation because of the transaction costs and political capital expenditure required. Offering more than fair market value enables the government to share some of the savings of avoiding condemnation litigation to property owners, to give them incentives to settle.


186. *Id.* at 2665 (majority opinion).
generate the kind of economic development in the form of more jobs and higher city revenue. It is unclear after \textit{Kelo} whether an economic development project would meet the public use test if it did not increase the tax base and increase employment opportunities.

O'Connor's critique that the majority's test for public use would encompass almost any use of property seems more accurate: legislatures should be able to define economic development however they see fit. A local government could define economic development to include fair wages, health-care provision by employers, or long-term skilled labor opportunities and then condemn big-box retail establishments through eminent domain in order to create a collection of small, community-based businesses. This change would probably not increase employment or the tax base, but it could well achieve the local government's definition of economic development. Given that fair wages, health care, and labor opportunities are rationally related to public health and welfare, this condemnation could survive the rational basis test. In the extreme, a local government could choose to define economic development so that even the tiniest, least profitable businesses would qualify: in this scenario, a local government could prioritize citizens' economic productivity and condemn superstores to replace them with health food stores and yoga studios. Local governments need this kind of flexibility to serve the needs of their electorates.\footnote{See \textit{Gillette}, \textit{supra} note 179, at 15.}

\textit{B. The Exercise of Eminent Domain Operates Within Political and Fiscal Constraints}

Exercise of eminent domain requires political capital and financial resources. These realities constrain the use of condemnation, even in the face of a broad public use definition and rational basis judicial review. O'Connor's concern about limitless public use definitions ignores the political realities of the power of eminent domain. When a government exercises eminent domain, it must have the resources to pay fair market value for the condemned property.\footnote{But see \textit{Haw. Hous. Auth. v. Midkiff}, 467 U.S. 229 (1984) (using funds from private purchasers to fund the condemnation of land underneath purchasers, who were homeowners and tenants of the condemned land).} Governments cannot afford to condemn each and every piece of property that may serve a political purpose, so even a broad public use definition supported by judicial deference will not mobilize the bulldozers about which the dissent is so worried.\footnote{See, e.g., \textit{Savage}, \textit{supra} note 8.} Eminent domain actions also involve costs beyond the actual compensation of property owners. For example, the condemning government must pay the transaction costs of administration, appraisals,
Certainly such expenses dissuade politicians from exercising their full power of eminent domain.

As for political constraints, the government is most likely to act only when the legislators perceive enough community (or state) support for the project that the politicians are willing to experience the approbation of former owners of condemned land. One scholar has noted that the more often a government exerts the power of eminent domain, the greater the public outcry, which reduces the probability that the government will continue to exercise the power. In all, these mitigating factors suggest that equilibrium will be reached before the bulldozers destroy all private property. Furthermore, local politicians are unlikely to condemn valuable property or property owned by politically powerful entities.

One of the most vocal opponents of eminent domain—the Institute for Justice’s Castle Coalition—ignores these constraints when detailing what it considers “abuses” of the power of eminent domain. The Castle Coalition has chronicled years of eminent domain abuses, which it defines as condemnations in which private parties received some eventual benefit. The Castle Coalition does not account for the fact that the politicians committing these “abuses” had to pay for the property and live with the political fallout from the condemnation. Furthermore, when a community disapproves of a condemnation, it can remove the abusers from power.

In fact, democratic processes have already effected change in public use jurisprudence. Thirty-seven states have changes pending in their legislatures. Several others, including California, have initiatives on the ballot. These changes are taking place as legislative decisions—as they should be—rather than through judicial redefinition of public use or imposition of a higher standard of review.

C. Political Constraints Have Not Prevented Discrimination

While representative government limits the use of eminent domain generally, it has not prevented governments from sacrificing the good of a
few members of the minority by condemning their property. Of course, it is interesting to note that *Kelo* involved white, middle-class petitioners, and this image evoked more nationwide concern for property rights than have other condemnations. Nonetheless, concerns about the effect of majoritarian decision making on minority groups are an important critique of public use jurisprudence. *Berman* represents one example of discriminatory condemnation in which the federal government exercised eminent domain to redevelop a predominantly African American neighborhood.

Justice Thomas articulated this problem in his dissent in *Kelo*, explaining that poor and minority neighborhoods face the most dire threat of condemnation because low political capital in poor neighborhoods and low property values mean that many other uses will provide objective improvements in the community's economic status. Thomas discussed the inequitable application of the power of eminent domain to communities with the least political power, echoing O'Connor's concern that "fallout from this decision will not be random." According to O'Connor, "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process" and according to Thomas, "the government now has license to transfer property from those with fewer resources to those with more." Thomas cited social science research documenting the disproportionate effect that eminent domain proceedings have on poor and minority communities, and said that the broad definition of public use enables the government to "destroy[]" communities and displace African Americans. In his view, "just compensation" has been interpreted to exclude intangible, subjective values, so displaced property owners often suffer inherently unjust compensation. For example, a neighborhood may contain properties with low monetary values, but high subjective values if the same neighbors have lived in the area for years and have developed their own social fabric that will not be reflected in fair market value when it is destroyed.

So far, no satisfactory solution to this problem of discriminatory infliction of eminent domain on low-income people and people of color has come to light. First, O'Connor's harm-prevention test would only

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199. *Id.* at 2687.
200. *Id.* at 2677 (O'Connor, J., dissenting).
201. *Id.* at 2677; *id.* at 2687 (Thomas, J., dissenting).
204. *Id.* at 2686.
protect low-income people and people of color against discriminatory condemnations if governments did not characterize their neighborhoods as poor enough to be harmful. However, such neighborhoods have been considered poor or blighted enough to be harmful in the past, so O'Connor's test would not necessarily prevent discriminatory uses of eminent domain. Second, Thomas' proposed reversion to original intent would change takings law so dramatically that it is impossible to predict the new law's effect on these communities.

A third way of looking at the problem of the potential for discriminatory infliction of eminent domain is to consider the cumulative, rather than individual, effects of legislation. While an individual exercise of eminent domain may negatively affect individuals with less political power, the overall body of legislation may provide net benefits. Professor Joseph Sax has explained that there is value in the cumulative nature of legislative decision making. Of course, legislators are not "perfect cost-benefit analysts," but "the very act of considering the claims of conflicting resource users, identifying the interests at issue, and searching for solutions" pushes "toward rationality" when the legislature truly represents the interests of its constituents. Each individual decision contributes one small piece to the overall effect of legislative decision making. In sum, the process allocates resources fairly and efficiently through tradeoffs since individual constituents benefit from different legislative decisions. Close judicial scrutiny would jeopardize such balance, because overturning individual compromises would upset the equilibrium achieved in the political process. This perspective from Professor Sax does not provide a perfect solution for protecting communities of people of color and low-income communities, but suggests that as with any public policy, the exercise of eminent domain involves tradeoffs, some of which are reconciled in the long term rather than the short term.

A fourth way to prevent low-income people and of people of color from shouldering a disproportionate share of condemnations is to provide more than fair market value for condemnations. Doing so would increase the cost of condemnations, so the government would condemn fewer properties. This change would provide the owners of condemned

205. Sax, supra note 141, at 175.
206. Professor Clayton Gillette has suggested that racial minorities and people with low income levels tend to have less political clout and despite the high stakes, they often lack the inclination, time, or resources to raise their voices and fight back. As a result, the communities may not organize until condemnation proceedings have begun, when it may be too late to fight. Gillette, supra note 179, at 15. Furthermore, when a disproportionate share of public costs fall on individuals in a minority group who feel that the allocation of public costs is unjust, these individuals have a correspondingly disproportionately low incentive to "raise their voices loudly" because the response to their complaints is less than the response would be to similar complaints from individuals in the majority. Id.
property with more resources with which to relocate and higher "fair market values" may come closer to approximating the actual costs of dislocation and relocation. However, poor neighborhoods will still seem cheaper to the government than richer ones and increasing the costs of eminent domain reduces the ability of the government to bring about needed change in communities.

Nonetheless, mobilizing these disproportionately affected communities may be effective in the long term: a fifth solution may be slow but steady social change through democratic institutions. Social and environmental justice movements have brought inequities to light and slowly changed public perceptions about the acceptability of such disproportionate impacts. For example, the Department of Transportation has adopted a more rigorous review process of proposed federal highway projects in response to criticism that interstates traversed and destroyed African American neighborhoods; similar concerns have arisen in connection with efforts to rebuild New Orleans after Hurricane Katrina. In New Orleans, community fear of ubiquitous condemnation in African American neighborhoods has awakened public awareness of the potential for discriminatory condemnations. Public officials are consequently confronting these social justice tradeoffs in deciding how to rebuild New Orleans.

D. Comprehensive Plans Play an Uncertain Role in Public Use Determinations

If anything, the Kelo decision's greatest weakness was suggesting that NLDC's comprehensive plan played a role in the Court's decision that economic development satisfied the public use requirement. The majority emphasizes the comfort it takes in the "carefully considered" development plan, just as the Berman court discussed the blight-reduction plan central to the District of Columbia's exercise of eminent domain. Does a comprehensive plan need to have been formulated to ward off judicial inquiry? Or was it a sufficient, but not necessary


component in *Kelo*? Under the “any conceivable rational public purpose” standard, comprehensive plans should not be necessary. However, their centrality in *Kelo* implicates a higher standard than “any conceivable” connection. The question may eventually be answered by a suit recently filed in Pennsylvania. The city in question did not complete a comprehensive plan before instigating condemnation proceedings, leading the property owners to claim that the city’s proceedings were thus insufficient under *Kelo*.

Of course, *Kelo*’s articulation of a broad reservation of legislative power to define public use suggests that a comprehensive plan is not necessary. Instead, legislatures should be able to decide for themselves through whatever deliberative and informative process they choose. At the same time, outcry against a “limitless” definition of public use suggests that requiring a comprehensive plan could be a handy, administrable limit to answer concerns about a newly meaningless Public Use Clause. However, this bright-line rule would provide no more safeguard against eminent domain abuse than the current rule because a comprehensive plan could itself provide pretextual reasons for condemnation that would not be discoverable with judicial deference.

CONCLUSION

In *Kelo*, the Court applied the same definition of public use and the same level of judicial scrutiny that it has consistently applied to eminent domain cases. In doing so, it rejected alternative models from states that have moved away from the federal courts’ undemanding test. Justice O’Connor’s dissent artfully conveyed two contradictory messages: it argued for a change in the established law and at the same time convinced the public that the majority’s decision represented a change in the law. This is the conclusion of a vociferous chorus contemplating the *Kelo* decision. Most articles criticize the holding in *Kelo* and few

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210. Professor Echeverria found the *Kelo* decision to be “far more restrained than the full-throated embrace” of rational basis review in earlier cases. Echeverria, *supra* note 1, at 10,586. Professor Gillette emphasized that the discussion of comprehensive plans differentiated *Kelo* from past public use cases by restricting local governments’ flexibility by ensuring all parties are at least heard. See Gillette, *supra* note 179, at 18–19.


support it, perhaps because many takings scholars expected the result and were only surprised by how closely the court split. In any case, articles on each side “speak” to that side’s followers: the answer seems inexplicably clear to both opponents and proponents, creating two divergent discourses with few intersection points.

These divergent public discourses—among lay people in popular news media and within the legal community—are likely to effect a change in public use jurisprudence despite the fact that the *Kelo* decision itself did not. On the most basic level, people are talking about takings and the exercise of eminent domain. The idea that government has the power to condemn private homes resonates with many people who would not otherwise have thought twice about the power of eminent domain.

The *Kelo* decision has also created some surprising alliances working for and against legislative change. Libertarians, the NAACP, and consumer advocates all campaign to limit the exercise of eminent domain via a more restrictive public use definition and tighter judicial deference. Developers—usually proponents of strong property rights with regard to local land use decisions—ally with environmentalists and local and state governments to protect the right of eminent domain. Without the threat of eminent domain, development—and redevelopment in particular—will face huge challenges due to the potential for “holdouts.”

These divergent discourses are likely to collide this November at the ballot boxes when initiatives to strictly limit the use of eminent domain face off against initiatives to preserve the power of eminent domain. In the wake of *Kelo*, proponents of the status quo—a broad definition of public use and easier exercise of the power of eminent domain—face a more difficult public relations challenge than do proponents of changes in the definition of public use and stark limitations on the use of eminent domain. *Kelo* seemed so unfair to so many people—initially to the dissent, then to the media whose first reports borrowed from the dissent’s charged language to convey shock and horror that the government could take nice middle-class family homes, and finally to American people who

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213. *See also* Echeverria, supra note 1, at 10,586.

thought, "this could be me being evicted from my home just as Susette Kelo will be evicted from hers."

The strength of this message overshadows the strength of local and state governments' messages that they will be unable to govern without the power of eminent domain. People love to criticize the government. But many successful exercises of eminent domain are invisible to most people. Were they more visible, the use of eminent domain might be more popular. For example, it does not usually raise public hackles to condemn open space to build interstate highways. Razing the homes and neighborhoods of thousands of African Americans during the 1960s did not raise public hackles, either. Only now, when a white, middle-class nurse from suburbia faces the loss of her home do so many people pay attention.

Another way in which the parallel discourses would meet is if severely restrictive legislative changes take place. The way governments function at the local, state, and federal levels will change dramatically. This short-sighted backlash from Kelo would make it more expensive and difficult to build infrastructure like roads, schools, and airports that satisfy takings tests based on deference to broad legislative determinations of public benefit. Increased taxes to pay increased property costs will not be popular, nor will a deterioration of the public infrastructure.

The immediate aftermath suggests that the Kelo decision may catalyze a dramatic change in property rights, but in the opposite direction from decried by the dissent as having already occurred. Instead, state legislatures—and even Congress—have acted quickly and decisively to limit the definition of public use. The petitioners in Kelo may have lost the battle, but they may win the war: not only are they still living in their houses in Fort Trumbull nine months after their ostensible judicial loss, but laws around the county are changing in the direction they sought.